Article

Alternative Law Journal
2020, Vol. 45(1) 4–11

DOI: 10.1177/1037969X19899661
journals.sagepub.com/home/altlj
SAGE

The *Human Rights Act 2019* (Qld): Some perspectives from Victoria

Bruce Chen
PhD candidate, Faculty of Law, Monash University, Australia

Abstract
The *Human Rights Act 2019* (Qld) is modelled on Victoria's dialogue model for human rights protection, the *Charter of Human Rights and Responsibilities Act 2006* (Vic). This article provides a Victorian perspective on the operative provisions of Queensland's Human Rights Act, particularly those which bind public entities, courts and tribunals when applying legislation (sections 13, 48, 58 and 59). The potential impacts of amendments by the Act to the *Corrective Services Act 2006* (Qld) and *Youth Justice Act 1992* (Qld) are also considered.

Keywords
Human Rights Act 2019 (Qld), *Charter of Human Rights and Responsibilities Act 2006* (Vic), dialogue model for human rights, human rights law

The full commencement of the *Human Rights Act 2019* (Qld) (Qld HRA) on 1 January 2020 marked a momentous occasion on which Queensland became the third Australian jurisdiction with a human rights statute,[1] joining Victoria and the Australian Capital Territory. Queensland's Human Rights Bill had been referred to an inquiry by the parliamentary Legal Affairs and Community Safety Committee (the Inquiry), and the government members of the Committee recommended that the Bill be passed.[2]

The Qld HRA is based on what is commonly known as a 'dialogue'[3] model for human rights, which 'aims to promote a discussion, or dialogue'[4] about human rights between the three branches of government – the Executive, Parliament, and the courts. As a statutory version of the 'dialogue' model, the Qld HRA is not constitutionally entrenched, and is intended to preserve parliamentary sovereignty.[5]

When the Queensland government first announced that it would introduce a human rights statute, it said

[1]This does not include the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), which only provides for parliamentary scrutiny through statements of compatibility and parliamentary committee reports.

[2]Legal Affairs and Community Safety Committee, Parliament of Queensland, *Inquiry into the Human Rights Bill 2018* (2019) 2 [1.5].

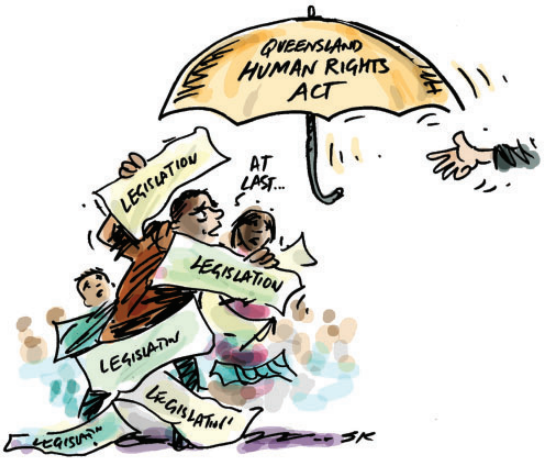
[3]Although in *Momcilovic v The Queen* (2011) 245 CLR 1, usage of the term 'dialogue' was criticised by members of the High Court; cf Julie Debeljak, 'Does Australia Need A Bill of Rights?' in Paula Gerber and Melissa Castan (eds), *Contemporary Perspectives on Human Rights Law in Australia* (Lawbook, 2013) 61–2 n 104.

[4]Queensland, *Parliamentary Debates*, Legislative Assembly, 31 October 2018, 3185 (Yvette D'Ath, Attorney-General and Minister for Justice); see also Explanatory Notes, Human Rights Bill 2018 (Qld) 6; Queensland, *Parliamentary Debates*, Legislative Assembly, 26 February 2019, 353 (Yvette D'Ath, Attorney-General and Minister for Justice).

[5]Queensland, *Parliamentary Debates*, Legislative Assembly, 31 October 2018, 3185 (Yvette D'Ath, Attorney-General and Minister for Justice); Explanatory Notes, Human Rights Bill 2018 (Qld) 3; Queensland, *Parliamentary Debates*, Legislative Assembly, 26 February 2019, 353 (Yvette D'Ath, Attorney-General and Minister for Justice).

Corresponding author:
Bruce Chen, Faculty of Law, Monash University, Vic 3800, Australia.
Email: bruce.chen@monash.edu

that it would be modelled on Victoria's *Charter of Human Rights and Responsibilities Act 2006* (Victorian Charter) although the Qld HRA has taken its human rights statute further. For example, the Qld HRA goes beyond the civil and political rights protected by the Victorian Charter and includes two economic, social and cultural rights – the right to education[6] and the right to health services. The Qld HRA also implements a number of drafting improvements on the Victorian Charter, but at the same time several aspects will still require resolution. These are explored in this article from the perspective of the Victorian Charter.



This article focuses on the operative provisions of the Qld HRA, particularly those which bind public entities, courts and tribunals when applying legislation (rather than provisions which deal with the development and scrutiny of new legislation). In particular, this article examines: the general limitations clause – s 13; the interpretive provision – s 48; public entity conduct obligations – s 58; and seeking of relief or remedy for breach of public entity conduct obligations – s 59.

This article also outlines the potential impact of amendments made by the Qld HRA to the *Corrective Services Act 2006* (Qld) and *Youth Justice Act 1992* (Qld).

The general limitations clause

Like the Victorian Charter, the Qld HRA recognises that human rights are not absolute. Section 13 is the 'general limitations clause',[7] and provides that a human right can be limited where that limitation is reasonable and demonstrably justified (often referred to as a justification and proportionality test). Sub-section (1) provides: 'A human right may be subject under law only to reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom'. This is very similarly worded to the chapeau to s 7(2) of the Victorian Charter.

However, the guidance provided as to what would constitute a reasonable and demonstrably justified limit is in some ways different from s 7(2) of the Victorian Charter. The Victorian Charter lists five non-exhaustive factors:

- the nature of the right;
- the importance of the purpose of the limitation;
- the nature and extent of the limitation;
- the relationship between the limitation and its purpose; and
- any less restrictive means reasonably available to achieve the purpose.

The Victorian Charter factors are modelled on the general limitations clause in the South African Bill of Rights,[8] and 'broadly correspond'[9] with the Canadian jurisprudence on the general limitations clause in the Canadian Charter of Rights and Freedoms.[10] The Canadian jurisprudence has in turn been applied to the general limitations clause in the *New Zealand Bill of Rights Act 1990* (NZ).[11]

By contrast, s 13(2) of the Qld HRA provides for seven factors. It adds a new factor – 'the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom' – and modifies an existing factor, adding the words '*the importance of preserving the human right, taking into account* the nature and extent of the limitation on the human right' (emphasis added). It adds a further factor, requiring that a balancing exercise be undertaken specifically between the importance of preserving the human right, and the importance of the purpose of the limitation.

Some of these modifications are curious and the intention underlying them is unclear. Although they are said to be 'intended to align generally with the principle of proportionality',[12] they might overly complicate the standard test to be applied. It remains to be seen what impact they will have in practice on the workings of the general limitations clause.

Where the Qld HRA does improve on the Victorian Charter is that it makes crystal clear that the concept of human rights 'compatibility' incorporates s 13 of the Qld

[6]The *Human Rights Act 2004* (ACT) s 27A also provides for a right to education. See further Tamara Walsh and Bridget Burton, 'Queensland's New Right to Education: What does it mean for children with disabilities?' (2020) 45(1) *Alternative Law Journal* 18.

[7]Queensland, *Parliamentary Debates*, Legislative Assembly, 31 October 2018, 3185 (Yvette D'Ath, Attorney-General and Minister for Justice); Explanatory Notes, Human Rights Bill 2018 (Qld) 16.

[8]*Constitution of the Republic of South Africa 1996* (South Africa) ch 2.

[9]Alistair Pound and Kylie Evans, *Annotated Victorian Charter of Rights* (Lawbook Co, 2nd ed, 2018) 64 [CHR.7.180].

[10]*Constitution Act 1982* (Canada) pt I.

[11]*R v Hansen* [2007] 3 NZLR 1.

[12]Explanatory Notes, Human Rights Bill 2018 (Qld) 17; Queensland, *Parliamentary Debates*, Legislative Assembly, 31 October 2018, 3185 (Yvette D'Ath, Attorney-General and Minister for Justice).

HRA. Section 8 provides that an act, decision or statutory provision is compatible with human rights if it does not limit a human right at all, or where it limits a human right 'only to the extent that is reasonable and demonstrably justifiable in accordance with section 13'. This ensures clarity and uniformity in the meaning of human rights 'compatibility' across all aspects of the Qld HRA – the preparation of statements of compatibility and interpretation of legislation (statutory provisions), and public entity conduct obligations (acts and decisions).

Happily, this rectifies an issue that has vexed the Victorian Charter. In *Momcilovic v The Queen* (*Momcilovic*),[13] the most significant High Court case to date on the Victorian Charter, the High Court was so deeply divided it left no binding ratio on whether the general limitations clause had any role to play in interpretation of legislation.[14] But at the same time, the Queensland courts will at some point necessarily be confronted with the stance taken by some of the justices in *Momcilovic* – that justification and proportionality in interpretation transgresses beyond the constitutional role of the courts,[15] and renders operative provisions of a human rights statute invalid.[16]

The interpretive provision

Turning to the interpretive provision itself, s 48 of the Qld HRA is the equivalent of s 32 of the Victorian Charter. Section 48(1) states: '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'. Although there is some difference in phrasing ('to the extent possible', rather than '[s]o far as is it is possible to do so' under the Victorian Charter), it can be expected that s 48(1) will operate in much the same way as how s 32(1) of the Victorian Charter has been applied post-*Momcilovic*.

In *Momcilovic*, a 6:1 majority rejected the 'very strong and far reaching'[17] approach to interpretation under the United Kingdom *Human Rights Act 1998*. That approach allowed the courts to, within certain limits, 'depart from the unambiguous meaning the legislation would otherwise bear'.[18] So where did the rejection of the United Kingdom's approach leave s 32(1) of the Victorian Charter?

The Victorian Court of Appeal has predominantly interpreted *Momcilovic* as equating s 32(1) with the common law principle of legality, but with 'a wider field of application'.[19] The principle of legality is a presumption that Parliament does not intend to interfere with fundamental common law rights, freedoms, immunities and principles, and to depart from the general system of law, except by clear and unambiguous language.[20] The characterisation that s 32(1) is a codification of the principle of legality seems to be based on the judgment of French CJ in *Momcilovic*.[21]

In the leading post-*Momcilovic* case of *Slaveski v Smith*,[22] the Victorian Court of Appeal said: 's 32(1) does not require or authorise a court to depart from the ordinary meaning of a statutory provision, or the intention of Parliament in enacting the provision'.[23] Rather, it 'requires the court to discern the purpose of the provision in question in accordance with the ordinary techniques of statutory construction'[24] The Court went on to say s 32(1) 'does not allow the reading in of words which are not explicit or implicit in a provision, or the reading down of words so far as to change the true meaning of a provision'.[25]

In light of this approach, s 32(1) has rarely been used post-*Momcilovic*. When it has been used, the courts have usually done so conservatively, to fortify constructions of statutes already reached on non-Charter principles of statutory interpretation and, unfortunately, s 32(1) has been given very little work to do.[26] While it is not impossible for the Queensland courts to strike out on their own, a similar approach to that taken in *Slaveski v Smith* is likely under s 48(1) of the Qld HRA.

[13](2011) 245 CLR 1.

[14]See Bruce Chen, 'Making Sense of *Momcilovic*: The Court of Appeal, Statutory Interpretation and the *Charter of Human Rights and Responsibilities Act 2006*' [2013] (74) *Australian Institute of Administrative Law Forum* 64; and Julie Debeljak, 'Proportionality, Rights-Consistent Interpretation and Declarations under the Victorian *Charter of Human Rights and Responsibilities*: The *Momcilovic* Litigation and Beyond' (2014) 40 *Monash University Law Review* 340.

[15](2011) 245 CLR 1, 43–4 [34]–[36] (French CJ); 163–4 [408]–[409], 172 [431] (Heydon J dissenting); see also 215 [559], [561], 219–20 [572]–[575] (Crennan and Kiefel JJ).

[16]Ibid 175 [439] (Heydon J dissenting).

[17]*Sheldrake v DPP* [2005] 1 AC 264, 303 [28] (Lord Bingham).

[18]*Ghaidan v Godin-Mendoza* [2004] 2 AC 557, 571 [30] (Lord Nicholls).

[19]See *Slaveski v Smith* (2012) 34 VR 206, 215 [23], 219 [45] (Warren CJ, Nettle and Redlich JJA); *Noone v Operation Smile (Aust) Inc* (2012) 38 VR 569, 608 [139] (Nettle JA); *Victorian Toll v Taha* (2013) 49 VR 1, 12–13 [25] (Nettle JA); *Nigro v Secretary to the Department of Justice* (2013) 41 VR 359, 383 [85] (Redlich, Osborn and Priest JJA); *Carolan v The Queen* (2015) 48 VR 87, 103–4 [46] (Ashley, Redlich and Priest JJA).

[20]See Bruce Chen, 'The Principle of Legality: Issues of Rationale and Application' (2015) 41(2) *Monash University Law Review* 329.

[21]See Bruce Chen, 'The French Court and the Principle of Legality' (2018) 41(2) *University of New South Wales Law Journal* 401, 423–4; Debeljak (n 14) 355, 382.

[22](2012) 34 VR 206.

[23]Ibid 214 [20].

[24]Ibid.

[25]Ibid 219 [45].

[26]See further Bruce Chen, 'Revisiting s 32(1) of the Charter: Strained Constructions and Legislative Intention' (2020) 46(1) *Monash University Law Review* (forthcoming).

This is reinforced by the Explanatory Notes to the Queensland HRA Bill, which state that 'the emphasis on giving effect to the legislative purpose means that the provision does not authorise a court to depart from Parliament's intention'.[27] The Explanatory Notes do acknowledge that 'a court may depart from the literal or grammatical meaning of the words used in exceptional circumstances',[28] but as the Inquiry into the Bill noted, '[n]o examples of exceptional circumstances are given'.[29]

The Victorian jurisprudence mostly[30] fails to acknowledge that in the seminal modern statutory interpretation case of *Project Blue Sky Inc v Australian Broadcasting Authority*,[31] the High Court recognised that the principle of legality 'may require statutory words to be read in a way that does not correspond with a literal or grammatical meaning'.[32] If that is the case, at least the same could be argued for the interpretive provisions under the Qld HRA and Victorian Charter.

Statutory discretions and the interpretive provision

There is another issue which the Victorian experience tells us is likely to arise with respect to s 48(1) of the Qld HRA: whether it confines broad statutory discretions, such that they can only be exercised compatibly with human rights. The argument goes along the following lines: 'there is no such thing as an unfettered power'[33] or an 'unbridled discretion';[34] rather, every statutory discretion is subject to limits, identified by statutory interpretation, and the interpretive provision forms part of that exercise. This approach is also consistent with the operation of the principle of legality[35] and the interpretive provisions in the *Human Rights Act 1998* (UK)[36] and *New Zealand Bill of Rights Act 1990* (NZ).[37]

This argument has sometimes been raised in Victoria in effect to circumvent the exclusion of courts and tribunals, which are not bound by the 'public authority' obligations in s 38 of the Victorian Charter when acting in a judicial capacity.[38] Even though s 38 does not apply, s 32(1) arguably would still apply to confine broad statutory discretions conferred on courts and tribunals, so that they must act compatibly with human rights when exercising those discretions. Similarly to s 4(1)(j) of the Victorian Charter, s 9(4)(b) of the Qld HRA excludes courts and tribunals from the 'public entity' conduct obligations under s 58 when acting in a judicial capacity. As a result, courts and tribunals are not required to act compatibly with human rights when exercising statutory discretions in that capacity, and the same impetus therefore exists for litigants to raise the interpretational argument through s 48 of the Qld HRA.

However, whether such an argument can be sustained is doubtful given it cuts across s 9(4)(b) and s 58 of the Qld HRA.[39] Nevertheless, in the most recent Victorian Charter case on this issue, *Cemino v Cannon*,[40] the Victorian Supreme Court in *obiter* used the interpretive provision to impose a weak form of proper consideration on the exercise of a statutory discretion. It considered that a court in the exercise of a statutory discretion should take into account human rights, but this did not transform a discretion into an obligation to act in a particular way.[41]

'Most compatible' of incompatible interpretations

The drafting of s 32(1) of the Victorian Charter, the interpretive provision, assumes that for it to operate, one possible construction is compatible with human rights and another possible construction is *in*compatible with human rights. Accordingly, s 32(1) seemingly has no work to do when there are two available constructions and both are compatible with human rights,[42] or both are *in*compatible with human rights.

This was noted by the independent review into the Charter following eight years of its operation.[43] It recommended amendments to s 32, so that 'the preferred

[27]Explanatory Notes, Human Rights Bill 2018 (Qld) 30.

[28]Ibid.

[29]Legal Affairs and Community Safety Committee (n 2) 67 [2.6.4.1]. The departmental response during the Inquiry into the Bill was more forthcoming: see ibid 70 [2.6.4.3].

[30]With the exception of Tate JA in *Victorian Police Toll Enforcement v Taha* (2013) 49 VR 1, 61–2 [188]–[190] (in obiter). See also Justice Pamela Tate, 'Statutory Interpretive Techniques under the Charter: Three Stages of the Charter – Has the Original Conception and Early Technique Survived the Twists of the High Court's Reasoning in *Momcilovic*?' (2014) 2 *Judicial College of Victoria Online Journal* 43.

[31](1998) 194 CLR 355.

[32]Ibid 384 [78] and n 56.

[33]Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Lawbook Co, 6th ed, 2017) 116.

[34]*Wotton v Queensland* (2012) 246 CLR 1, 10 [10].

[35]See, eg, *Coco v The Queen* (1994) 179 CLR 427; *Hogan v Hinch* (2011) 243 CLR 506, 534–5 [27] (French CJ); *Attorney-General (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1, 32 [44] (French CJ).

[36]See, eg, *R (GC) v Metropolitan Police Commissioner* [2011] 3 All ER 859.

[37]See, eg, *R v Laugalis* (1993) 1 HRNZ 466; *Police v Beggs* [1999] 3 NZLR 615; *Zaoui v A-G (No 2)* [2006] 1 NZLR 289; *Dotcom v A-G* [2015] 1 NZLR 745, 785 [100]; *New Health New Zealand Inc v South Taranaki District Council* [2018] 1 NZLR 948, 995 [175] (Glazebrook J); 1029–31 [292]–[297] (Elias CJ).

[38]See *DPP v Ali (No 2)* [2010] VSC 503; *Nigro v Secretary, Department of Justice* (2013) 41 VR 359; *Cemino v Cannon* [2018] VSC 535.

[39]In the Victorian context, see Bruce Chen, 'How Does the Charter Affect Discretions? The Limits of Section 38(1) and Beyond' (2018) 25(1) *Australian Journal of Administrative Law* 28; and Bruce Chen, 'Section 32(1) of the Charter: Confining Discretions Compatibly with Charter Rights?' (2016) 42(3) *Monash University Law Review* 608.

[40][2018] VSC 535.

[41]Ibid [152]–[154].

[42]*WBM v Chief Commissioner of Police (Vic)* (2012) 230 A Crim R 322, 351 [123] (Warrren CJ).

meaning is the one that is most compatible, or least incompatible, with human rights' and the general limitations clause 'should be used to work out which meaning is most compatible, or least incompatible, with human rights'.[44] However, the implementation of this recommendation is 'pending'.[45]

The Qld HRA appears to partly respond to this consideration: s 48(2) provides that

> [i]f 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.

The Explanatory Notes indicate that the 'most compatible' of the incompatible constructions is determined by applying the general limitations clause under s 13 of the Qld HRA.[46]

Validity of incompatible provisions

Section 48(4) of the Qld HRA replicates s 32(3) of the Victorian Charter, making clear that the Qld HRA preserves parliamentary sovereignty and does not allow for the courts to strike down legislation for invalidity because of incompatibility with human rights. That would otherwise be contrary to the statutory model adopted in Victoria, the ACT, the United Kingdom and New Zealand.[47]

Having said that, the text of s 48(4)(b) implies that *delegated* legislation could potentially be invalidated if it is incompatible with human rights and is not 'empowered to be so by the Act under which it is made'. So much was recognised during the Inquiry into the Bill,[48] and is also a possibility under the Victorian Charter,[49] but one that has yet to be explored by the Victorian courts. Presumably, a human rights-compatible interpretation could restrict the scope of broad authorising powers which empower the making of delegated legislation, such that delegated legislation which is incompatible with human rights is rendered ultra vires and invalid.[50]

Public entity conduct obligations

The Qld HRA imposes particular obligations on the Executive, defined as 'public entities'[51] (as explained above, it does not include courts and tribunals acting in a judicial capacity). These 'public entity' conduct obligations in s 58(1) broadly mirror the 'public authority' obligations in s 38(1) of the Victorian Charter, which provides that it is unlawful for a public authority to act in a way that is incompatible with a human right (the 'acting compatibly' obligation) or, in making a decision, to fail to give proper consideration to a relevant human right (the 'proper consideration' obligation). Schetzer, and Walsh and Burton, in this issue[52] also discuss s 58. Some specific points regarding essential aspects of these public entity conduct obligations are made here.

'Proper consideration' obligation

In Victoria, it is established[53] that the 'proper consideration' obligation requires the decision maker to:

1. understand in general terms which of the rights of the person affected by the decision may be relevant and whether, and if so how, those rights will be interfered with by the decision;
2. seriously turn his or her mind to the possible impact of the decision on a person's human rights and the implications thereof for the affected person;
3. identify the countervailing interests or obligations; and
4. balance competing private and public interests as part of the exercise of justification.

These elements appear to draw upon some, but not all, of the factors in the Victorian Charter's general limitations clause, and only in a broad sense. Along with the view that there is 'no formula'[54] for meeting the 'proper consideration' obligation, the factors have led some to believe that the general limitations clause only applies to the 'acting compatibly' obligation.[55] However, this bifurcation is unhelpful; the rationale behind the inclusion of specific factors in the Victorian Charter's general

[43]Michael Brett Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (2015).

[44]Ibid 146; see further 148 (recommendation 28).

[45]Victorian Equal Opportunity and Human Rights Commission, *2018 Report on the Operation of the Charter of Human Rights and Responsibilities* (2019) 103.

[46]Explanatory Notes, Human Rights Bill 2018 (Qld) 31.

[47]Legal Affairs and Community Safety Committee (n 2) 3–7 [2.1.1].

[48]Ibid [2.6.4.6].

[49]See Bruce Chen, 'Delegated Legislation and Rights-based Interpretation' in Janina Boughey and Lisa Burton-Crawford (eds), *Interpreting Executive Power* (forthcoming).

[50]The principle of legality has a similar effect: see Dan Meagher and Matthew Groves, 'The Common Law Principle of Legality and Secondary Legislation' (2016) 39 *University of New South Wales Law Journal* 450.

[51]Qld HRA s 9.

[52]Louis Schetzer, 'Queensland's *Human Rights Act*: Perhaps not such a great step forward?' (2020) 45(1) *Alternative Law Journal* 12; Walsh and Burton (n 6).

[53]*Bare v IBAC* (2015) 48 VR 129, 223 [288]–[289] (Tate JA) citing *Castles v Secretary, Department of Justice* (2010) 28 VR 141; and see the discussion in Walsh and Burton (n 6).

[54]*Castles v Secretary, Department of Justice* (2010) 28 VR 141, 184 [185].

[55]See, eg, *De Bruyn v Victorian Institute of Forensic Mental Health* (2016) 48 VR 647, 682–3 [101].

limitations clause was to provide guidance for government (more so than for the courts) on how to balance rights with limitations.[56]

Section 58(5) of the Qld HRA might be intended to address this issue, although that is not altogether clear. It provides that

> giving proper consideration to a human right in making a decision includes, but is not limited to (a) identifying the human rights that may be affected by the decision; and (b) considering whether the decision would be compatible with human rights.

This might have the effect of mandating consideration of the s 13 general limitations clause of the Qld HRA, and its specific factors, before the 'proper consideration' obligation is discharged.

Validity of contravening conduct

Section 58(6)(a) provides that: 'an act or decision of a public entity is not invalid merely because, by doing the act or making the decision, the entity contravenes subsection (1)'.

This does not seem to have drawn much attention to date.[57] The Explanatory Notes offer no further guidance, but the departmental response during the Inquiry into the Bill said: 'The intention is that an act or decision that is unlawful under [s 58(1)] is not automatically invalid. To alter this position would risk removing certainty and undermining confidence in relation to public sector decision-making'.[58] This is likely intended to address the concerns raised in *Bare v IBAC*,[59] where the Victorian Court of Appeal (while not deciding the issue) cast serious doubt on whether breach of the Victorian Charter's public authority obligations amount to jurisdictional error, which would usually lead to invalidity.

Section 58(6) reduces the normative force of the public entity conduct obligations, by limiting the possible consequences for breach of s 58(1). But given that an act or decision is not invalid 'merely because' of breach, could a breach be at least a *factor* supportive of a determination of invalidity? In any event, the Victorian experience demonstrates that claims for breach of public entity conduct obligations can be brought in judicial review proceedings,[60] and other forms of judicial review relief remain available – namely, relief in the nature of certiorari for error of law on the face of the record (even if breach of s 58 does not amount to jurisdictional error),[61] and injunctive[62] and declaratory relief.[63]

Corrective services and youth justice exemptions?

The effect of the Qld HRA may be to exempt segregation or placement of prisoners, and placing children in youth justice detention centres, from compliance with the public entity conduct obligations and the right to humane treatment when deprived of liberty.[64] This possibility arises because, for example, s 126 of the Qld HRA amends the *Corrective Services Act 2006* (Qld) to declare that the public entity conduct obligations are not contravened 'only because the chief executive's or officer's consideration takes into account (a) the security and good management of corrective services facilities; or (b) the safe custody and welfare of all prisoners'. While the extrinsic materials outline that these are *additional* relevant factors to be taken into account, further to the s 13 general limitations clause,[65] the text of those provisions might be interpreted otherwise.

The amendments effected by s 126 might operate so that the mere taking into consideration of security and good management, or safe custody and welfare of all prisoners, is sufficient to discharge the public entity conduct obligations, without having any regard to the s 13 general limitations clause. If that is so, it would represent a marked abdication of human rights responsibilities within closed environments. In those contexts, human rights limitations are often made under the cover of security and management, and safety and welfare concerns.

While these drafting issues were raised during the Inquiry into the Bill and noted by the department,[66] no changes were made to the Bill that became the Qld HRA. The operation of these provisions will form part

[56]Human Rights Consultation Committee, Parliament of Victoria, *Rights, Responsibilities and Respect* (2005) 47.

[57]But see Janina Boughey and George Williams, Submission No 8 to Legal Affairs and Community Safety Committee, *Inquiry into the Human Rights Bill 2018*, 14 November 2019, 6–7.

[58]Legal Affairs and Community Safety Committee (n 2) 78 [2.6.6.5].

[59]*Bare v IBAC* (2015) 48 VR 129.

[60]See *Director of Housing v Sudi* (2011) 33 VR 559.

[61]*Bare v IBAC* (2015) 48 VR 129; *Haigh v Ryan* [2018] VSC 474.

[62]*Certain Children v Minister for Families and Children (No 2)* [2017] VSC 251.

[63]*Certain Children by their Litigation Guardian Sister Marie Brigid Arthur v Minister for Families & Children* (2016) 51 VR 473; *Certain Children v Minister for Families and Children (No 2)* [2017] VSC 251; *Minogue v Dougherty* [2017] VSC 724; *Haigh v Ryan* [2018] VSC 474.

[64]Qld HRA s 126 inserting new s 5A into the *Corrective Services Act 2006*; Qld HRA s 183 amending s 263 of the *Youth Justice Act 1992*.

[65]Queensland, *Parliamentary Debates*, Legislative Assembly, 31 October 2018, 3186 (Yvette D'Ath, Attorney-General and Minister for Justice); Explanatory Notes, Human Rights Bill 2018 (Qld) 9; Queensland, *Parliamentary Debates*, Legislative Assembly, 26 February 2019, 378 (Yvette D'Ath, Attorney-General and Minister for Justice).

[66]Legal Affairs and Community Safety Committee (n 2) 115–7 [2.8.3.2]–[2.8.3.3]. See further Ben Smee, 'Queensland Human Rights Bill has "Major Flaws", Advocates Say', *The Guardian* (online, 23 November 2018) https://www.theguardian.com/australia-news/2018/nov/23/queensland-human-rights-bill-has-major-flaws-advocates-say.

of a 'first review' of the Qld HRA for its operation leading up to 1 July 2023.[67]

Relief or remedy against a public entity

The Qld HRA confers a human rights complaint and dispute resolution function (including conciliation)[68] on the newly renamed Queensland Human Rights Commission, a sensible and beneficial function which its Victorian counterpart does not have under the Victorian Charter.

However, when it comes to litigants being able to bring proceedings in courts and tribunals on the basis of breach of s 58, the Qld HRA closely replicates s 39 of the Victorian Charter – its relief and remedies provision. The intention of s 39 was not to create a new or independent right to relief or remedy for Charter breaches,[69] but its complexity has been much maligned.[70]

Section 59(1) of the Qld HRA provides that 'a person may seek any relief or remedy in relation to an act or decision of a public entity on the ground that the act or decision was, other than because of section 58, unlawful'. Section 59(2) clarifies that '[t]he person may seek the relief or remedy . . . even if the person may not be successful in obtaining the relief or remedy on the ground mentioned in subsection (1)'. Like the Victorian Charter, s 59(3) of the Qld HRA rules out the possibility of damages for breach of s 58.

Section 59(2) is welcome, in that it codifies the position under the Victorian case law which does not require a non-Charter claim for relief or remedy to be successful before a Charter claim can be successful.[71] However, there remain a host of technical issues which the Victorian experience tells us s 59(1) will likely give rise to, including:

- whether a litigant must be able to 'seek', or must actually 'seek', a non-s 58 claim;
- alternatively, whether some of kind of 'abstract availability' is sufficient – in the sense that the relief or remedy for the s 58 claim is merely available 'in principle' and the litigant 'has the right process, the right court and is within time';[72]
- whether the non-s 58 claim must be able to survive an application for strike out or summary dismissal;[73]
- whether the non-s 58 claim must be 'non-colourable' in the sense that it is not 'made for the improper purpose of "fabricating" jurisdiction'[74] – ie, 'bona fide and not spurious, hypothetical, illusory or misconceived';[75]
- whether tort claims (and which kinds) are a form of non-s 58 unlawfulness which can support a s 58 claim for relief or remedy;
- although damages are specifically precluded for breach of s 58, whether breach can nevertheless be taken into account when assessing damages for a non-s 58 claim;[76]
- the extent to which the Queensland Civil and Administrative Tribunal has jurisdiction to hear claims for breach of s 58,[77] and the extent to which it does not have jurisdiction.[78]

The Victorian Charter has been criticised for its 'confusing and limited remedies provision . . . undermining its effectiveness'.[79] It is most unfortunate that the Qld HRA, despite such warning signs, replicates the Victorian Charter in this respect. Litigants will undoubtedly be similarly hamstrung in their ability to obtain an effective relief or remedy for a breach of the Qld HRA in court and tribunal proceedings. The Qld HRA provides that s 59 will form part of its 'first review' after 1 July 2023.[80]

Conclusion

The Qld HRA is the next evolution of a human rights statute for an Australian jurisdiction, a milestone which should be celebrated. The operative provisions of the Qld HRA are more advanced than the Victorian Charter, its main source of inspiration, in several respects. For example, the Qld HRA clarifies that justification and proportionality apply to the meaning of human rights 'compatibility' (s 8); legislation which is incompatible with human rights must still be interpreted

[67]Qld HRA s 95(4)(c).

[68]Ibid pt 4, div 2; see the discussion in Walsh and Burton (n 6).

[69]Cf *Human Rights Act 2004* (ACT) s 40C which provides for a stand-alone cause of action.

[70]The Victorian Court of Appeal has described it as 'drafted in terms that are convoluted and extraordinarily difficult to follow': *Director of Housing v Sudi* (2011) 33 VR 559, 596 [214] (Weinberg JA).

[71]*Goode v Common Equity Housing* [2014] VSC 585.

[72]Mark Moshinsky, 'Bringing Legal Proceedings Against Public Authorities for Breach of the Charter of Human Rights and Responsibilities' (2014) 2 *Judicial College of Victoria Online Journal* 91, 96–7; cited in *Bare v IBAC* (2015) 48 VR 129, 258–9 [394] (Tate JA).

[73]*Djime v Kearnes (Human Rights)* [2015] VCAT 941, [95], [194].

[74]*Kheir v Robertson* [2019] VSC 422, [100]–[101].

[75]Ibid [101] citing *Edge Technology Pty Ltd v Lite-On Technology Corporation* (2000) 156 FLR 181, 186 [31].

[76]*Gebrehiwot (who sues by his litigation guardian Tamar Hopkins) v State of Victoria (Ruling No 2)* [2019] VCC 1229, [133]–[134], [140]–[149]; cf *Cruse v State of Victoria* [2019] VSC 574, [219] n 45.

[77]*Caripis v Victoria Police (Health and Privacy)* [2012] VCAT 1472, [98]–[99]; *Slattery v Manningham CC (Human Rights)* [2013] VCAT 1869, [160]; *Kuyken v Lay (Human Rights)* [2013] VCAT 1972, [194].

[78]*Director of Housing v Sudi* (2011) 33 VR 559; *AVW v Nadrasca Ltd (Residential Tenancies)* [2017] VCAT 1462, [81]–[83].

[79]Brett Young (n 43) 127; see also the further discussion of s 59 of the Qld HRA in Schetzer (n 52) in this issue.

[80]Qld HRA s 95(4)(b).

in a way that is most compatible with human rights (s 48 (2)); and a non-Charter claim for relief or remedy need not succeed for a Charter claim to succeed (s 59(2)).

It is hoped that the Qld HRA's reduction of these technical ambiguities and complexities will assist in making human rights 'real' – encouraging public entities to embed human rights in everyday decision-making, community members and advocacy groups to raise human rights as part of resolving disputes, and courts and tribunals to apply human rights in litigation. Nevertheless, there remain a number of issues arising from its operative provisions which public entities, advocates, the courts and tribunals will have to come to terms with in the coming years. The lack of a stand-alone cause of action in particular represents a missed opportunity to ensure an effective remedy is available whenever there is a breach of human rights.

ORCID iD

Bruce Chen https://orcid.org/0000-0002-9200-3414

Declaration of conflicting interests

The author(s) declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

Funding

The author(s) received no financial support for the research, authorship, and/or publication of this article.

Bruce Chen is a PhD candidate in the Faculty of Law at Monash University and a human rights legal adviser in Victoria.