



Queensland Advocacy Incorporated

Our mission is to promote, protect and defend, through advocacy, the fundamental needs and rights and lives of the most vulnerable people with disability in Queensland.

Systems and Individual Advocacy for vulnerable People with Disability

Free and equal: An Australian conversation on human rights

Submission by Queensland Advocacy Incorporated

Australian Human Rights Commission

30 October 2019

To deny people their human rights is to challenge their very humanity.

(Nelson Mandela)

I am neither an optimist nor pessimist, but a possibilist.

(Max Lerner)

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

(United Nations, International Bill of Human Rights)

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QAI endorses the objectives, and promotes the principles, of the Convention on the Rights of Persons with Disabilities.

Patron: His Excellency The Honorable Paul de Jersey AC

About Queensland Advocacy Incorporated

Queensland Advocacy Incorporated (**QAI**) is an independent, community-based systems and individual advocacy organisation and a community legal service for people with disability. Our mission is to promote, protect and defend, through systems and individual advocacy, the fundamental needs and rights and lives of the most vulnerable people with disability in Queensland.

QAI has an exemplary track record of effective systems advocacy, with thirty years' experience advocating for systems change, through campaigns directed to attitudinal, law and policy reform and by supporting the development of a range of advocacy initiatives in this state. We have provided, for almost a decade, highly in-demand individual advocacy through our individual advocacy services – the Human Rights Legal Service, the Mental Health Legal Service, the Justice Support Program and more recently the National Disability Insurance Scheme Appeals Support Program and Decision-Support Pilot Program.

QAI has been a long-time campaigner for greater human rights protection in Queensland and in Australia. At an international level, QAI participated as an NGO in the final session of the Ad Hoc Committee in August 2006 when the draft text of the Convention on the Rights of Persons with Disability (**CRPD**) was finalised, and was actively engaged in working towards the signing and ratification by Australia of the CRPD in 2008, and of the Optional Protocol to the CRPD in 2009.

Subsequent to this, QAI developed and published the Human Rights Indicators for People with Disability: A Resource for Disability Activists and Policy Makers (**Human Rights Indicators**). The Human Rights Indicators set out a preliminary set of human rights indicators for persons with disability, which are based on the elements of the CRPD. The Human Rights Indicators are both a reference that describes the human rights of people with disability and a tool for measuring the extent to which those rights have been met. Numerous entities, including government departments and NGOs, have adopted the Human Rights Indicators as the standard against which they measure their efforts to promote the rights of people with disability. The World Bank included the Human Rights Indicators in its Inter-Agency Disability Knowledge Sharing System, a web-based disability toolkit for UN Agencies and public entities.

As a further step to encourage full implementation of the CRPD, QAI was involved in building a coalition to write a 'shadow report' to the 'baseline report' for the CRPD in 2012 (the resulting report was titled: *Disability Rights Now: CRPD Civil Society Report on Australia*), which again shadow reported on the most recent review of the CRPD, in 2019 (*Disability Rights Now 2012: Australian Civil Society Shadow Report to the United Nations Committee on the Rights of Persons with Disabilities: UN CRPD Review 2019*).

QAI has been actively involved in Conferences of State Parties to the CRPD and reviews of Australia's performance in sessions on the United Nations Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (**CAT**). In June 2018, QAI was granted Special consultative status with the United Nations Economic and Social Council (**ECOSOC**), which enables QAI representatives to register and participate in events, conferences and activities of the UN and sit as observers at public meetings of ECOSOC and its subsidiary bodies, General Assembly, Human Rights Council and other United Nations intergovernmental decision-making bodies. We are also able to make written or oral statements to ECOSOC relevant to their work.

QAI was actively involved in the grassroots campaign for introduction of a Human Rights Act in Queensland which culminated in the passage of the *Human Rights Act 2019* (Qld) in February 2019. Our involvement included membership of the steering committee and auspicing the campaign within QAI.

At a national level, QAI was represented at the human rights consultations and made a detailed written submission to the human rights inquiry headed by Father Frank Brennan (**Brennan Inquiry**) in 2009. More recently, QAI has collaborated with other organisations and academics campaigning for introduction of a federal Human Rights Act. QAI takes the view that a federal Human Rights Act will not only provide avenues for complaints and set national benchmarks, it will also lead to widespread systemic change that will inevitably be reflected in community and society to create the most liveable, fair and equitable society possible.

Executive Summary

QAI recommends:

1. The Australian Human Rights Commission should support introduction of a federal Human Rights Act which protects the fundamental civil, political, economic, social and cultural rights contained in the United Nations treaties Australia has signed and ratified.
2. QAI submits that a federal Human Rights Act should protect all civil and political rights, as well as a broad range of economic, social and cultural rights.
3. In the initial period of operation of a Human Rights Act, court access could be limited to breaches of civil and political rights only, with the remaining rights progressively realised by becoming actionable after a designated period.
4. A federal Human Rights Act should include an accessible enforcement mechanism and remedies for breach.
5. QAI supports a model akin to the 'dialogue mode' of human rights protection implemented through the Queensland and Victorian human rights legislation, under which human rights are taken into account when developing, interpreting and applying the law and a dialogue between the different arms of government (legislature, executive and judiciary) is facilitated.
6. The right to life, the right to freedom from torture and slavery, freedom from forced work, the right to liberty and security of person, humane treatment when deprived of liberty, and the right to a determined period if liberty is deprived, the right to a fair hearing and the rights of children in the criminal process should be absolute or non-derogable (not able to be denied, limited or restricted in any way). Other human rights are not absolute and can be subject to reasonable and proportionate limitations.
7. A federal Human Rights Act should recognise the equal, inalienable human rights of all human beings and explicitly acknowledge that the exercise of one person's human rights must respect the human rights and dignity of other humans.
8. A federal Human Rights Act should include an independent cause of action for breaches of the human rights protected in the Act, the ability to make a complaint to the Australian Human Rights Commission and for the complaint to be heard and reconciled by the Commission. It should include the full range of judicial remedies for breach, including declarations, injunctions, orders to cease the offending conduct and damages, and should protect complainants against adverse costs orders, except in exceptional circumstances. A federal Human Rights Act should include provision for class actions to be brought, in recognition that human rights are often of special significance to a particular group, with standing given to appropriate representative organisations in the position to support or represent individuals and groups of people whose human rights have been breached and who have specialised skills or knowledge that is helpful for a particular group(s).
9. The federal Government should provide a broad program of education to increase Australia's

literacy about human rights.

10. Government must take the lead in modelling progressive change, such as by imposing and honouring quotas for the employment of persons with disability in government departments and requiring all government schools, social welfare, health and other services to be properly accessible and inclusive.
11. The government should call on the Australian corporate sector and community organisations to pledge their commitment to protecting human rights and developing a human rights culture in Australia.
12. The Australian Human Rights Commission will have a pivotal role in educating individuals, the community and government departments and agencies on their rights and responsibilities under the human rights legislation and international law and supporting attendance at United Nations conferences and sessions.
13. QAI submits that a federal Human Rights Act should include provision for statutory review of the legislation within designated timeframes. Review must be authentically undertaken, with action in response to recommendations monitored, including review of relevant case studies, reports by NGOs and reporting by the United Nations.
14. It is vital that adequate resources are committed to realise human rights law, policy and practice.

Response to Questions in Issues Paper

QAI thanks the Australian Human Rights Commission (**AHRC**) for initiating this important conversation and for the opportunity to make this submission.

1. What human rights matter to you?

As a disability advocacy organisation and community legal centre working to protect and defend the rights of the most vulnerable people with disability in Queensland, QAI considers that it is important that all people have their basic human rights protected at law.

As the Commission is well aware, Australia has signed and ratified seven United Nations human rights treaties, which collectively document the fundamental human rights identified by the international community:

- the International Covenant on Civil and Political Rights (**ICCPR**);
- the International Covenant on Economic, Social and Cultural Rights (**ICESCR**);
- the International Convention on the Elimination of All Forms of Racial Discrimination (**CERD**);
- the Convention on the Elimination of All Forms of Discrimination against Women (**CEDAW**);
- the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (**CAT**);
- the Convention on the Rights of the Child (**CRC**);
- the Convention on the Rights of Persons with Disabilities (**CRPD**).

Australia is also a party to the following Optional Protocols:

- the Optional Protocol to the International Covenant on Civil and Political Rights establishing an individual communication mechanism;
- the Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty;
- the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict;
- the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography;
- the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women establishing an individual communication mechanism;
- the Optional Protocol to the Convention on the Rights of Persons with Disabilities establishing an individual communication mechanism.

QAI is of the view that, given the rights contained in these treaties are the rights Australia has committed to respect and protect, it is appropriate that they should form the content of federal human rights legislation.

QAI submits that human rights legislation should protect all civil and political rights, as well as a broad range of economic, social and cultural rights, as specified below. In addressing vulnerability and disadvantage, we cannot afford to include only civil and political rights but must commit to protecting key economic, social and cultural rights as well. The economic, social and cultural rights give meaning and substance to many of the civil and political rights and the benefits of protecting these rights outweigh the costs, at individual, social and national levels.

Australia has committed to not only respect and protect civil and political rights (through the ICCPR) but also economic, social and cultural rights (through the ICESCR). QAI submits that it is appropriate that we translate this commitment into legislative protection for all of the civil, political, economic, social and cultural rights contained in these conventions. This is specifically demanded by these Conventions – the ICCPR provides that states must take steps to give effect to ICCPR rights and to ensure that victims of violations of the ICCPR have an effective remedy.¹ The ICESCR provides that states must take steps ‘to the maximum of [their] available resources’ to achieve the ‘progressive realisation’ of ICESCR rights.²

We further submit that, consistent with our international commitments under these treaties, protection should also be provided for key rights contained in the thematic treaties – the CRPD, CERD, CEDAW, CAT and CRC.

In Australia, three jurisdictions have enacted a Human Rights Act or Charter: the ACT, Victoria and Queensland. All three jurisdictions protect fundamental civil and political rights, with the ACT and Queensland also offering protection for education (an economic social and cultural, or ‘ESC’ right) and Queensland’s Act extending to protect the ESC rights to culture for Australia’s first people and to access health services without discrimination.

We consider that this extension by the Queensland government is consistent with the progressive development of human rights at a global level and urge the Commission to recommend that federal human rights legislation should take a progressive and expansive approach.

Below, we provide a summary of the rights which are protected in the human rights instruments of the ACT, Victoria and Queensland:

Right	Protected by Human Rights Act 2004 (ACT)?	Protected by Charter of Human Rights and Responsibilities Act 2006 (Vic)?	Protected by Human Rights Act 2019 (Qld)?
Civil and political rights			
Recognition and equality before the law	✓	✓	✓
Right to life	✓	✓	✓
Protection from torture and cruel, inhuman or degrading treatment	✓	✓	✓
Freedom from forced work	✓	✓	✓
Freedom of movement	✓	✓	✓
Privacy and Reputation	✓	✓	✓
Freedom of thought,	✓	✓	✓

¹ See United Nations Human Rights Council, The nature of legal obligations imposed on state parties to the covenant, General Comment no. 31, UN Doc CCPR/C/21/Rev.1/Add.13 (2004).

² See Article 2 of the ICESCR.

conscience, religion and belief			
Freedom of expression	✓	✓	✓
Peaceful assembly and freedom of association	✓	✓	✓
Protection of families and children	✓	✓	✓
Taking part in public life	✓	✓	✓
Property rights	X	✓	✓
Right to liberty and security of a person	✓	✓	✓
Humane treatment when deprived of liberty	✓	✓	✓
Children in the criminal process	✓	✓	✓
Fair hearing/trial	✓	✓	✓
Rights in criminal proceedings	✓	✓	✓
Right not to be tried or punished more than once	✓	✓	✓
Retrospective criminal laws	✓	✓	✓
Compensation for wrongful conviction	✓	X	X
<i>Economic, social and cultural rights</i>			
Cultural rights	X	✓	✓
Cultural and other rights of Aboriginal and Torres Strait Islander Peoples	✓	✓	✓
Right to education	✓	X	✓
Right to health services	X	X	✓

QAI submits that human rights legislation should therefore protect the following rights:

Civil & political rights	Economic, social & cultural rights
Recognition and equality before the law (including the right of persons with disabilities to access the support they may require to exercise their legal capacity)	Cultural rights of Aboriginal and Torres Strait Islander people, including the right to self-determination
Freedom from discrimination on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, pregnancy, disability, impairment, sexuality, gender identity, lawful sexual activity, breastfeeding, relationship status, family responsibilities, trade union activity, age, association with a person with a prescribed attribute	Cultural rights of ethnic, religious or linguistic minorities
Right to life	Right to education
Protection from torture and cruel, inhuman or degrading treatment	Right to adequate health care and to access health services without discrimination
Freedom from forced work	Right to housing (including the right to live where, how and with whom you want)
Freedom of movement	Right to an adequate standard of living
Privacy and reputation	
Freedom of thought, conscience, religion and belief	
Freedom of expression	
Peaceful assembly and freedom of association	
Protection of family and children and family life	
Right to participate in public life	
Property rights	
Right to liberty and security of person	
Human treatment when deprived of liberty	
Rights of children in the criminal process	
Right to a fair hearing	
Protection of rights in criminal proceedings	
Protection against retrospective criminal law	
Right to be tried or punished not more than once	
Right to compensation for wrongful conviction	

Consistent with international law, in the initial period of operation of a Human Rights Act, court access could be limited to breaches of civil and political rights only, with the remaining rights progressively realised by becoming actionable after a designated period.

The federal government is in a position where it can take leadership and enact human rights legislation that comprehensively protects the rights Australia has committed to protect at international law. Alternatively, at a minimum, a federal Human Rights Act should protect the human right covered in the instruments of the ACT, Victoria and Queensland. The Act should, at a

minimum, offer the same standard of protection as the *Human Rights Act 2019* (Qld), which has been described as the strongest model of protection in Australia at present.³

A key benefit of the introduction of human rights legislation would be giving effect to what we have committed to under various international treaties and conventions. This is an important step forward in a number of ways: it would keep us in step with the rest of the western, democratic world that has introduced legislative protection of human rights; it would enable human rights complaints to be heard and determined within Australia; and it would demonstrate to the international community that the Australian Government takes its international commitments seriously. Other legal benefits include improved law making and government policy and a simplified and consistent human rights framework – the present disbursement of an ad hoc and incomplete collection of human rights protections amongst a range of different statutes, governed by different legal jurisdictions and institutions, as discussed above, increases the costs and confusion for all parties and does not acknowledge the costs borne by individuals or families whose human rights have been ignored or abused.

2. How should human rights be protected in Australia?

QAI submits that human rights should be protected in Australia by the enactment of comprehensive human rights legislation, the proposed content of which is outlined above, that includes an accessible enforcement mechanism and remedies for breach.

The human rights protections should extend to all persons subject to Australian laws and policies, irrespective of residency or citizenship, to ensure that a culture of respect and protection for human rights informs all government action.

The current human rights protections in Australia fall well short of the obligations the Australian government has committed to in signing and ratifying the international treaties and conventions, detailed above.

At present, the main human rights protections are limited to:

(a) The Parliamentary Joint Committee on Human Rights:

Established by the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), the role of the Parliamentary Joint Committee on Human Rights is limited to scrutinising and inquiring into Bills and legislative instruments for human rights compatibility and report to Parliament on its findings.

(b) Legislative protection:

There are some human rights protections found in certain statutes, primarily anti-discrimination laws, at a state and federal level, but there are significant limitations, including that:

- Protections are piecemeal – while the patchwork enforcement framework for Commonwealth anti-discrimination laws⁴ has been reviewed and a consolidation proposal developed to bring together and align anti-discrimination laws,⁵ this proposal stalled for a number of years at the

³ Prof. George Williams, “Law Lifts Bar on Human Rights”, *The Australian*, 5 March 2019, available at: <https://www.theaustralian.com.au/commentary/opinion/law-lifts-bar-on-human-rights/news-story/8545f2f2f4e61a26b1cbf7ba588be34b>

⁴ There are separate Acts for different types of discrimination: The *Racial Discrimination Act 1975* (Cth), *Sex Discrimination Act 1984* (Cth), *Disability Discrimination Act 1992* (Cth) and *Age Discrimination Act 2004* (Cth).

⁵ This was proposed in April 2010 as a key part of the Australian Human Rights Framework. In September 2011, a Consolidation Discussion Paper was released to initiate the formal process for consultation and law reform: see <http://www.ag.gov.au/antidiscrimination>; Attorney-General's Department, *Consolidation of Commonwealth Anti-Discrimination Laws: Discussion Paper*, September 2011 (Commonwealth of Australia). At present, there are no clear indications of the likely changes that will result from the review.

draft discussion stage, ultimately being put on hold on the basis that the draft laws failed to strike the desired balance,⁶

- Protections are not sufficiently robust or effective;
- Anti-discrimination legislation can be politically volatile and subject to funding cuts according to the preference of the government of the day, which can have significant ramifications for the jurisdiction;
- Anti-discrimination laws take an individualist approach to a collective problem. As discriminatory practices, by their very definition, only affect persons because of their membership of a particular class or group, a key requirement of any anti-discrimination system should be that claims are understood in a collective light. While the ability to lodge an individual complaint is central to protecting individual rights to equality and non-discriminatory treatment, it is also important that the collective vulnerability of certain groups in our society is properly understood. In other jurisdictions, class action has proved a vital means of challenging embedded or institutional discrimination, however the sole collective right contained in the legislation (the right to make a representative complaint) is not designed in a user-friendly way and so is not utilised.;
- Anti-discrimination laws are predominantly complaints-based and reactive, relying on the aggrieved person to initiate and pursue a complaint (we note the recent exception in the context of work, with the Fair Work Ombudsmen recently empowered to inquire into, investigate and initiate enforcement action for workplace discrimination complaints where it considers it is in the public interest). We note that measures have been included to attempt to mitigate the power imbalance, including making the first step conciliation in an accessible, inexpensive forum. Yet the requirement for a person to lodge their claim in the approved form to the appropriate body and outline their case when face-to-face with their alleged perpetrator in a formal bureaucratic setting is highly threatening for many people, particularly disempowered persons not familiar with the law and legal system. The power balance between the parties also casts a significant shadow over conciliation negotiations. This is particularly so given that majority of aggrieved persons have been significantly marginalized and, as the legislation explicitly acknowledges, are members of traditionally disempowered groups who are highly vulnerable thus less equipped than most to initiate and pursue a claim.
- Framing discrimination laws around the notion that individual differences are to be treated as irrelevant is also inherently problematic. This approach can entrench the significance of difference, rather than generating respect for individual difference, which a more substantive conception of equality may create.⁷ The use of the comparator test is particularly problematic and further marginalizes disempowered groups. Essentially, the comparator test involves comparing likes with unlikes. As Thornton explains:⁸ *“The benchmark figure is likely to be a white, Anglo-Celtic, heterosexual male who falls within acceptable parameters of physical and intellectual normalcy, who supports, at least nominally, mainstream Christian beliefs, and who fits within the middle-to-the-right of the political spectrum.”*
- Anti-discrimination laws focus on formal rather than substantive equality;⁹
- Anti-discrimination laws are primarily negative – this is a further reason why they fail to

⁶ See: <http://www.ag.gov.au/Consultations/Pages/ConsolidationofCommonwealthanti-discriminationlaws.aspx> for more information.

⁷ Rosemary Owens, Joellen Riley and Jill Murray, *The Law of Work*. 2nd edition (Oxford University Press, 2011), 397.

⁸ Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (Oxford University Press, 1990), 1-2.

⁹ Beth Gaze, ‘Twenty Years of the Sex Discrimination Act: Assessing its Achievements’, (2005) 30(1) *Alternative Law Journal* 3, 4-5; Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (Oxford University Press, 1990), 15, 22.

recognize and address systemic discrimination. There is no general, positive duty to promote equity. This is consistent with the traditional Australian legal approach of seeking to remedy harm once it has occurred, rather than proactively seeking to prevent it. QAI submits that to achieve choice and equity for vulnerable members of our society, we need more than negative freedom and minimalist welfare support – what we need are proactive measures designed to level the playing field and to support autonomous choice. The onus should not be on vulnerable people to defend their human rights; rather, there must be widespread understanding that anyone thinking of breaching the human rights of another does so at risk to themselves.

- Anti-discrimination legislation has traditionally failed to offer adequate remedies to enforce compliance with the law, deter breaches and compensate victims. The usual remedy is the award of monetary compensation (damages) to the individual complainant. The amount awarded is usually quite low and is often eroded by the legal costs incurred in reaching this point. There is no exemplary or punitive component to the damages routinely ordered.
- There are many exceptions, exclusions and exemptions that narrow the scope of anti-discrimination law. Anti-discrimination law is often considered a blunt tool to help people who have experienced discrimination.

(c) The ability to complain directly to an international committee body:

Ratification of an international treaty creates the right for a citizen of that country to make a complaint to the Committee charged with oversight of that treaty. However, key limitations with this avenue are that:

- It can be a very time-consuming and protracted process, given that domestic avenues must first be exhausted;
- It can be expensive;
- It is not accessible to most people.

There is significant need for a comprehensive piece of legislation that establishes and protects the human rights of all Australians and provides them with an avenue to access protection and remedies for breach of their rights. The enactment of a Human Rights Act is a more appropriate, cost-effective and sustainable solution than a plethora of amendments to existing federal legislation.

At a federal level, the Commission will be well-informed of the 2009 Brennan Inquiry, which was initiated in November 2008 by the establishment of the National Human Rights Consultation Committee, chaired by Father Frank Brennan, by the Rudd Government. The Committee travelled and consulted widely and received 35,000 submissions.¹⁰ One of the final recommendations made by the Committee was that a federal Human Rights Act be introduced. However, the Commonwealth Government has failed to act on this recommendation to date, instead passing the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), which launched the 'Australia's Human Rights Framework'. This legislation and related framework fall well short of making adequate progress in the area of human rights protection or reforms, as it fails to recognise and protect key rights or to establish a framework for the resolution of human rights issues.

National and state inquiries have repeatedly highlighted the significant gaps and weaknesses in the human rights protections available to Australians, particularly vulnerable Australians. The human

¹⁰ See:

http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BriefingBook43p/humanrightsprotection.

rights of people with disability and mental illness are particularly precarious and fragile, and too often crushed in the face of laws that fail to expressly protect their human rights.¹¹

In the international context, the UK provides human rights leadership from which Australia can learn. Importantly in the context of disability, the UK Human Rights Inquiry, reported on by the Equality and Human Rights Commission, found that the Human Rights Act reaches parts that the Disability Discrimination Acts do not.¹² This is important in dispelling the myth that human rights of vulnerable groups are adequately protecting by existing legislation, such as anti-discrimination laws.

QAI supports a model akin to the 'dialogue mode' of human rights protection implemented through the Queensland and Victorian human rights legislation, under which human rights are taken into account when developing, interpreting and applying the law and a dialogue between the different arms of government (legislature, executive and judiciary) is facilitated as follows:

1. Bills are assessed for human rights compatibility prior to introduction to Parliament, with the tabling of all Bills accompanied by a Statement of Compatibility;
2. All legislation (including subordinate legislation) introduced to Parliament is considered by the Scrutiny of Acts and Regulations Committee to check its human rights compatibility;
3. Public authorities must act compatibly with human rights and give appropriate consideration to human rights in all decision-making processes;
4. Courts and tribunals must interpret and apply legislation consistently with human rights, to the greatest possible extent;
5. The Federal Court can issue a Declaration of Inconsistent Interpretation where it is found that a law cannot be applied consistent with human rights and the Government must respond to this Declaration within 6 months;
6. The relevant body would be responsible for monitoring and reporting on the implementation and operation of the legislation.

3. What are the barriers to the protection of human rights in Australia?

QAI submits that key barriers to the protection of human rights in Australia include the lack of awareness of the vulnerability of all Australians in the absence of legislative protection for fundamental human rights; myths and misconceptions about the scope, impact and cost of human rights legislation; and the lack of a human rights culture in Australia.

Understanding our vulnerability

The human rights protections provided by the Commonwealth Constitution are very limited, and encompass only the right to vote,¹³ protection against acquisition of property on unjust terms,¹⁴ the right to a trial by jury,¹⁵ freedom of religion,¹⁶ and prohibition of discrimination on the basis of State of residency.¹⁷ Other limited rights have been recognised by the High Court as implied by the language and structure of the constitution. Additional rights have been found by the High Court to

¹¹ See, for example, Report of the National Inquiry into the Human Rights of People with Mental Illness, 1993 (<https://www.humanrights.gov.au/report-national-inquiry-human-rights-people-mental-illness>).

¹² Ms Caroline Ellis, Deputy Chief Executive, RADAR – transcript 23.10.08. See: http://www.equalityhumanrights.com/sites/default/files/documents/hri_report.pdf.

¹³ Section 41

¹⁴ Section 51 (xxxix)

¹⁵ Section 80

¹⁶ Section 116

¹⁷ Section 117.

be implied by the language and structure of the Constitution - for example, the implied right to freedom of communication on political matters.¹⁸

The common law protects some human rights, such as the right against self-incrimination;¹⁹ the presumption of innocence in a criminal trial;²⁰ the presumption that the standard of proof in criminal cases is that of beyond reasonable doubt;²¹ the right to a fair trial;²² the right to access legal counsel when accused of a serious crime;²³ and Aboriginal and Torres Strait Islander native title rights in Australia.²⁴

In addition, the common law protects human rights indirectly through two key principles of statutory interpretation. Firstly, the principle of legality ensures that courts will construe legislation so as not to curtail fundamental rights unless the Parliament's intention to do so is manifested by 'unmistakable and unambiguous language'. Secondly, if there is ambiguity, the principle is that the courts should favour a construction of a statute which accords with the obligations of Australia under a relevant international treaty.

Despite the application of these principles, the common law does not provide adequate protection for human rights in Australia as governments can override the common law through demonstrating a clear intention to override common law rights in the passing of new legislation. Further, the development of common law rights is limited to cases brought before courts, which are confined by the doctrine of precedent.

The cost of human rights legislation

As with any change to the status quo, the introduction of human rights legislation would incur some expense, particularly in the initial period. However, the costs would not be disproportionately high and would be offset by significant economic benefits that would increase over time.

With the substantive obligations under the Queensland Act yet to commence, we can look to Victoria for some guidance on the likely costs. The 2011 review of the Victorian Charter, which was the first review for a human rights act in Australia that provided detailed information regarding economic costs, found that, over the first five years of its operation (from 2006-7 to 2010-11 financial years), the total economic cost of the Charter was \$13,488,750.

This was comprised of the following:

- Charter implementation funding for certain departments and agencies (Corrections Victoria, Department of Human Services and Victoria Police) (\$2,549,000);
- Establishment of the Human Rights Unit within the Department of Justice (\$3,405,185);
- Funding for VEOHRC's (Victorian Equal Opportunity Human Rights Commission) charter-related work (\$3,326,000);
- Grants provided by the Department of Justice for Charter education and legal advice (\$971,362);
- Other identified human rights staff in the Victorian Public Service (\$754,379);

¹⁸ *Nationwide News Pty Ltd v Wills* [1992] HCA 46, (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* [1992] HCA 45, (1992) 177 CLR 106.

¹⁹ *Reid v Howard* (1995) 184 CLR 1, 11–12; *Sorby v Commonwealth* (1983) 152 CLR 281, 288.

²⁰ *Momcilovic v The Queen* (2011) 245 CLR 1, 47 [44] (French CJ).

²¹ *Momcilovic v The Queen* (2011) 245 CLR 1, 47 [54] (French CJ).

²² *Dietrich v The Queen* (1992) 177 CLR 292, 298 (Mason CJ and McHugh J).

²³ *Dietrich v The Queen* (1992) 177 CLR 292, 317 (Mason CJ and McHugh J).

²⁴ *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 57, 69 (Brennan J, Mason CJ, McHugh J agreeing); 100–01 (Deane and Gaudron JJ); 184 (Toohey J).

- Charter-related training and the development of resources (\$160,665);
- Legal advice obtained for the initial audit of legislation in preparation for the introduction of the Charter and drafting of statutory provisions or general legal advice in relation to the Charter (\$272,971);
- Legal advice obtained for the preparation of statements of compatibility (\$470,339);
- Charter-related litigation involving the Department of Justice, DHS and Victoria Police (\$952,373).

The cost of conducting the review of the Charter was estimated at \$130,000. This amounts to a total cost of 50 cents per Victorian resident.

It is trite to state that costs will be incurred by the introduction of a Human Rights Act, particularly in the initial period as adjustments are made, relevant positions are established and existing legislation is audited and amended.

International research establishes that legislative protection of human rights has positive benefits for economies and protects against poverty. From a purely economic perspective, we cannot continue to lag behind our neighbours in the international community in this important area.

In the area of disabilities, human rights protections make financial sense. Protecting the human rights of persons with disabilities – for example, by protecting the right to education – can increase the rates of active and meaningful workforce participation, which correlates with reduced healthcare and welfare expenses. A cessation or reduction in the application of Restrictive Practices on vulnerable persons with disability in residential or institutional settings (which would be prohibited as a breach of the right to protection from torture and other cruel or inhuman treatment) has also been shown to result in reduced costs.

From the perspective of international humanitarian law, we cannot afford to continue to **not** have a Human Rights Act. Our failure to fulfil the human rights obligations which we have committed to by signing and ratifying international conventions and treaties is not only an international embarrassment, it leaves us lagging behind countries with comparable legal systems. In quantifying the cost of human rights legislation, the cost in terms of human life and quality of life stemming from failure to protect human rights must be considered, many of which also result in the incurring of significant costs to the Government. There are extensive examples to note in this regard, including the loss of life and quality of life of Aboriginal and Torres Strait Islander peoples who have died or experienced egregious breaches of their human rights, the costs for families relinquishing care due to deficiencies in the National Disability Insurance Scheme.

An analysis of litigation attributable to the introduction of the Victorian and ACT human rights legislation shows that the introduction of legislative protection of human rights does not result in a flood of litigation. To the contrary, by making human rights an important dimension of decision-making processes, solutions that are more satisfactory for all parties can often be reached at the decision-making stage, before relationships begin to break down and without resort to litigation.

Lack of a human rights culture

As Australia has been very late in coming to the human rights party, being the only western democratic country bereft of legislative or constitutional human rights protection, a human rights culture has not developed in Australia.

The Commission is no doubt well informed on the scope and efficacy of both the Victorian and ACT human rights legislative models. This information is readily available and we do not propose to repeat it here. We do note, as an example, that the level of public support for the Victorian Charter,

documented through the statutory review, has been exceptionally high – the 2011 review of the Victorian Human Rights Charter recorded 95% support for retaining or strengthening the Charter.

We draw the Commission's attention to the following benefits of the human rights legislation in these two jurisdictions which are particularly resonant for marginalised and vulnerable people such as people with disability, which is the core focus of QAI's concern in making this submission, as well as areas where the legislation could operate more effectively.

The main benefits for vulnerable and marginalised groups such as people with disability that have been achieved through the enactment of legislative human rights protection are as follows:

- Parliament is now required to consider and safeguard the human rights of vulnerable and marginalised groups when enacting, amending or repealing state legislation.
- Decision-making by government is more transparent and accountable – this has particular resonance for areas and services that impact on the rights and lives of vulnerable groups, such as those indefinitely detained in forensic detention, people subjected to the application of Restrictive Practices and to involuntary treatment, people forced to live in accommodation arrangements they do not choose, in conditions that are not acceptable. This is because in these areas where there are no human rights safeguards, decision-making often happens behind closed doors, with vulnerable people lacking appropriate support and legal representation, with no accountability. Many of the systems and processes that impact on the lives of the most vulnerable people with disability are closed off from any scrutiny. While human rights legislation has not been a panacea, there has been improvement in this regard.
- There has been a cultural shift, whereby human rights principles such as freedom, equality, dignity and respect have become embedded to some degree in the culture and work of government departments and public authorities. This has led to early identification of potential human rights issues before they escalate, normalising respect for human rights, providing a platform for advocacy around existing human rights issues and instigating cultural change. This has had a flow on effect in terms of savings in costly tribunal and court matters.
- This cultural shift has moved outwards from only those entities bound by the Human Rights Act to introduce increase understanding, awareness and respect for human rights in general society and culture. This has been facilitated by human rights education and empowerment programs.
- The introduction of human rights legislation initiates a human rights dialogue, which in turn leads to many human rights issues being resolved without resort to litigation.
- While the Human Rights Act has rarely been litigated (there has been no 'flood of litigation'), the Victorian Charter is noted to have had a moderate yet positive impact in court in challenging arbitrary or unjust policy or decisions. This is despite that in the eight-year review of the Charter documents there has been no 'discernible increase in the number, length or complexity of cases' coming before the Victorian courts and tribunals as a result of the Victorian Charter.
- One of the areas where the Victorian Charter is noted to have had its greatest practical impact is at the interface between service delivery providers and decision-makers and the community, particularly as regards marginalised or disadvantaged individuals and groups. This is an area that is particularly in need of reform at a national level.
- There has been improved accountability between the different arms of Government.

The 2015 review of the Victorian Charter notes the following positive impacts of the Charter which have resonance for people with disability:

- Improved services benefitting both individuals with disability and groups of persons with disabilities (for example, it was successfully argued on behalf of a child with autism that they should have access to disability assistance);
- A basis for challenging administrative orders, such as treatment orders placing restraints on people being treated involuntarily for mental illness or orders evicting a person with disability from public housing.

4. How should the Government address the situation where there is a conflict between different people's rights?

Most human rights are not absolute and can be subject to reasonable and necessary limitations, with limitations assessed on a case-by-case basis.

QAI accepts that it may be necessary for the Government to retain the right to restrict some human rights in certain circumstances but emphasise that this must never be a decision taken lightly. In regards to the appropriate way to do this, we propose that the Victorian model could be adopted, whereby non-absolute human rights can be reasonably limited²⁵ or overridden²⁶ in certain circumstances.

Where rights are already protected, the inclusion of these rights within the Human Rights Act will not derogate from this other protection.

QAI considers that the following rights are so basic they should be absolute or non-derogable (not able to be denied, limited or restricted in any way):

- the right to life;
- the right to freedom from torture and slavery;
- freedom from forced work;
- right to liberty and security of person;
- humane treatment when deprived of liberty, and the right to a determined period if liberty is deprived;
- right to a fair hearing;
- rights of children in the criminal process.

The human rights act should recognise the equal, inalienable human rights of all human beings and explicitly acknowledge that the exercise of one person's human rights must respect the human rights and dignity of other humans.

For example, the *Human Rights Act 2019* (Qld) (**HRAQ**) acknowledges in its preamble that human rights can be limited, but only after careful consideration and only in a way that can be justified in a free and democratic society based on human dignity, equality, freedom and the rule of law. Section 13 provides as follows:

Human rights may be limited:

- (1) 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.*

²⁵ Under a reasonable limits clause the rights protected by the Charter would be subject to 'such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'.

²⁶ Under an override clause parliament can state that a statute is intended to operate notwithstanding the fact that it is inconsistent with the rights protected by the Charter.

(2) *In deciding whether a limit on a human right is reasonable and justifiable as mentioned in subsection (1), the following factors may be relevant—*

- (a) *the nature of the human right;*
- (b) *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;*
- (c) *the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose;*
- (d) *whether there are any less restrictive and reasonably available ways to achieve the purpose;*
- (e) *the importance of the purpose of the limitation;*
- (f) *the importance of preserving the human right, taking into account the nature and extent of the limitation on the human right;*
- (g) *the balance between the matters mentioned in paragraphs (e) and (f).*

Section 14 of the HRAQ protects human rights from limits beyond what is allowed for in the Act.

We propose inclusion of equivalent provisions in federal legislation.

5. What should happen if someone's human rights are not respected?

A key limitation of the Victorian Charter that was identified in the eight-year review of the Human Rights Charter was the lack of an independent cause of action created by the legislation. In the ACT, there is a freestanding cause of action. However, as in Victoria, damages are not recoverable. In Queensland, there is an accessible complaints mechanism to the rebranded Queensland Human Rights Commission, in addition to the “piggy-back” cause of action to the Supreme Court.

QAI proposes that federal human rights legislation must provide an independent or freestanding cause of action for all rights, enabling independent complaints to be lodged alleging a breach of the legislation without the requirement that the action be linked to another claim. The Australian Human Rights Commission should also be vested with power to receive and conciliate human rights complaints.

A federal Human Rights Act should include:

- An independent cause of action for breaches of the human rights protected in the Act;
- The ability to make a complaint to the AHRC and for the complaint to be heard and reconciled by the AHRC;
- Availability of the full range of judicial remedies for breach, including declarations, injunctions, orders to cease the offending conduct and damages;
- Protection for complainants against adverse costs orders, except in exceptional circumstances (we note that in the anti-discrimination jurisdiction, where there have at times been costs orders against individual complainants, this has been a deterrent to potential complainants);
- Provision for class actions to be brought, in recognition that human rights are often of special significance to a particular group, with standing given to appropriate representative organisations in the position to support or represent individuals and groups of people whose human rights have been breached and who have specialised skills or knowledge that is helpful for a particular group(s).

QAI considers that it is necessary for rights to be properly enforceable, with a full range of remedies for breach, to ensure they are respected and to deter further breaches.

The reactive, rather than proactive, approach taken to date to addressing human rights violations has been inadequate. A strong, positive legislative regime protecting core human rights is needed.

6. What can the community do to protect human rights? How should the government support this?

The approach that has traditionally been taken in the human rights instruments introduced in Australian jurisdictions (the Australian Capital Territory, Victoria and Queensland) and in other western democratic nations has been to only bind public entities (government bodies, or those acting on behalf of government). Many jurisdictions, including Queensland, permit organisations other than public entities to “opt in” to voluntarily be bound by the obligations created by the Act.

All members of the community can respect human rights in their personal and business actions and interactions. The Government should support this by promoting human rights, modelling best practices, raising expectations of and for community through a broad program of education.

7. How should individuals, businesses, community organisations and others be encouraged and supported to meet their responsibility to respect human rights?

Changes in law can powerfully impact upon mindsets in a particular area. In the context of the international humanitarian reforms brought about by the CRPD, Lord and Stein explain:²⁷

Human rights norms have power to work change through non-legal mechanisms.... [They] trigger belief changes by providing information to societies about the human rights ideas with the attendant effect of serving as educational tools for altering social mores.

Government must take the lead in modelling progressive change, such as by imposing and honouring quotas for the employment of persons with disability in government departments and requiring all government schools, social welfare, health and other services are properly accessible and inclusive.

The government should call on the Australian corporate sector and community organisations to pledge their commitment to protecting human rights and developing a human rights culture in Australia (akin to the call made by the Palaszczuk Government’s call to the corporate sector and community organisations to pledge their commitment to acting against domestic and family violence in Queensland).²⁸

8. What should the Australian Human Rights Commission and the government do to educate people about human rights?

QAI considers that the Australian Human Rights Commission already plays a key role in generating awareness of and respect for human rights in Australia. We congratulate the Commission for its important work in this regard.

²⁷ Janet E Lord & Michael Ashley Stein, ‘The Domestic Incorporation of Human Rights Law and the United Nations Convention on the Rights of Persons with Disabilities’ (2008) 83 *Washington Law Review* 449, 474-75.

²⁸ Statement by Minister for Child Safety, Youth and Women and Minister for the Prevention of Domestic and Family Violence, the Hon. Di Farmer, “Queensland corporates and community orgs called to take action against domestic violence”, 16 July 2019.

QAI considers that the AHRC will have a pivotal role in educating individuals, the community and government departments and agencies on their rights and responsibilities under the human rights legislation and international law.

Supporting attendance at international human rights forums and conferences is also pivotal, as it generates awareness and understanding within Australia of the relevance and scope of international human rights law and creates expectations for individuals and organisations to meet. Government should raise expectations of and for community through a broad range of education and promotional activities, promoting human rights and modelling best practice.

9. What actions are needed to ensure that the government meets its obligation to fulfil human rights – for example, in addressing longstanding inequalities in the community?

Enactment of a Human Rights Act that translates international obligations into domestic law, accompanied by appropriate reform to subordinate laws, policies and practices is urgently needed, to address gaping holes in the protection provided to vulnerable groups and ensure respect and dignity for all Australians. There is also the need for acknowledgement and redress for flagrant breaches of human rights of vulnerable people.

10. How should we measure progress in respecting, protecting and fulfilling human rights?

QAI submits that any federal human rights instrument should include provision for statutory review of the legislation within designated timeframes. Review must be authentically undertaken, with action in response to recommendations monitored.

Case studies and reports by NGOs are critical in understanding the impact of human rights legislation and must be documented and collated.

United Nations sessions are an important mechanism for independent scrutiny of Australia's human rights performance, with shadow reporting by NGOs particularly critical to this process. UN recommendations must be meaningfully implemented, with the Government accountable for its action in response to identified deficiencies and breaches.

11. How should we hold government to account for its actions in protecting human rights?

Enforceable legislation that enables people who have had their human rights engaged by action by a public entity (a government entity, employee, or an entity whose functions are, or include, functions of a public nature or acting on behalf of government) to seek action and a remedy for this is vital. As a potential respondent to human rights claims, the government will be held accountable for its actions in protecting human rights.

12. Are there other issues on which you wish to comment?

QAI submits that it is vital that adequate resources are committed to realise human rights law, policy and practice.

Appropriate resourcing is vital to ensuring full implementation of any law reform. QAI submits that a lack of resourcing for law reform can be indicative of a lack of commitment from government and, in a resource-rich country such as Australia, should not be accepted as appropriate justification.

The translation of protections for economic, social and cultural rights into meaningful reforms would require Government funding. This is the basis on which governments are generally reluctant to

commit to these rights. However, the economic, social and cultural benefits that would flow from the protection of both broad categories of rights would far outweigh the costs. Economic, social and cultural rights make civil and political rights real – they create the conditions needed to exercise and enjoy these rights.

Conclusion

QAI thanks the AHRC for the opportunity to contribute to this very important conversation by attendance at roundtables and through this submission. We welcome the opportunity to be involved in further consultations.

QAI submits that the AHRC should recommend enactment of a federal Human Rights Act. A Human Rights Act, with appropriate form and content, could improve the lives of all Australians and particularly benefit our most vulnerable. A Human Rights Act is a social leveller – it applies to all people and is the first, important step in lessening the divide between those with heightened vulnerabilities and those without. French and associates assert:²⁹

Although human rights in their original formulation have always applied to persons with disability on the same basis as they have applied to others, in reality these rights have largely failed to penetrate to the principal sites of human rights violation experienced by persons with disability. Even where human rights discourse and practice have penetrated to some degree, it is strongly arguable that implementation efforts have not been sufficiently precise, or sufficiently potent, to enliven the full beneficial content of key human rights.

It is well recognised that paradigmatic shifts are initially accompanied by disbelief and resistance,³⁰ then followed by acceptance and incorporation as a cultural norm.

²⁹ Phillip French, Jeffrey Chan and Rod Carracher, “Realizing Human Rights in Clinical Practice and Service Delivery to Persons with Cognitive Impairment who Engage in Behaviours of Concern” (2010) 17(2) *Psychiatry, Psychology and Law* 245, 245.

³⁰ Kristen Booth Glen, ‘Changing Paradigms: Mental Capacity, Legal Capacity, Guardianship and Beyond’ (2012-2013) 44 *Columbia Human Rights Law Review* 93, 99.