



## **Inquiry into Australia's Human Rights Framework**

**Submission by**

**Queensland Advocacy for Inclusion**

**to**

**Joint Committee on Human Rights**

**June 2023**

## About Queensland Advocacy for Inclusion

Queensland Advocacy for Inclusion (**QAI**) (formerly Queensland Advocacy Incorporated) is an independent, community-based advocacy organisation and community legal service that provides individual and systems advocacy for people with disability. Our purpose is to advocate for the protection and advancement of the fundamental needs, rights and lives of people with disability in Queensland. QAI's Management Committee is comprised of a majority of persons with disability, whose wisdom and lived experience is our foundation and guide.

QAI has been engaged in systems advocacy for over thirty years, advocating for change through campaigns directed at attitudinal, law and policy reform. QAI has also supported the development of a range of advocacy initiatives in this state. For over a decade, QAI has provided highly in-demand individual advocacy services. These services are currently provided through our four advocacy practices: the **Human Rights Advocacy Practice** (which provides legal advocacy in the areas of guardianship and administration, disability discrimination and human rights law and non-legal advocacy support with the Disability Royal Commission and the justice interface); the **Mental Health Advocacy Practice** (which supports people receiving involuntary treatment for mental illness); the **NDIS Advocacy Practice** (which provides support for people challenging decisions of the National Disability Insurance Agency and decision support to access the NDIS); and the **Disability Advocacy Practice** (which operates the Pathways information and referral phone line for all people with disability in Queensland, and provides non-legal advocacy support to young people with disability, including in relation to education). Our individual advocacy experience informs our understanding and prioritisation of systemic advocacy issues.

Since 1 January 2022, QAI has also been funded by the Queensland Government to establish and co-ordinate the Queensland Independent Disability Advocacy Network (QIDAN). QIDAN has three aims: member support, sector advocacy and systemic advocacy. Member organisations work collaboratively to raise the profile of disability advocacy while also working towards attitudinal, policy and legislative change for people with disability.

The objects of QAI's constitution are:

- To advocate for the protection and advancement of the needs, rights, and lives of people with disability in Queensland;
- To protect and advance human rights including the Convention on the Rights of Persons with Disabilities (CRPD);
- To be accountable to the most disadvantaged people with disability in Queensland; and
- To advance the health, social and public wellbeing of disadvantaged people with disability.

## Contents

About Queensland Advocacy for Inclusion	2
QAI's recommendations	4
Introduction	5
1. Whether the Australian Parliament should enact a federal Human Rights Act, and if so, what elements it should include	5
2. The effectiveness of existing human rights Acts/Charters in protecting human rights	8
Conclusion	10

## QAI's recommendations

1. The enactment of a federal Human Rights Act, to translate the international human rights Australia has agreed to respect and protect into binding domestic law.
2. The inclusion of the 'participation duty' and the 'equal access to justice duty' as proposed by the Australian Human Rights Commission in their position paper, *Free and Equal: A Human Rights Act for Australia 2022*.

## Introduction

QAI welcomes the opportunity to publicly call for a federal Human Rights Act. A federal Human Rights Act would be instrumental in strengthening Australia's Human Rights Framework so that "people's rights matter, all of the time."<sup>1</sup>

As an organisation dedicated to upholding the human rights of people with a disability, QAI continues to bear witness to the numerous ways in which people with disability have their rights infringed on a daily basis. In 2019-20, a staggering 44% of complaints received by the Australian Human Rights Commission concerned instances of disability discrimination.<sup>2</sup> Current avenues for redress provide piecemeal protection and are burdensome to navigate for the individuals affected.

While Australia has human rights obligations under various pieces of international law, in reality they are difficult to enforce and the continued absence of domestic human rights legislation undermines their impact.

The introduction of a federal Human Rights Act would provide important human rights protections for all Australians, including people with a disability who are at greater risk of having their human rights infringed. It would assist by building a human rights culture that improves accountability in law-making and public administration and would support the realisation of a truly inclusive society.

### **1. Whether the Australian Parliament should enact a federal Human Rights Act, and if so, what elements it should include**

QAI strongly supports the enactment of a federal Human Rights Act. QAI has been a long-time campaigner for greater human rights protections for people with disability through implementation of, and compliance with, Australia's international human rights obligations. The enactment of a federal Human Rights Act would constitute a significant step forward in the meaningful fulfilment of these obligations. The existing Australian Human Rights Framework relies on the implementation of international treaties into domestic law which may or may not occur, and upon State and Territories to pass legislation to protect basic human rights. Available remedies for breaches of human rights under international law are also very limited. For example, the Optional Protocol to the Convention on the Rights of Persons with Disabilities (CRPD) provides an individual complaint mechanism for breaches of the CRPD, however this mechanism is largely inaccessible in practice and fails to produce a legally enforceable outcome.

Australia is the only western democracy without a national charter or similar law.<sup>3</sup> Relying on State and Territories to enact human rights legislation means that access to justice and human rights protections is inconsistent and dependent upon a person's location. This inconsistency does not align with the principles of all human beings being born equal and possessing inalienable, universally accessible rights, regardless of where they live.

Jurisdiction-based human rights legislation also does not impose human rights obligations on federal government agencies, such as the National Disability Insurance Agency (NDIA). For example,

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<sup>1</sup> Australian Human Rights Commission, *Free and Equal A Human Rights Act for Australia 2022*, p13

<sup>2</sup> Australian Institute of Health and Welfare (2022) *People with disability in Australia 2022: In brief*, catalogue number DIS 81, AIHW, Australian Government.

<sup>3</sup> Human Rights Law Centre (2022) *Charters of Human Rights Make Our Lives Better – Here are 101 cases showing how*

in Queensland, service providers operating under the National Disability Insurance Scheme (NDIS) must comply with Queensland's Human Rights Act if they are providing services in Queensland.<sup>4</sup> However, the NDIA themselves, along with other federal public entities such as Centrelink or Medicare, are not obliged to comply with this legislation, despite also providing services in Queensland. This piecemeal coverage creates confusion for service recipients and leaves an unacceptable gap in human rights protections for individuals interacting with federal government departments.

Human rights legislation also has an invaluable role to play in safeguarding against violence, abuse, neglect, and exploitation. The inadequacy of current human rights in protecting marginalised communities such as the disability community has been demonstrated throughout the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability. Research shows that people with disability are almost twice as likely to experience violence than people without disability, with particularly high rates of reported intimate partner and sexual violence.<sup>5</sup> The Royal Commission observed that the segregation and exclusion of Australians with disabilities made violence an 'everyday experience' in homes, schools, family structures and services. People with disabilities reported experiencing violence from authority figures (e.g., medical professionals who used chemical restraint for managing unwanted behaviour) and being ignored when they disclosed abuse.<sup>6</sup> It has suggested that current laws in Australia are failing to protect people with disabilities from violence, and do not comply with our international obligations under the CRPD.<sup>7</sup>

According to the Human Rights Law Centre, "charters of human rights help to level the playing field by promoting respect for human rights and by giving people power to take action if their rights are breached."<sup>8</sup> A federal Human Rights Act should provide individuals whose rights have been breached with access to a standalone cause of action in the court system that can lead to a legally enforceable outcome, explicitly upholding a person's human rights and preventing public authorities from acting in a way that breaches those rights.

There is presently an overreliance on discrimination laws to protect human rights, with the discrimination framework largely offering a dispute-focused model that is remedial rather than proactive. Whilst the complaints process can have the effect of achieving individual outcomes, and even policy change, it lacks the proactive establishment of a human rights culture into government departments and decision-making that is desperately needed. A federal Human Rights Act that embeds human rights considerations into all administrative decision-making by Australian public authorities would help to develop such a culture. In the words of Professor Rosalind Croucher:

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<sup>4</sup> *Human Rights Act 2019* (Qld), section 9(5)

<sup>5</sup> *Nature and extent of violence, abuse, neglect and exploitation against people with disability in Australia* (March 2021) Centre of Research Excellence in Disability and Health (CRE-DH)

<sup>6</sup> Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability: Interim Report

<sup>7</sup> Transcript of Proceedings – Public Hearing 18 of The Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability

<sup>8</sup> Human Rights Law Centre (2022) *Charters of Human Rights Make Our Lives Better – Here are 101 cases showing how*, p2

“The beauty of a Human Rights Act, and other measures that *frontload* rights-mindedness, is that they are expressed in the positive – and they are embedded in decision making and ahead of any dispute.”<sup>9</sup>

Further, there remain gaps and inadequacies in Australia’s discrimination laws, together with problematic legal precedents, that continue to impact the human rights of people with a disability. For example, a letter to the Attorney-General in June 2021 by People with Disability Australia highlighted the challenges that have arisen from the *Sklavos*<sup>10</sup> decision. They wrote:

“The effect of the *Sklavos* decision is that for the right to a reasonable adjustment to be enforceable, not only must a person with disability show they are disadvantaged by a failure to provide a reasonable adjustment, but that the failure to provide the adjustment was caused by the person’s disability... The outcome of the *Sklavos* decision creates a new and impracticable legal hurdle for people with disability seeking a reasonable adjustment....In its submission to the Committee on the Rights of Persons with Disabilities (July 2019) the AHRC observed that the additional requirements resulting from the *Sklavos* decision are too onerous, and also contrary to provisions in the CRPD providing that any limitation on the provision of a reasonable adjustment impedes the rights of persons with disabilities.”<sup>11</sup>

People with disability are entitled to the respect and dignity of domestic legislation that does not require a complex process to draw on the positive rights espoused in international conventions. Discrimination law must be supplemented by other mechanisms to promote equality and respect for human rights. A federal Human Rights Act could perform this role and potentially alleviate some of these issues.

The framing of discrimination laws around the notion that individual differences are to be treated as irrelevant is also inherently problematic. This approach can have the unintended consequence of failing to acknowledge and generate respect for individual difference, which a more substantive conception of equality, fostered by a federal Human Rights Act, could create.<sup>12</sup> A human rights perspective emphasises that all human beings are born free and equal and possess inalienable rights, with remedies available to everyone rather than certain groups of individuals due to the presence of certain characteristics.

Finally, QAI is particularly supportive of the ‘participation duty’ proposed by the Australian Human Rights Commission in their position paper, *Free and Equal: A Human Rights Act for Australia 2022*.<sup>13</sup> QAI fully supports a measure that would require public authorities to ensure the participation of persons with disabilities and other specified groups in relation to policies and decisions that directly or disproportionately affect their rights, in keeping with Australia’s obligations under international law. Similarly, QAI fully supports the proposed ‘equal access to justice duty’ that would require

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<sup>9</sup> Australian Human Rights Commission, *Free and Equal A Human Rights Act for Australia 2022*, p8

<sup>10</sup> *Sklavos v Australasian College of Dermatologists* [2017] FCAFC 128

<sup>11</sup> <https://pwd.org.au/media-release-disability-community-calls-for-reform-after-discrimination-claims-become-impossible-to-prove/>

<sup>12</sup> Rosemary Owens, Joellen Riley and Jill Murray, *The Law of Work*. 2nd edition (Oxford University Press, 2011), 397

<sup>13</sup> Australian Human Rights Commission, *Free and Equal A Human Rights Act for Australia 2022*, p22

public authorities to provide sufficient access to legal assistance, interpreters and disability support to individuals navigating the justice system.

Accordingly, QAI supports a national charter of human rights that gives full effect to Australia's international human rights obligations. While legislation alone is insufficient to ensure full human rights protections, it is a vital step that must be taken and one that must be accompanied by sufficient resourcing to ensure its proper implementation.

## **2. The effectiveness of existing human rights Acts/Charters in protecting human rights**

A recent report by the Human Rights Law Centre found that human rights laws in Victoria, Queensland and the ACT have all made concrete improvements to people's lives. The report describes 101 cases where the laws helped to uphold or prevent unreasonable restrictions on human rights, including examples that specifically concerned the treatment of people with a disability. For example, the *Human Rights Act 2019* in Queensland was used to assist two parents with disabilities avoid losing custody of their child, and instead access support to build practical and parenting skills to ensure their child was not removed from their care.<sup>14</sup> It also showed how human rights laws had helped to create accessible and inclusive communities. For example, when escalators at a train station were replaced by steep, inaccessible stairs, an older resident of the community made a human rights complaint which was resolved through a conciliation process that led to an agreement that escalators would be installed as part of the station upgrade.<sup>15</sup>

QAI was a key member of the alliance which initiated and led the campaign for a Human Rights Act in Queensland. Since its introduction, QAI has found Queensland's Human Rights Act to be a powerful advocacy tool that has helped protect and uphold the human rights of many of our clients. Its inclusion of the right to education and the right to health, both economic, social, and cultural rights, makes Queensland's legislation particularly noteworthy and powerful. Prior to Queensland's Human Rights Act, advocates did not have a simple and clear way to hold public entities accountable for breaches of human rights, but the *Human Rights Act 2019* (Qld) has changed this.

QAI's Young Peoples Program (YPP) has found the Human Rights Act to be especially effective. YPP provides individual advocacy to children and young people with disability and most of their work involves supporting young people with disability to uphold their right to education. Since the enactment of the *Human Rights Act 2019* (Qld), our advocates have noticed an increasing dialogue of human rights considerations in Queensland's state education system and that human rights discussions have become increasingly normalised. For example, every school suspension and exclusion decision must include a statement indicating that the Principal has considered the student's human rights when making the decision, and in particular, their right to education. Even in instances where it is questionable that a student's human rights have been considered, our advocates have been able to use this as a basis for continued dialogue with the school, including in

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<sup>14</sup> Human Rights Law Centre (2022) Charters of Human Rights Make Our Lives Better – Here are 101 cases showing how, p18

<sup>15</sup> Ibid, p19



discussions regarding access to reasonable adjustments. The clear and accessible format of the legislation makes it easy to reference in conversation both with clients and public entities. This is illustrated with the following case study:

#### **Case study 1**

*A young person with disability, Ryan\* was facing a proposed decision to refuse his enrolment at a state high school. Ryan had previously been excluded from another high school. The principal proposed to refuse his enrolment and welcomed Ryan to show cause to the contrary. QAI's advocate assisted Ryan and his mother to draft a letter to the Director-General explaining why Ryan should be permitted to enrol at the school. In the submission, the advocate emphasised Ryan's right to education, and laid out reasons why the refusal of enrolment would significantly limit this right. The advocate considered Ryan's right to education in conjunction with the legal requirement that Ryan be enrolled in school, and explained why the alternatives suggested would be more restrictive to him. Ryan and his advocate ultimately argued that, due to the causal link between Ryan's disability and his challenging behaviours, preventing him from enrolling would be in contravention of the Human Rights Act 2019 (Qld).*

\*Names have been changed to protect confidentiality

QAI's human rights advocates have also utilised the *Human Rights Act 2019 (Qld)* in matters relating to guardianship and administration appointments, as well as complaints regarding accessible parking, as exemplified in the following two case studies:

#### **Case study 2**

*Glen\* was subject to an administration order appointing the Public Trustee of Queensland as his financial administrator. At a QCAT hearing, Glen's advocate submitted that there was insufficient evidence before the Tribunal supporting the notion that Glen lacked capacity to manage his own finances, or that there would be a risk to Glen if an administrator was not appointed. Further, the advocate highlighted Glen's human rights under the Human Rights Act 2019 (Qld) and submitted that QCAT must consider Glen's right to be treated equally before the law and that Glen is entitled to be free from discrimination. The advocate also submitted that human rights considerations are set out in the General Principles of the Guardianship and Administration Act 2000 (Qld), and that the Tribunal in making their decision should have respect for inherent dignity and worth, individual autonomy, the freedom to make one's own choices, and the independence of persons. QCAT ultimately decided to revoke Glen's administration order, with the Member noting in their reasons for the decision that they took Glen's human rights into consideration in deciding whether to revoke the appointment of a substitute decision maker, as raised by Glen's advocate.*

\*Names have been changed to protect confidentiality

#### **Case study 3**

*Amber\*, a woman who uses a wheelchair for all mobility, frequents a Brisbane-based hospital for regular health services. Despite being an NDIS participant, Amber's funding does not cover taxi travel, so Amber drives herself to appointments in a modified vehicle. For several years, Amber had access to designated disabled parking bays, arranged by her specialist. Out of the blue, security guards began denying Amber access to the car park, even when spaces were available.*

*No reasonable explanation was provided, just the direction that Amber park across the road, in a spot that would be inaccessible to her. This inability to park in an accessible car park restricted Amber's ability to access essential health services. Amber sought QAI's assistance when her attempts to resolve the matter directly through the hospital's complaints process were unsuccessful. QAI wrote to the Complaints Coordinator of the hospital, reminding the hospital of their obligations under the Human Rights Act 2019 (Qld), and expressing concern that the hospital had not given proper consideration to Amber's human rights in making the decision to deny her ongoing access to appropriate parking. The letter requested reinstatement of Amber's access, along with the introduction of protocols to ensure these rights were respected by all relevant staff. QAI's letter prompted an immediate response, along with an apologetic telephone call from the Hospital Director assuring Amber that staff were being made aware of their positive human rights obligations.*

\*Names have been changed to protect confidentiality

In March 2023, the *Human Rights Act 2019* (Qld) was expressly overridden by the Queensland government with the enactment of the *Strengthening Community Safety Bill 2023* (Qld). This Bill sought to introduce numerous changes to Queensland's youth justice laws, such as making it a criminal offence for a young person to breach bail conditions. While advocacy attempts to halt the passing of this Bill were ultimately unsuccessful, its introduction into Parliament and eventual enactment caused a significant amount of controversy. It attracted widespread media coverage and rigorous debate and had the effect of centering human rights considerations in the law reform process. It arguably provided extra oversight of the Bill than would otherwise have been given, had the government not had to take the unprecedented step of expressly overriding human rights legislation in order to pass the Bill.

Further, despite there being a risk that public entities will consider human rights in a tokenistic manner, a federal Human Rights Act would begin the long-term process of cultivating the cultural shift that is required. The commencement of the *Human Rights Act 2019* (Qld) has given people with disabilities in Queensland the choice to hold government entities to account and an accessible, albeit imperfect, mechanism with which to do so. Queensland's Human Rights Act has provided our clients the opportunity to choose to enforce their human rights in an operationally effective and respectful way, and QAI believes this right should extend to all Australians, not just those living in Queensland.

## **Conclusion**

QAI thanks the Joint Committee on Human Rights for the opportunity to contribute to this inquiry. We are happy to provide further information or clarification of any of the matters raised in this submission upon request.