

14 March 2016

The Research Director
Legal Affairs and Community Safety Committee
Parliament House
BRISBANE QLD 4000


Dear Sir/Madam,

Queensland Legislative Assembly – Human Rights Inquiry

Thank you for the opportunity to contribute to the Queensland Legislative Assembly's Human Rights Inquiry. Endeavour Foundation commends the Legislative Assembly for its work in examining this important issue that has a direct impact on all members of our community.

Endeavour Foundation provides feedback in the attached submission. This submission does not attempt to respond to all areas of the Inquiry. The goal of this paper is to provide the Legal Affairs and Committee Safety Committee with an insight as to how a *Human Rights Act* can impact on those in our community, especially those who have a disability.

We are happy for our submission to be published and would be pleased to continue our involvement by providing verbal evidence to the Committee if required.

Further enquiries about this submission are welcomed 

Yours faithfully,



Andrew Donne
Acting Chief Executive Officer
Endeavour Foundation

Endeavour Foundation**Submission to the Queensland Legislative Assembly – Human Rights Inquiry**

Submission Title: Submission to Legal Affairs and Committee Safety Committee
– Human Rights Inquiry

Date: 14 March 2016

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Endeavour Foundation

Endeavour Foundation is an independent not-for-profit organisation supporting more than 3,300 people with a disability from more than 230 locations in Queensland, New South Wales, Victoria and South Australia.

We are one of Queensland's oldest charities.

Endeavour Foundation is a diverse community organisation providing person-centred support for people with a disability through education, training and life skill development, employment, accommodation support, respite and recreation.

Overview of Submission

The protection of human rights, under Queensland legislation, is inconsistent and somewhat limited. Whilst state-based and common law provide for a number of important protections against certain forms of discrimination, there is no comprehensive statute that protects the human rights of all Queenslanders. As has been identified in a number of jurisdictions in Australia, individuals seeking to protect their rights must rely on limited constitutional and common law protections and presumptions, single issue statutes and statutory interpretation.¹

The enactment of a *Human Rights Act* provides an opportunity for greater structure to the existing mix of human rights in the policy and legislative process.

What are Human Rights?

Human rights derive from the inherent dignity of the person and enshrine fundamental principles such as freedom, respect, equality and dignity.² Historically, they protect people and not corporations.

Rights under the Australian Constitution

As mentioned, Australian jurisdictions have a number of individual pieces of legislation that govern human rights, although there is no comprehensive protection of human rights at a national level. The *Commonwealth of Australia Act 1900* (Imp) ("the Constitution"), provides for a number of expressed human rights. These include:

- The right to trial by jury for indictable federal offences (s.80);
- A prohibition on the Commonwealth Government making laws to establish or to prevent the free access of religion (s.116); and
- The right to be free from discrimination because of interstate residence (s.117).

Further, the *Constitution* protects two economic rights, by providing for:

- Freedom of interstate trade (s.92); and
- Compensation on just terms in reference to the compulsory acquisition of property by the Commonwealth Government (s.51(xxi)).

¹ NSW Bar Association (2007). *Options Paper for a Charter of Human Rights for NSW*. Human Rights Committee, NSW Bar Association.

² Lynch, P. and Knowles, P. (2009). *The National Human Rights Consultation. Engaging in the Debate*. Human Rights Law Resource Centre. Melbourne, 1-137.

In addition to the expressed rights, found in the *Constitution*, the High Court of Australia has interpreted a number of implied constitutional rights. These include:

- The separation of judicial power from executive and legislative power; and
- The freedom of political communication.

The greatest benefit of constitutional rights (either expressed or implied) is that they are fixed by statute. The courts have the power to enforce the *Constitution* and can invalidate legislation that is unconstitutional. As the Human Rights Law Resource Centre has highlighted, the major impediment on the enforcement of constitutional rights by the judiciary is that someone needs to challenge the constitutionality of a particular piece of legislation in order to commence the judicial review process.³

Statutory Protection

There are a number of Commonwealth and State-based legislation that provide human rights protection. Often, human rights legislation has been passed as part of Australia's obligations under various international treaties. The following are a number of examples of legislation protecting the human rights of those in our community:

- *Racial Discrimination Act 1975* (Cth), which partially implements the International Convention on the Elimination of all forms of Racial Discrimination (1966);
- *Sex Discrimination Act 1984* (Cth), which partially implements the Convention on the Elimination of all forms of Discrimination against Women (1979);
- *Disability Discrimination Act 1992* (Cth), which partially implements the International Covenant on Civil and Political Rights (ICCPR (1966)) and the Convention Concerning Discrimination in Respect to Employment and Occupation (1958);
- *Human Rights and Equal Opportunity Commission Act 1986* (Cth), and
- *Anti-Discrimination Act 1991* (Qld).

Statutory based rights tend to be more comprehensive than those provided for by the *Constitution*. However, a fragmented approach to human rights can pose problems that include:

- Changes to government policy and subsequent amendments to legislation;
- Lack of consistency across various human rights legislation;
- Statutory exemptions that allow particular organisations or individuals to act without accordance to human rights obligations; and
- The scope of rights protected by statute is somewhat narrower than under international human rights laws.⁴

Protection under Common Law

A number of basic human rights and freedoms are protected by common law. These can include, but are not limited to:

- The right to access court;
- Immunity from deprivation of property without compensation;

³ Lynch, P. and Knowles, P. (2009). *The National Human Rights Consultation. Engaging in the Debate*. Human Rights Law Resource Centre. Melbourne, 1-137 at 23.

⁴ *Ibid.*

- Legal professional privilege;
- Prohibitions in trespass (that indirectly and partially protect the right to privacy);
- Privilege against self-incrimination;
- Immunity from interference with equality of religion; and
- The right to access legal counsel when accused of an indictable offence.

A number of writers have suggested that the following rights could be added to the above list:

- No deprivation of liberty (except by law);
- The right to procedural fairness when affected by the exercise of public power; and
- Freedom of speech and of movement.⁵

The common law encourages a rights-based approach to legislative interpretation, presuming that Parliament does not intend to override basic rights unless such an intention is clearly expressed.

An argument that has been made is that common law rights, protected by the application of the 'principle of legality', are an attempt by the courts to provide, in effect, a common law bill of rights.⁶ The principle asserts that when interpreting legislation, the court will not impute to Parliament an intention to repel fundamental rights unless the law expressly provides for such an exemption. The overall purpose of the principle is to ensure that law-makers are held accountable and responsible for the decisions they make regarding the abrogation of human rights. The courts have applied the principle to protect a number of rights. What constitutes a right capable of protection has been developed as part of the common law of statutory interpretation.⁷

The principle of legality does not prevent legislation inconsistent with rights being passed.⁸ Further, a finding by a court that a law is inconsistent with rights does not affect the validity or operation of the legislation. In relation to the *Human Rights Act (ACT)* and the *Victorian Charter of Human Rights and Responsibilities (Vic)*, there is an obligation to interpret the legislative provisions consistently with the rights each law protects. Whilst it is true to say that both provide for a more comprehensive procedure than the principle of legality, each have the same interpretive presumption as their basis.⁹

There are further problems in the reliance of the common law to protect human rights. For example, it may be inappropriate for unelected judges to introduce and develop laws which are really the role of elected representatives. This would only occur when a matter is actually brought before the court and even then only apply to the parties involved in the proceedings. Further, common law principles can be overridden by law-makers. This may even be achieved inadvertently.¹⁰ As a final point it should be noted that the development of the common law is limited by the doctrine of precedent (i.e., the court's decision must be consistent with previous case law on the matter).

⁵ Corrin, J. (2009). Australia: Country Report on Human Rights. *Victoria University of Wellington Law Review*, 40(1), 41-42.

⁶ Henry-Comley, A. (2013). The Principle of Legality: An Australian Common Law Bill of Rights? *University of Notre Dame Australian Law Review*, 15, 83-110.

⁷ Spigelman, J. (2005). Principle of Legality and the Clear Statement Principle. *Australian Law Review* 79, 769-775.

⁸ Henry-Comley, A. (2013). The Principle of Legality: An Australian Common Law Bill of Rights? *University of Notre Dame Australian Law Review*, 15, 83-110 at 107.

⁹ Ibid 83-110.

¹⁰ Lynch, P. and Knowles, P. (2009). *The National Human Rights Consultation. Engaging in the Debate*. Human Rights Law Resource Centre. Melbourne, 1-137.

Limitations

There are few rights that are absolute. Examples of rights that are absolute include the right to be free from torture and inhuman treatment and the right against slavery. Sometimes, however, rights need to be balanced against each other. On occasions it may be necessary to restrict some rights in order to protect other rights. This need to find an appropriate balance between human rights is noted in the *Universal Declaration of Human Rights*:

*"In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society".*¹¹

The balancing of human rights can be achieved by either placing limits on specific rights on a clause-by-clause basis or by including a general limits clause that applies to all rights. A number of international covenants contain both.¹² The ACT *Human Rights Act* and the Victorian *Charter* both contain general, reasonable limiting clauses. The ACT *Human Rights Act* states:

*"Human rights may be subject only to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society".*¹³

The above type of clause would require the Queensland Parliament to demonstrate that any legislative limits imposed on rights are demonstrably reasonable and justified.

Arguments for a Human Rights Act

*"The exigencies of modern politics have sometimes led Governments to ignore human rights in order to achieve objectives which are said to be for the common good".*¹⁴

A *Human Rights Act* for Queensland may allow for:

- Parliament to consider the impact of laws on human rights;
- The requirement that the executive arm of government respects human rights when implementing laws and making decisions;
- The protection of rights of the general population and dispel the belief that only minority groups have legally protected rights; and
- Access to courts and tribunals in order to declare that a particular piece of legislation is inconsistent with the protection of human rights.

Of particular interest to the people Endeavour Foundation supports is the economic and social disadvantage that is often associated with those with a disability. In a democratic society the focus is often on the interests of the majority. The rights of minorities are often overlooked and can be infringed. Vulnerable members in our community are more likely to engage with public services and are at greater risk of suffering breaches of their human rights than people in majority groups, or for people who have the resources to protect their interests.

¹¹ Article 29.2. of the *Universal Declaration of Human Rights*, GA Res 217 A3 (1948).

¹² Note: Article 4.1 of the *International Covenant on Civil and Political Rights* (1966); Article 4 of the *International Covenant on Economic, Social and Cultural Rights* (1966).

¹³ *Human Rights Act 2004* (ACT) s 28.

¹⁴ Brennan, G. (2008). *The Constitution, Good Government and Human Rights*. Human Rights Law Resource Centre, viewed 18 January 2016, <https://www.justinian.com.au/files/brennanhumanrights.pdf>.

The British Institute of Human Rights, when examining the *Human Rights Act 1998* (UK), identified that a culture of respect for human rights, supported by a formal human rights instrument, assists vulnerable members of the community “to challenge poor treatment and, through this, to improve their own and others’ quality of life”.¹⁵ Case studies from the United Kingdom suggest that:

- i. The language and ideas of human rights empower a wide range of people and organisations within the community to improve an individual’s experience of public services;
- ii. Human rights are a practical tool for people facing discrimination, disadvantage or exclusion;
- iii. Human rights principles can assist decision-makers and enhance their decisions that impact directly on consumers; and
- iv. Awareness raising about human rights empowers people to take action.¹⁶

Perhaps a lesser argument for the adoption of a *Human Rights Act* is that along with the ACT and Victoria, a Queensland Act would encourage other jurisdictions, including the Commonwealth, to enact similar legislation.

State Government Services

Human rights legislation could enhance the delivery of public services. Studies undertaken in a number of jurisdictions, that have human rights statutes in place, have concluded that human rights legislation can:

- i. Enhance transparency in government decision-making;
- ii. Promote a more flexible, responsive and individualised public and social services; and
- iii. Assist in the development of more effective/targeted social inclusion strategies.¹⁷

Further discussion is warranted about what government services/authorities would be governed by a human rights instrument.

Developing a Human Rights Culture

Following a review into the *Human Rights Act 1998* (UK), the Department for Constitutional Affairs found that the legislation had led to the development of more flexible government policies which identified the circumstances of individuals.¹⁸ Further, enacting human rights legislation could provide for an important education function, highlighting standards, rights and responsibilities that are necessary for an inclusive community.

Advocacy and Human Rights

In its submission to the review of the *Charter of Human Rights and Responsibilities Act 2006*, the Office of the Public Advocate in Victoria explained that the Charter had been effective in advocating for people with disability who had been treated without due consideration for their human rights.¹⁹ In effect the Victorian Charter provided general rules,

¹⁵ British Institute of Human Rights. (2007). *The Human Rights Act: Changing Lives*, viewed 18 January 2016, <https://www.bihhr.co.uk/sites/default/files/The%20Human%20Rights%20Act%20-%20Changing%20Lives.pdf>.

¹⁶ Ibid.

¹⁷ Office of the United Nations High Commissioner for Human Rights. (2002). *Guidelines of a Human Rights Approach to Poverty Reduction Strategies*.

¹⁸ The Department for Constitutional Affairs (United Kingdom) (July 2006). *Review of the Implementation of the Human Rights Act* (2006).

¹⁹ Office of the Public Advocate (Victoria). (2015). *Submission to the Review of the Charter of Human Rights and Responsibilities Act 2006*. Victoria, 1-21 at 11.

for service delivery, that included fundamental dignity and human rights for all people who require state funded services.

An Argument against a Human Rights Act

One argument against the adoption of a statutory based human rights model is that it would shift the power on important matters, concerning social policy, from elected parliamentarians to unelected judges.²⁰ Further, the protection offered by an over-arching *Human Rights Act* may be too vague. The preference to such an approach would be for specific pieces of legislation addressing particular human rights issues (e.g. *Anti-Discrimination Act 1991* (Qld)).

Whose rights should be protected by a Human Rights Act?

In many jurisdictions, including the ACT and Victoria, human rights obligations do not impose obligations on individuals acting in a private capacity. The general approach has been to require government and public authorities to comply with human rights legislation. This approach can be extended to cover government contractors who are engaged to perform public functions within their employment.

As mentioned, reference needs to be made concerning the definition of “*public authority*”. With the increase in public-private partnerships (PPPs) and community sector involvement, it will be necessary to have a clear definition of what a public authority is and what organisational structures it applies to. As the Human Rights Law Centre in Victoria commented, the state’s obligation in regards to human rights should not be contingent on the vehicle that the state chooses to deliver public services.²¹

When trying to define what a public authority is law makers should adopt a comprehensive definition that incorporates the varied public functions that are delivered in Queensland. The definition should include those who exercise ‘hybrid’ or devolved public powers (such as corporatised public bodies, private contractors engaged in public functions or those identified as performing functions that are in the public interest).²²

The *Human Rights Act 1988* (UK), s6 (3) defines ‘public authority’ as:

- a) A court or tribunal; and
- b) Any person certain of whose functions are functions of a public nature.

The legislative intent of the above definition was to extend compliance with human rights standards beyond State organisations to private and community-based agencies that perform functions and deliver services on behalf of the State.²³

The Victorian *Charter* provides greater scope in its definition of ‘public authority’. The *Charter* does list, at s 4(1), a number of entities that fall within the definition:

- (1) For the purposes of this charter a public authority is:

²⁰ French, R. (2012). *Human Rights Protection in Australia and the United Kingdom. Contrasts and Comparisons (Part Two)*. Anglo-Australasian Lawyers Society and Constitutional and Administrative Law Bar Association. London.

²¹ Human Rights Law Centre. (2015). *More Accessible, More Effective and Simpler to Enforce: Strengthening Victoria’s Human Rights Charter. HRLC Submission to the 2015 Review of the Victorian Charter of Human Rights*. Melbourne, 1-37.

²² Tasmanian Law Reform Institute (2007). *A Charter of Rights for Tasmania*, Report No 10, Hobart at 71.

²³ Joint Committee on Human Rights. (2004). *The Meaning of Public Authority under the Human Rights Act* Seventh Report, House of Commons Paper No 382.

- a) a public official within the meaning of the *Public Administration Act 2004*; or
- b) an entity established by a statutory provision that has functions of a public nature; or
- c) an entity whose functions are or include functions of a public nature, when it is exercising those functions on behalf of the State or a public authority (whether under contract or otherwise); or
- d) Victoria Police;
- e) a Council within the meaning of the *Local Government Act 1989* and Councillors and members of Council staff within the meaning of that Act; or
- f) a Minister; or
- g) members of a Parliamentary Committee when the Committee is acting in an administrative capacity; or
- h) an entity declared by the Parliament to be a public authority for the purposes of this Charter –

But does not include –

- i) Parliament or a person exercising functions in connection with proceedings in Parliament; or
- j) a court of tribunal except when it is acting in an administrative capacity; or
- k) an entity declared by regulations not to be a public authority for the purposes of this Charter.

The above could be improved upon by identifying, by way of a non-exhaustive list, the functions considered to be 'of a public nature'. This could include the delivery of essential services (such as gas, water and electricity), medical and disability services (public and private), correctional services, education (including private and public education), housing services and public transport operations. Further, a definition of 'public authority' could extend to State owned companies and government business initiatives.

Recommendation 1

A definition of 'public authority' should include tribunals, courts, government departments, public officials, statutory authorities, government business initiatives/bodies, State owed companies, Qld Police Service, local government, Ministers, Parliamentary Committee members when acting in an administrative function, a declared public authority and an entity whose functions include those of a public nature (whether under contract or otherwise).

Human rights legislation in a number of jurisdictions protects the rights of corporations and individual citizens.²⁴ However, the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights* only applies to human beings. In Australia, the *Human Rights Act 2004 (ACT)* and *Charter of Human Rights and Responsibilities 2006 (Vic)* also only applies to individuals. The argument is that to extend the protections in human rights legislation to corporations would ignore the fact that human rights are concerned with the dignity and value of the lives of individuals.

"...the Charter should protect the rights of individuals not corporations. This reflects the rationale for human rights protections expressed in various international covenants – that human rights are

²⁴ *Bill of Rights Act 1990 (NZ)*; *Canadian Charter of Rights and Freedoms 1982 (Canada)*.

concerned with the dignity and value of human lives. Corporations could well use human rights protections in ways that undermine individual and community rights”.²⁵

Limiting protections to human beings has some foundation. Allowing corporations to claim protection through human rights legislation can have an adverse impact upon legitimate strategies to regulate corporate activities, for example, the benefit of the community. In Canada, where human rights legislation protects individuals and corporations, a tobacco company successfully challenged Canadian legislation that restricted the sale and advertising of tobacco products without health warnings.²⁶

A Queensland human rights framework must consider who should be covered under the law. For example, should the legislation cover all people in the State regardless of their citizenship status? Having a comprehensive definition on citizenship will work in different ways for different people depending on their residence status and the nature of the right in question. The right to vote in State elections, for example, would not extend to temporary visitors and non-residents of the State.

Recommendation 2

A *Human Rights Act* should apply only to human beings.

Corporations, as defined by the *Corporations Act 2001* (Cth), should be excluded from any human rights protection measures in the Act.

A *Human Rights Act* should protect economic, social and cultural rights as well as civil and political rights.

Recommendation 3

Human rights protection in a *Human Rights Act* should apply to all people in Queensland regardless of their status as citizens and residents. It should also apply to people who are not in Queensland but who may be affected by State laws or decisions of Queensland public authorities.

A *Human Rights Act* should exclude the Queensland Parliament from its operation to the extent that it is necessary to preserve Parliament’s ability to enact legislation that is not human rights compliant. The Act should apply, however, when Parliament is examining Bills and when deciding whether to enact legislation that may override or erode human rights. When performing non-legislative functions, the Queensland Parliament should be bound by the Act.

Recommendation 4

A *Human Rights Act* for Queensland should not erode the sovereignty of Parliament to enact laws that balance, limit or abrogate human rights.

Any Human Rights legislation should bind the Queensland Parliament when examining Bills and when deciding to enact legislation that may override or encroach upon human rights.

²⁵ Amnesty International Tasmania (2007). Tasmania Law Reform Institute – *A Charter of Rights for Tasmania* (Submission 12).

²⁶ *McDonald Inc v Canada* [1995] 3 SCR 199.

Recommendation 5

Members of the Queensland Parliament, who propose new legislation, should be required to provide statements of compatibility regarding the Bills compliance with human rights standards.

Statements of compatibility should accompany all subordinate legislation tabled in the Queensland Parliament.

National Disability Insurance Scheme

As noted by the Public Advocate in Victoria, the introduction of the National Disability Insurance Scheme (NDIS) will see a transfer of disability service funding and oversight responsibility.²⁷ This change raises questions around the quality and safeguarding framework for disability support funded through the NDIS.

The Queensland Government will need to consider if the provisions in a proposed *Human Rights Act* will apply to people delivering services on behalf of the federal government. The *National Disability Insurance Scheme Act* provides that:

- 1) It is the intention of the Parliament that this Act is not to apply to the exclusion of a law of a State or Territory to the extent that the law is capable of operating concurrently with this Act.
- 2) The regulations may prescribe kinds of laws of States and Territories as examples of laws to which subsection (1) applies.²⁸

As mentioned above, a *Human Rights Act* in Queensland must impose human rights obligations on public authorities. As the Department of Communities, Child Safety and Disability Services moves away from its traditional role as a provider of disability services and direct funder of service providers, there is some uncertainty as to whether the National Disability Insurance Agency (NDIA) would meet existing definitions of a public authority under human rights legislation. For example, in Victoria it is unclear whether some service providers funded under the NDIS would be considered “functional public authorities” under their *Charter*.²⁹ As the Victorian Equal Opportunity & Human Rights Commission has indicated, State funding will flow to the NDIA under the NDIS, service providers may no longer be considered functional public authorities exercising functions on behalf of the State with the changed funding model to the Commonwealth.³⁰

The market approach of the NDIS will change the relationship between service providers and people with a disability, providing greater autonomy to people with a disability whilst aligning the allocation of services to the individual. Human rights protections are a crucial safeguard in managing the risks that may be associated with such a change in service delivery.

Recommendation 6

When drafting a *Human Rights Act* the Queensland Government negotiates with the Australian Government so that regulations made under the *National Disability Insurance Scheme Act 2013* (Cth) provide that the public authority obligations of the proposed Act come into force whenever a formal disability service is funded and provided in Queensland.

²⁷ Office of the Public Advocate (Victoria). (2015). *Submission to the Review of the Charter of Human Rights and Responsibilities Act 2006*. Victoria, 1-21 at 11.

²⁸ *National Disability Insurance Scheme Act 2013* (Cth) s 207.

²⁹ Victorian Equal Opportunity & Human Rights Commission (2015). *National Disability Insurance Scheme Quality and Safeguarding Framework*. Submission to the NDIS Consultation, Department of Social Services.

³⁰ *Ibid* at 3.2.

Human Rights Concerns and Disability

Accommodation

In Australia, approximately half of all disability funding is towards housing and accommodation support. The majority of this funding is directed to group homes.³¹ Unlike other closed environments (such as prison and detention centres) most people with an intellectual disability who reside in group homes are placed there by family or via an administrative order (i.e. accommodation decision by an appointed guardian for accommodation matters) rather than by a judicial decision.

The above arrangements have been viewed as impacting on an individual's human rights as the person is "*compelled or obliged to live in circumstances amounting to detention by the way in which essential support services are organised and delivered*".³²

Although the NDIS will provide a mechanism for greater choice in where an individual may wish to reside, there will still be those in our community where group housing will be a decision made for them. Human rights issues can be highlighted in such closed environments both by way of an individual's placement in such accommodation and by the daily practices (service delivery) that are imposed on the person who resides in such facilities.

The human rights of people with a disability are often contested, not acknowledged, in current legislation. A recent study identified three themes about the understanding and application of human rights in supportive accommodation settings:

- 1) Restriction of rights was inherent in these services as a result of the physical, staffing and administrative environment. Further restrictions were applied as a result of an individual's age and complexity of behaviour;
- 2) Human rights were understood and applied using a 'where possible' approach; and
- 3) A protective approach based on a particular understanding of 'duty of care' was used to explain why limitations were sometimes placed on rights.³³

Finding the balance between rights and other obligations, such as the care and safety and residents and staff, can be a difficult matter. Rights can be limited lawfully if that limitation is justifiable and proportionate to the particular circumstance.³⁴

³¹ Australian Institute of Health and Welfare. (2013). *Disability Support Services: Services Provided under the National Disability Agreement 2011-12*.

³² French, P. (2009). *Accommodating Human Rights: A Human Rights Perspective on Housing, and Housing and Support, for Persons with Disability*. People with Disabilities Australia (30).

³³ Frawley, P. and Naylor, B. (2014). Human Rights and People with Disabilities in Closed Environments. *Law in Context*, Vol 31, 48-83 at 70.

³⁴ Note: *Charter of Human Rights and Responsibilities 2006* (Vic) s 7(2).

Recommendation 7

A *Human Rights Act* for Queensland should provide for how a right can be limited. Endeavour Foundation recommends that a similar provision as to the one found in the *Charter of Human Rights and Responsibilities 2006* (Vic) s 7(2) be drafted into proposed human rights legislation. For example:

A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including—

- (a) the nature of the right; and*
- (b) the importance of the purpose of the limitation; and*
- (c) the nature and extent of the limitation; and*
- (d) the relationship between the limitation and its purpose; and*
- (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.*

Restrictive Practices

Some Queensland adults with a cognitive or intellectual disability exhibit severely challenging behaviour. This is behaviour that either causes physical harm to the adult or others, or represents a serious risk of physical harm to the adult or others. In Queensland, the use of restrictive practices (under the *Disability Services Act 2006*) means the use of physical, chemical, mechanical restraint, or containment and seclusion for those adults in receipt of services funded by the Department of Communities, Child Safety and Disability Services. The use of restrictive practices can only be authorised under an approved Positive Behaviour Support Plan.

There have been significant developments in practice from behaviour modification, which once used punishment as a means of compliance and learning, to positive behaviour support that now has its focus on changing environments and building skills.³⁵ However, the notion of restriction of rights remains a part of behaviour management practices.

Application of a human rights approach to all people with a disability can be problematic when one group of people with an intellectual disability can be subjected to practices that may impact of their fundamental human rights to liberty, free choice and security of the person.³⁶ Whilst the use of restrictive practices needs to be authorised and the conditions of any order are closely monitored by the State, it remains that a number of adults are subject to considerable restrictions and their lawful treatment includes strategies that limit their human rights.

Recommendation 8

Human rights legislation in Queensland needs to identify when the use of restrictive practices is lawful and under what circumstances a breach does not contravene the *Human Rights Act*.

³⁵ Frawley, P. and Naylor, B. (2014). Human Rights and People with Disabilities in Closed Environments. *Law in Context*, Vol 31, 48-83 at 78.

³⁶ Article 15 of the United Nations *Convention on the Rights of Persons with Disabilities*.

Voting

The *Commonwealth Electoral Act 1918* entitles all Australians who are over the age of 18 years, to enrol to vote.³⁷ However, it prevents people of “unsound mind” from enrolling or voting in the following terms:

A person who:

- (a) *By reason of being of unsound mind, is incapable of understanding the nature and significance of enrolment and voting.*

*Is not entitled to have his or her name placed or retained on any Roll or to vote at any Senate election or House of Representatives election.*³⁸

The *Electoral Act* does not provide a definition of “unsound mind”. Depriving voting privileges to a person of unsound mind could be applied to individuals with a range of impairments, including intellectual and psychosocial, acquired brain injury or a degenerative brain condition (such as dementia).³⁹ From Endeavour Foundation’s experience a number of people could, or could with assistance, vote.

Voting in a parliamentary election is a human right recognised under Australian and international law. In *Roach v Electoral Commissioner*,⁴⁰ the High Court found that the right to vote lies at the heart of Australia’s system of representative government. The High Court ruled that the right to vote should not be limited or infringed except where absolutely necessary and then only to the extent that the limitation is proportionate.

The Convention on the Rights of Persons with Disabilities (CRPD) requires Australia to “ensure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others, directly or through freely chosen representatives, including the right and opportunity for persons with disabilities to vote and be elected inter alia, by:

- i. Ensuring that voting procedures, facilities and materials are appropriate, accessible and easy to understand and use;
- ii. Protecting the right of persons with disabilities to vote by secret ballot in elections and public referendums without intimidation, and to stand for elections, to effectively hold office and perform all public functions at all levels of government, facilitating the use of assistive and new technologies where appropriate;
- iii. Guaranteeing the free expression of the will of persons with disabilities as electors and to this end, where necessary, at their request, allowing assistance in voting by a person of their own choice”.⁴¹

The CRPD makes it clear that governments should not restrict the right of an individual to participate in public life on the basis of a perceived or actual intellectual or psychosocial disability.⁴²

³⁷ Note: *Electoral Act 1992 (Qld)* s 64.

³⁸ *Commonwealth Electoral Act 1918 (Cth)* s 93(8).

³⁹ Human Rights Law Centre. (2014). *Disenfranchising persons of “unsound mind”: Discrimination in Australia’s electoral law*. Submission to the Australian Law Reform Commission Inquiry on Legal Barriers for People with a Disability. Melbourne.

⁴⁰ (2007) 233 CLR 162.

⁴¹ *Convention on the Rights of Persons with Disabilities (CRPD)* (2007), Article 29(a).

⁴² UN OHCHR (21 December 2011). *Thematic Study by the Office of the United Nations High Commissioner for Human Rights on participation in political and public life by persons with disabilities*.

In 2013, the CRPD Committee examined the unsound mind provision and recommended that Australia enact legislation that would restore the presumption of the capacity of individuals with a disability to vote and exercise choice, and to ensure that voting is made accessible to all citizens with disabilities.⁴³

“Article 29 does not foresee any reasonable restriction, nor does it allow any exception for any group of persons with disabilities. Therefore, any exclusion of the right to vote on the basis of a perceived or actual psychosocial or intellectual disability, including an individualised assessment, constitutes discrimination on the basis of disability”.⁴⁴

Recommendation 9

A *Human Rights Act* for Queensland should reflect the fundamental principles of non-discrimination, presumption of capacity and supported decision-making for people who have an intellectual, mental health or psychosocial disability.

The *Electoral Act 1992* (Qld) should be amended to ensure that all persons of voting age, regardless of any intellectual or psychosocial disability have the right to vote in State elections. Further, any amendment should incorporate that people with a disability are supported to participate in elections.

Role of the Ombudsman

Under the *Ombudsman Act 2001* (Qld) the Queensland Ombudsman has an expressed function to remedy complaints about administrative actions and to assist agencies to improve their decision-making and administrative practice. Section 14(1) of the *Ombudsman Act* states that the Ombudsman may investigate administrative actions of agencies. Endeavour Foundation believes that this aspect of the Ombudsman’s role could be enhanced under a *Human Rights Act* in Queensland.

The Ombudsman in Victoria is provided with the authority to enquire into or investigate whether an administrative action is incompatible with a *Charter* right.⁴⁵ Certain complaints of systemic issues around human rights could be appropriate for this kind of investigation and public reporting by the Queensland Ombudsman.

Recommendation 10

In the event that a *Human Rights Act* is enacted in Queensland, the *Ombudsman Act 2001* (Qld) be amended to allow the Ombudsman to enquire into or investigate whether an administrative actions incompatible with the *Human Rights Act*.

Jurisdictional Analysis

***United States Bill of Rights* – United States of America**

The *Bill of Rights* is the collective name for the first ten amendments to the *United States Constitution*. The rights contained in the amendments are expressed in absolute terms. This means that they are not subject to limitations such as those that apply under the ACT, Victoria, Canadian, New Zealand and South African human rights legislation (see below).

⁴³ Committee on the Rights of the Person with Disabilities (2013). *Concluding Observations on the initial report of Australia*.

⁴⁴ Committee on the Rights of Persons with Disabilities (2013) in *Bujdosó v Hungary* Communication No. 4/2011.

⁴⁵ *Ombudsman Act 1973* (Vic) s 13(2).

As the *Bill of Rights* forms part of the *Constitution*, it can only be altered by amending the *Constitution*. The rights contained in the Bill are primarily civil and political rights.

The Supreme Court of the United States has the power to invalidate a law that is consistent with the *Bill*. In contrast with the legislation mentioned below, the legislature has no power to override the *Bill of Rights* or to enact laws that abrogates rights within the *Bill of Rights*.

Charter of Rights and Freedoms 1982 Canada

The *Charter of Rights and Freedoms* forms part of the Canadian *Constitution*. This means that the Charter can only be changed by altering the *Constitution* following a referendum. The rights found in the Charter are enforceable by the courts, which have the power to impose remedies as they consider appropriate. There are no formal mechanisms in the *Charter* for pre-enactment review of legislation.

The Charter covers civil and political rights (including language and educational rights for minority groups). It applies to natural persons and corporations.

Bill of Rights Act 1990 – New Zealand

Enacted in 1990, the New Zealand *Bill of Rights Act* is an ordinary piece of legislation. There are no enforcement provisions in the act however; the Court of Appeal has held that compensation may be granted from government organisations for any breach of the rights found in the act.⁴⁶

The rights in the act are not prescribed in absolute terms. They are subject only to the reasonable limits expressed by law as can be demonstrably justified in a free and democratic society.⁴⁷ Therefore, whilst the Government may enact legislation that is inconsistent with the Act, the Attorney General is required to inform Parliament of any inconsistency relating to the Act.

The Act protects civil and political rights and applies to all legal persons, including corporations and natural persons.

Bill of Rights – South Africa

The South African Bill of Rights forms part of the *Constitution of the Republic of South Africa*, 1996. Limitations on rights must be reasonable and justifiable. Some rights, such as the right to life and human dignity, are absolute. Individuals can enforce their rights through the courts and the courts have the power to grant any relief that is appropriate.⁴⁸

The rights covered in the Bill are very broad and cover civil, political, social and economic rights. The rights found in the Bill apply to all laws, all state organisations and private relations. The South African Constitutional Court has the power to invalidate legislation that is inconsistent with the Bill.

⁴⁶ *Simpson v Attorney General* [1994] 3 NZLR 667.

⁴⁷ *Bill of Rights Act 1990*, s 5.

⁴⁸ Tasmanian Law Reform Institute (2007). *A Charter of Rights for Tasmania*, Report No 10, Hobart.

Human Rights Act 1998 (UK)

The *Human Rights Act* is an ordinary statute that can be amended or repealed by Parliament. Individuals are able to institute court proceedings to uphold their human rights and can obtain a number of remedies for breaches of their rights. The Act extends the power to award damages for a breach to any court that has the power to order payment of damages or compensation in a civil matter.⁴⁹ In practice however, damages have rarely been awarded with judicial review and injunctive relief often providing an effective remedy for breaches of human rights.

The Act requires the courts to interpret and give effect to legislation that is compatible (wherever possible) with the *European Convention on Human Rights*. The Courts have the power to declare legislation incompatible with the Convention but they have no authority to invalidate primary legislation (although the courts may invalidate subordinate legislation).

When legislation is introduced into Parliament, the Minister must provide a statement of compatibility with the rights found in the *European Convention*. The rights protected by the *Human Rights Act* are those found in the *European Convention on Human Rights* (where the focus is on civil and political rights). All public agencies (excluding Parliament) and courts must act in a manner that is compatible with the *European Convention*.

Human Rights Act 2004 (ACT)

In 2004, the Australian Capital Territory (ACT) was the first Australian jurisdiction to enact a human rights act. The *Act* is an ordinary piece of legislation that can be amended or repealed by the ACT Parliament. The Act does not provide for a direct right of action against public authorities or any explicit provisions for breaching the Act. The Act can, however, be used as an adjunct to current causes of action.

Courts in the ACT are required to interpret legislation in a manner that is consistent with the *Human Rights Act*. Where this is not possible, the ACT Supreme Court may issue a declaration of incompatibility. It is important to note that such a declaration does not invalidate the legislation in question however, the ACT Attorney-General must report to the Legislative Assembly on the Government's response to the court's declaration.

When a Bill is tabled the Attorney-General must provide a written statement that the proposed legislation's compatibility with the *Human Rights Act*. Human rights issues must also be addressed in the explanatory notes to any Bill.

The *Human Rights Act* addresses the rights of human beings but not those of corporations. It does not create an explicit duty on all public officials to act consistently with human rights. Further, the act does not cover economic, social or cultural rights.

Charter of Human Rights and Responsibilities 2006 (Vic)

The *Charter of Human Rights and Responsibilities* came into force in 2007. It is an ordinary piece of legislation that can be amended by Parliament.

Victorian courts are required to interpret legislation that is compatible with the *Charter*. The Supreme Court has the power to make a declaration that legislation cannot be interpreted consistently with the *Charter*. Similar to the ACT's Act, the *Charter* does not affect a piece of legislation's validity or continuing operation.

⁴⁹ *Human Rights Act 1998 (UK)* s 8.

The *Charter* requires Members of Parliament, when introducing a Bill, to provide a statement of compatibility before the second reading speech. This procedure differs from that of the ACT's *Human Rights Act* in that the Victorian legislation requires reasoned statements of compatibility to be given rather than mere assertions of compatibility.⁵⁰

In its first eight years of operation, the *Victoria Charter* has allowed for:

- a) An increased consideration of human rights in the development of laws and government policies;
- b) An improvement in public service design, implementation and delivery; and
- c) An avenue for remedying a number of individual and systemic injustices.⁵¹

The *Charter* requires an individual to establish an existing cause of action before being able to utilise the human rights protected in the *Charter* in court proceedings. The Victorian Human Rights Law Centre believes that such a requirement is too complex with the result being that for some individuals, access to appropriate remedies for breaches of their rights is limited.⁵²

*"The complexity of establishing a cause of action for a breach of the Victorian Charter, particularly for individuals who may not be able to access legal advice or representation, often acts as a barrier to such individuals being able to access an effective remedy for a breach of their rights".*⁵³

The *ACT Act* and the *Human Rights Act 1998* (UK), both provide for an independent cause of action. Both allow individuals to:

- a) Initiate proceedings directly against public authorities who they allege have breached their human rights; or
- b) Rely on human rights in any legal proceeding.

Recommendation 11

Endeavour Foundation supports the view that a free-standing cause of action will ensure that individuals are able to access effective remedies for breaches to human rights.

A Queensland Model for Human Rights Protection

A number of international human rights treaties either explicitly or implicitly require that an individual has access to effective remedies, including judicial remedies, if their rights are breached. A *Human Rights Act* could provide a direct right of action in the Queensland Civil and Administrative Appeals Tribunal (QCAT) as an accessible, low cost jurisdiction. In matters in which QCAT finds a breach of the *Human Rights Act* by a public sector agency, the Tribunal could make a range of orders, including compensation for loss, damage or injury suffered.

Alternative dispute resolution (ADR) should be considered for inclusion in any proposed *Human Rights Act* for Queensland. ADR could provide for an initial level of redress in any remedies provision. Dispute resolution processes can provide timely, accessible and cost

⁵⁰ Tasmanian Law Reform Institute (2007). *A Charter of Rights for Tasmania*, Report No 10, Hobart.

⁵¹ Human Rights Law Centre. (2015). *More Accessible, More Effective and Simpler to Enforce: Strengthening Victoria's Human Rights Charter*. HRLC Submission to the 2015 Review of the Victorian Charter of Human Rights. Melbourne, 1-37.

⁵² Ibid at 13.

⁵³ Ibid at 24.

effective mechanisms for individuals to informally resolve disputes that have impacted on their human rights. It would also serve to remind public authorities of any obligation they may have under a *Human Rights Act*. Queensland's Anti-Discrimination Commission has expertise in this area and may be best placed to perform this function.

Recommendation 12

Endeavour Foundation recommends that a *Human Rights Act* should be enacted as an ordinary statute.

Conclusion

A statutory based system for human rights is a positive initiative. However, the continued development of a human rights culture cannot rely on legislation alone. As the Law Institute in Victoria argues, other measures may be needed to develop a robust human rights culture. This may include:

- Leadership from Government
The development of a consistent vision that highlights the importance of human rights legislation.
- Education
Awareness raising and providing information/training to enable all government officers (or those providing state funded services) to engage with and apply the provisions under a Human Rights Act/Charter.
- Accountability
Enforcement and review to allow for the development of a culture that actively promotes human rights. This could extend the current mechanisms that are in place for checks and balances on executive power and providing members of the community with clear avenues in order to remedy breaches of the Act/Charter.⁵⁴

"Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court, can even do much to help it. While it lies there it, needs no constitution, no law, no court to save it".⁵⁵

⁵⁴ Law Institute Victoria. (2015). *Review of the Charter of Human Rights*. Melbourne.

⁵⁵ Judge Learned Hand, *The Spirit of Liberty* (Speech given at an "I am an American" celebration), New York, 21 May 1944.