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 Legal Advocacy for vulnerable people with Disability

The Appropriateness and Desirability of Legislating for a Human Rights Act in Queensland

Submission by Queensland Advocacy Incorporated

Legal Affairs and Community Safety Committee

April 2016

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, The International Bill of Human Rights

About Queensland Advocacy Incorporated

Queensland Advocacy Incorporated (QAI) is 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 does this by engaging in systems advocacy work, through campaigns directed to attitudinal, law and policy change, and by supporting the development of a range of advocacy initiatives in this state.

QAI has been a long-time campaigner for greater human rights protection in Queensland, and in Australia. 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* (the *Human Rights Indicators*). The *Human Rights Indicators* se out a preliminary set of human rights indicators for persons with disability, which are based on the elements of the CRPD. It is 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 NGO's, have adopted the Human Rights Indicators as the standard against which they will measure their efforts to promote the rights of people with disability. Recently the World Bank has requested permission to include it 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. Submission of the 'baseline report', which outlined Australian compliance with the CRPD, was a requirement of ratification of the CRPD. The 'shadow report' served the same purpose, but was written by NGO's from the perspective of people with disability and their advocates. In September 2012, QAI co-hosted with DLA Piper a Brisbane launch of the Shadow Report 'Disability Rights Now'.

In December 2008, the Federal Government launched a national public consultation on how best to protect human rights and responsibilities in Australia (the 'Brennan Inquiry'). QAI was represented at the Bill of Rights consultations in Brisbane on March 2009. QAI made a detailed written submission to the inquiry, and encouraged individuals, families, and organizations to make submissions.

More recently, QAI has collaborated with other organisations and academics towards the introduction of a federal Human Rights Act, building on positive momentum generated by our involved with the Australian NGO delegation to appear before the United Nations Committee Against Torture in Geneva in November 2014.

QAI has been actively involved in the present collective of individuals and organisations working together under the 'Rights 4 Queenslanders Alliance' banner to push for the introduction of a Human Rights Act in Queensland. Our involvement in this regard has included membership of the steering committee and broader committee of the Rights 4 Queenslanders Alliance, collaborating with Caxton Legal Centre to host the launch 'The Right Way: A Dialogue about a Human Rights Act for Queensland' at Parliament House in September 2015, lobbying members of Parliament and meeting with members of Parliament and government ministers including Attorney-General Yvette D'Ath and engaging in public and media dialogue about this issue. We are presently in the process of formally auspicing the Human Rights Act 4 Queensland Alliance to QAI.

QAI warmly welcomes the move by the Queensland Government to consider the introduction of a Human Rights Act in Queensland.

Background of why we need legislative protection of human rights in Queensland

Summary and key recommendations:

- Queensland needs a Human Rights Act.
- Equality and a 'fair go' are central to our state, and national, ethos. However, key features of our economy and political structural, including our economic rationalist basis, minimalist welfare system and unicameral system of parliament, means that the basic human rights of vulnerable groups are afforded scant protection at best, and are more often unprotected and trampled.
- The reactive, rather than proactive, approach taken to date to addressing human rights violations has been inadequate and, for many, ineffective.
- Australia is the only Western market economy without a Human Rights Act. While the Australian Capital Territory and Victoria have enacted a Human Rights Act or Charter, Queensland has yet to follow suit.
- While the human rights of Queenslanders currently receive some protection from the common law, the anti-discrimination and other legislation and the Australian Constitution, there are significant gaps in the existing protection of human rights that must be addressed.
- The time is right to introduce a Human Rights Act in Queensland.

The first term of reference for the Legal Affairs and Community Safety Committee (Committee) is whether it is appropriate and desirable to legislate for a Human Rights Act (HR Act) in Queensland, other than through a constitutionally entrenched model.

QAI submits that it is. Legislative protection of human rights in Queensland is vital and long overdue.

If it can be said that there is a predominant Queensland, and Australian, cultural ethos, it is typically defined by reference to core values including a 'fair go', freedom, egalitarianism, mateship and community spirit. Yet (not far) beneath this we are a capitalist economy, built upon (neo-) liberal ideology. Central to an economic rationalist society such as ours is the privileging of autonomous choice – we propagate the rhetoric that individuals in this lucky country are free to choose from the myriad goods and opportunities society has to offer, relying on their own merits and endeavours, with their choices accommodated by the government through the application of formal principles of equal treatment. There is rhetoric to the notion of choice, which vests risk and responsibility for any hardships with individuals (attributed to their autonomous decision-making), while failing to acknowledge social responsibility for individual hardship or marginalisation.

Neo-liberal philosophy does recognize a concept of common good – this was the basis for the creation of the welfare state in Australia.[1] Yet it is individualism, rather than protectivism, that is at the heart of the liberalist philosophy. This translates into a general lack of protection for the more vulnerable members of our society – the communal safety net is a basic string net which fails to cushion, or indeed catch, many of our most vulnerable.

The rhetoric of equality has been important in shaping the economic, political and social landscape in Australia.[2] Equality is a core objective and lynchpin of the statutory anti-discrimination model – the laws operate on the conceptual understanding that everyone is to be treated alike and differential treatment is discriminatory.[3]

However, neo-liberalism and equality are in sharp conflict. As Thornton, an equality scholar, notes, the ideology of merit and support for free enterprise and a market economy, which are official values of a western, liberal, capitalist democracy, are undermined by inequality – the 'paradox of liberalism' is that individualism and social equality are simultaneously valued, yet

[1] There are of course many different, often undefined, strands of liberalism that vary significantly, ranging from minimal state intervention – an extreme focus on deregulation – to a more protective-libertarian view: Philip Mendes, 'Retrenching or renovating the Australian welfare state: the paradox of the Howard government's neo-liberalism' (2009) 18(1) *International Journal of Social Welfare*102; Judy Fudge and Rosemary Owens (eds), *Precarious work, women, and the new economy: The challenge to legal norms* (Hart Publishing, 2006) 5-7; Breen Creighton and Andrew Stewart, *Labour Law*, 5th edition (The Federation Press, 2010), 7-10.

[2] Equality has its roots variously in Judaeo-Christian belief, ideals of democratic governance and in our political and philosophical heritage and is thus variously construed as 'equal distribution and thus equality among citizens, equality before the law as well as equal political rights, equal share in the state' and the belief that 'all human beings are created equal in the sight of God': Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (Oxford University Press, 1990) , 9.

[3] Rosemary Owens, Joellen Riley and Jill Murray, *The Law of Work*. 2nd edition (Oxford University Press, 2011), 396-7.

unchecked individualism necessarily results in social inequality.[4]

In recent decades, the hallmarks of neo-liberal ideology and economic rationalism, in particular the emphasis on individual autonomy and an ever-decreasing welfare safety net have become more pronounced. This has had profound repercussions for vulnerable groups in our society. The benefits of capitalism and globalisation are not equally accessible or equally shared.

The rest of the Western world, like Australia, adheres to the dominant political discourse of neo-liberalism. However, Australia stands alone among Western industrialized market economies in our lack of legal protection of equality – the absence of an act or charter dedicated to protecting human rights. While there have been judicial assertions of the primacy of such human rights as freedom, dignity and equality,[5] there is no blanket implication of equality as an individual right or fetter on governmental power.[6] Rather, protection of equality falls to the patchy and incomplete bundle of laws that have been enacted.

It is appropriate here to note the important differences between the concepts of equality and equity, which are now acknowledged in our society. While equality involves treating all people equally, equity strives for fairness by treating 'unequals unequally' – that is, acknowledging that people are not all on a level playing field and attempting to reduce the differences in opportunity that exist. 'Equity' has a more far-reaching impact upon vulnerable people – particularly people with disability – as it creates scaffolding supports to assist in translating rights, such as the right to inclusive education, into practice. While equality would simply mean provision of equal support to all students, equity enables the particular support needs of students with disabilities to be addressed, so that they may participate and excel and have the same range of opportunities as their peers. QAI therefore adopts the language of equity as the core focus, particularly in any discussion of human rights for vulnerable people.

Two Australian jurisdictions have enacted human rights acts or charters – the Australian Capital Territory, in 2004, and Victoria, in 2006. In Queensland, a reactive, 'putting out fires' approach to addressing the most egregious cases of human rights abuses (which is highly dependent on the whim of the political party of the day) has resulted in an unfinished patchwork of legislative protection of human rights, which is not only incomplete but inconsistent. This is particularly concerning as Queensland is alone in having a unicameral system of government (lack of an upper house) – this is discussed further, below, but is relevant to note in this context as a key reason why the introduction of a Human Rights Act in Queensland is particularly vital. The coverage and omission of the Queensland statutory framework will be discussed further in the next section.

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[4] Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (Oxford University Press, 1990) , 12-14.

[5] *Gerhardy v Brown* (1985) 159 CLR 70, 101-2 and 125-6; *Mabo v The State of Queensland (No 1)* (1988) 166 CLR 186, 229.

[6] *Leeth v The Commonwealth* (1992) 174 CLR 455; *Kruger v The Commonwealth* (1997) 190 CLR 1; Rosemary Owens, Joellen Riley and Jill Murray, *The Law of Work*. 2nd edition (Oxford University Press, 2011), 395.

The effectiveness of current laws and mechanisms for protecting human rights in Queensland and possible improvements to these mechanisms

Summary and key recommendations:

- Some Queensland laws presently address particular human rights of particular groups.
- The protection of human rights is ad hoc and incomplete. The most comprehensive coverage is provided by the *Anti-Discrimination Act 1991* (Qld) yet this Act is limited in terms of its scope, standing and remedies.
- The current human rights protections available in Queensland fall well short of the obligations the Australian government has committed to in signing and ratifying relevant international treaties and conventions, including the International Bill of Rights (comprised of Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and its two Optional Protocols) and, relevantly for people with disability, the Convention on the Rights of Persons with Disabilities.
- The enactment of a Human Rights Act is a more appropriate, cost-effective and sustainable solution than a plethora of amendments to existing Queensland statutes.
- Given Queensland's unique potential for abuse of power and process that results from our unicameral system of Parliament, it is crucial to enact a Human Rights Act for our state.
- The enactment of a Human Rights Act is the appropriate and necessary next step for the Queensland Parliament that will send a clear message to all Queenslanders about the value accorded to human rights by the Government.
- Reform or supplementation of existing state legislation, in whatever form, will be an inadequate compromise.

In our neo-liberal capitalist economy the law plays a significant role as one regulatory tool shaping behaviour. In Queensland there is currently ad hoc and incomplete legislative protection of human rights. There are some human rights protections found in certain statutes, but they are piecemeal and not sufficiently robust or effective.

In the laws pertaining to persons with disabilities, we note the following human rights protections:

Anti-discrimination law

The anti-discrimination framework is comprised of parallel anti-discrimination legislation at both a state and federal level, between which there is presently, unfortunately, a significant degree of inconsistency.[7]

(a) The *Anti-Discrimination Ac 1991* (Qld)

The *Anti-Discrimination Act 1991* (Qld) (ADA) is the most comprehensive piece of human rights legislation in Queensland. The ADA protects persons from being treated less favourably on the basis of certain attributes, which are sex, relationship status; pregnancy, parental status, breastfeeding, age, race, impairment, religious belief or religious activity, political belief or activity, trade union activity, lawful sexual activity, gender identity, sexuality, family responsibilities, and association with, or relation to, a person identified on the basis of any of the above attributes.[8]

The anti-discrimination statutes operate to establish general human rights and social standards and are designed to secure equality by eradicating less favourable treatment or outcomes for members of marginalized groups or classes. The anti-discrimination legislation is built upon the core concepts of adverse impact and causation and prohibits both direct and indirect discrimination.

- *Direct discrimination* is based on the premise that like should be treated alike and occurs where a person is treated less favourably by reference to a comparator (a person who is in circumstances that are the same or not materially different from the aggrieved person) on the basis that they possess one or more of the proscribed characteristics (such as sex, race or impairment, as outlined above).
- *Indirect discrimination* occurs where the same requirement or condition is applied, with a disparate impact on members of a particular proscribed group, as a consequence of their membership of that particular group or class. While the focus remains on the individual complainant, indirect discrimination is aimed at acknowledging the stigmatizing effects of membership of a disadvantaged group.

The scope is therefore broadly directed at protecting members of vulnerable groups. The protection is limited to particular spheres of public life – broadly, these areas include:

- Work;
- Education;
- The provision of goods and services; and
- Accommodation.

[7] See for example: *Viskauskas v Niland* (1983) 153 CLR 280 and *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1980) 142 CLR 237.
[8] Section 7 of the *Anti-Discrimination Act 1991* (Qld).

(b) Federal anti-discrimination law

At a federal level, the anti-discrimination framework consists of the *Australian Human Rights Commission Act 1986* (Cth), which establishes the enforcement framework by designating the Australian Human Rights Commission as a federal entity with regulatory oversight over all Commonwealth discrimination law, which is divided into four separate types of discrimination, each with its own Act.[9] This is a different approach to that taken in Queensland, where a single Act (the ADA) addresses discriminatory treatment on the basis of a range of different attributes.

This patchwork enforcement framework for Commonwealth anti-discrimination laws is presently under review; the Federal government is considering a proposal to, among other things, consolidate the disparate anti-discrimination laws.[10] This would involve amalgamating the five existing Commonwealth anti-discrimination acts into a single comprehensive statute, making the laws clearer and more effective and streamlining the complaints procedures. The review, initiated in 2009, was stalled for a number of years at the draft discussion stage, being put on hold by the Gillard Government on the basis that the draft laws failed to strike the desired balance.[11]

(c) Key limitations of anti-discrimination laws

In our liberal democracy, anti-discrimination legislation is highly politically volatile. It is generally not well liked by conservatives – in its extreme, the individualistic legal perspective is heavily critical of anti-discrimination legislation, considering it an intrusion by the state into private contractual rights. Under the Howard government, the budget of the then Human Rights and Equal Opportunities Commission (now the Australian Human Rights Commission) was cut by 40%, reducing its staff by one-third. Staff of the human rights branch of the Attorney-General's department was also reduced, from 21 to five.

QAI considers that the main problems with the anti-discrimination laws we have are:

a) The individualist approach taken

The anti-discrimination laws require individuals aggrieved by discriminatory treatment to take action to assert the violation of their rights and pursue an appropriate remedy. Both state and federal systems have adopted an individual complaints process, where receipt of a complaint alleging discriminatory treatment leads to investigation of the complaint by the relevant Commission. Traditionally, only victims have had standing to lodge a claim alleging discriminatory treatment, although the Fair Work Ombudsmen has recently been empowered

[9] The *Racial Discrimination Act 1975* (Cth), *Sex Discrimination Act 1984* (Cth), *Disability Discrimination Act 1992* (Cth) and *Age Discrimination Act 2004* (Cth).

[10] 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.

[11] See: http://www.ag.gov.au/Consultations/Pages/ConsolidationofCommonwealthanti-discriminationlaws.aspx for more information.

to inquire into, investigate and initiate enforcement action for workplace discrimination complaints where it considers it is in the public interest.

This model is far from satisfactory. In contrast to other areas of law, where the parties are often on a level playing field in terms of their access to and ability to pay for legal advice, etc there is usually a significant disparity between the resources and bargaining power of the parties (which are usually the aggrieved person and a company) in a discrimination claim. Litigation is very expensive – the cost places it well out of the reach of many people (particularly disempowered people) – and anti-discrimination complaints can be complex and lengthy to resolve. Awareness of this is enough to deter any people from making a complaint in the first place. Sadly, these factors all work to further oppress and marginalise people from vulnerable groups.

These issues have been acknowledged and addressed to some degree. Parliament attempted to minimise power imbalance by making the first step in the determination of a claim a compulsory, confidential conciliation. The availability of this compulsory first step is why the anti-discrimination complaint process is often described as being informal and accessible. However, the requirements to identify and articulate the relevant breaches of the legislation, lodge a claim in the approved form to the appropriate body and adequately represent their case when face-to-face with their alleged perpetrator in a formal bureaucratic setting is highly threatening to many lay 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.

The 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.

QAI submits that 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.

b) The way discrimination is identified – use of the 'comparator' test

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.[12]

The use of the comparator test is particularly problematic and further marginalizes disempowered groups. Essentially, the comparator test involves comparing likes with unlikes. Thornton explains it in this way:[13]

> *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.*

c) The focus on formal, rather than substantive equality

As Thornton explains in her comprehensive review of Australian anti-discrimination laws, anti-discrimination law has proved, at best, a mediocre mechanism for putting equality on the agenda and, at worst, a façade masking the significant abyss between the rhetoric of equality and substantive equality.[14] The approach that the Government has taken through this legislation is blunt, ineffective, costly, unpredictable, expensive and inept in the face of complex problems such as systemic discrimination.

Thornton contends that formal equality can actually promote substantive inequality.[15] Gaze agrees, arguing that while overt or explicit sex discrimination has significantly diminished as a result of the introduction of the *Sex Discrimination Act 1984* (Cth), it has been replaced by more 'covert and subtle forms of discrimination which are more difficult to prove'.[16] Structural and systemic inequality has blossomed in the absence of a commitment to eradicate substantive inequality. An example of this is that gender-based wage inequality continues, notwithstanding that we have formally adopted the principle of equal pay for work of equal value.[17]

d) The focus on negative, rather than positive or affirmative, action

Anti-discrimination laws are primarily negative – this is a further reason why they fail to 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

[12] Rosemary Owens, Joellen Riley and Jill Murray, *The Law of Work*. 2nd edition (Oxford University Press, 2011), 397.
[13] Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (Oxford University Press, 1990), 1-2.
[14] Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (Oxford University Press, 1990), 14. While this work is now dated, the stagnancy of anti-discrimination law supports the continuing relevance of this work.
[15] Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (Oxford University Press, 1990), 15, 22.
[16] Beth Gaze, 'Twenty Years of the Sex Discrimination Act: Assessing its Achievements', (2005) 30(1) *Alternative Law Journal* 3, 4-5.
[17] *National Wage and Equal Pay Cases* (1972) 147 CAR 172.

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.

A new approach proposed by commentators such as Collins and Hepple to supplement the doctrine of anti-discrimination law and as integral to the future of equality law, is that of social inclusion or solidarity.[18] Social inclusion and solidarity are overlapping concepts. They are about integrating all members of a society in a way that enables their full participation and contribution. This would involve both positive and negative duties – for example, a requirement not to discriminate accompanied by affirmative action.

e) The lack of effective remedies or sanctions

A further problem with our anti-discrimination legislation is the lack of appropriate penalties or sanctions to enforce compliance with the law, deter breaches and compensate victims. Aside from limited examples, such as the recent empowering of the Fair Work Ombudsman to initiate and prosecute discrimination claims on behalf of individual complainants, there has been no 'big stick'. This is mainly because we require vulnerable individuals to initiate a claim against their perpetrator, and have not established an enforcement agency tasked with doing this work.

Anti-discrimination law places a strong focus on settling complaints by conciliation, and the vast majority of complaints are resolved in private conciliations. The outcome is confidential. While this does have its merits in some circumstances, it means that it's impact is quite limited – it is unhelpful as a deterrent, as a driver for altering social behavioural norms, as an impetus for the development or reform of laws or as a means by which policies and practices that create healthier, more productive communities can be developed. If the dispute doesn't settle by agreement and is referred to the Queensland Civil and Administrative Tribunal for determination, the Tribunal can order that the perpetrator: stop doing the action that caused the complaint; pay compensation; pay interest on compensation; do something specific things to redress the loss or damage suffered; make a public or private apology or retraction; implement programs to eliminate unlawful discrimination; pay the other party's costs; or declare an agreement is not legally binding.

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 has been little attention paid to developing remedies that may have class-wide implications. This means that, despite its stated objectives, the aim of the anti-discrimination legislation appears to be the private resolution of interpersonal disputes and compensation of individual victims. The fact that appeals from the Tribunal are directed to a

[18] Catherine Barnard, Simon Deakin, Bob Hepple and Gillian Morris (eds). *The Future of Labour Law* (Hart Publishing, 2004), 213, 227.

court is also unhelpful as courts are traditionally very formal and conservative. This has certainly been true for anti-discrimination cases, where judges usually take a limited and conservative approach.[19] Our most superior court, the High Court, has modelled this approach, restrictively interpreting the scope of direct discrimination.[20] Former High Court Justice Michael Kirby noted (in a dissenting judgment) in 2006 that the High Court has been increasingly reluctant to provide relief to claimants in the anti-discrimination jurisdiction, with no successful High Court claims in the preceding decade.[21]

(e) The exceptions, exclusions and exemptions narrow the scope of anti-discrimination law

The many exceptions, exclusions and exemptions contained in the ADA also narrow the scope of anti-discrimination law. Anti-discrimination law is often considered a blunt tool to help people who have experienced discrimination.

In the context of this understanding of the limits of anti-discrimination law, it is perhaps unsurprising that anti-discrimination law has not been coveted as providing an effective remedy for the use of Restrictive Practices (RPs), despite the arguable case that the use of RPs breaches anti-discrimination law. This is particularly so in the context of an understanding of the vulnerability and disempowerment inherent in the experience of an intellectual or cognitive disability, both for the person and their family.

Anti-discrimination laws have had a mild normative effect in influencing the general social acceptance of overt discrimination – a 'consciousness raising effect'[22] – and have provided some individuals with a means of redressing grievances that flow from discriminatory treatment. However, overall anti-discrimination laws have proved ineffective at challenging systemic and ingrained discrimination.

Guardianship law

The legal guardianship regime in most Western societies, including Australia, provides decision-making mechanisms for adults with intellectual disabilities.[23] In Queensland, the *Guardianship and Administration Act 2000* (Qld) (GAA) contains a comprehensive regime governing the appointment of guardians for persons with impaired capacity.[24]

In Queensland, approximately 2,300 people are subject to guardianship and administration orders at any time.[25] The purpose of the GAA, as expressly stipulated by the Act, is to

[19] See for example *Waters v Public Transport Corp* (1993) 173 CLR 49 at 372; *Purvis* (2003) 217 CLR 92 at [202] – [203]. Note that tribunals have on occasion developed remedies designed to prevent further discrimination (eg *Bellamy v McTavish & Pine Rivers Shire Council* [2003] QADT 15; *Simpaon v Boyson & Belli Park Stud Pty Ltd* [2003] QADT 19) yet this is rare.
[20] *Purvis v New South Wales (Dept of Education and Training)* (2003) 217 CLR 92.
[21] *New South Wales v Amery* (2006), above n 149 [86] – [88], discussed by Creighton and Stewart, above n 22, 556-7.
[22] Sandra Berns, *Women Going Backwards: Law and Change in a Family Unfriendly Society* (Ashgate, 2003), 76.
[23] Shih-Ning Then, 'Evolution and Innovation in Guardianship Laws: Assisted Decision-Making' (2013) 35 *Sydney Law Review* 133, 133.
[24] See *Guardianship and Administration Act 2000* (Qld), Ch 3.
[25] As at 30 June 2015, there were just over 2,300 guardianship clients of the Adult Guardian: *Office of the Adult Guardian (Queensland) Annual Report 2014-2015*.

achieve balance between the right of an adult with impaired capacity to the 'greatest possible degree of autonomy in decision-making' and their right to 'adequate and appropriate support for decision-making'.[26]

In reality, the human rights of a person facing a guardianship order are often given little or no consideration.

This is particularly so in the making of an interim order or when a hospital or service provider makes an application for the appointment of a guardian or administrator. It is during these times that the General Principles contained in the *Guardianship and Administration Act 2000* (Qld) are often overlooked or not considered and so the individual's human rights fail to be enlivened.

Paradoxically, the General Principles can serve both as a sword and a shield to the recognition of human rights. This is evident when entities (both government and non-government) give a weighting to the separate principles so that one is seen as more important than the other. For instance, some statutory bodies consider *Principle 10 – Appropriate to the circumstances* as being more important than *Principal 2 – Same human rights*. As a result, the decision-making process is skewed to the statutory body's objective and not necessary that of the individual. In QAI's experience references to human rights in the GAA and General Principals are not operative, merely declaratory in effect.

QCAT hearings appear to be influenced by the tribunal member's ideology and the fact that guardianship grew from and remains part of a paternalistic system. In reality this means that it is difficult to anticipate with any accuracy any outcome even if the factual scenarios are similar. Whilst some members will focus on the individual as autonomous and endeavour to uphold their rights, others succumb to the competing obligation to protect that individual. A Human Rights Act would ensure that the individual's rights are upheld more robustly than currently occurs.

Case study:

Through our work providing advocacy and legal representation for individuals in guardianship proceedings, QAI has first-hand experience of the way decision-makers who are charged with protecting the best interests of vulnerable people fail to hear and respond to their voices. Key decisions that significantly affect and shape the lives of vulnerable people, including who their guardian is, where and with whom they live and how their finances are managed, are often made without any consultation or regard for the person's wishes.

In Victoria, the introduction of the *Charter of Human Rights and Responsibilities 2006* (Vic) changed the landscape by making the human rights of the person directly affected by guardianship proceedings a relevant consideration for decision-makers. In Queensland, in the absence of human rights legislation, there is no equivalent requirement. In some cases, a positive outcome is able to be reached by tenacious and skilled legal representation (the

[26] *Guardianship and Administration Act 2000* (Qld), s 6.

proceedings are more protracted, costly and emotionally stressful for the person concerned due to the absence of legislative human rights protection). Yet in the significant majority of cases, legal representation is not available or accessible or the decision-maker fails to heed submissions concerning the importance of a person's rights in reaching the decision. The outcomes in the latter category can constitute significant human rights breaches, from the sale of a person's family home and the redirection of their funds without their consent to forcing a person to live in inappropriate accommodation arrangements that are not chosen by them (this can then escalate into the demonstration of behaviours of concern and further human rights breaches, through the imposition of Restrictive Practices as a response to these behaviours).

The *Disability Services Act 2006* (Qld)

The *Disability Services Act 2006* (Qld) is meant to acknowledge and safeguard the rights of people with disability, promote their inclusion in the community, ensure they have choice and control in accessing services and that the services they receive are safe, accountable and responsive to their needs.[27]

While the DSA is built around the principle that people with disability have the same human rights as others and that regard must be had to the human rights of adults subjected to Restrictive Practices, this is not consistent with QAI's experience. As noted by Philip French, a disability and human rights lawyer, the drafting of the legislation insofar as human rights principles are concerned is declaratory only – there are no operative provisions that translate this broad statement into practice, nor are any of the other human rights contained in the CRPD, or more generally in international law, recognised or incorporated.[28]

This is a significant practical hurdle. However, it illustrates the general approach taken by Parliament to human rights (not only in disability-specific areas, but across the board): we support human rights in theory and will happily state it, but we will not accompany this declaration of support with any concrete measures that mean that human rights are actually respected or protected in practice.

When the DSA was recently amended, the stated purpose was to protect persons with an intellectual or cognitive impairment who are subject to the DSA because they receive support services funded under the Act, by regulating the use of RPs on these adults by their Service Providers. However, QAI has extensive firsthand knowledge and experience that in practice, the DSA has been used to sanction the largely unfettered application of Restrictive Practices and to provide immunity to service providers for actions that, but for the Restrictive Practices legislation, would be considered false imprisonment or assault in breach of our criminal laws.

[27] *Disability Services Act 2006* (Qld), s 6.
[28] Phillip French, 'Human Rights and Human Wrongs: A Human Rights Analysis of Queensland Restrictive Practices Legislation', Presentation to Queensland Advocacy Incorporated's Restrictive Practices Forum, 24 August 2010, 9.

The procedures prescribed by the DSA include assessments and the development and approval of positive behaviour support plans – which is only to be given where it is shown that the RP is necessary and the 'least restrictive way' of achieving the desired goal. The new amendments also provide time-limited immunity from criminal and civil liability for services providers implementing Restrictive Practices, provided they acted honestly and without negligence, where there are delays in deciding an approval or consent.[29] This is a broad protection that essentially authorises actions that would otherwise amount to a contravention of the criminal law (for example, false imprisonment, assault). Prior to the introduction of the immunity provision, service providers were adequately protected by the common law doctrine of necessity and by workplace health and safety legislation. In none of these scenarios have the human rights of the people subjected to RPs been respected – the only human rights are those on paper only; the acknowledgement and inclusion of these human rights in the DSA has not translated to any improvement of the experience of people with disability. The rights are not real, or enforceable.

Case in point:

If the Restrictive Practices regime established under the *Disability Services Act 2006* (Qld) had initially been or was now properly scrutinised for consistency with human rights principles, it would likely be deemed incompatible with a Human Rights Act. This is due to the lack of safeguards it contains for the vulnerable people with disabilities whose lives it impacts. The prohibition against torture, cruel or inhuman or degrading treatment or punishment is widely recognised as an absolute and inalienable human right. Appropriate recognition of the inconsistency between the DSA and human rights would likely have the result that people formerly experiencing practices that amount to torture would be freed of such cruel and inhuman treatment and instead be supported in ways that respond to their communication and needs. As well as the individual, social and cultural benefits this would bring, there would be significant, widespread legal and economic benefits that would flow from the expected reduction in the number and complexity of applications and cases before the courts and tribunals.

Similarly, human rights scrutiny of proposed amendments to the *Police Powers and Responsibilities Act 2000* (Qld) could have identified the dangers of giving police pat-down powers without reasonable suspicion, powers which disproportionately affect people with intellectual disabilities.

French and associates outline intersecting reasons that are typically proposed to account for this problem:[30]

[29] See s 189 *Disability Services Act 2006* (Qld).
[30] 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, 245-6.

1. The invisibility of persons with disability within human rights discourse (it is argued that there has been a failure to substantially recognize persons with disability as right-bearers, and a tendency to view the needs and concerns of persons with disability in terms of social development and population health rather than in terms of human rights);
2. The somewhat abstract and general nature of the traditional formulation of some key human rights has created difficulties in the application of these rights with certainty to specific violations more likely to be, or uniquely, experienced by persons with disability; and
3. A lack of disability-related experience and expertise in human rights protection and implementation agencies.

They note that these problems have been particularly acute in relation to persons with cognitive impairment who engage in behaviours of concern.[31]

QAI recently applied for a grant to develop a set of Human Rights Indicators for the Use of Restrictive Practices on vulnerable people with disability that would be universally applicable (not only applicable to funded service providers). Such a tool would undoubtedly result in fewer applications for the use of RPs and provide an educational tool for families that may employ RPs unwittingly or without intent. While the development of these indicators would be beneficial in that it would increase the protection afforded this vulnerable group, to have an impact akin to a blanket protection of basic human rights, Human Rights Indicators would need to be developed for every context in which vulnerable people are routinely stripped of their autonomy or their human rights. This is impractical and is another reason why we need a Human Rights Act in Queensland.

Other measures

The Department of Social Services has recently developed the *National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector*. Like the purported rationale for the changes to the DSA in Queensland, the Framework is theoretically designed to reduce the use of Restrictive Practices in disability services as an interim step in the transition to the regulation of RPs under the NDIS. While the introduction of the Framework, and a unified national approach to minimising the use of Restrictive Practices, is laudable, to date there has been no apparent change in the Restrictive Practices usage of many disability services providers. The translation of Framework policy into practice remains to be seen. The release of the Framework has not been accompanied by decisive practical measures, rigorous safeguards or enforceable fetters on the powers of service providers to apply Restrictive Practices to those in their care. As such, without further development, its practical impact is questionable. Further, the fact that there is a National Framework aimed at regulating, rather than eliminating, the use of torture on vulnerable members of society is an indication that the government does not currently conceive of human rights for people with disability. Legislative protection of human rights is required.

[31] Ibid.

Conclusion on the effectiveness of current laws and mechanisms for protecting human rights in Queensland

Queensland is uniquely vulnerable, as compared with other Australian states and territories, due to our unicameral system of government. This lack of an upper house, or house of review, means that the power of the government of the day is largely unrestrained. This is not just an abstract possibility – Queenslanders have witnessed the abuse of power by a government during the recent reign of the Newman Government in Queensland. Many of these abuses directly impacted on the human rights of the most marginalised and disempowered Queenslanders – for example, interference with the autonomy of the judiciary; the abolition of measures designed to protect vulnerable people in their interface with the criminal justice system, including the Drug Courts and Queensland Courts Referral process; the removal of human rights-based protections in laws regulating the use of Restrictive Practices by service providers on people with disability; the passage of the VLAD laws; and the introduction of juvenile justice measures including the naming and shaming of children in public and the removal of natural justice for parents in the educational system to appeal short term suspensions of students.

Case Study 1 – The application of Restrictive Practices on a vulnerable female with disability

Tina was being supported by a service provider who regularly sought to increase the range of Restrictive Practices they could use around Tina. As a baseline, Tina was contained (physically prevented – such as by locked doors and gates – from freely exiting the premises where she received disability services) for 16 hours per day and secluded (physically confined, alone, in circumstances where she was not free to leave) for eight hours overnight. During the day she would also be placed in seclusion or have behaviour controlling medication applied in order to control her behaviour.

Tina's behaviour arose because neither she nor her family were listened to. Tina was bored, had little meaningful activity in her life and had been isolated from the community in which she lived. The service provider showed little interest in addressing these issues when they were raised by the family. Instead, they attempted to restrict Tina's access to her family and on several occasions applied to QCAT to have the public guardian appointed, as opposed to the family member. The service provider refused to acknowledge that Tina's behaviour was a form of communication (expressing dissatisfaction) and labelled Tina as difficult and prone to 'challenging behaviours'.

Tina really wanted to move to her own place and be closer to her family. The service provider discouraged this dream. Rather, they made application to QCAT submitting that Tina could never live on her own, was unsafe to be in the community and needed high level use of Restrictive Practices. The service secured from the Department a very large funding package to enable the resource-intensive requirements of such frequent and ongoing use of RPs. The family continued their strong advocacy for Tina and contacted QAI for assistance.

Eventually Tina was moved into her own residence, closer to her family and to a service provider who never used any form of Restrictive Practices. Tina now has a part-time job and has become part of her local community. The 'challenging behaviours' have drastically reduced, as has the level of funding required to provide her support, now only about one quarter of that previously required.

The human rights breaches inflicted on Tina include a breach of Articles 3, 14, 15, 16, 17, 18, 19, 20, 22, 23, 25, 26, 27, 28 and 30 of the Convention on the Rights of Persons with Disabilities. This means that the circumstances of this Queensland case directly breached a number of Tina's human rights that Australia has agreed to respect, by signing and ratifying the CRPD, yet there is no protection or remedy for Tina under Queensland or Australian law.

Case Study 2 – Frances, a 22 year old female

Frances was living in the community, however due to inadequate funding and inappropriate supports Frances' needs were unmet. As a result she started to display behaviours which were seen by the service provider as challenging, so much so that they withdrew from providing support. A decision was made by Disability Services to place Frances in a secure facility, contrary to the appointed guardian's requests. This meant that Frances was contained 24 hours per day, seven days a week.

Subsequent to the move all activities that Frances had previously enjoyed were ceased, as was her personal mobility and freedom. Due to boredom and an inability to move around freely, Frances began to self-harm and strike out at staff. Additional Restrictive Practices such as seclusion and chemical restraint were applied yet, unfortunately, positive strategies were not as rigorously applied. Frances began to spend large amounts of time in seclusion.

It was 18 months before activities pleasurable to Frances were re-introduced into her daily routine. This was only achieved through the strong advocacy of her family and QAI's involvement. Some 12 months later Frances remains at this facility and continues to have Restrictive Practices applied, albeit the frequency of use is decreasing.

The question to be pondered is: would any of this have occurred if appropriate funding and supports were available to Frances in the first instance?

The human rights breaches inflicted on Frances include a breach of Articles 3, 4, 14, 15, 17, 18, 19, 22, 23, 26, 28 and 30 of the Convention on the Rights of Persons with Disabilities. This means that the circumstances of this Queensland case directly breached a number of Frances' human rights that Australia has agreed to respect, by signing and ratifying the CRPD, yet there is no protection or remedy for Frances under Queensland or Australian law.

Case study 3 – Michael, a 50 year old male

Michael was living happily with his sister in a Department of Housing house. However due to a bureaucratic policy around department of housing tenancies a third person was moved in with them. This occurred without discussion or consultation with either Michael or his sister.

The co-tenant became abusive to Michael's sister. This naturally resulted in Michael becoming protective of her and beginning to hit out at the co-tenant. Eventually Michael became subject to Restrictive Practices, in particular physical restraint. Michael's 'behaviour' was not explored and he was labelled an aggressor. By placing this label on Michael, no additional support was provided to prevent the escalation, nor was any consideration given to removal of the co-tenant. Rather, there was a reliance on using Restrictive Practices to manage the situation.

Michael's advocate contacted QAI for assistance when the service provider requested ongoing approval to use Restrictive Practices. The Restrictive Practice order was revoked and additional supports were placed in the house to manage the situation. However, the co-tenant remains and the situation remains conflictual.

The human rights breaches inflicted on Michael include a breach of Articles 3, 4, 5, 15, 17, 19, 22, 23 and 28 of the Convention on the Rights of Persons with Disabilities. This means that the circumstances of this Queensland case directly breached a number of Michael's human rights that Australia has agreed to respect, by signing and ratifying the CRPD, yet there is no protection or remedy for Michael under Queensland or Australian law.

Proposed improvements to these mechanisms

One of the issues which the Committee is tasked to consider is whether the existing laws presently do or, with appropriate amendments, could achieve the same outcome as a Human Rights Act.

QAI strongly submits that this is not the case. The enactment of a Human Rights Act is the appropriate and necessary next step for the Queensland Parliament. Reform or supplementation of existing state legislation, in whatever form, will be an inadequate compromise that will send a clear message to all Queenslanders about the value accorded to human rights by the Government.

As noted above, there are endemic, structural weaknesses with the anti-discriminatory model in Queensland that go to the very foundation of the laws. As noted above, an enforceable set of Human Rights Indicators would be required for every law, which is impractical. We are not proposing a raft of reforms to existing legislation that could suffice in the absence of the enactment of a Human Rights Act for the simple reason that we consider that the only viable outcome from this Inquiry is the enactment of a Human Rights Act. We will therefore

concentrate on the form that we propose this Act should take, discussing ancillary reforms to the existing relevant Acts in this regard.

The operation and effectiveness of human rights legislation in Victoria, the Australian Capital Territory and by ordinary statute internationally

Summary and key recommendations:

- The introduction of a Human Rights Act or Charter in Victoria and the ACT has had a demonstrable, positive impact on the culture of each of these jurisdictions. It has not been accompanied by adverse effects, such as a flood of litigation or an abuse of power by the judiciary.
- A limitation of the Victorian model, which was identified in the eight-year review of the Human Rights Charter, was the lack of a freestanding cause of action created by the legislation. QAI proposes that the Queensland model replicate the ACT approach and provide standing to seek a remedy under the Human Rights Act without the need for a related cause of action. We propose that the Queensland HR Act enable independent complaints to be lodged alleging a breach of the HR Act without the requirement that the action be linked to another claim.
- For all human rights models, funding is critical to ensure there is appropriate systems, expertise and infrastructure in place to support the translation of the human rights laws into practice.

The Committee 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. Suffice to note that the level of public support for the Charters documented through the periodic review has been at exceptionally high levels – the 2011 review of the Victorian Human Rights Charter recorded 95% support for retaining or strengthening the Charter.

We do wish to draw the Committee's attention to the following benefits of the human rights legislation in these two jurisdictions which are particularly resonant for marginalised and disempowered groups 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.

Core benefits

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 area 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.
- There has been a cultural shift, whereby human rights principles such as freedom, equality, dignity and respect have become embedded 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 the HR Act and Charter has initiated a human rights dialogue, which has in turn led 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 in Queensland – we need to shine a light on the practices of service providers that disadvantage vulnerable people with disability.

- There has been improved accountability between the different arms of Government.

Areas for improvement

A key limitation of the Victorian Charter that was identified in the eight-year review of the Human Rights Charter was the lack of independent standing created by the legislation. In the ACT, there is a freestanding cause of action. However, as in Victoria, damages are not recoverable.

QAI proposes that the Queensland HR Act should provide an independent or freestanding cause of action for all rights in the HR Act, enabling independent complaints to be lodged alleging a breach of the HR Act without the requirement that the action be linked to another claim.

As noted elsewhere, we also strongly support the introduction of an independent body empowered to investigate potential breaches of the HR Act.

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.

Approximately five percent of issues considered under the Charter to date have involved disability law.[32]

The costs and benefits of adopting a HR Act (including financial, legal, social and otherwise)

Summary and key recommendations:

- While there would be some implementation costs associated with the introduction of a Human Rights Act in Queensland, these costs would be outweighed by the economic benefits that would increase over time.

[32] http://www.liv.asn.au/getattachment/ec878607-f355-4b16-8592-6a025ac0ff0f/inquiry-and-review-of-the-charter-of-Human-rights-.aspx.

- Further, there would be significant social and other benefits that would result from the introduction of a Human Rights Act in Queensland.
- The commitment of appropriate funding is essential to enable the translation of human rights ideals into practice. To fail to financially support a Human Rights Act is false economy.

Financial costs and benefits of a Human Rights Act

As with any change to the status quo, the introduction of a Human Rights Act in Queensland 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.

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 this level of information regarding economic costs, has published details of the calculation of costs.

This review 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)
- 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.

It is trite to state that costs will be incurred by the introduction of a Human Rights Act in Queensland, particularly in the initial period as adjustments are made, relevant positions are established and a review of existing legislation is conducted. However, to use this expense as a potential reason to not introduce a Human Rights Act would be foolish and short-sighted.

We know from international research 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, protecting the human rights of persons with disabilities 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.

Legal costs and benefits of a Human Rights Act

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 is leaving us lagging behind other western democratic nations.

A key benefit of the introduction of a HR Act 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 Queensland; and it would demonstrate to the international community that the Queensland 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.

The Victorian and ACT experiences have both shown 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 without resort to litigation, thus reducing costs.

Case in point:

Presently in Queensland, the Queensland Civil and Administrative Tribunal is tasked with hearing approximately 800 Restrictive Practice applications each year. Queensland Advocacy has the capacity to represent only approximately 15 of these each year. For the remainder, the legal representation remains a pressing, unmet need. Strong human rights leadership in this area would have significant positive implications for the legal sector, in reducing the Tribunal's time expended in this area.

Social costs and benefits of a Human Rights Act

The social benefits of introducing a Human Rights Act in Queensland would be significant and the social costs negligible. The introduction of a Human Rights Act would be a strong statement of what we value as a community and would help to define the Queensland ethos in a positive and contemporary way moving forwards.

The introduction of a Human Rights Act would protect marginalised Queenslanders and address disadvantage. This would have important social benefits, not only for these Queenslanders but for entire communities and society in general. It would also be a social leveller, applicable to all people without distinction. As such, as Queensland Human Rights Act would be a first, important step in lessening the divide between those with heightened vulnerabilities and those without.

Previous and current reviews and inquiries (in Australia and internationally) on the issue of human rights legislation

Summary and key recommendations:

- The idea of legislative protection of human rights in Queensland is not new, but dates back to the 1950s, when it was first tabled by the then Country-Liberal Coalition Government.
- Previous inquiries in Australia have recorded very high levels of public support for the introduction of a Human Rights Act and the Australian state and federal Committees that have been tasked with considering this issue have unanimously recommended for the introduction of legislative human rights protection.
- Concerns about the introduction of formal human rights protections have chiefly pertained to the introduction of a constitutionally-ingrained bill of rights, rather than the passage of a Human Rights Act as an ordinary Act of Parliament.

In Queensland, the potential for a Human Rights Act is not a novel idea. References to proposed human rights legislation in Hansard date back to 1957, with a Constitution (Declaration) of Rights) Bill introduced by the Nicklin (Country-Liberal coalition) Government in 1959 in response to an election promise.[33] The main criticisms with this proposal centred on property rights and the proposed constitutional entrenchment of rights, rather than any substantive concerns about the formal protection of human rights.

Since that time, human rights were periodically tabled in Parliament, generally in response to specific federal or international human rights concerns or initiatives (for example, the enactment of Commonwealth human rights, equal opportunity and discrimination legislation in the 1970s and 1980s).

The plight of those with disability, particularly intellectual or cognitive disability or mental illness, are often highlighted as part of submissions emphasising the need for legislative human rights protection. In Tasmania, the Law Reform Institute inquiry into the need for a Charter of Rights in Tasmania, conducted in 2006, highlighted that people with intellectual disabilities routinely experience a lack of dignity and respect, even by service providers and those charged with safeguarding their interests. It was noted that there is a lack of genuine engagement with the people that these services are meant to care and work for, which means that many rights that the majority of citizens take for granted, such as the right to freedom of movement, are illusory for those with disabilities. Because this right is not considered in terms of the varying needs of those with disabilities, at even the most basic level of access to buildings, facilities and the like, it may be denied to them. It was noted that the following rights are particularly critical, yet routinely violated, for people with disability:

- the right to be treated with respect and dignity;
- the right to privacy;
- the right to be able to make choices;
- the right to self-determination;
- the right to information and to be informed;
- the right to have a say;
- the right to be free from abuse;
- the right to independence;
- the right to sexual expression;
- the right to complain;
- the right to have an advocate;
- the right to work;
- the right to an adequate income;
- the right to access the community;
- the right to freedom of movement and adequate transport.

It should be noted that both the Tasmanian inquiry of 2006 and the Western Australian inquiry of 2007, which were both public consultations into proposed human rights protections, akin to

[33] See http://www.parliament.qld.gov.au/work-of-assembly/hansard/indexes-to-debates.

the present Queensland inquiry, recommended that a Charter of Human Rights be enacted at a State level.

Through our work advocating for the most vulnerable people with disability in Queensland, QAI is aware that these are the same rights (the protection of which is vital) to the enablement of people with disability to live a good, ordinary life. They are also the rights routinely violated, including by service providers and government agencies and organisations charged with protecting them. As was also recognised in the Tasmanian inquiry, there is the need for both individual protection of these rights as well as systems change and advocacy to address systemic issues such as disability discrimination in employment.

At a federal level, the Committee 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.[34] 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 falls well short of making real progress in the area of human rights protection or reforms, whilst no incurring significant expense for the government.

Other national and state inquiries have repeatedly made a similar finding – that the human 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.[35]

In the international context, the UK provides human rights leadership from which Australia and Queensland 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.[36] This is important in dispelling the myth that human rights of vulnerable groups are adequately protecting by existing legislation, such as anti-discrimination laws.

The objectives of the legislation and rights to be protected

Summary and key recommendations:

- The main objective of a Human Rights Act must be to protect the basic human rights of all Queenslanders.
- A related objective to equalise the current power imbalance between those with and

[34] See: http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BriefingBook43p/humanrightsprotection.
[35] 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).
[36] Ms Caroline Ellis, Deputy Chief Executive, RADAR – transcript 23.10.08. See: http://www.equalityhumanrights.com/sites/default/files/documents/hri_report.pdf.

without heightened vulnerabilities, by ensuring the rights of all Queenslanders are protected at all times, in all circumstances.

- QAI submits that the Human Rights Act 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 protect key economic, social and cultural rights as well. The economic, social and cultural costs of doing so are far outweighed by the benefits.

The human rights protection provided by the Victorian and ACT acts is primarily for civil and political rights.

The ACT Human Rights Act also covers some economic, social and cultural rights in a limited way (such as the right to education and the cultural, religious and language rights of minorities). On reviews of the ACT HR Act, the Government has refrained from expanding the economic, social and cultural rights contained in the HR Act without engaging in public consultation.

Australia has signed and ratified the International Bill of Rights, which includes a commitment to not only civil and political rights (through the International Covenant on Civil and Political Rights) but also Economic, Social and Cultural rights (through the International Covenant on Economic, Social and Cultural Rights). 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.[37] The ICESCR provides that states must take steps 'to the maximum of [their] available resources' to achieve the 'progressive realisation' of ICESCR rights.[38]

We further submit that protection should also be provided for key rights contained in the *Convention on the Rights of Persons with Disabilities*, the *Convention on the Elimination of All Forms of Discrimination Against Women*, as well as the rights already articulated in the *Anti-Discrimination Act 1991* (Qld).

QAI submits that the Queensland Human Rights Act should therefore protect the following rights:

- ★ right to self-determination (this includes the right to autonomy, with appropriate support);
- ★ 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);
- ★ 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,

[37] 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).
[38] See Article 2 of the ICESCR.

breastfeeding, relationship status, family responsibilities, trade union activity, age, association with a person with a prescribed attribute;

- ★ 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, 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;
- ★ cultural rights of ethnic, religious or linguistic minorities;
- ★ property rights;
- ★ right to liberty and security of person;
- ★ humane treatment when deprived of liberty;
- ★ rights of children in the criminal process;
- ★ right to a fair hearing;
- ★ protection of rights in criminal proceedings and against retrospective criminal law;
- ★ right to be tried or punished not more than once;
- ★ right to housing (including the right to live where, how and with whom you want);
- ★ right to education;
- ★ right to adequate health care;
- ★ right to food;
- ★ protection of the environment;
- ★ right to an adequate standard of living;
- ★ right to participation in cultural life.

Of these, 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;

- ★ human 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.

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 limited[39] or overridden[40] 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.

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.

QAI proposes that in the initial period of operation of the 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.

How the legislation would apply to: the making of laws, courts and tribunals, public authorities and other entities

Summary and key recommendations:

- ➢ A Human Rights Act would prescribe the minimum standards to apply to all new laws that impact on the human rights and obligations of Queenslanders.
- ➢ The Human Rights Act could:
  - o Establish a new Queensland Human Rights Commission with jurisdiction to hear, conciliate and determine allegations of human rights breaches, educate and inform the public and bodies about their human rights and obligations;
  - o If the Committee is of the view that this first proposal is not feasible having regard to the costs of establishing a new, separate Human Rights body, the Anti-

[39] 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'.
[40] 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.

Discrimination Tribunal (ADTQ) should be re-enlivened, and the jurisdiction of the ADCQ broadened, so that these two bodies can collaboratively investigate, conciliate, hear and determine allegations of breaches of the HR Act, along with educative and training functions;

- If the Committee considers that this second proposal is also not financially feasible, the jurisdiction of the ADCQ should be broadened, so that it has jurisdiction to receive notification of allegations of breaches of the HR Act and to conciliate complaints, along with educative and training functions. Akin to the present Queensland anti-discrimination model, there should be power for the ADCQ to refer human rights matters to QCAT (and ultimately to the courts) where complaints have been unsuccessfully conciliated.

- QAI proposes that the Act must create a new statutory body, which could be separately established or created as a branch within the Human Rights Commission or ADCQ or ADTQ, as the case may be, with independent authority to investigate and prosecute complaints either upon notification or independent investigation. This is vital as the most offensive human rights breaches are often inflicted on our most vulnerable members of society, who may lack the confidence, skills, ability and financial capacity to know that their human rights have been breached, to lodge a complaint and to pursue it to an appropriate resolution.

- The Human Rights Act should be binding on the Queensland Government, all persons, organisations, businesses and entities carrying out the functions of the Queensland Government and those who 'opt in' to be bound by the Act.

How a Human Rights Act would apply to the making of laws

A HR Act would provide a benchmark for the fundamental rights of all Queenslanders that must be respected in the passage or amendment of all Queensland laws. The rights and obligations set out in the HR Act would represent the minimum standards to be met in all legislation.

As in Victoria (where the Charter contains a mechanism for promoting the compatibility of new legislation with human rights, via the preparation of Statements of Compatibility and the review by Scrutiny of Acts and Regulations Committee (SARC) of all Bills introduced into Parliament), the Queensland Government would be required to consider the compatibility of any new legislation, as well as any amendments or repeal, with the HR Act. The HR Act would not impair the sovereignty of Parliament. The HR Act would give Parliament the right to pass legislation that is not compatible with human rights, though a statement to this effect would have to be released, and due consideration given to the issue of human rights in this circumstance.

QAI supports a Queensland model akin to the 'dialogue mode' of human rights protection implemented through the Victorian Charter, 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 Supreme Court can issue a Declaration of Inconsistent Interpretation where it is found that a law cannot be applied consistent with human rights and the Queensland Government must respond to this Declaration within 6 months;
6. The relevant body (the ADCQ, ADTQ or a Queensland Human Rights Commission) would be responsible for monitoring and reporting on the implementation and operation of the Charter.

How a Human Rights Act would apply to courts and tribunals

QAI proposes that the Human Rights Act would need to establish a body with specific jurisdiction for all matters pertaining to the enforcement of the Act.

If funding considerations preclude the establishment of an independent Human Rights Commission, it would be far more preferable to extend the jurisdiction of the ADCQ than to extend the jurisdiction of QCAT, on the basis that the ADCQ is already the premier human rights body in Queensland and has the appropriate knowledge and expertise to deal with human rights-based complaints.

In order of priority, we rank the three viable options we have identified as follows:

1. The Human Rights Act should establish a new commission with jurisdiction to:
    a. hear, conciliate and determine allegations of breaches of the act by individuals and groups;
    b. educate individuals and bodies about their rights and obligations under the HR Act.

c. independently investigate suspected breaches and prosecute breaches of the HR Act, either in response to its own inquiries or on notification from any individual or body;

2. If the Committee is of the view that this first proposal is not feasible having regard to the costs of establishing a new, separate Human Rights body, the Anti-Discrimination Tribunal should be re-enlivened, and the jurisdiction of the ADCQ broadened, so that these two bodies can collaboratively investigate, conciliate, hear and determine allegations of breaches of the HR Act, along with educative and training functions.

3. If the Committee considers that this second proposal is also not financially feasible, the jurisdiction of the ADCQ should be broadened, so that it has jurisdiction to receive notification of allegations of breaches of the HR Act and to conciliate complaints, along with educative and training functions. Akin to the present Queensland anti-discrimination model, there should be power for the ADCQ to refer human rights matters to QCAT (and ultimately to the courts) where complaints have been unsuccessfully conciliated.

In both the second and third options, the name of the ADCQ and ADTQ should be altered, to reflect its new human rights jurisdiction. QAI proposes that any of the following sets of names would be appropriate:

- The Queensland Human Rights Commission (and the Queensland Human Rights Tribunal);
- The Queensland Human Rights and Anti-Discrimination Commission (and the Queensland Human Rights and Anti-Discrimination Tribunal);
- The Queensland Human Rights and Equal Opportunities Commission (and the Queensland Human Rights and Equal Opportunities Tribunal).

There is a fourth option, which is to vest the Queensland Civil and Administrative Tribunal with jurisdiction to determine complaints under the Human Rights Act. However, QAI does not support this option. QCAT already has a broad jurisdiction over a range of civil matters including building and tenancy disputes and retail shop leases, occupational matters, consumer, trader and debt disputes, guardianship and decision-making and with general administrative review. The clustering of human rights-based complaints with other, unrelated types of complaints is not ideal. Specialist experience and training in human rights matters is necessary to ensure that these matters are appropriately responded to and that the vulnerable people who have had their human rights breached can receive an appropriate response. QAI therefore considers this fourth option inappropriate. In the event that QCAT is deemed the appropriate arbiter for unconciliated claims, the claims should in the first instance always be directed to the (renamed) ADCQ.

QAI submits that it is imperative that the scope of powers vested in the new Human Rights Commission, or the expanded powers vested in the ADCQ or ADTQ, must include power to

independently investigate suspected cases involving a human rights breach(es). That is, rather than being purely responsive to individual (or even group) complaints, which is a recognised key weakness of the current anti-discrimination regulatory law model, a proactive investigative function must be created, by the establishment of an appropriate statutory investigative body within the relevant Commission. This is particularly vital when we consider that many of the most untenable human rights breaches are committed against our most vulnerable members of society, who may lack the confidence, skills, ability and financial capacity to know that their human rights have been breached, to lodge a complaint and to pursue it to an appropriate resolution.

How a Human Rights Act would apply to public authorities and other entities

QAI submits that the Human Rights Act should be binding on the following:

- The Queensland Government;
- All persons, organisations, businesses and entities carrying out the functions of the Queensland Government;
- Those entities who elect to 'opt in' to the obligations of public authorities and be bound by the Act (as under the ACT Human Rights Act).

A Human Rights Act should also give standing to appropriate representative organisations, who are 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). For example, QAI should be empowered to lodge individual and collective claims and to negotiate on behalf of vulnerable people or groups of people with disability.

A Queensland Human Rights Act, once it is well established as everyday law and practice, should have implications for big business as well. No company like Telstra or BHP should be exempt from compliance with a Human Rights Act. As previously noted, a Human Rights Act has the power to influence cultural normative behaviour. Just as most of us are now accustomed to smoking laws, and we all are ingrained with seat belt laws, so too should respecting HR laws be common, every day practice for every business and every citizen

The implications of laws and decisions not being consistent with the legislation

Summary and key recommendations:

- From the Victorian experience, we know that key components of effective human rights legislation are:

- a simple, effective enforcement mechanism;
- a straight-forward and user-friendly procedure for lodging a complaint;
- widespread public awareness and understanding of the existence of the Human Rights legislation and its implications, particularly amongst vulnerable and disempowered groups.

➢ The Human Rights Act should offer a broad range of effective remedies, accessible in a user-friendly, non-intimidating and affordable forum, designed to compensate those whose human rights have been breached, to send a strong message about the importance of respecting human rights, and to deter further human rights breaches.

Implications for inconsistent laws

Upon enactment of the Human Rights Act, all current Queensland legislation should be scrutinised to determine whether it is compliant with the HRA. In the event that the legislation is deemed non-compliant, a statement of non-compatibility must be issued and the legislation subjected to review.

All new legislation introduced following enactment of the HRA should be reviewed for compliance prior to passage.

The Supreme Courts should be given power under the HRA to issue a declaration of incompatibility when a law cannot be interpreted consistently with human rights. This would not have the effect of invalidating the law, but it would activate an obligation on the part of Parliament to prepare and table a response to the declaration.

Implications for inconsistent decisions

As noted above, damages are not recoverable for a breach of the Human Rights Act or Charter in the ACT or Victoria. This is a limiting provision of this legislation, that can perhaps be explained by the 'softly, softly' approach taken by the respective ACT and Victorian governments in introducing legislative protection of human rights, as Australian trailblazers in this area.

QAI submits that Queensland, following a decade behind this leadership, should take initiative in developing the human rights law jurisdiction in a progressive way, one that is consistent with the likely future directions of human rights law reform in the ACT and Victoria. We propose that the Queensland HR Act should establish a freestanding cause of action with a full range of remedies, including damages.

In light of the vulnerability and disempowerment of many victims of human rights violations, we propose that the starting point for lodging an action for breach of the HR Act should be the

user-friendly and relatively informal environment of a Commission or Tribunal, rather than a Court such as the Supreme Court, with its intimidating, legalistic and costly environment.

Further, as noted elsewhere, the ability to independent lodge a claim should be buffered by the existence of a statutory body with powers to independently investigate and prosecute human rights breaches.

The process could be as follows:

1. A person alleging their human rights have breached should have standing to lodge a claim with the relevant Commission or Tribunal, as the case may be (as discussed above), with jurisdiction to determine breaches of the HR Act;
2. Akin to the present Queensland anti-discrimination regulatory model, the first step may be the convening of a conciliation conference, where an attempt is made to resolve the dispute in the presence of an independent arbiter. While the confidentiality of the complainant should be protected, the facts of the complaint should otherwise be made public, to avoid a recognised pitfall of the anti-discrimination law jurisdiction, which is the confidential nature of the conciliation process.
3. If resolution of the complaint is unsuccessful, the complaint should proceed to arbitration, in a costs-neutral jurisdiction.
4. Without detracting from any of the above rights, an independent statutory body should have powers to investigate, upon independent inquiry or notification from any source, suspected breaches of the HR Act of both an individual and systemic nature and to prosecute perpetrators, with reference to a full range of remedies, including injunctive relief, declarations, orders to cease the infringing conduct and damages.

It is essential that all vulnerable people, including people with disability, should be adequately and appropriately supported at all stages of this process to communicate and pursue their complaint and be informed about their rights.

The implications of the legislation for existing statutory complaints processes

Summary and key recommendations:

- The ability to make a complaint alleging a breach of a right(s) under the Human Rights Act should be additional to, and should not detract from, existing legal rights.
- A likely result of the enactment of a Human Rights Act would be a reduction, rather than increase, in rights-related complaints.
- There would be some overlap with existing statutory complaints processes (particularly in the area of anti-discrimination law), and some separate complaints lodged under the Human Rights Act.
- Many individual causes of action would be replaced by investigation and resolution of

human rights breaches by the independent statutory body proposed.

QAI submits that a cost-effective way to roll out a Human Rights Act in Queensland would be to build upon the existing anti-discrimination law jurisdiction. While there are many deficiencies in this jurisdiction, as discussed above, in terms of both the form and substance of the law and process, there are also positive features that could be adapted and strengthened. There are cost benefits to be gained by the amalgamation of anti-discrimination complaints, although a freestanding cause of action is also essential. As noted above, QAI also supports the expansion of the regulatory model to include pro-active investigation by a statutory body of suspected breaches of the HR Act.

The functions and responsibilities under the legislation

Summary and key recommendations:

- An overarching aim of the introduction of a Human Rights Act in Queensland should be the creation of a robust human rights culture in Queensland, facilitated through a regulatory model akin to the 'dialogue' model established by the human rights legislation of Victoria, the ACT and the UK.
- A Queensland Human Rights Commissioner should be appointed with responsibility to provide leadership and oversight over human rights issues in Queensland. This position may be amalgamated with the role of Anti-Discrimination Commissioner of Queensland.
- A Queensland Human Rights Commission should be established with responsibility for:
  - promoting, protecting and defending human rights in Queensland;
  - creating a culture of understanding of and respect for human rights in Queensland;
  - resolving complaints (both individual and group) lodged under the Human Rights Act;
  - disseminating information and providing training and leadership to business, government and the community;
  - conducting regular, periodic reviews of the Act, to ensure compliance with core objectives of the HR Act and international human rights treaties to which Australia is party.

Like the 'dialogue' model established by the human rights legislation of Victoria, the ACT and the UK, QAI supports implementation of a regulatory human rights model that encourages interaction between the three arms of government with a view to building a robust human rights culture in Queensland.

Following enactment of a HR Act, the legislative arm of government – the state Parliament – should be required, through the establishment of a parliamentary Human Rights Committee, to review existing Queensland law to identify compatibility with the HR Act and to propose suggested improvements, as appropriate, in circumstances of non-compliance (and to issue a statement of human rights compatibility for all bills and regulations introduced into Parliament). Parliament should also be required to consider whether new laws comply with the HR Act prior to passage and the potential human rights implications of all laws. Appropriate steps should be taken to safeguard the rights of vulnerable people under all legislation.

The executive arm of government – the government agencies, businesses and organisations that perform duties of a public nature – should be bound by the HR Act in their dealings with all individuals. They should have regard to the HR Act in making decisions. They should work to create a culture of human rights compliance and respect, and ensure state departments and agencies develop human rights action plans, prepare annual reports and conduct human rights audits, ingraining human rights principles into public sector values, practice and procedure.

The judicature – the courts and tribunals – should be required to comply with the HR Act, as well as with relevant international human rights laws, in making all decisions.

A Queensland Human Rights Commission should be established with responsibility for:

- promoting, protecting and defending human rights in Queensland;
- creating a culture of understanding of and respect for human rights in Queensland;
- receiving, investigating and resolving complaints (both individual and group) lodged under the Human Rights Act;
- disseminating information and providing training and leadership to business, government and the community about their rights and responsibilities under the HR Act;
- conducting regular, periodic reviews of the Act, to ensure compliance with core objectives of the legislation as well as international obligations to which Australia has committed by signing and ratifying international conventions and treaties.

Whether a Queensland Human Rights Commission is established as an independent body, or whether an existing statutory body such as the Anti-Discrimination Commission is vested with jurisdiction to administer the Human Rights Act in Queensland, it is vital that the body is appropriately staffed and resourced to carry out its functions.

Conclusion

It is time for the Queensland Government to take action to protect the rights of all Queenslanders. A Human Rights Act, with appropriate form and content, could improve the lives of all Queenslanders 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:[41]

> *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,[42] then following by acceptance and incorporation as a cultural norm. Research also shows us the potential for changes in law to 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:[43]

> *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.*

It is time for the Queensland Government to initiate this paradigm shift, and begin the process of normalising respect for human rights that should have been commenced long ago.

[41] 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.
[42] Kristen Booth Glen, 'Changing Paradigms: Mental Capacity, Legal Capacity, Guardianship and Beyond' (2012-2013) 44 *Columbia Human Rights Law Review* 93, 99.
[43] 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.