



INTERNATIONAL
COMMISSION
OF JURISTS

International Commission of Jurists Queensland Inc

PO Box 12249
George Street
BRISBANE QLD 4003

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

Dear Research Director

Submission to the Human Rights Inquiry

The International Commission of Jurists (Qld) Inc (**ICJ Qld**) writes in support of a Human Rights Act in Queensland on the basis that it is necessary for the rule of law in parliamentary democracies of the 21st century.

1. Executive Summary

- 1.1. This submission addresses in broad terms the following Terms of Reference of the Human Rights Inquiry: 1, 2(a) and (b) and 3(b) and (d).
- 1.2. ICJ Qld submits that a Human Rights Act is necessary because:
 - (a) a Human Rights Act in Queensland would preserve and enhance the rule of law and separation of powers in Queensland; and
 - (b) there are real gaps in the legal protection of Queenslanders at present.
- 1.3. ICJ Qld further submits that a Human Rights Act should provide for:
 - (a) stand-alone remedies for breaches of a person's human rights which are protected by the Act;
 - (b) complaint and conciliation processes in a similar form to that provided in the *Anti-Discrimination Act 1991* (Qld); and
 - (c) the ability for Parliament to limit or override human rights in certain circumstances, and otherwise have the final say about legislation it makes.

2. About ICJ Qld

- 2.1. The International Commission of Jurists (ICJ), founded in Berlin in 1952, is an international non-governmental organisation, dedicated to the primacy, coherence and implementation of international law and principles that advance human rights and the defence of judicial independence through the rule of law.
- 2.2. One of the visions of the ICJ is a world in which everyone is equal before the law and protected from human rights violations by the law and in practice; one in which those in power are held accountable for human rights violations; where justice is administered in accordance with due process of law; where victims have access to effective remedies and justice; and those who come before the courts receive a fair trial and never face the death penalty.
- 2.3. The ICJ holds consultative status with the United Nations Economic and Social Council, the United Nations Educational, Scientific and Cultural Organisation, the Council of Europe, and the African Union. ICJ won the United Nations Award for Human Rights in 1993 and was designated in 1987 as a Peace Messenger by the United Nations General Assembly.
- 2.4. ICJ Qld is a branch of the Australian section of the ICJ; the latter was founded in 1958.

3. A Human Rights Act is a necessary part of modern day democracy

Promotes the Rule of Law

- 3.1. The Rule of Law is at the cornerstone of our Westminster parliamentary democracy. The United Nations states that the Rule of Law:

“refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards.”¹ (emphasis added)

- 3.2. A Human Rights Act enhances the Rule of Law in the following ways:
 - (a) It provides the benchmark of human rights standards against which new laws can be assessed to ensure all intentional or unintentional effects on human rights are known, publicly debated and either consciously approved by Parliament or minimised by amendment;
 - (b) It provides an important check and balance in Queensland’s uni-cameral system, whereby all legislation can be assessed against a clear and defined list of human rights prior to its introduction to Parliament;
 - (c) It can guide decision-makers within government departments or other public authorities to deliberately consider the human rights of individuals and to exercise their, often wide, powers in a way that is fair and just, and not arbitrary (whether that be intentional or by inadvertence, delay or incompetence);

¹ Report of the Secretary-General: The rule of law and transitional justice in conflict and post-conflict societies (S/2004/616).

- (d) When a government decision impacts on the human rights of an individual, it can provide a mechanism for review that is not limited to the narrow framework of judicial review or anti-discrimination laws;
 - (e) It can provide a language that empowers individuals, and organisations assisting individuals, to engage with government departments and improve their experience of public services without the need to have recourse to litigation; and
 - (f) It can provide the basis for important education of public servants and have positive impacts on culture within government departments and the way in which they engage with, and make decisions about, members of the public.
- 3.3. Further, concerns about the risk to Parliamentary sovereignty have not been borne out in the modern human rights Acts in common law jurisdictions. The following elements of the Victorian *Charter of Human Rights and Responsibilities (VCHRR)*, in particular, preserve parliamentary sovereignty and maintain the appropriate separation of powers:
- (a) A reasonable limits clause, such as s.7(2) VCHRR, permits a human right to be subject to reasonable limits as can be demonstrably justified in a free and democratic society. Parliament can continue to make decisions about how best to balance competing rights, how to protect the community from crime and how to allocate limited public funds. The list of relevant facts in s.7(2) VCHRR also makes the operation of this provision more transparent and makes it easier for the public and persons applying the Act to know when a right can be limited.
 - (b) The power of the Supreme Court to adjudicate on legislation is limited to making a declaration of inconsistent interpretation (such as s.36 VCHRR) and such a declaration has no effect on the validity or operation of the legislation and does not create any cause of action or create any legal right in any individual (see s.36(5) VCHRR). The power remains with the Parliament as to whether any change to the legislation should be made – that is, Parliament can be informed by, but is not subject to or bound by, the decisions of the Supreme Court.
 - (c) An override clause, such as s.31 VCHRR, recognises that Parliament may need to be able to introduce legislation that is clearly in contravention of human rights. This clause gives Parliament a power, to be used in exceptional circumstances, to declare that an Act or a provision of an Act, has effect despite being incompatible with one or more human rights. Such a declaration is not justiciable in the Courts; and it has a sunset clause, requiring Parliament to re-consider the need for such a provision after 5 years. Such a clause is technically unnecessary, but it is advantageous because it permits Parliament to address political imperatives or emergency situations without needing to amend or dilute the human rights legislation itself.
- 3.4. In short, in any form, a Human Rights Act promotes good governance and good decision-making. It ensures that the executive arm of government, in particular, acts according to the Rule of Law and is accountable when they act in a way that is not fair or just. Appropriate provisions can be included which preserve Parliamentary sovereignty and avoid the negative effects associated with, for example, the United States' Bill of Rights.
- 3.5. A 21st century Human Rights Act, modelled on those from the common law jurisdictions, can therefore preserve and enhance the Rule of Law and the separation of powers in Queensland's Westminster democratic system.

Gaps in current protections

- 3.6. It is often wrongly assumed that if a person is unfairly treated in their dealings with government or publicly funded services in Queensland that they will always have an ability to have that decision reviewed and overturned.
- 3.7. Anti-discrimination laws are specific and the jurisprudence can often be complicated. A person must be treated less favourably substantially because of a particular attribute and this must be less favourable in comparison to all other persons without that particular attribute (not most people, or not people with a different attribute). Alternatively, a person must be able to prove that a term was imposed on them and that persons with the attribute are not able to comply and that a higher proportion of persons without the attribute are able to comply and that term is not reasonable. Many people are not protected by decisions which are made unfairly, arbitrarily, carelessly or without any reason.
- 3.8. Judicial review is also narrow in its scope. Judicial review:
- (a) only applies to decisions made under an Act of Parliament. It does not apply to all decisions made by persons in government departments, and rarely applies to decisions made by non-governmental/private persons or organisations who may provide publicly funded services, notwithstanding the fact that those decisions can have a profound impact on the lives of a person;
 - (b) cannot assess the merits of a decision and focuses only on technical legal errors;
 - (c) cannot permit a judicial officer to make a new, better decision, but results in the matter being remitted to the original decision-maker to make again according to law; and
 - (d) can rarely impinge a decision-maker with wide discretionary powers, even if their decision resulted in an unfair outcome.
- 3.9. Further, not all decisions made are subject to internal review processes.
- 3.10. The gaps in protection can be demonstrated by the following example: an elderly married couple enters a State funded nursing home together and are not permitted to continue to sleep in the same bedroom, or be in the same wing of the building or even perhaps in the same facility. Usually such a decision is an operational decision and not one made pursuant to any legislation; therefore, it would not be amenable to review under the *Judicial Review Act 1991*. Further, the anti-discrimination laws would not apply because their treatment was not because they were married or elderly. It was because a policy was applied strictly and/or without consideration to their right to a private life or family life. Such a couple would not have any legal recourse in Queensland at present; nor would they have any human rights language which they, or others, could use to advocate on their behalf.
- 3.11. Attached as Table 1 to these submissions are case studies from the first five years of operation of the VCHRR. In all of the examples annexed, other legal recourse was either not available at all or was not easily available or would not have resulted in the same positive outcomes.

4. Elements that must be included

4.1. ICJ Qld suggests that there is much that can be learned from:

- (a) the successful and informal operation of the Anti-Discrimination Commission of Queensland (**ADCQ**) and its processes; and
- (b) the operation of the Victorian and ACT human rights frameworks over the last decade.

4.2. In particular, ICJ Qld submits that a Queensland Human Rights Act should provide for:

- (a) stand-alone remedies for breaches of a person's human rights which are protected by the Act;
- (b) complaint and conciliation processes in a similar form to that provided in the *Anti-Discrimination Act 1991* (Qld); and
- (c) the ability for Parliament to limit or override human rights in certain circumstances, and otherwise have the final say about legislation it makes.

4.3. As to the need for a stand-alone cause of action, the *United Nations International Covenant on Civil and Political Rights* obliges States to provide effective remedies for non-compliance with protected rights: article 2(3).

4.4. Further, the *2015 Review of the Victorian Charter of Human Rights and Responsibilities Act 2006* included the following recommendations which are pertinent to the formulation of a human rights framework for Queensland:²

- (a) that the Victorian Charter be amended to include a stand-alone cause of action in the Victorian Civil and Administrative Tribunal;
- (b) that if the Tribunal finds that a public authority has acted incompatibly with a Charter right, it should have power to grant any relief or remedy that it considers just and appropriate, excluding the power to award damages;³
- (c) that a person can seek judicial review of a decision on the ground that the decision is unlawful under the Charter, without having to seek review on any other ground;⁴
- (d) that the Victorian Equal Opportunity and Human Rights Commission be given the statutory function and resources to offer dispute resolution for disputes under the Charter.⁵

4.5. There have also been calls in the ACT jurisdiction to give legislative clarity to the proposition that remedies for breaches of human rights protected in the Act can be given by courts and tribunals other than the Supreme Court. This was because of concern that the provisions were not being utilised due to the expense and formality of the Supreme Court processes.⁶

² http://assets.justice.vic.gov.au/justice/resources/f7185d30-454f-47bb-944e-14fb51bd699f/report_final_charter_review_2015.docx

³ See recommendation 27(a).

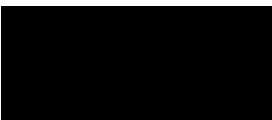
⁴ See recommendation 27(c).


⁵ See recommendation 23.

⁶ 2014 Review by the ACT Human Rights and Discrimination Commissioner: *Look who's talking: A Snapshot of Ten Years of Dialogue under the Human Rights Act 2004*, pp.6-7.

- 4.6. Moreover, in 2014/2015, the ADCQ successfully resolved 53% of complaints through conciliation,⁷ with 92% of complaints being finalised within the Commission within 6 months.
- 4.7. The importance of the clauses which preserve Parliamentary sovereignty are set out in paragraph 3.3 above.
- 4.8. It is the submission of ICJ Qld that the above facts show the value of a Queensland human rights framework that would include the following:
- (a) A stand-alone cause of action for a breach of those human rights protected under the Act;
 - (b) The ADCQ, or similar body, with the statutory function and resources to receive complaints and offer conciliation processes in the same way that discrimination complaints are dealt with;
 - (c) Justiciability in the Queensland Civil and Administrative Tribunal (**QCAT**) of complaints that are not successfully resolved in the ADCQ (or similar body) and power for QCAT to grant any relief or remedy that it considers just and appropriate;
 - (d) The ability for a person to raise a breach of the Human Rights Act in another legal proceeding, and the ability for a court or tribunal to make any order, or grant any relief or remedy, within its powers in relation to that proceeding;
 - (e) The inclusion in the *Judicial Review Act 1991 (Qld)* of an independent ground of review that a decision is unlawful under the Human Rights Act/ in breach of a human right protected under that Act;
 - (f) The vesting of primary judicial authority on points of law in the Queensland Supreme Court in relation to the Human Rights Act, including to hear appeals from QCAT with respect to complaints under the Human Rights Act and interpreting whether a statute is consistent with the Human Rights Act; and
 - (g) A “reasonable limits” clause, an “override” clause and a provision which makes it clear that a pronouncement by the Supreme Court that an Act or provision is not consistent with the Human Rights Act has no effect on the validity or operation of that Act or provision and creates no legal right or cause of action in an individual (such as found in ss.7(2), 31 and 36(5) of the VCHRR).
- 4.9. We are happy to address the Committee in person if required.

Yours sincerely



C.J.Klease
Vice-President, ICJ Qld
Replies to Vice-President (Carla Klease) 

⁷ See Annual Report 2014/2015, p.9.

TABLE 1 – CASE STUDIES FROM VICTORIA

Source: Victoria's Charter of Human Rights and Responsibilities in Action: Case studies from the first five years of operation, Human Rights Law Centre, March 2012.

<p><u>Young boy not expelled thanks to Charter: p.34</u></p> <p>A male student with a learning disability was threatened expulsion by his school due to his behavioural issues. The advocate outlined to both the school itself and to the Department of Education and Early Childhood Development the student's relevant human rights. As a result of the communication, the boy was provided with the supports, which reduced his behavioural issues and consequently, he was allowed to stay on at the school.</p>
<p><u>Man with physical disability allowed to continue living in family home: p.36</u></p> <p>A man suffering from physical disabilities and limited mobility continued to live in his family home after his mother had been admitted in an elderly care unit and placed under a financial administration order by VCAT. In order to prevent the home being sold, the advocate raised the right to property under the Charter. In consideration of this right an agreement was reached whereby the man could continue living in the house as a tenant paying rent.</p>
<p><u>Man deprived of aids in correctional facility: p.36</u></p> <p>A physically disabled person in a corrections facility was frequently deprived of his aids while being moved from one part of the correction facility to another. This would result in him being without aids for weeks at a time and consequently suffering a great amount of pain. The advocate invoked the Charter, specifically right to humane treatment when deprived of liberty. As a consequence, the aids were returned to him and it was assured that they would remain for the period of his sentence.</p>
<p><u>Refugee afforded appropriate secure housing: p.38</u></p> <p>A female refugee and her children had been settled in public housing accommodation in Victoria. She applied for alternative accommodation out of fear for her security but was denied this by the Victorian Office of Housing. The legal service used the Charter to communicate with the Office of Housing, their obligation to uphold the woman's rights, including the right to security of persons and protection of families. As a consequence the woman and her children were relocated to more appropriate accommodation.</p>
<p><u>Young woman living with cerebral palsy provided with disability support services: p.38</u></p> <p>A 19 year old woman living with cerebral palsy was left in her home, alone and unable to leave, while waiting for the government to determine whether or not she was eligible for disability support services. The advocate communicated with the government that this treatment amounted to a breach of freedom from cruel, inhuman and degrading treatment, as protected by the Charter. Additionally, this was a breach of her right to privacy. The consequence of the communication was that the women was quickly determined eligible to receive support services and placed on a waiting list for case management.</p>
<p><u>Rehabilitation centre agree to consider Charter obligations when discharging patients: p.39</u></p> <p>A disabled centre was seeking to discharge a number of young people suffering from brain injury on the basis that their two-year term in the Centre had come to an end. The plan was to relocate them to an aged care facility, which would not provide the appropriate services or environment for the</p>

young persons. The disability advocate raised Charter rights in negotiations with the Care Centre and as a result, the Centre agreed to take into consideration their obligations under the Charter when determining what action should be taken with regard to these young persons.

Charter invokes understanding and response from TAC : p.39

A 40 year old man suffering from brain injury was living within an aged care home. An opportunity arose for him to assume residence within a more appropriate care facility. However, this needed to be accepted within a 30 day period. His grandparents wrote to the Transport Accident Commission (TAC) for them to service notice on the aged care facility but they failed to do so and the time limit lapsed. Upon appealing to the TAC, the grandparents were told that the Commission was simply required to follow procedure. The grandparents were then assisted to communicate with the TAC about the Charter rights of their grandchild. Within 12 hours of receipt of this communication, the TAC accepted responsibility for the omission and recognised the need to uphold the man's rights.

Charter gives young woman opportunity to find appropriate housing: p.40

A young woman who had settled in Victoria under refugee status was given a notice to vacate at the end of her three-month fixed-term tenancy agreement in transitional housing operated by a private provider. Despite having engaged a caseworker and lodging an application for public housing, she had not received assistance to find appropriate accommodation. Following the expiry of the notice period the private provider applied for a possession order for eviction. HPLC argued that this would be incompatible with the Charter, namely the right not to have home or property unlawfully or arbitrarily interfered with. As a consequence, the provider withdrew the application for possession and signed a second 3-month lease. After this second lease period ended, the young woman had still not found appropriate alternative accommodation. However, with the assistance of HPLC, she was approved for public housing and further, through negotiating with the private provider, was able to stay in the property during the application process.

Charter assists in affording 66 year old woman appropriate accommodation: p.42

A 66 year old woman, suffering various nervous state-type disorders had been applying for alternative accommodation as her public housing property was exacerbating her health conditions. She was told by the Office of Housing (OOH) that a transfer would not be possible for three years. The HPLC communicated with the OOH to remind them of their obligations under the Charter, namely the right to security and the right to life. They requested that the transfer to appropriate accommodation be prioritised. This was successful, with the OOH transferring the woman within 2 weeks.