



# Aboriginal & Torres Strait Islander Legal Service (Qld) Ltd

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

**By email: [lacs@parliament.qld.gov.au](mailto:lacs@parliament.qld.gov.au)**

Dear Research Director

## **Human Rights Inquiry**

Thank you for the opportunity to make a submission to the above inquiry. Our view is that:

1. it is appropriate and desirable for Queensland to introduce a Human Rights Act; and
2. together with other measures, the introduction of a Human Rights Act would improve the protection of the human rights of Queensland's Aboriginal and Torres Strait Islander peoples.

The views provided in this submission are based on our work with Aboriginal and Torres Strait Islander peoples in Queensland as they interact with the law. Accordingly, we have focused on the potential benefit of a Human Rights Act for Aboriginal and Torres Strait Islander Queenslanders and have addressed the following terms of reference:

1. the effectiveness of current laws and mechanisms for protecting human rights in Queensland and possible improvements to these mechanisms;
2. the operation and effectiveness of human rights legislation in Victoria, the Australian Capital Territory and by ordinary statute internationally;
3. the costs and benefits of adopting a HR Act (including financial, legal, social and otherwise); and

4. the objectives of the legislation and rights to be protected.

The Aboriginal and Torres Strait Islander Legal Service (QLD) Ltd ('ATSILS') provides legal services to Aboriginal and Torres Strait Islander peoples throughout Queensland. Our primary role is to provide criminal, civil and family law representation (inclusive of child protection representation).

We are also funded by the Commonwealth to perform a State-wide role in key areas of Law and Social Justice Reform, Community Legal Education and monitoring Aboriginal and Torres Strait Islander Deaths in Custody. As an organisation which for four decades has practiced at the coalface of the justice system, we believe we are well placed to provide meaningful comment, not simply from a theoretical or academic perspective, but also from a platform based upon actual experiences.

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

### *The human rights of Aboriginal and Torres Strait Islander Queenslanders*

The United Nations Declaration on the Rights of Indigenous Peoples ("the Declaration") contains the most relevant articulation of the human rights that relate to Aboriginal and Torres Strait Islander peoples.

The Australian Government announced their support of the Declaration in 2009. The Queensland Government has obligations arising from the Declaration and the current Minister for Aboriginal and Torres Strait Islander Partnerships has acknowledged that the Declaration,

*"...places a responsibility on States to cooperate in good faith with Indigenous peoples and their representatives to obtain informed consent on legislative or administrative measures that may affect them."*<sup>1</sup>

This responsibility arises from the obligations held by States, and accepted through their support of the Declaration, to take measures to respect, protect and fulfil the human rights of indigenous peoples including:

1. The right to self-determination (article 4);
2. The right to our own distinct political, legal, economic, social and cultural institutions while retaining our rights to participate fully in the political, economic, social and cultural life of the State (article 5);
3. The right to practice and revitalise our cultural traditions (articles 11, 12, 13 and 15);
4. The right to be consulted through our own representative institutions in order to obtain our free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect us (article 19);

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<sup>1</sup> See media statement, 13 September 2015, <http://statements.qld.gov.au/Statement/2015/9/13/today-marks-un-declaration-on-rights-of-indigenous-peoples>, on 7 April 2016.

5. The right, without discrimination, to the improvement of our economic and social conditions and the obligation of States to take effective measures to ensure the continuing improvement of our economic and social conditions (article 21).

The Declaration refers to the historic injustices that are the result of colonisation and dispossession of our lands, territories and resources. James Anaya, the previous United Nations Special Rapporteur on the rights of indigenous people has said,

*"...by alluding to this history from the outset, the Declaration reveals its character as essentially a remedial instrument. It is not privileging indigenous peoples with a set of rights unique to them. Rather indigenous peoples and individuals are entitled to the rights enjoyed by other peoples and individuals, although these rights are to be understood in the context of the particular characteristics that are common to groups with the indigenous rubric."<sup>2</sup>*

#### *Protection of the rights of Aboriginal and Torres Strait Islander peoples in Queensland*

While we welcome the Queensland Government's statement in relation to their commitment to operationalising the Declaration, in practice the rights of indigenous peoples as articulated in the Declaration are not properly protected in Queensland.

Our people are grossly over-represented in the criminal justice system, our children are grossly over-represented in the child protection system and we have no clear legal guarantees that historical injustices such as 'Stolen Wages' will never be repeated.

There is currently no clear, uniform process for consulting with Aboriginal and Torres Strait Islander peoples in Queensland and consequently laws and policies affecting us are introduced without our free, prior and informed consent.

We do not have a representative body that the government is required to consult with when making decisions that affect us.

Because there is no clear framework for the protection of our rights, when our rights are not given appropriate consideration in law making and government decision making we have no avenue for proper redress.

#### *Improvement of the protection of the rights of Aboriginal peoples through a Human Rights Act*

A Human Rights Act is an opportunity to better protect the rights of Aboriginal and Torres Strait Islander peoples. This legislation could, as it does in Victoria and the Australian Capital Territory (ACT), impose obligations on each arm of government to consider our rights in the performance of their duties. Both the ACT and Victorian Acts recognise the special significance of human rights to

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<sup>2</sup> S. James Anaya, "Why there should not have to be a Declaration on the rights of indigenous peoples", Keynote address to the 52d Congress of Americanists, Seville, July 2006.

Aboriginal peoples<sup>3</sup>, both Acts specifically protect the cultural rights of Aboriginal peoples,<sup>4</sup> and it has recently been recommended that the Victorian government work with Victorian Aboriginal peoples to consider how the Victorian Charter of Rights and Responsibilities could be improved to better protect the right of Aboriginal peoples to self-determination.<sup>5</sup>

Clearly, the type of legal human rights protection offered by the Victorian and ACT human rights legislation would improve the protection of our human rights in Queensland. There have been numerous case examples of how this human rights legislation has assisted Aboriginal peoples including the following:

1. A Victorian Aboriginal woman lived in housing owned and leased by a non-Aboriginal community organisation. A condition of her tenancy was that she was required to engage with community services. After her nephew died she went back to her country for a couple of weeks for sorry business. When she returned she started receiving warnings to engage with services, however she wasn't able to do so because she was overwhelmed with family responsibilities, trauma and grief. A possession order was made and the police came to her door with a warrant.

Her advocates made an application for an urgent review and stay. They argued that the community organisation had failed to engage with her cultural rights and the rights of her grandchild and family members in their eviction process. These rights are protected in the Victorian *Charter of Human Rights and Responsibilities Act 2006*. As a result the community organisation withdrew their possession application and engaged an Aboriginal support service.<sup>6</sup>

2. An Aboriginal girl was serving a sentence in a youth justice centre in the ACT for a number of offences. While incarcerated, she was also charged with two assaults and one charge of obstructing a territory official. She was convicted of these offences and sentenced. She appealed the sentences on the basis that the sentences were excessive and that certain required factors had not been taken into account. The judge found that the sentences were inappropriate, reduced them to shorter periods and ordered that they be served concurrently with her current period of incarceration. The judge took the young person's personal circumstances into account and found that the significant delay between the offence and the sentencing was unacceptable and in violation of the ACT's *Human Rights Act 2004*.<sup>7</sup>

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<sup>3</sup> See the preambles of the *Human Rights Act 2004* (ACT) (HRA) and the *Charter of Human Rights and Responsibilities 2006* (Vic) ('the Charter').

<sup>4</sup> See section 19 of the HRA and section 27 of the Charter.

<sup>5</sup> Michael Brett Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (September 2015), recommendation 49, <https://myviews.justice.vic.gov.au/2015-review-of-the-charter-of-human-rights>.

<sup>6</sup> Victorian Aboriginal Legal Service Submission to the 8 year review of the Charter, June 2015, Submission 98 (Case Study 1), [http://myviews.justice.vic.gov.au/application/files/9114/5567/8612/Submission\\_98\\_\\_Victorian\\_Aboriginal\\_Legal\\_Service.pdf](http://myviews.justice.vic.gov.au/application/files/9114/5567/8612/Submission_98__Victorian_Aboriginal_Legal_Service.pdf).

<sup>7</sup> *TM v Karapanos and Bakes* [2011] ACTSC 74.

## Complementary measures

While a Human Rights Act provides a framework for law and government decision making that should improve the consideration that governments give to our rights, the experience in Victoria and the ACT has been that this legislation alone will not provide the remedial protection of rights that is facilitated through the implementation of the Declaration.

Our view is that the introduction of a Human Rights Act for Queensland should be complemented by:

1. An education campaign that specifically works with Aboriginal and Torres Strait Islander peoples and organisations to help them to understand and seek enforcement of their rights;
2. Education for law and policy makers and the judiciary about the protection of the rights of Aboriginal and Torres Strait Islander peoples under the Act;
3. Resourcing for Aboriginal and Torres Strait Islander legal services to ensure that free, specialised legal representation is available to our people when their rights are unjustifiably limited; and
4. The establishment of an Aboriginal and Torres Strait Islander Social Justice Commissioner that reports directly to parliament in relation to the fulfillment of the Queensland government's human rights obligations modelled on the Aboriginal Torres Strait Islander Social Justice Commissioner role that sits within the Australian Human Rights Commission.

As a provider of criminal justice services for Aboriginal and Torres Strait Islander peoples we have been actively involved in the 'Change the Record' campaign. This campaign asks state, territory and Commonwealth governments to support justice reinvestment as a response to the over-representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system and the high levels of violence experienced by our peoples. The implementation of the principles associated with justice reinvestment is consistent with the Declaration and would be an example of policy informed by human rights. In addition to the measures listed above, our view is that the introduction of a Human Rights Act should be complemented by the implementation of the Change the Record policy reform principles.<sup>8</sup>

## 2. The operation and effectiveness of human rights legislation Victoria and the ACT

Queensland has an opportunity to learn from the experiences of Victoria and the ACT in the introduction of a Human Rights Act for Queensland. While, as outlined above, there are clearly better human rights protections for Aboriginal peoples in the ACT and Victoria, improvements to these models are required if we are to realise the potential offered by human rights legislation for Aboriginal and Torres Strait Islander peoples.<sup>9</sup>

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<sup>8</sup> Change the Record Key Principles [www.changetherecord.org.au/solutions](http://www.changetherecord.org.au/solutions).

<sup>9</sup> See the Victorian Aboriginal Legal Service Submission to the 8 year review of the Charter, June 2015, Submission 98 at [http://myviews.justice.vic.gov.au/application/files/9114/5567/8612/Submission\\_98\\_\\_Victorian\\_Aboriginal\\_Legal\\_Service.pdf](http://myviews.justice.vic.gov.au/application/files/9114/5567/8612/Submission_98__Victorian_Aboriginal_Legal_Service.pdf).

These improvements should include ensuring that:

1. Rights derived from the Declaration, including the right to self-determination, are protected in the Act;
2. the cultural rights protected in the Act are properly incorporated into lawmaking and policy development;
3. Queensland's Human Rights Act contains a clear cause of action, an accessible and cost effective dispute resolution process and remedies that include damages;
4. rights protected in the Act are considered during sentencing;
5. a clear definition of 'public authority' so that non-government organisations that are publically funded to perform public functions have clear obligations under the Act; and
6. the parliamentary committee system include a Human Rights Committee with the role of scrutinising legislation to ensure that it is consistent with the human rights included in the Act.

### **3. The costs and benefits of adopting a Human Rights Act**

The costs and benefits of adopting a Human Rights Act can be assessed by looking at the experience of other jurisdictions. The Human Rights Law Centre's submission to the current Queensland Human Rights Inquiry outlined the benefits that have been experienced in Victoria.

The Victorian Equal Opportunity and Human Rights Commission reports annually on the Victorian Charter's operation. Most recently they reported that after eight years the Charter has "become part of the everyday business of public authorities" and that it has "driven important human rights initiatives". They said that the Victorian Police, for example, have been addressing discriminatory policing and racial profiling by developing human-rights based policies, standards and strategies in Aboriginal communities.<sup>10</sup>

### **4. The objectives of the legislation and the rights to be protected.**

Our view is that:

1. the rights protected in the international human rights treaties that Australia is a party to, should be protected in a Human Rights Act for Queensland;
2. In order for the remedial potential of a Human Rights Act to be realised the rights articulated in the Declaration should be protected in a Human Rights Act for Queensland;
3. As a minimum a Human Rights Act for Queensland, should:
  - a. Include preambular recognition of the special importance that human rights have for Aboriginal and Torres Strait Islander peoples;
  - b. Protect the cultural rights of Aboriginal and Torres Strait Islander peoples; and

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<sup>10</sup> Victorian Equal Opportunity and Human Rights Commission, *2014 Report on the Operation of the Charter of Human Rights and Responsibilities*, 2015.

- c. Protect the right of Aboriginal and Torres Strait Islander peoples to self-determination and give effect to this right through the establishment of a Queensland Aboriginal and Torres Strait Islander Social Justice Commissioner.

Thank you again for the opportunity to provide our views to Queensland's Human Rights Inquiry. We encourage you to actively seek the views of other Aboriginal and Torres Strait Islander peoples and organisations as part of your inquiry and we would welcome the opportunity to speak to our submission at a public hearing.

Yours faithfully,



Shane Duffy  
Chief Executive Officer