



**Community  
Legal Centres  
Queensland**

# Human Rights Bill 2018

Submission to the Legal Affairs and  
Community Safety Committee

26 November 2018

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# About Community Legal Centres Queensland Inc.

All Australians understand and value the idea of a “fair go” – that we will be treated equally and fairly regardless of the circumstances we face. This extends to our legal systems, and community legal centres play a vital role in making Australia a safer and fairer place to live, by ensuring that everyone has access to justice.

Community legal centres are independent, community-run organisations that provide legal help to anyone who asks. There are more than thirty of these organisations across Queensland providing legal advice and ongoing representation and support.

**Community Legal Centres Queensland is the peak body for Queensland’s community legal centres, and we work with those centres towards a fair and just Queensland.**

We help community legal centres so they can provide effective, high quality services to their communities.

We help the network of community legal centres keep informed, united and relevant.

We help disadvantaged and vulnerable people in the community to understand their legal and human rights, access legal help, and be heard and respected.

**[www.communitylegalqld.org.au](http://www.communitylegalqld.org.au)**

## Executive summary

Community Legal Centres Queensland welcomes the introduction of the *Human Rights Bill 2018* (Qld) (**the Bill**) and appreciates the opportunity to make this submission to the Legal Affairs and Community Safety Committee (**Committee**). The introduction of the Bill, and its subsequent passing into law, will substantively strengthen the laws and practices that protect and promote human rights in Queensland.

Community Legal Centres Queensland supports the Bill in its current form. We propose some improvements to the Bill, including:

- incorporating more human rights from the UN DRIP to further protect and promote the rights of Indigenous Queenslanders;
- giving the Commissioner powers to direct public entities to address human rights complaints that are found to be substantiated;
- providing an independent cause of action for breaches of human rights;
- omitting consequential amendments to the *Corrective Services Act 2006*, or improving this clause if it is to be retained;
- recognising detention is a last resort for children; and
- including additional rights, including the right to housing; rights to protect survivors of domestic violence, sexual assault and other crime; and, the right to a healthy environment.

We endorse recommendations presented to the Committee by other submitters, including:

- amending the objects of the Bill (at clause 3(b)) to '*to help build a culture in ~~the~~ Queensland including the public sector that respects and promotes human rights*';
- providing greater clarity about the definition of 'public entities';
- strengthening the protection and promotion of the human rights of older Queenslanders;
- strengthening the protection and promotion of human rights of children and young people;
- removing the ability of Parliament to override the Act, as any laws should be consistent with human rights;
- ensuring only government decisions that are unlawful can be valid;
- strengthening reporting requirements, to provide greater accountability and increase community awareness of human rights; and
- considering how intervenors, contradictors and friends of the Court might be permitted to contribute to legal proceedings.

A copy of our 2016 submission to the Committee's inquiry into a Human Rights Act is **attached**, and provides examples of the practical impacts we expect from the Bill, and more detailed discussion of human rights norms and practices. This submission is directed to the Bill before the Committee, and offers strong support for the Bill, with some suggestions for improvement.

## We strongly support this Bill

Our members provide free legal help to about 50,000 vulnerable Queenslanders each year, and they have a unique insight into the experiences of Queenslanders who interact with government institutions, legal processes, and the law.

We commend the Government on its introduction of the Bill and its willingness to enshrine important protections for human rights in Queensland. Community Legal Centres Queensland believes introducing legislation is essential to safeguarding human rights in this State, and a Human Rights Act is necessary to protect vulnerable Queenslanders.

Community legal centres have a keen insight into the benefits that the Bill (if made into law) will have for thousands of vulnerable Queenslanders. We support strengthening laws and practices to protect and promote human rights in Queensland. The Bill will increase fairness and justice for vulnerable and disadvantaged Queenslanders – many of whom are our clients.

Practical examples where our members think this Bill could improve the protection of Queenslanders' human rights include:

- "Protection of the human rights to education and to equality will help to ensure children with disability are given access to an inclusive education and have their support needs met within the state educational system."  
– *Emma, Queensland Advocacy Inc.*
- "The Human Rights Act will help public housing authorities' prioritise people who are most at risk of being deprived of their rights to security and life. This will assist those, especially older vulnerable Queenslanders, who are at risk of homelessness due to family violence and other factors."  
– *Eugene, Brisbane North Community Legal Service*
- "We hope the Human Rights Act will bring about periodic reviews of the appointment of the Public Trustee for those clients who did not choose to have their money managed by a stranger"  
– *Robyn, Cairns Community Legal Centre Inc.*
- "The right to recognition before the law will recognise the rights of older Queenslanders and people with disability to assert their autonomy and independence, including the right to make legal decisions and act as their own agent. This will impact on the day-to-day decision making including medical treatment. It complements and enhances the rights already recognised by our Guardianship laws."  
– *Bill, Townsville Community Legal Service*
- "The security and sanctity of a person's home is central to their wellbeing and safety. By explicitly recognising the right to privacy, family and home, we expect the Human Rights Act will ensure fewer people are evicted to homelessness or subject to intrusive housing practices."  
– *Stephen, LawRight*



We support the Bill's clear objective of promoting a dialogue about the nature, meaning and scope of human rights, as we consider this dialogue is likely to strengthen a culture of protecting, promoting and preserving all Queenslanders' human rights..

**Recommendation 1: That the Committee recommend that the Bill be passed.**

We strongly support the inclusion of the 23 distinct human rights highlighted in the Bill. We are pleased each of the 21 human rights recommended for inclusion in our 2016 submission to the Human Rights Inquiry (**2016 Submission**) has been included in the Bill.<sup>1</sup> A copy of our 2016 Submission is **attached**.

We welcome the inclusion of two human rights beyond those recommended in our 2016 Submission – the right to health services and the specific protection for the cultural rights of Aboriginal peoples and Torres Strait Islander peoples.

## Cultural rights

Aboriginal and Torres Strait Islander peoples hold distinct cultural rights as Australia's first peoples, and it is imperative they are not denied the right to practice their culture.

Community Legal Centres Queensland notes this human right has not been expressly and separately<sup>2</sup> included in equivalent legislation in other Australian states and territories. Other states' approaches shouldn't prevent this human right being included in Queensland's the Bill, and we welcome the Government's leadership on this important national issue.

The landscape and understanding of reconciliation and recognition of the rights of Aboriginal and Torres Strait Islander peoples has also developed since the enactment of the ACT Legislation and the Victorian Legislation. It is entirely appropriate that a modern understanding of the rights of Australia's first peoples is reflected in its human rights legislation – and this should clearly include a particular recognition of the cultural rights of Aboriginal peoples and Torres Strait Islander peoples.

We acknowledge that further rights of Indigenous Persons, recognised in international law, are absent from the Bill, and suggest that incorporating rights from the UN Declaration on the Rights of Indigenous Persons (**UN DRIP**) be incorporated into the Bill. Other submissions to the Committee will consider the impact of this Bill on First Australians in more detail, and provide more detailed recommendations for improvement.

**Recommendation 2: that the Bill incorporate more human rights from the UN DRIP to further protect and promote the rights of Indigenous Queenslanders.**

## Right to health services

Including a specific right to health services is an essential inclusion in any Queensland human rights legislation, and should be supported by the Committee in its consideration of the Bill. Specifically, where the Bill seeks to regulate the actions of public entities insofar

<sup>1</sup> Our submission to the 2016 Inquiry was made under our former name, QAILS.

<sup>2</sup> Section 19(2) of the Victorian Legislation recognises the cultural rights of Indigenous people, as a component of broader cultural rights.

as they perform public functions, it is essential this specifically extends to health services, given the important role public entities serve in providing such services.

It is unclear why this right (and the right to education in clause 36) is framed as a 'right to access' rather than simply a right to health care or a right to education.

In Queensland, the government and other public entities provide essential health services to thousands of vulnerable people who would otherwise not have access to them. Given the importance of these services to Queenslanders wellbeing, and the limited access to these services, public entities providing health services must be conscious of the human rights of those who access their services. In particular, we believe public entities are obliged to ensure non-discrimination in the delivery of health services and a right of recourse for people who feel as though they have been unfairly treated will deliver an important layer of transparency to health services in Queensland.

Each of the rights discussed above have their basis in international human rights standards (as noted in the explanatory note), and we are entirely supportive of their inclusion in the Bill.

## Dispute resolution processes could be stronger

We have carefully considered the dispute resolution provisions included in the Bill, which provide for conciliation between complainants and public entities where the Commissioner has accepted a complaint.

We are concerned the Bill's conciliation provisions do not deliver binding outcomes or provide for enforcement of the rights set out in the Bill in any way. Specifically, if a conciliation fails, the Bill merely provides that the Commissioner is required to prepare a report for the complainant and the respondent setting out the substance of the complaint and the actions taken to resolve the complaint.<sup>3</sup>

We believe where there is no binding or clear outcome from a complaint being brought to the Human Rights Commission, aggrieved individuals will be disincentivised from raising concerns about breaches of their human rights by public entities. This is particularly the case given the structural power imbalance that naturally exists between individuals (who have human rights) and public entities with significant power (including the coercive power of the State). It is difficult to understand why an individual would bring a complaint to the Human Rights Commission under the framework set out in the Bill, given there is no right to a binding outcome and the complainant would have already sought to conciliate an outcome with the relevant public entity as a precondition of having the Commissioner even accept a complaint.

The current drafting is weighted in favour of public entities rather than individual complainants. However, the legislation is required because public entities already have significant power to influence the lives of individuals within Queensland, and it is necessary to correct the balance between individuals and public entities with legislation protecting human rights.

The legislation does little to further human rights protections in Queensland if individuals have difficulty seeking a resolution to their concerns about disregard for their human rights

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<sup>3</sup> Clause 88 of the Bill.

under its framework. The current dispute resolution framework will limit the efficacy of the Human Rights Commission insofar as regulating breaches of human rights is concerned. This should not be the position accepted by the Committee in its consideration of the Bill.

**Recommendation 3: that the Commissioner be given powers to direct public entities to address human rights complaints that are found to be substantiated.**

We endorse the position outlined in the submission to this inquiry from the Human Rights for Queensland campaign (of which we are a member), LawRight, Queensland Law Society and other submitters, that the Bill should provide victims with a freestanding cause of action against any public entity which fails to support human rights, with the full range of remedies, including damages. As it stands, the Bill only allows claims to be raised in legal proceedings if there is another ground on which to challenge the decision or action. A recent independent review of the Victorian Charter recommended introducing a standalone cause of action to address this failing.

**Recommendation 4: that the Bill be amended to provide an independent cause of action for breaches of human rights.**

## Respect the human rights of people in detention

In our 2016 Submission, we acknowledge the general point that not all human rights are 'absolute'.

We have some reservations, however, about proposed amendments to the *Youth Justice Act 1992* (Qld) and the *Corrective Services Act 2006* (Qld).

In particular, we are concerned about the proposed amendment to the *Corrective Services Act 2006* (Qld) as the consideration of human rights for a prisoner detained without charge is excused, provided the chief executive has considered the 'security and good management of corrective service facilities'.<sup>4</sup>

Given the Bill's recognition that rights can be limited,<sup>5</sup> we believe the consequential amendment to the *Corrective Services Act 2006* (Qld) is unnecessary.

**Recommendation 5: that clause 126 of the Bill be omitted.**

If consequential amendments to the *Corrective Services Act 2006* remain in the Bill, we strongly recommend that:

- **the 'or' at the end of the proposed section 5A(2)(a) be replaced with the word 'and'**, such that the chief executive is compelled to consider the safe custody and welfare of all prisoners when making decisions. The obligations of the chief executive and officers in relation to the Bill should not be satisfied merely because they have considered the security and good management of a facility – there must be an obligation to consider the welfare of all prisoners before it can be said a decision is consistent with the Bill.
- **the word 'also' be inserted into section 5A(2)**, to ensure the chief executive or officer does not contravene the clause 58(1) responsibility "only because the chief

<sup>4</sup> Clause 126 of the Bill.

<sup>5</sup> Clause 13 of the Bill.

executive's or officer's consideration **also** takes into account" the listed factors, together with the factors in clause 13 of the Bill.

We are particularly concerned about the proposed wording given it extends to officers, which includes all corrective services officers. It is imperative the Bill protects vulnerable Queenslanders, however the proposed wording clearly creates a risk that protections afforded by the Bill will be disregarded or ignored for prisoners within corrective facilities (who are some of Queensland's most vulnerable people).

There are already a number of well-documented and high profile instances of prisoners being treated poorly within correctional facilities. Building protections for officers, rather than prisoners, into Queensland's human rights legislation will do nothing to correct existing systemic issues, or extend the protections created by the Bill to those who require them.

**Recommendation 6: that any amendments to the *Corrective Services Act 2006* be limited.**

We do not share the same concerns in relation to the *Youth Justice Act 1992* (Qld), as the proposed amendments are limited only to the chief executive, which can be specifically and clearly delegated (such that the exemption is much more narrowly applied). We also appreciate there are instances in which it is appropriate to segregate children for their own protection, such as separating younger offenders from older offenders. However, we endorse the submission of the Youth Advocacy Centre, that the Bill should be amended to provide that detention is a last resort for children, as set out in article 37 of the Convention on the Rights of the Child, which is otherwise incorporated into the Bill.

**Recommendation 7: that the Bill should recognise detention is a last resort for children.**

## Additional rights could be included in the Bill

### Right to housing

As the Queensland Law Society submission to this inquiry states, adequate housing is essential for human survival with dignity. Without a right to housing, many other basic human rights will be compromised including the right to family life and privacy, the right to freedom of movement, the right to assembly and association, the right to health and the right to development.<sup>6</sup>

The ICESCR protects the right to an adequate standard of living for individuals and their families, including adequate food, clothing and housing, and to the continuous improvement of living conditions.<sup>7</sup>

**Recommendation 8: that the Bill be amended to include a right to housing.**

<sup>6</sup> Chris Sidoti, Housing as a Human Right, <[https://www.humanrights.gov.au/sites/default/files/content/pdf/human\\_rights/housing.pdf](https://www.humanrights.gov.au/sites/default/files/content/pdf/human_rights/housing.pdf)>

<sup>7</sup> ICESCR, Article 11

## Rights of survivors of domestic violence, sexual assault and other crime

The Committee should consider ways to strengthen the protections afforded to survivors of domestic violence and sexual assault under the Bill.

The Queensland Government already adheres to the Charter of Victims' Rights for agencies, as set out in the *Victims of Crime Assistance Act 2009* (Qld). Given part of the rationale for developing a human rights legislative framework in Queensland is to bring together the patchwork of differing protections of rights across the laws of Queensland, we submit it would be appropriate for the Bill to expressly recognise the human rights of victims of crime in Queensland.

This could be done in a number of ways:

- adding 'freedom from all forms of exploitation, violence and abuse, including their gender-based aspects' as a protected right, as recognised in international human rights laws;<sup>8</sup>
- expanding the right to fair hearing (clause 31) and rights in criminal proceedings (clause 32) to protect the rights of victims;
- providing for affected persons to bring complaints for a breach of their rights under the Charter of Victims' Rights to the Human Rights Commissioner;
- supporting victims and their advocates to use the Act to protect and promote their rights.<sup>9</sup>

**Recommendation 9: that the Bill be strengthened to recognise the human rights of victims of crime in Queensland.**

A number of submissions to this inquiry will provide more information on this issue; we direct the committee's attention to submissions from Women's Legal Service Queensland (a member of our organisation), Professor Heather Douglas, and others. We also note that the submission of experts from the T.C. Beirne School of Law (**UQ Law**) also recommends incorporating the *Charter of Rights of a Child in Care* in Schedule 1 of the *Child Protection Act 1999* – this Bill is an opportunity to make these legislative charters more effective and meaningful.

## The right to a healthy environment

The Bill should be amended to include an express right to a healthy environment. As humans, our health and wellbeing is inextricably linked to the health of the environment we live in and depend on. In this context, we direct the Committee's attention to the submission from the Environmental Defenders Office (a member of our organisation) to this inquiry.

The right to a healthy environment was initially formally recognised in the Stockholm Declaration and Rio Declaration.<sup>10</sup> There is broad recognition now that the protection of

<sup>8</sup> United Nations General Assembly 2006, *Convention on the Rights of Persons with Disabilities*, article 16.

<sup>9</sup> See further, Human Rights Law Centre, *Advancing the rights of victim/survivors of crime using Victoria's Human Rights Charter: Your advocacy guide* (August 2018), [available online](#).

<sup>10</sup> *Declaration on the United Nations Conference on the Human Environment*, UN Doc A/CONF.48/14/Rev.1 (1972); *United Nations Declaration on Environment and Development*, UN Doc A/CONF.151/5/Rev.1 (1992).



the environment is a key part of contemporary human rights doctrine, and will become increasingly relevant as the earth's population continues to increase and the strain placed by the human population on the earth's resources continues to grow.

The protection of the right to a healthy environment would likely require public entities to better consider how proposed legislation, policy or projects might impact on the environment on which we depend for our livelihoods and health. With our members (especially the two Environmental Defenders Offices in Queensland, we consider there are clear public benefits flowing from such consideration.

#### Recommendation 10: that the right to a healthy environment be added to the Bill

The only express mention of the environment in the Bill is in clause 28, which is expressly limited to and focussed on the distinct cultural rights of Aboriginal peoples and Torres Strait Islander peoples. This reference notes that Aboriginal and Torres Strait Islander peoples must not be denied the right to 'conserve and protect the environment and productive capacity of their land, territories, waters, coastal seas and other resources'. We support clause 28 as it preserves the distinct rights of Aboriginal peoples and Torres Strait Islander peoples – but consider non-Indigenous Queenslanders should also have their right to a healthy environment recognised by the Government and preserved by the Bill.

## Resourcing implementation of the Act

The Human Rights Act will only have real impact if each arm of government and the community understands how it applies to them. The Queensland Government must allocate sufficient resources to ensure each government department reviews its laws, policies and practices to ensure its compliance with human rights, for the Commission to be enabled to conduct its statutory responsibilities, and for community education.<sup>11</sup> A number of submissions to this inquiry have identified the need to resource community legal centres and other advocates to provide advice to people whose rights are infringed, and to provide representation in conciliations (as provided in clause 83 of the Bill). We will continue to advocate for resources to meet this emerging need in our ongoing discussions with Government.

## Other issues

We endorse a number of other groups' submissions to this Inquiry, and draw the Committee's attention to a number of issues raised in those submissions, including:

- amending the objects of the Bill (at clause 3(b)) to '*to help build a culture in ~~the~~ Queensland including the public sector that respects and promotes human rights*', raised in the submissions of Townsville Community Legal Service (**Townsville CLS**), Queensland Law Society, and others;
- providing greater clarity about the definition of 'public entities', canvassed in the submissions of the Australian Lawyers Alliance, the Queensland Law Society and others;
- strengthening the protection and promotion of the human rights of older Queenslanders, as considered in Townsville CLS's submission;

<sup>11</sup> Information about the costs of implementing Victorian Legislation can be found in the [Victorian Government submission to the Scrutiny of Acts and Regulations Committee's review of the Charter of Human Rights and Responsibilities Act 2006](#).

- strengthening the protection and promotion of human rights of children and young people, as considered in the Youth Advocacy Centre's submission;
- removing the ability of Parliament to override the Charter (clause 43), as any laws should be consistent with human rights, as the Australian Lawyers Alliance suggests;
- removing section 58(6), as it is absurd that a government decision that is unlawful can be valid (canvassed by the Australian Lawyers Alliance);
- strengthening reporting requirements, to provide greater accountability and increase community awareness of human rights (recommended by Queensland Law Society, LawRight, UQ Law, and others); and
- considering how intervenors, contradictors and friends of the Court might be permitted to contribute to legal proceedings (recommended by Townsville CLS, UQ Law, and others).

## Conclusion

In conclusion, we support the Bill and commend the Queensland Government for introducing this vital piece of legislation to Parliament. We urge the Committee to support the passing of the legislation, with amendments as recommended in this submission.





**Community  
Legal Centres  
Queensland**



# **A fair and just Queensland**

## Submission to the Human Rights Inquiry

April 2016



Queensland Association of  
Independent Legal Services Inc



Queensland Association of Independent Legal Services (**QAILS**) is the peak body for community legal centres in Queensland and its vision is for a fair and just Queensland. To achieve this, QAILS supports and develops community legal centres to provide effective, high quality services to their communities, and leads to unite its members and be a leading voice for social justice.

[www.qails.org.au](http://www.qails.org.au)

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# Executive summary

QAILS (Queensland Association of Independent Legal Services Inc) is the peak organisation for Queensland's community legal centres. QAILS members provided free legal help to over 50,000 vulnerable Queenslanders in 2015, and our members have a unique insight into the experiences of Queenslanders who interact with government institutions, legal processes, and the law.

**Based on these experiences, QAILS supports the strengthening of laws and practices that will protect and promote human rights in Queensland. QAILS supports the introduction of a Human Rights Act in Queensland, which will increase fairness and justice for vulnerable and disadvantaged Queenslanders – community legal centres' clients.**

This submission is set out in three parts:

- **Which rights should be protected?** By reference to international human rights law (which sets out an agreed, international, universal framework of rights), QAILS identifies rights that should/could be better protected in Queensland law. We list these rights, identify ways that they are currently protected (or not) in Queensland laws, and provide examples (based on community legal centres' work) of situations where our clients' rights were not adequately protected (in **red**), or where human rights laws in other jurisdictions have protected people's human rights (in **green**).
- **Section 2: How should we protect human rights?** QAILS supports the introduction of a Human Rights Act in Queensland, based on models adopted in Victoria, the ACT, the UK and New Zealand, but tailored to be appropriate for Queensland. This submission recommends how a Human Rights Act could be developed, including:
  - Making and interpreting legislation
  - Obligations on public authorities
  - Strengthening the role of the Anti-Discrimination Commission
  - Complaints and litigation
  - Education / public awareness
- **Section 3: Costs and benefits of a Human Rights Act.** Responding specifically to the Inquiry's terms of reference 2(c), this section considers the costs and benefits of adopting a HR Act (including financial, legal, social and otherwise), with reference to the experience in other Australian jurisdictions, and in the context of Queensland's social and democratic institutions.

## ***QAILS's Recommendations***

This submission contains xx recommendations; these recommendations are predicated on the core recommendation that Queensland should introduce a Human Rights Act. However, we recognise that there may be other measures that could be used to strengthen human rights protections, and these are included as 'alternate recommendations'. A summary of our recommendations are set out below:



# Which rights should be protected?

## What are Human Rights?

Human rights are the basic rights that belong to every person, regardless of age, race, sex, social status or any other characteristic. They are derived from, and serve to protect, the inherent dignity and worth of each person as the foundation of freedom, justice and peace in the world.<sup>1</sup> Examples of human rights include the right to a fair trial, freedom of speech and freedom from torture or other inhuman or degrading treatment or punishment.

Human rights are recognised and protected under international law. Many are codified in treaties. The two key treaties are the International Covenant on Civil and Political Rights (the **ICCPR**) and International Covenant on Economic, Social and Cultural Rights (the **ICESCR**). Australia has signed and ratified both treaties. It has also signed and ratified five of the six other human rights treaties.<sup>2</sup>

The ACT, Victoria, UK and New Zealand have human rights legislation that protects and enshrines a selection of civil and political rights. Few rights recognised in the ICESCR are protected by such domestic legislation: only the rights to education, protection of property and the cultural rights of minorities and indigenous peoples receive piecemeal protection in certain jurisdictions.<sup>3</sup> The human rights that are protected under existing legislation are discussed in part 5 of this paper.

It is important to note that, just because a right is not listed in the Queensland Human Rights Act, does not mean it is extinguished. Such rights continue to be protected by the international and domestic laws from which they spring. It is typical for human rights legislation to include an express provision to this effect.<sup>4</sup>

## Can Human Rights be Limited?

It is generally accepted that not all human rights are 'absolute'. Their enjoyment can be limited in certain circumstances. The ACT Act and Victorian Charter provide that the human rights set out in those Acts may be subject 'only to such reasonable limits as can be demonstrably justified in a free and democratic society' and taking into account 'all relevant factors', including the nature of the right affected, the purpose of the limitation and its extent.<sup>5</sup>

<sup>1</sup> See, for example, the Preamble to the Universal Declaration of Human Rights, resolution adopted by the UN General Assembly, 10 December 1948, A/RES/3/217A, <<http://www.un-documents.net/a3r217a.htm>>

<sup>2</sup> Namely, the *International Convention on the Elimination of all Forms of Racial Discrimination (CERD)*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969); *Convention on the Elimination of all Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981); *Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment (CAT)*, opened for signature 4 February 1985, 1465 UNTS 85 (entered into force 26 June 1987); *Convention on the Rights of the Child (CROC)*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990); *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 993 UNTS 3 (entered into force 3 May 2008). Australia is not a party to the *Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, opened for signature 18 December 1990, 2220 UNTS 93 (entered into force 1 July 2003)

<sup>3</sup> See ACT Act, sections 27 (rights of minorities) and 27A (right to education); Victorian Charter, section 19 (cultural rights of minorities and indigenous peoples); UK Act, Schedule 1 (protection of property) and (right to education); NZ Bill of Rights, section 20 (rights of minorities)

<sup>4</sup> See, for example, ACT Act, section 7; Victorian Charter, section 5

<sup>5</sup> ACT Act, section 28; Victorian Charter, section 7

However, the Queensland Human Rights Act could also specify that certain rights – for example, the right to freedom from slavery or torture – are absolute, and that the derogation provision does not apply to those rights.<sup>6</sup>

## How Queenslanders' rights are protected now

Only a limited number of rights are currently protected in Queensland. Those rights are protected in 4 ways: through the Australian Constitution, Commonwealth and State legislation, the common law and structural mechanisms. Each of these mechanisms will be discussed briefly in this section, and case studies provided to demonstrate that human rights are not currently adequately protected in Queensland.

### *Constitutional Mechanisms*

There are a limited number of human rights protected by the Commonwealth Constitution. As the Constitution has application in Queensland, its protections extend to Queenslanders.

The entrenched protections are:

- compulsory property acquisition to be on just terms;<sup>7</sup>
- right to trial by jury for Commonwealth offences;<sup>8</sup>
- freedom of religion;<sup>9</sup> and
- freedom from disabilities or discrimination on the basis of state residence.<sup>10</sup>

There are also the following implied protections:

- freedom of political communication;<sup>11</sup> and
- separation of powers.<sup>12</sup>

The scope of these constitutional protections should not be overstated, as in practice they are constrained by their limited wording and narrow judicial interpretation.<sup>13</sup>

Further, the existence of the implied constitutional protections remains controversial, and the rights are limited in their scope. For example, the implied right of freedom of political communication found by the High Court in *Lange v Australian Broadcasting Commission*<sup>14</sup> is not as broad as a right to freedom of expression.

There are no human rights protections entrenched within the *Constitution of Queensland 2001* (Qld).

<sup>6</sup> See, for example, ICCPR, Art 4(2)

<sup>7</sup> *Australian Constitution* s 51(xxxi).

<sup>8</sup> *Australian Constitution* s 80.

<sup>9</sup> *Australian Constitution* s 116.

<sup>10</sup> *Australian Constitution* s 117.

<sup>11</sup> *ACTV v Commonwealth* (1992) 172 CLR 106; *Nationwide News v Wills* (1992) 177 CLR 1.

<sup>12</sup> *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

<sup>13</sup> The Hon Jim McGinty, 'Human Rights Act for Australia' (2010) 12 *University of Notre Dame Australia Law Review* 6.

<sup>14</sup> *Lange v Australian Broadcasting Commission* (1997) 189 CLR 520.



## Legislative Mechanisms

Legislation has the potential to positively assert basic human rights of citizens, restrict the government, and provide remedies for citizens whose rights have been infringed.<sup>15</sup> In Queensland, both Commonwealth and State legislation can operate in this way.

Examples of Commonwealth rights-based legislation operating in Queensland include the *Racial Discrimination Act 1975*, the *Sex Discrimination Act 1984*, the *Human Rights and Equal Opportunity Commission Act 1986*, the *Privacy Act 1988* and the *Disability Discrimination Act 1992*, which largely fall outside the scope of this inquiry.

In Queensland, the key legislation protecting human rights is the *Anti-Discrimination Act 1991* (Qld). This Act provides it is an offence for a person to be discriminated against on the basis of:

- sex;
- age;
- gender identity;
- relationship status;
- pregnancy;
- parental status;
- breastfeeding;
- race;
- association with, or relation to, a person identified on the basis of any of the above attributes,<sup>16</sup>
- impairment;
- religious belief or activity;
- political belief or activity;
- trade union activity;
- lawful sexual activity;
- sexuality;
- family responsibilities;

in the following contexts:

- work,
- education,
- the provision of goods and services,
- superannuation,
- insurance,
- disposition of land,
- accommodation,
- club membership,
- administration of state laws and programs; and
- local government.<sup>17</sup>

The range of discrimination covered by this Act mirrors the specific Commonwealth legislation of the *Racial Discrimination Act 1975*, the *Sex Discrimination Act 1984*, and the *Age Discrimination Act 2004*.

These laws have failed to adequately protect the human rights of Queenslanders.

For example, during October and November 2013 the Queensland Parliament was able to pass a suite of anti-bikie legislation<sup>18</sup> including provisions that:

- 'include a presumption against bail for members of motorcycle clubs;

<sup>15</sup> 'The preservation and enhancement of individuals' rights and freedoms in Queensland: Should Queensland adopt a bill of rights?' (Research Paper No 12, Parliamentary Library, Legislative Assembly of Queensland, 1998), 22.

<sup>16</sup> *Anti-discrimination Act 1991* (Qld), s 7. There are some exceptions, and these are detailed throughout Parts 4 and 5.

<sup>17</sup> *Anti-Discrimination Act 1991* (Qld), Part 4.

<sup>18</sup> This includes the *Vicious Lawless Association Disestablishment Bill 2013* and the *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013*.

- make it an offence for groups of three or more such members to ride together;
- allow police to stop and search persons wearing motorcycle club colours;
- introduce new forms of aggravated criminal liability, such as where the defendant meets the definition of a 'vicious lawless associate', and impose a mandatory sentencing regime for certain offences;
- establish special prisons for such offenders; and
- invest the Crime and Misconduct Commission with coercive powers to conduct hearings into matters relating to organised criminal activity.<sup>19</sup>

Further, in March 2014 the Queensland Parliament amended the *Youth Justice Act 1992* (Qld) to:

- remove the principle that detention should be a last resort;
- expand the instances when the Children's Court may be opened;
- increase the opportunity to name and shame offending youth;
- allow all juvenile criminal history to be admissible in adult courts;
- create a separate offence for young people of breaching bail by reoffending;
- make provision for the automatic transfer of 17-year-olds to adult correctional facilities; and
- introduce a mandatory boot camp order for certain recidivist motor vehicle offenders.<sup>20</sup>

Though a Charter of Rights in Queensland would not have directly precluded the enactment of such laws, it would have forced the Parliament to more closely (and publicly) examine the laws through the prism of human rights, which may have had the same result.

## *Judicial Mechanisms*

The common law is insufficient in the absence of a bill of rights to adequately safeguard basic human rights.

There are a number of common law protections of human rights, and these are based on principles of statutory interpretation and the presumption that there is no legislative intention to encroach upon fundamental rights and freedoms (unless the legislation clearly displays the intention to displace the presumption).<sup>21</sup> These protections include freedom of speech, the right to personal liberty (except where overridden by law), access to courts, legal professional privilege, the privilege against self-incrimination and immunity from deprivation of property without compensation.<sup>22</sup>

However, the common law has failed to recognise a number of vital human rights, including a general right to privacy, and religious freedom and expression.<sup>23</sup> In some cases the common law has actually developed in a way that denies individuals' rights. For example, common law developments were

<sup>19</sup> Law Council of Australia, 'Briefing Note – Anti-bikie Laws: Recent Developments' (2014) [https://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/Briefs\\_Fact\\_Sheets\\_and\\_Publications/29\\_4\\_14\\_-\\_M\\_-\\_Anti-bikie\\_laws\\_Briefings\\_2.pdf](https://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/Briefs_Fact_Sheets_and_Publications/29_4_14_-_M_-_Anti-bikie_laws_Briefings_2.pdf).

<sup>20</sup> Jodie O'Leary, 'Out of Step and Out of Touch: Queensland's 2014 Youth Justice Amendments' (2014) 26(2) Current Issues in Criminal Justice 159.

<sup>21</sup> French, Robert 'The Common Law and the Protection of Human Rights' (Paper presented at the Anglo Australasian Lawyers Society 4 September 2009) <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj4sep09.pdf>

<sup>22</sup> Ibid.

<sup>23</sup> *Grace Bible Church v Reedman* (1984) 36 SASR 389, 393.

responsible for excluding women from the right to vote, the right to own property, and denied the possibility of rape in marriage. In those cases it was Parliament that was required to intervene to redress these rights abuses.<sup>24</sup>

## ***Structural Mechanisms***

Queensland is uniquely vulnerable to breaches of human rights because it only has one house of parliament. In other states, an upper house serves to fetter government power. While representative democracy provides a theoretical recourse for breaches of human rights, elections rarely focus on those sorts of matters, instead casting a broader net and emphasising populist issues.

The remaining doctrines, while useful to some degree, do not go far enough, as discussed in the case studies in this Submission.

### **Representative democracy**

Queensland is a representative democracy. This concept emphasises that government ministers must exercise their executive powers to represent the people.<sup>25</sup> If the population at a national or state level does not support the actions of government on any issue (including human rights), it can display its dissatisfaction by voting for a change of government.

### **Responsible government**

At its heart, responsible government requires the Minister responsible for a portfolio to display transparency and accountability for the actions of any portfolio department to the Parliament. Traditionally, if a department in the Minister's sphere of control has breached its standards, remit or acted unlawfully (including by infringing human rights), the Minister will take responsibility for this. Responsibility can include standing down. However, the exponential increase in the size, complexity and scope of the Executive has effectively diluted this responsibility, so too has the two-party parliamentary system.

### **Parliamentary sovereignty**

The doctrine of Parliamentary sovereignty provides that where the judiciary or executive acts outside of their powers, the parliament can intervene and legislate to override the actions of the other arms of government.

The doctrine of parliamentary sovereignty provides human rights protections if there has been a breach of such rights by the executive or judiciary to the extent as to attract the attention and intervention of the parliament.

### **The separation of powers**

The separation of powers is assumed in 'Chapters I, II and III of the Commonwealth Constitution, whereby legislative, executive and judicial power of the Commonwealth are respectively vested in the Parliament, the Executive Government and the Judicature'.<sup>26</sup> The purpose of the doctrine is to ensure that 'no one of these branches exercise the powers or functions of another and that no one person is a member of more than one branch'.<sup>27</sup>

<sup>24</sup>Tasmania Law Reform Institute, *A Charter of Rights for Tasmania Tenth Report* (October 2007) 34.

<sup>25</sup> *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 50.

<sup>26</sup> Lexis Nexis, *Halsbury's Laws of Australia*, vol 1 (at 28 May 2014) Federal and State Institutions in Administrative Law, [10-20]; *Australian Constitution* ss 1, 61, 71.

<sup>27</sup> 'The preservation and enhancement of individuals' rights and freedoms in Queensland: Should Queensland adopt a bill of rights?' (Research Paper No 12, Parliamentary Library, Legislative Assembly of Queensland, 1998), 21.

The Queensland Constitution does not require a separation of powers, nor does this principle emerge from the common law.<sup>28</sup> However, in practice, there is an independent judiciary, ensuring that it can fulfil its role as a safeguard for liberty.<sup>29</sup>

The doctrine empowers the Court to invalidate legislation that the parliament does not have the power to pass, while the parliament can legislate to counteract a judicial decision or precedent. This means the Court can strike down legislation which breaches a Constitutional human rights protection (such as the implied freedom of political communication).

Recommendation X: Based on the examples provided in this (and other) submissions, that the Committee recognise that Queenslanders' human rights are not adequately protected by existing laws and practices.

## Rights protected under other Australian human rights laws

QAILS suggests that the starting point for consideration of which rights should be protected in a Queensland Human Rights Act is the inclusion of those human rights that are already protected in the ACT Act and Victorian Charter (and, to a lesser extent, the NZ Bill of Rights, NZ Human Rights Act and UK Act). Each of these rights is considered in turn in this section 1.3; section 1.4 then considers internationally-recognised human rights that are not explicitly protected under these laws, but could (or should) be considered.

In this discussion, we briefly describe the right, and provide examples of where existing Queensland laws insufficiently protect those rights (in **red**). These are real examples, based on the experiences of Queensland community legal centres, that show that Queenslanders' rights are not adequately protected by existing laws and practices. We contrast this with case studies from other jurisdictions that are analogous to the work of Queensland's community legal centres (in **green**), where human rights laws delivered better outcomes for vulnerable people.

### Right to recognition and equality before the law

This right affords every person recognition and equality before the law and protection against discrimination. It provides that equal opportunity measures are not discriminatory.<sup>30</sup>

### Right to life

This is the right to life and to not be arbitrarily deprived of life.<sup>31</sup>

<sup>28</sup> *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372, 401.

<sup>29</sup> 'The preservation and enhancement of individuals' rights and freedoms in Queensland: Should Queensland adopt a bill of rights?' (Research Paper No 12, Parliamentary Library, Legislative Assembly of Queensland, 1998), 21.

<sup>30</sup> Victorian Charter, section 8; ACT Act, section 8

<sup>31</sup> Victorian Charter, section 9; ACT Act, section 9

It is important to note that nothing in the Victorian Charter affects any law applicable to abortion or child destruction,<sup>32</sup> maintaining the status quo of the law as it relates to abortion.<sup>33</sup> Similarly, the right to life in the ACT only applies to a person from the time of birth.<sup>34</sup>

The UK Act specifically abolishes the death penalty.<sup>35</sup>

#### Case study: Right to life for older Queenslanders<sup>36</sup>

Queensland does not have a clear statement of rights in respect of these issues including the implications of euthanasia, refusal of life sustaining treatment and the implications of palliative care. Our rights are still based on the common law and out of step with other places.<sup>37</sup> The *Powers of Attorney Act 1998* provides that a patient's refusal made in advance has the same status as regular refusals of medical intervention. However, Section 103 of the Act provides that doctors who reasonably believe instructions are "inconsistent with good medical practice" will not face any liability if they fail to follow a patient's directive.

#### Case Study: Charter assists in affording 66 year old woman appropriate accommodation<sup>38</sup>

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.

### Right to protection from torture and cruel, inhuman or degrading treatment

This right provides that a person must not be subjected to torture, treated or punished in a cruel, inhuman or degrading way, or subjected to medical or scientific experimentation or treatment without full, free and informed consent.<sup>39</sup>

<sup>32</sup> Victorian Charter, section 48

<sup>33</sup> George Williams, 'The Victorian Charter of Human Rights and Responsibilities' (2006) 30 *Melbourne University Law Review* 880, 896

<sup>34</sup> ACT Act, section 9(2)

<sup>35</sup> UK Act, Schedule 1

<sup>36</sup> Townsville Community Legal Service, *A Human Rights Act for Queensland: Submission by Townsville Community Legal Service Inc* (19 April 2016), 9-10.

<sup>37</sup> *Brightwater Care Group (Inc) v Rossiter* [2009] WASC 229, [23]–[26] (Martin CJ); *Re B* [2002] 2 All ER 449, 455–6 (Butler-Sloss P); *Re MB* [1997] 2 FLR 426, 432 (Butler-Sloss LJ); *Airedale NHS Trust v Bland* [1993] AC 789, 857 (Lord Keith). MB, *Re* [1997] EWCA Civ 3093 (26 March 1997) sets out the general principle that an adult is presumed to have the capacity to consent to or refuse medical treatment unless and until that presumption is rebutted.

<sup>38</sup> Homeless Persons Legal Clinic: Submission for Review of the Victorian Charter of Human Rights and Responsibilities Act 2006.

<sup>39</sup> Victorian Charter, section 10; ACT Act, section 10

**Case study: Elder abuse, violence exploitation and neglect<sup>40</sup>**

“The importance of protecting older Queenslanders from family violence, abuse, exploitation and neglect has been recently reinforced by the Committee’s report into the Adequacy of Existing Financial Protections for Queensland Seniors<sup>41</sup> and the Taskforce into Family and Domestic Violence.<sup>42</sup> Notwithstanding all this attention, Queensland has no specific elder abuse laws in place. Based on recent data, somewhere between 2% and 14% of older Queenslanders could be affected by elder abuse without any specific statement of human rights in remedy or response. Similar issues were recently raised by a Victorian Royal Commission which found that older persons have specific needs with respect to protection from abuse. Additionally the Attorney General Brandis has commissioned a report<sup>43</sup> and referred matters to the Australian Law Reform Commission to look into elder issues.<sup>44</sup>”

**Case study: Restrictive practices<sup>45</sup>**

“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.”

<sup>40</sup> Townsville Community Legal Service, *A Human Rights Act for Queensland: Submission by Townsville Community Legal Service Inc* (19 April 2016), 10.

<sup>41</sup> Parliament of Queensland, Communities, Disability Services and Domestic and Family Violence Prevention Committee, *Inquiry into the adequacy of existing financial protections for Queensland’s seniors*, Report No.2, 55th Parliament

<sup>42</sup> Special Taskforce on Domestic and Family Violence in Queensland, *Not Now, Not Ever, Putting an End to Domestic and Family Violence in Queensland*.

<sup>43</sup> Kaspiew, R., Carson, R., & Rhoades, H. (2015). *Elder abuse: Understanding issues, frameworks and responses*. Melbourne: Australian Institute of Family Studies.

<sup>44</sup> <https://www.alrc.gov.au/inquiries/elder-abuse/terms-reference>

<sup>45</sup> Queensland Advocacy Inc, *The Appropriateness and Desirability of Legislating for a Human Rights Act in Queensland* (April 2016), 14.



**Case study: The application of Restrictive Practices on a vulnerable female with disability<sup>46</sup>**

“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: Aged Care<sup>47</sup>**

“Freedom from inhumane treatment including restrictive practices that impact on older persons with psychiatric impairments, dementia and behaviours of concern. While aged care may be a federal responsibility, there are significant differences in the way restrictive practices and interventions are regulated within institutional care in Queensland. The treatment of older persons in Queensland aged care facilities is sub-par when compared with other Queensland institutions subject to the *Disability Services Act 2006*.”

<sup>46</sup> Queensland Advocacy Inc, *The Appropriateness and Desirability of Legislating for a Human Rights Act in Queensland* (April 2016), 14.

<sup>47</sup> Townsville Community Legal Service, *A Human Rights Act for Queensland: Submission by Townsville Community Legal Service Inc* (19 April 2016), 10.



**Case Study 53: Woman afforded appropriate disability services thanks to Charter<sup>48</sup>**

A woman living with dual disability was ineligible for assistance in accessing services because neither of her disabilities when considered separately met the requirements of the relevant government departments. The woman sought to be moved into more appropriate living conditions as she had been robbed and sexually assaulted in the special residential services in which she lived. The advocate for her case wrote to the relevant government departments raising various issues of breach of the Charter, these being recognition and equality before the law, protection from inhuman and degrading treatment, right to liberty and security of persons. The Charter enabled the advocate to frame the woman's issues with regard to her rights and communicate these in a more effective way with the departments. As a result, she was appointed a case worker, will soon be moved into appropriate housing and receives 15 hours per week of one-to-one support.

**Right to freedom from forced work**

This right provides that no one may be held in slavery or servitude, or made to perform forced or compulsory labour (excluding lawful court orders, emergencies or civil obligations such as jury service).<sup>49</sup>

**Case Study: Charter assists Good Shepherd Youth and Family Service in a variety of ways<sup>50</sup>**

The St Kilda Branch of the Good Shepherd Youth and Family Service notes the various ways in which they have found the Charter to be of great assistance in their work.

- They successfully employed Charter rights when ensuring that a woman, released from prison was able to secure work and reintegrate into the community.
- They raised the Charter during negotiations where business operators wished to remove homeless persons.
- They used the Charter to run sessions and programs, which outline the various needs and associated rights of marginalised persons, including women who have faced violence, trafficking, forced labour.

**Right to freedom of movement**

This is the right to move freely within the jurisdiction, to enter and leave it and choose where to live.<sup>51</sup>

**Case Study: Guardian upholds Charter rights<sup>52</sup>**

A guardian was questioned in the Magistrate's Court as to why he had not made the decision to place his guard in residential care. The guardian responded that upon deliberating this decision he

<sup>48</sup> Leadership Plus: Submission for Review of the Victorian Charter of Human Rights and Responsibilities Act 2006.

<sup>49</sup> Victorian Charter, section 11; ACT Act, section 26

<sup>50</sup> Good Shepherd Youth and Family Service: Submission for Review of the Victorian Charter of Human Rights and Responsibilities Act 2006.

<sup>51</sup> Victorian Charter, section 12; ACT Act, section 13

<sup>52</sup> Office of the Public Advocate: Submission for Review of the Victorian Charter of Human Rights and Responsibilities Act 2006.

acted not only in accordance with the Guardianship and Administration Act 1986 but also in line with the Charter. Specifically, the relevant right is that of freedom of movement, which the guard was afforded in being allowed to stay in his current residence.

#### **Case study: Charter used to prevent criminalisation of sleeping in cars<sup>53</sup>**

The Homeless Persons Legal Clinic (HPLC) recently drew upon the Charter in their advocacy campaign against the criminalisation of sleeping in cars. The Shire of Yarra Ranges proposed to pass a law, which prohibited persons sleeping in cars with the desired effect of preventing back packers who were using parks without paying a fee. However, the consequence of such law would be to penalise homeless persons sleeping in their cars due to the lack of available appropriate accommodation. The HPLC based the advocacy campaign against the proposed law on the fact that it was incompatible with the rights encompassed in the Charter, namely freedom of movement, right to life and right to security and liberty. The campaign was successful, with the resulting arrangement to be a redrafting of the law and development of implementation guidelines. This process was conducted in conjunction with HPLC and local community service providers. Specifically, the aim of the redrafting was to ensure that persons experiencing homelessness would not be penalised and this was further given effect by including an obligation upon officers suspecting a person to be homeless to contact a support agency.

#### **Right to privacy and reputation**

This is the right to not have one's privacy, family, home or correspondence unlawfully or arbitrarily interfered with, and to not have one's reputation unlawfully attacked.<sup>54</sup>

#### **Case study: Right to family life for older Queenslanders<sup>55</sup>**

"The right to privacy for older persons includes within institutional care and within reporting regimes, adult guardianship<sup>56</sup> and mental health systems. These systems disproportionately impact on older persons."

In the UK Act, there is also a right to marry, according to law.<sup>57</sup>

The ICESCR goes further, thereby providing an opportunity for the Queensland Human Rights Act to improve on current, domestic human rights legislation. Article 10 of the ICESCR provides that special protection should be accorded to mothers before, during and after childbirth. This includes the right to leave with pay or adequate social security benefits.

Further, Article 10 provides for special measures of protection and assistance for children and young persons. This right includes protection against:

<sup>53</sup> Homeless Persons Legal Clinic: Submission for Review of the Victorian Charter of Human Rights and Responsibilities Act 2006.

<sup>54</sup> Victorian Charter, section 13; ACT Act, section 12

<sup>55</sup> Townsville Community Legal Service, *A Human Rights Act for Queensland: Submission by Townsville Community Legal Service Inc* (19 April 2016), 11.

<sup>56</sup> Queensland Law Reform Commission, Confidentiality in the Guardianship System: Public Justice, Private Lives, Report 62, 2007.

<sup>57</sup> UK Act, Schedule 1; see ICCPR, Article 23

- economic and social exploitation;
- work harmful to a child's morals or health, or dangerous to life or likely to hamper their development; and
- paid child labour.

**Case Study: Charter used as framework to make council submissions<sup>58</sup>**

The Fitzroy Legal Service (FLS) has found that the Charter provides a useful framework by which they can engage councils in discussion about issues associated with use of public space, freedom of association and freedom of expression. More specifically, the Charter enables an approach whereby competing interests can be considered and balanced. The FLS cite one example in which the parties were able to consider all relevant Charter obligations in negotiations and consequently, adopted monitoring procedures and various measures to minimise the impact of their policies on human rights. The FLS stated that in all cases, the Charter principles were formally recognised by the councils with which they were negotiating.

**Case Study: Charter allows disabled man access to his own mail<sup>59</sup>**

A physically disabled man living in a shared supported accommodation unit objected to his mail being opened by the workers at the unit on the basis that he was capable of opening his own mail and therefore his right to privacy was being breached. The rationale behind the unit's policy was to ensure that any accounts needing payment could be taken care of. The advocate invoked the Charter, claiming that the right to privacy and reputation needed to be upheld. Consequently, the unit's policy was changed and the man was allowed access to his own mail.

**Case Study: More information requested to ensure the right to a fair hearing<sup>60</sup>**

The Director of Housing applied for a possession order to evict a family living in public housing. The application was based upon alleged breaches of a compliance order. Eviction would have had serious negative effects on the family, including risk of homelessness. The HPLC requested evidence of the breaches from the DOH but they refused, stating that it would be provided at the hearing. Consequently, HPLC submitted at the hearing that the DOH had breached the right to a fair hearing under the Charter by failing to provide the requisite evidence. Further, they argued that the DOH had not considered the family's right to privacy and reputation and the protection of families and children under the Charter when applying for the order. VCAT adjourned the hearing until the evidence was produced. DOH withdrew the application for possession and agreed to negotiate with the family to determine a more appropriate solution.

**Right to freedom of thought, conscience, religion and belief**

<sup>58</sup> Fitzroy Legal Service: Submission for Review of the Victorian Charter of Human Rights and Responsibilities Act 2006.

<sup>59</sup> Disability Justice Advocacy: Submission for Review of the Victorian Charter of Human Rights and Responsibilities Act 2006.

<sup>60</sup> Homeless Persons Legal Clinic: Submission for Review of the Victorian Charter of Human Rights and Responsibilities Act 2006.

This is the right to freedom of thought, conscience, religion and belief, including the freedom to have or to adopt a religion or belief and to demonstrate one's religion or belief in worship, observance, practice and teaching, either individually or as part of a community, in public or in private. The right also protects against religious coercion.<sup>61</sup>

**Case Study: Tenant's freedom of religion protected in housing works dispute<sup>62</sup>**

A physically disabled tenant in public housing objected to work being carried out on his house on a holy day due to his religious beliefs. The contractors threatened to claim breach of the Residential Tenancies Act. The advocate invoked the Charter on the tenant's behalf and claimed that the threat was in contravention of freedom of thought, conscience, religion and belief. As a consequence, the threat was withdrawn and the work rescheduled.

### Right to freedom of expression

This is the right to hold an opinion without interference, and to freedom of expression. In Victoria, this right is expressed as being subject to lawful restrictions reasonably necessary to respect the rights and reputations of other persons, or for the protection of national security, public order, public health or public morality.<sup>63</sup>

**Case study: Hume City Council – Community Engagement Framework and Planning Guide**

The Hume City Council developed the Community Engagement Framework and Planning Guide to assist the council to undertake community engagement activities within a human rights framework. The guide states that:

'Effective community engagement not only provides Council with an opportunity to strengthen its relationship with the community, but provides for sound investment in better decision making by ensuring decisions are informed of community needs and aspirations. When done in a meaningful way, it contributes to building trust between the community and Council, and also raises the quality of, and strengthens representative democracy while building community capacity'.

The guide refers to specific Charter rights that are relevant to community engagement, including that:

- 'every person in Victoria has the right, and is to have the opportunity, without discrimination, to participate in the conduct of public affairs' (section 18)
- that 'every person has the right to freedom of expression which includes the freedom to seek, receive and impart information and ideas of all kinds, whether within or outside Victoria' (section 15).

### Right to peaceful assembly and freedom of association

<sup>61</sup> Victorian Charter, section 14; ACT Act, section 14

<sup>62</sup> Disability Justice Advocacy: Submission for Review of the Victorian Charter of Human Rights and Responsibilities Act 2006.

<sup>63</sup> Victorian Charter, section 15; ACT Act, section 16

This is the right to peaceful assembly and freedom of association with others (specifically in Victoria including in respect of trade unions).<sup>64</sup>

#### **Case Study: Balancing of competing Charter rights leads to best solution**

A woman living in a nursing home wished to continue receiving visits from her son despite him frequently pestering and at times, threatening her for money. Charter rights were considered in the guardian's decision as to whether the son should be able to contact her. The competing rights were that of freedom of association and protection of the family on the one hand and on the other hand, right to security of person. It was decided that the son could continue contact, however all visits were to be conducted under the supervision of a third party

#### **Case Study: Charter used as framework to make council submissions<sup>65</sup>**

The Fitzroy Legal Service (FLS) has found that the Charter provides a useful framework by which they can engage councils in discussion about issues associated with use of public space, freedom of association and freedom of expression. More specifically, the Charter enables an approach whereby competing interests can be considered and balanced. The FLS cite one example in which the parties were able to consider all relevant Charter obligations in negotiations and consequently, adopted monitoring procedures and various measures to minimise the impact of their policies on human rights. The FLS stated that in all cases, the Charter principles were formally recognised by the councils with which they were negotiating.

### **Right to protection of families and children**

This is the right of every child, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child.<sup>66</sup>

The ACT Act and Victorian Charter recognise that families are the fundamental group unit of society and are entitled to protection.<sup>67</sup> 'Family' has a broad meaning to include diverse family groups.<sup>68</sup>

#### **Case study: Examples where children and young people's human rights have recently been/are at risk in Queensland<sup>69</sup>**

- The ongoing overrepresentation of Aboriginal and Torres Strait Islander children and young people in the youth justice and child protection systems, including the over-policing of Indigenous young people
- The principle at common law, in legislation and in breach of the United Nations Convention on the Rights that children in the youth justice system should only be held in custody as a last resort was removed in 2014 (is before Parliament for reinstatement).

<sup>64</sup> Victorian Charter, section 16; ACT Act, section 15

<sup>65</sup> Fitzroy Legal Service: Submission for Review of the Victorian Charter of Human Rights and Responsibilities Act 2006.

<sup>66</sup> Victorian Charter, section 17(2); ACT Act, section 11(2)

<sup>67</sup> Victorian Charter, section 17(1); ACT Act, section 11(1)

<sup>68</sup> See, for example, note to ACT Act, section 11 and Explanatory Memorandum to the Victorian Charter

<sup>69</sup> Youth Advocacy Centre, Submission by YOUTH ADVOCACY CENTRE INC to the Inquiry of the Legal Affairs and Community Safety Committee In relation to A Human Rights Act for Queensland (April 2016) 8.

- Children in the criminal justice system are subject to public identification (other than first time offenders): this was also imposed in 2014 (is before Parliament for removal).
- A police practice of charging a child with offences where the child has appeared subsequent to them and been dealt with for later matters: in one matter, the police were aware of the earlier offences when prosecuting the later ones but then charged the young person months later – at a time when his life was settling down and he was in employment. This was in breach of a principle in the *Youth Justice Act 1992* that decisions should be made in a timeframe appropriate to the child's sense of time and the requirement in Art 40 UNCROC that a child must have a matter determined 'without delay'.
- The closure of a building which was Queensland's only specialist Children's Court building. If there had been a Human Rights Act, the decision making process may have taken proper account of the best interests of children as required by UNCROC.
- Security staff at courts not being adequately trained in interacting with young people and other vulnerable groups.
- Queensland remains the sole jurisdiction in Australia to treat 17 year olds as adults for the criminal justice system, including being placed in adult jail, even though they cannot vote, purchase alcohol, etc until they are 18. This has been the subject of ongoing advocacy by YAC and other community agencies and individuals since the introduction of the then *Juvenile Justice Act* in 1992 as well as negative comment by the UN Committee on the Rights of the Child.
- Children are the only group of people in Queensland (and indeed Australia) who can be legally assaulted – unacceptable at a time when domestic and family violence is quite rightly being condemned and an anomaly not lost on young people themselves:

“...if [adults] physical contact with someone, like punching ‘em, it’s against the law...they could go to jail, they could be charged with assault...And that’s exact same for smacking. But...if you’re a kid, and it’s in the house, it’s o.k because they’re your kids... If you are a kid, it doesn’t really matter...because...you barely have any say” (age 9)<sup>70</sup>

- Children in the care of the State, victims of trauma, suffer further abuse in a range of ways, including criminalisation for behaviour which most functional families would deal with themselves: breaking crockery in temper (wilful damage) and similar.
- Children are criminalised for behaviour for which an adult cannot be found to have broken the law: a girl under 16 taking a picture of herself and sending it to her boyfriend being prosecuted for making, possessing and distributing child exploitation material which is a serious sex offence and which will affect her ability to get a “blue card” in the future if she wanted to be a teacher or similar. Similarly: young people under 16 are charged with indecent dealing for consensual sexual activity with a peer boy or girlfriend which should be considered as normal adolescent development. While adults may wish to dissuade them from this behaviour due to the potential risks, these are education, health and welfare issues, not criminal matters in this context.
- Children are denied a proper education when a Principal decides to suspend them from school if charged with **any** offence or exclude them after being found guilty of **any** offence even though the offence was not related to the school, another student or a teacher or during school hours {our emphasis) on the basis of an ill-defined test of “being reasonably satisfied it would not be in the best interests of other students or of staff” for the charged/convicted child to attend school.

<sup>70</sup> Bernadette Sanders and Chris Goddard, Children and Society Vol 22 (2008) *Children's Perspectives on Physical Punishment*: quoted Presentation by Tiffany Overall, Youthlaw, on behalf of the Child Rights Taskforce to NHRC.



- An eight year old boy who may appear as a witness in relation to the alleged murder of a man by his father when he was six, was named in a Queensland newspaper which included the following statement online: “An eight-year-old Brisbane boy has accused his father of a heinous crime.....”
- The use of electronic devices and other means intended to dissuade children and young people from using public space.

### Case study: Child protection<sup>71</sup>

“There is an existing *charter of rights for a child in care* located in section 74 and Schedule 1 to the *Child Protection Act 1999*. The operation of the *charter of rights for a child in care* provides both a useful example of the value of a Charter of Rights for vulnerable people but also offers us an example of the limitations of a Charter of Rights which is not supported by effective enforcement.

[Caxton Legal Centre has] noticed that the *charter of rights for a child in care* clearly affects the child’s right to be informed and, often, to participate in decision making. In our experience there are some procedural problems with the way this is implemented, particularly in situations when a child’s participation in decision making may not be in their best interests due to family abuse or child immaturity, but nonetheless it is broadly positive that these particular rights (of information and participation) are facilitated and promoted via the *charter of rights for a child in care*.

In our experience some of the other rights under the *charter of rights for a child in care*, including the right to maintain relationships with the child’s family and community, are not well delivered. In these instances, the *charter of rights for a child in care* offers little for the child, as an individual, to take action to seek access to those denied rights. It is important that any charter of rights provides for options for enforcement when rights are not delivered and that standing to bring a complaint resides **both** with the individuals affected and with an appropriate body with investigatory functions.

The drafting of the *charter of rights for a child in care* also presents some difficulties in that it merely requires offering a child ‘access’ to certain civil rights, such as education and transition support, but does not warrant the quality or appropriateness of those services, and does nothing to assist a child who has their own difficulties making use of that ‘access’.”

### Case study: Right to family life for older Queenslanders<sup>72</sup>

The right to family life “incorporates the interests of older persons to keep the family unit intact despite care and guardianship arrangements including provision of service to assist ageing in place, to avoid separating couples and older persons from family carers.”

<sup>71</sup> Caxton Legal Centre, *Submission to the Legal Affairs and Community Safety Committee Human Rights Inquiry on the adoption of a Human Rights Act in Queensland* (18 April 2016) 20.

<sup>72</sup> Townsville Community Legal Service, *A Human Rights Act for Queensland: Submission by Townsville Community Legal Service Inc* (19 April 2016), 11.



**Case Study: Young girl protected from having to testify against offender<sup>73</sup>**

Fitzroy Legal Service (FLS) has protected a young girl from having to testify against her alleged perpetrators in a criminal trial. The young girl and her family believed that testifying and being cross examined would cause her serious harm. FLS advocated in favour of her choice not to testify and was successful in doing so. They achieved this by raising section 17 of the Charter, which enshrines the protection of families and children. They argued that protection of her rights as a child and protection of the family should be given due regard when determining whether or not the young girl would be required to provide witness testimony. The Tribunal agreed that she should not testify and consequently provided her with financial assistance in recognition of the trauma suffered by her.

**Case Study: Guardianship revoked due to incompatibility of decisions with Charter rights<sup>74</sup>**

A woman contested the decision of her guardian to have her moved into a residential facility where no workers spoke her language, understood her cultural and religious beliefs or would prepare food prepared in a way which was required by her religion. The woman and her family wished for her to stay primarily with them in her family home. PILCH assisting in challenge the guardian's decision. The advocates argued that the requirements under the Guardianship and Administration Act were not met by this decision, such as least restrictive measures employed etc. They also raised the argument that the decision was in breach of the Charter, namely protection of families and children, cultural rights and the right to freedom of religion. The resulting decision of VCAT was that the guardianship be revoked

**Right to take part in public life**

This is the right and opportunity to participate in the conduct of public affairs, without discrimination, either directly or through freely chosen representatives. It is also the right of eligible persons to vote, be elected and have equal access to the public service and public office.<sup>75</sup>

**Case study: Guardianship proceedings in Queensland<sup>76</sup>**

"Through our work providing advocacy and legal representation for individuals in guardianship proceedings, QAI [Queensland Advocacy Incorporated] 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

<sup>73</sup> Fitzroy Legal Service: Submission for Review of the Victorian Charter of Human Rights and Responsibilities Act 2006.

<sup>74</sup> Public Interest Law Clearing House: Submission for Review of the Victorian Charter of Human Rights and Responsibilities Act 2006.

<sup>75</sup> Victorian Charter, section 18; ACT Act, section 17

<sup>76</sup> Queensland Advocacy Inc, The Appropriateness and Desirability of Legislating for a Human Rights Act in Queensland (April 2016), 14.

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 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)."

#### **Case Study: Guardian employs Charter to ensure continued access to care<sup>77</sup>**

A man was inappropriately discharged from a mental health service, leaving him without access to health services or case management. The guardian informally raised the Charter issues in a letter which stated: 'You are a public authority like OPA and we have obligations under the Charter to consider the potential impact of our decisions on the human rights of our clients. Have you considered whether or not the delay in discharging the client is adversely impacting upon Mr X's rights? To me [www.hrlc.org.au](http://www.hrlc.org.au) | Page 34 Victoria's Charter of Human Rights in Action | Case studies the delay may impact Mr X's right to take part in public life, right to the enjoyment of life and protection from degrading treatment.' The use of the Charter assisted the guardian to focus upon and convey the rights of an individual using the 'universal language' of the Charter.

### **Cultural rights**

In Victoria, all persons with a particular cultural, religious, racial or linguistic background must not be denied the right, in community with other persons of that background, to enjoy culture, to declare and practise religion and use language.<sup>78</sup>

There is a similar provision in the ACT Act, which is that anyone who belongs to an ethnic, religious or linguistic minority must not be denied the right, with other members of the minority, to enjoy his or her culture, to declare and practice religion or use language.<sup>79</sup>

The Victorian Charter also confers specific rights on Aboriginal persons (with other members of their communities) to enjoy identity and culture, maintain and use language, maintain kinship ties and maintain a distinctive spiritual, material and economic relationship with the land, waters and other resources with which they have a connection under traditional laws and customs.<sup>80</sup>

<sup>77</sup> Office of the Public Advocate: Submission for Review of the Victorian Charter of Human Rights and Responsibilities Act 2006.

<sup>78</sup> Victorian Charter, section 19(1)

<sup>79</sup> ACT Act, section 27

<sup>80</sup> Victorian Charter, section 19(2)

The ICESCR goes further, in that it recognises the right of everyone to take part in cultural life, to enjoy the benefits of scientific progress and its applications, and to benefit from the protection of moral and material interest arising from any scientific, literary or artistic production.<sup>81</sup> QAILS may consider that there is an opportunity for the Queensland Government to do more for Queenslanders in the protection of their cultural and related rights by fully adopting the ICESCR cultural and scientific rights.

#### **Case study: Corrections Victoria establishes diversion program for Koori males<sup>82</sup>**

Corrections Victoria has engaged the Charter as a key source in informing the decision making process behind establishing the Wulgunggo Ngalu Learning Place – a diversion program for adult Koori males. The program provides a holistic rehabilitative program in which residents can complete their community orders while being supported with training and rehabilitative services. A key component of the program is the protection of cultural rights evidenced by the integration of the Learning Place with community organisations and the community elders program.

#### **Case Study: Human rights-based framework for agreements between state and traditional owner groups<sup>83</sup>**

The Victorian Government has passed an Act which creates a framework for agreements to be made between the state and traditional owner groups. The first agreement under this Act was made between The Victorian Government and the Gunai/Kurnai people, recognising them as traditional owners land in the Gippsland region. The most progressive element of this Act is that it affords traditional land owners essential cultural rights as protected by the Charter. Specifically, it recognises the rights of traditional land owners to enjoy their culture and identity and to maintain a spiritual relationship with the land and its resources. The further advantage of this Act is that it ensures that native title disputes can be resolved in a time and cost effective manner.

#### **Case Study: Mansfield Shire Council establishes community group<sup>84</sup>**

The Mansfield Shire Council has responded to feedback from residents who state they feel isolated or neglected because of their cultural/ linguistic background. The Council has addressed this issue by establishing a community based Mansfield Multi Cultural group. The Council's action demonstrates a commitment to upholding cultural rights.

### **Property rights**

<sup>81</sup> ICESCR, Article 15

<sup>82</sup> Victorian Equal Opportunity and Human Rights Commission - Submissions to the Four Year Review of the Charter of Human Rights and Responsibilities Act 2006 (1 July 2011), p155, citing Victorian Equal Opportunity and Human Rights Commission, Talking Rights: compilation report: Resource materials to accompany the 2010 report on the operation of the Charter of Human Rights and Responsibilities, 2011, p.30.

<sup>83</sup> Victorian Equal Opportunity and Human Rights Commission - Submissions to the Four Year Review of the Charter of Human Rights and Responsibilities Act 2006 (1 July 2011), Appendix I.

<sup>84</sup> Victorian Equal Opportunity and Human Rights Commission - Submissions to the Four Year Review of the Charter of Human Rights and Responsibilities Act 2006 (1 July 2011), Appendix I.

This is the right in Victoria and the UK to not be deprived of property, other than in accordance with law.<sup>85</sup> This right does not provide a right for compensation where such deprivation occurs. There is no correlating provision in the ACT Act.

#### **Case study: eviction of Indigenous woman from social housing<sup>86</sup>**

[Caxton Legal Centre was] unable to prevent the eviction of one of our Indigenous clients after she became unable to control the behaviour of persistent unwanted 'visitors' to her housing complex. Although there was a protection order in place to protect our client from the behaviour of the 'visitor' and our client telephoned police to assist when the problems arose, our client was still subjected to 'strikes' against her as a result of his behaviour and ultimately evicted.

#### **How could have the HR Act helped?**

If, in the drafting of legislation, parliament was compelled to consider human rights implications these laws may have been differently drafted.

In development of policy and exercise of their legislative rights, the housing providers (the state and agencies engaged by the state) would have had to consider and adopt human rights principles which may have tempered their attitude and helped them to see the context of the misbehaviour at their properties. It may have assisted our client to articulate her needs at an early stage.

Our client would have been able to bring a complaint directly to the ADCQ or another complaint agency when the problems originally arose, facilitating discussion around competing rights and needs before eviction proceedings were considered or brought. As it is, the only option for our client was an internal complaint after she received a 'strike' against her as a tenant.

If eviction proceedings were commenced our client could have argued human rights principles and the decision maker would have had to interpret the legislation in line with human rights principles which may have led to a wholly different outcome. There are a number of Victorian Charter cases where people have successfully stopped evictions because they have raised charter arguments.<sup>87</sup>

#### **Case Study: Man with physical disability allowed to continue living in family home<sup>88</sup>**

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.

<sup>85</sup> Victorian Charter, section 20; UK Act, Schedule 1

<sup>86</sup> Caxton Legal Centre, *Submission to the Legal Affairs and Community Safety Committee Human Rights Inquiry on the adoption of a Human Rights Act in Queensland* (18 April 2016) 20.

<sup>87</sup> <http://www.liv.asn.au/For-Lawyers/Submissions-and-LIV-projects/Charter-Case-Audit/Charter-Case-Audit-Search?AreaOfLaw=Residential+Tenancies>

<sup>88</sup> Disability Justice Advocacy: Submission for Review of the Victorian Charter of Human Rights and Responsibilities Act 2006.

**Case Study: Family of seven protected from homelessness<sup>89</sup>**

A family of seven had experienced great difficulty in receiving financial support and secure housing since arriving in Australia. They were given permission to sublet a public housing property but were required to vacate it upon the original tenant returning. The property later became vacant due to being damaged by fire and the family, left with no other options, moved back in. They contacted The Office of Housing (OOH) to discuss the situation but the Office stated they would have them removed. HPLC contacted the OOH, stating that the family's removal would be in breach of rights contained in the Charter, including protection of children and families, the right to property and the freedom from interference with a person's home. Negotiations between HPLC and OOH led to an arrangement allowing the family to sign a tenancy agreement for the property.

**Right to liberty and security of person**

This is the right to liberty, security and protection against arbitrary arrest or detention. It is also the right to not be deprived of liberty except by law.<sup>90</sup>

**Case study: Arbitrary detention of older Queenslanders<sup>91</sup>**

"The potential for arbitrary detention occurs across a range of living arrangements for older persons. This includes institutional care that both Queensland and federal governments are responsible for. Issues with respect to guardianship have been considered in detail and many right issues for older persons remain unresolved."<sup>92</sup>

The following protections are afforded to persons who have been arrested:

- they must be informed at the time of arrest about the reason for the arrest and must be promptly informed about any proceedings to be brought against him or her;
- they must be promptly brought before a court and have the right to be brought to trial quickly (in Victoria, this is expressed as 'without unreasonable delay' and in the ACT, it is 'within a reasonable time') and must be released if these obligations are not complied with;
- a person awaiting trial must not be automatically detained in custody; and
- they are entitled to apply to a court for a declaration or order regarding the lawfulness of the detention. The court must make a decision without delay, and is required to order the release of the person if it finds that the detention is unlawful.<sup>93</sup>

In the ACT, a person who has been unlawfully arrested or detained has the right to compensation.<sup>94</sup>

<sup>89</sup> Homeless Persons Legal Clinic: Submission for Review of the Victorian Charter of Human Rights and Responsibilities Act 2006.

<sup>90</sup> Victorian Charter, section 21(1)-(3); ACT Act, section 18

<sup>91</sup> Townsville Community Legal Service, *A Human Rights Act for Queensland: Submission by Townsville Community Legal Service Inc* (19 April 2016), 10.

<sup>92</sup> Queensland Law Reform Commission, *Review of Guardianship Laws*, Report 67, 2010.

<sup>93</sup> Victorian Charter, section 21(4)-(7); ACT Act, section 18

<sup>94</sup> ACT Act, section 18(7)

Further, a person must not be imprisoned only because of his or her inability to perform a contractual obligation.<sup>95</sup>

**Case study: Older Queenslanders' right to fair and expeditious judicial determination<sup>96</sup>**

"International jurisprudence says competent judicial authorities should display particular diligence in handling cases involving older persons, taking in to account age and health.<sup>97</sup> The advanced age of a person is a factor in whether a case was dealt with "within a reasonable time" and may tighten the requirement for prompt trial. Importantly, delay is a fundamental reason why older persons do not engage in legal processes or seek to enforce rights. This is not reflected in any statement of rights for older persons in Queensland."

**Case Study: Woman afforded appropriate disability services thanks to Charter<sup>98</sup>**

A woman living with dual disability was ineligible for assistance in accessing services because neither of her disabilities when considered separately met the requirements of the relevant government departments. The woman sought to be moved into more appropriate living conditions as she had been robbed and sexually assaulted in the special residential services in which she lived. The advocate for her case wrote to the relevant government departments raising various issues of breach of the Charter, these being recognition and equality before the law, protection from inhuman and degrading treatment, right to liberty and security of persons. The Charter enabled the advocate to frame the woman's issues with regard to her rights and communicate these in a more effective way with the departments. As a result, she was appointed a case worker, will soon be moved into appropriate housing and receives 15 hours per week of one-to-one support.

**Right to humane treatment when deprived of liberty**

When deprived of liberty, people still have human rights.

This is the category of rights for all persons deprived of liberty to be treated with humanity and respect. Accused persons must be segregated from convicted persons, except (in Victoria) where reasonably necessary or (in the ACT) in exceptional circumstances, and must be treated in a way that is appropriate for a person who has not been convicted.<sup>99</sup>

**Case study: Rights of people held in prison<sup>100</sup>**

<sup>95</sup> Victorian Charter, section 21(8); ACT Act, section 18(8)

<sup>96</sup> Townsville Community Legal Service, *A Human Rights Act for Queensland: Submission by Townsville Community Legal Service Inc* (19 April 2016), 11.

<sup>97</sup> See for example: Council of Europe, Committee of Ministers, Recommendation CM/Rec(2014)2 of the Committee of Ministers to member States on the promotion of human rights of older persons, ¶155. See cases: including *Süssmann v. Germany* (1998) 25 EHRR 64 and *Jablonská v. Poland* (2003) 36 EHRR 27.

<sup>98</sup> Leadership Plus: Submission for Review of the Victorian Charter of Human Rights and Responsibilities Act 2006.

<sup>99</sup> Victorian Charter, section 22; ACT Act, section 19

<sup>100</sup> UQ Pro Bono Centre, Submission to the Human Rights Inquiry (April 2016), 15.



'Barry' was involved in crime throughout his formative years, and as such already had an extensive criminal history established upon his entry into prison. He was first placed in the mainstream prison population, but was moved into solitary confinement after committing serious offences in custody. Barry has been in solitary confinement for over 15 years.

Within solitary confinement he is entitled to very little. For example under the *Corrective Services Regulation 2006* (Qld) a person in separate confinement must be given the opportunity to exercise in fresh air for at least two daylight hours a day.<sup>101</sup> Fresh air and daylight however, do not necessitate being outside. For these two hours Barry is taken to an exercise yard with three brick walls, one glass wall and a grated roof – he has not actually been outside in 20 years with the exception of being transported between prisons in the prison truck.

The excessively regulated environment of solitary confinement often results in trivial issues escalating into security breaches that are used to justify Barry's ongoing detention in solitary confinement. For example, regulations allow prisoners in solitary confinement to take one piece of fruit with them into the exercise yard. On one occasion, the fruit on offer was smaller than usual so Barry took two pieces with him. Corrective Services Officers announced to him that this would be recorded as a violation of good behaviour. Barry felt frustrated by the pettiness of this restriction and responded by verbally abusing the officers.

As a result of Barry having no control over anything in his life, he has no normal social interactions. For him to get the food he wants or access to cleaning products for his cell he feels he must use threats. He states the guards provoke him, but then he is the one who gets written up for unacceptable behaviour if he retaliates. This creates a catch 22-type situation – Barry will not be released from solitary confinement unless he can show he can exercise self-control and voluntary good behaviour, but for him to show these characteristics he needs to be released from solitary confinement.<sup>102</sup> The impact of solitary confinement on Barry's mental health is becoming increasingly marked. He spreads his faeces on the walls in an attempt to annoy officers and exercise some control over his life.

In 2006, the Queensland Court of Appeal recognised in *Garland* that it is not a requirement of putting someone on a solitary confinement order that the chief executive be satisfied that the prisoner be contained humanely if such an order was to be made. Furthermore, it is not a condition of such an order that the prisoner be contained humanely such that if it is not complied with the order becomes unlawful.<sup>103</sup> The introduction of a Human Rights Act in Queensland might result in prisoners in

<sup>101</sup> *Corrective Services Regulation 2006* (Qld) s 5.

<sup>102</sup> *Garland v CE, Dept Corrective Services* [2006] QCA 568 [47].

<sup>103</sup> *Ibid* 21.

solitary confinement, such as Barry, being subject to less excessive regulations and ultimately being treated more like human beings. This may result in more opportunities for the prisoners to show self-development and move out of the solitary confinement environment. For prisoners like Barry, this is often their only goal.

#### **Case Study: Man deprived of aids in correctional facility<sup>104</sup>**

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.

#### **Case study: older person in locked dementia ward<sup>105</sup>**

Caxton [Legal Centre] successfully assisted a healthy woman in her mid-70s obtain release from a locked dementia ward where she had been improperly placed following an incorrect diagnosis. Although the outcome was successfully resolved in QCAT with the client obtaining a declaration of capacity and then discharging herself, she had spent 10 months locked up in a facility deprived of the amenities of independent life.

This client would have been substantially aided by a hospital intake and assessment process which gave consideration to her human rights. Additionally, the language to articulate her need as a right to liberty and security and/or a right to protection from inhumane or degrading treatment would have helped her to talk to the hospital and seek an early resolution to the problem once it had arisen.

#### **How could the HR Act have helped?**

Importantly, a stand-alone cause of action would not only have assisted this client to seek an earlier release, it could also have given her an opportunity to seek redress for the loss of liberty and amenity over those 10 months. Within the current framework, her only viable options of seeking such redress would arise only if an injury had been sustained or if the decision to detain her was tainted by unlawful conduct such as discrimination.

Even if a HR ACT only gave this client the opportunity of an 'add-on' cause of action and no right to claim damages, she could have used the Act to ask for a broader reaching range of remedies in her successful case. For example, she could have secured human rights training for the institution which detained her.

### **Rights of children in the criminal process**

<sup>104</sup> Disability Justice Advocacy: Submission for Review of the Victorian Charter of Human Rights and Responsibilities Act 2006.

<sup>105</sup> Caxton Legal Centre, *Submission to the Legal Affairs and Community Safety Committee Human Rights Inquiry on the adoption of a Human Rights Act in Queensland* (18 April 2016) 19.

An accused child who is detained must be segregated from adults. An accused child must be brought to trial as quickly as possible.<sup>106</sup>

### Case study: Delay in youth justice matters<sup>107</sup>

In 2015, the Youth Advocacy Centre (YAC) represented 'John', a 16-year-old who was charged with three offences that were alleged to have occurred 15 months to 2 years beforehand when he was fourteen (14) and (15). Between the time of the alleged commission of these offences, John had resolved other matters and completed the penalty imposed for those offences. He had found a job and he was concerned that further proceedings and punishment orders may jeopardise his employment.

John had already been previously charged for the most recent of the three "fresh" offences and the police had failed to deliver a brief of evidence within eight weeks and consequently the charge was withdrawn.

Due to the significant impact of delay, YAC brought an application on behalf of John to stay all three "fresh" charges.

The *Youth Justice Act 1992* contains a principal that "a decision affecting a child should, if practicable made and implemented within a timeframe appropriate to the child's sense of time" (schedule 1 of the *Youth Justice Act 1992*).

This section is not as direct as the requirement contained in Article 40 of the Convention on the Rights of the Child (CROC):

*40.1 States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner and consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in this society.*

*40.2 To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:*

*(b) every child alleged as or accused of having infringed the penal law has at least the following guarantees:*

*(iii) to have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to*

<sup>106</sup> Victorian Charter, section 23; ACT Act, section 20(1) and (3)

<sup>107</sup> UQ Pro Bono Centre, Submission to the Human Rights Inquiry (April 2016), 10.

*be in the best interests of the child, in particular, taking into account his or her age or situation, his parents or legal guardians.*

This Article was relied upon the ACT in *Perovic v. CW CH 05/1046 ACT Childrens Courts Unreported (1 June 2006)* where it was held there is a distinction between the general right to a fair trial which applies to adults, and the special rules which the legislature intended to apply to children involved in the criminal process.

Whilst ultimately successful in obtaining a stay, the absence of a Human Rights Act in Queensland meant that a full day hearing was required, involving calling witnesses to establish the adverse consequences of delay. The adoption of a Human Rights Act may therefore alleviate the adverse consequences of significant delay in the commencement of charges against children, particularly if it includes specific provisions for child rights.

Convicted children in Victoria, or convicted and accused children in the ACT, must be treated in a way that is appropriate for their age and circumstance.<sup>108</sup>

#### **Case Study: Office of the Child Safety Commissioner highlights positive impact of Charter<sup>109</sup>**

Victoria's Office of the Child Safety Commissioner has stated that the Charter has assumed a meaningful role, impacting positively on children. More specifically, they believe that governments are 'increasingly examining issues relating to children through a human rights lens'. To evidence this, the Office cites the Victorian Law Foundation's consultation with young people as to how the Children's court should be reformed.

#### **Case Study: Administration of the Working with Children Act guided by Charter principles<sup>110</sup>**

The administration of the Working with Children Act is annually reviewed by the Office of the Child Safety Commissioner. The review and subsequent amendments are conducted in line with the Charter principles, namely that of acting in the best interests of the child.

#### **Case Study: Young girl protected from having to testify against offender<sup>111</sup>**

<sup>108</sup> Victorian Charter, section 23(3); ACT Act, section 20(2) and (4)

<sup>109</sup> Victorian Equal Opportunity and Human Rights Commission - Submissions to the Four Year Review of the Charter of Human Rights and Responsibilities Act 2006 (1 July 2011), Appendix I.

<sup>110</sup> Victorian Equal Opportunity and Human Rights Commission - Submissions to the Four Year Review of the Charter of Human Rights and Responsibilities Act 2006 (1 July 2011), Appendix J.

<sup>111</sup> Fitzroy Legal Service: Submission for Review of the Victorian Charter of Human Rights and Responsibilities Act 2006.

Fitzroy Legal Service (FLS) has protected a young girl from having to testify against her alleged perpetrators in a criminal trial. The young girl and her family believed that testifying and being cross examined would cause her serious harm. FLS advocated in favour of her choice not to testify and was successful in doing so. They achieved this by raising section 17 of the Charter, which enshrines the protection of families and children. They argued that protection of her rights as a child and protection of the family should be given due regard when determining whether or not the young girl would be required to provide witness testimony. The Tribunal agreed that she should not testify and consequently provided her with financial assistance in recognition of the trauma suffered by her.

### Right to a fair hearing

A person charged with a criminal offence, or a party to a civil proceeding, has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing.

Courts may nevertheless exclude the media or the general public from all or part of a hearing if permitted to do so by law. The ACT Act specifies the circumstances in which the media and public may be excluded in section 21(2) of the ACT Act.

All judgments or decisions made by a court or tribunal in a criminal or civil proceeding must be made public, unless the best interests of a child dictate otherwise (or, in Victoria, another law permits it).<sup>112</sup>

### Case Study: Severe Substance Dependence Treatment Act framed by Charter<sup>113</sup>

Proposed legislative reform which enables the detainment and treatment of person suffering from substance dependence in the absence of committing an offence, has been contested by members of the community sector. In lobbying to frame the legislation, organisations such as the Fitzroy Legal Service used the Charter to provide a principled approach by which various interests could be considered and balanced. The two most important interests being the safety and welfare of persons with substance dependence and the protection of fundamental human rights such as freedom of movement, freedom from forced treatment and right to a fair trial. Fitzroy Legal Service states that engagement with principles espoused in the Charter greatly assisted with their negotiations.

### Rights in criminal proceedings

This is the right for a person charged with a criminal offence to be presumed innocent until proved guilty according to law.

A person in those circumstances also has the following rights, without discrimination:

- to be told promptly and in detail, in a language or other communication that he or she understands, about the nature and reason for the charge;
- to have adequate time and facilities for the preparation of their defence;
- to be tried without unreasonable delay;

<sup>112</sup> Victorian Charter, section 24; ACT Act, section 21

<sup>113</sup> Fitzroy Legal Service: Submission for Review of the Victorian Charter of Human Rights and Responsibilities Act 2006.

- to defend themselves in person or through legal assistance of their own choosing (or, if eligible, legal aid). This includes the right to be tried in person;
- to examine witnesses;
- to have the free assistance of an interpreter; and
- to not be compelled to testify against themselves or to confess guilt.

A child charged with a criminal offence has the right to a procedure that takes account of their age and the desirability of promoting the child's rehabilitation.

Any person convicted of a criminal offence has the right to have the conviction and any sentence imposed in respect of it reviewed by a higher court.<sup>114</sup>

The ACT Act also provides a right of compensation for wrongful conviction.<sup>115</sup>

### **Right not to be tried or punished more than once**

This is the right against 'double jeopardy'. A person has the right to not be tried or punished more than once for an offence in respect of which he or she has already been finally convicted or acquitted in accordance with law.<sup>116</sup>

### **Retrospective criminal laws**

No one may be found guilty of a criminal offence because of conduct that was not criminal when it was engaged in. Further, a higher penalty must not be imposed than the penalty that applied to the offence when it was committed.<sup>117</sup>

### **Right to education**

The ACT Act provides that every child has the right to access free, school education appropriate to his or her needs. Every person has the right to access further education and vocational and continuing training.<sup>118</sup> The UK Act also provides for a right to education,<sup>119</sup> but there is no correlating provision for this right in the Victorian Charter.

#### **Case study: Deaf students in Queensland schools<sup>120</sup>**

"Caxton [Legal Centre] has successfully assisted several children who have experienced problems accessing education. Our most significant case *Hurst v State of Queensland* [2006] FCAFC 100 was the culmination of several years of litigation on behalf of two deaf children who needed provision for education in Auslan.

The litigation involved complex arguments regarding the ability of the children to manage without Auslan, several layers of litigation and ultimately a Federal Court appeal action carrying a risk of

<sup>114</sup> Victorian Charter, section 25; ACT Act, section 22

<sup>115</sup> ACT Act, section 23

<sup>116</sup> Victorian Charter, section 26; ACT Act, section 24

<sup>117</sup> Victorian Charter, section 27; ACT Act, section 25

<sup>118</sup> ACT Act, section 27A

<sup>119</sup> UK Act, Schedule 1

<sup>120</sup> Caxton Legal Centre, *Submission to the Legal Affairs and Community Safety Committee Human Rights Inquiry on the adoption of a Human Rights Act in Queensland* (18 April 2016) 21.



costs if not successful. A year or two (or more) of education is a lot to miss out on while bringing an action against the state to ensure your right to education is ultimately realised.

For these clients and so many like them a HR Act which includes a positive right to education may:

- (i) Facilitate better education policy that is consistently drafted with human rights principles at the forefront;
- (ii) Give families and older children language to help them ask for their rights and teachers and schools clarity in responding to those requests;
- (iii) Facilitate earlier resolution of education matters in some situations;
- (iv) Ensure that decision makers interpreting law would need to have regard to human rights principles meaning that better judicial decisions might be made earlier.

We note that although our example was a Commonwealth law matter, there is similar state law to which a HR Act could have been applied. The ability to mount a HR Act argument may be a relevant consideration in choosing jurisdiction in matters such as these when both State and Commonwealth laws apply."

#### **Case Study: Young boy not expelled thanks to Charter<sup>121</sup>**

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.

**Recommendation X:** That the Committee consider ways to strengthen the protection and promotion of Queenslanders human rights, in either a Human Rights Act (discussed in section 2 of this submission) or through other mechanisms (section 3), including the following rights:

- Right to recognition and equality before the law
- Right to life
- Right to protection from torture and cruel, inhuman or degrading treatment
- Right to freedom from forced work
- Right to freedom of movement
- Right to privacy and reputation
- Right to freedom of thought, conscience, religion and belief
- Right to freedom of expression

<sup>121</sup> Youth Affairs, Council of Victoria: Submission for Review of the Victorian Charter of Human Rights and Responsibilities Act 2006.

- Right to peaceful assembly and freedom of association
- Right to protection of families and children
- Right to take part in public life
- Cultural rights
- Property rights
- Right to liberty and security of person
- Right to humane treatment when deprived of liberty
- Rights of children in the criminal process
- Right to a fair hearing
- Rights in criminal proceedings
- Right not to be tried or punished more than once
- Retrospective criminal laws
- Right to education

## Other human rights that should be protected

The Queensland Human Rights Act could improve on current human rights legislation in Australia by protecting a wider range of economic, social and cultural rights, as well as the abovementioned civil and political rights.

These two categories of rights are mutually reinforcing. Failure to protect the latter undermines the former. QAILS suggests that a Queensland Human Rights Act should protect all of the human rights codified in both the ICCPR and, importantly, the ICESCR (although some adaptation may be required for a domestic, Queensland context).<sup>122</sup>

In this way, a Queensland Human Rights Act would contribute to, and improve upon, Australia's fulfilment of its international human rights obligations. Article 50 of the ICCPR and Article 28 of the ICESCR state that human rights protections extend to all parts of federal states without limitation or exception. Consequently, the State Party (that is, the Commonwealth of Australia) must ensure that all government authorities, including at the state level, respect, protect and fulfil the human rights obligations under these treaties.

<sup>122</sup> See, for example, 'Australian Capital Territory Economic, Social and Cultural Rights Research Project', Australian Research Council (2010), < [http://acthra.anu.edu.au/documents/ACTESCR\\_project\\_final\\_report.pdf](http://acthra.anu.edu.au/documents/ACTESCR_project_final_report.pdf) >

*Case Study 3 – Refugee and Immigration Legal Service<sup>123</sup>*

A woman and her two young children have been sponsored for Australian permanent residence by the woman's husband. A decision on their visa application has not yet been made, but they live lawfully in Australia on bridging visas. They experience family violence and the police intervene. For their safety, the woman and children are removed from their home and referred to emergency accommodation. The woman does not speak English fluently.

They apply for Special Benefit payments from Centrelink, but because they are on bridging visas they are ineligible. Without a regular income, domestic violence refugees are unable to offer stable accommodation. Because they are not yet permanent residents, the family is not eligible for state housing.

The children are subject to international student fees levied by Education Queensland, which the woman cannot afford. The woman remains fearful of her husband, and would like to apply for a Domestic Violence Protection Order, but cannot afford legal representation.

Because of their circumstances, Child Safety investigates whether the children should be removed from their mother. The woman is confused by the various government agencies and community organisations with which she has to interact. Some use interpreters when speaking with her, but not all. The community organisations generally do not receive funding to pay for interpreters.

A Human Rights Act that included economic, social and cultural rights, as well as child rights, would provide an avenue for the woman and her children to obtain housing and to stay together as a family. The Act would allow the woman and her children to argue that multi-level government and service provider policies which reject providing services to the woman and her family are in violation of the rights to housing and family. For example, the CROC provides that 'States Parties shall recognize for every child the right to benefit from social security' (Art. 26); and the ICESCR mandates the right of every person 'to an adequate standard of living for himself and his family, including adequate food, clothing and housing'.

Each of these additional opportunities for rights protection are discussed below.

### **Right to work**

The ICESCR protects a person's right to work.

The right to work includes the right to the opportunity to gain a living by work freely chosen or accepted.

The steps that State Parties to the ICESCR are obliged to take in order to achieve the realisation of this right include:

<sup>123</sup> UQ Pro Bono Centre, Submission to the Human Rights Inquiry (April 2016), 13.

- technical and vocational guidance and training programs; and
- policies and techniques to achieve steady economic, social and cultural development, and full and productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.<sup>124</sup>

Given the current Queensland inquiry relates only to state human rights legislation (as compared to national legislation), some modification of the appropriate steps to implement this right in Queensland may be required.

### **Right to the enjoyment of just and favourable conditions of work**

The ICESCR also protects a person's right to enjoy just and favourable conditions of work, which ensure fair remuneration (including for women), a 'decent living', safe and healthy working conditions, and equal opportunity for promotion. This category of right also includes the right to rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays.<sup>125</sup>

### **Right to social security**

The ICESCR protects a person's right to social security, including social insurance. Given some social security in Australia is provided at the national level, this right may require some adaptation for the Queensland context.<sup>126</sup>

### **Right to an adequate standard of living**

The ICESCR protects the right to an adequate standard of living for individuals and their families, including adequate food, clothing and housing, and to the continuous improvement of living conditions.<sup>127</sup>

#### **Case study: Michael, a 50 year old male<sup>128</sup>**

"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."

<sup>124</sup> ICESCR, Article 6

<sup>125</sup> ICESCR, Article 7

<sup>126</sup> ICESCR, Article 9

<sup>127</sup> ICESCR, Article 11

<sup>128</sup> Queensland Advocacy Inc, The Appropriateness and Desirability of Legislating for a Human Rights Act in Queensland (April 2016), 20.

## Right to physical and mental health

The ICESCR protects a person's right to enjoy the highest attainable standard of physical and mental health.

Achieving the full realisation of this right includes taking steps that are necessary:

- to reduce the stillbirth-rate and infant mortality;
- for the healthy development of children;
- to improve all aspects of environmental and industrial hygiene;
- to prevent, treat and control epidemic, endemic, occupational and other diseases; and
- for the creation of conditions that would assure medical service and medical attention to all persons in the event of sickness.<sup>129</sup>

### Case study: Environmental law<sup>130</sup>

Without a clean, healthy environment, the basic human rights to life, health, work and education all cannot be fully realised. As stated in the Rio Declaration, human beings are “at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.”<sup>131</sup>

A Human Rights Act would be a step forward in the effectiveness of Queensland laws in protecting our human right to a healthy environment, and would also help to give more rights to those whose lives are impacted by environmental abuses.

- Protection of the right to a healthy environment will likely require government to consider more fully how proposed legislation or policy might impact on the environment on which we depend for our livelihoods and health.
- By providing a requirement for the consideration up front of the impact a proposed project, law or policy might have on the human right to a healthy environment, there is less chance that litigation might be undertaken to challenge that project, law or policy on the basis of the impacts to the right to a healthy environment.
- The rights of marginalised Queenslanders whose livelihood is dependent on a healthy environment – such as farmers - are not given as strong a weight as the rights of others. They frequently suffer impacts to their air and water quality which would not be allowed to occur in urban Queensland. A Human Rights Act would help to address the imbalance between needs of rural Queenslanders and those living in cities.

<sup>129</sup> ICESCR, Article 12

<sup>130</sup> UQ Pro Bono Centre, Submission to the Human Rights Inquiry (April 2016), 10.

<sup>131</sup> Rio Declaration on Environment and Development:  
<<http://www.unep.org/documents.multilingual/default.asp?documentid=78&articleid=1163>>

- A Human Rights Act would likely result in greater transparency and accountability with respect to development proposals.

#### **Case study: Frances, a 22 year old female<sup>132</sup>**

"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."

#### **Case Study: Mental Health Bill reviewed to protect Charter rights<sup>133</sup>**

The Department of Health has reviewed the Mental Health Act 1986 with a view to taking a rights-based approach to the regulation of mental health services. More specifically, the DOH aim to bring the Act in line with the Charter and Australia's human rights obligations more generally. The process of review will include community consultations in order to address any human rights issues brought to light by the Exposure Draft.

#### **Case Study: Charter encourages Department of Health to review mental health service practices<sup>134</sup>**

Victoria's Department of Health has reviewed procedures in mental health services in light of Charter requirements. Consequently, efforts have been made to reduce the use of restraint and seclusion. This process is being achieved through:

<sup>132</sup> Queensland Advocacy Inc, The Appropriateness and Desirability of Legislating for a Human Rights Act in Queensland (April 2016), 14.

<sup>133</sup> Victorian Equal Opportunity and Human Rights Commission - Submissions to the Four Year Review of the Charter of Human Rights and Responsibilities Act 2006 (1 July 2011), Appendix J.

<sup>134</sup> Victorian Equal Opportunity and Human Rights Commission - Submissions to the Four Year Review of the Charter of Human Rights and Responsibilities Act 2006 (1 July 2011), Appendix J.



- involvement in the National Safety Priorities Action Plan;
- the review of guidelines on seclusion published by the Chief Psychiatrist (2006);
- the development of state-wide training and education programs; and
- the establishment of a clinical audit program.

#### **Case Study: Charter rights raised to ensure Mental Health Board procedures met<sup>135</sup>**

Following 3 adjournments of a Mental Health Review Board hearing, a patient in a mental health facility lodged an appeal. The issue of Charter rights was raised by the community visitor at the Area Mental Health Clinical Service meeting. The ongoing failure to review led to the issue being escalated the Director of the Mental Health Clinical Services.

#### **Case Study: Man with physical and mental disability receives facilitation of community integration<sup>136</sup>**

A patient in a supported accommodation unit was not been provided appropriate services, in which he was entitled. In particular, he was unable to leave the unit to integrate with the community. The advocate invoked the Charter on his behalf, claiming that failure to provide this service was a breach of his freedom of movement. Consequently, services were provided to enable his integration into the community.

**Recommendation X:** That the Committee consider ways to strengthen the protection and promotion of Queenslanders human rights, in either a Human Rights Act (discussed in section 2 of this submission) or through other mechanisms (section 3), including the following rights:

- Right to work
- Right to the enjoyment of just and favourable conditions of work
- Right to social security
- Right to an adequate standard of living
- Right to physical and mental health

<sup>135</sup> Office of the Public Advocate: Submission for Review of the Victorian Charter of Human Rights and Responsibilities Act 2006.

<sup>136</sup> Disability Justice Advocacy: Submission for Review of the Victorian Charter of Human Rights and Responsibilities Act 2006.

## Right to self-determination for Indigenous peoples

The right to self-determination is a principle of international law, and Aboriginal and Torres Strait Islander peoples are entitled to protection of their right to self-determination under international law.<sup>137</sup>

The right to self-determination of Indigenous peoples is described in the UN Declaration on the Rights of Indigenous Peoples (**UNDRIP**) in the following terms:

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.<sup>138</sup>

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.<sup>139</sup>

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.<sup>140</sup>

There is also a positive obligation on Australia (as a State within the meaning of International Law) to promote the realisation of the right of self-determination, and to respect that right, in conformity with the provisions of the Charter of the United Nations.<sup>141</sup>

It should be noted that the right to self-determination does not amount to a right to secession.<sup>142</sup> The right to self-determination is generally interpreted to create an obligation on the part of the government to provide recognition of the distinct cultures and forms of social organisation, governance and decision-making of Indigenous peoples.<sup>143</sup>

<sup>137</sup> This right is contained in a number of international law instruments, including article 1 of the Charter of the United Nations, the International Convention on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights. Australia agreed to be bound by the International Convention on Civil and Political Rights on 13 August 1980, and it is scheduled to the *Australian Human Rights Commission Act 1986* (Cth), meaning that it forms part of Australia's domestic laws. Australia agreed to be bound by the International Covenant on Economic, Social and Cultural Rights on 10 December 1975 but it has not been scheduled to the *Australian Human Rights Commission Act 1986* (Cth) and therefore does not form part of Australia's domestic laws. The *Australian Human Rights Commission Act 1986* (Cth) does, however, give protection of specific rights to Indigenous Australians and requires the Aboriginal and Torres Strait Islander Social Justice Commissioner to have regard to a range of international conventions, including the International Covenant on Economic, Social and Cultural Rights.

<sup>138</sup> United Nations Declaration on the Rights of Indigenous Peoples (**UNDRIP**): resolution / adopted by the General Assembly, 2 October 2007, A/RES/61/295, article 3.

<sup>139</sup> UNDRIP: resolution / adopted by the General Assembly, 2 October 2007, A/RES/61/295, article 4.

<sup>140</sup> UNDRIP: resolution / adopted by the General Assembly, 2 October 2007, A/RES/61/295, article 5.

<sup>141</sup> See United Nations Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations which indicated the intended meaning of 'self-determination' as it is used in the International Convention on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights included Indigenous peoples within nation states; see Christine Fletcher, *Aboriginal Self-Determination in Australia* (1994) Aboriginal Studies Press, Australia, pp 74-75.

<sup>142</sup> Australian Human Rights Commission, 'Self-determination and effective participation 'within the life of the nation'? An Australian perspective on self-determination' 5 Feb 2003, citing Daes, E., Discrimination against Indigenous people - Explanatory note concerning the draft declaration on the rights of Indigenous peoples, UN Doc; E/CN.4/Sub.2/1993/26/Add.1, 19 July 1993, para 21.

<sup>143</sup> Australian Human Rights Commission, 'Self-determination and effective participation 'within the life of the nation'? An Australian perspective on self-determination' 5 Feb 2003.

A series of principles have been developed to assist in defining what self-determination means in practice.<sup>144</sup> These include:

- (a) emphasising the role of Indigenous peoples in decision making with respect to their traditional lands and resources, and economic activities;<sup>145</sup>
- (b) supporting rights to develop language and culture;<sup>146</sup> and
- (c) calling for increased Indigenous participation in State institutions.<sup>147</sup>

The two Australian jurisdictions that have enacted human rights legislation (Victoria and the Australian Capital Territory) have not (yet) adopted a right to self-determination, instead choosing alternate avenues of protecting the specific cultural rights to Indigenous peoples. These are discussed at **Appendix B**.

In 2010 Professor Larissa Behrendt and Dr Alison Vivian from the Jumbunna Indigenous House of Learning suggested options for pursuing Aboriginal self-determination through the Victorian Charter. These options represent a sensible array of mechanism for consideration in Queensland. The options identified were:

- having the right to self-determination specifically protected in the Charter;
- adding several rights to the Charter that would help Aboriginal and Torres Strait Islander peoples exercise the right to self-determination;
- having a Charter Preamble that places self-determination as a key principle against which the rights within the Charter need to be interpreted; and
- having a mechanism that supports the enforcement of Charter rights that are central to self-determination.<sup>148</sup>

While QAILS has members that are led by Aboriginal and Torres Strait Islander governance bodies and/or management, and/or provide services exclusively to Aboriginal and Torres Strait Islander clients, it would be inappropriate for QAILS to suggest any specific legislative mechanism in any proposed human rights law that supports First Australians' right to self-determination.

**Recommendation X:** That the Committee consults with Aboriginal and Torres Strait Islander organisations, communities and peoples to develop a framework to promote a right to self-determination.

<sup>144</sup> Professor Larissa Behrendt and Dr Alison Vivian, *Indigenous Self-determination and the Charter of Human Rights and Responsibilities—A Framework for Discussion* (2010) 10.

<sup>145</sup> Ibid.

<sup>146</sup> Ibid.

<sup>147</sup> Ibid.

<sup>148</sup> Ibid, 26-27.

# How should we protect human rights?

QAILS considers that the best way to strengthen the rights (discussed in section 1 of this submission) is to introduce a Human Rights Act for Queensland.

**Recommendation X:** That the Committee recommends the introduction of a Human Rights Act for Queensland.

Section 2 of this submission examines mechanisms that could be adopted in the Queensland Human Rights Act. It does so by drawing on current examples from human rights legislation in the ACT, Victoria, UK and New Zealand.

The recommended mechanisms are broadly summarised as follows:

- mechanisms relating to making and interpreting legislation;
- obligations on public authorities;
- functions and powers of a human rights commission;
- complaints and litigation; and
- human rights education.

## Making and interpreting legislation

### *Statements of compatibility*

A Queensland Human Rights Act could require new bills introduced to the Queensland Parliament to be accompanied by a statement of compatibility with human rights. This is the position in the ACT Act and Victorian Charter.<sup>149</sup>

It has been argued that the Victorian process in particular has been designed to ensure that Members of Parliament take responsibility for the human rights impact of their legislation, and to assist Parliament in its consideration of bills.<sup>150</sup>

A failure to comply with the requirement for a statement of compatibility should not affect the validity, operation or enforcement of any law.<sup>151</sup>

**Recommendation X:** That a Queensland Human Rights Act requires new bills introduced into Queensland Parliament to be accompanied by a statement of compatibility with the Act.

<sup>149</sup> ACT Act, section 37; Victorian Charter, section 28

<sup>150</sup> Simon Evans, 'The Victorian Charter of Rights and Responsibilities and the ACT Human Rights Act: Four Key Differences and Their Implications for Victoria' (Paper presented at the Australian Bills of Rights: The ACT and Beyond Conference, Australian National University, 21 June 2006), cited in Tasmania Law Reform Institute, *A Charter of Rights for Tasmania Tenth Report* (October 2007) 38.

<sup>151</sup> ACT Act, section 39

**Alternative Recommendation X:** That the Introduction of Legislation Act requires...

There is also a need to consider pre-existing legislation. The Victorian Department of Justice coordinated a review of Victorian legislation for compatibility with the Victorian Charter before it came into force.<sup>152</sup>

**Recommendation X:** That, prior to the Queensland Human Rights Act coming into force, the Department of Justice and Attorney-General review Queensland legislation for compatibility with human rights.

### ***New laws to be considered by committee***

The Queensland Human Rights Act may also require new bills to be scrutinised by a parliamentary standing committee. The committee would report to the Queensland Parliament on the compatibility of the bill with human rights. This is the position in the ACT Act and Victorian Charter.<sup>153</sup>

A recent independent review of the Victorian Charter recommended that the Victorian Government refer amendments to non-Victorian laws that apply in Victoria under a national scheme, and to Regulations made under those laws, to the Scrutiny of Acts and Regulations Committee for consideration.<sup>154</sup>

In the ACT, the ACT Government concluded in a recent review that it would not change the current legislative scrutiny process, however it will maintain a watching brief on the Commonwealth scrutiny of bills scheme. It would be prudent for the Queensland Government to do similarly.<sup>155</sup>

**Recommendation X:** That a Queensland Human Rights Act require the Legal Affairs and Community Safety Committee to review Bills introduced to parliament, on the compatibility of the bill with the rights contained in the Human Rights Act.

The *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) established the Parliamentary Joint Committee on Human Rights. This committee's main function is to examine all bills and legislative instruments for compatibility with human rights,<sup>156</sup> and to report to both Houses of Parliament on its findings. The committee usually publishes its reports in each joint sitting week, providing the committee's view on the compatibility of bills introduced into Parliament, and legislative instruments received, since its last report.

**Alternative Recommendation X:** That Queensland introduce a Human Rights (Parliamentary Scrutiny) Act to review Bills introduced to parliament, on the compatibility of the bill with the rights.

<sup>152</sup> Brennan Report at 155.

<sup>153</sup> ACT Act, section 38; Victorian Charter, section 30

<sup>154</sup> Michael Brett Young, 'From Commitment to Culture the 2015 Review of the Charter of Human Rights and Responsibilities Act 2006', recommendation 38

<sup>155</sup> ACT Government, 'Economic, social and cultural rights in the Human Rights Act 2004 Section 43 review' (November 2014), page 26

<sup>156</sup> Human rights are defined in the Act as the rights and freedoms contained in seven core human rights treaties to which Australia is a party. These treaties are the ICCPR, the ICESCR, the CROC, the International Convention on the Elimination of All Forms of Racial Discrimination, Convention on the Elimination of All Forms of Discrimination against Women, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Convention on the Rights of Persons with Disabilities.

## *Interpreting laws in a manner consistent with human rights*

Queensland laws should be interpreted in a manner consistent with the human rights identified in the Queensland Human Rights Act, so far as it is possible to do so consistently with the purpose of those laws. This is the position in the ACT Act and Victorian Charter.<sup>157</sup>

**Recommendation X:** That a Queensland Human Rights Act requires all legislation to be interpreted consistently with human rights.

**Alternative Recommendation X:** That the Introduction of Legislation Act requires...

When interpreting the laws, the Queensland Human Rights Act should clarify that international law and the judgments of domestic, foreign and international courts and tribunals relevant to the human right or rights, should be considered. The Victorian Charter adopts this approach, as does the ACT Act (with the exception of the reference to the judgments of domestic courts and tribunals).<sup>158</sup> The ACT Act provides the following parameters for deciding whether the extraneous materials should be considered, and their weight:

- the desire to rely on the ordinary meaning of the Act;
- the desire not to prolong proceedings; and
- the public accessibility of the relevant material.<sup>159</sup>

Consideration would need to be given as to whether the provisions should affect the validity of an Act, subordinate instrument (for example, a regulation or by-law) or provision that is incompatible with a human right. This is discussed below.

## Obligations on public authorities

### *Conduct of public authorities*

A public authority includes an authority of the State, a Minister, police officer, public servant and, critically, another entity performing public functions (including a private entity performing public functions). It does not include Parliament or the Courts.<sup>160</sup> Further discussion is attached at **Appendix A**.

<sup>157</sup> ACT Act, section 30; Victorian Charter, section 32(1)

<sup>158</sup> Victorian Charter, section 32(2); ACT Act, section 31(1)

<sup>159</sup> ACT Act, section 31(2)

<sup>160</sup> Victorian Charter, section 4



Public authorities may be required to perform their duties in a manner consistent with human rights, and to give proper consideration to human rights when making a decision of a public nature. This is the position in the ACT Act (except in relation to economic, social and cultural rights).<sup>161</sup>

In Victoria, special protections exist for the actions of religious bodies.<sup>162</sup> A recent independent review of the Victorian Charter recommended that the Charter be amended to clarify that decisions of public authorities must be substantively compatible with human rights. This could be achieved by defining 'to act' as including 'to make a decision', or by specifying in another section of the Charter (section 38(1)) that it is unlawful for a public authority to make a decision that is incompatible with a human right.<sup>163</sup>

**Recommendation X:** That a Queensland Human Rights Act require public authorities to perform their duties in a manner consistent with human rights, and to give proper consideration to human rights when making a decision of a public nature.

**Alternative Recommendation X:** That the Public Service Act 2008 (Qld), Police Service Administration Act 1990 (Qld) and similar legislation be amended to require public servants and other authorities to perform their duties in a manner consistent with human rights, and to give proper consideration to human rights when making a decision of a public nature.

The review further recommended that section 4 of the Victorian Charter be amended to set out a non-exhaustive list of functions of a public nature, including:

- the operation of prisons and other correctional facilities;
- the provision of public health services;
- the provision of public education, including public tertiary education;
- the provision of public housing, including by registered housing providers;
- the provision of public disability services;
- the provision of public transport;
- the provision of emergency services; and
- the provision of water supply.<sup>164</sup>

It recommended that the Victorian Government use the *Charter of Human Rights and Responsibilities (Public Authorities) Regulations 2013* (Vic) to prescribe entities to be or not be public authorities, including entities that provide services under national schemes, where necessary to resolve doubt.<sup>165</sup>

<sup>161</sup> ACT Act, section 40B

<sup>162</sup> Victorian Charter, section 38; religious exceptions and equality measures in other Victorian laws are currently under review in Victoria, and an independent review recommended this provision also be examined during the review process: Young, above, n5, recommendation 18

<sup>163</sup> Young, above, n5, recommendation 17

<sup>164</sup> Young, above, n5, recommendation 12

<sup>165</sup> Young, above, n5, recommendation 13

## *Reporting and auditing by public authorities*

In the ACT, government departments and agencies (i.e. 'public authorities') are required to report on the implementation of the ACT Act in their annual reports. This obligation is included in the *Annual Reports (Government Agencies) Act 1995* (ACT)<sup>166</sup> and could be inserted by consequential amendment into the equivalent Queensland legislation. Alternatively, it could be imposed by a provision in the Queensland Human Rights Act itself.

The five year review of the ACT Act recommended that public authorities be 'strongly encouraged' to audit their legislation and policies for human rights compliance and to identify which practices which may be inconsistent with human rights.<sup>167</sup> The recommendation was made to address lingering 'complacency' and 'lack of awareness' about the ACT Act amongst 'frontline decision-makers'.<sup>168</sup>

VHREOC is empowered to review a public authority's programs and practices for compatibility with human rights, upon request. The Victorian Charter specified that the four year review of the Charter must consider whether 'regular auditing of public authorities to assess compliance with human rights should be made mandatory'.<sup>169</sup> In its four year review report, SARC recommended that the optional review provision be retained.<sup>170</sup> The Young Review concluded that other bodies already had responsibility for mandatory auditing of public authorities. Consequently, it recommended that VHREOC not be given this power and responsibility, but that auditing agencies should be able to request assistance from VHREOC in this regard if necessary.<sup>171</sup>

At a federal level, the Brennan Report recommended that the federal government require federal departments and agencies to develop human rights action plans and to report on human rights compliance in their annual reports.<sup>172</sup>

These mechanisms are good ways to make public authorities engage with a human rights Act in a meaningful way. They encourage the development of a human rights culture within government and also assist the relevant human rights body in surveying human rights compliance and progress. As the ACT experience shows, it is not enough to merely enact a human rights Act; public authorities must be required to engage with that Act for a human rights culture to develop.

## *Application of Human Rights Act to Courts*

Both the Victorian and ACT charters differ from most other modern human rights instruments<sup>173</sup> in excluding the courts from their definitions of 'public authority', except when they are performing administrative functions. This appears to be on the back of the view that it may be unconstitutional for

<sup>166</sup> *Annual Reports (Government Agencies) Act 2004* (ACT), ss 5, 8.

<sup>167</sup> ANU Review, recommendation 21.

<sup>168</sup> ANU Review at 42.

<sup>169</sup> Victorian Charter, s 44(1)(c).

<sup>170</sup> SARC Review, recommendation 4.

<sup>171</sup> Young Review, recommendation 22.

<sup>172</sup> Brennan Report, recommendation 10.

<sup>173</sup> For example, the United Kingdom *Human Rights Act 1998*, the New Zealand *Bill of Rights Act 1990* and the Canadian *Charter of Rights and Freedoms 1982* apply to courts in the performance of all their functions.

a State legislature to require courts to apply a State Charter of Rights when adjudicating common law causes of action.<sup>174</sup> There is continuing support for this view.<sup>175</sup>

We recommend that the Queensland Human Rights Act adopt the approach taken in Victoria and the ACT. Courts and tribunals should be classed as public authorities only when they are acting in their administrative capacity. Further, given that it can often be complex to distinguish between administrative and judicial functions, a note to the section should be inserted setting out a non-exhaustive list of when a court or tribunal is acting in an administrative capacity.

### *Individuals, corporations and community organisations*

A number of stakeholders have argued that human rights legislation should extend into the private sphere for the following reasons:

- if human rights are conceived as 'indivisible' in nature they cannot be conceived as 'divisible' in application;
- the way in which community organisations are funded as well as the degree to which they work with government social service systems means binding only public authorities under a Charter is impractical;
- corporations need to be covered by any Charter as they often provide essential services either through their own core business or through government outsourcing;
- the effect of binding only government but not corporations or community organisations may create perverse incentives for government to shift responsibilities as a means of limiting the application of any Charter; and
- if the objective of human rights law is the protection of human dignity, it is logical that remedies be available for violations of human rights whether committed by public or private actors.<sup>176</sup>

Precedent for requiring all sectors and members of the community to comply with a Charter of Human Rights is provided by the South African *Bill of Rights 1996*. However, in requiring such compliance, the South African *Bill of Rights 1996* draws a distinction between organs of state and other entities including individuals and corporations. In respect of individuals and corporations, provisions in the Bill only apply to the extent that they logically can do so taking into account the nature of the rights they contain and the nature of any duties they impose.<sup>177</sup>

Others have raised the following objections to such a breadth of application:

- a Charter binding only the Government still has reach into the private sphere;<sup>178</sup> and

<sup>174</sup> Victorian Human Rights Consultation Committee, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005) 59.

<sup>175</sup> See, for example, Michael Brett Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (2015) 79.

<sup>176</sup> Above n 3, 67.

<sup>177</sup> South African *Bill of Rights 1996*, s8.

<sup>178</sup> Paul Rishworth 'Human Rights' [2005] *New Zealand Law Review* 87; Andrew Geddes 'The Horizontal Effects of the New Zealand Bill of Rights Act as Applied in *Hosking v Runting*' [2004] *New Zealand Law Review* 681; Anthony Lester, 'The Magnetism of the *Human Rights Act 1998*' [2002] *Victoria University of Wellington Law Review* 20; Murray Hunt, 'The "Horizontal Effect" of the Human Rights Act' [1998] *PL* 423; Lord Justice Buxton, 'The Human Rights Act and Private Law' (2000) 116 *Law Quarterly Review* 48; Antony Lester and David Pannick, 'The Impact of the Human Rights Act on Private

- to extend the reach of a Charter beyond the public sphere from the outset would have extensive educational, resource and enforcement implications, which may render it unacceptable and its implementation unfeasible for the Government.<sup>179</sup>

However, the Charter does not necessarily need to remain static in this regard. If the Charter commenced operation as applicable only to 'public authorities' (however defined), the issue of application could be revisited during reviews of the Charter and the question may be left open about the further extension of the Charter's application throughout society in a manner consistent with section 8 of the South African *Bill of Rights 1996*.

### *Opt in clause*

The ACT Act also includes an 'opt-in' provision, which allows private entities to write to the ACT Attorney-General to request a declaration that they be bound by the provisions of the ACT Act that apply to public authorities.<sup>180</sup> A recent review of the Victorian Charter recommended that this provision be included in the Charter.<sup>181</sup>

This unique provision arises out of a recognition that imposing human rights obligations on private entities from the outset may be perceived to be too onerous and lack support. Though there has not been a rush from private bodies to opt-in,<sup>182</sup> with significant time, education and training, more private bodies may wish to demonstrate their commitment to human rights and the communities within which they operate.<sup>183</sup>

## Strengthening the Human Rights Commission

A Queensland Human Rights Act could empower a body to investigate, report on and conciliate human rights complaints, intervene in relevant legal proceedings, conduct alternative dispute resolution processes, and research and report on compliance and reform of the Charter. In Queensland, the Anti-Discrimination Commission could carry out this role, if it were appropriately empowered and resourced.<sup>184</sup> A recent review of the Victorian Charter recommended empowering the Victorian Human Rights and Equal Opportunity Commission to conciliate complaints, and provide human rights education to the public sector.<sup>185</sup>

The Commission could exercise some or all of a number of functions, including:

- receiving, investigating and/or reporting on human rights complaints;

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Law: The Knight's Move', (2000) 116 *Law Quarterly Review* 380; AS Butler, 'The New Zealand Bill of Rights and Private Common Law Litigation' [1991] *New Zealand Law Journal* 261.

<sup>179</sup> Human Rights and Equal Opportunity Commission, *Submission in response to the Tasmanian Law Reform Institute's Issues Paper: A Charter of Rights for Tasmania?* (15 December 2006) 22.

<sup>180</sup> ACT Act, section 40D

<sup>181</sup> Young, above, n5, recommendation 15

<sup>182</sup> According to the ACT legislation database (available at <http://www.legislation.act.gov.au/ni/current/h.asp>), there have been seven notifiable instruments registered since 2004 declaring private entities to be subject to the *Human Rights Act 2004* (ACT).

<sup>183</sup> Australian Lawyers' Alliance, *A human rights act for Australia*, Submission to the federal human rights consultation, <http://www.hrlrc.org.au/files/human-rights-consultation-submission.pdf> (accessed on 20 November 2015).

<sup>184</sup> See for example, *Human Rights Commission Act 2005* (ACT), Victorian Charter, Part 4 and *Human Rights Act 1993* (NZ), Part 1

<sup>185</sup> Young, above, n5, recommendation 23

- intervening in and/or initiating legal proceedings;
- administering alternative dispute resolution processes, such as negotiation, mediation and conciliation, in relation to human rights complaints;
- reviewing legislation for compliance with human rights and recommending reform;
- auditing public authorities on their compliance with human rights;
- promoting a human rights culture through education of government departments and officers, private entities and the community;
- reviewing the Queensland Human Rights Act, or assisting the relevant Minister in his or her review;<sup>186</sup> and
- assisting the relevant Minister in relation to any questions that arise regarding the application and/or operation of the Charter.

There are several options available; A Queensland Human Rights Act could:

1. establish a new human rights commission;
2. empower an existing body with additional human rights functions;
3. enact a combination of these approaches – that is, split responsibility for the supplementary functions between multiple bodies.

QAILS supports broadening the powers of the Queensland Anti-Discrimination Commission to carry out this role. It is already empowered by the *Anti-Discrimination Act 1991* (Qld) to receive complaints regarding discrimination and to investigate and conciliate those complaints,<sup>187</sup> so the necessary mechanisms and experience are already established.

The jurisdiction of these bodies could be expanded by the Queensland Human Rights Act or by consequential amendment to their existing empowering Acts. Of course, as noted above, it is also crucial to ensure these entities are adequately resourced to deal with their expanded responsibilities.

**Recommendation X:** That a Queensland Human Rights Act vest the following functions in the Anti-Discrimination Commission of Queensland:

- receiving, investigating and/or reporting on human rights complaints;
- intervening in and/or initiating legal proceedings;
- administering alternative dispute resolution processes, such as negotiation, mediation and conciliation, in relation to human rights complaints;
- reviewing legislation for compliance with human rights and recommending reform;
- auditing public authorities on their compliance with human rights;
- promoting a human rights culture through education of government departments and officers, private entities and the community;

<sup>186</sup> As noted in our options paper on 'mechanisms', the ACT and Victorian human rights Acts provide for a review of the operation of the Charter within a specified number of years. See, in particular, Victorian Charter, ss 45-46; ACT Act, s 41.

<sup>187</sup> *Anti-Discrimination Act 1991* (Qld), Pt 1.

- reviewing the Queensland Human Rights Act, or assisting the relevant Minister in his or her review; and
- assisting the relevant Minister in relation to any questions that arise regarding the application and/or operation of the Charter.

**Alternate recommendation X:** That the Anti-Discrimination Commission Act be amended, to vest the following functions in the Anti-Discrimination Commission of Queensland:

- receiving, investigating and/or reporting on human rights complaints;
- intervening in and/or initiating legal proceedings;
- administering alternative dispute resolution processes, such as negotiation, mediation and conciliation, in relation to human rights complaints;
- reviewing legislation for compliance with human rights and recommending reform;
- auditing public authorities on their compliance with human rights;
- promoting a human rights culture through education of government departments and officers, private entities and the community;
- assisting the relevant Minister in relation to any questions that arise regarding the application and/or operation of the Charter.

## Complaints and litigation

As set out above, the Anti-Discrimination Commission of Queensland should be empowered and resourced to investigate, report on and conciliate human rights complaints, intervene in relevant legal proceedings, conduct alternative dispute resolution processes, and research and report on compliance and reform of the Charter.

However, there does need to be additional protections to ensure compliance with human rights responsibilities, and experience in other jurisdictions suggest the roles of courts and tribunals is vital.

### *Legal proceedings*

The Queensland Human Rights Act should provide for a freestanding cause of action for victims of any contravention by public authorities of the requirement to act consistently with human rights, with the full range of remedies, including damages.

**Recommendation X:** That a Queensland Human Rights Act provide for a freestanding cause of action for victims of any contravention by public authorities of the requirement to act consistently with human rights, with the full range of remedies, including damages.



The ACT Act has a freestanding cause of action, although damages are not recoverable.<sup>188</sup> The issue of damages was recently considered in an ACT Government review of the ACT Act, and the Government confirmed:

... the existing human rights framework affirmatively meets the requirement for an effective remedy through the availability of other suitable remedies such as declaratory or injunctive relief, interpreting legislation in accordance with human rights and vindication through declarations of incompatibility... Consistent with the Government's response to the five year review of the [Act], the Government does not agree that damages be available as a form of relief for breach of a human right under the [Act].<sup>189</sup>

Claims of unlawfulness under the Victorian Charter may only be raised in legal proceedings if there is another ground on which to impugn the decision or action. Damages are not recoverable.<sup>190</sup>

A recent review of the Victorian Charter recommended that the Charter provide a freestanding cause of action similar to the one that exists in the ACT. However, rather than being required to start court proceedings in the Supreme Court, it is recommended that proceedings commence in the Victorian Civil and Administrative Tribunal.<sup>191</sup>

In the UK, a freestanding cause of action applies in certain circumstances. In relation to any act (or proposed act) of a public authority that the court finds is (or would be) unlawful, the court may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate. Damages may only be awarded by a court that has power to award damages or the payment of compensation in civil proceedings. No award of damages will be made unless, in all the circumstances, the court is satisfied that the award is necessary to afford just satisfaction to the victim.<sup>192</sup>

## ***Tribunal***

In addition to having a multi-functional human rights body, a Queensland Human Rights Act could also establish a tribunal to deal with violations of the Charter, or alternatively empower an existing tribunal to deal with such violations.

This would go some way towards addressing the accessibility and efficiency issues associated with the only remedy being enforcing rights in legal proceedings.

The advantage of a separate tribunal is specialisation. The problem is resourcing. It is probably more likely that the government would extend the jurisdiction of an existing tribunal to encompass breaches of a human rights act than establish a separate tribunal.

New Zealand has a separate 'Human Rights Review Tribunal'. It was initially established under anti-discrimination legislation<sup>193</sup> to deal with discrimination complaints, and interim orders and exceptions from that Act for genuine occupational qualifications and justifications. Its jurisdiction was later expanded to include civil proceedings for breaches of that Act.<sup>194</sup> It has not been given jurisdiction

<sup>188</sup> ACT Act, section 40C; see also ACT Government, 'Economic, social and cultural rights in the Human Rights Act 2004 Section 43 review' (November 2014), pages 23-24

<sup>189</sup> ACT Government, above, n28, page 25

<sup>190</sup> Victorian Charter, section 39

<sup>191</sup> Young, above, n5, recommendations 6, 23 and 27

<sup>192</sup> UK Act, section 8

<sup>193</sup> See Part 4 of the *Human Rights Act 1993* (NZ).

<sup>194</sup> NZ Bill of Rights, s 94.

over complaints under the separate NZ Act but it is a potential model for how such a tribunal could function.

Neither the Victorian or ACT Acts establish separate tribunals. Nor are any existing tribunals empowered to adjudicate on breaches of their respective human rights Acts; this restricts access to justice, as complainants are forced to seek remedies through higher courts (which are more formal and costly).

It may be appropriate for this to be to the Queensland Civil and Administrative Tribunal.<sup>195</sup> That tribunal already has jurisdiction in relation to a variety of matters including unlawful discrimination.

**Recommendation X:** That a Queensland Human Rights Act provides that proceedings can be commenced in the Queensland Civil and Administrative Tribunal (QCAT) via a complaint.

### ***Referral to the Supreme Court***

QCAT and lower courts may be empowered to refer to the Supreme Court a question of law relating to the application of the Queensland Human Rights Act, or a question about the interpretation of a statutory provision in accordance with the Charter. The effect of this mechanism would be that the court or tribunal making the referral cannot then make a determination or proceed with the matter until, and in accordance with, the Supreme Court's decision.

This power exists in Victoria, but only in circumstances where there is an existing proceeding before a court or tribunal, a party has made an application for referral and the court or tribunal considers that the question is appropriate for determination by the Supreme Court.<sup>196</sup>

**Recommendation X:** That a Queensland Human Rights Act provides that lower Courts to be empowered to refer questions of law or interpretation about the Act to the Supreme Court.

### ***Rights to intervene***

The Queensland Attorney-General, and any human rights commissioner (discussed below) with leave, may be empowered to intervene in a court proceeding that involves the application of the Queensland Human Rights Act. This is the position in the ACT Act and Victorian Charter.<sup>197</sup>

**Recommendation X:** That a Queensland Human Rights Act provides the Attorney-General and any human rights commission with a right to intervene in Court proceedings.

Additionally, in both the ACT and Victoria, a party to a relevant proceeding in the Supreme Court (or referred to the Supreme Court) must give notice to the Attorney-General and the Commission.<sup>198</sup>

<sup>195</sup> See its website at <http://www.qcat.qld.gov.au/>. Its empowering Act is the *Queensland Civil and Administrative Tribunal Act 2009* (Qld).

<sup>196</sup> Victorian Charter, section 33

<sup>197</sup> ACT Act, sections 35-36; Victorian Charter, section 34

<sup>198</sup> Victorian Charter, section 35; ACT Act, section 34

**Recommendation X:** That a Queensland Human Rights Act provides a relevant proceeding in the Supreme Court (or referred to the Supreme Court) must require notice to be provided to the Attorney-General and the Commission.

### ***Declarations of incompatibility***

The Supreme Court may be empowered to make a declaration that an Act of Parliament or a subordinate instrument is not consistent with a relevant human right. This is the position in the ACT Act, however the declaration of incompatibility does not affect the validity, operation or enforcement of law, or the rights or obligations of people.<sup>199</sup> The Attorney-General and Commission must receive notice of any proceeding in which the Supreme Court is considering making a declaration, and will be given time to decide whether to intervene.<sup>200</sup> Once the ACT Attorney-General receives a copy of the declaration, he or she must present a copy to the Parliament within 6 sitting days. Then, within 6 months, the Attorney-General must prepare and table a written response to the declaration.<sup>201</sup>

In Victoria, the declaration is called a 'declaration of inconsistent interpretation'. The provisions of the Victorian Charter are largely similar to those described above (although the process is slightly different to the ACT Act), however the provisions are expressly subject to any relevant 'override declaration'.<sup>202</sup> The Parliament may, in exceptional circumstances, declare in an Act that the Act (or a provision of the Act) has effect despite incompatibility with human rights or the Charter. Such an 'override declaration' extends to any subordinate instrument made under the Act. The effect of a declaration is that the Charter has no application to the relevant statutory provision.<sup>203</sup>

The position is somewhat different in the UK. In that jurisdiction, courts have the power to declare legislation incompatible with the Human Rights Convention.<sup>204</sup> However, in response to a declaration of incompatibility, the Government may in certain circumstances make a remedial order to amend the legislation where there are compelling reasons to do so.<sup>205</sup>

**Recommendation X:** That a Queensland Human Rights Act empower the Supreme Court to make a declaration that an Act of Parliament or a subordinate instrument is not consistent with a relevant human right.

It has recently been recommended that the provision for override declarations be repealed. This is because the Parliament has continuing authority to enact any statute (including statutes that are incompatible with human rights), and the statement of compatibility is the mechanism for noting any incompatibility. It was nevertheless recommended that, if legislation is passed that is incompatible with human rights, the responsible Minister should report to Parliament on its operation every five years.<sup>206</sup>

<sup>199</sup> ACT Act, section 32

<sup>200</sup> ACT Act, section 34

<sup>201</sup> ACT Act, section 33

<sup>202</sup> Victorian Charter, section 36

<sup>203</sup> Victorian Charter, section 31

<sup>204</sup> UK Act, section 4

<sup>205</sup> UK Act, section 10

<sup>206</sup> Young, above, n5, recommendation 46

## Education / public awareness

The need for human rights education is recognised by a variety of international human rights instruments. For example, the Universal Declaration of Human Rights provides that:<sup>207</sup>

'Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.'

The UN has also proclaimed a World Programme for Human Rights Education.<sup>208</sup> Including educational measures in a Queensland Human Rights Act would assist Australia in complying with this.<sup>209</sup>

Father Frank Brennan's report following the 'National Human Rights Consultation' in 2009 found a lack of understanding amongst Australians of what human rights are, strong support for an improved human rights culture and strong criticism of the lack of education around human rights.<sup>210</sup> It recommended that human rights education be the 'highest priority' for improving and promoting human rights in Australia.<sup>211</sup>

### *What form of education?*

For these reasons, a Queensland Human Rights Act should be supported by educational and awareness programs directed at government, the community and the private sector.

It is appropriate to charge the human rights body with this responsibility. As noted above, both VHREOC and the ACT HRC have a responsibility to educate about their respective Acts.<sup>212</sup> Of course, it is crucial that the responsible body is adequately funded to carry out these functions.

Specific educational activities undertaken by VHREOC and the ACT HRC include:

- developing resources on the Charter – for example, the DJCS has developed a 'toolkit' for public servants to assist them in developing human rights compatible legislation<sup>213</sup> and both VHREOC and the ACT HRC have a variety of resources of resources available on their websites to educate the community on various aspects of the Charter;
- holding workshops, seminars and other training sessions on the Charter and on particular issues – for both public servants and the community; and
- surveying awareness of and compliance with the Charter within government, the community and the private sector.

<sup>207</sup> Art 26(2). See also ICCPR, Art 13(1).

<sup>208</sup> See <http://www.ohchr.org/EN/Issues/Education/Training/Pages/Programme.aspx>.

<sup>209</sup> Brennan et al, *National Human Rights Consultation: Report* (September 2009) (*Brennan Report*) at 141.

<sup>210</sup> Brennan Report at xvii, 134-135, 149.

<sup>211</sup> Brennan Report, recommendation 1.

<sup>212</sup> Victorian Charter, s 41(d); *Human Rights Commission Act 2005* (ACT), s 27(2)(a).

<sup>213</sup> DCJS Review at 34.

The Brennan Report also recommended:<sup>214</sup>

- developing a national plan to implement a comprehensive framework of human rights education in schools, universities, the public sector and the community generally;
- publishing a readily comprehensible list of human rights and responsibilities that can be translated into various community languages;
- that any education and awareness campaign incorporate the experiences of Indigenous Australians;
- that the Federal Government collaborate with non-government organisations and the private sector in developing and implementing its national education plan; and
- incorporating human rights compliance into the Australian Public Service Values and Code of Conduct.

The Young Review additionally recommended the use of 'community advocates' and workshops for the judiciary and legal profession.<sup>215</sup>

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<sup>214</sup> Brennan Report, recommendations 2 and 9. See generally, Part 6.2.

<sup>215</sup> Young Review, recommendations 8, 11.

# Costs and benefits of a Human Rights Act

If Queensland enacts and implements its Human Rights Act in a similar manner to Victoria, there is strong evidence to suggest that the overall cost will be very low. Most financial costs are likely to be fixed costs that will not persist in the future. In contrast, the benefits that the Human Rights Act's enactment will generate are likely to increase over time and have a long-lasting effect.

While there is some difficulty in quantifying the financial benefits that will be generated by the enactment of the Human Rights Act, there is strong academic evidence suggesting a correlation between the protection of human rights and economic and social development. Reductions in discrimination that have been achieved by the enactment of the *Disability Discrimination Act 1992* (Cth) and efforts to close the gap in life expectancy between Indigenous and non-Indigenous Australians have generated significant economic benefits. This suggests that the protection of human rights through the enactment of a Queensland Human Rights Act will achieve similar benefits.

## Legal Benefits

### *Improvement in law making and public policy*

#### Statements of Compatibility

Procedural requirements set out in a Human Rights Act will ensure that human rights are considered at all stages of the law-making and policy development process. A requirement for bills to be accompanied by statements of compatibility will ensure the consideration of and compliance with protected human rights in the legislative drafting process. In Victoria and the ACT, all bills must be accompanied by statements of compatibility.<sup>216</sup> Evidence shows that in both of these jurisdictions, increased political debate and consideration of policy by law makers has had positive impacts on the drafting and finalisation of legislation.<sup>217</sup>

#### Declarations of Incompatibility

In Victoria, the ACT and the UK, courts can issue declarations of incompatibility when they consider that legislative provisions are incompatible with protected human rights.<sup>218</sup> In these jurisdictions, there is no requirement for Parliament to comply with a declaration of incompatibility. This preserves parliamentary sovereignty and also provides for certainty of law in the interim between the issuing of a declaration and Parliament's response.<sup>219</sup> If Parliament ignores a declaration of incompatibility or passes new legislation at odds with it, it is an exercise of democratic dialogue with the courts. In *Re Application for Bail by Isa Islam*<sup>220</sup> Justice Penfold of the ACT Supreme Court made the first declaration of incompatibility under the ACT Act. The government formally disagreed with the declaration, however after an adjournment of the appeal made 'drafting suggestions' to the Act under

<sup>216</sup> Victorian Act, s28; ACT Act, s37.

<sup>217</sup> ACT Justice and Community Safety Directorate, *Government Responses: Australian National University Human Rights Research Project Report The Human Rights Act 2004 (ACT): The First Five Years of Operation* (March 2012) at 2, <[https://cdn.justice.act.gov.au/resources/uploads/JACS/PDF/Government\\_RespoRes\\_first\\_5\\_yrs\\_PDF.pdf](https://cdn.justice.act.gov.au/resources/uploads/JACS/PDF/Government_RespoRes_first_5_yrs_PDF.pdf)>

<sup>218</sup> ACT Act, ss32, 33; Victorian Act, ss36, 37; UK Act, s4.

<sup>219</sup> David Hoffman, *Impact of the UK Human Rights Act on Private Law* (Cambridge University Press, 2011), 74.

<sup>220</sup> (2010) 4 ACTLR 235.



consideration. Although these suggestions are yet to be implemented, it is a good example of how a declaration of incompatibility has inspired political debate.<sup>221</sup> In the UK, commentators have suggested that it is more likely for Parliament to comply with these declarations of incompatibility due to the political repercussions of resisting a finding of a rights violation combined with the legal repercussions in the event of an adverse finding in the European Court of Human Rights.<sup>222</sup>

### Scrutiny Committees

Scrutiny committees within jurisdictions with operative Human Rights Acts commonly report on human rights issues related to bills and any limitations imposed on human rights by those bills. In the ACT, the government has amended legislative proposals in response to criticisms in the scrutiny committee's reports.<sup>223</sup> In the ACT, a Minister may be asked to account for a failure to respond to a committee report within three months.<sup>224</sup> Notably from 2004 until 2008 only 13 bills that were a subject of a scrutiny committee report did not receive a formal response.<sup>225</sup>

### *Increased protection of rights*

Statutory protection of human rights will make it easier for parties to enforce these rights and will result in increased protection of vulnerable individuals. When used effectively, a Human Rights Act will allow for a range of individual and systematic injuries to be remedied.

In both the ACT and Victoria, human rights legislation was initially referred to cautiously by courts and tribunals. However the number of cases referencing human rights and raising human rights issues has increased since commencement.<sup>226</sup>

The table below depicts mentions of the ACT Act by year of operation.<sup>227</sup>

Year	ACT Court of Appeal	ACT Supreme Court	Total
First year: July 2004 – June 2005	1	10	11
Second year: July 2005 – June 2006	2	12	14
Third year: July 2006 – June 2007	2	8	10
Fourth year: year: July 2007 – June 2008	3	13	16
Fifth year: July 2008 – June 2009	2	23	25
Sixth year: July 2009 – June 2010	3	21	24
Seventh year: July 2010 – June 2011	0	20	20
Eighth year: July 2011 – June 2012	4	18	22

<sup>221</sup> Chief Justice Helen Murrell, ACT Supreme Court, *The Judiciary and Human Rights* (July 2014) at 20, <<http://regnet.anu.edu.au/sites/default/files/uploads/2015-06/Chief%20Justice%20Helen%20Murrell.pdf>>.

<sup>222</sup> David Hoffman, *Impact of the UK Human Rights Act on Private Law* (Cambridge University Press, 2011), 76.

<sup>223</sup> For example, the government limited broadly drafted powers in the *Environmental Protection Authority under the Water Resources Bill 2007* (ACT); the powers of Health Professions Tribunals to issue warrants of detentions were restricted under the *Health Legislation Amendment Bill (No 2) 2006* (ACT); Scrutiny Committee, Parliament of ACT, *Scrutiny Report No 34* (2006).

<sup>224</sup> Temporary Order s254A, 9 December 2008, ACT Legislative Assembly Standing and Temporary Orders (Feb 2009).

<sup>225</sup> Australian National University, *The Human Rights Act 2004 (ACT) The First Five Years of Operation* (May 2009) at 32, <[http://justice.act.gov.au/resources/attachments/report\\_HumanRightsAct\\_5YearReview\\_ANU\\_20091.pdf](http://justice.act.gov.au/resources/attachments/report_HumanRightsAct_5YearReview_ANU_20091.pdf)>.

<sup>226</sup> Human Rights & Discrimination Commissioner, ACT Human Rights Commission, *Look who's talking, A snapshot of ten years of dialogue under the Human Rights Act 2004* (2014) at 9, <<http://hrc.act.gov.au/wp-content/uploads/2015/03/HRA-10-yr-snapshot-HRDC-webversion.pdf>>.

<sup>227</sup> Human Rights & Discrimination Commissioner, ACT Human Rights Commission, *Look who's talking, A snapshot of ten years of dialogue under the Human Rights Act 2004* (2014) at 9, <<http://hrc.act.gov.au/wp-content/uploads/2015/03/HRA-10-yr-snapshot-HRDC-webversion.pdf>>.

Ninth year: July 2012 – June 2013	6	14	20
Tenth year: July 2013 – June 2014	4	20	24

To put these figures into context, in its first ten years of operation the ACT Act was mentioned in approximately 50 cases in the ACT tribunals (6.6% of published decisions), 157 cases in the ACT Supreme Court (9.2% of published decisions) and in 27 cases in the ACT Court of Appeal (7.6% of published decisions).<sup>228</sup>

60% of cases that referred to the ACT Act from 2004 until 2009 concerned criminal law and addressed a variety of issues including bail, search warrants, admissibility of evidence, treatment of persons in custody, the particular rights of children in the criminal process, the right to trial without undue delay, the right to a jury trial and sentencing issues.<sup>229</sup> The ACT Act was also referred to in a number of civil matters, including protection orders, adoption, defamation, discrimination, personal injury, mental health proceedings and leasing disputes.<sup>230</sup>

This evidence suggests that a Human Rights Act in Queensland would ensure greater justice in the legal system, particularly for individuals involved in criminal matters.

A similar trend has emerged under the Victorian Act. The table below depicts mentions of the Victorian Act by year of operation.<sup>231</sup>

Year	Vic Court of Appeal	Vic Supreme Court	Total
First year: 2007	0	8	8
Second year: 2008	8	16	24
Third year: 2009	3	20	23
Fourth year: 2010	10	21	31
Fifth year: 2011	10	14	24
Sixth year: 2012	5	18	23
Seventh year: 2013	8	18	26
Eighth year: 2014 (to November)	8	16	24

In its first seven years of operation the Victorian Act was mentioned in approximately 213 cases in the VCAT tribunals (1.1% of published decisions), 131 cases in the Vic Supreme Court (2.6% of published decisions) and in 52 cases in the Vic Court of Appeal (2.9% of published decisions).<sup>232</sup>

<sup>228</sup> Human Rights & Discrimination Commissioner, ACT Human Rights Commission, *Look who's talking, A snapshot of ten years of dialogue under the Human Rights Act 2004* (2014) at 5, <<http://hrc.act.gov.au/wp-content/uploads/2015/03/HRA-10-yr-snapshot-HRDC-webversion.pdf>>.

<sup>229</sup> Australian National University, *The Human Rights Act 2004 (ACT) The First Five Years of Operation* (May 2009) at 47, <[http://justice.act.gov.au/resources/attachments/report\\_HumanRightsAct\\_5YearReview\\_ANU\\_20091.pdf](http://justice.act.gov.au/resources/attachments/report_HumanRightsAct_5YearReview_ANU_20091.pdf)>.

<sup>230</sup> Australian National University, *The Human Rights Act 2004 (ACT) The First Five Years of Operation* (May 2009) at 47, <[http://justice.act.gov.au/resources/attachments/report\\_HumanRightsAct\\_5YearReview\\_ANU\\_20091.pdf](http://justice.act.gov.au/resources/attachments/report_HumanRightsAct_5YearReview_ANU_20091.pdf)>.

<sup>231</sup> Human Rights & Discrimination Commissioner, ACT Human Rights Commission, *Look who's talking, A snapshot of ten years of dialogue under the Human Rights Act 2004* (2014) at 9, <<http://hrc.act.gov.au/wp-content/uploads/2015/03/HRA-10-yr-snapshot-HRDC-webversion.pdf>>.

<sup>232</sup> Human Rights & Discrimination Commissioner, ACT Human Rights Commission, *Look who's talking, A snapshot of ten years of dialogue under the Human Rights Act 2004* (2014) at 5, <<http://hrc.act.gov.au/wp-content/uploads/2015/03/HRA-10-yr-snapshot-HRDC-webversion.pdf>>.

## *Establishment of a dedicated Human Rights body*

This submission proposes that a Commission is empowered to investigate and report on human rights complaints, intervene in legal proceedings, conduct alternative dispute resolution and research and report on compliance and reform.

The VEOHRC fulfils similar functions. The VEOHRC has exercised its intervention power in court proceedings 46 times since its establishment.<sup>233</sup> In the exercise of its intervention power, the VEOHRC has assisted courts, tribunals and practitioners, provided a respected independent institutional voice in proceedings, promoted the protection of human rights and provided guidance on complex questions of the Victorian Act's application.<sup>234</sup> The VEOHRC's submissions were frequently applied by VCAT, resulting in more robust reported decisions. Although the courts are less willing to apply the VEOHRC's submissions, the interventions have nevertheless contributed to the clarification of the laws and their practical requirements.<sup>235</sup>

The ACT Human Rights Commission's functions include reviewing effect of laws to ensure compliance with the ACT Act, advising the Attorney-General on the operation of the ACT Act, and providing education on the ACT Act.<sup>236</sup> To date, the ACT Human Rights Commissioner has committed four human rights audits, which have led to immediate reform and the development of long term plans for continuous improvement.<sup>237</sup> The ACT Human Rights Commission has also submitted several reports regarding law reform on a number of matters in the context of protected human rights, including changes to the ACT Act, discrimination law reform (including racial gender and family discrimination and vilification law), health and mental health and criminal law.<sup>238</sup> The ACT Human Rights Commissioner has also been formally approached for advice on a range of issues.<sup>239</sup> This is a valuable tool for government officers and other interested parties to seek clarification and advice relating to human rights issues.

## Legal costs

In jurisdictions with an entrenched list of protected human rights, the enforcement and interpretation of these rights will fall to the judiciary.<sup>240</sup> It has been argued that this power may undermine

<sup>233</sup> Victorian Equal Opportunity & Human Rights Commission, *Report to Stakeholders: Review of the Commission's Intervention Functions in the Charter of Human Rights and Responsibilities Act 2006 (Vic) and the Equal Opportunities Act 2010 (Vic)* (May 2015) at 3  
<[http://www.humanrightscsmission.vic.gov.au/media/k2/attachments/Report\\_to\\_Stakeholders\\_on\\_review\\_of\\_the\\_Commissions\\_intervention\\_functions\\_May\\_2015.pdf](http://www.humanrightscsmission.vic.gov.au/media/k2/attachments/Report_to_Stakeholders_on_review_of_the_Commissions_intervention_functions_May_2015.pdf)>.

<sup>234</sup> Victorian Equal Opportunity & Human Rights Commission, *Report to Stakeholders: Review of the Commission's Intervention Functions in the Charter of Human Rights and Responsibilities Act 2006 (Vic) and the Equal Opportunities Act 2010 (Vic)* (May 2015) at 6  
<[http://www.humanrightscsmission.vic.gov.au/media/k2/attachments/Report\\_to\\_Stakeholders\\_on\\_review\\_of\\_the\\_Commissions\\_intervention\\_functions\\_May\\_2015.pdf](http://www.humanrightscsmission.vic.gov.au/media/k2/attachments/Report_to_Stakeholders_on_review_of_the_Commissions_intervention_functions_May_2015.pdf)>.

<sup>235</sup> Victorian Equal Opportunity & Human Rights Commission, *Report to Stakeholders: Review of the Commission's Intervention Functions in the Charter of Human Rights and Responsibilities Act 2006 (Vic) and the Equal Opportunities Act 2010 (Vic)* (May 2015) at 6  
<[http://www.humanrightscsmission.vic.gov.au/media/k2/attachments/Report\\_to\\_Stakeholders\\_on\\_review\\_of\\_the\\_Commissions\\_intervention\\_functions\\_May\\_2015.pdf](http://www.humanrightscsmission.vic.gov.au/media/k2/attachments/Report_to_Stakeholders_on_review_of_the_Commissions_intervention_functions_May_2015.pdf)>.

<sup>236</sup> ACT Act, s 27 and 41.

<sup>237</sup> ACT Human Rights Commission, *Human Rights Audits* (November 2015) <<http://hrc.act.gov.au/humanrights/human-rights-audits/>>.

<sup>238</sup> ACT Human Rights Commission, *Law Reform and Other Consultation Responses* (July 2015) <<http://hrc.act.gov.au/humanrights/policy-systemic-work/law-reform-consultation-responses/>>.

<sup>239</sup> For example, by the Chief Minister Jon Stanhope in 2007 regarding ACT terrorism laws and the Commonwealth Government's 2007 intervention in Aboriginal communities in the NT. See Request for Advice on Discrimination and Human Rights Implications of Commonwealth Emergency Measures in NT Indigenous Communities Announced on 21 June 2007 (2007) Human Rights Commission.

<sup>240</sup> James Allen, 'Bills of Rights and Judicial Power – A Liberal's Quandary?' (1996) 16 Oxford Journal of Legal Studies 337, 347-348; Scrutiny of Acts and Regulations Committee, *Review of the Charter of Human Rights and Responsibilities Act 2006* (September 2011) at 145, <[http://www.parliament.vic.gov.au/images/stories/committees/sarc/charter\\_review/report\\_response/20110914\\_sarc.charterreviewreport.pdf](http://www.parliament.vic.gov.au/images/stories/committees/sarc/charter_review/report_response/20110914_sarc.charterreviewreport.pdf)>.

parliamentary sovereignty by granting excessive power to the unelected judiciary.<sup>241</sup> The nature of the judicial system allows for limited circumstances where judges make value judgments regarding the application of certain laws.<sup>242</sup> This is an inevitable corollary of the system, however the judicial power is limited by the established principle that judges must follow the law and apply precedent. Judicial power is made legitimate by the perceived and actual independence of the judiciary, and the requirement to follow court procedures and policy. Concerns that the Victorian Act 'confers an interpretation on steroids power on the unelected judges'<sup>243</sup> have not materialised in Australian jurisdictions.<sup>244</sup> The broad purposive approach to interpretation that exists in the UK, where the courts are willing to depart from legislation to give effect to protected human rights,<sup>245</sup> has been explicitly rejected by the ACT Supreme Court, and the High Court has implied it is unconstitutional.<sup>246</sup> Moreover, the drafting of the Victorian provision prevents judges from interpreting legislation in a way that contradicts Parliament's intention.<sup>247</sup> The Victorian Act says 'so far as it is possible to do so *consistently with their purpose*, all statutory provisions must be interpreted in a way that is compatible with human rights'.<sup>248</sup> The Queensland Human Rights Act is likely to be drafted in similar terms. Use of the reading down provision to change the meaning of legislation would ground a right to appeal the decision in a higher court.<sup>249</sup>

Furthermore, where a Human Rights Act is enacted as an ordinary piece of legislation, and not a constitutional enactment, courts do not have the power to invalidate legislation or legislative provisions that are declared to be incompatible with protected human rights. The roles of the courts and tribunals are limited so as to protect the legislative supremacy of the Parliament as the ultimate expression of the democratic will.<sup>250</sup>

## Financial benefits

Unlike financial costs which can be easily quantified, it may be difficult to place a dollar figure on the value of the benefits associated with the enactment of a Human Rights Act. Changes in governance arrangements and social policy initiatives that are brought about as a result of the enactment of human rights legislation are benefits that accrue to the community over an extended period of time, and it may

<sup>241</sup> James Allen, 'Bills of Rights and Judicial Power – A Liberal's Quandary?' (1996) 16 Oxford Journal of Legal Studies 347; Scrutiny of Acts and Regulations Committee, *Review of the Charter of Human Rights and Responsibilities Act 2006* (September 2011) at 145, <[http://www.parliament.vic.gov.au/images/stories/committees/sarc/charter\\_review/report\\_response/20110914\\_sarc.charterreviewreport.pdf](http://www.parliament.vic.gov.au/images/stories/committees/sarc/charter_review/report_response/20110914_sarc.charterreviewreport.pdf)>.

<sup>242</sup> Scrutiny of Acts and Regulations Committee, *Review of the Charter of Human Rights and Responsibilities Act 2006* (September 2011) at 146, <[http://www.parliament.vic.gov.au/images/stories/committees/sarc/charter\\_review/report\\_response/20110914\\_sarc.charterreviewreport.pdf](http://www.parliament.vic.gov.au/images/stories/committees/sarc/charter_review/report_response/20110914_sarc.charterreviewreport.pdf)>.

<sup>243</sup> James Allen, 'The Victorian Charter of Human Rights and Responsibilities: Exegesis and Criticism' (2006) 30 Melbourne University Law Review 906, 909-910.

<sup>244</sup> Chief Justice Helen Murrell, ACT Supreme Court, *The Judiciary and Human Rights* (July 2014) at 7, <<http://regnet.anu.edu.au/sites/default/files/uploads/2015-06/Chief%20Justice%20Helen%20Murrell.pdf>>.

<sup>245</sup> *Ghaidan v Godin-Mendoza* [2004] UKHL 30.

<sup>246</sup> *R v Fearnside* (2009) 3 ACTLR 25; *Momcilovic v The Queen* [2011] 245 CLR 1, 49-50; Chief Justice Helen Murrell, ACT Supreme Court, *The Judiciary and Human Rights* (July 2014) at 8, <<http://regnet.anu.edu.au/sites/default/files/uploads/2015-06/Chief%20Justice%20Helen%20Murrell.pdf>>.

<sup>247</sup> Emily Howie et. al., *Briefing Paper: A Human Rights Act for Australia* (November 2009) Human Rights Law Resource Centre <<http://www.hrlrc.org.au/files/Briefing-Paper-A-Human-Rights-Act-for-Australia1.pdf>>

<sup>248</sup> ***Charter of Human Rights and Responsibilities Act 2006 (Vic) section 32.***

<sup>249</sup> Philip Lynch et. al., *The National Human Rights Consultation - Engaging in the Debate* (Undated) <<http://www.hrlrc.org.au/files/hrlrc-the-national-human-rights-consultation-engaging-in-the-debate.pdf>>.

<sup>250</sup> Justice Kevin Bell, *The significance of the Charter of Human Rights and Responsibilities Act 2006 (Vic) for reconciliation with the Aboriginal community and a federal charter of rights* (September 2008) at 7, <<http://www.austlii.edu.au/au/journals/VicJSchol/2008/16.pdf>>.

be difficult to quantify these benefits.<sup>251</sup> However, unlike the start-up fixed costs associated with the enactment of a Human Rights Act (which are likely to decrease over time), the benefits and cost savings associated with the enactment of a Human Rights Act are likely to increase over time.<sup>252</sup>

While it is difficult to determine the precise extent to which the protection of human rights will financially benefit individuals and organisations, it is clear that the enactment of a Human Rights Act will add economic value. In their submission to the National Human Rights Consultation, the Human Rights Law Resource centre noted that academic research in the field of economics suggests a strong correlation between effective and equitable social policy and economic development and growth.<sup>253</sup>

Development theory has shifted from an approach that solely measures success by gross domestic product, to one that uses human well-being as the dominant measure.<sup>254</sup> According to this more contemporary form of development theory, poverty is created by deficiencies, which not only include lack of income, but also encompass factors such as discrimination and exclusion from political processes.<sup>255</sup> By addressing such deficiencies, human rights legislation can pave the way for sustainable economic growth in Queensland.

The correlation between the protection of human rights and economic growth can be seen through two Australian examples.

Firstly, a Productivity Commission review of the *Disability Discrimination Act 1992* (Cth) found that reductions in discrimination can enhance the productive capacity of the economy as it increases participation and the employment of people with disabilities.<sup>256</sup> This can also encourage students with disabilities to improve their educational outcomes, allowing them to participate more fully in the workforce.<sup>257</sup> In this regard, efforts to reduce disability discrimination can lead to greater labour force participation, thereby creating economic growth.

Secondly, efforts taken to close the gap in life expectancy between Indigenous and non-Indigenous Australians have also generated significant economic benefits.<sup>258</sup> Access Economics and Reconciliation Australia noted that in a 'what if' scenario that involved eliminating the gap between the life expectancy of Indigenous and non-Indigenous Australians and increasing the proportion of

<sup>251</sup> Victorian Government, *Victorian Government Submission to the Scrutiny of Acts and Regulations Committee's Review of the Charter of Human Rights and Responsibilities Act 2006* (2011) at 60, <[http://www.parliament.vic.gov.au/images/stories/committees/sarc/charter\\_review/submissions/324\\_-\\_Victorian\\_Government\\_Submission.pdf](http://www.parliament.vic.gov.au/images/stories/committees/sarc/charter_review/submissions/324_-_Victorian_Government_Submission.pdf)>.

<sup>252</sup> Human Rights Law Centre, *SARC Victorian Charter Review: Response to Questions on Notice* (August 2011) at 4, <[http://www.parliament.vic.gov.au/images/stories/committees/sarc/charter\\_review/supplementary\\_info/263\\_-\\_HRLC\\_Qs\\_on\\_Notice.pdf](http://www.parliament.vic.gov.au/images/stories/committees/sarc/charter_review/supplementary_info/263_-_HRLC_Qs_on_Notice.pdf)>.

<sup>253</sup> Human Rights Law Resource Centre, *A Human Rights Act for all Australians – National Human Rights Consultation Submission on the protection and promotion of human rights in Australia* (May 2009) at 72, <<http://www.hrlrc.org.au/files/hrlrc-submission-a-human-rights-act-for-australia.pdf>>.

<sup>254</sup> World Resources Institute, *A Roadmap for Integrating Human Rights into the World Bank Group* (2010) at 12, <[http://www.wri.org/sites/default/files/pdf/roadmap\\_for\\_integrating\\_human\\_rights.pdf](http://www.wri.org/sites/default/files/pdf/roadmap_for_integrating_human_rights.pdf)>.

<sup>255</sup> World Resources Institute, *A Roadmap for Integrating Human Rights into the World Bank Group* (2010) at 12, <[http://www.wri.org/sites/default/files/pdf/roadmap\\_for\\_integrating\\_human\\_rights.pdf](http://www.wri.org/sites/default/files/pdf/roadmap_for_integrating_human_rights.pdf)>.

<sup>256</sup> Productivity Commission, Review of the Disability Discrimination Act 1992, *Productivity Commission Inquiry Report* (Volume 1, Report No 30) (30 April 2004) at 134, <<http://www.pc.gov.au/inquiries/completed/disability-discrimination/report/disability-discrimination.pdf>>.

<sup>257</sup> Productivity Commission, Review of the Disability Discrimination Act 1992, *Productivity Commission Inquiry Report* (Volume 1, Report No 30) (30 April 2004) at 134, <<http://www.pc.gov.au/inquiries/completed/disability-discrimination/report/disability-discrimination.pdf>>.

<sup>258</sup> Human Rights Law Resource Centre, *A Human Rights Act for all Australians – National Human Rights Consultation Submission on the protection and promotion of human rights in Australia* (May 2009) at 72, <<http://www.hrlrc.org.au/files/hrlrc-submission-a-human-rights-act-for-australia.pdf>>.



Indigenous Australians in the workforce, real GDP would be 1% higher than it otherwise is in the year 2029; this is an increase of around \$10 billion.<sup>259</sup>

## Financial costs

The individuals and organisations that may incur financial costs as a result of the enactment of the HRA can be grouped into one of the three categories discussed below.

### *Government*

While there may be differences between the Victorian Act and the Queensland Human Rights Act, the costs that have been incurred by the Victorian Government in the initial few years following the Victorian Act's implementation are a close approximation of the costs that may be incurred by the Queensland Government in the first few years following their enactment of a Human Rights Act. The costs incurred by the Victorian Government which are quantifiable are:

- implementation funding for certain departments and agencies (Corrections Victoria, Department of Human Services and Victoria Police);
- funding for the Human Rights Unit within the Department of Justice;
- funding for the VEOHRC;
- grants provided by the Department of Justice for education and legal advice;
- costs of employing other identified human rights staff in the Victorian Public Service;
- costs of training and the development of resources;
- costs of legal advice obtained for the initial audit of legislation in preparation for the introduction of the Victorian Act;
- costs of legal advice on the drafting of statutory provisions or general legal advice in relation to the Victorian Act;
- costs of legal advice obtained for the preparation of statements of compatibility; and
- costs of related litigation involving the Department of Justice, Department of Human Services and Victoria Police.<sup>260</sup>

In addition to the costs noted above, there were some other costs incurred by the Victorian Government that were mentioned but not quantified in their submission to the Scrutiny of Acts and Regulations Committee's (**SARC**) Review of the Victorian Charter. These include:

- the cost of time spent on attending to Victorian Act related management and policy issues;

<sup>259</sup> Access Economics and Reconciliation Australia, *An overview of the economic impact of Indigenous disadvantage* (August 2008) at 47, <[http://generationone.org.au/uploads/assets/RA-Access-Economics-Report\\_The\\_economic\\_impact\\_of\\_Indigenous\\_disadvantage\\_Aug\\_08.pdf](http://generationone.org.au/uploads/assets/RA-Access-Economics-Report_The_economic_impact_of_Indigenous_disadvantage_Aug_08.pdf)>.

<sup>260</sup> Scrutiny of Acts and Regulations Committee, *Review of the Charter of Human Rights and Responsibilities Act 2006* (September 2011) at 141, <[http://www.parliament.vic.gov.au/images/stories/committees/sarc/charter\\_review/report\\_response/20110914\\_sarc.charterreviewreport.pdf](http://www.parliament.vic.gov.au/images/stories/committees/sarc/charter_review/report_response/20110914_sarc.charterreviewreport.pdf)>.



- Victorian Act implementation costs other than those reported for the Department of Justice, Department of Human Services, Victoria Police and Victorian Equal Opportunity and Human Rights Commission;
- the cost of auditing legislation and policy for Victorian Act compliance other than the costs of external legal advice and costs to Corrections Australia;
- the costs of advice on statutory drafting and the costs of preparing statements of compatibility, other than those costs where external legal advice was obtained; and
- grants for Victorian Act related projects or activities made by publicly funded bodies other than the Department of Justice.<sup>261</sup>

The table below details the annual breakdown of the quantified costs incurred by the Victorian Government in the years 2006 to 2011.<sup>262</sup>

#### Breakdown of costs incurred by Victorian Government in implementing Charter 2006-11

	2006-07	2207-08	2008-09	2009-10	2010-11	Total
<b>Implementation funding for departments and agencies</b>						
Victoria Police	\$900,000	\$906,000	\$0	\$0	\$0	<b>\$1,806,000</b>
Corrections Victoria	\$119,000	\$0	\$0	\$0	\$0	<b>\$119,000</b>
Department of Human Services	\$375,000	\$249,000	\$0	\$0	\$0	<b>\$624,000</b>
<b>Total implementation funding</b>	<b>\$1,394,000</b>	<b>\$1,155,000</b>	<b>\$0</b>	<b>\$0</b>	<b>\$0</b>	<b>\$2,549,000</b>
<b>Funding for Human Rights Unit within the Department of Justice</b>						
Training	\$249,826	\$194,269	\$17,513	\$21,173	\$13,893	<b>\$496,674</b>
Employee costs	\$322,181	\$506,943	\$375,131	\$501,363	\$381,161	<b>\$2,086,779</b>
Project costs	\$0	\$0	\$0	\$55,775	\$297,915	<b>\$353,690</b>
Other	\$82,345	\$82,325	\$140,490	\$152,999	\$9,883	<b>\$468,042</b>
<b>Total funding for Human Rights Unit</b>	<b>\$654,352</b>	<b>\$783,537</b>	<b>\$533,134</b>	<b>\$731,310</b>	<b>\$702,852</b>	<b>\$3,405,185</b>
<b>Funding for Victorian Equal Opportunity and Human Rights Commission</b>						
Charter Act education	\$500,000	\$500,000	\$337,000	\$203,000	\$209,000	<b>\$1,749,000</b>
Reporting, review and intervention	\$0	\$275,000	\$319,000	\$485,000	\$498,000	<b>\$1,577,000</b>
<b>Total funding for Victorian Equal Opportunity and Human Rights Commission</b>	<b>\$500,000</b>	<b>\$775,000</b>	<b>\$656,000</b>	<b>\$688,000</b>	<b>\$707,000</b>	<b>\$3,326,000</b>
<b>Grants provided by the Department of Justice for Charter Act education and legal advice</b>						
Grant to Human Rights Law Centre	\$0	\$55,000	\$100,000	\$150,000	\$130,000	<b>\$435,000</b>

<sup>261</sup> Victorian Government, *Victorian Government Submission to the Scrutiny of Acts and Regulations Committee's Review of the Charter of Human Rights and Responsibilities Act 2006* (2011) at 44, <[http://www.parliament.vic.gov.au/images/stories/committees/sarc/charter\\_review/submissions/324\\_-\\_Victorian\\_Government\\_Submission.pdf](http://www.parliament.vic.gov.au/images/stories/committees/sarc/charter_review/submissions/324_-_Victorian_Government_Submission.pdf)>.

<sup>262</sup> The data within the table is sourced from the Victorian Government Submission to the Scrutiny of Acts and Regulations Committee's Review of the *Charter of Human Rights and Responsibilities Act 2006*.

	2006-07	2207-08	2008-09	2009-10	2010-11	Total
Grant to Eastern Community Legal Centre	\$0	\$0	\$0	\$50,000	\$0	<b>\$50,000</b>
Grant to Victorian Local Governance Association	\$0	\$45,112	\$50,000	\$120,000	\$26,250	<b>\$241,362</b>
Victorian Council of Social Services	\$0	\$75,000	\$45,000	\$125,000	\$0	<b>\$245,000</b>
<b>Total grants provided</b>	<b>-</b>	<b>\$175,112</b>	<b>\$195,000</b>	<b>\$445,000</b>	<b>\$156,250</b>	<b>\$971,362</b>
<b>Cost of employing human rights staff in the Victorian Public Service</b>						
<b>Total cost of employing staff</b>	<b>-</b>	<b>\$95,654</b>	<b>\$197,048</b>	<b>\$297,921</b>	<b>\$163,756</b>	<b>\$754,379</b>
<b>Cost of legal advice for audit of legislation and policy</b>						
<b>Total cost of legal advice for audits</b>	<b>\$165,824</b>	<b>\$400,576</b>	<b>\$60,076</b>	<b>\$0</b>	<b>\$0</b>	<b>\$626,476</b>
<b>Cost of Charter-related training and development of resources</b>						
<b>Total cost of training and development of resources</b>	<b>\$0</b>	<b>\$19,500</b>	<b>\$102,520</b>	<b>\$23,695</b>	<b>\$14,950</b>	<b>\$160,665</b>
<b>Cost of legal advice on the drafting of statutory provisions or general legal advice in relation to the Charter</b>						
<b>Total cost of legal advice for drafting of statutory provisions and general legal advice</b>	<b>\$20,048</b>	<b>\$65,677</b>	<b>\$96,624</b>	<b>\$27,058</b>	<b>\$63,564</b>	<b>\$272,971</b>
<b>Cost of legal advice obtained for the preparation of statements of compatibility</b>						
<b>Total cost of legal advice for preparing statements of compatibility</b>	<b>\$0</b>	<b>\$86,504</b>	<b>\$98,195</b>	<b>\$110,872</b>	<b>\$174,768</b>	<b>\$470,339</b>
<b>Cost of Charter-related litigation</b>						
<b>Total cost of Charter-related litigation</b>	<b>\$0</b>	<b>\$39,556</b>	<b>\$165,213</b>	<b>\$387,609</b>	<b>\$359,995</b>	<b>\$952,373</b>
<b>Total costs</b>	<b>\$2,734,224</b>	<b>\$3,596,116</b>	<b>\$2,103,810</b>	<b>\$2,711,465</b>	<b>\$2,343,135</b>	<b>\$13,488,750</b>

The breakdown of costs demonstrates that over the five financial years from 2006 to 2011, the total cost of implementing the Victorian Act has been approximately \$13.5 million.<sup>263</sup> This equates to a cost of \$2.7 million per year or 51 cents per Victorian per year.<sup>264</sup> If the Queensland Government's costs are comparable to those incurred by the Victorian Government, the enactment of a Queensland Human Rights Act will be a very cost effective way to protect Queenslanders' human rights.

## Public authorities

Public authorities may need to incur costs in order to ensure that in performing public functions, they are acting consistently with, and giving due consideration to, human rights. The SARC Review of the Victorian Charter noted that Victorian local governments had incurred costs associated with:

<sup>263</sup> Victorian Government, *Victorian Government Submission to the Scrutiny of Acts and Regulations Committee's Review of the Charter of Human Rights and Responsibilities Act 2006* (2011) at 58-9, <[http://www.parliament.vic.gov.au/images/stories/committees/sarc/charter\\_review/submissions/324\\_-\\_Victorian\\_Government\\_Submission.pdf](http://www.parliament.vic.gov.au/images/stories/committees/sarc/charter_review/submissions/324_-_Victorian_Government_Submission.pdf)>.

<sup>264</sup> Human Rights Law Centre, *SARC Victorian Charter Review: Response to Questions on Notice* (August 2011) at 4, <[http://www.parliament.vic.gov.au/images/stories/committees/sarc/charter\\_review/supplementary\\_info/263\\_-\\_HRLC\\_Qs\\_on\\_Notice.pdf](http://www.parliament.vic.gov.au/images/stories/committees/sarc/charter_review/supplementary_info/263_-_HRLC_Qs_on_Notice.pdf)>.

- reviews of policies, procedures and local laws;
- compliance reporting;
- related education, promotion, advocacy and advice;
- training (including overhead costs and the opportunity cost of public sector employees undergoing training rather than engaging in other activities); and
- the employment of special personnel.<sup>265</sup>

While these costs were not precisely quantified, they are likely to be exceeded by the benefits that would eventuate from performing the above functions. Costs incurred on functions such as reviews and training are fixed costs that are likely to only be incurred in the first few years following the enactment of a Human Rights Act in Queensland. In the later years of the Human Rights Act's existence, the initial costs of reviews and training will either be eradicated or greatly minimised. In addition, the performance of the above functions will lead to better decision-making and long term legal benefits that are likely to outweigh the short term financial costs that are incurred.

While the incurrence of costs to public authorities is inevitable, they can be minimised by adopting efficient practices. In Victoria, many local authorities noted that there was a lack of assistance provided (in the form of resources and training) and this created difficulties for public authorities in achieving their obligations under the Victorian Act.<sup>266</sup> To avoid these hindrances and minimise costs incurred by public authorities, the Queensland Government should consider providing centralised training to public authority personnel in order to provide them with mechanisms to efficiently review their policies and procedures.

### ***Broader community***

The enactment of a Human Rights Act is likely to generate litigation, which can impose financial costs on public authorities, government, claimants and the broader community.

While it is foreseeable that the enactment of a Human Rights Act in Queensland will inevitably generate litigation and create costs, there are two reasons why this cost should not be a significant barrier to its enactment.

Firstly, the United Kingdom and Victoria's experiences suggest that human rights legislation can effectively protect human rights without the need for expensive litigation. In Victoria<sup>267</sup> and the ACT,<sup>268</sup> the volume of litigation flowing from breaches of human rights legislation has been small. In Victoria, both Victoria Legal Aid and the Bar Council have used the Victorian Act to better negotiate outcomes

<sup>265</sup> Scrutiny of Acts and Regulations Committee, *Review of the Charter of Human Rights and Responsibilities Act 2006* (September 2011) at 143, <[http://www.parliament.vic.gov.au/images/stories/committees/sarc/charter\\_review/report\\_response/20110914\\_sarc.charterreviewreport.pdf](http://www.parliament.vic.gov.au/images/stories/committees/sarc/charter_review/report_response/20110914_sarc.charterreviewreport.pdf)>; Victorian Government, *Victorian Government Submission to the Scrutiny of Acts and Regulations Committee's Review of the Charter of Human Rights and Responsibilities Act 2006* (2011) at 44, <[http://www.parliament.vic.gov.au/images/stories/committees/sarc/charter\\_review/submissions/324\\_-\\_Victorian\\_Government\\_Submission.pdf](http://www.parliament.vic.gov.au/images/stories/committees/sarc/charter_review/submissions/324_-_Victorian_Government_Submission.pdf)>.

<sup>266</sup> Scrutiny of Acts and Regulations Committee, *Review of the Charter of Human Rights and Responsibilities Act 2006* (September 2011) at 144, <[http://www.parliament.vic.gov.au/images/stories/committees/sarc/charter\\_review/report\\_response/20110914\\_sarc.charterreviewreport.pdf](http://www.parliament.vic.gov.au/images/stories/committees/sarc/charter_review/report_response/20110914_sarc.charterreviewreport.pdf)>.

<sup>267</sup> Scrutiny of Acts and Regulations Committee, *Review of the Charter of Human Rights and Responsibilities Act 2006* (September 2011) at 114, <[http://www.parliament.vic.gov.au/images/stories/committees/sarc/charter\\_review/report\\_response/20110914\\_sarc.charterreviewreport.pdf](http://www.parliament.vic.gov.au/images/stories/committees/sarc/charter_review/report_response/20110914_sarc.charterreviewreport.pdf)>.

<sup>268</sup> ACT Department of Justice & Community Safety, *Human Rights Act 2004 – 12 Month Review – Report* (June 2006) at 11 <[https://acthra.anu.edu.au/documents/HRA\\_twelve\\_month\\_review.pdf](https://acthra.anu.edu.au/documents/HRA_twelve_month_review.pdf)>.

for clients without engaging in costly litigation.<sup>269</sup> Similarly, in the United Kingdom, the enactment of the UK Act has prompted many local authorities to review their policies to ensure that they are treating marginalised and vulnerable members of the population with respect and many citizens who use public services have utilised the legislation as a means of securing better and fairer services.<sup>270</sup> In this respect, the enactment of human rights legislation can generate better outcomes for the community without the need to resort to litigation.

Secondly, while there is a cost associated with litigation, the outcomes of such litigation can provide substantial benefits in the future, particularly if it prompts changes to procedures and policies that will benefit many people.<sup>271</sup> For example, the SARC Review of the Victorian Act noted<sup>272</sup> that in Victoria, a number of changes were made to the procedures of the Mental Health Review Board following the decision in *Kracke v Mental Health Review Board*.<sup>273</sup>

Costs of litigation in Queensland can also be minimised by allowing for a freestanding cause of action for victims of human rights contraventions. In Victoria, the requirement for claimants seeking a remedy to bring another legal claim in addition to their claim under the Victorian Act has led to the incurrence of additional costs, including costs of resolving preliminary questions and costs of bringing human rights disputes in the Supreme Court (rather than a more accessible forum).<sup>274</sup> It is submitted that Queensland should avoid adopting this requirement, as the Victorian experience suggests that it may result in unnecessary costs and burdens on the legal system.

## Social benefits

### *Improving public service delivery*

An enquiry in the UK in 2009 found that the UK Act has had a positive effect in a number of public sector areas, including health, local authority services, policing, schools and regulatory authorities.<sup>275</sup> The inquiry concluded:

...the human rights framework, backed by the legal underpinning of the Human Rights Act, has had a positive impact in the delivery of public services.... Properly understood and applied, it can have a transformative function, transforming the organisation itself, the services delivered, and ultimately the lives of the people receiving these services.<sup>276</sup>

<sup>269</sup> Scrutiny of Acts and Regulations Committee, *Review of the Charter of Human Rights and Responsibilities Act 2006* (September 2011) at 140, <[http://www.parliament.vic.gov.au/images/stories/committees/sarc/charter\\_review/report\\_response/20110914\\_sarc.charterreviewreport.pdf](http://www.parliament.vic.gov.au/images/stories/committees/sarc/charter_review/report_response/20110914_sarc.charterreviewreport.pdf)>.

<sup>270</sup> Liberty, *Human Rights Act Mythbuster*, <<https://www.liberty-human-rights.org.uk/human-rights/what-are-human-rights/human-rights-act/human-rights-act-mythbuster>>.

<sup>271</sup> Scrutiny of Acts and Regulations Committee, *Review of the Charter of Human Rights and Responsibilities Act 2006* (September 2011) at 145, <[http://www.parliament.vic.gov.au/images/stories/committees/sarc/charter\\_review/report\\_response/20110914\\_sarc.charterreviewreport.pdf](http://www.parliament.vic.gov.au/images/stories/committees/sarc/charter_review/report_response/20110914_sarc.charterreviewreport.pdf)>.

<sup>272</sup> Scrutiny of Acts and Regulations Committee, *Review of the Charter of Human Rights and Responsibilities Act 2006* (September 2011) at 145, <[http://www.parliament.vic.gov.au/images/stories/committees/sarc/charter\\_review/report\\_response/20110914\\_sarc.charterreviewreport.pdf](http://www.parliament.vic.gov.au/images/stories/committees/sarc/charter_review/report_response/20110914_sarc.charterreviewreport.pdf)>.

<sup>273</sup> [2009] VCAT 646.

<sup>274</sup> Michael Brett Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (September 2015) at 120, <[http://assets.justice.vic.gov.au/justice/resources/3848843f-afd1-47a5-9279-1a1a87ac2aad/report\\_final\\_charter\\_review\\_2015.pdf](http://assets.justice.vic.gov.au/justice/resources/3848843f-afd1-47a5-9279-1a1a87ac2aad/report_final_charter_review_2015.pdf)>.

<sup>275</sup> UK Equality and Human Rights Commission, *Human Rights Inquiry: Executive Summary* (June 2009) at 4, <[http://www.equalityhumanrights.com/sites/default/files/publication\\_pdf/Human%20rights%20inquiry%20exec%20summary.pdf](http://www.equalityhumanrights.com/sites/default/files/publication_pdf/Human%20rights%20inquiry%20exec%20summary.pdf)>.

<sup>276</sup> UK Equality and Human Rights Commission, *Human Rights Inquiry: Executive Summary* (June 2009) at 14, <[http://www.equalityhumanrights.com/sites/default/files/publication\\_pdf/Human%20rights%20inquiry%20exec%20summary.pdf](http://www.equalityhumanrights.com/sites/default/files/publication_pdf/Human%20rights%20inquiry%20exec%20summary.pdf)>.

A Queensland Human Rights Act would improve the relationship between public service providers and the users of their services.<sup>277</sup> Employees of the public service will be reminded of their values and motivation through a human rights approach.<sup>278</sup>

In both New Zealand and the UK, the introduction of a Human Rights Act led to the government publishing handbooks for public authorities, designed to increase awareness of human rights issues and to provide guidance on how to conduct functions consistently with the human rights standards of the respective Acts.<sup>279</sup>

Australian jurisdictions have had similar experiences with their Human Rights Acts. The ACT Attorney-General acknowledged in his forward to the ACT Government's response to the five year review of the ACT Act that:

In the last five years of operation, there has been evidence of a marked shift in the way that Directorates undertake their work and many agencies, particularly those with a service delivery focus, are exploring the opportunities to better serve the community through human rights compliant policies, legislation and operational practices.<sup>280</sup>

In Victoria, the VEOHRC observed in its most recent review of the Victorian Act that the Act's use:

...has matured beyond simple compliance with the law. The Charter is not only part of 'everyday business' for many public authorities, but drives important human rights initiatives to address systemic issues. In this way, it prompts organisations to take a proactive, rather than reactive, approach to their operations and the way they engage with the community.<sup>281</sup>

The VEOHRC also noted that, while there is still much to be done, the Victorian Act has become 'firmly embedded' in the 'work, language and culture' of many public authorities.<sup>282</sup> The Human Rights Law Resource Centre concluded in 2015 that the Victorian Act has led to improvements in public service design, delivery and outcomes.<sup>283</sup>

Costs savings as a result of the operation of the Victorian Act included more efficient and effective service delivery, improved health and well-being for individuals, greater participation in social and economic life and reduced complaints with handling disputes.<sup>284</sup>

<sup>277</sup> Alice Donald, et. al. *Human Rights in Britain Since the Human Rights Act 1998: A Critical Review* (UK Equality and Human Rights Commission, April 2008) at 56 and 89  
<[http://www.equalityhumanrights.com/sites/default/files/documents/human\\_rights\\_in\\_britain\\_since\\_the\\_human\\_rights\\_act\\_1998-a\\_critical\\_review.pdf](http://www.equalityhumanrights.com/sites/default/files/documents/human_rights_in_britain_since_the_human_rights_act_1998-a_critical_review.pdf)>.

<sup>278</sup> Alice Donald, et. Al. *Human Rights in Britain Since the Human Rights Act 1998: A Critical Review* (UK Equality and Human Rights Commission, April 2008) at 62-63 and 89.

<sup>279</sup> UK Ministry of Justice, *Human rights: human lives – A handbook for public authorities* (October 2006), <<https://www.justice.gov.uk/downloads/human-rights/human-rights-handbook-for-public-authorities.pdf>>; NZ Ministry of Justice, *Guidelines on the New Zealand Bill of Rights Act 1990* (November 2004), <<http://www.justice.govt.nz/publications/publications-archived/2004/guidelines-on-the-new-zealand-bill-of-rights-act>>.

<sup>280</sup> ACT Justice and Community Safety Directorate, *Government Response: Australian National University Human Rights Research Project Report The Human Rights Act 2004 (ACT): The First Five Years of Operation* (March 2012) at 1, <[http://cdn.justice.act.gov.au/resources/uploads/JACS/PDF/Government\\_Response\\_first\\_5\\_yrs\\_PDF.pdf](http://cdn.justice.act.gov.au/resources/uploads/JACS/PDF/Government_Response_first_5_yrs_PDF.pdf)>.

<sup>281</sup> Victorian Equal Opportunity and Human Rights Commission, *2014 Report on the Operation of the Charter of Human Rights and Responsibilities* (June 2015) at 1, <<http://humanrightscommission.vic.gov.au/index.php/our-resources-and-publications/charter-reports/item/1260-2014-report-on-the-operation-of-the-charter-of-human-rights-and-responsibilities>>.

<sup>282</sup> Victorian Equal Opportunity and Human Rights Commission, *2014 Report on the Operation of the Charter of Human Rights and Responsibilities* (June 2015) at 1.

<sup>283</sup> Human Rights Law centre, "More Accessible, more Effective and Simpler to Enforce: Strengthening Victoria's Human Rights Charter, HRLC Submission to the 2015 Review of the Victorian Charter of Human Rights" (June 2015) at 1  
<http://humanrightscommission.vic.gov.au/index.php/our-resources-and-publications/charter-reports/item/1260-2014-report-on-the-operation-of-the-charter-of-human-rights-and-responsibilities>.

<sup>284</sup> Human Rights Law centre, "SARC Victorian Charter Review: Response to Questions on Notice" (July 2011) at 4.

## *Protecting marginalised Queenslanders by addressing disadvantage*

The Human Rights Law Centre has previously argued that there is strong evidence a human rights approach can:

- empower marginalised and vulnerable individuals, communities and groups;
- provide a framework for the development of more effective, efficient and holistic public and social policy;
- promote more flexible, responsive, individualised and 'consumer friendly' public and social services;
- challenge 'poor treatment' and thereby improve the quality of life of marginalised and disadvantaged individuals and groups; and
- assist in the development of more effective social inclusion and poverty reduction strategies.<sup>285</sup>

The empowering effect of a Human Rights Act is one of the key benefits of the Victorian Act identified by the VEOHRC, as it gives Victorians the tools to question and challenge matters that have the potential to impact their human rights.<sup>286</sup> The VEOHRC has also identified this beneficial effect at a group level, with organisations:

...increasingly using the Charter in more sophisticated ways to review, develop and implement policies and practices that aim to protect people from breaches of their human rights or to actively promote the realisation of rights.<sup>287</sup>

The experience in the UK appears to have been similar, with a compilation of case studies (the 'Changing Lives' report) leading the British Institute of Human Rights to conclude:

...groups and people themselves are using not only the letter of the law, but also the language and ideas of human rights to challenge poor treatment and negotiate improvements to services provided by public bodies... Human rights are an important practical tool for people facing discrimination, disadvantage or exclusion.<sup>288</sup>

That report concluded that awareness-raising about human rights empowers people to take action.<sup>289</sup>

There is also some evidence in the UK that a human rights approach can extend existing approaches to addressing inequality and discrimination. In particular, the human rights framework can give a voice to marginalised groups that fall outside the UK's anti-discrimination legislation such as gay partners, family carers, mothers in prison and domestic violence victims. In this way, human rights underpin equality.<sup>290</sup>

In commenting on the *Racial Discrimination Act 1975* (Cth), it was recognised that the legislation filled a gap. The general right to be free from racial discrimination was never developed in the common law

<sup>285</sup> Human Rights Law Resource Centre, "A Human Rights Consultation Submission on the Protection and Promotion of Human Rights in Australia" (May 2009) at 70-71.

<sup>286</sup> Victorian Equal Opportunity and Human Rights Commission, *Victoria's Charter of Human Rights and Responsibilities*, <<http://www.humanrightscsmission.vic.gov.au/index.php/the-charter#what-are-the-benefits-of-having-the-charter>>.

<sup>287</sup> Human Rights Law centre, "More Accessible, more Effective and Simpler to Enforce: Strengthening Victoria's Human Rights Charter, HRLC Submission to the 2015 Review of the Victorian Charter of Human Rights" (June 2015) at 1.

<sup>288</sup> British Institute of Human Rights, *The Human Rights Act: Changing Lives* at 5, <[http://www.equalityhumanrights.com/sites/default/files/publication\\_pdf/The%20Human%20Rights%20Act%20-%20Changing%20Lives.pdf](http://www.equalityhumanrights.com/sites/default/files/publication_pdf/The%20Human%20Rights%20Act%20-%20Changing%20Lives.pdf)>.

<sup>289</sup> British Institute of Human Rights, *The Human Rights Act: Changing Lives* at 5.

<sup>290</sup> Alice Donald, et. al. *Human Rights in Britain Since the Human Rights Act 1998: A Critical Review* (UK Equality and Human Rights Commission, April 2008) at 68-69 and 89.



but the Act established that right.<sup>291</sup> The introduction of human rights legislation could fill other social gaps.

### *Contributing to the development of a human rights culture*

The cultural importance of human rights legislation has been acknowledged in the UK. The British Institute for Human Rights noted in a recent report that:

When the Human Rights Act was passed in 1998, the Government explained that its purpose was to support a culture of respect for everyone's human rights – making human rights a feature of everyday life... Thus the Human Rights Act would have its greatest impact not in our courts of law, out of the reach of the public at large, but in the wider community... Through this process, a culture of respect for human rights would take root in the UK.<sup>292</sup>

Similar sentiment was expressed in a 2015 review of the Victorian Act:

The Charter is a strong statement of the importance of the values of freedom, dignity, equality and respect in our society; it is one mechanism by which we set out our expectations of how these values will be recognised and protected.<sup>293</sup>

The 2015 review report stated that, for the Victorian Act to be effective, the Victorian Government needed to do more to build a human rights culture, particularly in respect of public sector interactions with Victorians. This would be achieved by senior leadership and organisational vision, improving operational capacity, external input and oversight and human rights education. A strong human rights culture facilitates better government decision-making and human rights protection.<sup>294</sup>

It has been the ACT's experience that:

Establishing a human rights culture and developing its underpinning framework is a constructive process of continuous improvement through incremental developments in case law and policy...

However... [there is a] need to promote greater understanding of the [Human Rights Act] by the general community, legal professionals and public authorities by increasing the availability of training programs to address the lack of systemic education about human rights within the ACT public service.<sup>295</sup>

Thus, the Human Rights Law Resource Centre has previously argued that creating a culture of respect for human rights is not simply a matter of enacting a law. Education, among other things, is vital.<sup>296</sup>

If the law does educate, it is because the law stands to express a community's political morality. The law sets a standard for how we live together. The law reflects our aspirations for fairness and justice.<sup>297</sup>

Local human rights groups often acquire greater legitimacy and political prominence in their struggle against a repressive regime when the government makes formal, tactical concessions.<sup>298</sup>

<sup>291</sup> Simon Rice, "Human rights" (2015) 89 *Australian Law Journal* 303 at 303.

<sup>292</sup> British Institute of Human Rights, *The Human Rights Act: Changing Lives* at 3.

<sup>293</sup> Michael Brett Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (September 2015), <<https://myviews.justice.vic.gov.au/2015-review-of-the-charter-of-human-rights>>.

<sup>294</sup> Michael Brett Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (September 2015) at 5.

<sup>295</sup> ACT Government, "Government response, Australian National University Human Rights research Project Report, the *Human Rights Act 2004* (ACT): The First Five Years of Operation" (March 2012), 1 and 3.

<sup>296</sup> Human Rights Law Resource Centre, "A Human Rights Consultation Submission on the Protection and Promotion of Human Rights in Australia" (May 2009) at 71.

<sup>297</sup> Simon Rice, "Human rights" (2015) 89 *Australian Law Journal* 303 at 305.

<sup>298</sup> Thomas Risse & Kathryn Sikkink, *The socialization of international human rights norms into domestic practices: introduction*, (1999) Cambridge University Press, Cambridge at 25-28.

Although we lack sufficient evidence to generalise with confidence, what we know suggests that trials seldom hurt survivors by reviving psychological issues they have addressed and put to rest.<sup>299</sup>

### ***Assisting to fulfil Australia's human rights obligations***

Human rights are recognised and protected under international law. Article 50 of the ICCPR and Article 28 of the ICESR state that human rights protections extend to all parts of federal states without limitation or exception. A Human Rights Act in Queensland would contribute to, and improve upon, Australia's fulfilment of its international human rights obligations.

## **Social costs**

### ***Failing to account for social issues in the institutional framework***

Some argue that the judiciary is institutionally incompetent to deal with the socio-economic issues that frequently arise in cases under human rights legislation.<sup>300</sup>

However, the inclusion of social issues in the institutional framework mainly depends on good governance. Governance is crucial to the realisation of economic and social rights, particularly in terms of the sound management of public resources and goods, and in relation to equal access to public service.<sup>301</sup>

The French have provided an access-to-justice program in collaboration with a local government-run program to engage with disadvantaged members in Paris with claims regarding discrimination.<sup>302</sup> Local governments are more likely to be aware of the disadvantaged so a similar program in Queensland could ensure those who truly need the Queensland Human Rights Act are able to access the institutional framework.

### ***Promoting an individualistic society***

It has been suggested that articulating social welfare needs as individual "rights" makes people everywhere more passive and isolated.<sup>303</sup> Since one of the main purposes of rights is to limit the arbitrary exercise of governmental power, utilitarian goals masquerading as group rights would perhaps seriously undermine the power of rights as trumps.<sup>304</sup>

However, a concern for collective rights and an ethical obligation on public actors to ensure rights are realised and protected can promote a compassionate society.<sup>305</sup>

Human rights operate as a fundamental moral limit on how we human beings, both individually and collectively, may live our lives, on what choices we may make.<sup>306</sup>

<sup>299</sup> Jamie O'Connell, 'Gambling with the Psyche: Does Prosecuting Human Rights Violators Console Their Victims?' (2005) 46 *Harvard International Law Journal* 2 at 325.

<sup>300</sup> Lon Fuller, 'The Forms and Limits of Adjudication' (1978) 92 *Harvard Law Review* 353 at 394-404; R.A. MacDonald, 'Postscript and Prelude – the Jurisprudence of the Charter: Eight Theses' (1982) 4 *Sup Ct Law Rev* 321 at 337.

<sup>301</sup> Siobhán McInerney-Lankford, 'Human Rights and Development: Some Institutional Perspectives' *Netherlands Quarterly of Human Rights* 25 at 474.

<sup>302</sup> Jeremy Perelman, 'Transnational Human Rights Advocacy, Clinical Collaborations, and the Political Economies of Accountability: Mapping the Middle' (2013) *Yale Human Rights and Development Law Journal* 16 at 132.

<sup>303</sup> David Kennedy, 'International Human Rights Movement: Part of the Problem?' *Harvard Human Rights Journal* 15 (2002) at 102.

<sup>304</sup> Alison Renteln, *International Human Rights: Universalism Versus Relativism*, (2013) Quid Pro Books, New Orleans at 1976.

<sup>305</sup> Jim Ife, *Human Rights and Social Work: Towards Rights-Based Practice* (2012) Cambridge University Press, Cambridge at 178.

<sup>306</sup> Michael Perry, *The Idea of Human Rights: Four Inquiries* (1998) Oxford University Press, New York at 5.

We express respect for others if we deliberate with people differing arguments about human rights because this pushes society towards a better understanding of our potentially shared human rights regime.<sup>307</sup>

Recommendation X: Based on the examples provided in this (and other) submissions, that the Committee recognise that human rights laws can, and do, offer stronger protections for Queenslanders' human rights.

<sup>307</sup> Michael Ignatieff and Amy Gutmann, *Human Rights as Politics and Idolatry* (2003) Princeton University Press, Princeton at xxvii.

# Glossary

<b>ACT</b>	Australian Capital Territory
<b>ACT Act</b>	Human Rights Act 2004 (ACT)
<b>ANU Review</b>	ANU, The Human Rights Act 2004 (ACT): The First Five Years of Operation (May 2009)
<b>Brennan Report</b>	Brennan et al, National Human Rights Consultation: Report (September 2009)
<b>CROC</b>	Convention on the Rights of the Child
<b>DCJS</b>	ACT Department of Justice and Community Safety
<b>DCJS Review</b>	DCJS, Human Rights Act 2004: Twelve-Month Review – Report (June 2006)
<b>ICCPR</b>	International Covenant on Civil and Political Rights
<b>ICESCR</b>	International Covenant on Economic, Social and Cultural Rights
<b>NZ Bill of Rights</b>	New Zealand Bill of Rights Act 1990 (NZ)
<b>NZ Human Rights Act</b>	Human Rights Act 1993 (NZ)
<b>OAIC</b>	Office of the Australian Information Commissioner
<b>Privacy Act</b>	Privacy Act 1988 (Cth)
<b>Queensland Human Rights Act</b>	Any human rights act or charter that may be enacted in Queensland
<b>RAILS</b>	Refugee and Immigration Legal Service
<b>SARC</b>	Victorian Scrutiny of Acts and Regulations Committee
<b>SARC Review</b>	SARC, Review of the Charter of Human Rights and Responsibilities Act 2006 (2010)
<b>UK</b>	United Kingdom
<b>UK Act</b>	Human Rights Act 1998 (UK)
<b>Victorian Charter</b>	Charter of Human Rights and Responsibilities Act 2006 (Vic)
<b>YAC</b>	Youth Advocacy Centre
<b>Young Review</b>	Michael Brett Young, From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act (2006)

# Appendix A: Public Authorities

## *Victorian position*

Section 4 of the Victorian Charter provides as follows:

(1) *For the purposes of this Charter a public authority is—*

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

*but does not include—*

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

(2) *In determining if a function is of a public nature the factors that may be taken into account include—*

- (a) *that the function is conferred on the entity by or under a statutory provision;*
- (b) *that the function is connected to or generally identified with functions of government;*
- (c) *that the function is of a regulatory nature;*
- (d) *that the entity is publicly funded to perform the function;*
- (e) *that the entity that performs the function is a company (within the meaning of the Corporations Act) all of the shares in which are held by or on behalf of the State.*

(3) *To avoid doubt—*

- (a) *the factors listed in subsection (2) are not exhaustive of the factors that may be taken into account in determining if a function is of a public nature; and*
- (b) *the fact that one or more of the factors set out in subsection (2) are present in relation to a function does not necessarily result in the function being of a public nature.*

(4) *For the purposes of subsection (1)(c), an entity may be acting on behalf of the State or a public authority even if there is no agency relationship between the entity and the State or public authority.*

(5) *For the purposes of subsection (1)(c), the fact that an entity is publicly funded to perform a function does not necessarily mean that it is exercising that function on behalf of the State or a public authority.*

The Victorian Charter provides greater specificity in its definition of 'public authority' and also gives greater guidance in the construction of that definition.

The Charter also applies a modified version of the United Kingdom 'function test' to the determination of whether an entity is a 'public authority': s 4(1)(c). To date there has been insufficient judicial consideration to determine whether the modified version is more effective, however it is possible that the absence of discussion is a consequence of a well-drafted provision.

The Human Rights Law Resource Centre argued in its submission to the Institute that the approach taken in Victoria could be improved upon by identifying by way of a non-exhaustive list, the functions considered to be 'of a public nature'.<sup>308</sup> This approach has been adopted in the ACT (discussed below).

## ***ACT position***

The application of the *Human Rights Act 2004* (ACT) is not materially different to that of the Victorian Charter, except that it includes the following deeming provision in respect of certain functions in section 40B(3):

(3) *Without limiting subsection (1) or (2), the following functions are taken to be of a public nature:*

- (a) *the operation of detention places and correctional centres;*
- (b) *the provision of any of the following services:*
  - (i) *gas, electricity and water supply;*
  - (ii) *emergency services;*
  - (iii) *public health services;*
  - (iv) *public education;*
  - (v) *public transport;*

<sup>308</sup> Human Rights Law Resource Centre, *Respecting, Protecting and Fulfilling Human Rights in Tasmania*, Submission to the Tasmanian Law Reform Institute (November 2006) 37.



(vi) *public housing.*

Its modified function test has also not yet been the subject of any substantive judicial consideration.

### ***UK position***

The United Kingdom *Human Rights Act 1998*, s 6(3) defines 'public authority' as,

*(a) a court or tribunal, and*

*(b) any person certain of whose functions are functions of a public nature,*

*but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.*

The legislative intent behind this definition was to extend compliance with human rights standards beyond purely State bodies to private and community bodies undertaking functions on behalf of the State.<sup>309</sup> To achieve this section 6(3) applies a 'function test' to the determination of whether an entity is a 'public authority'. However, application of that test has proved to be problematic. Its interpretation is susceptible to different approaches (as reasonable minds can clearly differ over whether a particular function is 'of a public nature') and, accordingly, to inconsistent outcomes.<sup>310</sup>

<sup>309</sup> Joint Committee on Human Rights, *The Meaning of Public Authority under the Human Rights Act* Seventh Report, House of Commons Paper No 382; House of Lords Paper No 39, Session 2003-04 (2004) 5-7; 9-10.

<sup>310</sup> Tasmania Law Reform Institute, *A Charter of Rights for Tasmania* Tenth Report (October 2007) 71.

## Appendix B: Self-determination in Australian human rights laws

The two Australian jurisdictions that have enacted human rights legislation (Victoria and the Australian Capital Territory) have not (yet) adopted a right to self-determination, instead choosing alternate avenues of protecting the specific cultural rights to Indigenous peoples.

### (d) The Victorian approach

The Preamble to the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (***the Victorian Charter***) acknowledges that 'human rights have a special importance for the Aboriginal people of Victoria, as descendants of Australia's first people, with their diverse spiritual, social, cultural and economic relationship with their traditional lands and waters'.<sup>311</sup> Section 19 of the Victorian Charter provides that Aboriginal people hold distinct cultural rights, and must not be denied the right to enjoy their culture and identity,<sup>312</sup> maintain their language<sup>313</sup> and kinship ties,<sup>314</sup> and maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs.<sup>315</sup>

The Explanatory Memorandum to the Victorian Charter stated that exclusion of the right to self-determination from the Victorian Charter was 'because the right to self-determination is a collective right of peoples. Moreover, there is a lack of consensus both within Australia and internationally on what the right to self-determination comprises'.<sup>316</sup> The Consultation Committee ultimately took the view that a self-determination right should not be included in the Victorian Charter because it lacked clear community support and its application was uncertain. This also reflected a view that while issues of indigenous self-governance were important, these cannot be adequately resolved through a human rights instrument like the Victorian Charter, but required a broader constitutional settlement through a treaty or other instrument.<sup>317</sup>

Section 44(3) of the Victorian Charter mandated that the review of the Victorian Charter after four years of operation must specifically consider whether the right to self-determination should be included in the Victoria Charter.<sup>318</sup> This review was undertaken in 2011, and the decision was made by the reviewing committee not to include a right to self-determination.<sup>319</sup> In 2011, the Human Rights Consultation Committee submitted to the Scrutiny of Acts Regulation Committee that:

The Committee notes that there is a lack of consensus both domestically and internationally on what the right to self-determination comprises beyond the idea that it involves participation in decision-making. The Committee is concerned that, in the absence of settled precedent about

<sup>311</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic) (***Victorian Charter***), Preamble.

<sup>312</sup> Victorian Charter, s 19(2)(a).

<sup>313</sup> Victorian Charter, s 19(2)(b).

<sup>314</sup> Victorian Charter, s 19(2)(c).

<sup>315</sup> Victorian Charter, s 19(2)(d).

<sup>316</sup> Explanatory Memorandum, Victorian Charter, p 8.

<sup>317</sup> George Williams, 'The Victorian Charter of Human Rights and Responsibilities' (2006) 30 *Melbourne University Law Review* 880, 896.

<sup>318</sup> Victorian Charter, s 44(2)(b).

<sup>319</sup> Scrutiny of Acts and Regulations Committee, *Review of the Charter of Human Rights and Responsibilities Act 2006*, p. 52.

the content of the right as it pertains to Indigenous peoples, the inclusion of a right to self-determination may have unintended consequence. The Committee wants to ensure that any self-determination provision contains some detail about its intended scope and reflects Indigenous communities' understanding of the term.<sup>320</sup>

In 2015, a second review was undertaken of the operation of the Victorian Charter (*Eight Year Review*).<sup>321</sup> This review was tabled in September 2015 and reconsidered the issue of the inclusion of a right to self-determination. The review noted that 'recognising the right to self-determination could help facilitate the realisation of this right by requiring public authorities to consider the self-determination of Aboriginal Victorians when developing laws and policies, delivering services, and making other decisions that affect Aboriginal people'.<sup>322</sup> The review ultimately recommended that the principle of self-determination should be included in the Preamble to the Victorian Charter.<sup>323</sup> Specifically, the Eight Year Review has recommended that the Preamble to the Victorian Charter 'refer to self-determination having special importance for the Aboriginal people of Victoria, as descendants of Australia's first peoples'.<sup>324</sup> The Preamble 'explains the objects that the Charter seeks to achieve and the context in which the Charter is to be interpreted'.<sup>325</sup> As such, the inclusion of self-determination in the Preamble establishes it as a principle against which the provisions of the Victorian Charter are to be interpreted. This recommendation would therefore ensure that the Victorian Charter is interpreted in a way that is consistent with the right to self-determination.

#### (e) The ACT approach

The *Human Rights Act 2004* (ACT) (*the ACT Act*) came into effect on 1 July 2004. When the ACT Act commenced, it did not protect indigenous cultural rights or provide a right to self-determination. The Australian Capital Territory passed the *Human Rights Amendment Bill 2015* (ACT) (*the ACT Bill*) on 11 February 2016. This bill makes a number of amendments to the ACT Act. Specifically, once the amendments contained in the ACT Bill commence, the ACT Act will provide for the cultural rights of Aboriginal peoples. These amendments 'give effect to a decision of the ACT Government to incorporate cultural rights for Aboriginal and Torres Strait Islander people in a similar form to section 19 of the Victorian Charter'.<sup>326</sup> Specifically, the ACT Act will now provide that 'Aboriginal and Torres Strait Islander peoples hold distinct cultural rights and must not be denied the right to maintain, control, protect and develop their cultural heritage and distinctive spiritual practices, observances, beliefs and teachings, languages and knowledge, and kinship ties'.<sup>327</sup>

We note that the proposed amendments in the ACT were tabled (in February 2015) in Parliament before the Eight Year Review was tabled by the Attorney-General of Victoria in Parliament (in September 2015). The Victorian Government has not yet released its response to the recommendations made by the Eight Year Review.

<sup>320</sup> Human Rights Consultation Committee, *Rights, Responsibilities and Respect*, November 2005, p. 39.

<sup>321</sup> This review was conducted to satisfy the review requirement in s 45 of the Victorian Charter.

<sup>322</sup> Michael Brett Young, *From Commitment to Culture: 2015 Review of the Charter of Human Rights and Responsibilities Act 2006*, 1 September 2015, p. 218.

<sup>323</sup> Michael Brett Young, *From Commitment to Culture: 2015 Review of the Charter of Human Rights and Responsibilities Act 2006*, 1 September 2015, p. 220.

<sup>324</sup> Michael Brett Young, *From Commitment to Culture: 2015 Review of the Charter of Human Rights and Responsibilities Act 2006*, 1 September 2015, p. 220.

<sup>325</sup> Explanatory Memorandum, *Charter of Human Rights and Responsibilities Bills 2006* (Vic).

<sup>326</sup> Explanatory Memorandum, *Human Rights Amendment Bill 2015* (ACT).

<sup>327</sup> *Ibid*, p. 3.

QAILS strongly supports strengthening the right of self-determination in Queensland law human rights legislation. Additionally, we recommend, at a minimum, that QAILS pursues the protection of Aboriginal and Torres Strait Islander peoples' cultural rights (as has been done in the Victorian Charter, and in the ACT Act).

# Appendix C: Human rights commissions

## *Victorian Charter*

The Victorian Charter confers a variety of functions and powers on the pre-existing Victorian Human Rights and Equal Opportunity Commission (**VHREOC**).<sup>328</sup> VHREOC is empowered to intervene in and be joined as a party to any proceeding before a court or tribunal in which a question involving the Charter arises.<sup>329</sup> In addition, VHREOC has the following functions:<sup>330</sup>

- to present to the Attorney-General an annual report examining the Charter's operation and all declarations of inconsistent interpretation and override declarations made that year (which, in turn, the Attorney-General must table before the Parliament);<sup>331</sup>
- when requested by the Attorney-General, to review and provide a written report on the effect of legislation and the common law on human rights;
- when requested by a public authority, to review that authority's programs and practices to determine their compatibility with human rights;
- to assist the Attorney-General in its review of the Charter's operation;
- to advise the Attorney-General on anything relevant to the operation of the Charter; and
- to provide education about the Charter (discussed further in Part 3.3 below).

VHREOC is empowered to do all things necessary or convenient to perform those functions.<sup>332</sup>

Its website shows that VHREOC has exercised its functions to, amongst other things, prepare publicly-available resources and publications, set up a telephone enquiry line, and deliver education, training and consultancy services on the Charter. VHREOC also pursues a variety of projects directed to promoting and protecting the human rights set out in the Charter.

VHREOC is not empowered to receive complaints or resolve disputes about the Victorian Charter. Instead, complaints about the failure of most public authorities to comply with the

<sup>328</sup> See its website at: <http://www.humanrightscommission.vic.gov.au/>. Its empowering Act is the *Equal Opportunity Act 2010* (Vic).

<sup>329</sup> Victorian Charter, s 40.

<sup>330</sup> Victorian Charter, s 41.

<sup>331</sup> Victorian Charter, s 43.

<sup>332</sup> Victorian Charter, s 42.

Charter can be made to the Victorian Ombudsman,<sup>333</sup> while complaints in relation to the police can be made to the Victorian Independent Broad-based Anti-corruption Commission.<sup>334</sup>

The Victorian Ombudsman is empowered to enquire into or investigate whether any administrative action is incompatible with a human right set out in the Charter.<sup>335</sup> It can receive and investigate complaints made to it, and also conduct investigations of its own motion.<sup>336</sup> Once its investigations are complete, it must report to the authority and make any recommendations it sees fit. These recommendations must be sent to the responsible Minister for the authority and may be sent to the Premier. The Ombudsman may request that the authority or Minister notify it of any steps that have been taken to give effect to the recommendations. If the Ombudsman is of the opinion that appropriate steps have not been taken, then he or she may provide a copy of his report to the Governor in Council and Parliament.<sup>337</sup>

The four year review of the Victorian Charter by the Scrutiny of Acts and Regulations Committee (**SARC**) recommended that VHREOC not be given a dispute resolution function.<sup>338</sup> The eight year review (released in 2015) led by Michael Brett Young recommended the contrary.<sup>339</sup>

## ACT Act

The *Human Rights Commission Act 2005* (ACT) establishes the ACT Human Rights Commission (**ACT HRC**).<sup>340</sup> It is made up of five Commissioners, including one with responsibility for exercising functions in relation to human rights. In particular, that Commissioner is tasked with:<sup>341</sup>

- providing education about human rights and the ACT Act; and
- advising the Attorney-General on anything relevant to the operation of the ACT Act.

In addition, the ACT Act requires the ACT HRC to review the effect of territory laws, including the common law, on human rights, and report in writing to the Attorney-General on the results of the review. The Attorney-General is required to table that report in Parliament.<sup>342</sup> This review is not stated to be annual or recurring on any particular date. So far, it appears that the ACT HRC has published the results of four separate 'human rights audits' of specific areas of law.<sup>343</sup>

<sup>333</sup> See its website at <https://www.ombudsman.vic.gov.au/>.

<sup>334</sup> See its website at <http://www.ibac.vic.gov.au/>.

<sup>335</sup> *Ombudsman Act 1973* (Vic), s 13.

<sup>336</sup> *Ombudsman Act 1973* (Vic), Pt IV.

<sup>337</sup> *Ombudsman Act 1973* (Vic), s 23.

<sup>338</sup> SARC, *Review of the Charter of Human Rights and Responsibilities Act 2006* (2010) (**SARC Review**), recommendation 7.

<sup>339</sup> Michael Brett Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act* (2006) (**Young Review**), recommendation 23.

<sup>340</sup> See its website at <http://hrc.act.gov.au/>.

<sup>341</sup> *Human Rights Commission Act 2005* (ACT), s 27.

<sup>342</sup> ACT Act, s 41.

<sup>343</sup> See <http://hrc.act.gov.au/humanrights/human-rights-audits/>.



Like VREOC, the ACT HRC is also empowered to intervene in any proceeding that involves a question of application of the ACT Act or if the Supreme Court is considering making a declaration of inconsistent interpretation.<sup>344</sup> It has intervened in two proceedings so far.<sup>345</sup>

The ACT HRC's website shows it undertakes similar activities to the VHREOC in relation to human rights, including producing human rights related resources, engaging in community education and making submissions on law reform.

Like the VHREOC, the ACT HRC is not empowered to investigate or resolve individual complaints about breaches of the ACT Act, though it is empowered to exercise such functions under Victoria's anti-discrimination legislation.<sup>346</sup>

The ACT Department of Justice and Community Safety's (*DCJS*) twelve month review of the ACT Act recommended that the Act should not be amended to include a complaints-handling function, which it described as a 'poor substitute for a direct duty to comply with human rights that is capable of being enforced in courts and tribunals'.<sup>347</sup>

With respect, this overlooks that a complaints-handling function is intended to supplement, not replace, the legally enforceable duty to comply with the ACT Act. As pointed out in the submissions to the twelve month review, it is important to supplement legal proceedings (which are expensive and time consuming) with more informal dispute resolution procedures to ensure remedies for breaches of human rights are accessible to all.<sup>348</sup> Such mechanisms also provide 'an opportunity to increase understanding on both sides of the difficulties involved in balancing and protecting human rights'.<sup>349</sup> Of course, it is imperative that the human rights body is adequately resourced to carry out any such functions.

The five year review of the ACT Act by the ANU recommended that the ACT HRC (or alternatively, the Ombudsman) be given a complaints-handling function, given the relative inaccessibility of the Supreme Court process for most people.<sup>350</sup>

## Other jurisdictions

Various other jurisdictions have human rights commissions. For example, there is the New Zealand Human Rights Commission,<sup>351</sup> the UK Equality and Human Rights Commission<sup>352</sup> and the South African Human Rights Commission.<sup>353</sup> We do not propose to embark on a detailed examination of the functions of each. Their functions are broadly similar to those of

<sup>344</sup> ACT Act, s 36.

<sup>345</sup> See <http://hrc.act.gov.au/humanrights/policy-systemic-work/cases/>.

<sup>346</sup> *Equal Opportunity Act 2010* (Vic), Part 9. See further at <http://hrc.act.gov.au/humanrights/enforcing-human-rights/>.

<sup>347</sup> DCJS, *Human Rights Act 2004: Twelve-Month Review – Report* (June 2006) (*DCJS Review*), recommendation 7. See also at 31.

<sup>348</sup> DCJS Review at 30.

<sup>349</sup> Submission from the Women's Legal Centre, quoted in the DCJS Review at 30.

<sup>350</sup> ANU, *The Human Rights Act 2004 (ACT): The First Five Years of Operation* (May 2009) (*ANU Review*), recommendation 17.

<sup>351</sup> See <https://www.hrc.co.nz/>.

<sup>352</sup> See <http://www.equalityhumanrights.com/>.

<sup>353</sup> See <http://www.sahrc.org.za/home/>.

the Victorian and ACT bodies described above, except that the South African commission (unlike all the others mentioned) does have a complaints-handling function.<sup>354</sup>

The South African commission is empowered to receive, investigate and resolve complaints about breaches of the 'fundamental rights' contained in the South African constitution. It may resolve complaints in writing or through alternative dispute resolution processes including negotiation, mediation or conciliation. The commission is empowered to proceed to a hearing process if these more informal procedures are unsuccessful, and to institute legal proceedings if appropriate. At the end of the process, it must issue a report to the breaching entity which includes recommendations, and it must monitor compliance with those recommendations. There is also an appeal mechanism.

This is a very 'strong' complaints-handling model, and it occurs in the context of a constitutional (not statutory) bill of rights and a specific human rights history. It would be controversial to enact such a 'strong' model in an Australian context. However, QAILS may be of the opinion that some elements could be adapted to apply in an Australian context.

An example of a similar body with a complaints handling function in the Australian context is the Office of the Australian Information Commissioner (**OAIC**). The OAIC is empowered by the *Privacy Act 1988* (Cth) (**Privacy Act**) to receive and investigate complaints about breaches of the Privacy Act.<sup>355</sup> It has broad powers in respect of these investigations, including to obtain information and documents, examine witnesses and hold hearings and compulsory conferences, in certain circumstances.<sup>356</sup> It must make reasonable attempts to conciliate a complaint, if that is reasonably possible, or it can refer the matter to an 'alternative complaint body' including the Commonwealth Ombudsman or Australian Human Rights Commission.<sup>357</sup>

After investigating the complaint, the OAIC may make a determination dismissing the complaint or find the complaint substantiated and make a determination that includes a direction that the public authority not engage in that conduct in the future, take specified steps to ensure that conduct is not repeated, and even provide redress to the complainant or pay compensation<sup>358</sup> (which is usually in the order of a few thousand dollars).<sup>359</sup> Organisations must comply with these determinations, and they can be enforced in the court.<sup>360</sup> In addition, the head of an agency must take all steps reasonably within his or her power to ensure that the terms of the determination are brought to the notice of all relevant officers and that the determination is complied with.<sup>361</sup>

This may be a more appropriate model for an Australian context.

<sup>354</sup> See the Department of Justice, 'Complaints Handling Procedures – Determination of the procedure contemplated in section 9(6) of the Human Rights Commission Act 54 of 1994' (27 January 2012) at <http://www.sahrc.org.za/home/index.php?ipkContentID=23>.

<sup>355</sup> Privacy Act, ss 36, 38.

<sup>356</sup> Privacy Act, ss 43-47.

<sup>357</sup> Privacy Act, ss 50, 52.

<sup>358</sup> Privacy Act, s 52.

<sup>359</sup> See the OAIC's previous determinations at <https://www.oaic.gov.au/privacy-law/determinations/>.

<sup>360</sup> Privacy Act, ss 52(1B), 55, 58, 81, 83, 84.

<sup>361</sup> Privacy Act, s 59.