Office of the Public Advocate (Qld)

Systems Advocacy

Submission to the Legal Affairs and Community Safety Committee

Human Rights Inquiry

April 2016

Queensland Government

Introduction

The Public Advocate (Qld)

The Public Advocate was established by the *Guardianship and Administration Act 2000* (Qld) to undertake systems advocacy on behalf of adults with impaired decision-making capacity in Queensland. The primary role of the Public Advocate is to promote and protect the rights, autonomy and participation of Queensland adults with impaired decision-making capacity (the adults) in all aspects of community life.

More specifically, the functions of the Public Advocate are:

- promoting and protecting the rights of the adults with impaired capacity for a matter;
- promoting the protection of the adults from neglect, exploitation or abuse;
- encouraging the development of programs to help the adults reach the greatest practicable degree of autonomy;
- promoting the provision of services and facilities for the adults; and
- monitoring and reviewing the delivery of services and facilities to the adults.[1]

In 2016, the Office of the Public Advocate estimates that up to 118,739 Queensland adults may experience impaired decision-making capacity.[2] The primary factors that can impact decision-making capacity include (but are not limited to) intellectual disability, acquired brain injuries arising from catastrophic accidents, mental illness, ageing conditions such as dementia, and conditions associated with problematic alcohol and drug use.

It is important to note that not all people with these conditions will have impaired decision-making capacity, and that impaired decision-making capacity does not necessarily impact all areas of an adult's life, and may fluctuate in response to situational issues. It is likely, however, that many people with these conditions may, at some point in their lives if not on a regular and ongoing basis, experience impaired decision-making capacity in respect of a matter.

Position of the Public Advocate

I wholeheartedly support the concept of a Human Rights Act being part of Queensland's legal framework. A Human Rights Act is potentially the best opportunity to create a single source of reference for the government and the people of Queensland to see the entrenched values and rules that should be followed by government and public services, and to generate an appropriate frame of reference for community expectations and behaviour.

Ensuring appropriate commitment in both word and action to the human rights of people with impaired decision-making capacity is central to our systems advocacy work, particularly given that people with impaired decision-making capacity constitute some of the most vulnerable members of the Queensland community.

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[1] *Guardianship and Administration Act 2000* (Qld) s 209.
[2] Office of the Public Advocate (Queensland), *The potential population for systems advocacy* (12 February 2016) Queensland Government, 2 <http://www.justice.qld.gov.au/__data/assets/pdf_file/0006/457539/fs02-potential-population-v5.00.pdf>.

The inquiry focusses on the 'dialogue' model, as implemented by the Australian Capital Territory (ACT) and Victoria. This model would establish positive obligations for government to more effectively uphold the rights of all citizens, while giving rise to the potential for a strong and cohesive 'human rights culture' within Queensland.[3] Such a culture could mitigate against human rights breaches by requiring due consideration for rights in decision-making by public authorities and other entities. This would be a positive development for Queensland.

By contrast, the current rights protection mechanisms within Queensland are primarily reactive and are given effect through a combination of various, sometimes conflicting, pieces of state and Commonwealth legislation. For example, in Queensland, general protections of certain rights exist under legislation such as the *Information Privacy Act 2009* (Qld) and the *Anti-Discrimination Act 1991* (Qld). However, each scheme comprises separate systems that often lack connectedness. This creates the potential for inconsistent remedies across systems, and may generate unnecessary complexity.

The dialogue model would require Parliament to consider whether new laws comply with the Human Rights Act and to issue a statement of compatibility as to whether bills are consistent with the rights contained therein.[4] The opportunity would also exist to review existing legislation against human rights standards. Many pieces of Queensland legislation may, arguably, no longer align with either community or human rights standards and expectations, for example certain provisions in the *Criminal Code Act 1899* (Qld) which will be further discussed in the body of this submission.

The mandated reviews established in Victoria and the ACT have detailed a variety of implementation issues that have been encountered,[5] leaving Queensland in an advantageous position to learn from these reviews and to design the system for Queensland accordingly. Importantly, the reviews have outlined the large number of benefits that human rights legislation has brought to those jurisdictions, and established that many of the predicted negative impacts were unfounded.

More importantly, the establishment of a Human Rights Act would bring Queensland into line with other developed countries by observing some level of explicit human rights guarantee. By adopting such an Act, Queensland, together with Victoria and the ACT, could initiate a national discussion centred on developing a framework to more effectively uphold the obligations that we, as a nation, have accepted in ratifying the various human rights treaties to which Australia is a signatory.

Paramount to the current inquiry is the need to take a forward-thinking and contemporary approach that recognises the obligations held by Queensland in respect of ensuring due consideration for human rights. Further, any action that is taken must recognise that human rights are equally applicable to all persons, and encourage all citizens to understand, respect and work toward a positive human rights culture in Queensland.

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[3] ACT Department of Justice and Community Safety (JACS), '*Human Rights Act 2004* Twelve Month Review Report' (2006) 34; Australian National University, 'The Human Rights Act 2004 (QCT): The First Five Years of Operation' (2009) 67; Michael Brett Young, 'From Commitment to Culture: The 2015 Review of the *Charter of Human Rights and Responsibilities Act 2006*' (2015).

[4] *Human Rights Act 2004* (ACT) s 37; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 28.

[5] ACT Department of Justice and Community Safety (JACS), '*Human Rights Act 2004* Twelve Month Review Report' (2006); Australian National University, 'The Human Rights Act 2004 (ACT): The First Five Years of Operation' (2009); Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Review of the Charter of Human Rights and Responsibilities Act 2006* (2011); Michael Brett Young, 'From Commitment to Culture: The 2015 Review of the *Charter of Human Rights and Responsibilities Act 2006*' (2015).

Human Rights

Principles

The Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights in Vienna in 1993 confirmed the universality of human rights and reaffirmed the Universal Declaration of Human Rights.[6] Importantly, it stated that:

> *"All human rights are universal, indivisible and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms."*[7]

This has been reiterated in other declarations, principles and conventions regarding human rights, including the United Nations *Convention on the Rights of Persons with Disabilities*.[8] Other basic principles found in the Vienna Declaration as well as in discussions of rights more generally include the concepts of participation, accessibility, transparency and equity/non-discrimination.[9]

The introduction of a Human Rights Act must take the following concepts into consideration:

- **Universality and inalienability:** All people are born with and possess the same rights, and people are entitled to them by virtue of being human.
- **Indivisibility:** Human rights are indivisible, and the denial of one right invariably impedes enjoyment of other rights. For example, the right for people in freedom of expression cannot be compromised at the expense of other rights, such as freedom of thought and conscience or the right for peaceful assembly and freedom of association.
- **Interdependence and interrelatedness:** Each right often depends, wholly or in part, on the fulfilment of other rights. Each right contributes to a person's realisation of their human dignity in the various needs that human rights are intended to fulfil.
- **Participation:** All people have the right to participate in decision-making processes, including having access to necessary information and the ability to have input into government decisions about rights.
- **Accountability:** The government and other bodies that are responsible for upholding rights must be answerable for the observance of human rights. This requires the creation of mechanisms of accountability for the enforcement of rights through being entitled to institute proceedings for appropriate redress.
- **Equality and non-discrimination:** There must be a guarantee of human rights without discrimination of any kind. The equal enjoyment of rights must be secured for everyone, which may require the provision of reasonable accommodation so that all people are able to overcome any existing inequities.

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[6] UN General Assembly, *Vienna Declaration and Programme of Action*, A/CONF 157/23 (12 July 1993).
[7] Ibid pt 1, para 5.
[8] *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, [2008] ATS 12 (entered into force 3 May 2008) preamble.
[9] See, for example, United Nations Human Rights Office of the High Commissioner, *What are Human Rights?* <http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx>.

Rights to be protected by a Human Rights Act

The implementation and review of human rights legislation in Victoria and the ACT are informative in terms of which rights can and should be implemented in Queensland.

The main treaty from which those similar jurisdictions have derived rights is the *International Covenant on Civil and Political Rights* (ICCPR).[10] The implementation of similar rights into a Queensland Human Rights Act should be relatively uncontroversial, considering the extensive discussions already undertaken in relation to what rights are most relevant in the context of an Australian federal system, including the constitutional issues that arise with certain rights.

The implementation in those jurisdictions takes account of the fundamental rights as found in the ICCPR and are adapted from the *Universal Declaration on Human Rights* that the United Nations General Assembly adopted in 1948.[11]

There has also been considerable debate as to whether the rights under the *International Covenant on Economic, Social and Cultural Rights* (ICESCR)[12] should be implemented. The arguments for and against the implementation of these further 'positive' obligations have already been discussed in great detail in other jurisdictions,[13] for example certain issues not being justiciable and enabling the judiciary to allocate resources on behalf of the government.[14] The concerns regarding implementation of rights from the ICESCR have generally been viewed as unfounded or unjustified.[15]

This was also noted during discussions about the implementation of a legislative human rights scheme in other jurisdictions such as when the Tasmanian Law Reform Institute stated, in recommending that Tasmania adopt a dialogue model, that:

> *"The arguments for limiting rights protection to civil and political rights are not compelling. They speak of timidity rather than rationality. Suggestions that courts are ill-equipped to engage with economic, social and cultural rights show little knowledge of the courts' current decision making responsibilities. Fears that the inclusion of economic, social and cultural rights in a Tasmanian Charter would deprive the governments of their control of fiscal policy and resource allocation are unfounded. Under the dialogue model recommended here for the Tasmanian Charter, this cannot occur. The Tasmanian Law Reform Institute recognises that human rights are indivisible and that the separation of rights into civil and political rights on the one hand and economic, social and cultural rights on the other is artificial."*[16]

The experiences and findings of other jurisdictions will serve to guide Queensland should it decide to pursue the development of a Human Rights Act.

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[10] Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
[11] *Universal Declaration on Human Rights*, GA Res 217A (III), UN GAOR 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948).
[12] Opened for signature 16 December 1966, 999 UNTS 3 (entered into force 3 January 1976).
[13] ACT Department of Justice and Community Safety (JACS), '*Human Rights Act 2004* Twelve Month Review Report' (2006) 37; Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Review of the Charter of Human Rights and Responsibilities Act 2006* (2011) 34; Michael Brett Young, 'From Commitment to Culture: The 2015 Review of the *Charter of Human Rights and Responsibilities Act 2006*' (2015) 224.
[14] ACT Department of Justice and Community Safety (JACS), '*Human Rights Act 2004* Twelve Month Review Report' (2006) 40.
[15] ACT Department of Justice and Community Safety (JACS), '*Human Rights Act 2004* Twelve Month Review Report' (2006) 45-46; Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Review of the Charter of Human Rights and Responsibilities Act 2006* (2011) 38; Michael Brett Young, 'From Commitment to Culture: The 2015 Review of the *Charter of Human Rights and Responsibilities Act 2006*' (2015) 224 – 225.
[16] Tasmanian Law Reform Institute, *A Charter of Rights for Tasmania,* Report No. 10, October 2007 122.

United Nations *Convention on the Rights of Persons with Disabilities*

Further rights that should be recognised in a Human Rights Act in Queensland would be those that realise the objectives of the United Nations *Convention on the Rights of Persons with Disabilities* (UNCRPD).[17] This convention was ratified in 2008, which notably was after the introduction of human rights legislation in Victoria and the ACT.

The UNCRPD has heralded a paradigm shift; that is, a new way of thinking about disability. Underpinned by what is known as the 'social model of disability', the UNCRPD incorporates a contemporary approach to disability and emphasises the importance of:

- recognising that disability is an evolving concept and that disability results from the interaction between people with impairments and their surroundings as a result of attitudinal and environmental barriers;
- the right and capacity of people with disability to make valued contributions to their communities; and
- recognising that all categories of rights apply to people with disability, who should therefore be supported to exercise those rights.

An important overarching principle in the UNCRPD is that of 'reasonable accommodation'. This refers to the support, modifications and adjustments that must be made so that people with disability can exercise their rights on the same basis as others. Importantly, discrimination is now defined by Article 5 of the Convention to also mean the failure to provide adequate accommodation. This broadens the concept of discrimination from the traditionally 'reactive' approach that provided a variety of remedies to discrimination in particular areas of life on the basis of disability, towards a positive obligation on state parties to ensure that people with disability have the information, assistance and support they need to exercise their rights.

Of equal relevance is Article 12, which imposes an obligation on state parties to recognise that people with disability enjoy legal capacity on an equal basis with others. It places a specific and positive obligation on state parties to "take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity."[18] Read with Article 5, an overarching principle of equality and non-discrimination, there is an obligation on state parties to ensure support is provided to people with disability to enable them to exercise their legal capacity, so as to avoid discrimination.

Although many of the rights contained within the UNCRPD reflect the concept of indivisibility and interrelatedness as explored earlier, the concept of 'reasonable accommodation' as found in the UNCRPD becomes an invaluable concept to further the rights of people with disabilities.

This concept should therefore be included in a Human Rights Act in Queensland for several reasons. First, it clarifies the notion that the broad concept of 'equality' can be complex, and includes the need to accommodate those with differing abilities to be able to fully realise it. Second, reasonable accommodation is an important part of the concept of indivisibility and interrelatedness of human rights and needs to be borne in mind by the agencies that will be required, under a Human Rights Act, to consider people's rights when performing their functions.

[17] Opened for signature 30 March 2007, [2008] ATS 12 (entered into force 3 May 2008).
[18] Ibid art 12(3).

Having such concepts outlined specifically in a Human Rights Act would provide a single point of authority for those who must apply human rights in performing the functions or responsibilities associated with their role. Such staff, many of whom do not have legal training, may not have the resources or expertise to consider how best to apply the various international human rights instruments and/or relevant legal decisions, a finding that emerged in the ACT review.[19]

The issue of accessibility for public authorities, and for the general public who deal with public authorities, requires clear, understandable legislation in the human rights context.[20]

Specifying the concept of reasonable accommodation in legislation would assist various agencies and services providers by acknowledging the need to attend to such a requirement without necessitating expert legal knowledge on human rights law. This could further assist in the development of a human rights culture that takes into account the need for reasonable accommodation in relation to people that require it, as well as influencing the various policies and discussions that arise.

[19] Australian National University, 'The Human Rights Act 2004 (ACT): The First Five Years of Operation' (2009) 80.
[20] Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Review of the Charter of Human Rights and Responsibilities Act 2006* (2011) 110; Michael Brett Young, 'From Commitment to Culture: The 2015 Review of the *Charter of Human Rights and Responsibilities Act 2006*' (2015) 71.

Implementation

Resourcing

Current government agencies

As experienced in other jurisdictions, proper resourcing will be required for the successful implementation of a Human Rights Act. This may involve education and publicity at all levels of government and the community in general.

The later reviews conducted in Victoria and the ACT (at eight and five years respectively) found that government agencies demonstrated inconsistent engagement with, and understanding of, their obligations under human rights legislation.[21] One of the recommendations in the Victorian review was to implement simpler mechanisms of training, such as explicitly spelling out the steps required to comply with the obligation to properly consider human rights in decision-making processes.[22]

A significant amount of time and an ongoing commitment of resources are required to build a human rights culture throughout government. In Victoria, there was some concern that there had been a deprioritisation of their Charter of Human Rights, which set back the development of a human rights culture and required government to relook at their Charter implementation strategy.[23]

Further training was also needed in the judiciary. The ACT's five-year review concluded that the engagement of the courts and tribunals with human rights legislation was 'patchy and relatively unsophisticated', and the judiciary had only received a limited amount of training regarding the legislation.[24] In Victoria, even after eight years, there was still a need to further educate the judiciary so there was a better understanding of how human rights legislation affected various areas of practice. It was ultimately recommended that the Judicial College of Victoria be responsible for educating judicial officers.[25] Opportunities for further training were also identified in Victoria for the legal profession generally, especially in relation to building human rights components into existing forums on various areas of law, such as criminal law.[26]

This demonstrates the need for proper and thorough consideration of what types of training are required to ensure the application of human rights laws in various branches of government. It also demonstrates the lack of understanding of human rights laws generally, even by those who have extensive experience in applying complex laws, such as people within the legal profession. This further evidences the need to explicitly include important concepts, such as that of reasonable accommodation under the UNCRPD. If those trained in the interpretation and application of laws experience difficulties comprehending the breadth of human rights laws, then it is unreasonable to expect other non-legally trained public authorities and the general public to go beyond information that is easily accessed and understood.

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[21] Australian National University, 'The Human Rights Act 2004 (ACT): The First Five Years of Operation' (2009) 42; Michael Brett Young, 'From Commitment to Culture: The 2015 Review of the *Charter of Human Rights and Responsibilities Act 2006*' (2015) 22-23.
[22] Australian National University, 'The Human Rights Act 2004 (ACT): The First Five Years of Operation' (2009) 8.
[23] Michael Brett Young, 'From Commitment to Culture: The 2015 Review of the *Charter of Human Rights and Responsibilities Act 2006*' (2015) 23.
[24] Australian National University, 'The Human Rights Act 2004 (ACT): The First Five Years of Operation' (2009) 49.
[25] Michael Brett Young, 'From Commitment to Culture: The 2015 Review of the *Charter of Human Rights and Responsibilities Act 2006*' (2015) 51.
[26] Ibid 50.

Creation of new government agencies

The discussion paper suggests that a Human Rights Act in Queensland could, amongst other functions, empower a body to investigate, report on and conciliate human rights complaints, and intervene in relevant legal proceedings.[27] The discussion paper suggested that, with appropriate resources, this function could be given to the Anti-Discrimination Commission Queensland (ADCQ).

There are a number of questions that remain as to how far the new human rights functions will operate, as well as how they will interact with existing complaints mechanisms. For example, if a member of the public has a complaint about a government agency's conduct that may have breached the Human Rights Act, they may be confused about whether to first approach the original agency, or whether to approach another existing government complaints agency (such as the Queensland Ombudsman), or the agency with the human rights functions. The Human Rights Act will need to be operationalised to ensure the appropriate handling of such complaints, and must ensure these processes are clearly understood. The interactions between complaints systems is one example of the type of consideration necessary in implementing a Human Rights Act.

Despite the discussion about a Queensland Human Rights Act and the mechanisms of operation being in its infancy, it is important to note the already complex processes and mechanisms that exist in government and the difficulties that some members of community experience in navigating them.

Application beyond government

Non-government entities

A Human Rights Act in Queensland would need to be similar to other dialogue models and apply to the three arms of government, the Parliament, Courts and Executive. Of particular importance is ensuring that a Human Rights Act also applies to government-funded service providers. Both Victoria and the ACT extend the application of their human rights protections by defining such providers as being a public authority when their functions include those of a public nature.[28]

An emerging issue noted in the more recent Victorian review is the increasing prevalence of national schemes such as the National Disability Insurance Scheme (NDIS).[29] A Queensland Human Rights Act would apply to service providers that operate under contract to Queensland government departments, as they would be considered to be performing a public function on behalf of the Queensland government. However the NDIS, as a Commonwealth government scheme, may not have these obligations under a Queensland Human Rights Act. There are other national schemes of similarly wide application where this issue must also be considered, for example, aged care.

A coherent approach will need to be adopted by the Queensland Government in considering how human rights protections will apply to national schemes. The application of these rights will need to be considered when negotiating new national schemes and a policy will need to be developed to apply rights as much as possible. For example, in Victoria, it was recommended that the Government adopt a whole-of-government policy that, in developing national schemes, the Victorian human rights legislation should apply to the scheme in Victoria to the fullest extent possible.[30]

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[27] Allens Linklaters and Human Rights Law Centre, *A Human Rights Act for Queensland*, Discussion Paper 2016 8.
[28] *Human Rights Act 2004* (ACT) s 40; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 4.
[29] Michael Brett Young, 'From Commitment to Culture: The 2015 Review of the *Charter of Human Rights and Responsibilities Act 2006*' (2015) 203.
[30] Michael Brett Young, 'From Commitment to Culture: The 2015 Review of the *Charter of Human Rights and Responsibilities Act 2006*' (2015) Recommendation 47.

General public

Although individuals and private entities would not be bound by a Human Rights Act, such an Act should encourage the general public to apply and promote human rights. Similar provisions for rights-based principles in Queensland legislation include those contained in the *Guardianship and Administration Act 2000*, which encourage the community to apply the general principles.[31]

Enforcement

The possibility of a right of action when the Human Rights Act is breached is raised in the discussion paper.[32] Both the ACT and Victoria did not have a freestanding right of action through the courts when their human rights legislation was first introduced. However, a direct right of action was implemented in the ACT following the first review of legislation.[33] The latest review in Victoria recommended that the Victorian legislation be amended in the same way.[34]

The introduction of a direct cause of action in the ACT has not resulted in a flood of litigation in the courts as a result of such a provision.[35] It was found, however, that an absence of clear, accessible and enforceable remedies can hold back the development of a human rights culture.[36]

A further recommendation in Victoria was that a proceeding regarding a breach of human rights legislation be brought before the Victorian Civil and Administrative Tribunal to improve accessibility. At the time, the Supreme Court was the only forum to which such proceedings could be brought.[37] Clearly, an equivalent right to bring such actions before the Queensland Civil and Administrative Tribunal (QCAT) would be of benefit to the community in terms of accessibility.

The issues explored in the ACT and Victoria both point to allowing breaches of a Human Rights Act to be a distinct cause of action that can be brought before an accessible tribunal such as QCAT. Ease of access would arguably facilitate the development of a human rights culture by empowering people to hold responsible agencies accountable and would reinforce to these agencies the importance of human rights by creating repercussions in situations whereby they are breached.

Legislative scrutiny

A dialogue model would require Parliament to consider the human rights implications of the laws it passes as well as commenting upon its consistency with those rights.[38] This model improves the quality of laws by ensuring that human rights are considered during all law-making and policy development; this was noted in both the ACT and Victorian reviews.[39]

Having said that, a particular issue that does not appear to have been addressed in these other jurisdictions is a systemic review of existing legislation to ensure compatibility with human rights.

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[31] *Guardianship and Administration Act 2000* (Qld) s 11(3).
[32] Allens Linklaters and Human Rights Law Centre, *A Human Rights Act for Queensland*, Discussion Paper 2016 8.
[33] ACT Department of Justice and Community Safety (JACS), '*Human Rights Act 2004* Twelve Month Review Report' (2006) recommendation 6, *Human Rights Act 2004* (ACT) s 40C.
[34] Michael Brett Young, 'From Commitment to Culture: The 2015 Review of the *Charter of Human Rights and Responsibilities Act 2006*' (2015) Recommendation 27.
[35] Ibid 126.
[36] Ibid 124.
[37] Ibid 128.
[38] *Human Rights Act 2004* (ACT) s 37; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 28.
[39] Allens Linklaters and Human Rights Law Centre, *A Human Rights Act for Queensland*, Discussion Paper 2016 9 – 10.

Although the Supreme Courts of each jurisdiction have been empowered to declare incompatibility when a law is inconsistent with human rights,[40] this process is not a mechanism to address the need for a broad review of current laws to ensure they comply with human rights obligations. In the ACT, the review identified a level of complacency by government agencies in assuming existing legislation and practices met human rights standards.[41] It was recommended that each government agency be strongly encouraged to audit its legislation and policies for human rights compliance.[42]

Clearly, the problem is that no legislative mechanism or preparation was made in either jurisdiction in terms of laws and policy already in existence. Although this would be a considerable undertaking, a properly planned mechanism must be put in place, should a Human Rights Act be implemented, to review all Queensland legislation and government policies and practices within a reasonable and achievable time period.

Limiting such scrutiny to new legislation may result in ongoing breaches of rights, with the only available recourse being a relatively inaccessible and complicated procedure to bring laws to the attention of the Supreme Court for a declaration of incompatibility. Such processes would be difficult for the general public, and even more so for marginalised people who have little access to resources or even the knowledge that such actions are possible. Existing laws that are incompatible with human rights would hinder the development of a human rights culture, suggesting that government is complacent in allowing inequities in law to continue.

There are a number of existing laws that are arguably incompatible with some basic concepts of equality that would be enshrined in a Human Rights Act. One example can be seen in the *Criminal Code Act 1899* (the Criminal Code) which, while protective in intent, effectively criminalises sexual activity for people with disability.

Section 216 of the Criminal Code states that 'any person who has or attempts to have unlawful carnal knowledge of a person with an impairment of the mind is… guilty of a crime'.[43] It is also a crime to engage in other sexual behaviours with a person with an impairment of the mind. Broadly speaking, this includes indecently dealing with the person, procuring the person to commit an indecent act, exposing the person to an indecent act or indecent matter, and taking indecent images of the person.[44]

These provisions in Queensland's Criminal Code have wide potential application. The definition of 'person with an impairment of the mind' is very broad. It includes a person with a disability that is attributable to an intellectual, psychiatric, cognitive or neurological impairment or a combination of these. It also notes that the disability must result in a substantial reduction of the person's capacity for communication, social interaction or learning, and in the person needing support.[45] While perhaps unintended, this definition has the potential to encompass many people with disability who, despite the presence of disability, have the capacity to make the decision to engage in a consensual sexual relationship.

The breadth of this definition was acknowledged by the Court of Appeal in a 2004 decision regarding section 216 and the phrase 'intellectually impaired person'.[46] The phrase 'intellectually impaired person' was defined identically to, but has since been replaced with, the current phrase 'person with an impairment of the mind'. In the 2004 decision, the Court acknowledged that an intellectually

[40] *Human Rights Act 2004* (ACT) s 32, *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 36.
[41] Australian National University, 'The Human Rights Act 2004 (ACT): The First Five Years of Operation' (2009) 42.
[42] Ibid 44.
[43] *Criminal Code Act 1899* (Qld) s 216(1).
[44] Ibid s 216(2).
[45] Ibid s 1 (definition of 'person with an impairment of the mind').
[46] *R v Mrzljak* [2004] QCA 420.

impaired person would often have the cognitive capacity to consent to sexual intercourse. The mere existence of an intellectual impairment does not mean that a person is incapable of giving or refusing consent.[47]

However, the nature of a person's impairment is relevant when determining whether a complainant has the necessary cognitive capacity.[48] This decision seems to indicate that, at least amongst the judiciary, there is a recognition that a person with an impairment of the mind can engage in consensual sexual relationships.

It is not suggested through this example that people with disability should not be afforded specific protections. However, questions arise as to whether the current provisions are unduly restrictive of a person's freedom. Further, the broad nature of the provisions as they are currently worded has raised concerns by service providers in respect of the extent to which the support and any education programs that they provide to clients could potentially be seen to encourage what are technically illegal acts. It also creates challenges in teaching appropriate concepts such as consent when, in engaging in a sexual relationship with a 'person with an impairment of the mind', even giving consent may not mitigate the unlawfulness of the act.

What this example highlights is that there are broadly applicable laws such as the Criminal Code that do not reflect the principles of equality before the law. Such laws highlight the need for a Human Rights Act that can be used as the standard against which all laws, new and existing, are scrutinised.

It is therefore recommended that, should a Human Rights Act be implemented in Queensland, it is accompanied by a cohesive, systemic mechanism under which all existing laws are reviewed to address issues of incompatibility.

Reviewing the progress of implementation

In both the ACT and Victoria, human rights legislation contains provisions that require a review and subsequent report at mandated periods after coming into force. In the ACT, the Attorney-General was to review and report to the Legislative Assembly after one and five years after its legislation coming into force.[49] In Victoria, two government reviews were provided for at four and eight years of operation,[50] however at the second review, consideration needed to be had for whether further reviews were required.[51]

Reviews relating to the implementation of a Human Rights Act should be regular and ongoing. Although it will be an ordinary Act of Parliament, it is by no means ordinary in its scope or implication. It will set a benchmark for all laws and policies by government as well as being the primary instrument in fostering a human rights culture in Queensland. Therefore, instead of limiting the number of reviews in legislation, it should be a periodic and ongoing process, perhaps occurring every four to five years of operation. As both the ACT and Victorian reviews have shown, a large number of issues still arose during the later reviews of five years and eight years respectively, and in both cases, further reviews were recommended so that the operation of the human rights act could continue to be monitored for its effectiveness.[52]

[47] Ibid [42], [47], [68].
[48] Ibid [42].
[49] *Human Rights Act 2004* (ACT) ss 43 - 44.
[50] *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 44 – 45.
[51] Ibid s 45(2).
[52] Australian National University, 'The Human Rights Act 2004 (ACT): The First Five Years of Operation' (2009) 46; Michael Brett Young, 'From Commitment to Culture: The 2015 Review of the *Charter of Human Rights and Responsibilities Act 2006*' (2015) 234.

Concluding comments

This inquiry into the potential for establishing a Human Rights Act in Queensland presents a unique opportunity to bring Queensland into line with much of the developed world in terms of ensuring that consideration for human rights is at the forefront of government decision-making. In view of this, I commend the Queensland Government for initiating the inquiry and fully support the implementation of a Human Rights Act in Queensland.

This submission outlines a number of potential improvements that could be made upon those models already present in Australia. Namely, these were to include 'reasonable accommodation', a fundamental concept from the UNCRPD, into the Human Rights Act so that it will be considered as a foundational element of the human rights framework. I have also suggested consideration for a systemic review of existing legislation to address any current inequities that may exist.

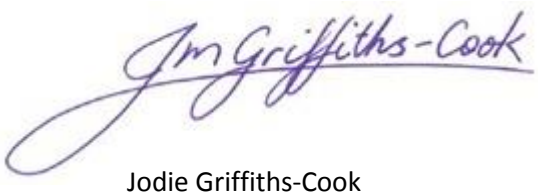
Given that Queensland is in an advantageous position of being able to consider not only similar human rights legislation of the ACT and Victoria but also the thorough reviews that those jurisdictions have undertaken, it is hoped that at least some of the same issues in implementation will not be encountered, such as those of proper resourcing.

Other issues that were not considered at the time of implementing human rights legislation in other jurisdictions can also now be considered, such as the growing importance of national schemes and how they will operate within a state-based Human Rights Act.

It is hoped that a Human Rights Act will build a human rights culture in not only public agencies but also the general public so that all people of Queensland can further develop values of equality, fairness and responsible government.

In closing, thank you for the opportunity to provide a submission in relation to a potential Human Rights Act in Queensland. I would be pleased to make myself available to further discuss the issues raised in this submission should additional information be required.

Yours sincerely,



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