



ANTI DISCRIMINATION  
COMMISSION QUEENSLAND

**SUBMISSION**

**CHARTER OF RIGHTS SUBMISSION TO  
THE NATIONAL HUMAN RIGHTS  
CONSULTATION COMMITTEE**

15 June 2009

## **ANTI-DISCRIMINATION COMMISSION QUEENSLAND**

### **Submission to the National Human Rights Consultation Secretariat for its consideration into protecting and promoting human rights and corresponding responsibilities in Australia June 2009**

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#### **Introduction**

This submission is made by the Anti-Discrimination Commission Queensland ('ADCQ'). The terms of reference of the National Human Rights Consultation are:

- Which human rights (including corresponding responsibilities) should be protected and promoted?
- Are these human rights currently sufficiently protected and promoted?
- How could Australia better protect and promote human rights?

This submission addresses those terms of reference with emphasis on the administration of the *Anti-Discrimination Act 1991* (Qld) ('the Queensland ADA'). It also lists a number of other measures that could be implemented to make federal and state agencies more effective in eliminating discrimination and promoting equality of opportunity.

#### **Role of the Anti-Discrimination Commission Queensland**

The ADCQ is established under the Queensland ADA. One of the functions of the ADCQ is to promote understanding and acceptance and the public discussion of human rights in Queensland.

The scheme of the Queensland ADA is to prohibit discrimination, both direct and indirect, on certain grounds in certain areas of activity unless an exemption under the Queensland ADA applies and to provide a mechanism for resolving contraventions of the Queensland ADA.

There are 16 prohibited grounds of discrimination.

Discrimination on these grounds is prohibited in the areas of work, education, goods and services, superannuation, insurance, accommodation, club membership and affairs, administration of state laws and programs, and local government.

The Queensland ADA also prohibits sexual harassment and other objectionable conduct such as victimisation and vilification.

## **Which human rights (including corresponding responsibilities) should be protected and promoted?**

### **Australia's international human rights obligations**

The range of human rights that might be incorporated in a National Charter includes:

- civil and political rights, such as the right to vote and the right to a fair trial
- economic, social and cultural rights, such as the right to education and the right to health
- rights of children and young people
- rights of women
- rights of Indigenous peoples
- rights of persons with disabilities
- rights of minority groups, such as ethnic, religious or linguistic minorities.

Australia is a signatory to a number of international human rights conventions and has accepted its obligation to incorporate these international human rights standards into national legislation:

- *International Covenant on Civil and Political Rights* ('ICCPR')
- *International Covenant on Economic, Social and Cultural Rights* ('ICESCR')
- *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ('CAT')
- *Convention on the Rights of the Child* ('CROC')
- *Convention on the Elimination of All Forms of Discrimination Against Women* ('CEDAW')
- *International Labour Organisation Discrimination (Employment and Occupation) Convention* ('ILO 111')
- *Convention on the Elimination of All Forms of Racial Discrimination* ('CERD')
- *Convention on the Rights of Persons with Disabilities* ('CRPD').

### **A National Charter of Rights**

The introduction of a National Charter of Rights ('National Charter') would begin the process of instilling a fundamental knowledge and understanding of human rights among Australians. It would be a basis for encouraging people to adopt a human rights culture that considers the impact on an individual for any actions that are proposed. It is hoped that a heightened awareness arising from the adoption of a

National Charter will result in the prevention of breaches of human rights with a corresponding reduction in the need to resort to litigation to enforce those rights.

The ADCQ has restricted this submission by drawing from examples from the *South African Bill of Rights* ('South African Bill')<sup>1</sup> and the *Victorian Charter of Human Rights and Responsibilities* ('Victorian Charter')<sup>2</sup>. The South African Bill is far-reaching and the first of its kind. The Victorian Charter is an Australian, state-based charter and could provide guidance for Australia's National Charter.

The significant difference between the South African Bill and the Victorian Charter is that the latter does not include economic, cultural and social rights. In discussing which rights should be protected, reference is made to both the Victorian Charter and the South African Bill<sup>3</sup>.

A comparative review of the rights covered by the South African Bill and the Victorian Charter provide examples to determine the rights that should be included in a National Charter. The ADCQ recommends that the following rights be considered for inclusion in a National Charter.

### **Civil and Political Rights**

The majority of the human rights outlined in the ICCPR have been incorporated into the South African Bill and the Victorian Charter and modified and varied to fit their particular jurisdictions.

At a minimum, the ADCQ recommends the inclusion of the civil and political rights set out in the Victorian Charter.

On the issue of competing rights, the South African Bill<sup>4</sup> in addressing the fundamental right of freedom of expression, has provided for the right but limited its operation to specifically prioritise competing rights. This addresses which rights take precedence in the face of competing rights protected by the National Charter. This is an approach that could be adopted when attempting to address competing rights. For example, the right to freedom of expression is limited if it is used for war propaganda, incitement of imminent violence, and advocacy of hatred based on race, ethnicity, gender or religion.

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1 *Constitution of the Republic of South Africa 2006*, Chapter 2, Bill of Rights, <http://www.info.gov.za/documents/constitution/1996/96cons2.htm>, accessed 15 May 2009.

2 *Charter of Human Rights and Responsibilities Act 2006 (Vic)* [http://www.austlii.edu.au/au/legis/vic/consol\\_act/cohrara2006433/](http://www.austlii.edu.au/au/legis/vic/consol_act/cohrara2006433/), accessed 2 June 2009

3 See the table at Appendix 1 for a comparison of the rights protected by the South African Bill and the Victorian Charter.

4 *South African Constitution* s16(1) and (2).

## Economic, Cultural and Social Rights

Australia signed the ICESCR on 18 December 1972 and ratified it on 10 December 1975.<sup>5</sup>

The rights outlined in ICESCR protect the majority of people who do not have a voice—the vulnerable people in society. Australia is obliged to implement measures, including legislation, to give effect to those rights<sup>6</sup>.

Support for a comprehensive human rights charter was advanced by the majority of the governance stream of the Australia 2020 Summit. It recommended a statutory charter or Bill of Rights that should protect and promote all civil, political, economic, social and cultural rights and provide meaningful remedies.<sup>7</sup>

Australia's obligations in terms of ICESCR are no different to those under the ICCPR and should be incorporated into a proposed National Charter in the same way. The rights enunciated in the ICCPR and ICESCR are interrelated and interdependent. The right to life (ICCPR) can have no practical effect if there is no corresponding right to food or adequate health services (ICESCR). For the most vulnerable people in society, it is only when their basic economic, social and cultural rights have been realised that they are then able to gain access to fundamental civil and political rights.

To exclude these rights from a proposed National Charter result in marginalisation of vulnerable members of the population who are in need of protection. The rights that should be given emphasis are those relating to housing, adequate healthcare, food and education.

The ICESCR clearly acknowledges that these rights should be gradually realised and that the pace of this realisation will be dependent on the available resources of different states.

The Victorian Charter did not incorporate the majority of the rights in the ICESCR, except for the right to property. Despite the Victorian Consultative Committee receiving 41% submissions for their inclusion<sup>8</sup>, it was decided not to include these rights and to review that decision in four years.

The common objections to the inclusion of economic, social and cultural rights are:

- The realisation of economic, social and cultural rights is entrenched in the resources a particular country has available

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<sup>5</sup> Office of the United Nations High Commissioner for Human Rights, [www2ohchr.org/English/law](http://www2ohchr.org/English/law), accessed 30 June 2009.

<sup>6</sup> See Article 2, ICESCR.

<sup>7</sup> Australian Government, *The Future of Australian governance*,

[http://www.australia2020.gov.au/docs/final\\_report/2020\\_summit\\_report\\_9\\_governance.doc](http://www.australia2020.gov.au/docs/final_report/2020_summit_report_9_governance.doc), accessed 4 June 2008.

<sup>8</sup> Human Rights Consultation Committee (Victoria) *Rights, Responsibilities and Respect Report*, November 2005

- Allowing the courts to make rulings on these rights, dependent on the remedies that these rights attract, could potentially impact on the separation of powers and parliamentary sovereignty.

The South African Bill<sup>9</sup> is innovative by incorporating a large number of economic, social and cultural rights within a constitutionally-entrenched model. The objection of resource scarcity in Australia cannot possibly apply when compared to a country like South Africa with its huge population and limited resources.

However, in order to address the resource scarcity objection to the inclusion of economic, social and cultural rights, the South African Bill focused on introducing a limitation to these rights so that that the state would not be held liable by the courts to guarantee these rights.

In order to balance the concerns of the state that budgetary and resource issues could be impacted upon by rulings of the courts, the South African Bill has incorporated a 'reasonableness test' as a possible defence to a challenge that an economic, cultural or social right has been breached. An example of this is section 26 of the South African Bill, which stipulates the right to adequate housing. This clause, in expanding on the obligation to achieve this right, states that:

The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.<sup>10</sup>

This approach allowed the economic, social and cultural rights to be incorporated within the constitutionally-entrenched Bill, without compromising parliamentary sovereignty or impacting on the separation of powers. This approach also recognises the spirit of the ICESCR which enshrines the understanding that the economic, social and cultural rights will have to be progressively realised by different states.

In terms of the practical application of these rights in South Africa, the constitutional court does not dictate how the state should meet the progressive realisation of these rights. This approach, together with the reasonableness test, adequately addresses the objection that the inclusion of these rights impacts on parliamentary sovereignty. The reasonableness test ensures that the state is not held liable for the realisation of rights that its limited resources do not allow. The South African courts acknowledge this:

The South African court recognises that it is poorly qualified to dictate precisely how the state should meet the socio-economic needs of the people.<sup>11</sup>

In order to practically implement economic, cultural and social rights, the South African Bill has also introduced a Human Rights Commission:

<sup>9</sup> *South African Constitution*, <http://www.info.gov.za/documents/constitution/1996/96cons2.htm#7> (accessed 7 May 2009)

<sup>10</sup> Ibid.

<sup>11</sup> Murray Weeson, 'Grootboom and Beyond: Reassessing the Socio-Economic Jurisprudence of the South African Constitutional Court' (2004) 20 *South African Journal of Human Rights* 284, 294.

In order to reinforce the protection of economic and social rights, the new Constitution introduces a mechanism that is unique in world jurisprudence. Each year the South African Human Rights Commission must request relevant organs of state to provide it with information on the steps they have taken towards the realisation of a number of economic and social rights. This gives the Commission the opportunity to monitor the implementation of these rights and to keep the issue on the national agenda.<sup>12</sup>

While the South African model is the first of its kind, it provides a clear example that incorporating these rights can be done in a way that balances the interests of the state with that of the individual.

A National Charter could follow the Victorian Charter which is a legislative model. Within this model, a reasonableness test could be incorporated. The difference is that under the Victorian Charter the courts cannot strike down any law or stop its operation as being inconsistent with the Victorian Charter. Under section 36<sup>13</sup> the court can make a 'declaration of inconsistency'. This declaration is provided to the Attorney-General, who then has six months to prepare a report to parliament. It is then up to parliament to decide whether or not to effect changes to the law.

Under the Victorian Charter, there can be no infringement of parliamentary sovereignty as the courts have no power to pass rulings that could impact on the resources of the state. In addition, incorporating a reasonableness test would result in less use of 'declarations of inconsistency' as the courts would consider the state's resources as well as the steps taken by the state for the progressive realisation of these rights before making such a declaration.

The use of these safeguards provides the requisite foundation to incorporate economic, cultural and social rights within a National Charter.

- The ADCQ recommends:
- a legislative model of a National Charter as adopted in Victoria
- a 'reasonableness test' as incorporated in the South African Bill
- the introduction of a Human Rights Parliamentary Commission to keep human rights on the national agenda, similar to the Human Rights Commission introduced in South Africa.

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12 Cristof Heyns, 'From the margins to the mainstream: socio-economic rights in South Africa' (1998) 1 *Economic and Social Rights in South Africa* [http://www.chr.up.ac.za/centre\\_projects/socio/esrvol1no1.html](http://www.chr.up.ac.za/centre_projects/socio/esrvol1no1.html), accessed 7 May 2009.

13 Victorian Charter [http://www.austlii.edu.au/au/legis/vic/consol\\_act/cohrara2006433/s8.html](http://www.austlii.edu.au/au/legis/vic/consol_act/cohrara2006433/s8.html), accessed 7 May 2009.

## Right to be free from discrimination

The right to equality in ICCPR<sup>14</sup> incorporates the right to be free from discrimination. The ADCQ administers the Queensland ADA and has substantial expertise in this area.

The Victorian Charter broadly states that persons have the right to be free from discrimination without listing particular attributes that would be covered, in contrast to the South African Bill that contains a non-exhaustive list of specific attributes.

It is preferable that a National Charter specifically lists protected attributes as is outlined in the South African Bill, rather than adopt the general phrasing used in the Victorian Charter. It is recognised that the grounds in a National Charter may be limited by the constitutional power of the federal parliament.

## Specific rights

The ADCQ suggests that the following rights should be specifically incorporated into a National Charter where that is constitutionally viable, or otherwise in a Queensland Charter:

### Gay Lesbian, Bisexual, Transgender and Inter-sex Rights ('LGBTI')

Article 2(1) of the ICCPR protects the rights of all individuals without distinction.

In Queensland, LGBTI rights are protected by the inclusion of the attributes of 'gender identity'<sup>15</sup> and 'sexuality'<sup>16</sup> within the discrimination legislation. The vilification provision<sup>17</sup> makes it unlawful, in public, to 'incite hatred towards, serious contempt for, or serious ridicule of' a person or a group of persons because of their sexuality or gender identity.

However, it is important to note that there is no specific national legislation that protects LGBTI communities. LGBTI communities face ongoing daily discrimination.<sup>18</sup> In addition, the state anti-discrimination legislation is individual complaint-focussed and does not address the systemic discrimination that continues because of the existence of policies and systems that do not recognise the human rights of LGBTI communities.

It is clear that gender identity is not fully understood by the general population in Australia. This has resulted in discrimination in legislation and policy, e.g. a

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<sup>14</sup> Article 2(1)

<sup>15</sup> *Anti-Discrimination Act 1991*, s7(m)

<sup>16</sup> *Ibid.* s7(n)

<sup>17</sup> *Ibid.* s124A

<sup>18</sup> Australian Human Rights Commission, *Stories of discrimination by gay, lesbian, bisexual, transgender and intersex community*, [http://www.hreoc.gov.au/human\\_rights/gay\\_lesbian/stories.html](http://www.hreoc.gov.au/human_rights/gay_lesbian/stories.html), accessed 30 June 2009.



transgender person is prohibited from changing identification documents from their birth gender to the gender with which they identify.<sup>19</sup>

The rights of LGBTI communities are not recognised in fundamental civil and political rights, such as the right to family incorporating the right to marriage.

The inclusion of the rights of LGBTI communities in a National Charter would begin the process of instilling a culture that focuses on the need for public authorities to understand, consider and respect these human rights in legislation, policies and general service delivery. Placing the rights of LGBTI communities on the national agenda would also result in a focus on educating the community to understand and respect the human rights of the LGBTI community.

### **Disability Rights**

Disability rights are protected in both ICCPR and ICESCR<sup>20</sup>:

The Committee on ICESCR requires governments to protect against disability discrimination and to take positive action to reduce disadvantages. Positive action means giving preferential treatment to people with disability to help them achieve full participation and equality in society.<sup>21</sup>

The magnitude of the problem faced by people with disabilities was recognised in a separate international convention to address their needs. Australia is a signatory to and has ratified the Convention on the Rights of Persons with Disabilities.<sup>22</sup> Australia's obligations in terms of this convention should be included in a National Charter.

Around 10 per cent of the world's population, or 650 million people, live with a disability. They are the world's largest minority.<sup>23</sup> In 1998, there were 3.6 million people with disability in Australia (19% of the population).<sup>24</sup>

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19 Australian Human Rights Commission, *Sex Files: the legal recognition of sex in documents and government records*, [http://www.hreoc.gov.au/genderdiversity/sex\\_files2009.html](http://www.hreoc.gov.au/genderdiversity/sex_files2009.html), accessed 30 June 2009.

20 ICCPR Articles 2 and 26 and ICESCR Article 2

21 CESCR General Comment 5 – Persons with Disabilities, eleventh session (1994), UN Doc E/1995/22 (paras 5 and 9); also recognised in the Standard Rules on the Equalisation of Opportunities for Persons with Disabilities, annexed to General Assembly resolution 48/96 of 20 December 1993 (para 17). <http://piac.asn.au/publications/pubs/Disability.pdf>, accessed 4 June 2009

22 United Nations, <http://www.un.org/disabilities/convention/signature.shtml>, accessed 4 June 2009

23 United Nations, <http://www.un.org/disabilities/convention/facts.shtml>, accessed 4 June 2009

24 ABS, *Disability, Ageing and Carers: Summary of Findings*, cat. no. 4430.0, Canberra (1999), p 13, quoted at <http://piac.asn.au/publications/pubs/Disability.pdf>, accessed 4 June 2009

In the 2007/2008 financial year 'impairment discrimination constituted 26 % of accepted grounds of complaint'<sup>25</sup>. This experience highlights the ongoing discrimination of persons with disabilities.

The current legislation, the *Disability Discrimination Act 1992* (Cth) ('DDA'), the *Disability Services Act 1986* (Cth) ('DSA'), and the Queensland ADA relies on an individual complaint-based mechanism to obtain remedies. The requirements to satisfy the elements of direct or indirect discrimination are onerous, incorporating a comparator requirement which is problematic in disability discrimination matters.

While individual complaints may address individual needs, or may result in disability access for a particular venue, change of this nature is slow, piecemeal and relies to a large extent on individuals to pursue the complaints process. This process does not address the systemic discrimination that exists because legislation, policies, and practical access issues continue to infringe on the rights of persons with disabilities.

Incorporating Australia's obligations from the Convention on the Rights of Person with Disabilities within a National Charter will be the positive action required to place persons with a disability in a position where they can actively participate equally in society.

### **Women's rights**

Neither the South African Bill nor the Victorian Charter has addressed women's rights as a separate and distinct category. Australia's international obligations are enunciated in the ICCPR, the ICESCR and CEDAW. CEDAW outlines a number of areas in which the human rights of women need to be protected, such as employment, education, public life, family, violence against women, trafficking of women and access to health services

The Queensland experience highlights the ongoing discrimination of women on a number of fronts with the following percentages for 2007/2008 in complaints that affect women:

Sexual harassment	15.3%
Sex	14.7%
Family responsibilities	6.9%
Pregnancy	5.5%
Breastfeeding	0.5% <sup>26</sup>

In the 2007/2008 financial year, the percentage of complaints received involving discrimination against women was 43% of the total complaints

<sup>25</sup> Anti-Discrimination Commission Queensland *Annual Report 07/08*, p13

<sup>26</sup> Ibid. p15

received. This phenomenal figure highlights that women's rights need a special and concentrated focus in a proposed National Charter.

Australian women remain significantly under-represented in many aspects of political and public life and suffer disproportionately from domestic violence.<sup>27</sup>

In some Australian states, Indigenous women are around 35 times more likely to be hospitalised as a result of family violence than their non-Indigenous counterparts.<sup>28</sup>

Section 12(1)(c) of the South African Bill addresses violence against women, albeit in a generic way. Under freedom and security of the person, it provides that all persons are 'to be free from all forms of violence from either public or private sources'. Instances of domestic violence which are a private source would fall within this fundamental right of security of the person, and state policies and legislation would need to recognise this.

While women would obtain general protections generally from a National Charter, there is a need to focus on Australia's international obligations and specifically target and protect women's rights in a National Charter. Incorporating section 12(1)(c) of the South African Bill would be a step in the right direction in addressing violence against women. A thorough and substantive focus on women's rights is required in a National Charter for Australia.

### **Children's rights**

Children's rights are addressed in both the South African Bill and the Victorian Charter. Australia's obligations in terms of CROC are clear and these rights should be included in a National Charter.

### **Cultural Rights**

Australia is a multicultural society and has a variety of multicultural policies in place. The protection of these rights in a National Charter would not only incorporate and highlight the Indigenous rights of traditional owners but all people who live in Australia who have come here from a large number of diverse cultures, religions and languages.

The Victorian Charter has incorporated a provision (at section 19) that specifically addresses and protects these rights. It is recommended that a National Charter incorporate a similar provision:

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<sup>27</sup> Victorian Equal Opportunity and Human Rights Commission, *Women, Rights & Equality – What do they want now?*, ( March 2008).

<sup>28</sup> NGO Submission to the Human Rights Committee, *Freedom Respect Equality Dignity: Action* (September 2008) p 62, <http://www.hrlrc.org.au/our-work/law-reform/ngo-reports/>, accessed 30 June 2009.f

19. Cultural rights
  - (1) 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 his or her culture, to declare and practise his or her religion and to use his or her language.

### **Indigenous rights**

While the Victorian Charter has incorporated Indigenous rights under cultural rights, it is recommended that a National Charter cover these rights in a separate section.

In the 2008 *Social Justice Report* the Social Justice Commissioner, Tom Calma discusses a comprehensive human rights protection framework for Aboriginal and Torres Strait Islander Australians based on standard, universally-recognised rights and the United Nations Declaration on the Rights of Indigenous Peoples ('DRIP').<sup>29</sup> DRIP is the culmination of 20 years of consultations including Indigenous Australians.

The Aboriginal and Torres Strait Islander Social Justice Commissioner has identified three main areas for future protection of Indigenous rights:

1. Recognition of Indigenous peoples in the preamble of a Human Rights Act
2. The scope of general human rights protections in a Human Rights Act
3. Additional specific recognition of Indigenous human rights in a Human Rights Act.

The ADCQ supports the recommendations contained in the 2008 *Social Justice Report*.

The specific recognition of Indigenous human rights is particularly important, given the history of human rights abuses of the Indigenous peoples of Australia since 1778. While abuses occur across much of Australia, this submission will briefly detail how these abuses have impacted upon Indigenous people in Queensland.

Aboriginal and Torres Strait Islander Queenslanders ('Indigenous Queenslanders') have a unique history and contemporary place in Queensland society, as a consequence of previous and current Queensland government legislation and policies relating to Indigenous Queenslanders.

The legislative history of the regulation of Indigenous Queenslanders includes:

- *Aboriginals Protection and Restriction of the Sale of Opium Act 1897*

<sup>29</sup> Australian Human Rights Commission *Social Justice Report 2008*

[http://www.hreoc.gov.au/social\\_justice/sj\\_report/sjreport08/index.html](http://www.hreoc.gov.au/social_justice/sj_report/sjreport08/index.html), accessed 30 June 2009

- *Aboriginals Preservation and Protection Act 1939*
- *Torres Strait Islanders Act 1939*
- *Aborigines' and Torres Strait Islanders' Affairs Act 1965*
- *Aborigines Act 1971*
- *Torres Strait Islanders Act 1971*
- *Aborigines Act and Torres Strait Islanders Act Amendment Act 1974*
- *Community Services (Aborigines) Act 1984*
- *Community Services (Torres Strait) Act 1984*

This legislative history highlights the regulation of Indigenous Queenslanders. These Acts have particularly affected Aborigines living on designated reserve communities. The effect of this regulation is evidenced in files kept on all Aborigines living on reserves which details an individual's behaviour throughout their life, while working, seeking approval to marry and having associations with other Aborigines. It is only recently that these files were made available to those individuals or members of their families.

While Indigenous Queenslanders could apply for exemption from the respective legislation, their lives were monitored by Chief Protectors and other government employees, particularly the police.

This history has had a profound effect on the way Indigenous Queenslanders are perceived within the broader Queensland community and on the opportunities that have historically been available to Indigenous Queenslanders. Indigenous Queenslanders continue to experience levels of social marginalisation through the daily indignities of racism and racial discrimination. Like many Indigenous communities across Australia, Queensland's Indigenous communities are disadvantaged on a well-documented range of statistical measures compared to the rest of the Australian community.

Currently the only means of protection against human rights violations for Indigenous Queenslanders are the Queensland ADA and the *Racial Discrimination Act 1975* (Cth) ('RDA'). Indigenous Queenslanders have utilised both the ADA and RDA to lodge complaints of racial discrimination which has produced significant case law such as *Koowartha v Bjelke-Petersen*<sup>30</sup>; *Mabo v Queensland*<sup>31</sup>; *Bligh and Ors v State of Queensland*<sup>32</sup>; and *Baird and Ors v State of Queensland*<sup>33</sup>.

<sup>30</sup> *Koowartha v Bjelke-Petersen* [1982] HCA 27

<sup>31</sup> *Mabo v Queensland* [1988] HCA 69

<sup>32</sup> *Bligh v Queensland* [1996] HREOCA 28 (24 September 1996)

<sup>33</sup> *Baird v State of Queensland* [2006] FCAFC 162

However, the recent passing of Commonwealth legislation enabling the establishment of the Family Responsibilities Commission (FRC) suspending both the RDA and ADA in the reserve communities of Hopevale, Mossman Gorge, Cohen and Aurukun illustrates the fragility of the protection against racial discrimination currently contained within those Acts.<sup>34</sup> It has been argued that the FRC is less encompassing than the Northern Territory Intervention legislation in its control of Aboriginal people and may fit the description of a 'special measure' as permitted by the RDA. The lack of consultation with community residents prior to the enactment of the FRC and the deeming of the FRC to be a 'special measure' has resurrected memories of the 'protectionist' era for many Indigenous Queenslanders.

This highlights the importance of a prohibition against racial discrimination to be contained within a National Charter. Such a prohibition should incorporate the special measures provisions allowing positive discrimination to occur within the framework of the *International Convention on the Elimination of All Forms of Racial Discrimination*.

As a minimum, the provision in the Victorian Charter could be utilised as a guide to what statements the National Charter should contain about Indigenous rights:

- 19(2) Aboriginal persons hold distinct cultural rights and must not be denied the right, with other members of their community-
- (a) to enjoy their identity and culture; and
  - (b) to maintain and use their language; and
  - (c) to maintain their kinship ties; and
  - (d) to 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.

### **Environmental rights**

The South African Bill incorporates environmental rights, by linking this right to health rights and the right to live in an 'environment that is not harmful to their health or well-being'.<sup>35</sup>

Section 24 Everyone has the right:

- a. to an environment that is not harmful to their health or well-being; and

<sup>34</sup> *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007*, (Cth) s 5

<sup>35</sup> *Constitution of the Republic of South Africa 2006*, Chapter 2, Bill of Rights, s24.

- b. to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that
  - i. prevent pollution and ecological degradation;
  - ii. promote conservation; and
  - iii. secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

The phrasing of this section is unique in that it seeks to incorporate aspirational third generation rights, i.e. the rights of future generations, with the current rights of existing generations. This approach is forward thinking and it is recommended that these rights be considered in a National Charter.

### **Summary of rights to be protected**

The ADCQ supports a National Charter that protects:

1. Civil and political rights, namely:
  - (i) recognition and equality before the law
  - (ii) right to life
  - (iii) protection from torture and cruel, inhuman or degrading treatment
  - (iv) freedom from forced work
  - (v) freedom of movement
  - (vi) privacy and reputation
  - (vii) freedom of thought, conscience, religion and belief
  - (viii) freedom of expression
  - (ix) peaceful assembly and freedom of association
  - (x) protection of family and children
  - (xi) right to participate in public life
  - (xii) cultural rights of ethnic religious or linguistic minorities
  - (xiii) property rights
  - (xiv) right to liberty and security of person
  - (xv) humane treatment when deprived of liberty
  - (xvi) rights of children in the criminal process
  - (xvii) right to a fair hearing
  - (xviii) protection of rights in criminal proceedings and against retrospective criminal law;



- (xix) right to be tried or punished not more than once.
- 2. Economic, cultural and social rights, namely:
  - (xx) housing
  - (xxi) education
  - (xxii) adequate health care
  - (xxiii) food
  - (xxiv) environment.
- 3. Freedom from discrimination on the grounds of:
  - (xxv) race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, pregnancy, disability, age and trade union activity.<sup>36</sup>

### **Are these human rights currently sufficiently protected and promoted?**

#### **Common law and statutory protection of human rights in Australia**

There is no comprehensive statement of human rights in Australia that operates as a minimum standard for the protection of rights. Commentators have discussed the range of common law and statutory protections that currently exist in Australia and the ADCQ does not propose to restate those current protections in this submission. The paper *National Human Rights Consultation - Engaging in the Debate* prepared by the Human Rights Law Resource Centre, in conjunction with Allens Arthur Robinson, comprehensively discusses existing human rights protections in Australia.<sup>37</sup>

In this submission the ADCQ proposes to look at some of the significant statutory protections of human rights that currently exist in Queensland.

#### **Statutory interpretation**

In statutory interpretation there is a presumption that legislation is not intended to encroach upon fundamental rights and freedoms. This presumption can be displaced by the legislation itself. The rights and freedoms upheld by the courts include the freedom of speech, personal liberty, access to courts, legal professional privilege, self-incrimination, procedural fairness, no alienation of property without compensation, and equality of religion.

<sup>36</sup> These include the ICCPR grounds and grounds covered in the *Convention on the Rights of Persons with Disabilities* and the *Convention on the Elimination of All Forms of Discrimination Against Women*. A Queensland Charter should expand on these grounds to include additional grounds currently protected by the Queensland ADA: i.e. sexuality, gender identity.

<sup>37</sup> Human Rights Law Resource Centre *The National Human Rights Consultation: Engaging in the Debate*, 22-31; Law Council of Australia *A Charter protecting the Rights of All Australians*,

[http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file\\_uuid=576D5A42-1E4F-17FA-D260-F75AF0309582&siteName=lca](http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=576D5A42-1E4F-17FA-D260-F75AF0309582&siteName=lca), accessed 8 July 2009.



A contemporary example of this concerns a regulation made under the *World Youth Day Act 2006* (NSW), which gave an authorised person the power to direct a person within a declared area to cease engaging in conduct that caused annoyance or inconvenience to participants in the World Youth Day event in 2008. The Full Court of the Federal Court interpreted that Act on the presumption that it was not the intention of parliament that regulations would be made under the Act preventing or interfering with the exercise of the fundamental right to freedom of speech.<sup>38</sup> The relevant clause was declared invalid to the extent it sought to prevent merely annoying conduct.

In contrast, where a stateless person was detained with no real prospect of removal from Australia in the foreseeable future, the majority of the High Court failed to uphold the fundamental right to liberty, against indefinite executive detention.<sup>39</sup>

These cases demonstrate the differences in the application of principles of statutory interpretation, and the limitations of statutory interpretation in protecting fundamental human rights.

### **Queensland Legislation**

Under the *Legislative Standards Act 1992* (Qld), Queensland's Parliamentary Counsel must provide advice to Ministers, government entities, and members of the Legislative Assembly on the application of fundamental legislative principles. The principles include requiring that legislation has sufficient regard to the rights and liberties of individuals. The *Legislative Standards Act 1992* states<sup>40</sup>:

Whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation:

- (a) makes rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review; and
- (b) is consistent with principles of natural justice; and
- (c) allows the delegation of administrative power only in appropriate cases and to appropriate persons; and
- (d) does not reverse the onus of proof in criminal proceedings without adequate justification; and
- (e) confers power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer; and
- (f) provides appropriate protection against self-incrimination; and
- (g) does not adversely affect rights and liberties, or impose obligations, retrospectively; and
- (h) does not confer immunity from proceeding or prosecution without adequate justification; and

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<sup>38</sup> *Evans v State of New South Wales* (2008) 250 ALR 33 at para 7.

<sup>39</sup> *Al-Kateb v Godwin* (2004) 219 CLR 562.

<sup>40</sup> *Legislative Standards Act 1992* (Qld), s 4(3)

- (i) provides for the compulsory acquisition of property only with fair compensation; and
- (j) has sufficient regard to Aboriginal tradition and Island custom; and
- (k) is unambiguous and drafted in a sufficiently clear and precise way.

The Parliamentary Counsel is required to provide a brief assessment of the consistency of the Bill with fundamental legislative principles in the explanatory notes to a Bill before the Queensland Parliament. If the Bill is inconsistent with fundamental legislative principles, the reasons for the inconsistency must also be stated.

The *Parliament of Queensland Act 2001* (Qld) requires the Parliamentary Scrutiny of Legislation Committee to examine all Bills and subordinate legislation for the application of fundamental legislative principles.<sup>41</sup> The Committee may consider, report on, and make recommendations on the application of fundamental legislative principles contained in a Bill to the Assembly. The Committee can recommend a Bill be amended because, in the Committee's opinion, it does not have sufficient regard to fundamental legislative principles. However, there is no mandatory requirement for the Minister promoting the Bill to provide a response to the Committee's recommendation.<sup>42</sup>

Aside from the provisions in the *Legislative Standards Act 1992* and the *Parliament of Queensland Act 2001*, which have a limited impact on the protection of rights, there are no other formal or legislative requirements requiring the Queensland Legislative Assembly to have regard to the rights and liberties of individuals before passing legislation.

Neither act has any applicability once legislation has been considered by the Legislative Assembly. The provisions have no ongoing or broad purpose of protecting individuals from breaches of human rights.

### **Other Statutory Protections—Do existing anti-discrimination laws adequately protect human rights?**

The Commonwealth, states and territories have passed legislation prohibiting discrimination on a range of grounds. The grounds upon which discrimination is prohibited reflect a number of human rights instruments that the Commonwealth has ratified, including:

- *International Covenant on Civil and Political Rights*
- *International Convention on the Elimination of All Forms of Racial Discrimination*
- *Convention on the Elimination of All Forms of Discrimination Against Women*
- *International Labour Organisation, Discrimination (Employment and Occupation) Convention* ('ILO 111')

<sup>41</sup> *Parliament of Queensland Act 2001* (Qld) s 103.

<sup>42</sup> *Parliament of Queensland Act 2001* (Qld) s 107.

- *International Labour Organisation Workers with Family Responsibilities Convention ('ILO 156')*
- *Convention on the Rights of the Child*
- *Declaration on the Rights of Mentally Retarded Persons*
- *Declaration on the Rights of Disabled Persons.*

The anti-discrimination legislation does not purport to provide comprehensive protection for every human right articulated in the international human rights instruments. Rather, the legislation aims to promote equality of opportunity for everyone by providing protection from unfair discrimination in certain areas of public activity. The main process for remedying acts of unlawful discrimination is via the complaint process in the legislation.

### **The Complaints Process**

The complaint process allows for individuals who believe they have been discriminated against on the prohibited grounds to make a complaint to the relevant agency.

At the conciliation stage there are numerous ways in which complaints may be resolved, including negotiating changes in processes or procedures, changes in work conditions, and the giving of an apology. Negotiations, where successful, may lead to beneficial outcomes for the individuals involved in the complaint. However, the terms remain confidential and cannot serve as binding precedent, although de-identified information can be used for general educational purposes.

Not all complaints can be successfully conciliated and some may ultimately proceed to a public hearing before a tribunal or court. The decisions can indirectly affect more individuals and organisations than those involved in the specific complaint. The broader public benefit of tribunal or court decisions is that it builds a body of case law that can illustrate the circumstances and parameters of unlawful discriminatory conduct. Unfortunately, developing a body of case law can be slow and cannot efficiently assist the development of larger systemic changes that may be necessary to comprehensively protect an individual's human rights.

A complaints-based mechanism under existing discrimination legislation has an important but limited effectiveness in comprehensively protecting human rights. The complaints mechanism, while a valuable in dealing with instances of unlawful discrimination, cannot be relied upon as the primary means of ensuring an individual's human rights are comprehensively protected. Comprehensive protection is best achieved through a National Charter. However, a complaint process is an important remedy under a National Charter to enable the rights to be enforced. The anti-discrimination legislation and processes will be an important component in the framework of remedies under a Charter.

### **Other processes within anti-discrimination laws**

The anti-discrimination laws throughout Australia also provide a limited range of mechanisms to protect human rights. For example, provisions exist in some legislation to permit the relevant Commission:

- to intervene, with the leave of the court, where a proceeding involves human rights issues
- within limited circumstances to scrutinise legislation
- within limited circumstances to conduct inquiries.

To effectively protect human rights, relevant Commissions could be given rights to intervene in proceedings involving significant human rights issues, powers to scrutinise and report on existing or proposed legislation, and rights to conduct inquiries on any matter affecting human rights within the Commission's jurisdiction. The existence of a legislated human rights framework such as a National Charter would greatly facilitate the appropriate use of these powers, and the appropriate consideration by the legislature or the courts of any submissions made by a Commission pursuant to the powers.

### **Queensland's example of deficiencies in human rights protection—police 'move-on' powers**

- a) Passing of legislation that has a potential to infringe upon human rights— the police 'move-on' powers.

In June 2006, the *Police Powers and Responsibilities Act 2000* (Qld) was amended to make move-on powers available to the police in all public places, state wide. From 1997 to 2006, for police move-on powers to apply to a particular area, local councils had to apply for an area to be declared a 'Notified Area' under the *Police Powers and Responsibilities Act 2000* (Qld).

According to parliamentary debate over the last decade, move-on powers were intended to:

- help police to respond to public concerns about safety
- reduce the impact of anti-social behaviour on members of the public
- prevent more serious crime occurring
- reduce the need for people to be formally charged and dealt with by the criminal justice system.<sup>43</sup>

The move-on power allows police to deal with certain behaviour without arresting or charging the person with an offence. Essentially, it is the power to deal with a person summarily because the person does not have the right to answer a charge or

<sup>43</sup> Crime and Misconduct Commission *Review of Queensland's police move-on powers: Invitation for public comment* (December 2008) <http://www.cmc.qld.gov.au/data/portal/00000005/content/74691001228891880795.pdf> , accessed 8 July 2009.

complaint. When there is little transparency in the use of the power, there is a potential for the power to be abused. Although the move-on power may be regarded as preventative, it can impact on the fundamental rights and freedoms of a person to use and enjoy public places, including the right of assembly.

There has been much public debate about the move-on powers since their first introduction in 1997. Initially, little heed was paid to those expressing concerns about particular areas being proscribed as an area subject to police move-on powers. No major concerns appear to have been raised by either Parliamentary Counsel or the Parliamentary Scrutiny of Legislation Committee that the proposed legislation had the potential to breach fundamental legislative principles under the *Legislative Standards Act 1992* (Qld).<sup>44</sup>

Attempts by advocates to use other processes to challenge the situation of a local council proscribing a park area traditionally and frequently used by Aboriginal people as an area subject to move-on powers, by seeking an opinion from the Anti-Discrimination Tribunal as to how the Queensland ADA may apply in those particular circumstances, did not result in a comprehensive exploration of the human rights issues associated with the declaration.<sup>45</sup>

However, when the powers were expanded in 2006, because of concerns raised the legislation required the Crime and Misconduct Commission to review the use of the powers after an initial period of implementation.<sup>46</sup> The review process provided opportunities for persons who advocate on behalf of these disadvantaged groups to formally state their concerns about the framework of the law and the use of move-on powers by the police.

Had a formal requirement been in place in 1997 requiring the legislature to consider the rights protected by a National Charter before it passed legislation such as the move-on powers, a greater consideration of the issues now being examined by the Queensland Crime and Misconduct Commission (CMC) would have occurred at that time. Such a requirement would result in a more robust debate, and a more comprehensive consideration of important human rights issues before the passing of legislation.

#### b) Use of Move-On Powers by Police officers

All people have the right to assemble in and use and enjoy public space. The inappropriate and at times over-zealous use of move-on powers can impinge upon this right.

In Queensland due to development, tourism and the selling-off of public land, competition for use of public space has increased. As traditional Indigenous users have been forced out of meeting places, they have become more visible when using

<sup>44</sup> The principles in Section 4 (3)(a) and (g) of the *Legislative Standards Act 1992* (Qld) would appear relevant.

<sup>45</sup> See *Opinion re: Munro Martin Park* [2002] QADT 21 (13 December 2002)

<http://www.austlii.edu.au/au/cases/qld/QADT/2002/21.html>, accessed 8 July 2009.

<sup>46</sup> *Police Powers and Responsibilities Act 2000* (Qld), s49. The CMC has not yet delivered its report on the review.

certain public places. Young people are also frequent users of inner-city public spaces. A significant number of homeless people who experience mental illness are a marginalised and vulnerable group of people who regularly use public space. Homeless young people are a vulnerable group who find a degree of safety in being with a group of people in the same situation. Like all other members of the community, these groups have a right to be in and use public spaces.

It is not suggested that police should ignore the problem of unlawful behaviour in public places. Before the passing of legislation granting police broad move-on powers across Queensland, police had powers under a number of existing laws to deal with unlawful behaviour on an individual basis as required.<sup>47</sup>

There is potential for marginalised groups, particularly Aboriginal and Torres Strait Islander people, young homeless people and people with mental health issues to be discriminated against through the over or inappropriate use of police move-on powers. It is arguable that the inappropriate use of the powers by the police may constitute unlawful direct and indirect discrimination on the basis of race, age and impairment.<sup>48</sup>

The use and enforcement of move-on powers has the potential to discriminate, either directly or indirectly, against young Indigenous people, people with mental health issues and young people. If the laws are applied and enforced with absolutely no difference between park users with different attributes, direct discrimination is unlikely to occur. For instance, if the consumption of alcohol in a public park is prohibited, providing that police treat all park users who are consuming alcohol in the area in the same manner, with no differentiation based on race, or other attribute covered by the Queensland ADA, there can be no complaint of **direct** discrimination. However, if people are required to move-on substantially because of their race, this is likely to be unlawful direct discrimination.

The situation is different for **indirect** discrimination. Indirect discrimination on the basis of race, impairment or age, occurs when a person imposes a term, which a person with the attribute of race, disability, or age is not able to comply, with which a higher proportion of people without the attribute are able to comply, where the term is not reasonable.

Depending upon how the move-on powers are policed and enforced (this will be the 'term' for indirect discrimination), there is a strong possibility that Indigenous park users (who may or may not be homeless), homeless people with mental health issues, and young people who are homeless will be the groups most frequently subjected to being required by police to move-on. Recently, young people from the African community are reporting being subject to move-on directions. This conduct by the police could amount to indirect discrimination, as these groups may have much

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<sup>47</sup> For instance, the *Summary Offences Act 2005* (Qld) deals with public nuisance offences such as disorderly, offensive, threatening or violent behaviour which interferes with or is likely to interfere with the peaceful passage through or enjoyment of a public place by members of the public, and also prohibits wilful exposure and being drunk in a public place.

<sup>48</sup> *Anti Discrimination Act 1991* (Qld) see ss 7, 10, 11 and 101.



more difficulty complying with the term (of permissible public space use that will not subject them to being moved on) than park users who are not Indigenous, or who are not young and homeless, or who are not a homeless person with a mental health issue. The critical question is whether the requirement being imposed upon them is reasonable. Whether a term is reasonable depends on all the relevant circumstances of the case, including the consequences of failure to comply with the term, the cost of alternative terms and the financial circumstances of the person who imposes the term.<sup>49</sup>

The activities of police in Queensland are subject to the provisions of the Queensland ADA and both the police service and the ADCQ provide training to police officers on the requirement for the police not to unlawfully discriminate in performing their functions. Most police would be aware of the requirement not to directly discriminate against those groups covered by the Queensland ADA. It is the view of the ADCQ that many police officers would not have a good understanding of indirect discrimination, and how to perform their duties in a way that reduces the likelihood of indirect discrimination occurring. Education of public officials about the complex concept of indirect discrimination is an ongoing challenge for entities such as the ADCQ.

A clear statement of an individual's human rights contained within a National Charter is a much easier concept to understand, and has a much greater chance of being within the consideration of public officials as they perform their functions. A National Charter enacted to cover the activities of police and other state authorities, and a comprehensive education process will ensure persons acting on behalf of the state are aware of the obligation to respect rights of all its citizens.

#### **Available remedies to challenge inappropriate use of police move-on powers.**

Because of the high levels of disadvantage suffered by the types of users of public space discussed above, many are unlikely to use existing processes to formally challenge or complain about the inappropriate or discriminatory use of move-on powers by the police.

Apart from the unique requirement in section 49 of the *Police Powers and Responsibilities Act 2000* (Qld) requiring the CMC to commence a review of the move-on powers within a specific time frame, complaints to the CMC about the conduct of the police in their use of move-on powers in areas of public space are likely to be rare, given the limited resources and levels of disadvantage of those most likely to be moved on by the police. For the same reasons, complaints to the ADCQ by highly disadvantaged individuals or groups are also relatively rare.

The judiciary does not have the opportunity to scrutinise the reasonableness of the move-on order, unless a person subjected to the order is subsequently arrested and brought before the court.

Should a National Charter be enacted, a range of remedies is required to deal with breaches of rights contained within the Charter. The types of remedies that ought to

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<sup>49</sup> See *Anti-Discrimination Act 1991* (Qld), s 11.

be considered are discussed in detail later in this paper. In the case of the move-on powers, the ADCQ suggests that in relation to 'standing', anyone acting as a member of or in the interest of a group or class of persons, could seek direct redress by approaching the police commissioner (or the CMC) to seek an internal review of the police actions.<sup>50</sup> In addition, there ought to be a right to lodge a complaint with the ADCQ which can be referred to the Anti-Discrimination Tribunal, including a right to engage in conciliation about the alleged breach of rights.

Finally, there should be a right to seek redress in the courts should the matter arise before it in another cause of action.

## **How could Australia better protect and promote human rights?**

### **Protection of human rights at Commonwealth and state jurisdictions**

The ADCQ supports legislative National Charters to better protect human rights in Australia. To achieve protection at both federal and state level, options include:

- (a) A National Charter that intends to 'cover the field' and bind the states.  
Under this model, if state laws were inconsistent with the National Charter they would be invalid.<sup>51</sup> This would result in differential treatment of state and federal laws under the National Charter.
- (b) A National Charter that states could elect to 'opt in' to by passing mirror legislation or by referring power under s 51(xxxvii).  
The referral of powers model would still involve the striking down of state laws inconsistent with the National Charter and differential treatment of state and federal laws.
- (c) A National Charter that expressly states it is limited only to federal laws and agencies and does not bind the states.  
Under this model states could consider passing their own charter to apply to state laws, as has already occurred in Victoria and the ACT.

The ADCQ recommends a National Charter that is limited to apply to federal laws and agencies, and recommends that Queensland pass its own state charter of rights. Whether the Queensland Charter should mirror the National Charter would depend on the nature and form of the National Charter when it is drafted.

A National Charter limited to federal laws and agencies with complimentary state charters would overcome any limitations, such as the human rights protected and remedies, as a consequence of the source of power being the external affairs power. To rely on this source of power, there must be a specific regime defined by the treaty and the legislation must be appropriate and adapted to implementing the treaty.

<sup>50</sup> *Constitution of the Republic of South Africa 2006*, Chapter 2, Bill of Rights, s 38 is a useful guide in respect of standing.

<sup>51</sup> *Commonwealth of Australia Constitution Act (Cth)*, s109.



The current human rights legislation landscape involves a number of federal acts, enacted under the external affairs power,<sup>52</sup> with the state and territories all having their own anti-discrimination and equal opportunity acts.<sup>53</sup> The Australian Human Rights Commission administers the federal laws and there are separate state and territory bodies that administer their respective state and territory legislation. Although there is some variance among the federal and state legislation, the dichotomy of legislation and bodies has worked effectively to date, with minimal difficulties or inconsistencies.

It is to be noted that Australia has committed to the implementation of the ICCPR with the federal, state and territory authorities having regard to their respective constitutional powers and arrangements emanating from a federal constitutional system in which legislative, executive and judicial powers are shared or distributed between the Commonwealth and the states.<sup>54</sup>

The ADCQ recommends that a National Charter include the following characteristics:

1. Each Bill tabled in parliament is to be accompanied by a Statement of Compatibility setting out whether and how the Bill is compatible with or contravenes human rights.
2. All legislation to be considered by a parliamentary committee for the purpose of reporting to parliament on whether the legislation is compatible with human rights.
3. Government agencies to act in a way that is consistent with human rights and give due consideration to those rights in decision-making.
4. Courts and tribunals to interpret and apply legislation consistently with human rights and to issue a declaration of incompatibility when a law cannot be interpreted and applied consistently with human rights.
5. A requirement that the government respond to a declaration of incompatibility within a prescribed time frame.
6. Appropriate and accessible remedies for breaches of human rights.

<sup>52</sup> *Racial Discrimination Act 1975* (Cth), *Disability Discrimination Act 1992* (Cth), *Sex Discrimination Act 1984* (Cth), and *Age Discrimination Act 2004* (Cth).

<sup>53</sup> *Anti-Discrimination Act 1991* (Qld), *Anti-Discrimination Act 1977* (NSW), *Equal Opportunity Act 1995* (Vic), *Racial and Religious Tolerance Act 2001* (Vic), *Anti-Discrimination Act 1998* (Tas), *Equal Opportunity Act 1984* (SA), *Equal Opportunity Act 1984* (WA), *Anti-Discrimination Act 1996* (NT), *Discrimination Act 1991* (ACT) *Human Rights Act 2004* (ACT).

<sup>54</sup> See Australia's 1984 declaration to the ICCPR, <http://www2.ohchr.org/english/law/ccpr.htm>, accessed 8 July 2009

## 7. Remedies

A National Charter could apply to both federal and state governments in the drafting of legislation and the administration and implementation of legislation.

Some charters, such as the United Kingdom *Human Rights Act 1998* (the UK Act) are more comprehensive and have remedies for each of these applications; others such as the Victorian Charter provide more limited remedies.

The first application relates to legislation making and could have two or three tiers. A common feature of both constitutional and statutory human rights bills or charters is that at the legislation making level, the appropriate process is for proposed legislation to be reviewed before debate in Parliament, with compliance or otherwise with the protected human rights the subject of a report. The second tier is the ability of courts to declare when legislation is unable to be interpreted in a manner consistent with the protected human rights. The third tier is a requirement for the government to respond to a declaration of incompatibility within a specified time.

The second application concerns the administration and implementation of legislation including the functions and roles of government agencies. In contrast to the review capacity provided at the time of drafting, this second application has resulted in a range of possible remedies. For example, the Victorian Charter does not provide an additional right to legal action, but allows a person to raise a human rights argument in an existing case before a court or tribunal.

However, the UK Act allows a breach to be raised as a defence in court proceedings, as well as providing for a right of action for a breach of rights.

The UK Act is based on the *European Convention on Human Rights* (the Convention): the preamble describes it as an Act to give greater effect to the rights and freedoms guaranteed under the Convention. The UK Act incorporates the rights in Articles 2 to 12 and Article 14 in the Convention, as well as those in the First and Sixth Protocols.<sup>55</sup> The Convention provides that people whose rights have been breached should have the right to effective redress.<sup>56</sup> The UK Act was drafted so as to give people the right to take proceedings in British courts for breach of the Convention rights protected by that Act.

The ICCPR requires the state parties to provide effective remedies for breach of rights or freedoms. Article 2 clause 3 provides:

Each state Party to the present Covenant undertakes:

- (a) to ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity

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<sup>55</sup> See Appendix 2 for a list of the European Convention Rights

<sup>56</sup> *European Convention on Human Rights*, Article 13. <http://www.hri.org/docs/ECHR50.html>, accessed 8 July 2009.

- (b) to ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the state, and to develop the possibilities of judicial remedy
- (c) to ensure that the competent authorities shall enforce such remedies when granted.

The ICESCR requires the state parties to safeguard the right to work,<sup>57</sup> the *Universal Declaration of Human Rights* provides that everyone has the right to an effective remedy by competent tribunals for acts violating the fundamental rights granted by the constitution or law.<sup>58</sup> the CAT requires state parties to ensure that victims of an act of torture obtain redress and an enforceable right to fair and adequate compensation,<sup>59</sup> and the *Convention on the Rights of Persons with Disabilities* requires state parties to safeguard and promote the realisation of the right to work including legislation to redress grievances.<sup>60</sup>

There is strong argument that Australia and its constituent states and territories are obliged to provide adequate remedies for breaches of human rights protected by the international instruments to which Australia is a party.

The question is how to do this. The ADCQ submits there is no one measure to provide adequate and accessible remedies for breaches of human rights.

The administration of legislation and government involves the administrative decision making of agencies and the application of policies and processes by agencies. Where human rights are breached in the decisions and actions of agencies, the person(s) whose rights have been breached (the victim) is likely to want:

- (a) an acknowledgement of the breach
- (b) the breach to stop, if it is on-going
- (c) a different decision or action where appropriate
- (d) compensation.

These outcomes could be achieved by providing a range of remedies, such as:

1. taking the matter up with the agency
2. raising the matter in existing proceedings
3. complaining to a separate independent body
4. asking a court to review the decision.

<sup>57</sup> *International Covenant on Economic, Social and Cultural Rights*, Article 6.

<sup>58</sup> *Universal Declaration of Human Rights*, Article 8

<sup>59</sup> *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Article 14

<sup>60</sup> *Convention on the Rights of Persons with Disabilities*, Article 27

## **1. Taking the matter up with the agency**

This would involve an internal complaints process, either formal or informal. Most government agencies currently have internal complaints processes.

Many of the case studies from jurisdictions with a charter, on websites such as the Human Rights Law Resource Centre, involve the person or their advocate raising the human rights issues with the relevant agency and achieving an appropriate outcome.

With education and awareness programs this is likely to be the most frequently used process.

## **2. Raising the matter in existing proceedings.**

This is the situation in Victoria. Case studies include processes to bring criminal proceedings to trial, eviction proceedings and mental health reviews and proceedings.

Referring to the Queensland example of the police use of move-on powers, if a National Charter were in place, the right to freedom of movement and assembly may be rights that could be raised before and examined by the courts, following the arrest by an individual for failure to comply with a police direction. At present the courts can only examine whether or not the move-on order made by police was reasonable in the circumstances.<sup>61</sup>

## **3. Complaining to a separate independent body.**

Currently people can complain to the Ombudsman about decisions or actions of government agencies at the federal level and in many states including Queensland. Under a National Charter, the Ombudsman would be able to make recommendations about decisions or actions that were inconsistent with the human rights protected by the National Charter.

Supporters of a National Charter argue there should be a right of legal action to a court. The ADCQ supports a right of action for the breach of rights, but suggests this right should be similar to the rights under existing federal and state anti-discrimination laws; a right to make a complaint to a body that endeavours to resolve the matter before referral to a court or tribunal. The appropriate bodies would be the existing human rights agencies: the Australian Human Rights Commission (for complaints under a National Charter) and the ADCQ (for complaints under a Queensland Charter).

The anti-discrimination laws and processes at the federal and state level were enacted as part of the implementation of Australia's obligations under

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<sup>61</sup> *Rowe v Kemper* [2008] QCA 175.

international treaties on human rights. It is consistent that further implementation of those obligations through federal and state charters utilise the existing structures and processes for a right of action for breach of the National Charter.

The Queensland anti-discrimination scheme is for the ADCQ to endeavour to resolve a complaint through conciliation, and where that is not achieved there is a right of referral to the Anti-Discrimination Tribunal.<sup>62</sup> Approximately 60% of all accepted complaints are resolved through conciliation, with approximately 18% (or fewer) being referred to the tribunal.

All federal, state and territory anti-discrimination legislation involve a scheme of complaint to body that endeavours to resolve it by conciliation before referral or application to a tribunal or court. It is intended to be less formal, and more cost effective than a direct application to a court.

A similar scheme for complaints of National Charter breaches would be provide an effective remedy for individual complaints.

#### **4. Asking a court to review the decision.**

Under the UK Act, a person with a sufficient interest can apply for judicial review of a decision of a public body.

The ADCQ suggests a breach of the National Charter be added to the grounds of review under the *Administrative Decisions (Judicial Review) Act 1997* (Cth) in respect of a National Charter, and to the *Judicial Review Act 1991* (Qld) in respect of a Queensland Charter.

Application for judicial review of an administrative decision can be a relatively quick and simple process, at least in Queensland. However, not all decisions of government agencies are subject to review under the federal or state judicial review legislation. Therefore, having a range of remedies available for breach of human rights addresses this shortfall.

#### **Accessibility of remedies**

Providing consequences for breaches in the form of remedies often drives cultural change. But for remedies to be effective they need to be accessible to the people who need them. As has been discussed earlier in this submission, many of the people who need the protection of a National Charter are disadvantaged, disenfranchised and in the minority. People with disabilities, youth, people from culturally and linguistically diverse communities, and Aboriginal and Torres Strait Islander peoples have difficulty accessing judicial or complaint-based processes, and it is even more difficult for homeless people.

<sup>62</sup> This function will be transferred to the Queensland Civil and Administrative Tribunal (QCAT) from 1 December 2009.

For these reasons, the Queensland Commission advocates for a broad 'standing' provision. There are many forms that this could take but it is important for remedies to be premised on the concept of broad 'standing' so that advocate and support groups can enforce the rights of those who are unable to do so themselves.

## **8. Conclusion**

The ADCQ supports a comprehensive National Charter. Drawing on the learnings and experience of other nations and Australian states, the ADCQ has suggested that there is a strong case that a National Charter will better protect Australian citizens from government actions that breach human rights.

Consistent with its role of promoting and understanding human rights in Queensland it recommends a National Charter that has an educational focus, as well as a suite of remedies to ensure that all citizens rights are protected.

Anti-Discrimination Commission Queensland

## Appendix 1

### Comparison of rights protected under the South African Bill and the Victorian Charter

South Africa	Victoria
Equality and human dignity	Recognition and equality before the law
Freedom from discrimination on grounds including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.	The right to enjoy his or her human rights without discrimination.
Right to life	Right to life
Freedom and security of person	Protection from torture, cruel and inhuman and degrading treatment
Slavery, servitude and forced labour	Protection from forced work
Freedom of movement and residence	Freedom of movement
Privacy	Privacy and reputation
Freedom of religion, belief and opinion	Freedom of thought, conscience, religion and belief
Freedom of expression	Freedom of expression
Assembly, demonstration, picket and petition Freedom of association	Peaceful assembly and freedom of association
Children	Protection of families and children
Political rights	Taking part in public life
Language and culture	Cultural rights
Property rights	Property rights
Freedom and security of person	Right to liberty and security of person
Arrested, detained and accused persons	Humane treatment when deprived of liberty
	Children in the criminal process
Access to courts	Fair hearing
	Rights in criminal proceedings

<b>South Africa</b>	<b>Victoria</b>
	Right not to be tried or punished more than once
	Retrospective criminal laws
Citizenship	
Freedom of trade, occupation and profession	
Labour relations	
Environment	
Housing	
Healthcare, food, water and social security	
Education	
Cultural, religious and linguistic communities	
Access to information	
Just administrative action	



## Appendix 2

### European Convention Rights

Article 2: Right to life

Article 3: Prohibition on torture

Article 4: Prohibition on slavery and forced Labour

Article 5: Right to liberty and security

Article 6: Right to a fair trial

Article 7: No punishment without law

Article 8: Right to respect for private and family right

Article 9: Freedom of thought conscience and religion

Article 10: Right to freedom of expression

Article 11: Freedom of assembly and association

Article 12: Right to marry and found a family

Article 14: Prohibition on discrimination

First Protocol, Article 1: Protection of property

First Protocol, Article 2: Right to education

First Protocol, Article 3: Right to free elections