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## It's time for a Queensland Human Rights Act

Submission to the Legal Affairs and Community Safety Committee's Human Rights Inquiry

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## Human Rights Law Centre

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## 1. Introduction

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Thank you for the opportunity to provide a submission to the Committee's Human Rights Inquiry. The Human Rights Law Centre (**HRLC**) strongly welcomes this community consultation on whether it is appropriate and desirable to legislate for a Human Rights Act in Queensland.

The HRLC has significant expertise and experience in the content and operation of legislative charters of human rights in Australia and overseas and has been actively involved in the development, implementation and construction of the *Charter of Human Rights and Responsibilities Act 2006 (Vic)* (**Victorian Charter**).

This submission aims to provide technical assistance on the following term of reference concerning human rights legislation broadly:

- (a) the costs and benefits of adopting a Human Rights Act (including financial, legal, social and otherwise).

It then addresses the following features of a Human Rights Act, and in doing so comments on the operation and effectiveness of human rights legislation in Victoria, ACT and internationally:

- (a) the rights to be protected;
- (b) the impact on law-making,
- (c) the powers and practices of courts and tribunals,
- (d) the functions and responsibilities of public authorities.

## 2. Executive Summary

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A Human Rights Act would be a force for good in protecting the rights of all Queenslanders, and in particular for vulnerable Queenslanders such as people experiencing homelessness and mental illness, people with disabilities, Aboriginal and Torres Strait Islander peoples and elderly people, prisoners and ethnic and religious minorities.

Human Rights Acts introduced in Victoria and the ACT in the last decade or so have been proven to deliver significant benefits to people living in those places by:

- (a) improving law making and government policy;
- (b) improving public service delivery;
- (c) protecting marginalised Queenslanders by addressing disadvantage;
- (d) contributing to the development of a human rights culture;
- (e) creating and adding economic value;

- (f) assisting to fulfil Australia's human rights obligations; and
- (g) 'bringing rights home' by enabling human rights complaints to be heard and determined within the State of Queensland.

The major impact of these Acts has not been in the courts, but in the development of a broader rights respecting culture in government and the wider community.

Australians are firmly committed to democratic values and we have a strong sense of a fair go. Living in a modern democracy, we appreciate the importance of having laws that ensure all people can live in safety and dignity whilst enjoying their freedom. We also understand that government plays an important role in preserving public safety and order. Australians strongly support human rights.

Yet Australia is the only western democratic nation that doesn't have a national Human Rights Act or a constitutional bill of rights. Nor does Queensland offer that protection at state level.

It's time for Queensland to enshrine the values of freedom, equality, respect and dignity in a Human Rights Act. Without protection in law with access to justice for violations, the government is sending mixed messages about the importance it places on its people's human rights.

A Human Rights Act would clearly set out what Queenslanders' human rights are, guarantee a process for how the Queensland's government will respect those rights and provide avenues to seek justice when our rights have been violated. It would require parliament to consider rights in law-making, courts to interpret laws in accordance with rights and public servants to act in accordance with rights. Each branch of government would have a part to play in development of a rights-respecting culture.

A Queensland Human Rights Act would place important checks and balances on government, protecting people from abuse of power. For example, human rights laws ensure that when the government is keeping the community safe, it considers the impact on our rights and freedoms. These checks and balances are even more important in Queensland, a state without an upper house of parliament to provide scrutiny.

It makes sense for the development of the Queensland Act to be broadly in accordance with Human Rights Acts in Victoria, ACT and the UK, but a Queensland Act need not be confined to those models. The adoption of an Act by Queensland at this stage should be seen as an opportunity to improve upon the models for protection of human rights elsewhere. Queensland can benefit from the experiences in Victoria and ACT, where the Human Rights Acts have been reviewed, and amended to improve their operation.

However, there are three important lessons from other jurisdictions that Queensland should benefit from:

- (a) A Human Rights Act must contain a free-standing cause of action and affordable and accessible remedies for breach if it is to reach its true potential and respect, protect and promote the rights of Queenslanders.

- (b) A law alone is not enough to create cultural change; government needs to invest in the development of a human rights culture. Adequate resources must be provided around the introduction to educate the community, government, courts and parliamentarians. Special effort should be made to empower marginalised and vulnerable groups such as Aboriginal and Torres Strait Islander communities as to how the Act could improve their lives.
- (c) A parliamentary scrutiny committee should be created that has broad scope and is given the necessary support and expertise to do its job. It should play a pivotal role in the establishment of a parliamentary human rights culture by scrutinising bills for their compliance with human rights. It should also monitor and report on systemic human rights issues and advise on responses to judicial human rights decisions or cases concerning Queensland that have been considered by UN human rights bodies.

### 3. Recommendations

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The Committee should recommend that it is appropriate and desirable for Queensland to legislate for a Human Rights Act.

The Committee should recommend that Queensland introduce a Human Rights Act in a manner and form consistent with the ACT and Victorian Acts, albeit drawing on the following lessons for improving human rights protection in those jurisdictions:

- a Queensland Human Rights Act should contain a freestanding cause of action;
- the Government should provide adequate resources and support around the introduction of the Act to educate communities, politicians, government officials and the courts and create a culture of human rights;
- Parliamentary scrutiny committees should play a strong role including scrutiny of bills, monitoring and reporting on systemic issues and responding to judicial human rights decisions.

### 4. Benefits of a Human Rights Act<sup>1</sup>

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As well as enshrining human rights in law, a Human Rights Act would provide important social, economic and cultural benefits. The key benefits are:

- (a) improving law making and government policy;
- (b) improving public service delivery;
- (c) protecting marginalised Queenslanders by addressing disadvantage;

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<sup>1</sup> This section is taken from joint work of Human Rights Law Centre and Allens in briefing paper January 2016.

- (d) contributing to the development of a human rights culture;
- (e) creating and adding economic value;
- (f) assisting to fulfil Australia's human rights obligations; and
- (g) "bringing rights home" by enabling human rights complaints to be heard and determined within the State of Queensland.

Each of these is discussed in turn.

#### 4.1 Improving law making and government policy

A Human Rights Act can improve the quality of laws by making the consideration of human rights part of all law-making and policy development processes. Compatibility statements, and declarations of incompatibility (see parts 6.2 and 6.3 below) will both play a part in encouraging Parliament to act in a manner consistent with human rights. It can be a "bad look" for Parliament to breach a Human Rights Act (and be required to publicly acknowledge that), thereby encouraging lawmakers to pass laws which are consistent with the human rights enshrined in a Human Rights Act.

This benefit has been observable in the experience of the ACT since the introduction of the *Human Rights Act 2004* (ACT) (the **ACT Act**). In 2009, the Australian National University described the improvement to the quality of law making in the ACT as one of the "clearest effects" of the Act.<sup>2</sup> The ACT Government has also acknowledged the positive effects, observing that the Act has had a "positive impact on political debate and consideration of policy issues by Government",<sup>3</sup> provides "an impetus for agencies to properly consider human rights obligations and consult within and across different areas of government on the implications of their bills"<sup>4</sup> and has increased "awareness through Government of human rights issues".<sup>5</sup>

In Victoria, it was clear in the first eight years of operation of the *Victorian Charter of Human Rights and Responsibilities Act 2006* (Vic) (the **Victorian Act**) that the Victorian Act played an important role in ensuring that human rights were appropriately considered by government, including in the development of law and policy.<sup>6</sup>

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<sup>2</sup> Australian National University, *The Human Rights Act 2004 (ACT): The First Five Years of Operation* (May 2009) at 6, <[https://justice.act.gov.au/resources/attachments/report\\_HumanRightsAct\\_5YearReview\\_ANU\\_20091.pdf](https://justice.act.gov.au/resources/attachments/report_HumanRightsAct_5YearReview_ANU_20091.pdf)>.

<sup>3</sup> ACT Justice and Community Safety Directorate, *Government Response: Australian National University Human Rights Research Project Report The Human Rights Act 2004 (ACT): The First Five Years of Operation* (March 2012) at 2, <[http://cdn.justice.act.gov.au/resources/uploads/JACS/PDF/Government\\_Response\\_first\\_5\\_yrs\\_PDF.pdf](http://cdn.justice.act.gov.au/resources/uploads/JACS/PDF/Government_Response_first_5_yrs_PDF.pdf)>.

<sup>4</sup> ACT Justice and Community Safety Directorate, *Economic, social and cultural rights in the Human Rights Act 2004 – Section 43 review* (November 2014) at 26, <[http://cdn.justice.act.gov.au/resources/uploads/JACS/ACT\\_Government\\_s\\_43\\_Review\\_Report.pdf](http://cdn.justice.act.gov.au/resources/uploads/JACS/ACT_Government_s_43_Review_Report.pdf)>.

<sup>5</sup> ACT Justice and Community Safety Directorate, *Government Response: Australian National University Human Rights Research Project Report The Human Rights Act 2004 (ACT): The First Five Years of Operation* (March 2012) at 24, <[http://cdn.justice.act.gov.au/resources/uploads/JACS/PDF/Government\\_Response\\_first\\_5\\_yrs\\_PDF.pdf](http://cdn.justice.act.gov.au/resources/uploads/JACS/PDF/Government_Response_first_5_yrs_PDF.pdf)>.

<sup>6</sup> Human Rights Law Centre, "More Accessible, more Effective and Simpler to Enforce: Strengthening Victoria's Human Rights Charter, HRLC Submission to the 2015 Review of the Victorian Charter of Human Rights" (June 2015), 1.

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## 4.2 Improving delivery of public services

A Human Rights Act can also encourage the incorporation of human rights standards into public service delivery. An inquiry in the UK in 2009 found that the UK Act has had a positive effect in a number of public sector areas, including health, local authority services, policing, schools and regulatory authorities.<sup>7</sup> The inquiry concluded:

...the human rights framework, backed by the legal underpinning of the Human Rights Act, has had a positive impact in the delivery of public services...Properly understood and applied, it can have a transformative function, transforming the organisation itself, the services delivered, and ultimately the lives of the people receiving these services.<sup>8</sup>

In the UK the experience of public authorities that have begun to embed human rights into their service provision is that the services are more responsive to the users. This is because stigma and mistrust are eroded, and prejudicial attitudes are challenged. It improves relationships between public service providers and the users of their services.<sup>9</sup>

A human rights approach can lead to organisational renewal – that is, employees of public authorities remember the values and motivation which led them to start working in the public service in the first place.<sup>10</sup>

A human rights framework can be an effective mechanism to challenge existing poor practice in service delivery. Case studies from the UK demonstrate how human rights arguments have been used successfully in the UK to challenge routine practices that infringe the dignity of service users.<sup>11</sup>

In both New Zealand and the UK, the introduction of a Human Rights Act led to the government publishing handbooks for public authorities, designed to increase awareness of human rights issues and to provide guidance on how to conduct functions consistently with the human rights standards of the respective Acts.<sup>12</sup>

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<sup>7</sup> UK Equality and Human Rights Commission, *Human Rights Inquiry: Executive Summary* (June 2009) at 4, <[http://www.equalityhumanrights.com/sites/default/files/publication\\_pdf/Human%20rights%20inquiry%20exec%20summary.pdf](http://www.equalityhumanrights.com/sites/default/files/publication_pdf/Human%20rights%20inquiry%20exec%20summary.pdf)>.

<sup>8</sup> UK Equality and Human Rights Commission, *Human Rights Inquiry: Executive Summary* (June 2009) at 14, <[http://www.equalityhumanrights.com/sites/default/files/publication\\_pdf/Human%20rights%20inquiry%20exec%20summary.pdf](http://www.equalityhumanrights.com/sites/default/files/publication_pdf/Human%20rights%20inquiry%20exec%20summary.pdf)>.

<sup>9</sup> Alice Donald, et. al., *Human Rights in Britain Since the Human Rights Act 1998: A Critical Review* (UK Equality and Human Rights Commission, April 2008) at 56 and 89 <[http://www.equalityhumanrights.com/sites/default/files/documents/human\\_rights\\_in\\_britain\\_since\\_the\\_human\\_rights\\_act\\_1998\\_-\\_a\\_critical\\_review.pdf](http://www.equalityhumanrights.com/sites/default/files/documents/human_rights_in_britain_since_the_human_rights_act_1998_-_a_critical_review.pdf)>.

<sup>10</sup> Alice Donald, et. al., *Human Rights in Britain Since the Human Rights Act 1998: A Critical Review* (UK Equality and Human Rights Commission, April 2008) 62-63 and 89.

<sup>11</sup> Alice Donald, et. al., *Human Rights in Britain Since the Human Rights Act 1998: A Critical Review* (UK Equality and Human Rights Commission, April 2008), 64-65 and 89.

<sup>12</sup> UK Ministry of Justice, *Human rights: human lives – A handbook for public authorities* (October 2006), <<https://www.justice.gov.uk/downloads/human-rights/human-rights-handbook-for-public-authorities.pdf>>; NZ Ministry of Justice,



The ACT Attorney-General acknowledged “a marked shift” in how government undertakes its work, saying that “many agencies, particularly those with a service delivery focus, are exploring the opportunities to better serve the community through human rights compliant policies, legislation and operational practices.”<sup>13</sup>

The Victorian Act has led to improvements in public service design, delivery and outcomes.<sup>14</sup> The Victorian Equal Opportunity and Human Rights Commission (the **VEOHRC**) observed that the use of the Victorian Act:

...has matured beyond simple compliance with the law. The Charter is not only part of 'everyday business' for many public authorities, but drives important human rights initiatives to address systemic issues. In this way, it prompts organisations to take a proactive, rather than reactive, approach to their operations and the way they engage with the community.<sup>15</sup>

The VEOHRC also noted that, while there is still much to be done, the Victorian Act has become “firmly embedded” in the “work, language and culture” of many public authorities.<sup>16</sup>

#### 4.3 Protecting marginalised Queenslanders by addressing disadvantage

There is strong evidence that a human rights approach can empower marginalised and vulnerable individuals, communities and groups. The empowering effect of a Human Rights Act is one of the key benefits of the Victorian Act identified by the VEOHRC, as it gives Victorians the tools to question and challenge matters that have the potential to impact their human rights.<sup>17</sup> The VEOHRC has also identified this beneficial effect at a group level, with organisations:

...increasingly using the Charter in more sophisticated ways to review, develop and implement policies and practices that aim to protect people from breaches of their human rights or to actively promote the realisation of rights.<sup>18</sup>

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Guidelines on the New Zealand Bill of Rights Act 1990 (November 2004), <<http://www.justice.govt.nz/publications/publications-archived/2004/guidelines-on-the-new-zealand-bill-of-rights-act>>.

<sup>13</sup> ACT Justice and Community Safety Directorate, Government Response: Australian National University Human Rights Research Project Report The Human Rights Act 2004 (ACT): The First Five Years of Operation (March 2012) at 1, <[http://cdn.justice.act.gov.au/resources/uploads/JACS/PDF/Government\\_Response\\_first\\_5\\_yrs\\_PDF.pdf](http://cdn.justice.act.gov.au/resources/uploads/JACS/PDF/Government_Response_first_5_yrs_PDF.pdf)>.

<sup>14</sup> Human Rights Law Centre, "More Accessible, more Effective and Simpler to Enforce: Strengthening Victoria's Human Rights Charter, HRLC Submission to the 2015 Review of the Victorian Charter of Human Rights" (June 2015), 1.

<sup>15</sup> Victorian Equal Opportunity and Human Rights Commission, *2014 Report on the Operation of the Charter of Human Rights and Responsibilities* (June 2015) at 1, <<http://humanrightscommission.vic.gov.au/index.php/our-resources-and-publications/charter-reports/item/1260-2014-report-on-the-operation-of-the-charter-of-human-rights-and-responsibilities>>.

<sup>16</sup> Victorian Equal Opportunity and Human Rights Commission, *2014 Report on the Operation of the Charter of Human Rights and Responsibilities* (June 2015) at 1.

<sup>17</sup> Victorian Equal Opportunity and Human Rights Commission, *Victoria's Charter of Human Rights and Responsibilities*, <<http://www.humanrightscommission.vic.gov.au/index.php/the-charter#what-are-the-benefits-of-having-the-charter>>.

<sup>18</sup> Victorian Equal Opportunity and Human Rights Commission, *2014 Report on the Operation of the Charter of Human Rights and Responsibilities* (June 2015) at 1, <<http://humanrightscommission.vic.gov.au/index.php/our-resources-and-publications/charter-reports/item/1260-2014-report-on-the-operation-of-the-charter-of-human-rights-and-responsibilities>>.

The experience in the UK appears to have been similar, with a compilation of case studies (the *Changing Lives* report) leading the British Institute of Human Rights to conclude:

...groups and people themselves are using not only the letter of the law, but also the language and ideas of human rights to challenge poor treatment and negotiate improvements to services provided by public bodies....Human rights are an important practical tool for people facing discrimination, disadvantage or exclusion.<sup>19</sup>

That report concluded that awareness-raising about human rights empowers people to take action.<sup>20</sup>

There is also some evidence in the UK that a human rights approach can extend existing approaches to addressing inequality and discrimination. In particular, the human rights framework can give a voice to marginalised groups that fall outside the UK's anti-discrimination legislation such as gay partners, family carers, mothers in prison and domestic violence victims. In this way, human rights underpin equality.<sup>21</sup>

#### 4.4 Contributing to the development of a human rights culture

Not only can a Human Rights Act improve the dialogue within government and public authorities about human rights, it can also play a role in influencing community perception and dialogue about human rights, and thereby contribute to a human rights culture in the wider community.

Creating a culture of respect for human rights is not simply a matter of enacting a law. Education, among other things, is vital.<sup>22</sup>

The British Institute for Human Rights noted the cultural importance of human rights laws:

When the Human Rights Act was passed in 1998, the Government explained that its purpose was to support a culture of respect for everyone's human rights – making human rights a feature of everyday life...Thus the Human Rights Act would have its greatest impact not in our courts of law, out of the reach of the public at large, but in the wider community...Through this process, a culture of respect for human rights would take root in the UK.<sup>23</sup>

Similar sentiment was expressed in the 2015 review of the Victorian Act:

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<sup>19</sup> British Institute of Human Rights, *The Human Rights Act: Changing Lives* at 5, <[http://www.equalityhumanrights.com/sites/default/files/publication\\_pdf/The%20Human%20Rights%20Act%20-%20Changing%20Lives.pdf](http://www.equalityhumanrights.com/sites/default/files/publication_pdf/The%20Human%20Rights%20Act%20-%20Changing%20Lives.pdf)>.

<sup>20</sup> British Institute of Human Rights, *The Human Rights Act: Changing Lives* at 5.

<sup>21</sup> Alice Donald, et. al., *Human Rights in Britain Since the Human Rights Act 1998: A Critical Review* (UK Equality and Human Rights Commission, April 2008) at 68-69 and 89.

<sup>22</sup> Human Rights Law Resource Centre, "A Human Rights Consultation Submission on the Protection and Promotion of Human Rights in Australia" (May 2009) at 71.

<sup>23</sup> British Institute of Human Rights, *The Human Rights Act: Changing Lives* at 3, <[http://www.equalityhumanrights.com/sites/default/files/publication\\_pdf/The%20Human%20Rights%20Act%20-%20Changing%20Lives.pdf](http://www.equalityhumanrights.com/sites/default/files/publication_pdf/The%20Human%20Rights%20Act%20-%20Changing%20Lives.pdf)>.

The Charter is a strong statement of the importance of the values of freedom, dignity, equality and respect in our society; it is one mechanism by which we set out our expectations of how these values will be recognised and protected.<sup>24</sup>

It has been the ACT's experience that:

Establishing a human rights culture and developing its underpinning framework is a constructive process of continuous improvement through incremental developments in case law and policy...

However... [there is a] need to promote greater understanding of the [Human Rights Act] by the general community, legal professionals and public authorities by increasing the availability of training programs to address the lack of systemic education about human rights within the ACT public service.<sup>25</sup>

#### 4.5 Creating and adding economic value

While further research in this area is needed, there is a growing body of academic research that suggests that countries that protect human rights have, overall, stronger economies. Human rights are critical to development, and their absence contributes to poverty.<sup>26</sup>

For example, the Productivity Commission has previously concluded that reducing disability discrimination may yield substantial economic benefits by:

- increasing the productive capacity of the economy by enhancing the participation and employment of people with disabilities; and
- this in turn may provide incentives to students with disabilities to improve educational outcomes, making them more productive members of society.<sup>27</sup>

#### 4.6 Assisting to fulfil Australia's human rights obligations

A Human Rights Act in Queensland would contribute to, and improve upon, Australia's fulfilment of its international human rights obligations.

Article 50 of the ICCPR and Article 28 of the ICESCR state that human rights protections extend to all parts of federal states without limitation or exception. Consequently, the State Party must ensure that

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<sup>24</sup> Michael Brett Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (September 2015), <<https://myviews.justice.vic.gov.au/2015-review-of-the-charter-of-human-rights>>.

<sup>25</sup> ACT Government, "Government Response, Australian National University Human Rights Research Project Report, the Human Rights Act 2004 (ACT): The First Five Years of Operation," (March 2012), 1 and 3.

<sup>26</sup> See, for example, Kirk Herbertson et al, 'A Roadmap for Integrating Human Rights into the World Bank Group' World Resources Institute at 12, < [http://www.wri.org/sites/default/files/pdf/roadmap\\_for\\_integrating\\_human\\_rights.pdf](http://www.wri.org/sites/default/files/pdf/roadmap_for_integrating_human_rights.pdf) > , cited by the Human Rights and Discrimination Commissioner, *Look who's talking: A Snapshot of ten years of dialogue under the Human Rights Act 2004 by the ACT Human Rights and Discrimination Commissioner*, ACT Human Rights Commission (2014) at 26, <<http://hrc.act.gov.au/wp-content/uploads/2015/03/HRA-10-yr-snapshot-HRDC-webversion.pdf>>.

<sup>27</sup> See, for example, Productivity Commission, *Review of the Disability Discrimination Act 1992*, Productivity Commission Inquiry Report (Volume 1, Report No 30) (30 April 2004) at 134-135, < <http://www.pc.gov.au/inquiries/completed/disability-discrimination/report/disability-discrimination.pdf> > , cited in Human Rights Law Centre, *A Human Rights Act for All Australians*, May 2009, 73 <<http://www.hrlrc.org.au/files/hrlrc-submission-a-human-rights-act-for-australia.pdf>>; Human Rights Law Resource Centre, "A Human Rights Consultation Submission on the Protection and Promotion of Human Rights in Australia" (May 2009) at 72-73.

all government authorities, including at the state level, respect, protect and fulfil the human rights obligations under these treaties.

#### 4.7 “Bringing rights home” by enabling human rights complaints to be heard and determined within the State of Queensland.

Assuming the Human Rights Act passed in Queensland contains a complaint mechanism, this would provide Queenslanders with the opportunity to lodge, and have resolved within the State, a human rights complaint against State authorities. Depending on the legislative model selected by the Parliament, it is possible that separate and direct recourse to the courts may be available for such human rights complaints. This would significantly improve access to justice for Queenslanders.

## 5. The rights to be protected

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A Queensland Human Rights Act should enshrine all the fundamental civil, political, economic, social and cultural rights that are necessary for all people to live with dignity and participate fully and equally in our community (see Appendix 1 for full list of rights). This means that the Queensland Human Rights Act should protect all the rights protected in the International Covenant on Civil and Political Rights (**ICCPR**) and the International Covenant on Economic, Social and Cultural Rights (**ICESCR**). These are international treaties to which Australia is a party and in respect of which legal obligations to respect, protect and promote human rights have been created for Australian governments, including Queensland.<sup>28</sup>

The comprehensive recognition and protection of rights is vital because human rights are interdependent and indivisible. The enjoyment of many rights is contingent on, and contributes to, the enjoyment and reinforcement of other human rights.<sup>29</sup> Piecemeal recognition of human rights is inconsistent with basic human rights principles and threatens their effective implementation.

It is common for some human rights to be modified when they are included in a domestic human rights instrument so that they match contemporary aspirations of the domestic community and only contain those rights that have broad community acceptance. For example, the Victorian Charter refers to the distinct position of Aboriginal cultural rights when expressing the right to culture.<sup>30</sup>

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<sup>28</sup> For example, article 50 of the ICCPR states that the provisions of the Covenant ‘shall extend to all parts of federal States without any limitation or exception’.

<sup>29</sup> United Nations, *Vienna Declaration and Programme of Action: Report of the World Conference on Human Rights*, UN A/CONF.157/23 (1993). See also Office of the High Commissioner for Human Rights, *Guidelines on a Human Rights Approach to Poverty Reduction Strategies* (2002), 2–3.

<sup>30</sup> Section 19.

However, it would be beneficial for the articulation of human rights in the Queensland Human Rights Act to be consistent with the rights as articulated in the Victorian and ACT legislation, and also international law. This will allow for the development of human rights jurisprudence in Queensland to be informed and guided by the experience of other jurisdictions to the extent necessary, and in turn for Queensland jurisprudence to be influential and meaningful in jurisdictions outside of Queensland.

The ACT, Victorian, UK and New Zealand Human Right Acts enshrine a selection of civil and political rights and some economic, social and cultural rights. The right to education is protected in the ACT and UK, and the cultural, religious and language rights of minorities are protected in the ACT, Victoria and New Zealand.<sup>31</sup> The cultural rights of Aboriginal peoples are specifically protected in Victoria.

A Human Rights Act would not affect rights that are already protected in Queensland. The ACT and Victorian Acts clearly say that rights are protected in other ways and that the human rights legislation does not limit or change the protection of those rights.<sup>32</sup>

### 5.1 The need for a limitations clause

A Queensland Human Rights Act should include a general limitations clause that applies to all rights, except absolute rights.

Although expressed in broad language human rights are generally not enjoyed at the expense of all other considerations. Most rights can be “limited”, meaning that the enjoyment of a right will be reduced to allow for other concerns to take precedence, such as the enjoyment of other protected rights or potentially competing concerns such as public health and safety. For example, the right to freedom of expression does not extend to the right of a person to make threats to kill, distribute child pornography or engage in race hate speech. Limitations on human rights recognise that a balance is required. A Queensland Human Rights Act would provide a useful mechanism to strike the right balance.

In this regard, Queensland should adopt a limitations clauses along the lines of the ACT and Victoria. That would allow for all rights to be limited but “only to such reasonable limits as can be demonstrably justified in a free and democratic society” and taking into account “all relevant factors”, including the nature of the right affected, the purpose of the limitation and its extent.<sup>33</sup>

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<sup>31</sup> See ACT Act, ss 27 (cultural, religious and language rights of minorities), 27A (right to education); Victorian Act, s 19 (cultural, religious and language rights of persons with particular cultural, religious, racial or linguistic backgrounds and indigenous peoples); Art 2 (right to education); NZ Bill of Rights, s 20 (rights of minorities). See also the Human Rights Amendment Bill 2015 (ACT), which would insert a specific protection for the cultural rights of indigenous peoples.

<sup>32</sup> See ACT Act s7 and Victorian Act s5.

<sup>33</sup> ACT Act, s 28; Victorian Act, s 7. See also NZ Bill of Rights, s 5. The UK regime is somewhat different, as the Act gives effect to its obligations under the European Convention on Human Rights: see ss 14-17.

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A limitations clause like this allows for broader public interests to be taken into account and weighed against rights. Often the protection of human rights enhances public security, public order, public safety and public health, but where those matters do come into conflict (for example limiting a person's freedom of movement when held in quarantine) a limitations analysis allows for appropriate weight to be given to matters of public or communal concern that might override an individual's rights.<sup>34</sup>

However, certain rights, such as freedom from torture or slavery, are considered to be 'absolute', which means that no limitation of those rights is allowable. Those rights should not be subject to a limitations clause.

## 6. Making laws

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### 6.1 Joint Parliamentary Human Rights Committee

Parliaments, including through the work of parliamentary committees, have a critical role to play in promoting and protecting human rights<sup>35</sup> and discharging a state's legal obligation to respect, protect and fulfil human rights.<sup>36</sup>

Recognising and reflecting this, the Queensland Charter should establish a Joint Parliamentary Human Rights Committee to:

- (a) scrutinise all Bills and subordinate legislation for compatibility with protected rights;
- (b) conduct thematic inquiries into human rights issues; and
- (c) assist in government responses to Declarations of Incompatibility and other court and tribunal decisions and judgments such as those of the UN Human Rights Committee that concern Queensland.

The UK Joint Committee on Human Rights is the most appropriate and effective model.<sup>37</sup> It has been described as "one notable way in which parliamentary accountability is being enhanced."<sup>38</sup>

The scrutiny of new and existing legislation for compatibility with protected rights is an important preventative measure that can reduce the risk of legislation infringing human rights. The Committee

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<sup>34</sup> See The Hon Rob Hulls, Attorney-General, 'Second Reading Speech, Charter of Human Rights and Responsibilities Bill 2006', Hansard, Legislative Assembly, 4 May 2006.

<sup>35</sup> Commonwealth Human Rights Initiative, *The Parliamentary Committee as Promoter of Human Rights* (2007) 3.

<sup>36</sup> Human Rights Committee, *General Comment 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (2004), [4].

<sup>37</sup> See Joint Committee on Human Rights, *The Work of the Committee in 2007-08*, Second Report of Session 2008-09, HL Paper 10/HC 92, (26 January 2009), 18, available at <http://www.publications.parliament.uk/pa/jt/jtrights.htm>.

<sup>38</sup> Anthony Lester, 'Parliamentary Scrutiny of Legislation under the Human Rights Act 1998' (2002) 33 *Victoria University of Wellington Law Review* 1, 2.

should be given the power to review all legislation – proposed or existing, primary or subordinate – of its own motion in response to a report from an independent body such as the Queensland Human Rights Commission or following referral from Parliament. The Committee should have the usual powers of parliamentary committees, including receiving submissions from relevant stakeholders and reporting back to Parliament with findings and recommendations.

It is critical that such a committee is adequately resourced with expert advisors to develop the human rights expertise of parliamentarians.

## 6.2 Statements of compatibility

The Queensland Human Rights Act should require the parliamentarian responsible for a Bill to table a Statement of Compatibility at the time that the new Bill is introduced into Parliament. A Statement of Compatibility should state:

- (a) whether the Bill is compatible with human rights, and if so, how it is compatible;<sup>39</sup> and
- (b) if the Bill is inconsistent, the nature and extent of the incompatibility and why the Bill should nevertheless be considered by the Parliament.<sup>40</sup>

Subordinate legislation should also be accompanied by a statement of compatibility when it is tabled.

Statements of Compatibility have the potential to enhance transparency and accountability in policy making and legislative development<sup>41</sup> and to improve legislative and administrative protection and realisation of human rights. As the Victorian Scrutiny of Acts and Regulations Committee has stated:<sup>42</sup>

The requirement that all Bills be accompanied by a statement explaining whether and how they are compatible with human rights has the purpose of both informing parliamentary debate and ensuring that human rights are properly considered when Bills are developed.

The Queensland Human Rights Act should require Statements of Compatibility to be properly reasoned, so as to avoid the situation where Statements of Compatibility simply assert that provisions of an Act are human rights compliant, without giving any justification for that point of view. This very problem has caused delays in the scrutiny process in the UK, where the UK Joint Committee on

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<sup>39</sup> The Victorian Charter, ACT Human Rights Act and UK Human Rights Act each require law-makers to issue a 'Statement of Compatibility' at the time a law is introduced, indicating whether the law is consistent with protected rights.

<sup>40</sup> If the law is not consistent with protected rights, the Victorian Charter and ACT Human Rights Act require the statement to include details of the nature and extent of the inconsistency.

<sup>41</sup> VEOHRC, *Making Progress: The 2009 Report on the operation of the Charter of Human Rights and Responsibilities* (April 2010), 97-9.

<sup>42</sup> Scrutiny of Acts and Regulations Committee, Alert Digest 11 (14 September 2009) 3.



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Human Rights has been delayed in its scrutiny of Acts by the need to write to Ministers to ask for proper reasons for their assertions of rights compliance in Statements of Compatibility.<sup>43</sup>

Requiring the member or Minister responsible for a Bill to provide a Statement of Compatibility increases transparency and accountability in law-making. Even one of the most passionate critics of human rights law concedes that the provision in the Victorian Charter 'does seem to...make the elected legislature think more about rights before enacting laws'.<sup>44</sup> Although Australia's system of responsible government ostensibly means that parliamentarians are accountable to the electorate for their decision-making, requiring parliamentarians to consider rights and to make a public statement as to the likely impact a proposed law will have on human rights, reduces the likelihood of rights being inadvertently infringed. As the National Human Rights Consultation Committee stated in its 2009 report:<sup>45</sup>

Greater consideration of human rights is needed in the development of legislation and policy and in the parliamentary process in general. The primary aim of such consideration is to ensure that human rights concerns are identified early, so that policy and legislation can be developed in ways that do not impinge on human rights or, in circumstances where limitations on rights are necessary, those limitations can be justified to parliament and the community.

### 6.3 Responding to Declarations of Incompatibility

The Minister responsible for legislation should be required to respond to receipt of a Declaration of Incompatibility within a specified time frame.

In Victoria, the government is required to respond to Declarations within six months (section 37). It may be that a period of time somewhere between 30 days and six months is appropriate in order to allow the government to determine and craft its response, whether it be amending the legislation or the tabling of a declaration.

## 7. Role of courts and tribunals

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### 7.1 Interpretation of Laws Consistently with Human Rights

One of the core tasks of courts is to interpret the meaning of the laws that are passed by Parliament and to apply those laws in specific situations. The Queensland Charter should require that all Queensland legislation be interpreted and applied (and, if necessary, read up or down) in a manner that is most compatible with human rights (the **Interpretive Principle**). This is a codification and

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<sup>43</sup> See Joint Committee on Human Rights, *The Work of the Committee in 2007-08*, Second Report of Session 2008-09, HL Paper 10/HC 92, (26 January 2009), 18, available at <http://www.publications.parliament.uk/pa/jt/jtrights.htm>.

<sup>44</sup> James Allan, 'The Victorian Charter of Human Rights and Responsibilities: Exegesis and Criticism' (2006) 30 *Melbourne University Law Review* 906, 920.

<sup>45</sup> *National Human Rights Consultation Committee Report*, September 2009, p 174.



extension of the well-established common law principles that any ambiguity in legislation should be construed in favour of human rights and that legislation should not be deemed to abrogate fundamental rights without clear and express words evincing that intention.

In Victoria and the ACT, courts are obliged to interpret legislation in a way that is compatible with human rights and may consider international and comparative human rights jurisprudence while doing so.<sup>46</sup>

The success of the Interpretative Principle is dependent upon the judiciary deploying it robustly, so that remedial action is encouraged. Human rights should be interpreted and applied in a manner that renders them “practical and effective, not theoretical and illusory”.<sup>47</sup> Further, the Queensland Charter should be a “living document” to be interpreted and applied in the context of contemporary and evolving values and standards.<sup>48</sup>

Importantly, it is not only the courts who must use the Interpretive Principle. All persons should be required by the Human Rights Act to interpret Commonwealth legislation and subordinate legislation according to the Interpretive Principle

## 7.2 Using Judgments of Foreign and International Courts

The Queensland Charter should expressly empower courts to have regard to international and comparative human rights jurisprudence when interpreting and applying the Queensland Charter and any other laws that impact on human rights. A provision such as section 32(2) of the Victorian Charter would be appropriate. It provides:

International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision.

There are at least three reasons why courts should consider international and comparative jurisprudence:

- (a) Common jurisprudence reduces the extent to which courts will be required to reinvent the wheel and will better equip decision makers and courts to determine the substantive rights and issues that arise under the Queensland Charter by providing them with the opportunity to consider relevant international and comparative law jurisprudence.<sup>49</sup>
- (b) Utilising international and comparative human rights jurisprudence is particularly important as it enables the courts to have regard to the instruments and bodies from

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<sup>46</sup> ACT Act, ss 30, 31; Victorian Act, s 32.

<sup>47</sup> *Goodwin v United Kingdom* (2002) 35 EHRR 447, [73]-[74]. See also *Airey v Ireland* (1979) 2 EHRR 305, 314.

<sup>48</sup> *Tyrer v United Kingdom* (1978) 2 EHRR 1, 10; *Selmouni v France* (2000) 29 EHRR 403, [101].

<sup>49</sup> *Kracke v Mental Health Review Board & Ors* [2009] VCAT 646, paras 201-2 (Bell J).

which the rights in the Queensland Charter are derived.<sup>50</sup> International experience in the implementation of human rights laws is therefore likely to inform the mechanical provisions of a Queensland Charter.

- (c) Human rights are universal, so the development of human rights jurisprudence should be as consistent across all jurisdictions as is possible.<sup>51</sup>

Further, given the limited extent to which courts currently use international or domestic overseas jurisprudence in statutory or constitutional interpretation and in the development of the common law,<sup>52</sup> a Queensland Charter should expressly provide for courts to have regard to those sources.

### 7.3 Limiting Declarations of Incompatibility to the Supreme Court

The Supreme Courts of ACT and Victoria are each empowered to issue a declaration when a law cannot be interpreted consistently with human rights. This does not invalidate the incompatible law, but Parliament is obliged to prepare and table a response to the declaration.<sup>53</sup>

It is appropriate to limit the power to make Declarations of Incompatibility (sometimes also known as declarations of inconsistent interpretation) to the Supreme Court. This is the system adopted in Victoria and in ACT.<sup>54</sup>

The legislative model of human rights proposed for the Queensland Charter is based on a dialogue about human rights between the courts, the Parliament and the executive. It is most workable and efficient for that dialogue to occur from a single court, and also that the Supreme Court as the highest in the State be entrusted with that duty.

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<sup>50</sup> The rights protected in a Human Rights Act would be likely to be drawn from international law, especially the human rights treaties to which Australia is a signatory, such as the ICCPR and ICESCR. For example the jurisprudence of the HRC, which issues General Comments that elucidate the meaning of particular rights under the ICCPR and hears individual complaints under the First Optional Protocol to the ICCPR.

<sup>51</sup> In any event it is well established that it is desirable, as far as possible, that expressions used in international agreements be construed in a uniform and consistent manner by both municipal courts and international courts and panels: See, eg, *Rocklea Spinning Mills Pty Ltd v Anti Dumping Authority* (1995) 56 FCR 406, 421E; *Povey v Qantas Airways Ltd* (2005) 216 ALR 427, 433 per Gleeson CJ, Gummow, Hayne and Heydon JJ; *R v Asfaw* [2008] UKHL 31 (21 May 2008) [55]; *R v Immigration Appeal Tribunal, Ex p Shah* [1999] 2 AC 629, 657B.

<sup>52</sup> International human rights law is not directly applicable in Australia unless it is given domestic legislative effect. However, it can still be persuasive in domestic proceedings, in the following ways: as a tool for statutory interpretation; to influence the development of the common law; as a basis of judicial review in administrative law; in the exercise of judicial discretion; and as an indicia of contemporary standards and values and therefore relevant to the context in which the federal Constitution should be interpreted and applied.

<sup>53</sup> ACT Act, ss 32, 33; Victorian Act, ss 36, 37.

<sup>54</sup> See Victorian Charter, section 36 and ACT Human Rights Act, section 32.

#### 7.4 Right to a remedy and a freestanding cause of action

When a person's human rights are breached they should have affordable access to a remedy. The Queensland Act could improve on existing Australian human rights laws and allow a freestanding cause of action with a full range of remedies, including damages.

The ACT Act has a freestanding cause of action, although damages are not recoverable.<sup>55</sup> The Victorian remedy provision is more complex. In Victoria, claims of unlawfulness under the Human Rights Charter may only be raised in legal proceedings if there is another ground on which to impugn the decision or action. Damages are not recoverable.<sup>56</sup>

A recent independent review of the Victorian Human Rights has recommended that the Victorian Act be simplified by providing a freestanding cause of action like the one that exists in the ACT. However, rather than being required to start court proceedings in the Supreme Court, it recommended that proceedings can be started in the more accessible Victorian Civil and Administrative Tribunal (Victoria's equivalent of Queensland's QCAT). It has also been recommended that the Victorian Equal Opportunity and Human Rights Commission be empowered to receive and conciliate complaints under the Victorian Act.<sup>57</sup>

A free-standing cause of action will not "open the floodgates" of litigation.<sup>58</sup> However, in reality the "floodgates" argument is simply not borne out by the evidence and experience in other jurisdictions with independent causes of action. Neither outcome has eventuated in either the UK or the ACT, where the respective Human Rights Acts provide for a free-standing cause of action for a breach of human rights, or in New Zealand, where courts have implied a right of action and entitlement to a remedy for a breach of human rights.<sup>59</sup> Although the UK did experience an increase in the number of human rights cases immediately after the introduction of the Human Rights Act in 2000 until 2002-2003, there has since been a gradual and steady decline.<sup>60</sup> Courts report that the UK Human Rights

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<sup>55</sup> ACT Act, s 40C, inserted by the *Human Rights Amendment Act 2008* (ACT).

<sup>56</sup> Victorian Act, s 39.

<sup>57</sup> Michael Brett Young *From Commitment to Culture the 2015 Review of the Charter of Human Rights and Responsibilities Act 2006*, recommendations 23 and 27.

<sup>58</sup> Gabrielle McKinnon, *Strengthening the ACT Human Rights Act 2004* (2005) Australian National University, 2, available at <http://acthra.anu.edu.au/publications/index.html>.

<sup>59</sup> *Ibid.*

<sup>60</sup> See Sweet and Maxwell, 'UK courts see further decline in the use of Human Rights arguments' (Press Release, 19 February 2007), available at <https://www.smlawpub.co.uk/pressroom/2007/190207.html#table>. It states: 'The number of reported cases on Sweet & Maxwell's Lawtel & Westlaw service employing Human Rights arguments peaked during 2002-2003 with 541 cases making use of the Act, but over the past three years there has been a gradual decline.'

Act has not resulted in an overall increase in the length or cost of litigation.<sup>61</sup> On the contrary, the number of human rights cases before the courts has halved in the last eight years.<sup>62</sup>

A Human Rights Act in Queensland should also empower a body to investigate, report on and conciliate human rights complaints, intervene in relevant legal proceedings, conduct alternative dispute resolution processes, and research and report on compliance and reform of the Act. In Queensland, the Anti-Discrimination Commission could carry out this role. The Commission would need to be appropriately resourced and empowered.<sup>63</sup>

Queensland's Human Rights Act should include:

- (a) A separate cause of action for breaches of the human rights enshrined in the Act;
- (b) The ability to make a complaint to the Anti-Discrimination Commission and for the complaint to be conciliated by the Commission;
- (c) Power for the Anti-Discrimination Commission to investigate and report on systemic human rights issues that it identifies;
- (d) Provision for the Queensland Civil and Administrative Tribunal to receive applications alleging breaches of the Act;
- (e) the full range of judicial remedies, including declarations, injunctions, orders to cease the offending conduct and damages.<sup>64</sup>

## 8. Public authorities

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### 8.1 Responsibilities of public authorities

The central aim of a Human Rights Act is to ensure that the government respects, protects and fulfils human rights, in accordance with Australia's international human rights obligations.

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<sup>61</sup> Lord Thomas Bingham, 'Dignity, Fairness and Good Government: The Role of a Human Rights Act' (Speech delivered to the Human Rights Law Resource Centre, Melbourne, 9 December 2008), available at <http://www.hrlrc.org.au/content/topics/national-human-rights-consultation/lord-bingham/>. See also Administrative Court of England and Wales, *Report for the Period April 2001 to March 2002* (2003). The report found no evidence of an increase in the volume, length or costs of litigation.

<sup>62</sup> Robert Verkaik, 'Lawsuits on human rights halve despite European Act', *The Independent Online*, 20 April 2009.

<sup>63</sup> See, e.g. Victorian Act, Pt 4; Human Rights Commission Act 2005 (ACT), see Michael Brett Young *From Commitment to Culture the 2015 Review of the Charter of Human Rights and Responsibilities Act 2006*, recommendation 23 in relation to empowering the Victorian Human Rights and Equal Opportunity Commission to conciliate complaints.

<sup>64</sup> See the UK Act, s 8.

Under the Victorian and ACT Human Rights Acts, public authorities are obliged to act compatibly with human rights, and to give proper consideration to relevant human rights when making a decision.<sup>65</sup> A person affected by an authority's failure to do so can seek relief in certain circumstances.

The definition of “public authority” under a Queensland Charter is a crucial question. The definition of “public authority” would play a pivotal role in determining which governmental arms, organisations and authorities have human rights obligations, which is in turn fundamental to the effectiveness of the legislation as a means of protecting human rights.

## 8.2 Who is a “public authority”?

The extensive and ongoing privatisation and outsourcing of traditional public functions (such as the delivery of employment services) means that many traditional public services are no longer being performed purely by government agencies, but rather by private entities contracted or overseen by the government. In addition to binding the executive government, it is vital that a Queensland Charter also binds those private entities in circumstances where those entities are exercising public functions. This is the approach typically taken by other statutory Human Rights Acts.<sup>66</sup> Examples of public functions include public education, aged care, disability services, child protection services, transport, housing and health services, and supply of gas, electricity and water.<sup>67</sup>

As Justice Bell stated in respect of the ‘public authority’ provision of the Victorian Charter:

The state cannot shirk its human rights responsibilities by implementing its programs and policies through private entities acting on its behalf. Where private entities exercise public functions of a public nature on behalf of the State or a public authority, the functions come with unavoidable human rights responsibilities for the entity itself.<sup>68</sup>

As a Human Rights Act is directed at governmental action, private actors would not be bound by the Act when they are not exercising public functions.

The ACT Act has a provision allowing private entities to 'opt in' to the obligations of public authorities.<sup>69</sup> A Queensland Human Rights Act could include such a mechanism, as it encourages the development of a human rights culture in Queensland's business sector. However, it is not a complete solution, as

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<sup>65</sup> ACT Act, ss 30, 40B; Victorian Act, ss 32, 38.

<sup>66</sup> See ACT Act, s 40; Victorian Act, s 4; UK Act, s 6.

<sup>67</sup> See ACT Act, s 40A(3). See also MB Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (Young Review), September 2015, recomm 12.

<sup>68</sup> See *Metro West v Sudi* [2009] VCAT 2025 (9 October 2009).

<sup>69</sup> ACT Act, s 40D. The Young Review recommended inserting this mechanism into the Victorian Act: Young Review, recommendation 15, 64-65.

the experience in the ACT is that the mechanism was only adopted by the 'usual suspects'.<sup>70</sup> If an opt-in mechanism is created, it must be supported by other laws and initiatives (such as education).

## 9. Supporting the Human Rights Act

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The 2015 review report stated that, for the Victorian Act to be effective, the Victorian Government needed to do more to build a human rights culture, particularly in respect of public sector interactions with Victorians. This would be achieved by senior leadership and organisational vision, improving operational capacity, external input and oversight and human rights education. A strong human rights culture facilitates better government decision-making and human rights protection.<sup>71</sup>

If Queensland passes a Human Rights Act, it is critical to the success and effectiveness of that law that Queensland learns from the experiences in other jurisdictions and takes the necessary measures to creating a strong human rights culture.

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<sup>70</sup> This is the case with the seven entities who have opted into the ACT provision: see ACT Legislation Register, Human Rights Act 2004 – Notifiable instruments, <<http://www.legislation.act.gov.au/a/2004-5/ni.asp>>. See further, Human Rights Law Resource Centre, A Human Rights Act for All Australians, May 2009, <<http://www.hrlrc.org.au/files/hrlrc-submission-a-human-rights-act-for-australia.pdf>>.

<sup>71</sup> Michael Brett Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006*, Summary Report (September 2015), 5.

## Appendix 1

The key rights protected by the ICCPR and ICESCR are set out in the table below.

ICCPR	ICESCR
<ul style="list-style-type: none"> <li>• right to self determination;</li> <li>• non-discrimination in the enjoyment of ICCPR rights;</li> <li>• right to life;</li> <li>• right to equality before the law and equal protection;</li> <li>• freedom from torture or other cruel, inhuman or degrading treatment or punishment;</li> <li>• freedom from slavery and servitude;</li> <li>• freedom of movement;</li> <li>• right to privacy;</li> <li>• freedom of thought, conscience and religion;</li> <li>• freedom of expression;</li> <li>• freedom of assembly and association;</li> <li>• the right to participate in public life, including the right to vote; and</li> <li>• rights concerning criminal proceedings and punishment, including the right to a fair hearing, the presumption of innocence and the prohibition against double jeopardy.</li> </ul>	<ul style="list-style-type: none"> <li>• Right to self-determination</li> <li>• right to work and have fair conditions of work;</li> <li>• right to form trade unions and strike;</li> <li>• the right to a family life, including paid parental leave and the protection of children;</li> <li>• right to an adequate standard of living, including adequate housing;</li> <li>• right to social security;</li> <li>• right to the enjoyment of the highest attainable standard of physical and mental health; and</li> <li>• right to education, including free primary education</li> <li>• the right to participation in cultural life.</li> </ul>