A Human Rights Act for Queensland

Australian Lawyers Alliance

Submission to Legal Affairs and Community Safety Committee of Queensland Parliament

Human Rights Inquiry

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WHO WE ARE
The ALA is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA started in 1994 as the Australian Plaintiff Lawyers Association, when a small group of personal injury lawyers decided to pool their knowledge and resources to secure better outcomes for their clients – victims of negligence.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.

OUR STANDING TO COMMENT
The ALA is well placed to provide commentary to the Committee.

Members of the ALA regularly advise clients all over the country that have been caused injury or disability by the wrongdoing of another.

Our members advise clients of their rights under current state based and federal schemes, including motor accident legislation, workers compensation schemes and Comcare. Our members also advise in cases of medical negligence, product liability and other areas of tort.

Our members also often contribute to law reform in a range of host jurisdictions in relation to compensation, existing schemes and their practical impact on our clients. Many of our members are also legal specialists in their field. We are happy to provide further comment on a range of topics for the Committee.
INTRODUCTION
The Australian Lawyers Alliance (‘ALA’) welcomes the opportunity to provide a submission to the Legal Affairs and Community Safety Committee in its Human Rights Inquiry.

IS IT APPROPRIATE AND DESIRABLE TO LEGISLATE FOR A HUMAN RIGHTS ACT IN QUEENSLAND?
The Australian Lawyers Alliance considers it is appropriate, desirable and indeed necessary to legislate to protect human rights in Queensland through the creation of a Human Rights Act. Our arguments in support of this position are provided below.

We note that, through considering legislating a Human Rights Act, Queensland will be following in the footsteps of not only ACT and Victoria, but also the United Kingdom, Canada, Hong Kong and New Zealand. We note that Canada and Hong Kong have since enshrined their human rights commitments into their constitutions. Australia is the only common law country that has still not entrenched human rights into a national instrument. While we believe that a constitutionally entrenched model of protecting human rights would be more effective in ensuring that human rights are truly enshrined throughout our legal system, we understand that this is not within the scope of considerations for this inquiry.

EFFECTIVENESS OF CURRENT LAWS PROTECTING RIGHTS IN QUEENSLAND
While many Australians feel they enjoy a system of democracy that at face value provides for the enjoyment of basic human rights, and in fact many Australians would believe they hold human rights at law (such as freedom of speech), in reality neither Commonwealth or Queensland laws protect basic human rights.

While we as a nation have signed on to various treaties and conventions which recognise the need for human rights to be protected, including the United Nations Universal Declaration of Human Rights, the intent of these instruments has generally not been executed through national or Queensland laws, with few exceptions. Queensland and the federal government have no specific recognition of these rights except as scattered through various legislative frameworks, such as anti-
discrimination legislation and implied constitutional rights. Further, the Australian Lawyers Alliance considers that there are significant gaps in our state and federal legislative frameworks through which marginalised people are not afforded the same protections as others, and human rights are not adequately recognised or protected.

While Queensland has been a pioneer on certain fronts in upholding human rights, such as being the first state to abolish the death penalty, even in the last five years we have seen legislation passed that would be considered an attack on fundamental human rights. For example, the passing of the *Vicious Lawless Association Disestablishment Act 2013* (Qld) involved breaches of human rights such as the right to association and the right to access to justice by implementing provisions for mandatory higher punishment for being a ‘vicious lawless associate’, as well as removing recourse to parole in certain circumstances.

Also under the previous Queensland Government, many community rights such as the right to be involved in decision making, or to access information, were diminished. One of the more obvious of these was removing the long held right for community members to object to environmental impacts that may be posed by significant projects. Another example was the attempt to replace clear laws specifying the public’s rights to access information under planning law with vague, uncertain and subjective provisions that reduce the strength of this right. These examples demonstrate the ease by which new proposals and legislation pass without adequate scrutiny, and governments remain largely unaccountable for such changes.

Further, Queensland’s unicameral system provides fewer checks and balances on Queensland Parliament decision making than the typical bicameral parliamentary system present in other States. A Human Rights Act can act as a safeguard for Queensland by requiring public authorities to act consistently with the Act, encouraging human rights to be considered from the outset when developing laws or policies, ensuring that all new laws must be reviewed against the Human Rights Act, and requiring that courts and tribunals interpret legislation in a way that is consistent with human rights.

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2 *Planning and Development Bill 2014* (Qld) section 217, compared with the current *Sustainable Planning Act 2009* (Qld), Chapter 9, Part 6.
This would not unduly constrain the legislative power of parliament as human rights would not be absolute, but subject to the reasonable limits of law.  

It is recognised that occasionally it is necessary for the government to pass legislation that impacts the rights of Queensland’s in any way, for a greater public good, however the act would ensure transparency and critique of these instances so that it is ensured these instances only occur when necessary.

ADVANTAGES OF IMPLEMENTING A HUMAN RIGHTS ACT IN QUEENSLAND
The primary advantages of a Bill of Rights, and of course equally a Human Rights Act, were succinctly summarised by Sir Anthony Mason, then the Chief Justice of the High Court, in 1988 as follows:

• It deters Parliament from abrogating the rule of law, thereby presenting a constitutional obstacle to the use of parliamentary power as a means of a totalitarian system;
• It ensures that the power of the majority in Parliament cannot be used to override the rights of minorities and individuals;
• It offers more secure protection of individual and minority rights from the exercise of power by institutions and pressure groups operating through government machinery;
• It offers principled and reasoned decision-making on fundamental issues;
• It reinforces the legal foundations of society, thereby enhancing the role of the law in society;
• It has a major educative role in promoting greater awareness of, and respect for, human rights.  

These are all highly beneficial outcomes that can flow from the relatively simply but powerful act of legislating recognition and protection of the human rights we as a society have agreed to protect. Indeed, the impact of these outcomes that can flow from a Human Rights Act should not be underestimated. For example, the improvement to law making and government policy, by improving the robustness of

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3 See for example Charter Of Human Rights And Responsibilities Act 2006 (Vic), s 7
decision making by public authorities and parliamentarians, has implications for all legislation going through parliament.

Under a good Human Rights Act, the intent of which is successfully entrenched in the culture of all sectors, human rights become a fixed consideration for all government decision making, including in the preparation of laws or policy, and a consideration by which laws are also reviewed through an independent body prior to being passed. The ACT Government has itself acknowledged that the passing of the Human Rights Act in the ACT has:

- increased awareness of human rights issues throughout Government;\(^5\)
- had a ‘positive impact on political debate and consideration of policy issues by Government’;\(^6\) and
- 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’.\(^7\)

These are outcomes that Queenslanders also deserve; they too deserve a Human Rights Act.

**WHAT RIGHTS SHOULD A QUEENSLAND HUMAN RIGHTS ACT PROTECT?**

The Queensland Human Rights Act should protect all of those rights set out in the United Nations International Covenant on Civil and Political Rights (ICCPR) and the United Nations International Covenant on Economic, Social and Cultural Rights (ICESCR). In addition, we consider Queensland recognise more procedural and modern rights:


\(^6\) Ibid, p.2.

• the right to public participation in decision making

The right to public participation in decision making is a well-recognised right that is often seen as a derivative of the right to participate in public life\(^8\) or in participatory governance,\(^9\) however we consider it would be fruitful to clearly provide recognition of these individual rights. This is particularly pertinent to Queensland, where citizens reacted to reductions in legal rights to participate in decision making by electing a government on a platform of transparency and accountability.

• the right to access to justice

The right to access to justice is essential when seeking to protect human rights. For example, the Commonwealth Senate Legal and Constitutional References Committee has stated that ‘[i]mproving access to justice is essential to breaking the cycle that leads to homelessness and poverty.’\(^{10}\) Those most marginalised in our community are typically those who are not aware of their rights to access justice, or not able to access facilities easily to assist them in accessing justice services. The Australian Lawyers Alliance supports the recognition of this right in a Human Rights Act for Queensland.

• the right to public access to information, transparency and accountability in governance and decision making

The Australian Lawyers Alliance believes that the right to public access to information, transparency and accountability in governance and decision making are essential rights to uphold democratic governance. There are rights found in our existing Queensland legislation which provide some level of achievement of these rights, such as statutory public registers, and freedom/ right to information frameworks. However, in the experience of the Alliance, the success of these frameworks and statutory rights is proportionate to the willingness of the government of the day to promote transparency and accountability. The Alliance therefore considers that Queensland would greatly benefit from enshrining the requirement to recognise, promote and protect these rights in a Human Rights Act.

• the right to a healthy and safe environment

\(^8\) Article 25 of the International Covenant on Civil and Political Rights.

\(^9\) Articles 21 of the Universal Declaration of Human Rights recognizes the importance of a participatory government.

Following initial recognition in the Stockholm Declaration in 1972,\(^\text{11}\) it is now firmly established that the protection of the environment ‘is a vital part of contemporary human rights doctrine and a sine qua non for numerous rights, such as the right to health and the right to life.’\(^\text{12}\) This right has been previously seen as a deriv ate of other rights, such as the right to life.\(^\text{13}\) The Advisory Council of Jurists of the Asia Pacific Forum has recognised, however, that a right to a safe and healthy environment needs to be explicit, rather than being only exercisable through reference to other existing rights.\(^\text{14}\) They further noted that existing trends and environmental law instruments have not been adequate in supporting the recognition of a clear and specific right to, as they refer to it, ‘an environment of a particular quality.’\(^\text{15}\) Accordingly every modern democratic constitution drafted in the last three decades has included an explicit recognition of the right to a healthy environment.\(^\text{16}\) The Australian Lawyers Alliance believes that there is a need to specifically recognise the right to a healthy and safe environment in a Queensland Human Rights Act.


\(^\text{15}\) Ibid.

WHAT MECHANISMS AND INSTITUTIONS SHOULD THE HUMAN RIGHTS ACT PROVIDE FOR?

The Australian Lawyers Alliance considers that the ACT, Victorian, New Zealand and United Kingdom human rights instruments provide good models for Queensland to mirror, however there are improvements that Queensland can make with the benefit of reflecting on the successes and failures of these instruments in protecting human rights.

For example, a weakness of both the Victorian and ACT instruments is that they are narrow in terms of remedial protection. Neither the ACT Human Rights Act nor the Victorian Charter provide for the direct right to bring legal action in the courts for breach of the instrument with an ability of the courts to provide a range of remedies, including compensation. There must also be a direct right of remedy whereby an application could be made to strike out a law as being inconsistent with the Human Rights Act.

The Alliance provides the following suggestions for mechanisms and institutions that should be provided for in a Human Rights Act in Queensland:

**In the making of legislation**

- *Proposed and existing laws must be subject to scrutiny by an independent entity who reviews the laws against the Human Rights Act to check for consistency and highlight any inconsistencies.*

- *New laws must be accompanied by an explanation as to how, if at all, the law may interfere with human rights, why this interference was necessary, and the extent of and results of public consultation undertaken for the laws.*

A Queensland Human Rights Act could establish a Joint Parliamentary Human Rights Committee to undertake reviews of laws, as established in the UK and at a Commonwealth level in Australia. Drafters of legislation should be required to include in their explanatory notes a statement as to the compatibility of the legislation with the Human Rights Act.

Where the review Committee highlights a breach of the Human Rights Act which has not been discussed in the explanatory notes, the Committee should be empowered to require an explanation as to why the breach is seen to be necessary or how the breach will be rectified.
Enforcement mechanisms

- There must be clear and simple redress to a court to remedy breaches of the Human Rights Act. This right should not be dependent on the bringing of another action at law separate from the Human Rights Act.

The Alliance believes that for the protection of people’s rights in Queensland, the government needs to show a willingness to be held accountable. If a person’s rights are breached there needs to be adequate forms of redress through the courts to remedy breaches. Courts should be able to provide remedies for the unjustified infringement of people’s rights. They must play a critical role in protecting the rights of minorities.

Governments are always concerned that new avenues for redress will expose the government to overwhelming financial liability. However, despite predictions by outspoken opponents, there has been no evidence provided to our knowledge of an enduring excess of litigation in any of the jurisdictions which have provided redress through the courts for enforcing human rights instruments. Moreover, concerns that there would be a transfer of power from the executive to the judiciary have been demonstrated to be equally unfounded.

- The court should have the power to critique legislation to determine its validity against the Human Rights Act.

Courts should also be able to criticize legislation that proves to be incompatible with a Human Rights Act. The ACT Human Rights Act gives courts the right to issue a declaration that legislation is incompatible with the Act. However, the ACT government has no obligation to review their legislation. The Queensland Act needs to implement remedial mechanisms that ensure incompatible legislation is reviewed by the Queensland government and changed to adhere to, reflect protection and promotion of rights. This is not usurping the government’s power. The court is not making policy decisions, it is exercising its defined role in interpreting legislation.

Independent body overseeing the Act

- There should be an independent body authorised under the Human Rights Act to oversee the Act.

The Alliance recommends that the Queensland Human Rights Act could empower the creation of a commission or ombudsman with responsibility for overseeing the Act. This body could be the first point of call for complaints as to breaches of the Human Rights Act. They might also provide mediation services. Through providing a complaints investigation function, the independent body could ensure the concerns of those not willing to take court action are investigated, while also filtering actions
prior to them possibly being taken to court. The body could also undertake inquiries into thematic human rights matters, either by directive or by their own initiative.

Education

• Resources should be provided to educate public authorities, and private entities that act in a public capacity, on the recognition, promotion and protection of human rights.

• Queensland Government Departments should be required to develop and report against human right performance indicators.

A law is nothing if its policy intent is not understood by those who must enforce it or interpret it. Education is essential across the board, for public authorities, parliament and the judiciary, to explain the purpose and operation of the Human Rights Act.

The requirement for public authorities to report against human rights performance indicators provides transparency, accountability and a consistent reminder to public authorities of their duty to uphold human rights in their work.

CONCLUSION

The Australian Lawyers Alliance believes strongly in individual freedom by protecting and promoting individual rights. The Alliance fundamentally supports the need to better protect human right through the creation of a Queensland Human Rights Act. The Alliance supports a Queensland Human Rights Act that includes all rights, civil and political rights, economic, social and cultural rights, as well as those additional rights highlighted here, being a right to public participation in decision making, to access to justice, to public access to information, transparency and accountability in governance and decision making and to a healthy, safe environment.

We believe that a Human Rights Act will empower citizens to hold governments accountable in relation to its lawmakers in so far as those laws impact on people’s rights. Further, the Alliance supports the need for the provision of adequate remedies for breaches of such rights. Adequate redress through the courts should be available if rights are breached. The protection of rights is a concern for all Queenslanders, and indeed all Australians.