

The Research Director
Legal Affairs and Community Safety Committee
Parliament House
Brisbane QLD 4000

lacsc@parliament.qld.gov.au

Dear Madam/Sir,

We value the opportunity to make a contribution to the inquiry into whether it is appropriate and desirable to legislate for a Human Rights Act in Queensland. Spinal Life Australia is Queensland's peak body for people with a spinal cord injury, post-polio, and transverse myelitis.

Yours sincerely,



Michael Powell
Chief Executive Officer
Spinal Life Australia

Brisbane
p: 07 3391 2044 f: 07 3391 2088
e: enquiries@spinal.com.au
PO Box 5651, West End QLD 4101

Townsville
p: 07 4755 1755 f: 07 4723 8677
e: nqenquiries@spinal.com.au
PO Box 618, Aitkenvale BC QLD 4814

Cairns
p: 07 4755 1755 f: 07 4723 8677
e: nqenquiries@spinal.com.au
PO Box 452, North Cairns QLD 4870



Backing you. For life.

About Spinal Life Australia

We are Queensland's leading provider of advocacy, therapy and supports for people with spinal cord injuries. Our vision is for people with a spinal cord injury to live in an equitable, inclusive, integrated community, independently able to access every aspect of, and contribute to, the fabric of their region.

Initially called the Paraplegics Welfare Association, our services focused on advocacy, healthcare and lifestyle advice, as well as personal assistance. These services expanded to include support networks for members and employment assistance, along with peer support to assist people and their families with the transition from the hospital to home and the community.

Over the years, we have developed specialist knowledge and services and we are Queensland's peak body for people with spinal cord injuries, post-polio and transverse myelitis.

Human Rights Inquiry

Spinal Life Australia supports the implementation of a Human Rights Act for Queensland.

Introduction

In a country such as Australia, and a State such as Queensland, it is expected that most people, most of the time, do not need to turn their minds to human rights. Most people's human rights are respected in their everyday, which is why, in part, we now have the freedom and opportunity to consider the enactment of a Human Rights Act.

It is also true that most people will, in their lifetime, find themselves in a position in which they rely on others. The decisions of other people and public bodies will affect them more than they would have previously. Be it getting older, unwell or less financially secure, most people would, at some point in their lives, rely on the protections in a Human Rights Act to uphold their dignity and autonomy, were we to enact it.

For people with a disability, that time – when decisions of other people and public bodies disproportionately affect an individual's dignity and autonomy – is now.

This submission outlines Spinal Life Australia's support for a Human Rights Act in Queensland, the benefits of that legislation, improvements on current human rights legislation, the remedies that should be available for a violation of human rights, the process for resolving a complaint, and the application of a Human Rights Act to the introduction of the National Disability Insurance Scheme (NDIS).

Queensland has the opportunity to introduce the most effective Human Rights Act in Australia.

The benefits of a Human Rights Act for Queensland

A Human Rights Act in Queensland would enshrine human rights in law, and would provide social, cultural and economic benefits, which would include:

- Creating a culture of human rights in the legislative, executive and judicial branches of government.
- Ensuring human rights are considered in legislation and policy development.
- Service delivery and decision making by public bodies that is consistent with human rights.
- Ensuring vulnerable individuals are not disproportionately disadvantaged by government decisions and policy.

Improvements on the current human rights legislation

Two States in Australia currently have human rights legislation: the Victorian *Charter of Human Rights and Responsibilities Act 2006 (Charter of Human Rights)*; and the ACT *Human Rights Act 2004*.

The Victorian *Charter of Human Rights* was reviewed in 2015. The introduction to the review outlines three features of the Victorian system that, if addressed and improved in Queensland, would create Australia's most progressive human rights legislation:

*The Charter does not currently create any new cause of action or right to go to court, and the courts cannot award damages for a breach of Charter rights. ...[and] The Victorian Equal Opportunity and Human Rights Commission cannot take human rights complaints and offer dispute resolution under the Charter.*¹

To paraphrase, (1) the *Charter of Human Rights* does not have an independent cause of action to bring a complaint under the *Charter* itself, (2) damages cannot be awarded as a remedy for a breach of the *Charter*, and (3) a complainant cannot utilise the services of the Commission (equivalent to the Anti-Discrimination Commission Queensland (ADCQ) in Queensland). These issues will be discussed further below.

Resolving human rights issues using a Human Rights Act in Queensland

The process for resolving human rights issues using a Human Rights Act in Queensland should be:

- A separate cause of action for breaches of the human rights enshrined in the Act.
- The ability to make a complaint to the ADCQ and for the complaint to be conciliated by the ADCQ.
- Power for the ADCQ to investigate and report on systemic human rights issues that it identifies.
- Provision for the Queensland Civil and Administrative Tribunal (QCAT) to receive applications alleging breaches of the Act.
- The full range of judicial remedies, including declarations, injunctions, orders to cease the offending conduct and damages (monetary compensation).

1. Cause of action

Although this may seem like a necessary element, the Victorian *Charter of Human Rights* does not include an independent cause of action for breaches of human rights. A person who claims their rights have been breached can only seek a remedy if they piggy-back their human rights claim onto a separate, non-human rights claim. The ACT *Human Rights Act* does, however, have an independent cause of action for breaches of human rights.

¹ Michael Brett Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006*, Victorian Government, 4.

2. Making a complaint to the Anti-Discrimination Commission Queensland and the Queensland Civil and Administrative Tribunal

In both Victoria and the ACT, complaints for a breach of human rights must be made to the Supreme Court. For people with a disability, bringing a claim in such a complex, expensive and time consuming jurisdiction is prohibitive and, for most, almost impossible due to the cost, time and logistics involved. This problem could be resolved in Queensland if applications could be made and conciliated initially through the ADCQ and applications subsequently brought in QCAT. This issue was raised in the 2015 review of the Victorian *Charter of Human Rights*, and recommendations made concerning the issue regarding the cause of action and the jurisdiction for making a complaint:

Recommendation 27: The provisions and process for obtaining a remedy under the Charter be clarified and improved by:

(a) amending the Charter to enable a person who claims a public authority has acted incompatibly with their human rights, in breach of section 38 of the Charter, to either apply to the Victorian Civil and Administrative Tribunal for a remedy, or rely on the Charter in any legal proceedings. The amendment should be modelled on section 40C of the Human Rights Act 2004 (ACT).²

3. Awarding damages for a breach of human rights

Unlike human rights legislation in the United Kingdom and New Zealand, the Victorian *Charter of Human Rights* and the ACT *Human Rights Act* do not allow the award of damages for a breach of human rights. A full range of legal remedies, including damages, should be available to an individual who has had their human rights infringed or abused under a Queensland Human Rights Act.

In Victoria and the ACT, a range of legal remedies are available for acts or decisions that are incompatible with human rights:

- A decision can be set aside, and a new decision then made that properly considers human rights.
- An injunction can be granted to stop a public authority from continuing to act in a way that is incompatible with human rights.
- Evidence that was obtained in breach of the right to privacy, for example, can be excluded from a trial.
- An order can be made to require a public authority to take positive steps to remedy a breach, or to prevent a similar breach happening again.³

The review of the Victorian *Human Rights Charter* recommends the *Charter* not be amended at this stage to include damages. It does not, however, explain clearly why this should be the case.

² Ibid, 133.

³ Ibid, 130.

The review points out that consultation during the 2005 review showed that “[p]eople were less interested in big court cases and the possibility of damages than in getting the problem fixed”.⁴

This seems reasonable, and public consultation and support is vital. It is pointed out almost immediately though, from lessons learned and damages awarded under current discrimination and privacy legislation, that “public authorities have little to fear if damages were a remedy under the *Charter*”.⁵

The review then goes on to say that the relatively small payments “suggests awards of damages play only a minimal role in achieving compliance with equal opportunity and privacy legislation in Victoria”.⁶

So which is it: that damages shouldn’t be included under human rights legislation because it potentially opens the government up to large claims; or through experience, payment of damages under this kind of legislation is usually small, and is therefore unnecessary to the success of the legislation?

It is neither. All the review successfully points out is that claims for damages would most probably be reasonable and not prohibitive for government, and similar legislation that includes damages as a remedy provides successful outcomes.

Individuals who have had their human rights violated may have suffered actual harm and the difficulty in calculating how to compensate that loss should not dissuade a court or tribunal from attempting to provide a payment to redress that hurt, as an option in a suite of remedies.

A Human Rights Act in Queensland and the NDIS

The disability sector is currently undergoing significant reform with the introduction of the NDIS. The majority of the administration of the sector is transferring from State government departments and their contractors to the Federal Government run National Disability Insurance Agency (NDIA) and private providers. The issue for Queenslanders with a disability is that any State based human rights legislation only applies to actions and decision of State government bodies and providers who contract with them to provide services. The NDIA is a Federal Government body and therefore not directly bound by State legislation. This issue was highlighted in the 2015 review of the Victorian *Charter of Human Rights*.

Disability service providers that operate under contract to the Victorian Government have obligations under the *Human Rights Charter* as public authorities. Under the NDIS, they will no longer have these obligations. Core public authorities, such as departments, will continue to be bound by the *Charter*. Private providers will no longer be performing public functions on behalf of the Victorian Government, so will no longer have human rights obligations under the *Charter of Human Rights* after the full transition to the NDIS.

⁴ Ibid, 118.

⁵ Ibid, 131.

⁶ Ibid.

This issue was identified and addressed recently with amendments to the Queensland *Disability Services Act 2006* and other legislation. The Queensland Government currently oversees a quality and safeguards framework for providers of disability services. As Queenslanders with disabilities are admitted into the NDIS, their funding will come from the NDIA instead of the Queensland Government. The quality and safeguards framework is linked to service providers' contractual arrangements with the Queensland Government. When the provision of funding transfers to the NDIA, the Queensland Government would have lost its authority over the quality and safeguards system but for the amendments to the *Disability Services Act 2006* and other legislation, which will ensure that the Queensland Government maintains its authority over the quality and safeguards framework.

Although the *National Disability Insurance Scheme Act 2013* (Cth) is expressed to give effect to Australia's obligations under the *Convention on the Rights of Persons with Disabilities* and other international human rights treaties, any Human Rights Act in Queensland will need to bind the majority of providers and agencies involved in the implementation of the NDIS, or people with a disability will be excluded from exercising their rights under a Human Rights Act.

Conclusion

Australia is a stable democracy with strong public institutions that ensure that most people, most of the time, need not be concerned about their human rights. Many quick and strong voices will ask why we need a Human Rights Act for Queensland. They may ask why we need to enshrine in law the rights that, for the most part, we already have and enjoy. And it is for the very reason that someone has a quick and strong voice that they need to speak for their future selves – who may no longer be as quick, or as strong, or have the opportunity to voice their opinions as readily.