



Background paper

A HUMAN RIGHTS ACT FOR QUEENSLAND

Implications for people who experience mental illness

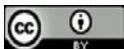
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ACKNOWLEDGEMENT

We wish to pay respect to Aboriginal and Torres Strait Islander Elders, past and present, and acknowledge the important role of Aboriginal and Torres Strait Islander people, their culture and customs across Queensland.

We also acknowledge the people living with mental health and drug and alcohol problems, their families and carers. We can all contribute to a society that is inclusive and respectful, where everyone is treated with dignity and able to focus on wellness and recovery and have fulfilling lives.

INTRODUCTION

The Queensland Parliament's Legal Affairs and Community Safety Committee is inquiring into whether it is appropriate and desirable for Queensland to pass a Human Rights Act. The Committee is inviting submissions and will report to Parliament by 30 June 2016.

The Queensland Mental Health Commission engaged Katy O'Callaghan from Outpost Consulting to assist in preparing a response to the Parliamentary Inquiry. In March 2016, a background paper was prepared to stimulate interest and gather the views of the Commission's stakeholders. This paper is the next step towards refining the Commission's position on the issue. It brings together Commission and stakeholder views along with an analysis of the potential opportunities of a Human Rights Act, with a specific focus on what it may mean for people with mental illness and the provisions in the *Queensland Mental Health Act 2016*. The paper is intended as advice to the Commission in focussing its submission to the Inquiry and continuing its advocacy in support of a Human Rights Act for Queensland.

THE PROPOSAL FOR A HUMAN RIGHTS ACT IN QUEENSLAND

What is a Human Rights Act

A Human Rights Act (sometimes called a bill of rights or a charter of rights) is a law that sets out the basic rights of individuals within a jurisdiction. Human rights include things like the right to a fair trial, freedom of speech and the right to be free from torture or other inhumane or degrading treatment or punishment.

Some countries (such as the United States and Canada) protect human rights through their constitutions. Australia's constitution names only a limited number of rights. We mainly rely on the courts applying common law principles and the Government's obligations under international law to respect, protect and fulfil human rights.

Two jurisdictions in Australia, the ACT and Victoria, have taken steps to compel government authorities to take human rights into account at the state/territory level. In 2004 in the ACT and in 2006 in Victoria, human rights legislation was enacted that require the parliaments, the courts and the executive in these States to respect, protect and fulfil human rights. Most of the human rights listed in these laws reflect the International Covenant on Civil and Political Rights. There is also an International Covenant on Economic, Social and Cultural Rights, which is less often included in such legislation. The ACT has recently added one social right – the right to education – and the Victorian Charter includes distinct cultural rights for Aboriginal people (more detail on both laws is provided in Appendix A).

Under these laws, the Victorian and ACT parliaments are required to consider the human rights compliance of laws that they pass; their courts are obliged to interpret legislation in a way that is compatible with the human rights listed in the respective Acts; and their public authorities (government departments and other organisations carrying out public functions) are obliged to act compatibility with human rights and give proper consideration to relevant human rights when making a decision.

Queensland is considering legislation similar to that introduced in Victoria and the ACT to better protect human rights in this state. As a common law Act, such models give the final say on any changes to laws to the Parliament. This is different from a constitutionally entrenched bill of rights that allows courts to strike down laws that are incompatible with human rights.

Background to the proposal for a Human Rights Act

The idea for a Human Rights Act was placed on the agenda by the independent member and current speaker of the Queensland Parliament, Hon. Peter Wellington in the wake of concerns about risks to people's freedoms and rights under Queensland's anti-association laws. In February 2015, the Premier committed to take steps towards a 'public discussion' on the adoption of a Human Rights Act in Queensland and the Parliamentary Inquiry was initiated in December 2015. The full terms of reference for the Inquiry are presented in Box 1 below.

Box 1: Terms of Reference for Parliamentary Inquiry into a Human Rights Act

1. That the Legal Affairs and Community Safety Committee inquire into whether it is appropriate and desirable to legislate for a Human Rights Act in Queensland, other than through a constitutionally entrenched model.
2. That, in undertaking the inquiry, the committee consider:
 - a. the effectiveness of current laws and mechanisms for protecting human rights in Queensland and possible improvements to these mechanisms;
 - b. the operation and effectiveness of human rights legislation in Victoria, the Australian Capital Territory and by ordinary statute internationally;
 - c. the costs and benefits of adopting a Human Rights Act (including financial, legal, social and otherwise); and
 - d. previous and current reviews and inquiries (in Australia and internationally) on the issue of human rights legislation.
3. That, if the committee decides it would be appropriate and desirable to legislate for a Human Rights Act in Queensland, the committee consider:
 - a. the objectives of the legislation and rights to be protected;
 - b. how the legislation would apply to: the making of laws, courts and tribunals, public authorities and other entities;
 - c. the implications of laws and decisions not being consistent with the legislation;
 - d. the implications of the legislation for existing statutory complaints processes; and
 - e. the functions and responsibilities under the legislation.
4. That the committee invite public submissions, consult with the community and key stakeholders and report to the Legislative Assembly by 30 June 2016.

The Premier's announcement was preceded by a widespread campaign in support of a Human Rights Act. This campaign has been gaining momentum and is supported by a range of community organisations and social justice groups, including the Anti-discrimination Commission Queensland.¹

This is not the first time a Human Rights Act has been considered in Queensland. In 1993, an inquiry by the Electoral and Administrative Review Commission recommended the establishment of a bill of rights, which was to contain an extensive array of civil and political rights, which would be enforceable in court by individuals against the government and its agencies. However, the Legislation Review Committee was unable to complete consultations on the proposal before Parliament was dissolved and the matter lapsed. The issue was picked up again in 1998 by a new Legalisation Review Committee. This committee chose not to recommend a bill of rights on the basis that it would result in 'inordinate legal, social and economic costs'. There were concerns that too much power would be transferred from the Parliament to the judiciary and that increased litigation would result in high costs to the public.²

Around the same time, a number of other jurisdictions, including the UK, then the ACT and Victoria, came to the conclusion that the benefits of such legislation outweighed the risks and they began to introduce human rights laws from the late 1990s. Several years later, the Australian Government, Western Australia and Tasmania all undertook consultation processes on this issue which all concluded that a Human Rights Act should be introduced. But in the end, these jurisdictions chose not to go ahead with legislation partly again due to concerns about cost and risks to parliamentary sovereignty.

The ACT and Victorian legislation have both been reviewed several times now with the findings indicating a positive overall impact from the legislation. The reviews provide guidance of implementing an effective Act, providing important lessons for Queensland in considering this proposal. A summary of how the legislation works in ACT and Victoria and some highlights from the reviews are outlined in Appendix A.

WHY HUMAN RIGHTS MATTER TO THE COMMISSION

Human rights are the basic rights that belong to every person, regardless of age, race, sex, social status or any other characteristic. They are derived from and serve to protect the dignity and worth of every person.

However, human rights protections have particular relevance for people who are vulnerable, marginalised or disadvantaged because these groups are more likely to encounter violations of human rights than others, and they may have more difficulty defending themselves. These groups include people whose mental health and wellbeing is compromised for short or long periods of time; people who experience a diagnosed mental illness; or people living with problematic alcohol and other drug misuse.

... for mental health and wellbeing

All Queenslanders, regardless of whether they are living with a mental illness or not, experience varying levels of mental health. Mental health is different from mental illness. The World Health Organisation defines mental health as 'a state ... in which the individual realises his or her own abilities, can cope with the normal stresses of life, can work productively, and is able to make a contribution to his or her community'³.

Good mental health and wellbeing is influenced by a wide range of factors including: whether they have been subject to discrimination; their social inclusion; and social and economic factors such as employment and access to services such as housing and health services. These factors play a significant role in the social and emotional wellbeing of Aboriginal and Torres Strait Islander Queenslanders.

Human rights protections provide safeguards for people when, for whatever reason, they experience compromised mental health and wellbeing and become vulnerable to discrimination and social exclusion.

... for people living with mental illness

People experiencing mental illness are more likely to:

- **Be subject to involuntary treatments and restrictive practices** – human rights legislation can protect against inhuman and degrading treatment.
- **Have shorter life expectancies and experience poor physical health** – human rights include the right to enjoyment of the highest attainable standard of physical and mental health and right to life.
- **Come into contact with the criminal justice system** – human rights include the right to a fair hearing, the right to legal advice and representation, the right to procedural fairness, the right to an expeditious hearing and the right to equality before the law.
- **Have difficulty accessing services** – human rights can include the right of all people to access services including housing, education and training.
- **Have difficulty obtaining and retaining employment** – human rights include the right of all people to equal opportunity.

During episodes of acute illness, a person with mental illness may be unable to assert their rights at the very time when those rights may be most vulnerable to being breached. There are occasions when a person's mental illness becomes severe and they are unable to consent to treatment, and if subject to criminal

proceedings may be of unsound mind or unfit for trial. On these occasions involuntary treatment including involuntary detention in hospital may be the best option our society can offer.

The Queensland Mental Health Commission has recently provided significant advice to the review of the *Mental Health Act 2000* to create a contemporary law that has a much stronger focus on respecting and protecting the human rights of patients. For involuntary patients, protections provided in the soon to be implemented *Mental Health Act 2016* provide an important safeguard to human rights violations. The use of seclusion and restraint and some forms of treatment are heavily regulated as they are recognised as being contrary to human rights and should be used only in the rarest of occasions. But this is not enough. The vulnerability of the patients this law protects means extra safeguards are required to uphold their rights.

Furthermore, this law is primarily about protecting people who have a mental illness who do not have the capacity to consent to be treated and those who have broken the law and are found to be of unsound mind. However, the vast majority of people who experience mental illness do not fall into this category and therefore are not covered by the human rights protections within the Act. People with mental illness outside the health and judicial systems are just as vulnerable to poor treatment. It is estimated, for example, that that 20% of all suicides are people who have already exited the health system⁴ and twice as many Queenslanders with mental illness experience discrimination or unfair treatment as a personal stressor compared to all Queenslanders.⁵

Stigma lies at the root of many human rights violations. Stigma affects people with mental illness but also people who do not have a mental illness but who, for whatever reason, may have been diagnosed with or treated for a mental illness at some time. This impacts perceptions of employers and others in the community and can limit the individual's capacity to gain an education or position commensurate with their abilities. The Queensland Government for instance issued an apology in February 2010 to 'those who as children in the care of the State of Queensland suffered in any way while resident in an adult mental health facility ... (acknowledging) that for some, such placements led to an incorrect diagnosis of mental illness, which has had a significant impact on their lives'.

Because human rights apply to everyone, people who experience mental illness are covered by protections whether or not they have a diagnosed condition, whether or not they have ever been treated and whether or not they are currently unwell. It also addresses common manifestations of stigma such as discrimination and inhumane or degrading treatment.

... for people living with problematic alcohol and other drugs use

The World Health Organisation indicates that people living problematic alcohol and other drug use can be subject to stigma and discrimination at very high levels. For example, illicit drug use is considered to be the most stigmatised condition in the world.⁶

Discrimination relating to problematic alcohol and other drug use can lead to and compound existing social disadvantage having a detrimental impact on recovery.

All people who experience problematic alcohol and other drug use have a right to services that support their recovery. Human rights are central to modern, recovery-oriented mental health practices that foster dignity, respect and choices and empower individuals to be at the centre of the care they receive. A Human Rights Act would provide a safety net for all people who do, or may, experience problematic alcohol and other drug use during their lives and thus become vulnerable to discrimination and other human rights abuses.

EXISTING HUMAN RIGHTS PROTECTIONS

The Australian Constitution and Commonwealth laws and policy

Unlike many Western countries, Australia does not have a federal bill of rights or similar legislation. A handful of rights are enshrined in the Constitution, including the right to vote (s41), the right to freedom of religion (s116), the right to trial by jury (s80). Additionally, some rights are protected in the form of Commonwealth legislation, such as:

- *Australian Human Rights Commission Act 1986*
- *Sex Discrimination Act 1984*
- *Racial Discrimination Act 1975*
- *Disability Discrimination Act 1992*
- *Age Discrimination Act 2004*

Under the *Australian Human Rights Commission Act 1986* (Cth) the Australian Human Rights Commission has a range of powers to look at how the federal government is meeting its human rights obligations. This includes:

- resolving complaints of discrimination or breaches of human rights under federal laws
- holding public inquiries into human rights issues of national importance
- developing human rights education programs and resources for schools, workplaces and the community
- providing independent legal advice to assist courts in cases that involve human rights principles
- providing advice and submissions to parliaments and governments to develop laws, policies and programs
- undertaking and coordinating research into human rights and discrimination issues.

In 2010, the Commonwealth rejected a recommendation by a National Human Rights Consultation Committee to establish a bill of rights and instead introduced an Australian Human Rights Framework. This is a policy package that involves:

- a Parliamentary Joint Committee on Human Rights (Joint Committee) to look at whether federal laws comply with international human rights law – this follows the model in Victoria and the Australian Capital Territory (ACT)
- a requirement that each new Bill introduced into Federal Parliament is accompanied by a Statement of Compatibility with Australia's international human rights obligations
- a requirement to review legislation, policies and practice for compliance with the seven core international human rights treaties to which Australia is party
- human rights education for the federal public service and the community
- the development of a new National Action Plan on Human Rights to outline future action for the promotion and protection of human rights.⁷

The Australian Government has also introduced an *Australian Mental Health Statement of Rights and Responsibilities* (2012) that states that mental health legislation should comply with international human rights principles. The statement seeks to ensure that consumers, carers, support persons, service providers and the community are aware of relevant rights and responsibilities and can be confident in exercising them.

International treaties

Australia has ratified seven main international human rights treaties: the International Covenant on Civil and Political Rights (ICCPR); International Covenant on Economic, Social and Cultural Rights (ICESCR); International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); Convention on the Elimination of Discrimination Against Women (CEDAW); Convention on the Rights of the Child (CRC); Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); and Convention on the Rights of Persons with Disabilities (CRPD).

Key treaties for the protection of people with mental illness include the International Covenant on Civil and Political Rights (ICCPR) which covers rights like the right to life; equality before the law; freedom of expression; and freedom from torture, other cruel treatment and arbitrary detention, and the International Covenant on Economic Social and Cultural Rights, which explicitly recognise the right of everyone to the highest possible mental health care. Article 12, states:

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

Another important treaty is the Convention on the Rights of Persons with Disabilities, which Australia signed in 2008. Under this treaty, Australia is bound to provide:

- the same range, quality and standard of free or affordable health care and programs as provided to other people
- the same quality of care by health professionals as others, including free and informed consent, dignity and autonomy
- health services as close as possible to people's communities, including in rural areas.

Australia has also ratified the Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care (United Nations General Assembly, 1991), which reinforces the rights enshrined in these International Covenants and provides guidance as to how those rights ought to apply to people with mental illness.

- Principle 8(1) makes clear that people with mental illness have the right to the same standard of health care as other ill persons.
- Principle 14 states that mental health facilities should have the same level of resources as any other health facility.
- Principle 7 emphasises the right to be treated and cared for as far as possible in the community.

Treaties and international declarations of principles oblige countries to promote and protect the human rights enshrined in these documents. However, they require appropriate action within each country to be implemented. One way that Australia and other countries have tried to promote accountability on human rights issues is by establishing human rights commissions. All signatory countries have to report periodically to the UN Human Rights Committee to show how they are meeting their human rights obligations. Recommendations are made to the reporting country on how to improve their human rights but it is up to the country whether they wish to accept and act on those recommendations.

State legislation

Queensland currently protects the human rights of people with mental illness through the *Anti-Discrimination Act 1991* and the soon to be implemented *Mental Health Act 2016*.

Queensland Anti-Discrimination Act

The aim of the Act is to promote equality of opportunity for everyone by protecting them from unfair discrimination in certain areas of activity and from sexual harassment and certain associated objectionable conduct. The principles contained in the *Anti-Discrimination Act 1991* are derived from international human rights treaties. The Anti-Discrimination Commission Queensland has a responsibility under the Act to promote the understanding and acceptance of human rights in Queensland. It does this through:

- complaint management and resolution
- education and training
- research and publications
- submissions to state and federal bodies, and
- community engagement.

Queensland's Mental Health Act 2016

Mental health legislation is required to ensure a regulatory framework for mental health services and other providers of treatment and care, and to ensure that the public and people with a mental illness are afforded protection from the often-devastating consequences of mental illness.

The new *Mental Health Act 2016* introduces a range of additional protections for people with mental illness. It adopts a recovery-oriented, least-restrictive approach which respects and protects the human rights of patients. Human rights are also advanced through additions such as:

- Inclusion of a 'nominated support person' rather than an 'allied support person' to enable people to choose who supports them when they are not well
- Inclusion of independent Patient Rights Advisors to ensure that patients and their support persons are advised of their rights and responsibilities under the Act and help the patient communicate their wishes
- Greater oversight over requirements for people to have a mental health examination
- Strengthened provisions to respect patient's choices for treatment outlined in their advance mental health directives
- A statement of rights to be prepared by the mental health service which is provided to and explained to patients and support persons
- Replacement of the position of Director of Mental Health Services with the independent position of Chief Psychiatrist to protect the rights of patients in mental health services.

These inclusions offer a strong basis for the protection of human rights for people covered under the Act. The Queensland Mental Health Commission is undertaking further work to identify policies and processes that provide support for patients to exercise their rights under the Act. However, in submissions to the legislative review, the Commission has also made reference to the United Nations Convention on the Rights of Persons with Disabilities (UN CRPD) and the expectation that patients can raise concerns with an officer outside the system. This is consistent with the United Nations Optional Protocols on the Convention on Torture, which require jurisdictions to provide external oversight of all places where people are deprived of their liberty, such as prisons and psychiatric hospitals.

WHY HAVE A HUMAN RIGHTS ACT

1. An overarching human rights framework

There is no overarching framework that articulates how Queensland is meeting its human rights obligations to people experiencing mental illness. Responsibility rests with a number of agencies, operating without formal linkages or structures, many of which are not covered explicitly by the Mental Health Act. With no centralised reporting or oversight, there is little capacity to distinguish between failures at an individual service level and those that are indicative of systemic weaknesses.⁸

A Human Rights Act and associated reporting arrangements could provide a common basis for decision-making and service provision for all public authorities as well as feedback on how rights are being protected and where further action might be required.

2. Stronger oversight when making laws

Queensland is more vulnerable than other jurisdictions to abuses of process because it has only one house of parliament. There is no upper house to review the laws passed by the House of Representatives as in other states, where this mechanism acts as a fetter on government power as well as a forum of debate. While the Committee process exists to consider legislation in Queensland, the full and frank debate that occurs in the tradition Upper House is not public and cannot therefore provide the community with detailed argument of the pros and cons of aspects of legislation.

A Human Rights Act would protect Queenslanders by explicitly requiring law-makers to consider the human rights implications of legislation, compensating to some extent for the having fewer checks on government power.

A Human Rights Act may well lead to ongoing changes to some laws, leading to uncertainty. For example, if the new Mental Health Act is found to be incompatible with a Human Rights Act, the court would be able to issue a declaration of incompatibility and refer the law back to the Parliament for review. Also, any amendments to the Mental Health Act would need to go through an extra process of being assessed for compatibility with the Human Rights Act. This does not mean incompatible laws will necessarily change. There would usually be provision for an override declaration in cases where legislation remains in effect despite it being incompatible. Such declarations would only be made in exceptional circumstances and would need to be justified by the member introducing the Bill.

While this process adds complexity to the legislation-making process, it also means that mental health legislation can be transparently judged against agreed human rights criteria, which are embedded in a Human Rights Act. This allows governments and individuals to make an informed assessment whether for example, human rights need to be curtailed to a greater or lesser extent in the interests of public or individual safety.

3. Extra safeguards for involuntary patients

Treatment for mental illness and oversight of that treatment has made significant progress in the last 50 years, but there are many people living today who have stories of forced treatment that is now outlawed.

However, involuntary treatments and use of mechanical restraint and seclusion are still permissible in Queensland under prescribed circumstances. While these practices are highly regulated under the *Mental Health Act 2016* and all efforts have been made to reduce their use, they are still controversial because they limit a person's human rights and need the utmost oversight to ensure practices are reasonable, necessary, justified and proportionate. Concerns about privacy, freedom of movement and cruel or degrading treatment aside, of overall health and incidences of deaths among people detained and treated involuntarily means their rights to highest possible standards of health needs to be carefully monitored.

The United Nations has recommended that Australia repeal all legislation that "authorizes medical intervention without the free and informed consent of the persons with disabilities concerned, committal of individuals to detention in mental health facilities, or imposition of compulsory treatment, either in institutions or in the community, by means of Community Treatment Orders".⁹ While this statement is a recommendation and is not legally binding, it clearly establishes that mental health laws that enable the involuntary detention of those with mental health problems are considered at an international level to be in breach of the right to liberty.

The new *Mental Health Act 2016* provides extra protections for patients, including a statutory position for an independent Chief Psychiatrist to protect the rights of patients in authorised mental health services and investigate matters under the Act. However, there are still weaknesses in the independence of the system. For example, Hospital and Health Services are not required to report back if and how issues raised by Community Visitors addressed. Community Visitors are charged with independently monitoring authorised mental health services on behalf of patients to protect their rights and prevent abuse. A Human Rights Act would provide a safety net for involuntary patients where there are gaps in policy and legislative protections.

4. Fairer access to programs and services

Government program and service program delivery is critical to the mental health and wellbeing of Queenslanders as well as the recovery of people living with mental illness or problematic alcohol and other drug use. Two out of five Queenslanders with a mental health condition have difficulty accessing services, and some groups are missing more than others due to a range of barriers:

- **Rural and remote residents:** proper access to well-resourced mental health services in rural and remote areas has been an ongoing problem in Australia and Queensland.¹⁰ Timely diagnosis, treatment and ongoing management of a mental health condition in rural and remote areas is likely to occur later or not at all, sometimes leading to tragic of outcomes.¹¹ The suicide rate for Queenslanders living outside urban centres is 17.1 per 100,000 versus 10.8 in Brisbane.¹²
- **Asylum seekers:** there is a high prevalence of mental health concerns experienced by asylum seekers as a result of social isolation due to language difficulties; the experiences that people are fleeing from; and the process of detention itself. Up to 1,300 new asylum seekers a month are being accommodated just in the greater Brisbane area.¹³ Asylum seekers currently struggle to access sub-acute mental health care services for a range of reasons, including inappropriate service models, limited resourcing and lack of capacity and cultural understanding.¹⁴ The recent conviction for 'attempted suicide' of an asylum seeker in the Nauru detention centre brings a stark reality to the rights of people seeking asylum in Australia.¹⁵
- **Aboriginal and Torres Strait Islander Queenslanders:** The rate of suicide among Aboriginal and Torres Strait Islander Queenslanders is seven per cent higher than the rest of Australia more than twice that of the non-Indigenous population.¹⁶ At least one mental health condition was recently found to be present in 73% of male and 86% of female Indigenous prisoners in Queensland.¹⁷ While Indigenous Australians use mental health services at higher rates than other Australians, it is hard to assess whether this use is as high as the underlying need.¹⁸

A Queensland Human Rights Act could reflect the obligations under the UN for the Rights of Persons with Disabilities which recognises “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health” with obligations to provide these health services as close as possible to people's own communities, including in rural areas. This would provide a safeguard for asylum seekers, rural and remote residents, Aboriginal and Torres Strait Islander people and other disadvantaged groups with mental illness who are denied proper treatment due to insufficient resources or not being fairly prioritised. Consideration of human rights in the design and delivery of services has the potential not only to increase access but also to provide more cost-effective services.

5. Better legal representation and advocacy support

While patients currently have the right to be represented by a lawyer at Mental Health Review Tribunal hearings, the rates of legal representation in Queensland are among the lowest in the country. The Tribunal may appoint a lawyer or another person if it considers it would be in the person's best interests but it is not required except under special circumstances (e.g. for a child or in relation to approval to perform electroconvulsive therapy). Access to skilled lay assistance to prepare for a hearing and speak on a patient's behalf is important for ensuring natural justice and protecting human rights. In 2012-13, only two per cent of Queensland patients on Involuntary Treatment Orders or Forensic Orders were legally represented at hearings.¹⁹ Cost is often a barrier. In New South Wales and the Northern Territory, on the other hand, nearly all patients are legally represented. These jurisdictions offer free legal representation for involuntary mental health patients.

A Human Rights Act would provide rights to a fair hearing and ensure all patients receive the right to good legal representation as part of the right to equality before the law, whether they can afford it or not. The Act could reflect the Convention on the Rights of People with Disability which requires parties to provide access by persons with disabilities or mental illness to the support they may require in exercising their legal capacity.

THE RIGHT DESIGN AND SUPPORT FOR IMPLEMENTATION

Inclusion of economic, social and cultural rights

After the Universal Declaration of Human Rights (UDHR) was adopted in 1948, two treaties were drafted, the International Covenant and Civil and Political Rights (ICCPR) on which the Victorian Charter and the ACT Human Rights Act are based, and the International Covenant on Economic Social and Cultural Rights (ICESCR), which includes rights like the right to work, the right to education and the right to participate in cultural life.

The official position within the United Nations is that economic, social and cultural rights and civil and political rights are interdependent and indivisible. This means that one set of rights does not have priority over the other and one set of rights cannot be enjoyed in a meaningful way if the other set of rights is also not enjoyed. For example, the right to vote and participate in public affairs will be weakened if an individual is denied food and water or deprived of the right to an education. The right to freedom from inhuman and degrading treatment will be compromised by a lack of adequate housing and access to health care.²⁰

There is a view that the full realisation of many economic, social and cultural rights will be expensive. For example, the right to the highest attainable standard of mental health requires investing in the medical and community facilities to ensure that people who need it have access to treatment and supports. However, there is provision under the ICESCR that takes account of the resources available to the state. It requires states to move as expeditiously as possible towards the full realisation of each economic, social and cultural right, *in light of available resources*.²¹

Some of these rights are already protected under other legislation, (e.g. equal opportunity laws), not all international economic, social and cultural rights come under the purview of state legislation (e.g. marriage, trade unions) and there are legal issues in regulating some rights. Nevertheless, a Western Australian Human Rights Committee found those that should be included in state human rights legislation are the right to the highest attainable standard of health; the right to an education; the right to adequate housing; and the right to take part in cultural life.²² The National Human Rights Consultation Committee concluded priority should be given to the right to an adequate standard of living (including adequate food, clothing and housing); the right to the enjoyment of the highest attainable standard of physical and mental health and the right to education.

The ACT is the first Australian jurisdiction to legislate for an economic, social and cultural right. In 2013, it introduced the right to education into its Human Rights Act. It has also recently committed to incremental inclusion of other economic, social and cultural rights. The 2015 review of the Victorian Charter has recommended economic, social and cultural rights be considered in the next review of the Charter. Health, housing and education were specific concerns raised.

People with mental illness or problematic alcohol or other drug use would benefit from elevating accessibility to social services, particularly around health and housing, to the status of rights worthy of inclusion in a Human Rights Act. This would create a system of accountability in which public authorities would be formally directed to pursue the realisation of these rights. Furthermore, many studies show that the longer term economic impact of providing access to health, education and housing services as soon as the need is identified results in significant savings in the longer term.

Accessible and effective remedies

The right to an effective remedy is an essential component of human rights under the International Covenant of Civil and Political Rights and other human rights instruments because even when appropriate legal and other measures to protect and promote human rights are in place, breaches can occur.

A key recommendation of the 2015 Victorian review was that providing for rights without remedies sends mixed messages about the importance of human rights. Currently, the Victorian Charter can only be enforced in a complicated way, typically through legal action in the Supreme Court. The review recommends sensible changes to make it simpler, easier and cheaper to protect human rights by giving community members access to dispute resolution at the Victorian Equal Opportunity and Human Rights Commission, and an avenue to have the Victorian Civil and Administrative Tribunal decide whether their rights have been breached. People could continue to raise the Charter in other legal proceedings where relevant.

The review found that if this change did not happen the system would continue to be flawed as the focus would be on government administration, rather than remedies for individuals and the Charter's use would be limited because many people would not have the resources pursue their human rights breaches in the Supreme Court.

Queensland should learn from this experience and ensure that legislation provides for a direct cause of action to the Queensland Civil and Administrative Tribunal for breaches of the Act, in line with the ACT's Human Rights Act. This would allow people to raise breaches easily in a low cost way that allows just and appropriate remedies to be available.

It is important to note in this context that the most vulnerable might be less likely to assert their human rights without empathetic supports. Studies have shown for instance that people are far less likely to complain about a mental health service than a general health service.²³ Thus some in our community may require assistance to raise breaches of their human rights and this should be provided by the State where appropriate.

Broad coverage

The need to consider human rights in program and service delivery should be extended to all services funded directly and indirectly by the State including those delivered by private and non-government organisations. This is particularly important given the trend towards outsourcing service delivery to organisations outside of government for example through the National Disability Insurance Scheme (NDIS).

The review of the Victorian Charter highlighted that while currently disability service providers that operate under contract to the Victorian Department of Health & Human Services have obligations under the Charter as public authorities, under the NDIS, they will no longer have these obligations. Core public authorities such as the Departments will continue to be bound by the Charter but 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 after the full transition to the NDIS.

To ensure people are protected under the new arrangements a Human Rights Act in Queensland would need to define public authorities broadly enough to include all private and not-for-profit organisations providing disability support services.

Fostering a human rights culture

Stigma about mental illness is a significant barrier to help seeking and accessing support.²⁴ The World Health Organisation lists legislation on the rights of persons with mental disorders as one of the eight key measures to combat stigma.²⁵ If over time, a Human Rights Act can create a culture of understanding and respect for human rights this will help reduce the stigma and negative perceptions associated with mental illness.

The Act will require significant support to realise its potential for cultural change. The 2015 review of the Victorian Charter concluded that having the law was not enough and that Victoria also needs a culture that makes human rights real in people's everyday interaction with public authorities. It found that improving people's understanding of human rights, how they are protected and what they mean for individual and collective responsibilities is vital to developing a good human rights culture and recommended building knowledge and capacity amongst ministers, senior public servants, supervisors and staff and the legal sector as well as better educating the community and the private sector about rights.²⁶

CONCLUSION

A Human Rights Act will help address gaps and weaknesses in current arrangements; provide a basis for strengthening and harmonising mental health legislation that impacts on vulnerable people including those living with mental illness and problematic alcohol and other drug use; and, if adequately supported, encourage a culture of human rights within organisations performing public functions. This will undoubtedly bring improved outcomes over time for Queenslanders who experience mental illness or are living with problematic alcohol or other drug use.

A Human Rights Act in Queensland should draw on lessons from the reviews of the ACT and Victorian Acts, including:

- providing accessible remedies for breaches of human rights
- including economic, social and cultural rights, such as adequate healthcare, education and housing
- investing in educational resources to support understanding of rights amongst individuals, parliamentarians and public authorities and to promote a human rights culture in Queensland
- using a broad definition of the public authorities to ensure organisations funded by the State Government to deliver services for example under the NDIS are within scope.

It is also important that people with lived experience are involved in the design of the legislation and that safe language guidelines and patient care protocols are applied in the drafting of this legislation and associated policy documentation to ensure appropriate terminology and safe, non-stigmatising wording is used.

APPENDIX 1

Human Rights legislation in Victoria and the ACT

The ACT Human Rights Act 2004

The ACT's *Human Rights Act 2004* protects some civil and political rights (recognition and equality before the law, right to life, protection from torture and cruel, inhuman or degrading treatment, protection of the family and children, privacy and reputation, freedom of movement, freedom of thought, conscience, religion and belief, peaceful assembly and freedom of association, freedom of expression, taking part in public life, right to liberty and security of person, humane treatment when deprived of liberty, the rights of children in the criminal process, fair trial, rights in criminal proceedings, compensation for wrongful conviction, the right not to be tried or punished more than once, rights in relation to retrospective criminal laws, freedom from forced work, rights of minorities) and one economic, social and cultural right (right to education). Under the Human Rights Act:

- courts and tribunals (and other decision-makers) must adopt, where possible, a human rights consistent interpretation of ACT laws.
- the Supreme Court is empowered to issue a declaration of incompatibility, declaring a law incompatible where such an interpretation cannot be adopted.
- a person who alleges that a public authority has breached a human right can apply to the Supreme Court for relief, and the Supreme Court may grant 'the relief it considers appropriate' except for damages. A person may also rely on the unlawfulness of the conduct of the public authority in other legal proceedings in ACT courts and tribunals.
- government bills must be assessed for Human Rights Act consistency before being introduced.
- the Attorney-General must table human rights audit reports by the Human Rights Commissioner in the Legislative Assembly.
- public authorities are obliged to comply with human rights in decision making.
- government departments and public authorities are accountable to the Legislative Assembly by reporting on the steps taken to implement the Human Rights Act.
- the Attorney-General is required to conduct mandatory reviews of the Human Rights Act and report to the Legislative Assembly.

Box 2: Case studies from the ACT

- The decision to evict a man and his three kids from crisis accommodation – which would have resulted in homelessness – was found to be an interference with his human rights and the Tribunal did not allow the eviction.
- A human rights audit into correctional centres resulted in changes to the treatment of women detainees, and in particular, a significant reduction in routine strip searching. It also informed design of new, more Human Rights based detention centre.

Reviews of the ACT Human Rights Act

The Act has been subject to three mandated reviews since 2004, the most recent of which was tabled in the ACT Legislative Assembly on 25 November 2014. After the first review the Human Rights Act was amended to introduce a duty on public authorities to comply with human rights, and an independent right of action in the Supreme Court for breaches of this duty, without entitlement to claim damages. A 2010 review resulted in the introduction of a right to education, the first jurisdiction in Australia to express recognition of a socio-economic right. It also found that there was a lack of understanding by the legal profession of the provisions of the Human Rights Act, and their potential application and that '[un]til the courts fully grasp their part in the human rights conversation, there will remain some question as to the Human Rights Act's ability to generate dialogue between the courts and legislature, and to provide accountability for the Government's implementation of human rights'.²⁷

In 2014, the ACT Human Rights Commission in reflecting on 10 years of the Act, found that although the Act is routinely raised in ACT courts and tribunals it has rarely made a difference to cases and that the direct right of action in the Act remains under-utilised and it may be a remedy that is out of reach for the vast majority of people in the community. They believe that a key factor contributing to the limited success of the Human Rights Act before the ACT courts and tribunals is the lack of clarity regarding the extent to which civil and administrative tribunal and lower courts may assess and remedy breaches of public authority obligations under the Human Rights Act. The Commission is also of the view that the availability of damages under the Human Rights Act would assist genuine claimants who may otherwise be deterred by the cost and time involved in pursuing test case litigation.

The Human Rights Act is seen to have had a positive impact on the quality of law-making in the Territory due to the statement of compatibility for each new bill and there are signs that it has made a genuine cultural difference to the way the Legislative Assembly works. It is also thought to have made a significant impact in policy formulation, although there has been no systemic measurement of this. The Commission recommends intensive and ongoing training on the HR Act should be implemented across Government.

The Victorian Charter of Human Rights and Responsibilities Act 2006

The Victorian Charter protects civil and political rights (recognition and equality before the law, right to life, protection from torture and cruel, inhuman or degrading treatment, freedom from forced work, freedom of movement, privacy and reputation, freedom of thought, conscience, religion and belief, freedom of expression, peaceful assembly and freedom of association, protection of families and children, taking part in public life, property rights, right to liberty and security of person, humane treatment when deprived of liberty, rights of children in the criminal process, fair hearing, rights in criminal proceedings, right not to be tried or punished more than once, rights in relation to retrospective criminal laws) and some cultural rights including the collective right of Aboriginal peoples to enjoy their identity and culture, to maintain and use their language, to maintain their kinship ties and to maintain their distinctive spiritual, material and economic relationship with land and waters and other resources that they have a connection to under traditional laws and customs.

The Charter protects human rights in Victoria in three main ways:

- Public authorities in state and local government must act in ways that are compatible with human rights
- Government and Parliament must consider human rights when developing new laws
- People and public institutions, including the courts, must interpret and apply all laws in a way that is compatible with human rights, as far as possible.

The Charter applies to state and local government, but not federal government agencies operating in Victoria. It puts obligations on private entities only if they are performing public functions (such as under a contract to provide government services) but not in their non-governmental activities.

The courts must interpret laws in a way that is compatible with human rights, as far as possible. If they cannot, the Supreme Court can issue a declaration of inconsistent interpretation to say a law cannot be interpreted consistently with the human rights in the Charter. This declaration is sent to the Victorian Government, which then reports to Parliament about it. Such a declaration from the Supreme Court does not make the law invalid; rather, it is a flag for the Government and Parliament so they can review and change the law if they choose.

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. People can make complaints about human rights issues to the Victorian Ombudsman and the Independent Broad-based Anti-corruption Commission (IBAC) where those bodies have jurisdiction. The Victorian Equal Opportunity and Human Rights Commission cannot take human rights complaints and offer dispute resolution under the Charter.

The rights in the Charter are not absolute. That is, they can be subject to reasonable and proportionate limitations when those limitations can be justified as part of living in a free and democratic society. In this way, the Government and Parliament may continue make decisions on behalf of the community about how best to balance rights, how to protect Victorians from crime, and how to use limited government funds for competing demands.

Box 3: Case studies from Victoria

- A man's Involuntary Treatment Order went for two years without being reviewed and his Community Treatment Order went for one year without being reviewed. The Mental Health Act includes timelines for review but is silent on the consequences of failure to review ITOs and CTOs within the legislated timelines. It was submitted that exceeding the time limit meant that the safeguards in the system had failed and the man's human rights had been breached.
- A disability support worker who had been dismissed from employment after dragging a person with an intellectual disability across a carpeted hallway appealed his dismissal. The Supreme Court upheld the dismissal in part because the worker was found to have breached the right to freedom from cruel, inhuman and degrading treatment.
- A community health service had a policy that enabled staff to refuse treatment for clients considered to be 'aggressive'. A complaint was lodged and it was found that this policy was non-compliant with the Charter. Following this finding, the service reviewed all of its policies and processes. Significant changes were made to ensure that their new policies were inclusive and reflected a human rights culture, including developing a new client engagement policy.

Reviews of the Victorian Charter

The Victorian Charter has been reviewed twice. The first review after four years of operation found that legislative protection of human rights provides a tangible benefit for Victorians. An eight-year review was completed towards the end of 2015.

A key recommendation of the review was that providing for rights without remedies sends mixed messages about the importance of human rights. Currently, the Charter can only be enforced in a complicated way, typically through legal action in the Supreme Court. The review recommends sensible changes to make it simpler, easier and cheaper to protect human rights by giving community members access to dispute resolution at the Victorian Equal Opportunity and Human Rights Commission, and an avenue to have the

Victorian Civil and Administrative Tribunal decide whether their rights have been breached. People could continue to raise the Charter in other legal proceedings where relevant.

The review found that if this change did not happen the system would continue to be flawed as the focus would be on government administration, rather than remedies for individuals and the Charter's use would be limited because many people would not have the resources pursue their human rights breaches in the Supreme Court.

The cultural value of the Charter was recognised by the review but it found that more needed to be done to promote the human culture through investing in education and organisational capacity within Government.

The review also recommended that the next four-year review consider the addition of new economic, social and cultural rights, such as adequate healthcare, education and housing, to complement the existing civil, political and cultural rights in the Charter.

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