Queensland Public Interest Law Clearing House Incorporated

Submission to the National Human Rights Consultation

June 2009

Prepared by the Queensland Public Interest Law Clearing House Incorporated

PO Box 3631
SOUTH BRISBANE BC QLD 4101

T: 07 3846 6317
F: 07 3846 6311
E: contact@qpilch.org.au
W: www.qpilch.org.au

Disclaimer: This submission expresses the views of the Queensland Public Interest Law Clearing House Incorporated (QPILCH) staff and does not necessarily reflect the views of our members.

About QPILCH

Queensland Public Interest Law Clearing House Incorporated (QPILCH) is an independent, not-for-profit incorporated association that brings together private law firms, barristers, community legal centres, law schools, legal professional associations, corporate legal units and government legal units to provide free and low cost legal services to people who cannot afford private legal assistance or obtain legal aid. QPILCH coordinates referrals to members for pro bono legal services in public interest matters and provides direct services – advice, assistance and representation support - through targeted projects, including the Homeless Persons' Legal Clinic, the Administrative Law Clinic, the Refugee Civil Law Clinic and the Self-Representation Civil Law Service.

QPILCH was established in June 2001 as an initiative of the legal profession and commenced services in January 2002.

QPILCH is a member of the Queensland Association of Independent Legal Services, is affiliated with the National Association of Community Legal Centres, and is a member of the PILCH network.

Introduction

QPILCH welcomes the opportunity to contribute its views on human rights in Australia.

QPILCH's primary function is as a law clearing house. This clearing house function involves mobilising and coordinating the legal profession to provide free legal assistance to disadvantaged people.

QPILCH also provides direct legal assistance to disadvantaged people throughout Queensland. These services are provided through the Homeless Persons Legal Clinic, Self Representation Civil Law Service, Administrative Law Clinic and Refugee Civil Law Clinic.

Because of the nature of our service, QPILCH is well placed to comment on the adequacy of the protection of the human rights of marginalised Australians.

In summary, our submissions are as follows:

1. Marginalised Australians experience limited protection of their human rights;
2. QPILCH supports the protection of the full range of rights that are contained in the international treaties that Australia is a party to including the International Convention on Civil and Political Rights and the International Convention on Economic, Social and Cultural Rights by adoption of those rights into Australian law using a "legislative dialogue model" similar to the Human Rights Acts that have been enacted in Victoria, the ACT, New Zealand and the UK;
3. A federal Human Rights Act should be part of a greater movement to create a human rights culture in Australia.
4. The purpose of more clearly defined and accessible rights should be to foster and protect an Australian society where all people are able to live with dignity, equality and respect.

1. Which human rights (including corresponding responsibilities) should be protected and promoted?

QPILCH provides direct legal assistance and legal services to people who are disadvantaged. This disadvantage arises from a variety of circumstances including homelessness, refugee status, poverty, disability and as a result of living in a rural or remote area.

Section 2 of our submission highlights the helplessness and distress that is experienced by QPILCH's clients, which could be lessened by improved awareness, promotion and protection of human rights.

In promoting and protecting human rights the focus and objective should be to foster and protect an Australian society where all people are able to live with dignity, equality and respect.

QPILCH supports the protection and promotion of the human rights that are set out in the Universal Declaration of Human Rights (UDHR).

Australia voted for the UDHR in 1948 and has ratified the International Convention on Economic, Social and Cultural Rights (ICESCR) and the International Convention on Civil and Political Rights (ICCPR). The division of rights into two instruments was the result of historical disagreement between states. Australia supported the incorporation of all the rights contained in the UDHR in one binding instrument.

In contrast to Australia's historic support of the incorporation of all rights contained in the UDHR, recent human rights legislation in Australia has reflected the division of rights according to their division in the ICESCR and the ICCPR. Accordingly, human rights legislation in Victoria and the ACT provide legislative protection of civil and political rights only.

QPILCH recognises that there is a reluctance to protect economic, social and cultural rights through legislation in Australia. It appears that this reluctance is primarily due to the view that it is inappropriate to have issues concerning the allocation of public resources dealt with by the courts. The view is that, consistent with the principles of parliamentary sovereignty and the separation of powers, allocation of public resources should be dealt with by parliament.

QPILCH supports the view that allocation of resources should be dealt with by parliament. However, it is submitted that it is possible to protect economic, social and cultural rights through legislation while maintaining our current democratic processes. As will be discussed in part 3 of our submission, QPILCH supports the enactment of a legislative model that would not allow courts to strike down legislation or order damages as a remedy. Our view is that this legislative model preserves parliamentary sovereignty while requiring government to give

due consideration to human rights and providing individuals with the ability to obtain a remedy in court when their rights are breached.

QPILCH is concerned that any federal human rights act should aim to foster and protect an Australian society where all people are able to live with dignity, equality and respect.

In order to achieve this, the Australian government should, in line with its international obligations, protect and promote civil and political rights and economic social and cultural rights in a uniform fashion in one binding legislative instrument.

2. Are these human rights currently sufficiently protected and promoted?

Through our dealings with our clients QPILCH has direct exposure to the consequences of the inadequate protection and promotion of human rights in Australia.

Following is a discussion, including case studies, of the human rights issues that we consider have particular relevance to our client base.

The right to an adequate standard of living, including adequate food, clothing and housing[1]

QPILCH provides legal assistance to a range of disadvantaged people throughout Queensland. QPILCH has directly assisted many Indigenous Australians to access legal services in relation to matters that are in the public interest. QPILCH has also been involved in law reform activities that specifically relate to Indigenous Australians.

It is well documented that Indigenous Australians experience a profoundly reduced standard of living. Characteristics of Aboriginal communities throughout Australia include inadequate housing and lack of access to affordable quality food and clothing. The housing in Aboriginal communities is often sub-standard and overcrowded. In addition to this, Aboriginal people living in remote locations have an inability to maintain or control the housing that they live in.

Homelessness is widely recognised as a human rights issue[2]. QPILCH's Homeless Persons' Legal Clinic sees firsthand the way in which the human rights of people experiencing homelessness are regularly infringed. Human rights infringements include the denial of a person's 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 be treated with dignity and respect.

QPILCH's Homeless Persons' Legal Clinic sought from its clients and other members of Queensland's homeless community details of their human rights related experiences and will provide these views to the consultation in a separate submission.[3]

The right to the enjoyment of the highest attainable standard of physical and mental health[4]

Through our legal service provision QPILCH has observed that people living in rural and remote areas in Queensland have a reduced ability to access services. QPILCH has undertaken a number of regional rural remote projects that aim to enhance the delivery of pro bono legal services in regional rural and remote Queensland.

---

[1] Article 11 International Covenant on Economic, Social and Cultural Rights (ICESCR)

[2] See for example*, Righting the Wrongs of Homelessness: PILCH Homeless Persons' Legal Clinic submission to the Federal Government's Green Paper: 'Which Way Home?'* 27 June 2008 and the *Human Rights Law Resource Centre Report to and Request for Action from UN Special Rapporteurs* November 2006.

[3] Homeless Persons Legal Clinic Submission to the Human Rights Consultation, June 2009

[4] Article 12 ICESCR

People living in rural and remote areas have a reduced ability to access health services. A particular concern for marginalised people in these areas is access to mental health services including counselling and psychiatric services.

Often the free mental health services that are available in rural towns are "visiting services" with extensive waiting lists. People living in rural and remote areas of Queensland are often required to travel significant distances to access health care services.

The right to education[5]

QPILCH has received applications for legal assistance from individuals who have been excluded from public schools. In some cases there is no cause of action or legal process to challenge this exclusion.

Case Study: Joseph is a high school student. He has a learning disability that has been recognised by medical professionals. Joseph's school had agreed to address his particular disability by conducting a behaviour management program. The school is a public school located in a regional town.

Joseph's school became unable to provide the behaviour management program. A short time later he was permanently excluded from school.

Joseph is from a single parent family. The prohibitive cost of travel to the next closest school in the area means that he is no longer able to attend school.

Joseph is currently working full-time. It is unlikely that he will have the opportunity to finish high school.

QPILCH received a request for legal assistance from Joseph. QPILCH was unable to assist him because there is currently no process that allows the decision of the Department of Education to exclude him from school to be legally challenged.

The right to equality before the law[6] and non-discrimination[7]

In June 1999, the report of the Commission of Inquiry into Abuse of Children in Queensland Institutions was tabled in the Queensland Parliament. The 'Forde Inquiry', as it was known, reported "incidents of unsafe, improper or unlawful treatment of children in many institutions licensed and established under the relevant Acts"[8].

[5] Article 13 ICESCR
[6] Article 26 International Covenant on Civil and Political Rights (ICCPR)
[7] Article 2 ICESCR
[8] Forde Inquiry into the Abuse of Children in Queensland Institutions, May 1999, pages 49 and 277

The terms of reference of the Forde Inquiry did not include children who were placed in institutions under Aboriginal protection legislation. Notwithstanding this, the Forde Inquiry concluded that indigenous children also suffered mistreatment.

A redress scheme was established in response to the Forde Inquiry to compensate those who were mistreated.

QPILCH received a number of applications from Aboriginal people seeking legal assistance in relation to the redress scheme.

Case Study: Gracie was a ward of the state pursuant to Aboriginal protection legislation during the 1940s – 1960s. She was placed on an Aboriginal mission and was subjected to poor treatment including caning and inadequate health care.

Gracie applied for compensation under the Queensland Government's Redress Scheme.

Gracie was deemed to be not eligible for compensation under the Redress Scheme because, although she was subjected to unlawful treatment in a government institution, she was placed in that institution pursuant to Aboriginal protection legislation.

Gracie has no avenue to obtain redress for the treatment that she was subjected to.

From the 1800s until the 1970s Aboriginal and Torres Strait Islanders in Queensland worked under a scheme which meant that their wages were remitted to the Queensland Government. The money was held in "trust accounts" for the benefit of the individuals to whom the funds were to be paid. This meant that indigenous Australians during that period were not permitted to manage their own financial affairs.

In addition to this, Aboriginal workers were paid less than other Australian workers. This was particularly true of Aboriginal people working on Aboriginal reserves and missions, where until as late as 1986, Indigenous workers were paid at below-award rates.

The accounts that the Queensland government kept in relation to the wages of Aboriginal people were not complete and, due to administrative errors and possibly misappropriation of funds, in many instances Aboriginal people did not receive the full value of their wages.

In response to the "stolen wages" issue, the Queensland government decided that a total amount of $55.4million would be made available and that this money would be paid to individuals in small lump sum amounts in settlement of all claims relating to stolen wages.

Through the above response the Queensland government was not required to account for the way that the wages of indigenous workers had been dealt with.

QPILCH received a large number of applications for legal assistance from Aboriginal people seeking compensation for lost wages.

In addition to evidence that people did not receive the full value of the wages that they worked for, QPILCH saw evidence that Aboriginal workers during that time were subjected to a range of cruel and degrading treatment including neglect and inadequate housing. There is no legal remedy to address the appalling treatment that Indigenous Australians have historically been subjected to.

Following the enactment of the *Racial Discrimination Act*[9] some forms of blatant discrimination against Indigenous Australians have ceased. This Act partly implements the International Convention on the Elimination of All Forms of Racial Discrimination[10].

QPILCH submits, however, that the *Racial Discrimination Act* ("the RDA") provides incomplete protection of the right to equality and non-discrimination.

The Northern Territory Emergency Response Legislative Package[11](NTER) broadly exempted the legislation governing the NTER as well as any acts done under or for the purpose of those provisions from the RDA. The practical effect of these exemptions is that if the NTER measures are racially discriminatory, then the usual protections that are afforded by the RDA will not apply.[12]

An example of one of the measures that were implemented by the NTER was that welfare payments for people living in designated Aboriginal communities in the Northern Territory were compulsorily quarantined, even for responsible people who could manage their money and care properly for their children.

The Central Australian Aboriginal Legal Service and the North Australian Aboriginal Justice Agency made the following comment about the implications of the suspension of the RDA:

"The suspension of the Racial Discrimination Act sent a message to mainstream Australia that it was acceptable and appropriate to discriminate against Aboriginal people from the Northern Territory. In Alice Springs, Aboriginal people experienced previously subtle racism

[9] 1975
[10] 1966
[11] *Northern Territory National Emergency Response Act 2007* (Cth); *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth); *Families, Community Services and indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act* 2007 (Cth); *Appropriation (Northern Territory National Emergency Response) Act (No. 1) 2007-2008 (2007)* (Cth); and *Appropriation (Northern Territory National Emergency Response) Act* (No. 2) 2007-2008 (2007) (Cth)
[12] Human Rights Law Resource Centre Submission to the Northern Territory Emergency Response Review Board Practical Implications of the Northern Territory Emergency Response, 15 August 2008 pg 17

becoming overt because the intervention conveyed implicit Government sanction of discrimination against Aboriginal people."[13]

The NTER is one illustration of how the historic discrimination that Indigenous Australians have been subjected to continues because of government policy despite the existence of the RDA.

It is also submitted that the RDA fails to adequately address the issues of substantive equality and systemic and compound discrimination. Australian law provides for numerous exceptions that are inconsistent with international human rights law and entrench stereotypes and perpetuate structural barriers to equality.[14]

QPILCH submits that a national "human rights campaign", comprising of legislation, education and other measures, should acknowledge the atrocities of the past, provide better legislative protection of the human rights of Indigenous Australians and should provide another mechanism to redirect the Australian government's relationship with the Indigenous people of Australia.

The right to family[15]

Through our Administrative Law Clinic QPILCH has received a number of applications from people who have lived in Australia for most of their lives but have not obtained Australian citizenship and who are seeking to appeal a government decision. Currently, these people have no ability to challenge a government decision on the basis that their right to family has not been properly considered.

Case Study: Aaron was born in a developing country to a non-Australian mother and an Australian father. His father legally brought him to Australia when he was ten years old. He has lived in Australia since that time.

Abandoned by his father at a young age, Aaron grew up in the care of a foster family. He learnt only English and identified as Australian. Aaron has strong bonds with his foster family and has no attachment to his country of birth.

Aaron has now lived in Australia for 20 years. He was entitled to become an Australian citizen however, he did not take the necessary steps to formalise his citizenship.

Aaron was convicted of a serious crime and is currently serving time in prison. As a result of

[13] Joint submission by the Central Australian Aboriginal Legal Aid Service and the North Australian Aboriginal Justice Agency to the Senate Select Committee on Regional and Remote Indigenous Communities June 2008 pg 4 http://www.aph.gov.au/SENATE/committee/indig_ctte/submissions/sub24.pdf on 3 June 2009

[14] Human Rights Law Resource Centre, *A Human Rights Act for all Australians,* National Human Rights Consultation Submission on the protection and promotion of human rights in Australia, Page 39.

[15] Article 23 ICCPR

his crime, the Department of Citizenship and Immigration issued him with a notification to cancel his permanent residency visa.

Case Study: As a young boy Ben legally moved with his family to Australia.

Despite growing up in Australia with his entire immediate family and being entitled to obtain citizenship Ben never obtained Australian citizenship.

Ben is currently serving time in prison as a result of being convicted of drug related offences. He has received a notification from the Department of Citizenship and Immigration that they intend to cancel his permanent residency visa once he is released from prison.

The right to liberty of movement[16]

Pursuant to the Queensland *Police Powers and Responsibilities Act 2000* police powers in Queensland include 'move-on powers' that enable the police to issue a direction to individuals or groups to move on or leave any public place in the state.

Case Study: In 2007 Bruce Rowe was arrested in Brisbane after failing to obey a move-on direction that was issued by the police.

The police issued the move-on direction after receiving a complaint from a cleaner. At the time that Mr Rowe was arrested he was homeless and was using public toilets to wash and get changed.

When Mr Rowe did not follow the move-on direction, he was roughly thrown to the ground, heavily knelt on by four officers, handcuffed and charged with failing to comply with a police order.

QPILCH assisted Mr Rowe to obtain legal assistance and he was able to successfully defend the charge.

Notwithstanding Mr Rowe's ability to defend the charges that had been made against him, there was no remedy for the human rights violations that he experienced as a result of his arrest.

In the experience of QPILCH's Homeless Persons' Legal Clinic (HPLC) the powers conferred on the police by the *Police Powers and Responsibilities Act* allow the police to prevent many homeless people from engaging in basic human activities.

[16] Article 9 ICCPR

Case Study: Lucas normally sells magazines on the street in a particular location where he is easily visible to a high number of potential buyers.

Following complaints from an individual in the local area, Lucas has been issued with a number of move-on directions. He has obeyed all these directions even though he believes that he has done nothing to warrant them.

As a result of the move-on directions, Lucas is no longer able to carry on his work as he normally would.

Unless Lucas is arrested as a result of disobeying a move-on direction, he has no ability to challenge the directions.

The right to a fair trial[17]

QPILCH's Self-Representation Civil Law Service (SRCLS) provides assistance to people that are without legal representation in the Queensland Supreme and District Courts. The experience of the SRCLS is that marginalised people are the most likely to need better human rights protection, but are the least likely to have meaningful access to justice.

The SRCLS notes that our judicial system is expensive and inaccessible due to its complexity.

As a result of the Victorian *Charter of Human Rights and Responsibilities Act*[18] the Supreme Court in Victoria was asked to consider the obligations of the Court to ensure a fair hearing to unrepresented litigants in civil matters.[19] The extent of this obligation remains undetermined.

QPILCH submits that the right to a fair trial, including the right to equality before Courts and Tribunals[20] includes an obligation to ensure that people who are unable to obtain legal representation have the ability to understand, access and navigate the justice system.

Case Study: Dora is an elderly disability support pensioner. After defaulting on her mortgage repayments, she was served with a warrant for possession of her home. She became very ill due to the stress associated with the prospect of losing her house. Due to her illness Dora was unable to comply with the warrant.

Dora believes that there are grounds to have the mortgage that she entered into in relation to her home set aside. However, she did not seek legal assistance until she was served with the warrant for possession.

[17] Article 14 and 16 ICCPR
[18] 2006
[19] *Kortel v Mirik and Mirik* [2008] VSC 103 (4 April 2008)
[20] Article 14, ICCPR

Through QPILCH and the pro bono legal assistance of a barrister, Dora had the warrant stayed in the Supreme Court.

Dora's ability to contest the validity of the relevant mortgage is hampered by the fact that she is a self-represented litigant, is unable to access legal aid, has no ability to pay for legal services and has limited understanding of the legal system.

3. How could Australia better protect and promote human rights?

QPILCH submits that marginalised people in Australia experience limited protection of their human rights. This is a result of the combined absence of adequate legislative protection of human rights and the lack of human rights knowledge and culture within Australian society.

A human rights culture would be fostered by:

1. Making a clear legislative statement of the human rights that are protected in Australia;
2. Improving the way that government operates by enacting legislation that would create a transparent human rights dialogue between all arms of government[21] and clearly articulate the responsibilities of each arm of government;
3. Ongoing education and promotion of human rights to:
    a. all arms of government at all levels;
    b. the general public; and
    c. as part of the school curriculum.
4. Developing mechanisms to engage corporations and businesses in the protection, promotion and realisation of human rights;
5. Complementary state human rights legislation.

The above measures should mean that the Australian government and community give greater consideration to human rights and that, when the government fails to act compatibly with human rights, individuals have legal recourse. The aim of these measures should be to create both legal and cultural changes for people in Australia.

A Human Rights Act ("the Act")

QPILCH supports the enactment of a "legislative dialogue model" similar to the models that have been enacted in Victoria, the ACT, the UK and New Zealand. This model would not change our current democratic processes and would preserve parliamentary sovereignty.

The Act would not prevent the Australian government from acting in a way that is incompatible with human rights but would require each arm of government to give appropriate consideration to human rights.

QPILCH supports the enactment of a Human Rights Act that would clearly articulate the distinct roles that are played by each arm of government in the protection and promotion of human rights in Australia. These roles are briefly outlined below.

[21] So that, in the same way that the Victorian *Charter of Human Rights and Responsibilities Act 2006* and the ACT *Human Rights Act 2004* operates, a Human Rights Act would require the executive arm of government to respect human rights in implementing laws and making decisions, require parliament to consider the impact of laws on human rights and allow courts and tribunals to declare that laws are inconsistent with protected rights.

The role of the judiciary

A federal Human Rights Act would require courts exercising federal jurisdiction to interpret laws of the Commonwealth in a way that is compatible with human rights. The Act would state that, in interpreting laws courts could give consideration to human rights jurisprudence in similar, including international, jurisdictions.

In the event that a matter is being heard in the Federal Court and an issue arises as to whether a law is consistent with a human right and the court is satisfied that the law is not consistent with the human right, the court may issue a declaration of inconsistency. A declaration of inconsistency would not affect the validity, operation, enforcement of the law or rights or obligations of anyone.

A copy of the declaration of inconsistency would be provided to the minister that is responsible for administration of the law that has been deemed incompatible. Within a specified timeframe the minister would be required to prepare a written response to the declaration and present it to both houses of parliament and also publish it in the Government Gazette. The purpose of the declaration of inconsistency would be to facilitate human rights dialogue between the judiciary and parliament rather than to invalidate or interfere with the operation of commonwealth laws.

QPILCH acknowledges that, in order for this element of the Act to be constitutional, a declaration of compatibility should only be sought in conjunction with a separate cause of action for other remedies or relief.[22]

QPILCH submits that, to assist the court to determine whether a law is compatible with human rights, the Act should allow the Human Rights Commissioner to intervene in proceedings where human rights issues are raised. The Human Rights Commission currently has the ability to intervene in proceedings with leave of the court. QPILCH submits that these powers should be broadened to allow the Commissioner to intervene 'as a right'. The intervention of the Commissioner would allow the judiciary to make use of the specialised expertise of the Human Rights Commissioner and help to alleviate the concern that the judiciary is ill-equipped to make determinations about human rights.

Much of the resistance to a human rights act in Australia is based around reservations concerning the role of the judiciary in determining human rights issues. While we will address these concerns, it is important not to lose sight of the fact that the focus of the Act is to generate a human rights culture rather than to generate human rights litigation. The Act

[22] Therefore alleviating the concern that if courts were to declare, but not enforce, the inconsistency of legislation, there would be no 'matter' before the court and the declarations would be merely advisory opinions which the court has no jurisdiction to provide.

would be proactive rather than reactive in that it aims to stimulate a transparent human rights discourse and awareness within government.

Concerns have been raised within the Australian community about un-elected judges being given additional powers under a human rights act. This concern is based on the argument that if judges are able to strike down legislation the balance of power between the three arms of government, whereby the judiciary's power is limited to the application and interpretation of laws, will be upset.

The legislative dialogue model that QPILCH endorses does not give courts the power to strike down legislation that is inconsistent with human rights. As previously stated, a declaration of inconsistency will be made by the court when a question of interpretation is raised during proceedings in the Federal Court and the court is unable to conclude that the law in question is consistent with human rights. The purpose of these declarations is not to affect the validity of the legislation or to create additional rights but to alert the Government and the Assembly to an issue of compatibility while preserving parliamentary sovereignty. The discretion to make a declaration of inconsistency will only arise if the court is unable to conclude that the law in question is consistent with the Act.

The power of the judiciary to make declarations of incompatibility has been established in the ACT, Victoria, New Zealand and the UK. In the NZ case of *Moonen v Film and Literature Board of Review*[23] the Court of Appeal said that the question of consistency is a legal one that is incidental to the judicial function of statutory interpretation.

QPILCH does not consider the power to make a declaration of inconsistency to be an inappropriate expansion of the judiciary's current powers. Consistent with the current role of the judiciary being the application and interpretation of laws, the role of the judiciary under the Act is statutory interpretation. Currently Australian judicial review can be regarded as a type of dialogue between the judiciary and the executive. Ideally, the decisions of courts should operate as a feedback mechanism to government.[24]

It is important to note that the strict form of parliamentary sovereignty has never been applied in Australia. This is because, while we have inherited the notion of parliamentary sovereignty and the Westminster system from the UK, we have a written constitution based, in part on the US model. This means that parliamentary sovereignty, being the power of the parliament to make any law whatsoever, has always been limited in Australia by judicial review under

[23] [2000] 2 NZLR 9
[24] Speech by Elizabeth Kelly, A/g CEO Dept of Justice and Community Safety Australian Institute of Administrative Law Forum Human Rights Act 2004: *A New Dawn for Rights Protection?* ACT Legislative Assembly Reception Hall, Wednesday 31 March 2004

the Constitution. Accordingly, there have been many occasions where the High Court of Australia has struck down legislation that is not consistent with the constitution.

Other concerns about declarations of inconsistency is that they could potentially empower courts to make determinations about how government resources should be spent and that they could be used to justify policy decisions that are otherwise inconsistent with human rights. For example, it would be concerning if an action could be brought pursuant to the Act which claims, among other things, that legislation that aims to address the unacceptably high level of disadvantage and social dislocation being experienced by Aboriginal Australians living in remote communities is not consistent with the right to an adequate standard of living. If the Federal Court was unable to interpret this legislation consistently with the right to an adequate standard of living as articulated in the Act the court could, at its discretion, issue a declaration of inconsistency. Using this example, the concerns would be that the judiciary would be making a statement about the allocation of resources and the government could then use the declaration of incompatibility to justify a decision to close Aboriginal communities on the basis that they do cannot afford to provide such adequate resources to these communities as would be necessary to comply with their obligations under the Act.

In order to address this concern it may be useful to look at how the court has approached its interpretative role under the Victorian Act. In *Kracke v Mental Health Review Board & Ors (General)*[25] Justice Bell commenced his decision by setting out the proper approach to interpretation and application of the Victorian *Charter of Human Rights and Responsibilities Act 2006.* He held that there are four broad steps to be followed when applying the *Charter*. The four steps are:

1. Engagement: The determination of whether the relevant statutory provision limits the scope of a human right specified in the Charter;
2. Justification and proportionality: If the legislation does limit the human right, whether the limitation is proportionate and justified under the general limitations provision[26];
3. Reinterpretation: If the limitation is not justified whether it is possible to interpret the legislation compatibly with the human rights under the special interpretive provision in the Charter[27];

[25] [2009] VCAT 646 (23 April 2009)
[26] Section 7(2) of the *Charter of Human Rights and Responsibilities Act 2006* says that a human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into consideration all relevant factors including – the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relationship between the limitation and its purpose and any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve
[27] Section 32(1) of the *Charter of Human Rights and Responsibilities Act 2006* says that as far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.

4. Declaration of inconsistency: If it is not possible to interpret the provision consistently with the relevant human right whether a declaration of inconsistent interpretation should be made.

The concern raised in relation to the potential misuse of declarations of inconsistency and illustrated in the example given relating to the closure of Aboriginal communities can be addressed using the above approach.

1. Engagement

An applicant under the Act would need to show that a statutory provision specifically limits a human right. In relation to the above example it would be difficult to imagine how legislation that had the purpose of addressing the unacceptably high level of disadvantage and social dislocation being experienced by Aboriginal Australians living in remote communities would limit the right to an adequate standard of living. The Applicant would need to be able to demonstrate how the legislation directly limits their right to an adequate standard of living.

If legislation was passed after the Act came into operation, it is important to note that the parliamentarian responsible for the bill that led to the legislation would have prepared and published a Compatibility Statement when it was tabled in parliament. This statement would have outlined whether the legislation complies with human rights and if not, the reasons for this.

2. Justification and proportionality

If the court did determine that the right to an adequate standard of living had been limited by the legislation the Court would then look at whether the limitation could be justified. In the second reading speech of the Victorian Charter it says that the "proportionality test"[28] is needed because "rights should not be generally seen as absolute but must be balanced against each other and against other competing public interests"[29].

The Victorian Act contains both a general limitation provision and also specific limitations in relation to some individual rights. Specific limitations do not reduce the nature of the right but are seen as an indication of what might be considered in determining whether any limitations are reasonable and justified under the general limitations provision.

While the Victorian Act does not protect a right to an adequate standard of living, it is foreseeable that if this right was included in a federal human rights act a specific limitation that relates to the resources of government would be incorporated.

[28] Contained in s7(2)
[29] Victorian, *Parliamentary Debates,* Legislative Assembly, 4 May 2006

Even if the right to an adequate standard of living was not specifically limited by the Act, it is likely that the Court would find that the ability of government to provide resources validly mitigates the right.

Jurisprudence in other jurisdictions shows that courts are very reluctant to interfere with matters pertaining to resourcing. In the UK decision of *R (FH and Ors) v Secretary of State for the Home Dept*[30] Justice Collins dealt with a problem that had occurred whereby past inefficiency and inadequate resources in the Home Office had led to a significant delay. In his judgement Justice Collins stated that there was an implied obligation to deal with asylum cases within a reasonable period of time but that what is reasonable depended upon, among other things, the resources of the government. He concluded that:

"It is only if the delay is so excessive as to be regarded as something manifestly unreasonable and to fall outside any proper application of policy or if the claimant is suffering some particular detriment which the Home Office has failed to alleviate that a claim might be entertained by the Court."

3. Reinterpretation

The second reading speech of the Victorian Charter recognises the traditional role of the courts is "interpreting legislation passed by the Parliament". While not allowing courts to invalidate legislation, the speech says s32(1) allows "courts to interpret statutory provisions in a way which is compatible with human rights contained in the charter, so far as it is possible to do so consistently with the purpose of the statutory provision"[31].

In *Kracke* Justice Bell notes that the Act seeks to preserve parliamentary sovereignty. Accordingly, he notes that interpretation of statutes is a matter for the courts; enactment of statutes and the amendment of statutes are matters for Parliament. He goes on to say that giving a statute a meaning which departs substantially from the fundamental feature of an Act of Parliament is likely to have crossed the boundary between interpretation and amendment. He says that this is particularly true where the departure has important practical repercussions which the court is not equipped to make.

Accordingly, there must be a close relationship between the purpose of the Act of Parliament that is being challenged and the human right that is allegedly being limited. It is also very unlikely that a court would comment on resource allocation given that this would have important practical repercussions.

4. Declaration of inconsistency

[30] [2007] EWHC 1571
[31] Victorian, *Parliamentary Debates,* Legislative Assembly, 4 May 2006

For the reasons outlined above, it is unlikely that an applicant making a complaint about resource allocation would be able to convince a court to make a declaration of inconsistency.

In any event, it has been shown that courts are reluctant to make Declarations of Inconsistency. For example, in Victoria the Supreme Court is yet to exercise this power.

In the UK it has been held that the power to make a declaration of inconsistent interpretation is an "exceptional course"[32] or "measure of last resort"[33]. In *Kracke* Justice Bell notes that if this is the case with the Charter then, whenever possible, a statutory provision should be interpreted compatibly with human rights under the special interpretive obligation in s 32(1).

In summary, as demonstrated above, the Act would not establish an avenue to challenge the way that government uses its resources. The purpose of the Act is to change the way that government performs its existing roles rather than shifting or creating additional power.

It would therefore be very unlikely that a court would make a declaration of incompatibility if the limitation of the right in question was justified by the government's power to allocate resources as it sees fit.

The role of the legislature

The legislature would be required to give formal consideration to human rights in the process of forming legislation. This would be done by requiring the parliamentarian that is responsible for the bill to prepare a Compatibility Statement and by establishing a joint parliamentary human rights committee. Naturally, parliament would also be required to respond to Declarations of Inconsistency from the Court.

Under the Act every bill that is tabled in parliament would be required to be accompanied by a written statement outlining whether the bill is consistent with human rights (a Compatibility Statement). The parliamentarian who is responsible for the bill is to table the Compatibility Statement. The Act should ensure that the Compatibility Statement contains details of whether and how the Bill is compatible with human rights, and if the Bill is inconsistent, the nature and extent of that incompatibility.

The Senate Scrutiny of Bills Committee ("the Senate Committee") currently assesses and reports on proposed legislation with respect to whether bills "unduly trespass on personal rights and liberties". While it can be argued that this means that the Senate Committee will give consideration to human rights, it has been seen that this happens on an ad hoc and in-frequent basis. The reason for this is that the committee is not formally required to consider

[32] *Sheldrake v Director of Public Prosecutions* [2004] UKHL 45; [2005] 1 AC 264, per Lord Bingham
[33] R v A (No 2) [2001] UKHL 25; [2002] 1 AC 24, per Lord Steyn

human rights. There is currently no formal pre-legislative process for the scrutiny of bills for compliance with human rights.

To incorporate human rights considerations into the current pre-legislative process a joint parliamentary human rights committee should be established. The committee would be required to scrutinise bills and subordinate legislation for compatibility with the rights that are protected under the Act, conduct enquiries into human rights issues and assist government to respond to Declarations of Inconsistency. An additional advisor with expertise in human rights law should be assigned to the committee.

The process outlined above would alert legislators to the existence of relevant rights, provide a mechanism for human rights education for legislators and impose obligations that they consider these rights in performing their legislative duties.

The role of the executive

Under this model, public authorities[34] that acted in a way that was incompatible with human rights or failed to give proper consideration to relevant human rights would be exposed to judicial and therefore public scrutiny. A strength of our judicial system is that judges decide in accordance with principle and publish their reasons, a process that government does not always follow.

Nonetheless, QPILCH submits that the executive's obligation should be specific rather than general and that public authorities should be required to:

1. Establish a human rights action plan which would outline how human rights are to be protected, considered and promoted;
2. Monitor compliance with the Act and implementation of the relevant human rights action plan;
3. Report on their human rights compliance including through an annual audit and report, including any complaints received by it; and
4. Develop an internal dispute resolution mechanism for human rights complaints.

The Act should establish a distinct cause of action whereby a person may start proceedings in court against a public authority where there is an alleged contravention of the obligation of the authority not to act in a way that is incompatible with a Human Right under the Act. Such proceedings should be initiated in a court of federal jurisdiction. All people in Australia, not only Australian citizens, should be protected by the Act.

[34] Including any entity performing a function of a public nature, including ministers and their departments, public employees, federal police and private entities performing public duties and excluding the parliament and the court, except where acting in an administrative capacity

QPILCH is concerned that all people in Australia, and particularly marginalised people, have the ability to protect their rights in accordance with the Act. Accordingly, it is submitted that a person should be able to elect to have the matter resolved through a conciliation process in the Human Rights Commission. In addition to this, public authorities should be required to establish internal human rights dispute resolution procedures. Participating in these alternative dispute resolution processes should not preclude a claimant from instituting proceedings in the Federal Court if they are unsatisfied with the outcome of these alternative processes.

A Human Rights Act has the ability to contribute to cultural change and the development of a "rights culture" by clarifying Australia's legal position on human rights.

Australia's current human rights protection is piecemeal and difficult to navigate. It is comprised by the limited protections offered by the constitution, anti-discrimination legislation, the human rights commission and the common law. One comprehensive legislative instrument that articulates which human rights are protected in Australia, who is responsible for protecting those rights and outlines how those obligations are to be exercised will give clarity to human rights discourse and disputes in Australia.

The Act should contain a preamble that sets out the social and legal background of the Act. For example the preamble of the ACT *Human Rights Act*[35] states that:

1. Human rights are necessary for individuals to live lives of dignity and value.
2. Respecting, protecting and promoting the rights of individuals improves the welfare of the whole community.
3. Human rights are set out in this Act so that individuals know what their rights are.
4. Setting out these human rights also makes it easier for them to be taken into consideration in the development and interpretation of legislation.
5. This Act encourages individuals to see themselves, and each other, as the holders of rights, and as responsible for upholding the human rights of others.
6. Few rights are absolute. Human rights may be subject only to the reasonable limits in law that can be demonstrably justified in a free and democratic society. One individual's rights may also need to be weighed against another individual's rights.
7. Although human rights belong to all individuals, they have special significance for Indigenous people—the first owners of this land, members of its most enduring cultures, and individuals for whom the issue of rights protection has great and continuing importance.

[35] 2004

QPILCH supports the incorporation of a similar preamble in a federal Human Rights Act. QPILCH submits that an appropriate name for the act would be the "Human Rights Act".

The articulation and clarification of human rights law in one clear legislative instrument would contribute to the demystification of human rights law in Australia and would therefore contribute to the development of a human rights culture in Australia.

The potential for legislation, combined with complementary education and publicity, to effect social change has been previously demonstrated in Australia. The Commonwealth *Sex Discrimination Act*[36] ("SDA") is an example of this. At the time the Bill was introduced it was met with "horror, caution and premonitions of the end of the world as we know it"[37]. Over 20 years on, much has been achieved by the SDA. For example, the SDA has led to workplace arrangements that enable women to both work in paid employment and have children.[38] The framing of the liability provisions of the SDA has driven change in workplace practices. This applies to recruitment and termination of employment practises and also to sexual harassment. The effect of these provisions has been to encourage employers to adopt preventative policies, which may themselves be indicative of, or which can lead to cultural change.[39]

The ability for human rights legislation to be a catalyst for cultural change in government has been tested in other jurisdictions. The UK, New Zealand, the ACT and Victoria all have human rights legislation based on the "legislative dialogue model" that QPILCH endorses. In Victoria the Human Rights Commission reports annually on the operation of the *Charter of Human Rights and Responsibilities Act* including reporting on cultural changes that have been effected by the Charter. The Victorian Human Rights Commission has repeatedly emphasised that the enactment of the Charter is a catalyst for change in the culture of government – in terms of how government approaches its role and functions, as well as how it builds its relationship with the community.[40]

In 2009, reporting on the 2008 calendar year, the Victorian Human Rights Commission said that reports from agencies and other sources suggest that the understanding of human rights in the Victorian public sector has been amplified and brought into sharper focus by the Charter.[41] Examples of how independent statutory authorities are improving their compliance with human rights are given by the Commission in its report. For example, under the

---

[36] (1984)
[37] Pru Groward *"The Sex Discrimination Act: Looking Back and Moving Forward"* [2004] UNSWLJ 54
[38] Ibid
[39] Ibid
[40] The Victorian Equal Opportunity and Human Rights Commission 2008 report on the operation of the Charter of Human Rights and Responsibilities "Emerging Change" page 43 http://www.humanrightscommission.vic.gov.au/pdf/2008charterreport.pdf at 15 May 2009
[41] Ibid page 5

Victorian *Police Integrity Act*[42] the Director of Police Integrity is now required to ensure that members of the police force have regard to the human rights protected under the Charter. The Commission commented that the Director pursues this role with a high level of co-operation from the Victorian Police and in a highly transparent manner. It notes that the Director's 2008 Annual Report included a section dedicated to ensuring and reporting on compliance with human rights.

Developing a mature human rights culture in Australia will take time. This is especially true because, if Australia does adopt a Human Rights Act, we will be well behind other countries in formally adopting comprehensive human rights instruments. More than 60 years have passed since the signing of the Universal Declaration of Human Rights. The *European Convention for the Protection of Human Rights and Fundamental Freedoms* has also been in force for nearly 60 years. Canada enacted a *Charter of Rights and Freedoms* more than 25 years ago, the United Kingdom adopted its *Human Rights Act* a decade ago and New Zealand enacted its *Bill of Rights Act* in 1990. The experience of these countries shows that building a strong human rights culture and a society where people are aware of and actively assert their rights is a lengthy process. It is, however, heartening to see that within a short time of enactment of the *Charter of Human Rights and Responsibilities Act*[43] the Victorian Human Rights Commission is able to report on real changes in the culture of government both in terms of how it approaches its role and functions as well as how it builds relationships with the community.

Human Rights Education

Cultural change is not effected by legislation alone. Complementary and on-going human rights education is required to ensure the effective implementation of the legislation and to encourage informed human rights dialogue within the community.

The Victorian *Charter of Human Rights and Responsibilities Act*[44] is "grounded in the notion of a human rights dialogue, in which public 'conversation' or exchange of views about human rights takes place between the Victorian community, the government, the Victorian parliament and the Courts."[45] It is expected that a federal Human Rights Act will be grounded in a similar notion.

[42] Section 8(1)(d)
[43] 2006
[44] 2006
[45] The Victorian Equal Opportunity and Human Rights Commission 2008 report on the operation of the Charter of Human Rights and Responsibilities "Emerging Change" page 61 http://www.humanrightscommission.vic.gov.au/pdf/2008charterreport.pdf at 15 May 2009

A survey by Amnesty International in July 2006[46] indicated that 61 per cent of respondents believed that Australia already had a Charter of Rights that protects their human rights. In the same survey 58 per cent of respondents indicated that they had a 'moderate' level of knowledge about human rights.

When QPILCH participated in public roundtable discussions as part of the National Human Rights Consultation our observation was that the consultation operated from a presumption that the Australian public understood:

1. What human rights are;
2. How human rights are currently protected in Australia; and
3. What a federal charter of rights would achieve.

From our observations we are not sure that the above assumptions are correct.

Australia has a duty to commit to providing human rights education. This duty is set out in, among other conventions, the ICESCR.

In order to engage the Australian public in a meaningful human rights dialogue, human rights education needs to occur. Human rights education should be part of the school curriculum and should reflect the development of human rights as inextricably linked to our history as a nation.[47] To complement this measure, all teachers should be provided with human rights training.

In addition to this, all arms of government, including the judiciary and decision makers, should be required to undertake ongoing comprehensive human rights training.

In the event that a Human Rights Act is adopted in Australia, this development should be widely celebrated and a broad public education and media campaign should accompany its commencement and implementation to ensure awareness of the Act and to create a catalyst for cultural change.

Mechanisms to engage corporations and businesses in the protection, promotion and realisation of human rights

In 1948, when the UNHR was drafted, states were regarded as the most powerful potential violators of human rights. Accordingly, human rights law has traditionally only bound states.

As the influence of corporations has increased and the potential of corporations as human rights violators has grown it is now important to consider mechanisms for engaging business

[46] Amnesty International Australia (survey prepared by Roy Morgan Research) 'Anti-Terrorism Legislation Community Survey', August 2006 <http://achtra.anu.edu.au/articles/Anti-terror%20community%20survey%20report.pdf at 11 May 2009

[47] See generally Geoffrey Robertson QC *"Statute of Liberty: How Australians can take back their rights"* Ideas Festival, Brisbane, March 2009 http://www.themonthly.com.au/node/1584 at 14 May 2009

in the human rights dialogue. This should include consideration of whether and how human rights obligations should be imposed on corporations.

QPILCH is a member based organisation. Private law firms and barristers accept referrals from us and provide free legal assistance to disadvantaged people. QPILCH is a clear example of the value to the community of corporations paying attention to their role in the community.

In order to encourage all corporations to give greater consideration to the human rights implications of their actions, some of the measures that have been used in the context of the legal profession to enhance consideration of the broader community should be considered. In particular:

1. Businesses could be required to produce a compliant human rights policy, implementation plan and/or compliance reports as a condition of doing business with the Government; and
2. Professional bodies and large corporations could be educated and encouraged to set aspirational human rights targets to meet or be measured against.

QPILCH supports the inclusion of a meaningful "opt-in" clause within a federal Human Rights Act. The opt-in clause would allow corporations to be voluntarily bound by the Act so that they are restricted from acting in a way that is incompatible with human rights or failing to give proper consideration to a relevant human right. This is the same obligation that would be imposed on public authorities by the Act.

State Legislation

Queensland currently has limited legislative protection of human rights.

Dr Helen Szoke, the Chief Executive Officer of the Victorian Equal Opportunity and Human Rights Commission, has noted that *"at some point everyone is in contact with government services such as education, policing and health services – so it is reassuring that human rights are now considered by agencies responsible for providing these services".*[48]

QPILCH notes that in order for Queenslanders to enjoy the same level of "reassurance" a state based Human Rights Act is required in Queensland.

QPILCH supports the enactment of state based Human Rights Acts in all Australian jurisdictions.

[48] Human Rights Law Resource Centre Bulletin Number 36 – April 2009 page 7

Conclusion

In summary QPILCH:

1. Submits that the human rights of marginalised people in Australia are not currently adequately promoted or protected;
2. Submits that following the ratification of the International Convention on Economic, Social and Cultural Rights and the International Convention on Civil and Political Rights the Australian government has an obligation to promote and protect the rights contained in those instruments, including through legislative protection;
3. Supports the enactment of a federal Human Rights Act that would improve the way that the government operates;
4. Submits that a federal Human Rights Act should be one component of a holistic approach to improving the Human Rights dialogue and fostering a human rights culture in Australia.

QPILCH is pleased to participate in the Human Rights Consultation process and looks forward to continued involvement in a process which should improve the lives of people in Australia and aim to create a society where people are able to live with dignity, equality and respect.