

## ***QUEENSLANDERS' BASIC RIGHTS***

This is an expanded and more detailed version of the handbook of the same name tabled by the committee in Parliament on 18 November 1998. Both versions of this handbook stem from the committee's

Report no 12 *The preservation and enhancement of individuals' rights and freedoms in Queensland: Should Queensland adopt a bill of rights?*

Prepared by the Legal, Constitutional  
and Administrative Review Committee  
of the Queensland Legislative Assembly

*THIS IS NOT A LEGAL DOCUMENT*

*The law on human rights in Queensland and Australia is complex and constantly changing. This handbook was originally prepared in 1998 and is intended to be revised periodically to keep it up-to-date with changes in the law on human rights. It is not intended to be a complete statement of the law on rights. Nor is it intended necessarily to generate any expectations about government action concerning rights. Rather, it is designed primarily as an education and resource tool for the purposes of information and discussion in the community. It is not designed to be used for legal advice and anyone wishing to enforce their rights under the law should contact appropriate community or government agencies or else seek legal advice.*

This document has been prepared on the basis of the law as it stands on 11 November 1998.

## **PREFACE**

This handbook has been created because there is a very clear need today for citizens to know more about their rights.

In the modern state our rights and freedoms will face new and unanticipated demands. Our rapidly changing world will mean that rights that we have taken for granted will come under new pressures. Our concept of rights will no doubt change.

Because of this state of change, citizens will need—more than ever before—an up-to-date understanding of their basic rights. Citizens will also need to know how to enforce their rights and how to enhance their rights where they do not feel that they are sufficiently protected.

We—the Legal, Constitutional and Administrative Review Committee of the Queensland Parliament—have produced this handbook *Queenslanders' Basic Rights* to do all of these things. Our aim is that this handbook will inform citizens about their rights and give them an awareness of their responsibilities as citizens. We also hope that this handbook will provide a basis upon which citizens can build particular rights.

In other words, our approach is to build citizens' rights and freedoms 'from the people up'.

We hope that this handbook will be used widely in Queensland as a ready-reference guide by and within many organisations such as schools, government departments, workplaces and community and advocacy groups.

We urge readers who have suggestions as to how this handbook might be improved to use the feedback form at the back of this handbook.

Finally, I thank the members of the committee for their hard work and enthusiasm. I also thank our research officers and Associate Professor Bryan Horrigan of the Queensland University of Technology Faculty of Law who have assisted us in the preparation of this handbook.

Gary Fenlon MLA  
Chair

17 November 1998

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## PART 1 - INTRODUCTION

### Rights-protection in Queensland

In Queensland, we live in a democratic society in which some basic rights and freedoms of citizens are guaranteed. Queensland has a government and members of Parliament who are elected directly by the people of Queensland. Governments and citizens alike are subject to the law and nobody is above the law, regardless of their position or influence in society. This is what it means to live in a parliamentary democracy governed by the rule of law. In this way, Queensland has a political and legal system which enables people to exercise their rights, to protect their rights, and to enhance their rights through the legal and political process, as members of a free and democratic society with respect for rights and the responsibilities which go with them.

The basic rights, freedoms, and liberties ("rights") of everyone in Queensland are protected in various ways. Australia is a federation under an Australian Constitution which gives different law-making powers to the Commonwealth and the States. So, the protection of rights in Queensland is not governed solely by Queensland law. It is also governed by Commonwealth law and the Australian Constitution. Moreover, it is also affected by international human rights law, especially where Australia has ratified (or signed) an international agreement about human rights.

This means that the legal protection and enforcement of rights in Queensland ("rights-protection") comes from a variety of sources. In summary, the main sources of protecting rights in Queensland are:

- constitutional protection of rights under the Australian and Queensland Constitutions;
- legislative protection of rights under laws passed by the Queensland and Commonwealth Parliaments;
- parliamentary protection of rights by scrutiny of new laws before they are passed by Parliament;
- administrative protection of rights through government policies and processes which protect rights in dealings between citizens and the State and Commonwealth Governments, and also through the actions of government agencies concerned specifically with rights;
- judicial protection of rights, primarily through having an unbiased and independent judiciary to protect rights through the judicial process and to protect rights under the common law (that is, judge-made law rather than legislation, which is law made by the Parliament); and
- international protection of rights, especially under international agreements signed by Australia which protect human rights and also under international human rights law generally.

### Reasons for handbook

The variety of sources of rights sometimes makes it difficult for people to know the range and limits of their rights under the law. Equally, education about rights is an important part of promoting public discussion about rights and their protection in Queensland.

This handbook has been prepared by the Legal, Constitutional and Administrative Review Committee—an all-party committee of the Queensland Legislative Assembly—with the aim of meeting this need. The concept emerged as a result of an inquiry conducted by the committee into the former Electoral and Administrative Review Commission's *Report on Review of the Preservation and Enhancement of Individuals' Rights and Freedoms* ("EARC Report").

The handbook is designed to help people in Queensland to know these things:

- what our basic rights are;
- how to enforce and expand our rights;

- how to seek additional protection of our rights where necessary; and
- who can help us to enforce and enhance our rights.

In this way, the handbook aids ongoing community education about rights. It also helps people to know how to enforce their rights through the legal process and to seek expansion of their rights through political action and the political process.

For these reasons, the committee believes that there is much value in collecting basic information about rights and their current protection in Queensland in one readily accessible form like this handbook. One result of this is to promote community awareness of the state of legal protection of citizens' basic rights, including any gaps in the adequacy of the law's protection. This can also serve as a springboard for public education and discussion about current mechanisms for protecting rights in Queensland and the extent to which greater protection of rights is necessary. This is an important part of public discussion and community education for a mature democratic and multicultural community which is reflecting on its constitutional framework for government at the centenary of federation, on the brink of a new millennium, and as a member of the international community.

While this handbook is intended mainly for use by people who have no legal training, it mentions the names of important international agreements, laws, and court cases, so that people know the sources of their rights. It quotes from direct sources of rights where possible, so that readers of this handbook can see the language in which their law-makers express their rights. This handbook is not designed to offer a comprehensive list of community legal centres and other sources of legal help and advice. At the same time, some key sources are mentioned here for guidance.

### **The handbook as an education and resource tool**

The committee hopes that this summary of basic rights and responsibilities of people in Queensland will provide an important educational tool and resource for rights-protection and civics education in Queensland schools and communities. The committee hopes that people, government and community organisations, and school and community groups in Queensland will use the information in this handbook in a variety of ways to discuss, protect, and enhance their rights.

This handbook might be used as an educational tool and reference source for schools, universities, community groups, and government departments and organisations. It might be used as a focal point for seminars and discussion forums about human rights. It might be used to analyse assumptions about rights which warrant further community discussion in an increasingly multicultural Australian community. It might be used as a reference source for anyone seeking government action to change current laws and policies. In these ways and more, community education and action concerning human rights is enhanced.

Serious gaps or breaches in the protection of human rights can require government or community action. Users of this handbook can communicate any concerns on this level to their local member of Parliament or to a relevant government department or organisation. Alternatively, the suggestions for further action and the contacts listed in Part 4 of this handbook might be useful starting points. In addition, users of this handbook are invited to use the tear-off section at the end of this handbook to send feedback and suggestions to the committee about the readability, usefulness, and coverage of the handbook.

### **Scope and limits of this handbook**

#### ***A non-exhaustive list of rights***

This handbook is not a complete list of all rights under Queensland law. For example, it contains nothing about rights in fencing disputes or the rights of landlords and tenants. It also cannot cover everything about legal aid, consumer rights, and children's rights. That is not its purpose. Rather, it focuses upon *basic* human rights, particularly democratic rights, and their current protection in

Queensland.

Of course, there can be different views on what counts as a "basic" or "democratic" right for this purpose, and clear dividing lines often cannot be drawn. Failure to cover any right in this handbook does not mean that it is not important. Readers of this handbook are invited to use the tear-off section at the end of this handbook to suggest changes or additions to the handbook for future editions. Readers with specific legal queries about their rights should consult relevant government bodies, community organisations and community legal centres, or a lawyer if necessary.

### ***Current debates about rights***

There is a controversial and ongoing debate amongst people in Australia and throughout the world about the nature of rights and their protection. Many people have different views about what "rights" are, what sorts of rights should be protected, whether bills of rights are the best means of protection, whether rights contain value biases, and even whether discussion of rights makes any sense at all. In addition, some people argue that the kinds of rights commonly protected in laws and international agreements are biased in one way or another, in favour of individual rights rather than community rights, or in favour of rights which some people do not have the opportunity to exercise equally with others because of their social and economic position. This is not the forum for discussing or settling any of those important questions about rights for ongoing community debate.

### ***Different rights have different features and different consequences***

The rights listed in this handbook are not all of the same kind. Nor do all of them necessarily fit common ideas about rights. For example, a right to freedom from arbitrary restriction of someone's freedom of speech to discuss politics—a right guaranteed under the Australian Constitution—is different from a right to promote ecologically sustainable development for current and future generations or a right to live in a safe society. Indeed, some people might think that the latter rights should not be called "rights" at all because they cannot be protected easily by the law.

Again, this handbook is not designed to settle these matters once and for all. The rights listed in this handbook mostly have been mentioned in various public reports, especially the EARC Report, and international agreements, especially agreements to which Australia is a party.

Moreover, not all of the rights in this handbook have the same source, the same character, or the same consequences if they are breached. For example, nobody can sue someone in court to get compensation for violation of the constitutional right of free speech to discuss politics. It is not that kind of right. So, this is why the information about particular rights in Part 3 of this handbook must be read in light of the information in Part 2 of this handbook, which briefly explains the context of rights-protection in Queensland.

Of course, rights can also be of different kinds. Some are rights which people can exercise without interference by government ("negative rights")—for example, a right to freedom of political discussion. Some are rights to non-interference from other people and government protection from any interference ("protective rights")—for example, a right to freedom from discrimination. Some are rights to the resources which are necessary to exercise choices and to benefit fully from opportunities and rights available in a free and democratic society ("positive rights")—for example, a right to an adequate standard of living and housing.

Now, this list of descriptions is neither exhaustive nor perfect, but it at least shows the different nature of various rights. Some people might say that nobody needs to know anything about human rights generally to know what their rights are and how to protect them. However, misunderstanding can result from a "tunnel vision" approach to rights in isolation. In any case, knowing something about human rights aids further understanding of what count as rights and what resources and measures might be necessary for their protection. It also aids better understanding of the different forms of rights-protection currently operating in Queensland.



For ease of reference, particular rights appear in various sub-headings in Part 3 of this handbook. Those rights are listed under three common categories as follows:

- civil and political rights;
- economic, social, and cultural rights; and
- group and community rights.

While no categorisation is perfect, this categorisation of rights reflects the broad evolution of Australian and international debate about human rights. That debate originally centred on what are called "first generation rights"—that is, rights concerned with basic liberties in a free and democratic society, like a right to freedom of speech. The debate evolved at some point to include discussion of what are called "second generation rights"—that is, opportunity-based rights, like a right to education. In contemporary society, the debate about human rights also involves concern for what are called "third generation rights"—that is, the rights of groups and communities, as distinct from individual rights. Other categorisations and rights are also possible.

### **Structure of handbook**

This handbook is divided into four parts:

**Part 1** - Introduction

**Part 2** - The nature and limits of our basic rights

**Part 3** - Detail of various rights and their sources

**Part 4** - How to enforce and enhance our basic rights

**Part 2** contains important background information for understanding fully the discussion of particular rights in **Part 3**. **Part 4** contains practical suggestions about enforcing and enhancing our rights as well as key contact points and reference sources. In this way, these parts contain a logical, step-by-step guide to understanding rights-protection in Queensland. For ease of reference, many of the headings and sub-headings use the names of particular rights protected under particular laws and international agreements.

## PART 2 - THE NATURE AND LIMITS OF OUR BASIC RIGHTS

### Overview

Rights-protection in Queensland relies on State, Commonwealth, and international laws on human rights, and those rights are protected in many different ways. Different rights of different kinds have different consequences under the law, and not all rights can be enforced by taking someone to court. The information in this part is necessary for a proper understanding of the particular rights discussed in Part 2. The structure of this part matches the key questions which someone in Queensland would ask about legal protection of their rights, in this order of priority:

- Are my rights constitutionally protected?;
- Is there a Queensland or Commonwealth law which protects my rights?;
- Are my rights protected by adequate scrutiny of new laws before Parliament makes them?;
- Are there any other Queensland Government or Commonwealth Government processes or policies which protect my rights?;
- Are my rights protected in some way by judges and laws made by them?; and
- Are my rights protected under international human rights law?

The following information in Part 2 deals with each of these key questions in turn.

### Constitutional protection of basic rights

How do the Queensland and Australian Constitutions protect rights? Both Constitutions primarily outline a framework or blueprint for democratic government rather than a list of basic rights protected by law. At the same time, these Constitutions contain some limits on the legislative powers of both Commonwealth and State Parliaments, and those limits affect rights directly or indirectly.

Rights are also protected by our constitutional system of government itself. At both State and Commonwealth levels of government, the protection of basic rights is an integral role for all three arms of government working together. Those three arms of government are:

- (1) the people's elected representatives in Parliament, who make legislation for the benefit of the people;
- (2) the independent judiciary, that is, the courts and judges which determine rights and duties by interpreting and applying legislation and also by making judge-made laws; and
- (3) the executive government, that is, the Queensland Premier or Commonwealth Prime Minister and their Ministers, departments, and agencies who put laws and policies into practice.

Separating each of these arms of government ensures that they act independently and free from each other's direct influence. This "separation of powers" doctrine is enshrined in the Australian Constitution at the Commonwealth level of government. It is the political principle on which government operates in Queensland. Rights are protected by this system of "checks and balances". For example, the High Court of Australia, which is Australia's highest court, has the role of deciding whether any Commonwealth or State laws which create or affect rights are invalid because they breach the Australian Constitution. The High Court makes its decisions without being pressured by any Parliament or any government.

Subject only to the Australian Constitution, the Queensland Parliament has absolute power under the Queensland Constitution to pass laws for the "peace, welfare and good government" of Queensland.

However, the Queensland Constitution does not contain any provisions which guarantee people's rights. The High Court has not yet said whether the Queensland Constitution implicitly protects freedom of political discussion or any other right. However, the Queensland Constitution at least requires that some changes to it need a referendum of the people and cannot be changed simply by an ordinary law in Parliament.

While the Australian Constitution contains very few rights, those rights contained in it are important. Some rights are written down clearly in the Constitution, and some are implied within it. Implied rights are rights found by "reading between the lines", because the Constitution makes no sense without them.

Express constitutional rights guaranteed under the Australian Constitution are:

- a right to vote in Commonwealth elections, and to change the Constitution at a referendum;
- freedom from compulsory acquisition of property by the Commonwealth except on just terms;
- a right to a trial by jury for indictable Commonwealth offences (that is, offences against Commonwealth law which are tried before a judge and jury);
- freedom from discriminatory government restrictions on the movement of people between States and on interstate communication;
- a right to exercise religious freedom;
- freedom from interstate discrimination in the application of laws; and
- a separation of judicial power from other government powers, which provides some protection for people against wrongful use of government powers.

Implied constitutional rights under the Australian Constitution include:

- freedom from State or Commonwealth legislative restriction on everyone's right to freedom of speech in political discussion;
- a right to have rights determined by judges who are exercising Commonwealth judicial power and adjudicating on rights free of influence from the Parliament and the executive government; and
- possibly, a right of legal equality of some kind.

At the same time, the Australian Constitution does not expressly guarantee a right to legal assistance in criminal trials, equality of opportunity for all citizens, absolute freedom of movement and association, freedom from sexual or other discrimination, or even freedom of speech to discuss anything. Moreover, the Australian Constitution imposes limits on the exercise of legislative power by the State and Commonwealth Parliaments in ways which might affect rights, but it does not create any personal rights which anyone can enforce in court to get compensation.

The Commonwealth Parliament has no general power to pass laws on human rights. So, Commonwealth laws relating to basic rights must fall within specific powers in the Australian Constitution. Subject to that Constitution, the Commonwealth Parliament has full power to pass laws for the "peace, order, and good government" of the Commonwealth under a number of heads of power, and those laws prevail over any contrary or inconsistent State or Territory laws. In particular, the Commonwealth Parliament's power under section 51(xxix) to pass laws concerning "external affairs" has been broadly interpreted by the High Court in modern times to allow the Commonwealth Parliament to pass a wide range of laws about rights after ratification of international human rights agreements by the Commonwealth Government.

### **Commonwealth, State, and other legislation protecting basic rights**

How do legislation and pre-legislative processes both affect and protect rights? Subject to a few constitutional limits, the Commonwealth and Queensland Parliaments can both pass laws which adversely affect rights, even with retrospective effect and even if court proceedings are current. Of

course, passing laws of this kind is the exception rather than the rule. There are also a number of safeguards against it, including requirements for good drafting of laws and proper scrutiny of laws by the Parliament.

Queensland's *Legislative Standards Act 1992* (Qld) outlines requirements for scrutinising proposed legislation to ensure its proper treatment of rights, the institution of Parliament, and other aspects of the rule of law. In particular, the Act indicates that Queensland legislation desirably should conform to what are called "fundamental legislative principles" ("FLPs"). The Act says these FLPs are "principles relating to legislation that underlie a parliamentary democracy based on the rule of law".

These FLPs include the requirement that "legislation has sufficient regard to ... rights and liberties of individuals". For example, legislation sufficiently respects rights if it "does not adversely affect rights and liberties, or impose obligations, retrospectively". The list of FLPs in the Act is not exhaustive. A proposed Queensland law's impact upon rights in accordance with relevant FLPs must be canvassed in explanatory material before Cabinet and the Queensland Parliament.

Various parliamentary committees and other government bodies have responsibilities to assess a proposed law's impact upon rights before it becomes law. For example, the terms of reference for the Queensland Scrutiny of Legislation Committee give it responsibility to consider "the application of fundamental legislative principles to particular Bills and particular subordinate legislation". The Office of the Queensland Parliamentary Counsel also has an important role in the application of FLPs to the drafting of legislation and advice on policy. Of course, the elected members of Parliament also consider the impact of proposed laws upon rights during debate and voting on bills before the Queensland Parliament.

So, people concerned about the possible impact upon rights of proposed Queensland legislation can find material in the *Legislative Standards Act 1992* (Qld) to decide whether or not a proposed law adequately respects basic rights. However, this Act cannot be used to invalidate other Queensland laws. Nevertheless, this Act can be a useful source of guidance for people and organisations wanting to contact members of Parliament about the impact of proposed legislation or wanting to follow any of the other suggestions for protecting and enhancing rights which appear in Part 4 of this handbook.

Similarly, at the Commonwealth level, the terms of reference for the Senate Standing Committee for the Scrutiny of Bills give it responsibility to assess the extent to which a Commonwealth law might "trespass unduly on personal rights and liberties; ... make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers; ... [or] make rights, liberties or obligations unduly dependent upon non-reviewable decisions".

Given Queensland's historical status as an English colony, some of Queensland's laws derive from the United Kingdom. However, while laws like the *Magna Carta* and the *Bill of Rights 1688* still have some legal force in Queensland, they do not cover all of the rights currently protected in Queensland and they have decreasing legal relevance.

### **Government policy, processes, and bodies protecting basic rights**

How does government policy-making and administration protect rights? Governments make laws and policies but often their real impact upon people and their rights happens when those laws and policies are administered by the executive arm of government.

Even if legislation is not necessary and a policy solution is a better solution than legislation for a particular community problem, governments often must consider the impact of policies upon rights. Moreover, various government departments are responsible for monitoring the operation of particular Queensland laws, as well as developing and implementing government policies in these areas. These activities can also require consideration of the potential effect upon human rights.

A number of government organisations include human rights in their area of responsibility and also promote public education about rights. For example, the Queensland Anti-Discrimination Commission has the statutory function under the *Anti-Discrimination Act 1991* (Qld) of promoting "an understanding and acceptance, and the public discussion, of human rights in Queensland". The Human Rights and Equal Opportunity Commission has a similar function at the Commonwealth level.

In addition, there are some public offices (eg Queensland and Commonwealth Ombudsmen) and review mechanisms (eg review of executive government action under Commonwealth laws by the Administrative Appeals Tribunal) which are designed to give people in the community a focal point for making complaints about government action affecting their human rights. Important information and contact details about some of these appear in Part 4 of this handbook.

### **The courts interpreting and protecting basic rights**

How do the courts and judges protect rights? They do it in a variety of ways.

Australia has a judicial system of State courts, who largely deal with State matters, and Commonwealth courts, who largely deal with Commonwealth matters. The Australian Constitution protects judges who are exercising Commonwealth judicial power from political interference when they decide people's rights under the law. It is one way of protecting rights. The judges of the High Court can say that a State or Commonwealth law is invalid if it breaches the Australian Constitution. This is another way in which judges protect rights. These protections are features of the rule of law in our society.

In addition, the law contains rules for reading legislation which allow judges to interpret laws in ways which favour rights. These are called rules (or presumptions) of statutory interpretation. For example, courts generally interpret ambiguous legislation in a way which minimises its impact upon rights. Other rules available to judges to read ambiguous legislation in ways which favour rights include:

- the presumption that legislation is not intended to interfere with rights unless there is a clear and unambiguous legislative indication to the contrary;
- the presumption against the retrospective operation of legislation;
- the presumption that ambiguous legislation should be construed consistently with Australia's obligations under international law; and
- the presumption that legislation is not intended to interfere with property rights without compensation.

Moreover, the common law (or judge-made law) recognises a number of basic rights, such as the right of a lawyer's client to legal professional privilege (that is, the right to receive legal advice without that advice being disclosed in court or to the authorities), and a right to a fair trial. Another example of a common law right is the right of someone to remain silent during police questioning and not to incriminate themselves. Other possibilities include a fundamental right of access to the courts. At the same time, the common law does not acknowledge an automatic right to legal assistance at public expense for all civil and criminal trials. The common law also contains various principles of fairness and justice which protect rights, particularly in areas of human activity affected by government administration.

The High Court's 1992 landmark decision in *Mabo v Queensland (No 2)* ("*Mabo (No 2)*") to recognise native title where it still survives throughout Australia is an example of the common law recognising a basic right—in this case, an Indigenous right concerning land. In appropriate cases, as illustrated in *Mabo (No 2)*, judges can develop the common law's protection of human rights by reference to protection for similar rights under international human rights law.

## International law and basic rights

How does international law protect basic rights? For most purposes, international law is separate from Commonwealth law and Queensland law, and cannot be enforced directly in Australian courts. This means that international human rights law and international agreements ratified by Australia generally have no direct legal force in Australia unless Parliament incorporates them into legislation. For example, a right contained in an international human rights agreement, such as a right to freedom from discrimination, usually has no legal force of its own in Australia and needs the backing of State or Commonwealth law before it can be enforced directly in the courts and tribunals of Queensland. However, Australian law also recognises a limited role for courts to refer to international law in the course of interpreting or developing Australian law.

Famous examples of Australian legislation based on international agreements on human rights include the *Anti-Discrimination Act 1991* (Qld) in Queensland, and the *Racial Discrimination Act 1975* (Cth), *Sex Discrimination Act 1984* (Cth), and *Human Rights and Equal Opportunity Commission Act 1986* (Cth) at the Commonwealth level.

Sometimes rights in international agreements might be taken into account in State and Commonwealth Government administration. In an important 1995 High Court case called *Minister for Immigration and Ethnic Affairs v Teoh*, for example, immigration officials were required to consider rights in a treaty ratified by Australia which made the best interests of children a primary consideration in government decisions affecting their welfare. More generally, this could mean that people have a right to expect that relevant international agreements affecting their rights will at least be considered in government administration, especially where human rights are at stake. As this requirement could affect Queensland and Commonwealth Government administration, the Commonwealth Government has taken some steps towards its removal.

Australia is a party to a number of important international human rights agreements. They cover democratic rights, discrimination, labour and employment, children, and people with special needs. The main ones focused on human rights are:

- the International Covenant on Civil and Political Rights ("ICCPR");
- the First Optional Protocol to the ICCPR;
- the Second Optional Protocol to the ICCPR, Aiming at the Abolition of the Death Penalty;
- the International Covenant on Economic, Social and Cultural Rights ("ICESCR");
- the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
- the International Convention on the Elimination of All Forms of Racial Discrimination;
- the Convention on the Elimination of All Forms of Discrimination Against Women;
- the Convention Concerning Discrimination in Respect of Employment and Occupation;
- the International Labour Organisation Convention No 111 - Discrimination (Employment and Occupation);
- the International Labour Organisation Convention No 156 - Workers with Family Responsibilities;
- the International Labour Organisation Convention No 159 - Vocational Rehabilitation and Employment (Disabled Persons);
- the Convention on the Political Rights of Women;
- the Convention on the Nationality of Married Women;
- the Convention on the Prevention and Punishment of the Crime of Genocide;

- the Convention on the Rights of the Child;
- the Declaration on the Rights of Mentally Retarded Persons; and
- the Declaration on the Rights of Disabled Persons.

This list is included here because it is important for people to know Australia's international human rights obligations and how they might apply in Queensland and Australia. Copies of international human rights agreements ratified by Australia, and further information about them, can be found in various sources, including preambles and schedules in some Commonwealth and Queensland Acts, government gazettes, and Internet sites like the "Australian Treaty Series" on the main *AUSTLII* site (<<http://www.austlii.edu.au>>).

Most significantly, as Australia is a party to the First Optional Protocol to the ICCPR, people in Australia whose rights under the ICCPR are violated by government actions can complain to the United Nations Human Rights Committee after exhausting all of their Australian remedies. However, protection of rights under the ICCPR is not absolute. For example, public emergencies or other legitimate public interests sometimes justify breaches of human rights ordinarily protected under the ICCPR, but even these exceptions do not permit discrimination solely on the basis of race, colour, sex, language, religion, social origin, or other features.

While decisions of the Human Rights Committee do not count as law in Australia unless governments act on them, any decision that Australia is in breach of its international human rights obligations carries significant political and diplomatic weight. For example, the Commonwealth Parliament passed a law called the *Human Rights (Sexual Conduct) Act 1994* (Cth) to override the criminal law in Tasmania after the UN Human Rights Committee decided that Tasmania's criminal law violated international human rights law by criminalising homosexual conduct.

So, the rights under the ICCPR offer a source of international protection for rights within Queensland and Australia. It is important for concerned citizens in a parliamentary democracy like Queensland to know what the ICCPR covers and how it might affect or help them. In appropriate circumstances, someone might be able to complain to the UN Human Rights Committee if their right is violated and it is protected under the ICCPR. Legal advice and help with this might be necessary.

In these limited but important ways, people in Queensland benefit from international human rights law in addition to protection of their rights under Queensland and Commonwealth laws. However, given the limited protection that international law affords rights in Queensland, the discussion of international sources of rights-protection in Part 3 appears in brackets and in smaller font.

### **Basic rights and responsibilities**

The link between rights and responsibilities is strong. Many ideas about rights recognise this link. Article 29 of the Universal Declaration of Human Rights ("UDHR") also recognises this link and the limits of legal restrictions on rights, in these words:

(1) Everyone has duties to the community in which alone the free and full development of his personality is possible.

(2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

Most people in a civilised society recognise the need to act responsibly towards others and with consideration for other interests as well as their own interests in many situations. For example, Article 19 of the ICCPR recognises that freedom of thought and speech "carries with it special duties and responsibilities", so that this freedom might be restricted where necessary to respect the rights or reputations of others or to protect national security, public order, or public health or morals.

Some rights have certain responsibilities attached to them and some rights generate responsibilities in others, including governments. Sometimes responsibilities receive the backing of the law because of their importance in society. The Queensland *Criminal Code*, for example, creates duties upon parents, public institutions, and others who have responsibility for children or other people in their care to provide things which are necessary for the preservation of life and health of those people. Similarly, the Police Responsibilities Code under the *Police Powers and Responsibilities Regulation 1998* (Qld) acknowledges "the principle that everyone in the community has a social responsibility to help police officers prevent crime and discover offenders".

Government responsibilities for rights-protection can arise in various ways. They include responsibility for passing laws to enhance rights-protection, preventing interference with rights by others in the community, monitoring government actions to prevent interference with human rights in the administration of government, providing resources where appropriate and available for the enforcement or enhancement of rights, and making policy decisions about competing rights and the public welfare.



## PART 3 - DETAIL OF VARIOUS RIGHTS AND THEIR SOURCES

### Overview

This part contains information about basic rights under three common categories of rights which are outlined in Part 1. The information about each right follows the order set out in Part 2. For each right, it helps to answer the following key questions, in this order of importance:

- Is my right constitutionally protected?;
- Is there a Queensland or Commonwealth law which protects my right?;
- Is my right protected by adequate scrutiny of new laws before Parliament makes them?;
- Are there any other Queensland Government or Commonwealth Government processes or policies which protect my right?;
- Is my right protected in some way by judges and laws made by them?; and
- Is my right protected under international human rights law?

### Civil and political rights

Many of the following rights are the kinds of rights which we can legally enforce in court if they are breached by other people or even governments. This is because many of them are rights protected under the Australian Constitution or under Queensland and Commonwealth laws.

In addition, many of them are listed in the ICCPR. This means they are protected under international law in the form of the First Optional Protocol to the ICCPR, to which Australia is a party. So, if a violated right appears in the ICCPR and all other avenues of complaint in Australia are exhausted, a person might be able to complain to the UN Human Rights Committee.

#### ***Right to life, liberty, and security of the person***

This right is not in the Queensland or Australian Constitutions. So, nothing written in the Queensland or Australian Constitutions prevents the Queensland Parliament from making any laws about "life and death" matters like abortion, physician-assisted suicide, euthanasia, or the death penalty. The death penalty is abolished for offences under Commonwealth law, under the *Death Penalty Abolition Act 1973* (Cth).

The nature and limits of a "right to life" are controversial in contemporary society, especially in "life and death" situations. The inclusion of a general "right to life" in international human rights agreements like the ICCPR settles nothing one way or the other about any of these issues:

- an embryo's right (if any) to be born;
- an embryo's right not to be mistreated (eg in human and animal cloning, and medical experimentation);
- a mother's right (if any) to decide whether or not to continue a pregnancy;
- an intellectually disabled teenager's right to freedom from sterilisation;
- a father's right (if any) to consultation in decisions about reproduction after conception;

- a comatose victim's right (if any) not to have treatment withdrawn or other "life and death" decisions made without their prior consent; and
- other equally fundamental yet difficult matters.

None of these rights are constitutionally protected in Queensland or Australia. Some of them are the subject to varying degrees of Queensland and Commonwealth legislation.

For example, the lawfulness of decisions and procedures concerning termination of pregnancy is regulated by the criminal law in Queensland, under the *Criminal Code*. An "advance health directive" can be given about withdrawal of life-sustaining medical treatment and other medical decisions under the *Powers of Attorney Act 1998* (Qld), but this can only be used in situations of extreme illness and incapacity, and it cannot authorise euthanasia or any other killing which is unlawful under the criminal law.

The Queensland *Criminal Code* also creates a number of offences for actions which affect liberty, including kidnapping, deprivation of liberty, stalking, and related actions. Moreover, any person or public officer who "interferes with the free exercise of any political right by another person" by violence, threats, or intimidation commits an offence under the *Criminal Code*. The common law also protects this right in various ways, under the laws of false imprisonment, personal trespass, and assault.

[At the international level, Article 6 of the ICCPR states: "Every human being has the inherent right to life [and] (n)o one shall be arbitrarily deprived of his life". Article 9 of the ICCPR states:

*Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.*

As Article 6 concedes, this does not necessarily prevent any state or nation from imposing the death penalty for the most serious crimes. On the other hand, it clearly prevents the crime of genocide.]

### ***Right to freedom of speech and freedom of expression***

Although the Australian Constitution does not guarantee absolute freedom of speech of all kinds, it does protect from unjustified legislative interference the freedom of communication amongst people and elected politicians which is necessary for the system of representative and responsible government enshrined in the Constitution. Accordingly, the High Court has recognised since 1992 in a series of cases about free speech that everyone in Australia has an interest in giving and receiving information and ideas about government and politics at all levels of government in Australia. The extent of that constitutional right's application to State and local government politics is unclear.

This means that governments in Australia cannot pass laws which restrict our constitutional right to discuss politics or to receive information about political issues from political parties or even the media. This constitutional right is not the sort of right whose violation would let anyone sue somebody in court to get compensation. It simply prevents government interference with the right.

At the same time, this right to freedom of political discussion is not as wide as a right to freedom of speech generally. Nor is it absolute. For example, the law of defamation protects a person's reputation from unjustified damage by someone else's exercise of freedom of speech.

[Article 19 of the ICCPR contains a right to freedom of expression which includes the right to seek and receive information and ideas and to communicate them too. This right can be exercised in a variety of ways—for example, writing, speaking, and art.]

### ***Right to freedom of thought, conscience, belief, and religion***

The Australian Constitution protects freedom of religion from government action, in the way outlined in section 116:

*The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.*

There is no equivalent restriction in Queensland's Constitution.

[The Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief covers religious worship, writing and disseminating religious material, teaching religion, observing religious practices, and discrimination concerning any of these things. It is an international agreement to which protection under the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) applies.

Article 18 of the ICCPR contains a right to freedom of thought, conscience, and belief. Article 18 of the ICCPR also contains a right to freedom of religion, including freedom to choose a religion and to participate in religious worship and practice, at least to the extent that this does not unduly interfere with the rights of others. Article 19 of the ICCPR contains a right to hold opinions without interference. Article 20 of the ICCPR prohibits religious hatred as well as racial hatred.]

### ***Right to freedom of movement, residence, and association***

It is unclear whether the Australian Constitution contains an implied right to freedom of movement and association generally for political or other purposes. However, some limited protection is available for interstate movement and interstate communication under section 92 of the Constitution, which says:

*On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free*  
...

There is no equivalent restriction in Queensland's Constitution.

Commonwealth and Queensland laws ensure that employers, employees, and independent contractors are free to join, or not to join, industrial associations (unions) of their choice. These laws also ensure that employers, employees, and independent contractors are not discriminated against or victimised because they are, or are not, members or officers of such associations. The *Industrial Organisations Act 1997* (Qld) covers industrial organisations registered in Queensland. Commonwealth employee and employer organisations operating in Queensland are registered under the *Workplace Relations Act 1996* (Cth).

The common law and the criminal law both protect freedom of movement to some degree, by laws such as those concerning false imprisonment, personal trespass, assault, and deprivation of liberty.

[Article 12 of the ICCPR outlines a right to liberty of movement and freedom to choose residence, subject to essential public interests like national security, public order or health, and the rights or freedoms of others.

Article 22 of the ICCPR outlines a right to freedom of association with others, including the right to form and join trade unions.]

### ***Right to freedom of peaceful assembly and peaceful protest***

In Queensland, the *Peaceful Assembly Act 1992* (Qld) recognises a person's "right to assemble peacefully with others in a public place". That right is "subject only to such restrictions as are

necessary in a democratic society in the interests of public safety, public order, or the protection of the rights and freedoms of other persons". The Act contains procedures for organising an authorised public assembly, including advance notice to the police and local authority.

It remains unclear whether the right to freedom of political communication or any other right in the Australian Constitution protects a freedom of assembly and protest, especially for political purposes.

[Article 21 of the ICCPR outlines a right of peaceful assembly, subject only to whatever limits are reasonable in a democratic society in the interests of others.]

### ***Right to bear arms***

There is no constitutionally protected right under the Queensland or Australian *Constitutions* to bear arms or to own and use weapons. However, lawful ownership of particular kinds of guns and other weapons is permitted if a person meets the requirements under the *Weapons Act 1990* (Qld).

### ***Right to legal recognition and equality, equal treatment, equal opportunity, equal application, and equal protection of the law***

The idea behind "legal recognition" is that everyone should be recognised as a person before and under the law, who has rights under the law and who can access the legal system to enforce those rights. The idea behind "equality" is that the law applies to everyone equally and that everyone is entitled to equal protection and benefit under the law.

Of course, the notion of "equality" in law and politics is not one-dimensional. It embraces a range of discrete ideas about equality of opportunity for everyone, treating everyone in the same way, subjecting everyone equally to the rule of law, and so on. At the same time, treating everyone in the same way can sometimes produce injustices, because of their social, cultural, and economic differences.

While some High Court cases suggest that the Australian Constitution might implicitly guarantee legal equality of some kind, the existence, nature, and scope of this guarantee all remain unclear. In any case, no guarantee of legal equality in the Constitution is likely to embrace all of the ideas associated with equal rights in a free and democratic society, not least because the Constitution establishes a framework for government rather than a set of protected rights. Nor would any guarantee of legal equality necessarily prohibit discrimination for good reasons.

The High Court has also decided that the Australian Constitution supports the broad principle of representative democracy without mandating any particular electoral system to give effect to that principle. So, the particular notion of electoral equality contained in the political idea of "one vote, one value" is not constitutionally guaranteed.

Queensland's *Anti-Discrimination Act 1991* (Qld) emphasises that "(t)he international community has long recognised the need to protect and preserve the principles of dignity and equality for everyone". As the *Anti-Discrimination Act 1991* (Qld) acknowledges throughout, protection from discrimination of various kinds is an important means of ensuring equality of opportunity for people. Similarly, judicial review of government administration under Queensland and Commonwealth laws is an important means of equal protection under the law, so that government decisions affecting people's rights are made in the right way and for the right reasons and so that the law does not treat people differently without justification.

Various State and Commonwealth laws ensure as much as possible that the legal rights and obligations which apply in legal proceedings involving citizens also apply in legal proceedings between citizens and governments. This means that governments are not above the law.

In addition, various international instruments (for example, the Declarations on the Rights of Disabled Persons and the Rights of Mentally Retarded Persons) and Australian laws concerning children, disabled people, and other people with special needs acknowledge the rights of these people to be

treated as much as possible like everyone else, and to have recognition of their needs and degree of responsibility and independence taken into account.

[At the international level, various Articles in the ICCPR embody various ideas associated with equality and legal recognition. Article 3 requires that signatories like Australia "undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights" in the covenant. Article 14 says: "All persons shall be equal before the courts and tribunals". Article 16 says: "Everyone shall have the right to recognition everywhere as a person before the law". Article 26 says: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law".

Similarly, Article 3 of the ICESCR recognises "the equal right of men and women to the enjoyment of all economic, social and cultural rights" recorded in it.]

### ***Right to freedom from discrimination, harassment, vilification, and victimisation***

The Australian Constitution protects residents of States from interstate discrimination, under section 117:

*A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State.*

This prevents discrimination between people simply on the basis of whether they live in Queensland as distinct from New South Wales, for example. There is no equivalent restriction in Queensland's Constitution.

Major Commonwealth laws preventing discrimination are the:

- *Racial Discrimination Act 1975* (Cth) (on racial discrimination);
- *Racial Hatred Act 1995* (Cth) (on racial hatred, vilification, and victimisation);
- *Sex Discrimination Act 1984* (Cth) (on sex discrimination);
- *Affirmative Action (Equal Employment Opportunity for Women) Act 1986* (Cth) (on equal employment opportunity ("EEO") programs for women);
- *Public Service Reform Act 1984* (Cth) and the *Equal Employment Opportunity (Commonwealth Authorities) Act 1987* (Cth) (both on EEO programs in the Commonwealth public sector);
- *Disability Discrimination Act 1992* (Cth) (on discrimination against differently abled people);
- *Human Rights (Sexual Conduct) Act 1994* (Cth) (on protection of all lawful sexual conduct between consenting adults in private from arbitrary interference by Commonwealth, State, and Territory laws); and
- *Human Rights and Equal Opportunity Act 1986* (Cth) (on various aspects of equal opportunity, freedom from discrimination, and protection of human rights).

There is some overlap between Queensland and Commonwealth laws in this area. Citizens might need legal advice to know which law applies to them if they think that someone has discriminated against them.

In practice, EEO programs at both Commonwealth and State levels are one of the most widely used means to promote equal opportunity. Various disability standards produced under the *Disability Discrimination Act 1992* (Cth) prevent disability discrimination in the workplace. The Human Rights and Equal Opportunity Commission has issued a Code of Practice which gives examples and guidelines about sexual harassment in the workplace.

The most important Queensland law in this area is the *Anti-Discrimination Act 1991* (Qld). It deal with

the prevention of direct and indirect discrimination in work and work-related areas, education, provision of goods and services, superannuation, insurance, land dealings, accommodation, club membership, administration of Queensland Government laws and programs, and local government activity. Importantly, subject to limited exceptions, the Queensland Act prohibits discrimination on any of these grounds:

- sex;
- marital status;
- pregnancy;
- parental status;
- breastfeeding;
- age;
- race;
- impairment;
- religion;
- political belief or activity;
- trade union activity;
- lawful sexual activity; and
- association with, or relation to, a person identified on the basis of any of these listed attributes.

As homosexual conduct has been decriminalised in Queensland, the idea of "lawful sexual activity" can include heterosexual, homosexual, and bisexual conduct which is otherwise lawful. This does not include sexual activity which breaches criminal laws about sexual offences, like rape and sexual abuse of children.

Of course, there are also a number of general exemptions under the *Anti-Discrimination Act 1991* (Qld) which permit justified discrimination. These mainly cover welfare, lawful actions, compulsory retirement, public health, workplace health and safety, religious institutions, charities, sport, legal incapacity, and exemptions granted by the Anti-Discrimination Tribunal. For example, travel concessions for pensioners and special accommodation only for victims of domestic violence, and equal opportunity programs are lawful under this law.

Many common areas of human activity in Queensland are covered by this important law. For example, an employer cannot refuse to employ an Asian person simply because the employer fears that person would be treated badly by other staff or customers who might be racially prejudiced. On the other hand, employers can insist on genuine occupational requirements, such as considering only women for a job which involves body searches of women. An employer cannot dismiss someone simply because they belong to a political party or are a candidate for election to Parliament. On the other hand, membership of a particular political organisation might be a genuine occupational requirement for appointment as a worker in the office of a member of Parliament.

The Queensland law does not mention gender identity as a prohibited ground of discrimination, so transgenderists (that is, people who identify themselves with a different gender from their gender at birth) might not be adequately protected from discrimination. While the Act also does not mention HIV/AIDS infection as a prohibited ground of discrimination, it might be covered indirectly by prohibiting discrimination on the basis of sex, lawful sexual activity, race, or impairment. Members of the community undoubtedly have different views about the proper scope of anti-discrimination laws, particularly in areas like work involving children, club membership and activities, recognition of sexual identity and activity, and schools generally.

The Queensland law also prohibits sexual harassment, discriminatory advertising, victimisation, and incitement to racial or religious hatred. In a school, for example, it can be sexual harassment for teachers, workers, and students to make sexually suggestive comments or propositions to anyone else. Other examples of sexual harassment outlawed under the Act include insinuations about a person's sex, suggestive comments about their appearance, touching someone in a sexual way, indecent exposure, and offensive mail and telephone calls. In terms of discriminatory advertising, it is lawful to advertise for workers under 21 years of age but unlawful to advertise for "men only" unless there is a legitimate reason under the Act for doing so.

Significantly, the Queensland law also aims "to promote equality of opportunity for everyone" by making employers and others vicariously liable for contraventions of the Act by their employees and agents, unless they have taken "reasonable steps" to prevent that contravention.

[While various Articles of the ICCPR mention freedom from discrimination, Article 26 most directly prohibits discrimination "on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".]

### ***Right to vote, stand for election, and participate in the electoral process***

Both Queensland and the Commonwealth have systems of representative democracy with governments comprising members of Parliament elected by the people at regular intervals. Queensland law governs the rights of Queenslanders to enrol, vote, and stand as a candidate for election in Queensland elections. Commonwealth law governs the rights of Queenslanders to enrol, vote, and stand as a candidate for election in federal elections.

Both the Queensland and Australian Constitutions establish some minimum requirements for these elections, to ensure that elected members of Parliament are directly chosen by voters making a free and informed vote. For example, the Queensland Constitution contemplates elections, by people who are qualified to vote, of members of Parliament who are qualified to stand for election. The Australian Constitution says that members of the Commonwealth Parliament (that is, the House of Representatives and the Senate) must be "directly chosen by the people".

The rules for voting in Commonwealth and Queensland elections appear in the *Commonwealth Electoral Act 1918* (Cth) and the *Electoral Act 1992* (Qld). The rules for voting in local government elections are contained in the *Local Government Act 1993* (Qld) and the *City of Brisbane Act 1924* (Qld). The general entitlement to enrol and to vote extends to anyone who is an Australian citizen, at least eighteen years of age, and living in the relevant electorate. This right to enrol and to vote is not available to some people, like prisoners serving particular sentences of imprisonment. Similar minimum qualifications apply to someone standing for election.

Voting is compulsory in federal, Queensland, and local government elections.

[Article 25 of the ICCPR says that everyone has the right to participate in public affairs, to vote and stand for election, and to have equal access to public service.]

### ***Right to fair and just treatment in police custody and criminal investigations of offences***

The Queensland and Australian Constitutions do not deal with this right specifically. Recent and important changes to police powers and responsibilities in Queensland appear in the *Police Powers and Responsibilities Act 1997* (Qld) and the Police Responsibilities Code contained in the *Police Powers and Responsibilities Regulation 1998*. This Police Responsibilities Code is available for inspection at police stations. It contains examples of police warnings and other practical guidelines. These items are mentioned here so that people know the sources of important rights, obligations, and police powers in this area.

The right to remain silent and to refuse to answer if questioned by police is a basic right under the common law which is preserved under the *Police Powers and Responsibilities Act 1997* (Qld), subject

to some statutory exceptions which require someone to provide personal information or answer specific questions. Subject to exceptions for urgency, safety, etc, various safeguards apply to protect people in custody at a police station or simply in the company of a police officer for the purpose of questioning, especially about serious offences.

A person in police custody is usually entitled to telephone or speak to a friend, relative, or lawyer, and police questioning must be delayed accordingly. They usually must be cautioned before questioning about their rights, including the right to remain silent. Any police interview might be electronically recorded. A person arrested without warrant must be informed that they are under arrest and for what offence(s).

Queensland police officers have a legal duty to take a person arrested and charged with an offence, as soon as reasonably practicable, before a court to be dealt with according to law unless the person is released, granted bail, or detained in custody for questioning. In the case of indictable offences (that is, offences heard by a judge and jury), police can detain someone in custody for questioning for limited periods, under the conditions specified in the *Police Powers and Responsibilities Act 1997* (Qld).

In general, Queensland police have extensive powers to search and seize people and things, sometimes without a warrant. They also have powers covering surveillance, detention for questioning, fingerprinting and other identification, medical and dental procedures, breaches of the peace, roadblocks, vehicles, covert operations, crime scenes, entry and inspection, use of reasonable force, directions, and a variety of other matters.

In Queensland, proposed legislation is scrutinised to ensure that it has sufficient regard to the rights and liberties of individuals, by following the guidelines in the *Legislative Standards Act 1992* (Qld). Section 4(3)(e) of the *Legislative Standards Act 1992* (Qld) says that whether Queensland legislation adequately respects rights here depends on whether an Act "confers power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer". Section 4(3)(f) says that whether Queensland legislation adequately respects rights here depends on whether it "provides appropriate protection against self-incrimination". Finally, section 4(3)(d) says that whether Queensland legislation adequately respects rights here depends on whether it "does not reverse the onus of proof in criminal proceedings without adequate justification".

The Australian Federal Police generally investigate offences under Commonwealth laws, such as social security and taxation fraud. The *Crimes Act 1914* (Cth) is the starting point for criminal offences and sentencing principles here. Offences under Commonwealth laws generally are dealt with in State courts.

[In addition to prohibiting arbitrary arrest and deprivation of liberty, Article 9 of the ICCPR requires that people arrested are told that they are under arrest and what charges are made against them. It also requires prompt appearance before a court after arrest, a timely trial, detention in custody before trial as the exception rather than the norm, and an opportunity to challenge in court the lawfulness of any detention.]

### ***Right to a fair trial and fair and just legal process***

The Australian Constitution's guarantee of trial by jury in section 80 does not specifically cover a right to a fair trial. It is limited to guaranteeing the right to a jury trial for someone charged with serious criminal offences under Commonwealth law:

*The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes.*

There is no equivalent guarantee in Queensland's Constitution.

Chapter III of the Australian Constitution also ensures that legal and court proceedings are fair by making Commonwealth courts (including State courts in some circumstances) "independent", that is,



protecting the courts from political or other interference. The independence of Queensland courts, judges, and juries from interference by governments or anyone else is an important safeguard of rights in civil and criminal trials.

The High Court has confirmed in a case called *Dietrich v The Queen* that "Australian law does not recognise that an indigent [or needy] accused on trial for a serious criminal offence has a right to the provision of [legal] counsel at public expense". However, according to that case, "Australian law acknowledges that an accused has the right to a fair trial", and lack of legal representation might sometimes prevent a fair trial and therefore justify stopping court proceedings.

In criminal trials, the general rule is that a person is presumed innocent until proven guilty. The prosecution must satisfy the court that an accused person is guilty beyond reasonable doubt. Judges also have the discretion to exclude evidence which is unfairly prejudicial to an accused person, or unfairly or illegally obtained. Once a person has been convicted and punished for an offence, they cannot be convicted and punished again for the same offence. Nor can someone acquitted of an offence be tried again for the same offence.

Fairness and justice are as important in civil trials as they are in criminal trials. For example, the rules of evidence in court cases about commercial matters are designed to promote fair and just outcomes in the treatment of evidence in court and the resolution of disputes.

[Article 14 of the ICCPR sets out a number of rights of people charged with criminal offences. These rights are:

- the right to "a fair and public hearing by a competent, independent and impartial tribunal established by law";
- "the right to be presumed innocent until proved guilty according to law";
- the right to be informed promptly of charges made against the person;
- the right to adequate time, resources, and legal assistance to prepare a defence;
- the right to a trial without undue delay;
- the right to be present at the trial, to defend themselves in person or with legal assistance, and to test the evidence of witnesses by cross-examining them;
- the right to free assistance of an interpreter to understand the language spoken in court;
- the right not to be forced to testify or to confess guilt;
- the right to an appeal against conviction and sentence if convicted of a crime;
- the right to compensation for a conviction which is later proved on fresh evidence to have been a miscarriage of justice; and
- the right not to be tried or punished twice for the same offence.]

### ***Rights of victims of crime***

In Queensland, victims of crime are entitled to "access to the State's system of justice", under the *Criminal Offence Victims Act 1995* (Qld). Under that Act, victims of crime are entitled to compensation for personal injury resulting from indictable offences (that is, offences tried before a judge and jury). Applications can be made to the court before whom the offender is convicted or to the State, following the procedure in the Act.

In addition, victims of crime are entitled to information from relevant government departments and organisations about crime prevention methods, investigation and prosecution of offenders, their role as

witnesses, available services (including counselling), and how to obtain compensation. Victims of crime are also entitled to protection from violence and intimidation from someone accused of a crime against them, and to information from law enforcement officers about what laws might help them to achieve this. Relevant remedies here include refusal of bail, court prohibition on publication of information or disclosure of a victim's identity, and exclusion of the public from the court.

A person whose property is damaged by a police officer exercising powers under the *Police Powers and Responsibilities Act 1997* (Qld) is entitled to compensation from the State Government in some situations.

### ***Rights of prisoners***

The list of people who might be imprisoned includes not only people convicted of crimes but also people who have not yet been tried and convicted but who are kept in custody, in police stations and watch-houses as well as prisons and juvenile detention centres. The Queensland Corrective Services Commission is responsible under the *Corrective Services Act 1988* (Qld) for "the security and management of prisons and community corrections centres and the safe custody and welfare of prisoners".

[Article 10 of the ICCPR says: "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person". It also requires ordinarily the segregation of convicted persons and accused persons, on one hand, and accused and convicted juveniles and adults, on the other. It says the "essential aim" of treatment of incarcerated prisoners is "their reformation and social rehabilitation".]

### ***Right to freedom from slavery***

This right is not in the Queensland or Australian Constitutions.

[Article 8 of the ICCPR prohibits slavery, servitude, and forced labour, but does not prohibit hard labour as part of punishment for a crime.]

### ***Right to freedom from torture, experimentation, and inhuman treatment***

This right is not in the Queensland or Australian Constitutions.

[Article 7 of the ICCPR prohibits "cruel, inhuman or degrading treatment or punishment", including "medical or scientific experimentation" performed without the person's consent.]

### ***Right to privacy***

The Internet and advances in technology create new challenges in protecting privacy and the confidentiality of personal information. Neither the Australian nor Queensland Constitutions guarantee a right of privacy.

Commonwealth Government departments and agencies generally must use personal information about people which is gathered for government purposes only for those purposes, in accordance with Information Privacy Principles set out in the *Privacy Act 1988* (Cth).

Although Queensland presently has no equivalent privacy law, some aspects of privacy are protected under Queensland law. For example, the *Invasion of Privacy Act 1971* (Qld) regulates credit reporting agencies and their information activities, the use of listening devices, and invasion of privacy within a home. The *Criminal Offence Victims Act 1995* (Qld) requires that the privacy of a victim of crime must be respected.

While there is no common law right to privacy in Australia, privacy interests are protected to some degree under the common law by laws concerning trespass, nuisance, defamation, and confidentiality.

[Article 17 of the ICCPR prevents arbitrary or unlawful interference with a person's "privacy, family, home or correspondence", and unlawful attacks upon a person's "honour and reputation". It also recognises the right to the law's protection against these interferences or attacks.]

### ***Right to natural justice, procedural fairness, and due process***

A number of laws ensure that the government bureaucracy (that is, the executive arm of government) not only makes the right decision but also goes about it the right way when it exercises power which affects someone's rights. This involves what is called "natural justice" or "procedural fairness" in Australia and "due process" elsewhere. These rules mainly require that a person has an opportunity to be heard and to put their case, and that the decision-maker is unbiased and only influenced by what is relevant.

At both Queensland and Commonwealth levels, there is judicial review legislation to allow someone to challenge the legality of bureaucratic decisions on the basis of a breach of natural justice or procedural fairness. This law is found in the *Judicial Review Act 1991* (Qld), and the *Administrative Appeals Tribunal Act 1975* (Cth) and the *Administrative Decisions (Judicial Review) Act 1977*(Cth). For example, the *Judicial Review Act 1991* (Qld) provides rights to obtain reasons for government decisions and to obtain a review of government decisions (and conduct) on procedural grounds like non-compliance with natural justice. Again, this is subject to exceptions in the public interest.

In Queensland, proposed legislation is scrutinised to ensure that it has sufficient regard to the rights and liberties of individuals by being "consistent with principles of natural justice", under section 4(3)(b) of the *Legislative Standards Act 1992* (Qld). In Queensland, proposed legislation is also scrutinised to ensure that it has sufficient regard to the rights and liberties of individuals because it "makes rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review" and because it "allows the delegation of administrative power only in appropriate cases and to appropriate persons", under section 4(3)(a) and section 4(3)(c) of the *Legislative Standards Act 1992* (Qld).

### ***Right to access and amend personal information held by government***

Subject to exceptions in the public interest, the *Freedom of Information Act 1992* (Qld) gives people in Queensland the right to obtain access to certain information and documents held by government departments and agencies, Ministers, and local governments. It also allows people to ensure that information held by the Government about their personal affairs is accurate, complete, up-to-date, and not misleading.

In Queensland, the *Judicial Review Act 1991* (Qld) provides people with a right to obtain reasons for government decisions and to obtain a review of government decisions (and conduct) on procedural grounds like non-compliance with natural justice. Again, this is subject to exceptions in the public interest.

Similar legislation regulates judicial review and freedom of information concerning Commonwealth Government bodies. See the *Administrative Appeals Tribunal Act 1975* (Cth), the *Administrative Decisions (Judicial Review) Act 1977* (Cth), and the *Freedom of Information Act 1982* (Cth).

Sometimes government employees or other people in government positions have information which they appropriately disclose to the public because the information exposes "unlawful, negligent or improper public sector conduct or danger to public health or safety or the environment". In Queensland, these disclosures by people (who are commonly called "whistleblowers") are protected from reprisal if they are made in accordance with the *Whistleblowers Protection Act 1994* (Qld).

### ***Right not to be detrimentally affected by retrospective legislation***

The common law contains a rule of statutory interpretation that legislation which affects substantive rights (as distinct from procedural rights) is prospective and not retrospective in its operation, unless the Parliament has clearly indicated otherwise. This means that the general rule is that Parliament does not intend to pass a law today which makes what someone did yesterday unlawful when they did it.

In Queensland, proposed legislation is scrutinised to ensure that it has sufficient regard to the rights and liberties of individuals because it "does not adversely affect rights and liberties, or impose obligations, retrospectively", under section 4(3)(g) of the *Legislative Standards Act 1992* (Qld).

### ***Right of self-determination***

Self-determination means the right of all peoples sharing certain racial, cultural, or other features to be legally recognised and to manage and govern their own affairs. It involves questions of self-management, self-government, and sovereignty. Some aspects of self-determination can be achieved within existing legal and political processes, and some would require constitutional change—for example, legal recognition of a self-governing Indigenous nation within Australia.

[Article 1 of the ICCPR recognises the right of self-determination for all peoples to determine freely their political status and their economic, social, and cultural development. Article 1 of the ICESCR recognises this right too. This right can embrace sovereignty and self-government.]

### ***Rights of the people***

Self-determination is not necessarily the only right of the people of a nation as a whole. Australian law increasingly recognises the sovereignty of the Australian people as the ultimate source of authority under the Australian Constitution. Similarly, Australian law increasingly recognises the relationship between governments and the people as a relationship which has political (and sometimes legal) obligations of trust, confidence, responsibility, and accountability.

Moreover, all governments in Australia hold and exercise their power on trust for the benefit of the people. This creates political obligations if not legal obligations. In matters of public policy, various notions of "the public interest" guide government action. All of these things can have a direct or indirect impact upon rights in legislation, policy-making, and government administration.

Everyone in Queensland schools and communities should be aware of the basic importance of the people and their rights in the political system. In the words of former High Court Chief Justice, Sir Anthony Mason, who made these comments in a landmark case about free speech in 1992, called *Australian Capital Television v Commonwealth*:

*The very concept of representative government and representative democracy signifies government by the people through their representatives ... (T)he Constitution brought into existence a system of representative government for Australia in which the elected representatives exercise sovereign power on behalf of the Australian people ... The point is that the representatives who are members of Parliament and Ministers of State are not only chosen by the people but exercise their legislative and executive powers as the representatives of the people. And in the exercise of those powers the representatives of necessity are accountable to the people for what they do and have a responsibility to take account of the views of the people on whose behalf they act.*

This is a powerful statement about the Australian people and their legal status. It is not just rhetoric. It has wide-ranging implications. The primary place of the people in Australia's and Queensland's systems of government also generates political and possibly legal obligations of responsibility and accountability in the exercise of government power. Those obligations are owed by governments to the people as a whole.

***Rights of people who are not Australian citizens***

In Queensland, some rights are available only to people who are citizens of Australia. For example, usually only Australian citizens can vote in Queensland and federal elections. At the same time, people who are not Australian citizens also have some special rights in Queensland. For example, a person who is not an Australian citizen and who is detained in custody by the police for questioning about an indictable offence (that is, offences tried before a judge and jury) is entitled to contact their national embassy or consulate office before questioning.

Matters concerning immigration to and from Australia, the status and rights of refugees in Australia, and the extradition of people to or from Australia to face trial are all governed by Commonwealth laws.

***Rights of children, teenagers, and young persons***

The rights of young people as a special group overlap with many other rights in this handbook, so you should not treat these rights in isolation. For example, a young person's right not to suffer torture is the same as an adult person's right. At the same time, some young people's rights are affected by their age, maturity, and level of understanding.

In general, Queensland and Australian law tries to ensure as much as possible that children, teenagers, and other young persons benefit from:

- having decisions about them made in their best interests;
- being told about and being able to express views on anything affecting their welfare and well-being and to have those views appropriately taken into account in light of the person's age, maturity, level of understanding, and capacity;
- giving informed consent to medical treatment and surgical operations (eg blood transfusions, organ donation, palliative care, etc) if they are able to give that consent in light of their age, maturity, level of understanding, and capacity;
- living with either or both of their parents unless their interests and needs require other arrangements;
- knowing and being cared for by parents and other significant people in their life, including appropriate financial support from their parents in their care and upbringing;
- being cared for by government if no family member, relative, or other appropriate person is available to care for them;
- living in a harm-free home environment and to be protected from harm by anyone;
- being adopted if suitable adoptive parents are available;
- knowing information about their birth parents if adopted;
- receiving adequate education;
- not being forced to perform labour or endure onerous work conditions;
- being free from unjustified discrimination solely on the basis of birth (for example, discrimination against a child of unmarried parents or a child artificially conceived) or age (for example, discrimination against young people in employment and work conditions); and
- receiving fair and just treatment in criminal and court investigations and proceedings, especially in light of a young person's age, maturity, understanding, and circumstances

A person becomes an adult for legal purposes in Queensland at eighteen years, under the *Law Reform Act 1995* (Qld). Under many Queensland and Commonwealth laws, the welfare and best interests of the young person are of paramount importance. For example, the *Family Law Act 1974* (Cth) makes the best interests of the child the paramount consideration in a variety of decisions affecting children, and outlines criteria for courts determining what is in a child's best interests. Similarly, Queensland's

*Adoption of Children Act 1964* (Qld) says "the welfare and interests of the child" are "the paramount consideration" in adoption decisions.

The *Status of Children Act 1978* (Qld) removes legal disabilities (eg under wills) for all children born, whatever the marital status of their parents and however they might have been conceived. The *Transplantation and Anatomy Act 1979* (Qld) regulates young people's organ and tissue donation as well as blood transfusions. The *Children's Services Act 1965* (Qld) covers many aspects of child and family welfare and assistance in Queensland, including institutional care, financial assistance for care of children, arrangements for care and protection of children, foster care, arrangements for guardianship, and custody of infants.

Queensland's laws on arrangements for the care and protection of children are currently being reviewed. Proposed new child protection legislation includes a charter of rights for children in care. The kinds of rights in this proposed charter include a child's rights to a safe and culturally appropriate living environment, to maintain relationships with their family and community, and to be consulted and participate in decisions affecting them in matters such as their health and schooling.

In terms of criminal matters and investigations, the *Juvenile Justice Act 1992* (Qld) differentiates the treatment of young persons from the treatment of adults in a variety of criminal contexts including investigation of offences, cautions by police, criminal proceedings against children, arrest and bail, custody and detention, and sentencing. For example, the Act specifies principles of sentencing for children. Subject to exceptions for safety, urgency, and other matters concerning police questioning, special safeguards apply to the questioning and options for proceeding against children for offences under the *Police Powers and Responsibilities Act 1997* (Qld), including notification to parents that a child has been arrested.

Some rights of young people are covered by the common law. Their exercise often depends upon the person's age, maturity, and understanding. For example, consent to some medical procedures and access to contraceptive advice without parental consent both turn on these factors. Finally, nobody should consider the rights of children or other young people in isolation, because their total rights include rights as people to freedom from discrimination as well as special rights as young people.

[Article 24 of the ICCPR acknowledges the right of every child to whatever protection from their family, society, and the State is required by the child's status as a minor, without any discrimination on the basis of race, colour, sex, language, religion, national or social origin, or property or birth. In addition, every child has the right to have their birth registered immediately, have a name, and acquire a nationality.

Article 10 of the ICCPR requires that accused juvenile offenders must be separated from accused adult offenders and speedily brought to trial, and that convicted juvenile offenders must be separated from adult prisoners and treated appropriately according to their age and legal status.

Article 3 of the Convention on the Rights of the Child requires the "best interests" of children to be "a primary consideration" in all actions concerning them "by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies". This requirement can affect Queensland and Commonwealth Government administration, although the Commonwealth Government has taken steps to minimise this possibility.

In terms of criminal matters, Article 40 of the Convention on the Rights of the Child outlines a range of measures to ensure fair and just treatment of children accused of committing criminal offences, including measures to protect their privacy. This is reinforced by Article 14 of the ICCPR, which contemplates that the interests of a young person might require that publicity about a court decision is restricted.]

### ***Rights and responsibilities of parents***

What is the overall balance of rights and responsibilities between parents and their children under the law? That balance was summarised in the following way by a judge in a landmark 1992 High Court case about human sterilisation, called *Re Marion*:

*The responsibilities and powers of parents extend to the physical, mental, moral, educational and general welfare of the child. They extend to every aspect of the child's life. Limits on parental authority are imposed by the operation of the general law, by statutory limitations or by the independence which children are entitled to assert, without extra-familial pressure, as they mature. Within these limits, the parents' responsibilities and powers may be exercised for what they see as the welfare of their children.*

The *Family Law Act 1974* (Cth) promotes parental responsibility in the care and upbringing of children, "to ensure that children receive adequate and proper parenting to help them achieve their full potential, and to ensure that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children".

Queensland's *Criminal Code* places a legal duty on everyone who has care of a child under sixteen years to provide the necessities of life for the child, and to protect the child from danger to their life, health, or safety. The *Criminal Code* also makes it a crime if a person in charge of a child under sixteen years causes the child suffering by failing to provide or ensure that the child has adequate food, clothing, medical treatment, accommodation, or care. In addition, it is a crime for a person in charge of a child under sixteen years to desert the child or leave the child without means of support.

[Article 3 of the Convention on the Rights of the Child requires Australia to "undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her".

Article 18 of the ICCPR commits its signatories to respecting the liberty of parents and legal guardians "to ensure the religious and moral education of their children in conformity with their own convictions".]

### ***Rights of particular groups and people with special needs***

Commonwealth and Queensland anti-discrimination laws provide a significant amount of protection for people with special needs. In addition, Queensland provides for care and assistance for special groups in the community, including mentally ill people and intellectually disabled people under laws like the *Mental Health Act 1974* (Qld) and the *Intellectually Disabled Citizens Act 1985* (Qld).

In criminal matters, sometimes a special hearing is necessary to determine if a person charged with an offence is fit to plead and to be tried.

[The Declaration on the Rights of Mentally Retarded Persons and the Declaration on the Rights of Disabled Persons both affirm the right of disabled people to enjoy as much as possible the same rights and freedoms available to other people. In particular, Australian anti-discrimination laws help to meet this objective in various ways and areas of activity, including accommodation, medical care, family support, education, work, and procedural safeguards to prevent arbitrary denial of basic rights to these people, as well as their protection from exploitation, abuse, and degrading treatment.]

## **Economic, social, and cultural rights**

Many of the following rights are not the kinds of rights which anyone can legally enforce in court by suing other citizens or even governments. They are not usually constitutional rights or rights protected directly under Queensland and Commonwealth laws. Nevertheless, aspects of them are protected directly or indirectly under a variety of Queensland, Commonwealth, and international laws, including

the ICCPR. Complaints about Australian violations of rights protected under the ICCPR can be brought before the UN Human Rights Committee under certain conditions.

### ***Right to adequate standard of living and housing, and reasonable access to social welfare***

[Articles 9 and 11 of the ICESCR outline a right to social security and a right to enjoy the highest achievable standard of physical and mental health.]

### ***Right to adequate health care and medical treatment***

[Article 12 of the ICESCR outlines a right to adequate medical services and disease prevention.]

### ***Right to work and work-related rights***

A number of work-related rights are covered by awards and laws at the Queensland and Commonwealth levels relating to employment and industrial relations, such as Queensland's *Workplace Relations Act 1997* (Qld). Queensland's *Workplace Health and Safety Act 1995* (Qld) establishes health and safety requirements for workplaces in Queensland, to help prevent death, injury, and illness being caused at work.

[Articles 6, 7, and 8 of the ICESCR outline a range of work-related rights. They include the right to gain a living by work of your own choice, the right to proper conditions of work (including a fair wage, as well as equal pay for equal work), the right to form and join trade unions, and the right to strike under the law.]

### ***Right to legal assistance***

Australian common law contains a right to a fair trial. This is a fundamental part of equal access to justice for all. In 1992, the High Court decided in a case called *Dietrich v The Queen* that the trial of a person who was charged with a serious criminal offence and who was unable to afford a lawyer to represent him in court should be stopped indefinitely because publicly funded legal assistance was not available. The Court said it would be unfair for him to be tried without having that assistance. This does not mean that all trials of unrepresented accused persons are unfair.

Of course, legal assistance embraces more than what might be needed for a person's defence at a criminal trial. In Queensland, arrangements for publicly funded legal assistance for court proceedings and alternative dispute resolution are governed by the *Legal Aid Queensland Act 1997* (Qld), which establishes the Legal Aid Office.

[Article 14 of the ICCPR outlines a right to publicly funded legal assistance if needed for a person's criminal trial.]

### ***Right to a safe society***

The right to live in and enjoy a safe society as an individual and as a community embraces a range of interests. They include safety as well as freedom from crime and violence. Nobody can go to court to sue someone for breaching this right, as it is not a right presently guaranteed under any Constitution or law as an absolute right. However, various Queensland laws protect these interests in a variety of ways, including laws about police powers, criminal offences, and domestic violence.

### ***Right to acquisition of property only on just terms***

The Australian Constitution guarantees in section 51(xxxi) that Commonwealth acquisitions of property of all kinds must be on just terms. While the States are not subject to that constitutional restriction, Queensland's *Acquisition of Land Act 1967* (Qld) outlines conditions (for example, procedures and compensation) for the compulsory acquisition or resumption of interests in land including native title.



Some justified exceptions to this right exist in Queensland. For example, the *Crimes (Confiscation) Act 1989* (Qld) deters crimes by allowing government confiscation of property associated with crime and the proceeds of crime.

The *Criminal Offence Victims Act 1995* (Qld) requires that the property of a victim of crime which is held for an investigation or as evidence must be returned to the victim as soon as reasonably possible.

There is also a rule of statutory interpretation for judges which says that legislation is presumed not to remove property rights without adequate compensation.

In Queensland, proposed legislation is also scrutinised to ensure that it has sufficient regard to the rights and liberties of individuals by providing "for the compulsory acquisition of property only with fair compensation", under section 4(3)(i) of the *Legislative Standards Act 1992* (Qld).

### ***Right to education***

School students in Queensland can receive publicly funded education in State schools. Parents in Queensland have the freedom to choose to send their children to State schools or private schools. Parents in Queensland also have the legal responsibility to ensure that their children attend school. All Queensland school students generally have a legal obligation to attend school, at least until a certain age (that is, over 15 years of age). These matters and the rights and responsibilities of students, school teachers, and school and parent bodies are regulated by key Queensland education laws like the *Education (General Provisions) Act 1989* (Qld). This covers compulsory attendance by school students, special education, suspension and expulsion of students, education curricula, and other aspects of education.

[Article 13 of the ICESCR contains a right to education. This recognises the importance of education for self-development, access to opportunities, and promotion of a free, informed, and tolerant community.]

### ***Right to freedom of family structure and family life***

Various Commonwealth and Queensland laws cover aspects of family structure and family life, ranging from marriage, custody of children, and other family matters under the *Marriage Act 1961* (Cth) and the *Family Law Act 1974* (Cth), to protection of families from domestic violence under the *Domestic Violence (Family Protection) Act 1989* (Qld), for example.

Although the law recognises heterosexual husband/wife relationships, the law does not recognise various family and other relationships as family units for all legal purposes. In some cases, this can create legal difficulties for certain couples in areas ranging from access to artificial conception, on one hand, to property rights after the breakdown of a relationship, on the other.

This right must not be considered on its own, because rights in this area are also affected by anti-discrimination laws throughout Australia.

[Article 23 of the ICCPR says the family is "the natural and fundamental group unit of society". This embraces a right to marry freely, to have a family, and to be protected and supported as a family unit by society. Article 10 of the ICESCR reinforces similar ideas.]

### ***Right to adequate childcare***

Social security and welfare for people without employment or with other special financial needs is largely a Commonwealth responsibility, as is the matter of taxation concessions for the cost of childcare for working parents and others.

[Article 10 of the ICESCR recognises various interests concerning adequate childcare, including family protection, the care and education of children, special assistance for mothers before and after childbirth, and special measures of protection and assistance for children.]

### ***Right to a person's identity and bodily rights***

The right to a person's identity protects citizens and those in the public eye from unjustified invasion of privacy or commercial exploitation of their identity. Nevertheless, Australian law protects this right only in a piecemeal way. Aspects of a person's right to exploit the publicity value of their name or likeness for commercial gain are protected by laws about misleading or deceptive conduct, for example. So, a company cannot mislead the public into thinking that a famous sporting personality endorses their product if that is wrong.

Advances in technology raise legal questions about a person's rights concerning their own body. People do not legally "own" their bodies in a way which gives them complete legal control over their bodies for all purposes. Queensland law currently prevents commercial surrogacy agreements, where one woman bears a child for someone else for a fee, for example. Queensland law also controls organ donation and transplantation.

However, the law remains unclear on issues like: Does a person legally own their genetic make-up? Can they be discriminated against by insurers because of something in their genetic make-up which predisposes them to illness or disease? How is respect for a person's uniqueness and dignity threatened by medical and technological progress and what safeguards are necessary?

The law on this is still evolving. These rights show that legal protection of human rights might extend to a wide range of individual rights in modern society.

[At the international level, work continues on the International Declaration on the Universal Rights in Relation to the Human Genome.]

### **Group and community rights**

Many of the following rights are not the kinds of rights which we can legally enforce in court by suing other citizens or even governments. They are not usually constitutional rights or rights protected directly under Queensland and Commonwealth laws. Nevertheless, aspects of them are protected directly or indirectly under a variety of Queensland, Commonwealth, and international laws including the ICCPR. Complaints about Australian violations of rights protected under the ICCPR can be brought before the United Nations Human Rights Committee.

#### ***Right to collective and individual development***

International law recognises the interest of people as individuals and also as a community of individuals to participate fully in the political, economic, social, and cultural development of their society. This includes being able to exercise the human rights which they enjoy.

#### ***Rights of Aboriginal people and Torres Strait Islanders***

Section 51 (xxvi) of the Australian Constitution gives power to the Commonwealth to pass laws concerning "the people of any race, for whom it is deemed necessary to make special laws". The extent to which this power can be used only to pass laws for the benefit of a race generally or Indigenous people in particular remains unclear.

Different Queensland and Commonwealth laws focus specifically on Indigenous interests and rights in contexts as various as cultural heritage, site protection, environmental management, land ownership, native title, juvenile justice, police investigations, and financial assistance.

In Queensland, the Preamble to the *Aboriginal Land Act 1991* (Qld) recognises that "(l)and is of spiritual, social, historical, cultural and economic importance to Aboriginal people", and that European settlement "dispossessed and dispersed" many Aboriginal people while some still maintained their traditional affiliation with the land. The Act promotes Indigenous rights to certain areas of mainly unalienated land in Queensland, "to foster the capacity for self-development, and the self-reliance and

cultural integrity, of the Aboriginal people of Queensland". Similarly, the *Aborigines and Torres Strait Islanders (Land Holding) Act 1985* (Qld) governs some grants of land titles to Indigenous communities for their benefit.

The common law of Australia recognises the native title rights of Indigenous people in Australian land and waters where those rights still survive throughout Australia and have not been extinguished by inconsistent legislation or executive action or the loss of a sufficient and ongoing Indigenous connection with land. Native title rights are the traditional rights of occupation, access, use, and ownership of land by an Indigenous group for traditional purposes such as sustenance, living, hunting, fishing, and ceremonial worship, according to the traditional laws and customs of the group. Native title rights can coexist with other rights, such as rights under commercial licences or pastoral leases.

Native title cannot be extinguished except in accordance with the *Native Title Act 1993* (Cth) and complementary State legislation like the *Native Title (Queensland) Act 1993* (Qld). Changes to those Acts caused by the so-called "10 point plan" and the *Native Title Amendment Act 1998* (Cth) mean that Australian native title law contains a complex balance of measures on native title, some of which are advantageous and some of which are less advantageous to Indigenous people.

Recognition by the common law of Indigenous land interests in the form of native title does not mean that Australian law acknowledges Aboriginal sovereignty and self-government or Aboriginal customary law existing as a separate law in opposition to Australian law. For example, *Mabo (No 2)* denies that the Crown's acquisition of sovereignty over Australia can be challenged in Australian courts. At the same time, rights under Indigenous customary law are sometimes relevant under Australian law. For example, the Australian legal system recognises and protects to some degree the collective and individual interests of Indigenous communities in traditional ritual knowledge and artwork, not least to prevent them from unauthorised commercial exploitation. Recognition of tribal punishment and customary law in criminal trials remains a contentious issue.

Some Queensland and Commonwealth cultural, heritage, and environmental laws also protect Indigenous interests. They include the *Cultural Record (Landscapes Queensland and Queensland Estate) Act 1987* (Qld) and the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth). In addition, the *Environmental Protection Act 1994* (Qld) must be administered in consultation with and taking account of Indigenous interests amongst others.

In Queensland, proposed legislation is scrutinised to ensure that it has sufficient regard to the rights and liberties of individuals in having "sufficient regard to Aboriginal tradition and Island custom", under section 4(3)(j) of the *Legislative Standards Act 1992* (Qld).

The Aboriginal and Torres Strait Islander Commission ("ATSIC") has special responsibility for Indigenous interests at the Commonwealth level, and various Aboriginal land councils undertake responsibility for local Indigenous communities throughout Queensland. These bodies can be an important contact point for Aboriginal and Torres Strait Islander people and others concerned about Indigenous interests in local communities.

[Various provisions in ratified international instruments like the ICCPR, the ICESCR, and the ICEAFRD specifically concern the rights of Indigenous people. Proposed international instruments concerning this topic include the United Nations Draft Declaration on the Rights of Indigenous People.]

### ***Rights of an author or creator***

Australian law recognises the interests of authors, creators, scientific designers, and artists of various kinds in laws like copyright law. At the Commonwealth level, the *Copyright Act 1968* (Cth) protects a variety of literary, artistic, dramatic, and other works, including music and film, from being copied or exploited without regard to the interests of the creator or owner of those works. There is no equivalent Queensland law.

As noted above, Australian law recognises to some degree the collective and individual rights of Indigenous people concerning traditional knowledge and art.

[Article 19 of the ICCPR recognises the freedom of expression of an author or creator of an artistic or other work. Article 15 of the ICESCR recognises that person's right to protect their interest in that work, whether it is a scientific, literary, or artistic work.]

### ***Right to environmental, cultural, and heritage protection and conservation***

Various Queensland and Commonwealth laws support the rights of people to maintain their own culture and to enjoy environmental protection and conservation. The *Environmental Protection Act 1994* (Qld) has the object of "ecologically sustainable development", in the sense of aiming "to protect Queensland's environment while allowing for development that improves the total quality of life, both now and in the future, in a way that maintains the ecological processes on which life depends". That object is achieved by an "integrated management program" comprising four cyclical phases:

- "establishing the state of the environment and defining environmental objectives";
- "developing effective environmental strategies";
- "implementing environmental strategies and integrating them into efficient resource management"; and
- "ensuring accountability of environmental strategies".

The Act covers environmental values, contamination and harm, protection policies and management, licensing of environmentally relevant activities, environmental offences, and environmental impact assessments.

Other aspects of cultural and heritage protection are provided in Queensland by laws like the *Queensland Heritage Act 1992* (Qld) and the *Cultural Record (Landscapes Queensland and Queensland Estate) Act 1987* (Qld).

[Article 15 of the ICESCR outlines the right of everyone, especially minority groups, to participate in their own form and expression of culture, arts, scientific progress, and creativity.]

### ***Right to ecologically sustainable development for current and future generations***

In Queensland, this right is also supported by the object and provisions of the *Environmental Protection Act 1994* (Qld).

### ***Right to freedom from war and invasion***

Section 119 of the Australian Constitution guarantees protection of the States from invasion and internal violence:

*The Commonwealth shall protect every State against invasion and, on the application of the Executive Government of the State, against domestic violence.*

In addition, many people in civilised societies throughout history recognise the right of all peoples to be free from unjustified wars, as well as the right of civilians and other innocent people in war to be free from attack or even the threat of attack. This would include targeting civilian populations as part of a nation's nuclear deterrence policy. Various international agreements concern the conduct of countries during wars, including their treatment of prisoners. This controversial topic raises both moral and legal questions.

## PART 4 - HOW TO ENFORCE AND ENHANCE OUR BASIC RIGHTS

### Who can provide more information or help enforce our rights?

Queensland and the Commonwealth have a number of government agencies and other public bodies which can provide further information about your basic rights and how you might protect them. At the Commonwealth level, the main government bodies include:

- the Australian Electoral Commission, dealing with all aspects of enrolment, nomination, and voting for Commonwealth elections;
- the Human Rights and Equal Opportunity Commission, dealing with many aspects of human rights and their treatment at the Commonwealth level and which currently consists of:
  - a President;
  - a Human Rights Commissioner;
  - a Race Discrimination Commissioner;
  - a Aboriginal and Torres Strait Islander Social Justice Commissioner;
  - a Sex Discrimination Commissioner;
  - a Privacy Commissioner; and
  - a Disability Discrimination Commissioner;
- the Commonwealth Ombudsman, dealing with complaints by people and investigations about actions by Commonwealth Government departments and agencies;
- the Commonwealth Administrative Appeals Tribunal, dealing with review of decisions by Commonwealth Government departments and agencies under Commonwealth laws;
- the National Crime Authority and the Australian Federal Police, dealing with investigation of Commonwealth criminal matters;
- the Aboriginal and Torres Strait Islander Commission ("ATSIC"), dealing with Indigenous interests generally;
- the National Native Title Tribunal, dealing with registration, administration, and mediation of native title claims;
- Commonwealth parliamentary committees of the House of Representatives, the Senate, or both whose areas of interest cover or affect rights, including:
  - House of Representatives or Senate Committees on:
    - ◇ Legal and Constitutional Affairs;
    - ◇ Aboriginal and Torres Strait Islander Affairs;
    - ◇ Employment, Education, and Training;
    - ◇ Environment, Recreation, Communications, and the Arts;
    - ◇ Family and Community Affairs; and
    - ◇ Scrutiny of Bills; and
  - Joint Parliamentary Committees on:
    - ◇ Treaties; and
    - ◇ Native Title and the Aboriginal and Torres Strait Islander Land Fund; and
- the Office of Parliamentary Counsel, dealing with drafting legislation.

In Queensland, the main government bodies include:

- the Anti-Discrimination Commission and the Anti-Discrimination Tribunal, dealing with all aspects of discrimination, sexual harassment, victimisation, racial or religious hatred, and related matters;
- Legal Aid Queensland, which is the government body established to provide publicly funded legal assistance under the *Legal Aid Queensland Act 1997* (Qld);
- the Children's Commission and the Children's Commissioner, dealing with many aspects of the welfare and interests of children and other young people;
- the Information Commissioner, dealing with investigations and review of decisions of government agencies and Ministers about government information and documents and access to them;
- the Health Rights Commission and the Health Rights Commissioner, dealing with many aspects of health care, services, and responsibilities within the community;
- the Employment Advocate, dealing with help, advice, and information for employees and employers concerning various aspects of employment;
- the Electoral Commission of Queensland, dealing with all aspects of enrolment, nomination, and voting for Queensland elections;
- the Parliamentary Commissioner for Administrative Investigations (that is, the Queensland Ombudsman), dealing with investigations and complaints about the decisions and actions of State Government bodies;
- the Queensland Law Reform Commission, dealing with reform of Queensland laws;
- the Queensland Crime Commission, dealing with investigation of criminal activity;
- the Criminal Justice Commission, the Parliamentary Criminal Justice Committee of the Queensland Legislative Assembly (an all-party parliamentary committee responsible for reviewing the Criminal Justice Commission), and the Parliamentary Criminal Justice Commissioner, all dealing with the administration of the criminal justice system and official misconduct;
- the Commissioner of the Police Service, and officers of the Police Service, dealing with protection and enforcement of rights under the law, rights in criminal matters and investigations, and related policing matters;
- the Queensland Corrective Services Commission, dealing with corrective services policy and administration, matters concerning prisoners, and related matters;
- the Intellectually Disabled Citizens Council of Queensland, dealing with applications for special assistance for intellectually disabled citizens;
- the Small Claims Tribunal, dealing with minor legal disputes;
- other court and tribunal registries throughout Queensland, who can advise generally about court procedures and forms;
- committees of the Queensland Parliament whose areas of responsibility cover human rights, including the Scrutiny of Legislation Committee and the Legal, Constitutional and Administrative Review Committee; and
- the Office of Parliamentary Counsel, dealing with drafting legislation.

In general, for any complaint, query, or concern about:

- how our rights are affected by Commonwealth Government actions—general assistance is available from the Commonwealth Ombudsman or the Administrative Appeals Tribunal;
- how our rights are affected by Queensland Government actions—general assistance is available

from the Queensland Ombudsman; and

- human rights, equal opportunity, or anti-discrimination—contact the Queensland Anti-Discrimination Commission or the Commonwealth Human Rights and Equal Opportunity Commission.

If anyone has information to report or a complaint about criminal actions affecting rights, they can contact the relevant bodies listed above which deal with criminal investigations, depending upon the nature of the information or complaint.

In general, if we think our basic rights have been infringed, we might need to seek legal advice and assistance.

We can also do other things to protect and enhance our rights. For example, a number of community, public interest, and advocacy groups also provide information about rights. They can approach members of Parliament or the Government on our behalf. In this regard, various non-government bodies help citizens to know and enforce their rights. A number of community bodies at Queensland, national, and international levels focus on human rights. Examples of such bodies operating in Queensland include:

- Amnesty International;
- the International Commission of Jurists;
- the Queensland Council for Civil Liberties;
- the Queensland Bar Association;
- the Queensland Law Society;
- the Australian Performing Rights Association;
- the various legal services which come under the umbrella of the Aboriginal and Torres Strait Islander Commission;
- various public interest advocacy groups;
- political parties; and
- various community legal centres throughout Queensland including specialised centres such as the:
  - Arts Law Centre (Qld) (assisting people in the Queensland arts industry);
  - Environmental Defenders Office (Qld) (dealing with public interest planning and environmental law);
  - Logan Youth Legal Service (specialising in representing young people under seventeen years in the Children's Court);
  - Prisoners' Legal Service (assisting prisoners and their families on matters relating to imprisonment);
  - Queensland Advocacy Incorporated (assisting people with disabilities);
  - South Brisbane Immigration and Community Legal Service (specialising in immigration and refugee law);
  - Tenants Union of Qld Inc - Brisbane and North Queensland Office (dealing with tenancy matters);
  - Welfare Rights Centre Inc (Qld) (specialising in advice relating to income support—social security and Austudy—and disability discrimination issues);
  - Women's Legal Service and North Queensland Women's Legal Service (specialising in assisting women); and
  - Youth Advocacy Centre (assisting young people between ten and sixteen years and their

families).

A local telephone directory should have contact details for these and other community bodies. Some contact details are also available via the main AUSTLII site on the Internet at <<http://www.austlii.edu.au/databases.html#homepages>>.

In addition, contact details for government bodies can often be found via Internet at the Queensland Government site (<<http://www.qld.gov.au>>) or the Commonwealth Government site (<<http://www.fed.gov.au>>).

### **Who can help expand our rights?**

If we think that our rights are not adequately protected under current law, we can do numerous things to seek to change the law as well as government policy. Any State or federal member of Parliament can assist here. They can be contacted at their electorate office or via Parliament House in Brisbane or Canberra. In addition, State or federal members of Parliament can advise citizens on which government agency, non-government body, or community legal centre to contact for more advice or help about enforcing and expanding rights.

Members of Parliament can also advise on how to seek to expand our rights by, for example:

- making representations and submissions to your local members of Parliament to change the law to improve its protection of rights;
- petitioning the Parliament to change the law to improve its protection of rights;
- urging governments and their officials to consider rights fully in scrutinising laws and administering policy;
- urging governments and their officials to respect human rights in all areas of government administration and not just in making laws;
- forming or joining school, community, and political organisations concerned about rights;
- writing to newspapers and speaking to the media about human rights;
- seeking legal advice and taking legal action in courts and tribunals; and
- encouraging Australia to sign international agreements on basic rights.

These are the various ways in which people in Queensland can seek to enforce their rights or contribute to public debate about changing the law on particular rights. They also reinforce the point that rights-protection is not just a matter for judges or politicians. It is not just a matter for victims of human rights violations seeking justice from the legal system. It is not just a matter for the international community. It is a matter for everyone in all levels of government and the people of Queensland and Australia too.

### **Suggested further reading and sources of guidance**

This version of the handbook can be obtained from the Legal, Constitutional and Administrative Review Committee's Internet site at <<http://www.parliament.qld.gov.au/committees/legalrev.htm>>. A simplified version of the handbook is also available via the same Internet site. In addition, the following documents and sources may be useful:

*Report on Review of the Preservation and Enhancement of Individuals' Rights and Freedoms*, Electoral and Administrative Review Commission, Government Printer, Brisbane, August 1993.



*The Preservation and Enhancement of Individuals' Rights and Freedoms': Should Queensland Adopt a Bill of Rights?*, Legal, Constitutional and Administrative Review Committee, Issues Paper No 3, Government Printer, Brisbane, September 1997.

*The Preservation and Enhancement of Individuals' Rights and Freedoms in Queensland: Should Queensland Adopt a Bill of Rights?*, Legal, Constitutional and Administrative Review Committee, Committee Report No 12, Government Printer, Brisbane, November 1998.

*Privacy in Queensland*, Legal, Constitutional and Administrative Review Committee, Committee Report No 9, Government Printer, Brisbane, April 1998.

*Caxton Legal Centre's Lawyers Practice Manual Queensland*, LBC Information Services, Sydney, 1996.

*The Duty Lawyer Handbook*, Legal Aid Office (Queensland) and Queensland Law Society, 2nd ed, Brisbane, 1993.

*The Queensland Handbook*, Caxton Legal Centre Inc, Brisbane, 1997.

Speeches by High Court judges on human rights, collected in the "Recent Speeches" section on the High Court's home page, located on the Internet at <<http://www.hcourt.gov.au>>.

P. Bailey, *Human Rights: Australia in an International Context*, Butterworths, Sydney, 1990.

D. Kinley, ed, *Human Rights in Australian Law*, Federation Press, Sydney, 1998.

# QUEENSLANDERS' BASIC RIGHTS HANDBOOK FEEDBACK FORM

The committee would like to hear from users of this handbook as to their thoughts on its coverage, readability and usefulness. The committee would also like to hear from organisations which would like to be specifically listed in Part 4 of this handbook.

Your comments and/or suggestions for improvement will be taken into account in preparing future editions of this handbook.

**1. Do you think this handbook is easy to understand?**

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**2. Do you think this handbook is useful?**

*If so, why?* \_\_\_\_\_

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*If not, why not?* \_\_\_\_\_

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**3. How could this handbook be improved?**

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**4. What else would you like to be covered in this handbook?**

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**QUEENSLANDERS' BASIC RIGHTS HANDBOOK FEEDBACK FORM**

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**5. Do you have any other comments?**

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The committee may wish to contact you regarding your suggestions, or it may wish to send you further information about rights. It would therefore be appreciated—but it is not compulsory—if you would provide the following details:

Name: \_\_\_\_\_

Address: \_\_\_\_\_

\_\_\_\_\_

E-mail: \_\_\_\_\_

Telephone: \_\_\_\_\_ Fax: \_\_\_\_\_

Please return this form to:

The Research Director  
Legal Constitutional & Administrative Review Committee  
Parliament House  
George Street  
BRISBANE QLD 4000

E-mail: [lcarc@parliament.qld.gov.au](mailto:lcarc@parliament.qld.gov.au)  
Fax: (07) 3406 7070