

QUEENSLANDERS' BASIC 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

11 November 1998

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PART 1 - INTRODUCTION

In Queensland we live in a democratic society in which certain freedoms and rights of citizens are guaranteed. We have a government and members of Parliament who are elected directly by the people.

Under our system of government, the basic rights of Queenslanders are protected at a number of levels. Australia is a federation, so rights are protected by Commonwealth law as well as Queensland law. International law is also becoming more relevant. In summary, the main sources which protect rights in Queensland include:

- the Queensland and Australian Constitutions;
- legislation made by the Queensland and Commonwealth Parliaments;
- scrutiny of new laws before they are introduced to Parliament;
- Queensland and Commonwealth government processes and policies;
- the common law (that is, judge-made law); and
- international human rights law.

These different sources make it difficult for people to know the range and limits of their rights under the law. This handbook has been prepared by the Legal, Constitutional and Administrative Review Committee—an all-party committee of the Queensland Legislative Assembly—to help people in Queensland to understand: (1) what their basic rights are and where those rights are found; (2) how to find more information about their rights and enforcing their rights; and (3) how they might go about expanding their rights.

This handbook stems from 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*.

In accordance with the committee's aims, this handbook contains three further parts.

Part 2 provides some important information on understanding the nature of people's basic rights and responsibilities, and the limits of rights. The rights listed in this handbook are not all of the same kind. Different consequences flow when different rights are breached. The information in Part 2 helps to explain these differences.

Part 3 sets out in detail various rights under three common categories, that is:

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

The rights set out in Part 3 are mainly those basic rights that are recognised internationally. Part 3 is not meant to contain a complete list of all rights in Queensland. For example, it contains nothing about specific rights when fencing disputes arise or the rights of landlords and tenants. Rather, it focuses upon *basic* rights. Therefore, the absence of a right from this part does not mean that it is not important or that it does not exist.

Part 4 provides information on how to enforce and enhance our rights, and contains some reference points for further information and assistance.

In addition, further information about rights can be obtained from a more detailed version of this handbook and the committee's report on its inquiry. Both of these documents are located via the Queensland Parliament's Internet site at <<http://www.parliament.qld.gov.au/committees/legalrev.htm>>.

There is a lot of debate about rights, such as, what 'basic' rights are, what sorts of rights should be protected, and how rights should be protected. This handbook is not designed to discuss or settle any of these issues. Rather, the committee intends that this handbook will be used by citizens, government bodies, and school and community groups to educate and inform themselves and others, and promote awareness about rights.

If any citizen would like to make any suggestion about how the committee could improve the coverage, readability or usefulness of this handbook, they are invited to provide their comments via the tear-off section at the back of this handbook.

PART 2 - THE NATURE AND LIMITS OF OUR BASIC RIGHTS

As noted in the introduction, rights are protected in many different ways. We cannot fully understand the extent of our rights without understanding their source and their limits. Different rights have different consequences under the law, and not all rights can be enforced by taking someone to court. This part summarises the different sources of rights. The information in this part will be very helpful in order to understand fully the rights set out in Part 3.

Constitutional protection of basic rights

The Australian and Queensland Constitutions provide a framework for 'government by the people' rather than a guarantee of basic rights. However, rights are protected by our system of government itself. At both State and Commonwealth levels of government, the protection of basic rights is a role of all three arms of government working together. The three arms of government are:

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

Separating each of these three arms of government ensures that they act independently from each other's influence. Rights are protected by this system of 'checks and balances' by, for example, enabling judges to make decisions without being pressured by Parliament or the government. This 'separation of powers' is enshrined in the Australian Constitution and is the principle on which government operates in Queensland.

The Australian and Queensland Constitutions also set out the power of their respective Parliaments to make laws which establish or affect rights. There are some limits to these powers and Australia's highest court—the High Court of Australia—decides whether any Commonwealth or State laws creating or affecting rights are invalid. The courts may rule laws invalid if Parliament does not have power under its constitution to make those laws.

The few express rights guaranteed under the Australian Constitution are:

- a right to vote in Commonwealth elections;
- 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 right to change the Constitution at a referendum.

The Australian Constitution also contains certain 'implied' rights, which are rights found by 'reading between the lines' because the Constitution makes no sense without them. An example of an implied right is freedom of political discussion.

However, because a right is a constitutional right does not mean that a citizen may sue someone if it is breached. For example, the implied constitutional right to freedom of political discussion under the Australian Constitution simply prevents such discussion from unwarranted interference by the Queensland and Commonwealth Governments and Parliaments. It is not the kind of right which can lead to an award of money by a court or tribunal.

The Queensland Constitution does not contain any provisions which guarantee people's rights. It simply gives Parliament power to make laws for the 'peace, welfare and good government' of Queensland.

Commonwealth, State and other legislation protecting basic rights

The Commonwealth and Queensland Parliaments have passed many specific laws which create and protect individuals' rights. In rare cases, the Parliaments might also seek to pass laws which limit rights. However, there are a number of safeguards against this.

In Queensland, the *Legislative Standards Act 1992* (Qld) attempts to ensure that legislation sufficiently respects rights. In particular, the Act requires that Queensland legislation should comply with 'fundamental legislative principles' ('FLPs'). 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 reverse the onus of proof in criminal proceedings without adequate justification'.

The office which actually drafts Queensland's laws—the Office of the Queensland Parliamentary Counsel—has an important advisory role in relation to the FLPs. The Scrutiny of Legislation Committee of the Queensland Parliament also examines proposed legislation to see if it conforms with the FLPs. A committee of the Commonwealth Parliament looks at whether Commonwealth legislation respects

rights in a similar way. Members of the Commonwealth and Queensland Parliaments may also consider the impact of proposed laws upon rights when debating and voting on proposed legislation (bills) in Parliament.

The *Legislative Standards Act* cannot be used to challenge the validity of Queensland laws. However, the FLPs are a useful guide for citizens wanting to lobby members of Parliament about the impact of proposed legislation on rights or wanting to follow any of the other possibilities for protecting and promoting rights which appear in Part 4 of this handbook.

Given Queensland's history as an English colony, some of Queensland's laws are inherited from the United Kingdom. Thus, laws like the 1215 *Magna Carta* and the 1688 *Bill of Rights* still have some legal force in Queensland. However, these laws 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

Whilst Parliament makes laws, their real impact on people and their rights is when those laws are put into practice by government bodies. Government bodies sometimes also rely on policies rather than laws to solve community issues and problems. Therefore, when governments develop and implement laws and policies they are often examining rights. Government bodies are also sometimes examining rights without having written laws which set out those rights.

There are various avenues to complain about government action affecting our rights. For example, we may approach the Queensland or Commonwealth Ombudsman, or seek to have the Administrative Appeals Tribunal review government action taken under Commonwealth laws.

A number of government organisations also have responsibilities in relation to protecting and promoting human rights. For example, the Queensland Anti-Discrimination Commission and Commonwealth Human Rights and Equal Opportunity Commission have important rights functions.

The Courts interpreting and protecting basic rights

Australia has a judicial system of State courts, which largely deal with State matters, and Commonwealth courts, which largely deal with Commonwealth matters, although there is some overlap. The courts and judges protect rights in a variety of ways.

The common law (or judge-made law) recognises a number of basic rights, such as the right to a fair trial and a person's right to remain silent during police questioning. The common law also contains various principles of fairness and justice which protect rights, particularly where people's rights are affected by government activity. However, the common law does not provide complete

protection of rights. For example, there are no common law rights to vote, to privacy or to ownership of one's own medical records.

The common law is always developing. The High Court's 1992 landmark decision in *Mabo v Queensland (No 2)* is an example of the common law recognising a basic right where it had not previously been recognised. In this case it was an Indigenous right concerning land, that is, 'native title' where it still survives throughout Australia.

Certain legal rules for reading laws made by Parliament also allow judges to interpret laws in ways which favour rights. These are called 'rules (or presumptions) of statutory interpretation'. For example, courts generally interpret legislation which may have more than one meaning in a way which minimises its impact upon rights.

International law and basic rights

Generally, international law cannot be enforced directly in Australian courts. International human rights law and international agreements signed by Australia have no direct legal force in Australia unless Parliament incorporates them into law. The courts sometimes use international law to assist in interpreting Australian law.

Australia is a party to a number of important international human rights agreements. The main agreements 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.

Copies of international human rights agreements signed by Australia, and further information about them, can be found in various sources such as Internet sites like the 'Australian Treaty Series' on the main *AUSTLII* site at <<http://www.austlii.edu.au>>.

Most significantly, 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 legal remedies. The Human Rights Committee can decide that Australia is in breach of its international human rights obligations. While such decisions do not count as law in Australia unless governments act on them, any such decisions carry a significant amount of political and diplomatic weight.

Sometimes rights in international agreements might also be taken into account in State and Commonwealth Government administration. A recent High Court decision indicates 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. This requirement could affect Queensland and Commonwealth Government administration. The Commonwealth Government has recently taken some steps to stop international agreements having these effects on government administration in Australia.

Given the limited protection that international law affords rights in Queensland, the discussion on international law in Part 3 appears in brackets and in smaller font.

Basic rights and responsibilities

The link between rights and responsibilities is strong. Most people in a civilised society recognise the need to act responsibly towards others and with consideration for their interests. This is recognised in many aspects of the law including international agreements.

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. For example, the

Queensland *Criminal Code* 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 for those people.

Some of these specific responsibilities are referred to in the discussion in Part 3.

PART 3 - DETAIL OF VARIOUS RIGHTS AND THEIR SOURCES

This part contains information on certain basic rights under three common categories of rights. The information under each particular right is set out in a similar order to the discussion in Part 2. It helps to answer the following key questions about each of our rights in this order of importance:

- Is my right constitutionally protected?
- Is there a Queensland or Commonwealth law which protects my right?
- Are there any other Queensland or Commonwealth Government processes which protect my right?
- Is my right protected in some way by judges and laws made by them?
- 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 the rights in this category are listed in the ICCPR. This means they are protected under international law by the First Optional Protocol to the ICCPR, to which Australia is a party. So, if a right appears in the ICCPR and it is breached and we have tried all other avenues of complaint in Australia, we might be able to complain to the United Nations 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, doctor-assisted suicide, euthanasia, or the death penalty. In fact, 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 today's society, especially in 'life and death' situations. Difficult issues arise such as:

- an embryo's right (if any) to be born;

- an embryo's right not to be mistreated (for example, in human and animal cloning, and medical experimentation);
- a mother's right (if any) to decide whether or not to continue a pregnancy; and
- an intellectually disabled teenager's right to freedom from sterilisation.

Whilst none of these rights are protected in Queensland's or Australia's Constitutions, some of them are partly affected by Queensland and Commonwealth legislation. For example, the termination of pregnancies is regulated by the criminal law in Queensland under the *Criminal Code*. An 'advance health directive' can be given about the withdrawal of life-sustaining medical treatment and other medical decisions under the *Powers of Attorney Act 1998* (Qld). However, 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. 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.

This does not necessarily prevent any state or nation from imposing the death penalty for the most serious crimes. However, it clearly prevents the crime of genocide.]

Right to freedom of speech and freedom of expression

The Australian Constitution does not guarantee unlimited freedom of speech of all kinds. However, it impliedly protects people's freedom to communicate about political matters which is necessary for the system of government enshrined in the Constitution. 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 which would let somebody be sued in court for breaching it. It simply prevents governments from interfering with our right.

This right to freedom of political discussion is not as wide as a right to freedom of speech generally. Nor is it unlimited. For example, the law of defamation protects a person's reputation from unjustified damage by someone else's exercise of freedom of speech. It is also unclear how far this constitutional right extends to State and local government politics.

[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, through 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 *Human Rights and Equal Opportunity Commission Act 1986* (Cth) makes discrimination based on religious grounds unlawful in Australia. Australia is also a party to the international *Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief*. The Declaration's articles cover religious worship, writing and disseminating religious material, teaching religion, observing religious practices, and discrimination concerning any of these things.

[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 supports an implied right to freedom of movement and association 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 legislation ensures that employers, employees and independent contractors are free to join, or not to join, industrial associations (unions) of their choice. This legislation also ensures that employers, employees and independent contractors are not discriminated against or victimised because they are, or are not, members or officers of industrial associations. The *Industrial Organisations Act 1997* (Qld) concerns industrial organisations registered in Queensland. Commonwealth employee and employer organisations in Queensland are registered under the *Workplace Relations Act 1996* (Cth).

The common law protects freedom of movement by laws such as those concerning false imprisonment, personal trespass and assault.

[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 government.

It is unclear whether the implied 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. Everyone should also be recognised as having rights under the law and be able to access the legal system to enforce those rights. The idea behind 'equality' is that everyone is entitled to equal protection and benefit of the law. The notion of equality involves a lot of different considerations. Sometimes treating everyone in the same way can produce injustices, because of people's social, cultural, and economic differences.

The High Court has not said conclusively that the Australian Constitution contains an implied guarantee of complete legal equality. The High Court has also decided that while the Australian Constitution supports the broad principle of 'representative democracy' (that is, the people govern through representatives they elect) it does not require any particular electoral system to give effect to that principle. So, the particular notion of electoral equality contained in the idea of 'one vote, one value' is not constitutionally guaranteed.

Various State and Commonwealth laws ensure as much as possible that legal rights and obligations apply equally to citizens and governments. This means that governments are not above the law.

Queensland's *Anti-Discrimination Act 1991* (Qld) recognises that protection from discrimination of various kinds is an important means of ensuring equality of opportunity for people. Similarly, courts reviewing the way governments put law into practice is an important means of ensuring equal protection under the law, so that government decisions affecting people's rights are made in the right way and for the right reasons.

[At the international level, various covenants such as the ICCPR, ICESCR, the *Declaration on the Rights of Disabled Persons* and the *Declaration on the Rights of Mentally Retarded Persons*, contain various articles associated with equality and legal recognition.]

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, for example, they live in Queensland as distinct from New South Wales. There is no equivalent constitutional restriction in Queensland's Constitution.

Major Commonwealth laws preventing discrimination are:

- the *Racial Discrimination Act 1975* (on racial discrimination);
- the *Racial Hatred Act 1995* (on racial hatred, vilification and victimisation);
- the *Sex Discrimination Act 1984* (on sex discrimination);
- the *Affirmative Action (Equal Employment Opportunity for Women) Act 1986* (on equal employment opportunity ('EEO') programs for women);
- the *Public Service Reform Act 1984* and the *Equal Employment Opportunity (Commonwealth Authorities) Act 1987* (both on EEO programs in the Commonwealth public sector);
- the *Disability Discrimination Act 1992* (on discrimination against disabled people);
- the *Human Rights (Sexual Conduct) Act 1994* (on protection of all lawful sexual conduct between consenting adults in private from unnecessary interference by Commonwealth, State and Territory laws); and
- the *Human Rights and Equal Opportunity Act 1986* (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. In particular, the *Anti-Discrimination Act 1991* (Qld) also covers aspects of discrimination covered in other Commonwealth laws. For example, the *Anti-Discrimination Act 1991* (Qld) and the *Racial Hatred Act 1995* (Cth) both prohibit racial hatred and vilification. Queenslanders 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 deals with the prevention of direct and indirect discrimination in work and work-related areas—for example, education, provision of goods and services, superannuation, insurance, land dealings, accommodation, 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.

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, 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 job requirements, such as considering only women for a job which involves conducting 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 job requirement to work 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, 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 ultimately liable for breaches of the Act by their employees and agents, unless they have taken 'reasonable steps' to prevent that breach.

[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

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.

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 *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 specifically deal with this right. However, the common law and Queensland legislation provide some important rights in this regard. 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 which is 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.

The right to remain silent and to refuse to answer if questioned by police is a basic right under the common law and also under the *Police Powers and Responsibilities Act 1997* (Qld). This right is only subject to some statutory exceptions which require someone to provide personal information or answer certain questions.

Subject to exceptions for urgency, safety, etc, various safeguards apply to protect people in police custody 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 about their rights, including the right to remain silent, before questioning. 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 kept 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 this can be done without written legal authorisation, that is, 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). This Act 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’;
- ‘provides appropriate protection against self-incrimination’; and
- ‘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 fraud. The *Crimes Act 1914* (Cth) is the starting point for Commonwealth criminal offences and sentencing principles. Offences under Commonwealth laws generally are dealt with in State courts.

[In addition to prohibiting arrest without good reason 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 guarantees 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 the 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 that an accused person does not have a common law right to legal aid or otherwise to be provided with legal representation at public expense. However, at the same time, the High Court said that an accused has the right to a fair trial, and that lack of legal representation might sometimes prevent a

fair trial and therefore justify stopping court proceedings.

In criminal cases the general rule is that a person is 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.

Fairness and justice are as important in civil court actions as they are in criminal trials. For example, the rules of evidence in court cases about business matters are designed to resolve disputes in a fair and just way.

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

Rights of victims of crime

In Queensland, the *Criminal Offence Victims Act 1995* (Qld) entitles victims of crime to compensation for personal injury resulting from someone committing an indictable offence (that is, offences which the law says must be tried before a judge and jury). Applications can be made to the court before whom the offender is convicted or to the State Government, 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 and court prohibition on publication of information or disclosure of a complainant's identity.

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, watch-houses, 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 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. This is 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 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 which allows someone to challenge in court 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), the *Administrative Appeals Tribunal Act 1975* (Cth) and the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

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 the *Legislative Standards Act 1992* (Qld). This Act also requires that proposed legislation is 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
- 'allows the delegation of administrative power only in appropriate cases and to appropriate persons'.

'Administrative power' refers to the power that public servants exercise when they 'administer' or put the law into practice.

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 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 officers 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 rights in a substantial way 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.

In Queensland, the *Legislative Standards Act 1992* (Qld) requires that 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'.

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.]

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 that the Australian people are 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 should be aware of the basic importance of the people and their rights in the political system. Former Chief Justice of the High Court, Sir Anthony Mason, said in 1992 that:

- our democracy means 'government by the people through their representatives';
- because of the Australian Constitution, 'elected representatives exercise sovereign power on behalf of the Australian people' and '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 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 kept in police custody 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. 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 well-being and to have those views appropriately taken into account in light of their age, maturity, level of understanding, and capacity;

- giving informed consent to medical treatment and surgical operations (for example, 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 a right to receive appropriate financial support from either or both of their parents in 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 being 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 a legal adult 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 most importance. For example, the *Family Law Act 1974* (Cth) makes the best interests of the child the most important consideration in a variety of decisions affecting children. The Act also outlines criteria for courts in 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 (for example, 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 regarding the arrangements for care and protection of children are currently being reviewed. Proposed new child protection legislation includes a charter of rights for children in care. The type of rights in this proposed charter include a child's rights to a safe and culturally appropriate living environment, and to maintain relationships with the child's family and community; and the right to be consulted and take part in decisions affecting them such as their health and schooling.

In terms of criminal matters and investigations, the *Juvenile Justice Act 1992* (Qld) provides that young persons should be treated differently from 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 knowledge both depend on these factors.

[A number of international documents such as Articles 10, 14 and 24 of the ICCPR and Articles 3 and 40 of the *Convention on the Rights of the Child* also recognise certain rights specific to children and other young people. These articles relate to matters such as discrimination, nationality and treatment in criminal matters.]

Rights and responsibilities of parents

The responsibilities and powers of parents extend to the physical, mental, moral, educational and general welfare of the child. These responsibilities and powers extend to every aspect of the child's life. They are not just 'moral' responsibilities; they are legal responsibilities. A parent's authority over their child is limited by the common law and legislation and, as the child matures, by the independence which the child is entitled to assert.

Queensland's *Criminal Code* places a duty on every person 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 the child's 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.

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'.

[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 say whether or not they are guilty and alright to be tried.

[The international *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 achieve this in various ways and areas of activity, including accommodation, medical care, family support, education and work. These laws also protect disabled people from exploitation, abuse, and degrading treatment.]

Economic, social and cultural rights

Some 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 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 laws, workplace awards and workplace agreements at both the Queensland and Commonwealth levels. In Queensland many laws regarding employment and industrial relations are found in the *Workplace Relations Act 1997* (Qld). Queensland's *Workplace Health and Safety Act 1995* (Qld) also 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 our 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 includes a range of interests. They include safety as well as freedom from crime and violence. We cannot go to court to sue somebody for breaching this right, as it is not a right presently guaranteed under any Constitution or law. 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 that if the Commonwealth acquires property of all kinds it must be on just terms. In addition, section 114 of the Australian Constitution prevents the Commonwealth and a State from taxing the ownership of one another's property.

While the States are not subject to that constitutional restriction, Queensland's *Acquisition of Land Act 1967* (Qld) outlines conditions for the compulsory acquisition or resumption of land, including compensation. 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, the *Legislative Standards Act 1992* (Qld) requires that proposed legislation is 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'.

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 young Queenslanders generally have a legal obligation to attend school, at least until they are 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).

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.

We should not consider this right 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. So is the matter of tax 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 is not yet clear on issues like: Can a person sell one of their own organs? Does a person legally own their genetic make-up? Can a person be discriminated against by insurers because of something in their genetic make-up which makes them likely to get an illness or disease? How is respect for a person's uniqueness and dignity threatened by medical and technological progress and what safeguards are necessary?

These are major, complex issues which society will have to deal with in the future.

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 interests of people as individuals—and as communities—to be included in the political, economic, social, and cultural development of their society.

Rights of Aboriginal people and Torres Strait Islanders

The Australian Constitution gives the Commonwealth power to pass laws concerning 'the people of any race, for whom it is deemed necessary to make special laws'. It is unclear whether this power can be used only to pass laws for the *benefit* of a race generally or Indigenous people in particular.

Different Queensland and Commonwealth laws focus specifically on Indigenous interests and rights in areas such 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.

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 other people concerned about Indigenous interests in local communities.

In Queensland, the *Legislative Standards Act 1992* (Qld) requires that 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'.

[Various provisions in ratified international instruments like the ICCPR, the ICESCR, and the *International Convention on the Elimination of all Forms of Racial Discrimination* 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'. 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 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.

PART 4 - HOW TO ENFORCE AND ENHANCE OUR BASIC RIGHTS

Who can provide more information or help enforce our rights?

There are a number of Queensland and Commonwealth Government agencies and other public bodies which can provide further information about our basic rights and how we might enforce them. Some of the major agencies and bodies are listed in this part of the handbook. A local telephone directory should have their contact details.

Any State or federal member of Parliament can also advise citizens on which government agency or public body to contact for more advice or help about our rights.

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

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 citizens have information to report or a complaint about criminal actions affecting rights, they should contact the relevant bodies listed below 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 may need to obtain legal advice and assistance.

At the Commonwealth level, the main government bodies dealing with rights include:

- 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;
- an 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 and investigating complaints by people 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 Australian Electoral Commission (dealing with all aspects of enrolment, nomination, and voting for Commonwealth elections);
- the National Crime Authority and the Australian Federal Police (dealing with investigation of Commonwealth criminal matters);
- the Aboriginal and Torres Strait Islander Commission (dealing with Indigenous interests generally);
- the National Native Title Tribunal (dealing with registration, administration, and mediation of native title claims); and
- Commonwealth parliamentary committees of the House of Representatives, the Senate, or both whose areas of interest cover or affect basic 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 dealing with rights 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);
- the Parliamentary Commissioner for Administrative Investigations or 'Ombudsman' (dealing with investigations and complaints about the decisions and actions of Queensland Government bodies);
- Legal Aid Queensland (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 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 Queensland 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 administrative review 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).

Non-government bodies can also help citizens to understand and enforce their rights. There are a number of community organisations at State, national, and international levels which focus on human rights. Whilst the following is not an exhaustive list, some of these bodies include:

- Amnesty International;
- the International Commission of Jurists;
- the Queensland Council for Civil Liberties;
- the Queensland Bar Association;
- the Queensland Law Society;
- various public interest advocacy groups;
- the various legal services which come under the umbrella of the Aboriginal and Torres Strait Islander Commission;
- political parties;
- the Australian Performing Rights Association; 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) Inc (dealing with public interest planning and environmental law);
 - Logan Youth Legal Service (specialising in representing young people under 17 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 10 and 16 years and their families).

A local telephone directory should have contact details for these and other community organisations.

Some contact details are also available via the main *AUSTLII* site on the Internet at <<http://www.austlii.edu.au/databases.html#homepages>>.

Who can help expand our rights?

If we think that our rights are not adequately protected by the current law, we can do a number of things to try and have the law and/or policies changed. Any State or federal member of Parliament can assist in this regard. They can be contacted at their electorate office or via Parliament House in Brisbane or Canberra.

Community, public interest, and advocacy groups—including some of those listed above—also promote law reform. They might approach members of Parliament or the government on our behalf.

Some examples of ways in which we might be able to expand our rights include:

- making representations and submissions to our 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 putting policies into practice;
- 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.

Protecting rights is not just a matter for judges or members of Parliament and government agencies. It is a matter for the people of Queensland and Australia.

Suggested further reading and sources of guidance

A more detailed version of this handbook can be obtained from the committee's Internet site at <<http://www.parliament.qld.gov.au/committees/legalrev.htm>>. In addition, the following documents 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 in Queensland: Should Queensland Adopt a Bill of Rights?, Legal, Constitutional and Administrative Review Committee, Issues Paper No 3, Government Printer, 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, Report No 12, Government Printer, November 1998.

Privacy in Queensland, Legal, Constitutional and Administrative Review 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.

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?

2. Do you think this handbook is useful?

If so, why? _____

If not, why not? _____

3. How could this handbook be improved?



QUEENSLANDERS' BASIC RIGHTS HANDBOOK FEEDBACK FORM

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

5. Do you have any other comments?

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
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George Street
BRISBANE QLD 4000

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