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[redacted]

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

By email: lacsc@parliament.qld.gov.au

Dear Research Director

Human Rights Inquiry

Thank you for the opportunity to make a submission to this inquiry. I consider that it is both appropriate and desirable to legislate for a Human Rights Act ('HR Act') in Queensland. The current mechanisms for protecting human rights in Queensland are ineffective in protecting human rights in circumstances where the conduct of the state itself is at issue. Further, the existing statutory complaints process under the *Anti-Discrimination Act 1991* (Qld) ('ADA') does not adequately address disputes between private citizens and the state. I am employed by a Queensland statutory authority, In 2014 I engaged the statutory complaints process against the State of Queensland and pursued a human rights matter through the Anti-Discrimination Commission of Queensland ('ADCQ') and The Queensland Civil and Administrative Tribunal ('QCAT'). I will draw upon my personal experience to highlight the deficiencies with the current statutory framework.

QCAT Case ADL081-14

It is not intended to discuss the merits of this particular case however, by way of background, a brief factual summary and a timeline of events follows.

October 2013-A State Government employer expressly prohibited trade union representatives from accessing workplace communication facilities, including emails, for particular purposes, including distributing details of planned union meetings (the prohibition policy). Other work related social, charity and sporting groups continued to be permitted to communicate within the workplace. The prohibition policy was ostensibly, 'government policy'.

July 2014- Correspondence was sent to the employer requesting consideration and response as to whether or not the prohibition policy was lawful and consistent with the ADA.

August 2014- The complaint was unable to be resolved internally. A formal complaint was filed with the ADCQ alleging a breach of the ADA.[1]

[1] *Anti-Discrimination Act 1991* (Qld) ss 10, 7(k), 15.

November 2014- ADCQ conciliation conference.[2] The complaint was declared unable to be resolved by conciliation and referred to QCAT by request of the complainant.[3]

February 2015- QCAT received submissions on whether the complaint should be heard as a representative complaint. This is required by the ADA where it is alleged the respondent contravened the ADA against a number of people.[4]

April 2015- QCAT decided to deal with the complaint as a representative complaint. Further directions were issued.

May 2015- Complainants contentions were filed.

June 2015- Orders by consent were entered.

September 2015- Respondent failed to comply with the QCAT order.

November 2015- Respondent complied, in part, with the QCAT order.

Deficiencies in the existing statutory framework.

Through my experience in this process I submit that the current statutory mechanisms are inadequate and inappropriate in protecting the human rights of individuals where those rights are alleged to have been breached by the state itself. Specifically;

(i) The lack of formal oversight or adequate education of state government entities to ensure that proper regard is given to those human rights obligations enshrined in Queensland law.

(ii) The lack of any mechanism in the complaints process to compel the state to formally account for its conduct and address allegations of improper conduct in a timely way.

(iii) Insufficient regard given to the significant power imbalances that exist between individuals and the state.

Lack of formal oversight of state government entities.

A fundamental principle underpinning the rule of law is that everyone, including the government, is required to act in accordance with the law. In some respects it is recognised that the state has an obligation to go further than merely complying with the law, and should be an exemplary adherent to it. This is reflected in the model litigant principle[5] and in the establishment of anti-corruption agencies and ombudsman services. In 2009 the National Human Rights Consultation reported that 'many of the human rights difficulties that do arise occur when ordinary members of the public have contact with public sector decision makers and service providers' and that 'there was… strong support for accountable and transparent decision making.'[6] The current legislation in Queensland fails to recognise the special responsibility of the state to be exemplary; open; and accountable in its conduct with respect to human rights. The ADA makes no distinction between ordinary citizens and the state. The lack of extraordinary public sector accountability presents a particular risk in circumstances

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[2] Ibid s 158.
[3] Ibid s 166.
[4] Ibid s 194.
[5] Rule of Law Institute of Australia, *Model Litigant Rules* < http://www.ruleoflaw.org.au/priorities/model-litigant-rules/>.
[6] *National Human Rights Consultation Report,* Commonwealth of Australia, 2009, 143.

where the executive branch of the state government does not show proper respect for the rule of law. The state executive has considerable influence over the public service, stemming from its control over the appointment and ongoing employment of public officers. An irresponsible executive may attempt to exploit this influence in order to implement policy which does not meet human rights obligations. Absent any form of independent oversight over public sector human rights compliance, it is likely that the public service will bend to the will of such an executive. The potential for the executive to exert undue influence on the public service may also be compounded by a lack of public sector human rights education, resulting in a situation where public officials fail to recognise the distinction between faithfully serving the government of the day, and being asked to take unlawful administrative actions. This situation is unacceptable, the proper way to alter rights in a liberal democracy is in full view of the people, in the people's parliament; not by abusing the executive power of government and implementing unlawful policy through the agency of the public service.

In the Australian Capital Territory, the *Human Rights Act 2004* (ACT) Part 5A, imposes particular obligations upon public authorities to act consistently with human rights, and confers jurisdiction upon the Supreme Court to grant appropriate relief where public authorities fail to act in accordance with human rights. It is important to note that these provisions recognise parliamentary sovereignty by allowing for public authorities to act inconsistently with human rights if a valid law in the Territory requires it.

I suggest:

1. Queensland should enact similar provisions to those contained in Part 5A of the *Human Rights Act 2004* (ACT).
2. In addition to, or as an alternative to, conferring jurisdiction on the Supreme Court to grant relief against public sector human rights breaches, Queensland should consider establishing a system of independent oversight over human rights compliance in the public sector.

Lack of any mechanism requiring timely account of state human rights conduct.

When a complaint is made under the ADA the respondent may, but is not compelled to, provide a written response to the allegations.[7] In the conciliation stage the respondent is required to do no more than merely 'attend' the conference.[8] If the matter then proceeds to QCAT the respondent is not required to provide a formal response until the complainant has first filed their written contentions and the respondent is ordered to file contentions in response. In QCAT Case ADL081-14, outlined above, the period of time that elapsed between initially raising the issue with the relevant state entity until a formal response was required from the state, amounted to approximately one year. As it happened, consent orders were agreed to on the last business day before that response was due. The state therefore did not, and still has not provided any reasonable explanation for, or proper account of its conduct other than through a thoroughly unsatisfactory and unrecorded oral contribution during the conciliation conference. The conciliation process is subject to statutory confidentiality requirements.[9]

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[7] *Anti-Discrimination Act 1991* (Qld) s 143 (2)(c).
[8] Ibid s 159.
[9] Ibid s 164AA.

This process may be appropriate in disputes between private citizens however considering the special obligation on the state to be a model adherent to the law, it is unreasonable to expect a private citizen to pursue a lengthy formal process whilst allowing the state to comfortably avoid any obligation to provide an account for questionable human rights conduct in a timely way.

I suggest:

1. Queensland should legislate to require the state to formally respond to human rights complaints in a timely fashion.

Insufficient regard to power imbalances between individuals and the state.

The existing statutory complaints process in Queensland makes some provision for addressing power imbalances between parties in human rights disputes. A party may only be represented by another person at an ADCQ conciliation with the commissioner's permission.[10] If the complaint proceeds to QCAT, leave must be sought by parties to be represented.[11] However, circumstances supporting the giving of leave to be represented include where the party seeking leave is a state agency.[12] It is also provided that in usual, though not all circumstances, QCAT is an own costs jurisdiction.[13]

These provisions do not adequately address the power imbalances present in human rights disputes between the state and individual citizens. In practical terms, the state has all the resources of government at its disposal, including specialised knowledge and administrative assistance. In addition, the state is more likely to be granted leave to be represented in QCAT, further increasing the cost burden on the individual if they are to present their case on an equal footing. Furthermore, as discussed above, the complainant is required to file a significant amount of documentation and make a significant time and cost commitment before the state is required to respond to complaints in any meaningful way.

The initial dispute resolution procedure is the conciliation conference. This process is only effective in circumstances where the participants are prepared to proceed in good faith to resolve the dispute, and where power imbalances can be properly managed. The hierarchical nature of government entities may tend to lead to situations where government officials attending conciliation have pre-determined instructions from their agency and have little discretion or flexibility to reach negotiated outcomes. In QCAT Case ADL081-14, I attended the conciliation conference alone and the state was represented by two government lawyers and a senior manager.[14] I apprehend that those attending on behalf of the state had little scope to settle the dispute regardless of any submissions made.

The decision to refer the complaint to QCAT was also significant as I felt that I did not have the time, skills or finances to properly progress the complaint against the resources of the

[10] *Anti-Discrimination Act 1991* (Qld) s 163.
[11] *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 43.
[12] Ibid s 43(3)(a).
[13] Ibid s 100.
[14] The conciliator sought my permission to have a 3:1 numbers balance, which I agreed to. The usual permissible ratio was 2:1

state. I was able to secure some assistance through my industrial organisation. Had this assistance not been forthcoming I would most likely have discontinued my complaint.

I suggest:

1. Queensland should enact legislation which properly accounts for the power imbalances between the state, and private citizens who seek to assert human rights recognised at state law.
2. Queensland should consider whether the ADCQ, or another third party public advocate, should be empowered to represent individuals who have established an arguable cause of action under state human rights law, and have reasonable prospects of success in such action against the state.

Conclusion

Queensland has played an underwhelming role in the development of human rights in Australia, often resisting and opposing their realisation, indeed, in some of Australia's most significant human rights cases, Queensland has stood as the party opposing the realisation of basic human rights.[15] Queensland belatedly enacted state anti-discrimination legislation in 1991, the second last state to do so. Two other states, Victoria and the Australian Capital Territory, have enacted human rights acts expanding the scope of human rights protections and safeguards for their citizens. The proposal to join these other states in legislating a human rights act for Queensland presents this state with an opportunity to take up a position as a human rights leader in Australia, rather than holding on to its traditional position as a backmarker. I particularly encourage the committee to consider the importance of legislating to ensure that the state itself exemplifies standards of human rights recognition, and conduct, befitting a modern democracy.

Yours Sincerely

Dean McNulty

[15] *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168; *Mabo v Queensland* (1989) 166 CLR 186; *Mabo v Queensland (No 2) ("Mabo case")* (1992) 175 CLR 1.