

A HUMAN RIGHTS ACT FOR QUEENSLAND

**SUBMISSION BY
TOWNSVILLE COMMUNITY LEGAL SERVICE INC.**

Tuesday, April 19, 2016

TO:

Research Director
Legal Affairs and Community Safety Committee
Parliament House
George Street Brisbane Qld 4000

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Background

1 Townsville Community Legal Service Inc. (TCLS) is a community-based, non-profit legal centre.

2 TCLS was established in 1991 as a voluntary service and funded by the Commonwealth in 1992. TCLS currently receives funding from the Queensland and Commonwealth Governments.

3 TCLS was invited to respond to the terms of reference.

4 The contact person for this submission is:

Bill Mitchell, Principal Solicitor
Townsville Community Legal Service Inc.

5 TCLS has a long and proud history of defending the human rights of Queenslanders. It has assisted in excess of 30,000 Queenslanders since it was established in 1991.

6 TCLS was the first CLC established north of the Tropic of Capricorn and has made submissions to many inquiries conducted by the Queensland Parliament, including by this committee.

7 TCLS made a comprehensive submission to LCARC in 1998 and our views have not changed since that statement of support for a Human Rights Act (HRA). LCARC reported our concern that rights are never adequately protected when they are developed in an ad hoc and reactive manner.¹ It is our view that this approach has left Queensland (almost 20 years after LCARC) without any structured or comprehensive system of human rights protections.

8 It is our view that it is both desirable and appropriate to legislate for a Human Rights Act in Queensland.

9 It seems uncontroversial that without an overriding framework in place, the protection of individuals' rights and freedoms will not be optimal. It will be

¹ Legislative Assembly of Queensland, Legal, Constitutional and Administrative Review Committee, The

piecemeal and fragmented. It will be ad hoc and reactive. There will be substantive and normative gaps in the system of protections. There will be a mismatch of language and lexicon from the gradual evolution. The way rights and freedoms are framed will be coloured by their time and context.

10 The rationale for introducing a HRA is complex and involves a range of imperatives including legal, societal and political. It seems clear to us that over and above the arguments about the model, there needs to be political will to take the step of drafting a HRA.

11 This political will needs to address the spurious arguments against a HRA, such as the notion that it represents either a villains' charter or a lawyers' picnic. Our own view is that the rule of law applies equally to all without fear or favour and human rights protections are one important aspect of that principle.

12 The utility of a HRA needs to be understood by using concrete examples about how a HRA would benefit all Queenslanders and in particular those who might be vulnerable by virtue of character or circumstance.

13 Rather than taking the expansive approach of making the arguments for and against, debating the model and method, in this instance TCLS is providing a rationale for a HRA for just one cohort of Queenslanders – older persons over the age of 60 years.

14 Let's first put this population cohort into context.

Societal Context of Older Persons

15 In Queensland, our population of older persons trebles over the next 25 years.² Those aged 100 + rises from 430 in 2006 to 6,500 in 2031.³ The median age rises from 36 to 43 by 2056.⁴

16 Queensland's ageing trend is characterized by a "decline in the proportion of persons in younger age cohorts (particularly under 35 years) and growth of older cohorts."⁵

² Queensland Treasury, Office of Economic and Statistical Research Demography and Planning, Population projections to 2031: local government areas, 2011 edition, Queensland Treasury, Office of Economic and Statistical Research Demography and Planning, Queensland Government population projections to 2056: Queensland and statistical divisions 2011 edition.

³ Ibid.

⁴ Ibid.

- 17 At Federation (1901), older persons constituted 4% of the Australian population. By 2011 it was 14% and by 2051 it will be 25%.⁶ By 2051 the demographic shift in Australia is conspicuous:
- 25% of the population is aged 65 years i.e. retirement age
 - There are 25 centenarians for every 100 babies
 - Older persons will outnumber children in the age group 0-14
 - The age group 65-84 rises from the population of Brisbane/Gold Coast (~2.6 million) to Brisbane and Melbourne (~6.3 million)
 - The age group 85 + rises from the population of Canberra (~400,000) to Perth (~1.8 million) and
 - Those working to support older persons halves – from 5 to 2.5 persons of workforce age.⁷
- 18 Globally, the number of older persons will more than double from 2013 to more than 2 billion by 2050.⁸ Older persons will exceed children for the first time by 2047.⁹
- 19 It is difficult to conceive exactly how this ageing demographic will impact of the human rights landscape in Queensland. It seems clear however that certain areas of human rights will increase in prevalence and relevance. It is on these areas that we now focus to illustrate the importance and benefits of a HRA.

Rights Context of Older Persons

- 20 Older persons provide a useful in this debate because:
- They are distinct population in terms of chronological age and in terms of societal representations and constructs
 - They can be a particularly vulnerable segment of the population in many ways including through the effects of ageism and stereotyping, poverty and exclusion, disease, senescence and death and as victims of crime,

⁵ <http://blog.id.com.au/2013/spatial-analysis-2/local-area-analysis/that-ole-chestnut-population-ageing-in-queensland/>

⁶ Australian Bureau of Statistics, 2011.0 Where and How do Australia's Older People Live - Reflecting a Nation: Stories from the 2011 Census, 2012–2013; Australian Bureau of Statistics, 2011.0 Who are Australia's Older People - Reflecting a Nation: Stories from the 2011 Census, 2012–2013.

⁷ Ibid.

⁸ United Nations, Department of Economic and Social Affairs, Population Division (2013) World Population Ageing 2013. ST/ESA/SER.A/348, p. xii.

⁹ Ibid.

exploitation, abuse and neglect. Older persons are also vulnerable to recession, disasters and even seasonal variation and

- They have distinct legal and rights needs – what Megret calls issues with “elder specificity”.¹⁰ The United Nation has reported that “a multiplicity of instances of the violations of human rights of older persons exist everywhere.”¹¹

Legal Needs of Older Persons

21 There are very few legal needs studies about older persons.

22 At a national level, the 2007 Parliamentary Inquiry into Older People and the Law¹² found a range of specific rights issues existed for older persons including:

- Fraud and financial abuse
- Substituted decision making
- Family agreements
- Discrimination and
- Retirement accommodation.

23 The issues canvassed by the Inquiry reflected that the legal needs of older persons are human rights issues. Indeed many of the problems people commonly experience, such as consumer, debt, employment, family, health, housing and injury problems, are nested within legal rights and obligations.¹³

24 Sadly that seminal report languished until recently when Attorney General dusted it off in his reference to the Australian Law Reform Commission on the issue of elder abuse.¹⁴ The Attorney noted the Commission should have regard to the recommendations of the Commonwealth House of Representatives report, *Older People and the Law* (2007).

¹⁰ Mégret, p. 7.

¹¹ Open-ended Working Group on Ageing, Report on 5th Working Session, A/AC.278/2014/2.

¹² The Parliament of the Commonwealth of Australia, Older people and the law, House of Representatives Standing Committee on Legal and Constitutional Affairs, September 2007 Canberra.

¹³ Christine Coumarelos et al, Legal Australia-Wide Survey: Legal Need in Australia, Access to justice and legal needs; v. 7, p1.

¹⁴ <http://www.alrc.gov.au/inquiries/elder-abuse/terms-reference>.

- 25 Importantly that Attorney’s referral noted that the Commission was also to have regard to:

“the principle that all Australians have rights, which do not diminish with age, to live dignified, self determined lives, free from exploitation, violence and abuse

the principle that laws and legal frameworks should provide appropriate protections and safeguards for older Australians, while minimising interference with the rights and preferences of the person.”¹⁵

- 26 The Attorney’s note is important because it reinforces the notion that older persons should be able to expect equal treatment from the law and their rights and freedoms that “do not diminish with age”. It sets the scene for the ALRC’s pending inquiry within a human rights framework. The reference poses the question of older persons rights within “relevant international obligations relating to the rights of older people under United Nations human rights conventions to which Australia is a party.”¹⁶

- 27 A few studies have been conducted at state and territory level. To the best of our knowledge none have ever been conducted in Queensland.

- 28 Studies conducted at state and territory level¹⁷ have noted:

“...a pressing need to consider the particular legal issues confronting older people, their ability to access legal services, and the issues within the legal system which present barriers for them.”¹⁸

- 29 Legal problems reflect stages of life.¹⁹ They reveal that age is strongly related to prevalence of legal problems, the strategies used to resolve them and whether or not they are finalized.²⁰

- 30 Studies found that older persons were less likely to be aware of and report legal problems,²¹ take legal action to enforce rights,²² recognise their legal needs and they exhibited a lack of knowledge about the available pathways

¹⁵ Ibid.

¹⁶ Ibid.

¹⁷ Law and Justice Foundation of New South Wales, The legal needs of older people in NSW, 2004; Law and Justice Foundation of New South Wales, The legal information needs of older people in NSW, 2004.

¹⁸ Ibid, p.iv.

¹⁹ Ibid.

²⁰ Christine Coumarelos et al, Legal Australia-Wide Survey: Legal Need in Australia, Access to justice and legal needs; v. 7, p229.

²¹ Ibid.

²² Ibid, p.xxii.

to legal resolution.²³ Where older persons commenced action, they had low finalization levels.²⁴

31 Prevalence of certain legal issues was more common.²⁵ These reflect the types of issues reported in the Older Persons and the Law report as well as wills and estates type matters.

32 Therefore we know that more work needs to be done to identify the legal needs of older persons but that they have specific legal needs and specific access issues to the legal system.

33 How then would a HRA change things?

The Impact of a HRA on Older Persons' Rights

34 Despite the absence of any legal needs data in Queensland, there is evidence to suggest that older persons legal needs are not being met. Recent inquiries into exploitation and violence has identified rights gaps for older Queenslanders.

35 In our view, older Queenslanders would benefit from a range of approaches inherent in a HRA. The 2 principal benefits would be that (1) A HRA would address the normative gap for older persons, and (2) A HRA would reduce barriers to accessing the legal system.

The Normative Gap

36 When compared with places that have a HRA, older Queenslanders are clearly faced with a normative gap.

37 A normative gap exists where the law fails to respond adequately to a recurrent event, act or structural factor which deprives human beings of their dignity.

38 How do we measure the normative gap? The appropriate measure, particularly when considering a HRA, is contemporary human rights standards.

²³ Ibid, p.230.

²⁴ Ibid, p. xxiii.

²⁵ Ibid, pp.16-17.

- 39 Under a HRA older Queenslanders could rely on substantive human rights that align with a number of standards including
- The *United Nations Principles for Older Persons* (UNPOP)
 - Existing human rights instruments and
 - Elder Specificities identified as needing protection
- 40 In the drafting process, Government would ensure that a HRA was complementary with existing contemporary human rights standards, including those to which we are signatory as a States Party or have adopted. This includes norms that reflect the context of older persons in society. The first of these is the United Nations Principles for Older Persons.
- 41 The Principles were adopted by General Assembly in December 1991.²⁶ A copy is annexed at Schedule 1.
- 42 These principles are non-binding, having only aspirational value. They are expressed as higher order values rather than specific rights. They include:
- Independence
 - Care
 - Participation
 - Self fulfillment and
 - Dignity
- 43 The principles reflect fundamental human rights as well as those specific to the needs and interests of older persons, for example:
- Determine when and at what pace to withdraw from workforce (¶3)
 - Be able to “age in place” at home for as long as possible (¶6)
 - Participate in inter-generational exchange of knowledge and skills (¶7)
 - Make decision about care and quality of life (¶14)
 - Live free from abuse and exploitation (¶17)
- 44 Unless all the principles are provided to older Queenslanders there is a normative gap.

²⁶ United Nations Principles for Older Persons, Adopted by General Assembly resolution 46/91 of 16 December 1991.

45 A further standard worth noting is Australia's reporting back under the Universal Periodic Review (UPR) process.²⁷

46 Australia's approach to 2nd Cycle UPR reporting has for the first time included references to older persons. The Australian Government committed:

"... to promoting and protecting the rights of older people internationally by modelling and advocating better use of existing UN human rights reporting mechanisms. Australia commits to including a dedicated section on the rights of 'older Australians' in all relevant human rights treaty and UPR reports. Australia will seek to have the rights of older persons reflected in UN resolutions and we will encourage existing Special Rapporteurs to consider the application of their mandate to older persons in close collaboration with the Special Rapporteur on the enjoyment of all human rights by older persons".

47 Australia, including Queensland will now report on how older persons are protected or otherwise in the treaty reporting process. For example, this means when Australia reports back on the CEDAW, it should also address how the rights of older women are protected against elder abuse.

48 It is another instance of where the specific rights of older persons are achieving greater attention. It will also no doubt reveal a number of substantive and normative gaps for older persons in Queensland and other states and territories.

Concrete Examples – Elder Specificities

49 So what are some concrete examples of rights and freedoms that illustrate a normative gap and are also elder specific? Elder specificities are an example of the rights and freedoms that are protected in a HRA. These include civil rights.

50 The **right to life**. This is a fundamental moral principle that includes a range of critical issues. Queensland does not have a clear statement of rights in respect of these issues including the implications of euthanasia, refusal of life sustaining treatment and the implications of palliative care. Our rights are still based on the common law and out of step with other

²⁷ <http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRMain.aspx>

places.²⁸ The *Powers of Attorney Act 1998* provides that a patient's refusal made in advance has the same status as regular refusals of medical intervention. However, Section 103 of the Act provides that doctors who reasonably believe instructions are "inconsistent with good medical practice" will not face any liability if they fail to follow a patient's directive.

51 **Freedom from inhumane treatment** including restrictive practices that impact on older persons with psychiatric impairments, dementia and behaviours of concern. While aged care may be a federal responsibility, there are significant differences in the way restrictive practices and interventions are regulated within institutional care in Queensland. The treatment of older persons in Queensland aged care facilities is sub-par when compared with other Queensland institutions subject to the *Disability Services Act 2006*.

52 **Freedom from abuse and violence.** This clearly includes elder abuse, exploitation and ageist treatment. The importance of protecting older Queenslanders from family violence, abuse, exploitation and neglect has been recently reinforced by the Committee's report into the Adequacy of Existing Financial Protections for Queensland Seniors²⁹ and the Taskforce into Family and Domestic Violence.³⁰ Notwithstanding all this attention, Queensland has no specific elder abuse laws in place. Based on recent data, somewhere between 2% and 14% of older Queenslanders could be affected by elder abuse without any specific statement of human rights in remedy or response. Similar issues were recently raised by a Victorian Royal Commission which found that older persons have specific needs with respect to protection from abuse. Additionally the Attorney General Brandis has commissioned a report³¹ and referred matters to the Australian Law Reform Commission to look into elder issues.³²

²⁸ *Brightwater Care Group (Inc) v Rossiter* [2009] WASC 229, [23]–[26] (Martin CJ); *Re B* [2002] 2 All ER 449, 455–6 (Butler-Sloss P); *Re MB* [1997] 2 FLR 426, 432 (Butler-Sloss LJ); *Airedale NHS Trust v Bland* [1993] AC 789, 857 (Lord Keith). *MB, Re* [1997] EWCA Civ 3093 (26 March 1997) sets out the general principle that an adult is presumed to have the capacity to consent to or refuse medical treatment unless and until that presumption is rebutted.

²⁹ Parliament of Queensland, Communities, Disability Services and Domestic and Family Violence Prevention Committee, Inquiry into the adequacy of existing financial protections for Queensland's seniors, Report No.2, 55th Parliament

³⁰ Special Taskforce on Domestic and Family Violence in Queensland, *Not Now, Not Ever, Putting an End to Domestic and Family Violence in Queensland*.

³¹ Kaspiew, R., Carson, R., & Rhoades, H. (2015). *Elder abuse: Understanding issues, frameworks and responses*. Melbourne: Australian Institute of Family Studies.

³² <https://www.alrc.gov.au/inquiries/elder-abuse/terms-reference>

- 53 **Freedom from arbitrary detention.** The potential for arbitrary detention occurs across a range of living arrangements for older persons. This includes institutional care that both Queensland and federal governments are responsible for. Issues with respect to guardianship have been considered in detail and many right issues for older persons remain unresolved.³³
- 54 **Right to fair and expeditious judicial determination.** International jurisprudence says competent judicial authorities should display particular diligence in handling cases involving older persons, taking in to account age and health.³⁴ The advanced age of a person is a factor in whether a case was dealt with “within a reasonable time” and may tighten the requirement for prompt trial. Importantly, delay is a fundamental reason why older persons do not engage in legal processes or seek to enforce rights. This is not reflected in any statement of rights for older persons in Queensland.
- 55 **Right to family life.** This incorporates the interests of older persons to keep the family unit intact despite care and guardianship arrangements including provision of service to assist ageing in place, to avoid separating couples and older persons from family carers.
- 56 **Right to privacy.** The right to privacy for older persons includes within institutional care and within reporting regimes, adult guardianship³⁵ and mental health systems. These systems disproportionately impact on older persons.
- 57 **Right to autonomy and make decisions.** The Queensland Law Reform Commission’s Review of Guardianship Laws noted the breadth of rights issues arising under that regime.
- 58 Older persons have a range of needs with respect to protection of political, economic and social rights that reflect their specific needs.

³³ Queensland Law Reform Commission, Review of Guardianship Laws, Report 67, 2010.

³⁴ See for example: Council of Europe, Committee of Ministers, Recommendation CM/Rec(2014)2 of the Committee of Ministers to member States on the promotion of human rights of older persons, ¶155. See cases: including Süssmann v. Germany (1998) 25 EHRR 64 and Jablonská v. Poland (2003) 36 EHRR 27.

³⁵ Queensland Law Reform Commission, Confidentiality in the Guardianship System: Public Justice, Private Lives, Report 62, 2007.

- 59 **Political Rights.** Older people are easily disenfranchised from political rights given their social and institutional isolation at times. These participation rights are fundamental to avoid social isolation.
- 60 The inclusion of **economic and social rights** is very important to older persons. These rights includes lots of examples where older persons may be provided with rights but do not have legislative guarantee of that right. This includes the right to social protections, health care and housing. Even though many of these rights may be observed in practice, they may not be equally applied to all.

Conclusions

- 61 This submission has only really dealt with TOR 1. And 2.
- 62 The current laws do not protect older persons' human rights adequately and there is a substantial normative gap in this regard. Accordingly a HRA is needed to guarantee the rights that align with the specific legal and societal needs of older persons.
- 63 There are concrete examples of where older persons rights are absent and/or not guaranteed by legislation even if observed in practice.

United Nations Principles for Older Persons

Adopted by General Assembly resolution 46/91 of 16 December 1991

The General Assembly ,

Appreciating the contribution that older persons make to their societies,

Recognizing that, in the Charter of the United Nations, the peoples of the United Nations declare, inter alia , their determination to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small and to promote social progress and better standards of life in larger freedom,

Noting the elaboration of those rights in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights and other declarations to ensure the application of universal standards to particular groups,

In pursuance of the International Plan of Action on Ageing, adopted by the World Assembly on Ageing and endorsed by the General Assembly in its resolution 37/51 of 3 December 1982,

Appreciating the tremendous diversity in the situation of older persons, not only between countries but within countries and between individuals, which requires a variety of policy responses,

Aware that in all countries, individuals are reaching an advanced age in greater numbers and in better health than ever before,

Aware of the scientific research disproving many stereotypes about inevitable and irreversible declines with age,

Convinced that in a world characterized by an increasing number and proportion of older persons, opportunities must be provided for willing and capable older persons to participate in and contribute to the ongoing activities of society,

Mindful that the strains on family life in both developed and developing countries require support for those providing care to frail older persons,

Bearing in mind the standards already set by the International Plan of Action on Ageing and the conventions, recommendations and resolutions of the International Labour Organization, the World Health Organization and other United Nations entities,

Encourages Governments to incorporate the following principles into their national programmes whenever possible:

Independence

1. Older persons should have access to adequate food, water, shelter, clothing and health care through the provision of income, family and community support and self-help.
2. Older persons should have the opportunity to work or to have access to other income-generating opportunities.
3. Older persons should be able to participate in determining when and at what pace withdrawal from the labour force takes place.

4. Older persons should have access to appropriate educational and training programmes.
5. Older persons should be able to live in environments that are safe and adaptable to personal preferences and changing capacities.
6. Older persons should be able to reside at home for as long as possible.

Participation

7. Older persons should remain integrated in society, participate actively in the formulation and implementation of policies that directly affect their well-being and share their knowledge and skills with younger generations.
8. Older persons should be able to seek and develop opportunities for service to the community and to serve as volunteers in positions appropriate to their interests and capabilities.
9. Older persons should be able to form movements or associations of older persons.

Care

10. Older persons should benefit from family and community care and protection in accordance with each society's system of cultural values.
11. Older persons should have access to health care to help them to maintain or regain the optimum level of physical, mental and emotional well-being and to prevent or delay the onset of illness.
12. Older persons should have access to social and legal services to enhance their autonomy, protection and care.
13. Older persons should be able to utilize appropriate levels of institutional care providing protection, rehabilitation and social and mental stimulation in a humane and secure environment.
14. Older persons should be able to enjoy human rights and fundamental freedoms when residing in any shelter, care or treatment facility, including full respect for their dignity, beliefs, needs and privacy and for the right to make decisions about their care and the quality of their lives.

Self-fulfilment

15. Older persons should be able to pursue opportunities for the full development of their potential.
16. Older persons should have access to the educational, cultural, spiritual and recreational resources of society.

Dignity

17. Older persons should be able to live in dignity and security and be free of exploitation and physical or mental abuse.
18. Older persons should be treated fairly regardless of age, gender, racial or ethnic background, disability or other status, and be valued independently of their economic contribution.