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18 April 2016

The Research Director
Legal Affairs and Community Safety Committee
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SUBMISSION TO HUMAN RIGHTS INQUIRY

Introduction

Background to the Cairns Community Legal Centre Inc (CCLC)

The CCLC is a not for profit, government funded community organisation that provides legal services for the benefit of members of the community experiencing disadvantage.

The CCLC operates a General Legal Service, which provides free legal services across a broad range of areas of law.

In addition to its General Legal Service, the CCLC also operates the following specialist services:

- Disability Discrimination Legal Service which provides legal advice and case work relating to disability discrimination complaints under the Federal *Disability Discrimination Act 1992 (DDA)* and the Queensland *Anti-Discrimination Act 1991 (ADA)*.
- Seniors Legal and Support Service which provides legal and support services for the benefit of seniors affected by elder abuse or financial exploitation.
- Family Law Service which provides legal services in relation to family law matters which involve children's issues.
- Consumer Law Service which provides legal services for consumers in relation to a range of consumer law matters including credit and debt matters, disputes about consumer products and services, bankruptcy matters and other consumer law matters.
- Domestic and Family Violence Duty Lawyer Service which provides services to aggrieved and respondent men.

Community education and awareness-raising activities as well as law reform work are other important aspects of the work of the CCLC.

All these services assist vulnerable groups of people for whom a breach of their human rights affect their personal welfare and their ability to take part in community life.

Our interest in the consultation

We first wrote a submission to the National Human Rights Consultation in 2009, along with more than 30,000 other interested individuals and organisations. The Commonwealth did not grasp the opportunity at that time to protect human rights in domestic law which it supported by signing various international treaties and conventions.

Many of the reasons for having national human rights legislation hold true for having State based legislative protection and promotion of human rights.

We draw on our previous submission where relevant to focus on State based issues.

Effectiveness of current laws and mechanisms for protecting human rights

We do not have any legislation currently providing general protection of human rights.

The ADA provides limited protections and means for aggrieved persons who have encountered discrimination in designated areas of public life, to lodge formal Complaints to the Anti-Discrimination Commission Queensland (**ADCQ**).

This is a conciliation process which deals mainly with individual complaints and does not determine whether or not discrimination has actually occurred. The process for progressing representative complaints where systemic discrimination is encountered is arduous, so most people decide to proceed with individual complaints instead.

Even if a small number of Complaints are referred to the Queensland Civil and Administrative Tribunal (**QCAT**) for a determination, that process is often daunting for aggrieved persons and fewer still proceed to a final hearing.

The following case study from a client of our Centre demonstrates how ineffective that process can be in bringing about change to systemic discrimination:

Julie has a long-term physical impairment that makes walking more than 20 metres difficult and painful. She has a trained assistance dog, Trish, to assist her to mobilise in the community by providing stability and strength, and to perform tasks such as picking up items and bringing them to her. Trish is trained to work off-lead. When Julie visits the local shops or the beach, she travels by bicycle with Trish running alongside, off-lead, the only time that Trish is not under Julie's direct physical control. Once she reaches her destination, Julie places a jacket and lead on Trish, identifying her as an authorised assistance dog, which is duly registered as such with the local Council.

Julie was fined by Council officers for having Trish off-lead when she travelled by bike. Although the Local Laws allow for trained dogs to work off-lead to move stock in public places, they do not allow for trained assistance dogs to accompany their handlers while off-lead in the same public places.

With the assistance of CCLC Julie lodged a formal Complaint of discrimination with the ADCQ. That process in the ADCQ failed to resolve the Complaint and Julie referred it to QCAT with the assistance of CCLC and additional pro bono representatives.

Although that matter initially failed to resolve in the early stages in QCAT, it was finally resolved to Julie's satisfaction (by way of improved mode of transport for both Julie and Trish) without the need for a full hearing.

Although Julie's particular complaint was settled, the Local Laws remain in force, prohibiting assistance dogs from accompanying their handlers while off-lead in public places.

Another example of the difficulty in bringing about systemic change to rectify perceived discrimination is the previous practice of the State involving families with children with severe disabilities who cannot care for their children at home without specialist disability support. In the absence of any or sufficient State funded support, parents had to relinquish care of their children to the Chief Executive of Child Safety.

This issue was addressed in various submissions from the CCLC, Queensland Ombudsman and the Commission for Children and Young People and Child Guardian, to the Queensland Child Protection Commission of Inquiry (**Commission of Inquiry**) established in July 2012. The consistent argument by responders to the inquiry was that disability support needs are not child protection issues.

In its Report delivered in July 2013, the Commission of Inquiry recommended that the practice of relinquishment be discontinued and that Disability Services allocate sufficient resources to families who have children with a disability to ensure they are adequately supported to continue to care for their children.

Following this Commission of Inquiry and in anticipation of the roll-out of National Disability Insurance Scheme (**NDIS**) which would take on the funding responsibility for that necessary support, the State changed its practices. It no longer requires struggling families to relinquish their children, and provides adequate support instead.

Early in 2012 a family in circumstances where they were forced to relinquish a child with severe behavioural issues due to disability, approached our Centre for assistance. We initially helped them to liaise with the relevant agencies to try to obtain an acceptable outcome for their child. When negotiations failed, we assisted the parents to lodge a formal Complaint of discrimination in the administration of State laws and programs with the ADCQ in November 2013.

When the matter failed to resolve at conciliation, it was referred to QCAT and progressed through to a final hearing. However, that action failed to obtain a determination that the family had been discriminated against by actions taken to remove their child from their care when they needed support.

In separate negotiations, and in anticipation of the NDIS, the State provided a substantial funding package and support to enable the family to once again care for their child at home.

If a HRA had been in place, the practice of relinquishment would have been reviewed internally and changed without the protracted and ultimately unsuccessful process of lodging a Complaint with the ADCQ and progressing it through QCAT.

Objectives of the legislation and rights to be protected

Objectives of the legislation

In our view, the Victorian *Charter of Human Rights and Responsibilities Act 2006* (**Victorian Charter**) covers what we consider should be the function of comparable Queensland legislation.

The Victorian Charter is founded on basic principles which are also essential to Queenslanders:

- human rights are essential in a democratic and inclusive society that respects the rule of law, human dignity, equality and freedom;
- human rights belong to all people without discrimination, and the diversity of the people of Queensland enhances our community;
- human rights come with responsibilities and must be exercised in a way that respects the human rights of others;
- human rights have a special importance for the Aboriginal people of Queensland, as descendants of Australia's first people, with their diverse spiritual, social, cultural and economic relationship with their traditional lands and waters.

The main purpose of any proposed legislation would be to protect and promote human rights by:

- setting out the human rights that Parliament specifically seeks to protect and promote; and
- establish a complaints mechanism to redress breaches of those rights; and

- ensuring that all statutory provisions, whenever enacted, are interpreted so far as is possible in a way that is compatible with human rights; and
- imposing an obligation on all public authorities to act in a way that is compatible with human rights; and
- requiring statements of compatibility with human rights to be prepared in respect of all Bills introduced into Parliament and enabling a Parliamentary Committee to report on such compatibility; and
- conferring jurisdiction on the Supreme Court to declare that a statutory provision cannot be interpreted consistently with a human right and requiring the relevant Minister to respond to that declaration.

Rights to be protected

It is our submission that rights set out specifically in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), and where expanded by rights in other relevant conventions, should be included.

We propose that the Queensland *Human Rights Act (HRA)* list and clearly identify the different classes of rights.

Absolute rights

Article 4 of the ICCPR states that in times of public emergency which threaten the life of the nation, State Parties may take measures derogating from their obligations under the covenant. However, it identifies certain rights which may never be interfered with in any way, including:

- right to life;
- not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment;
- not to be held in slavery or servitude;
- right to freedom of thought, conscience and religion;
- right to recognition as a person before the law;
- not to be imprisoned merely on the grounds of inability to fulfil a contractual obligation; and
- not to be subjected to retrospective criminal law.

Parliament will have to decide if each of these rights is to be treated as an absolute right in the HRA. Subject to our comment below, it is our submission that these rights should be classified as absolute rights.

Limited rights

Certain rights may be interfered with in strictly defined circumstances which would need to be set out in the HRA. For example: the right to liberty and security may be interfered with where someone has committed certain crimes (lawful arrest and detention), or is experiencing serious mental health problems which endanger the safety or life of that person or others.

It may also be argued that the right to freedom of religion (included above as an absolute right) may be limited where the rituals associated with a particular religion compromise the health and safety of followers or others. Paragraph 3 of Article 18 ICCPR supports limiting the right to *manifest* one's religion or beliefs where it is necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

Qualified rights

In a democratic society fundamental principles such as freedom of movement, of expression and of association, must be protected by law. However they are also subject to competing interests between individuals, and in some circumstances, between individuals and the State.

We note that Article 29 Universal Declaration of Human Rights (**UDHR**) states that everyone has duties to the community and that in the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

The ICCPR and the ICESCR, and extensive international jurisprudence has interpreted the proper meaning of this Article to be accorded to the concepts of legality, necessity, and proportionality that are implicit in this standard.

We therefore propose that the HRA clearly sets out that general human rights may be restricted if the restriction is:

- lawful;
- for a legitimate purpose;
- necessary; and
- proportionate (appropriate in the circumstances and not excessive).

Any interference with general rights must also be non-discriminatory.

Rights to be protected in Queensland legislation - HRA

We fully support the inclusion of rights in the HRA, all those set out in the Victorian Charter and the Australian Capital Territory *Human Rights Act 2004* (**ACT HRA**):

- Recognition and equality before the law, equal protection without discrimination
- Right to life
- Protection from torture and cruel, inhuman or degrading treatment
- Freedom from forced work
- Freedom of movement
- Privacy and reputation
- Freedom of thought, conscience, religion and belief
- Freedom of expression
- Peaceful assembly and freedom of association
- Protection of families and children
- Taking part in public life
- Cultural rights
- Property rights
- Right to liberty and security of person
- Humane treatment when deprived of liberty
- Children in the criminal process
- Fair hearing
- Rights in criminal proceedings

- Right not to be tried or punished more than once
- Retrospective criminal laws
- Right to education

In our view they cover the main areas identified in the ICCPR and the ICESCR. They have also been identified in previous consultations as being the most important in our society.

Positive obligations

In our view, it would be appropriate for the HRA to clearly set out where *positive obligations* exist on State Parties to take proactive steps.

An example is the obligation to protect, by preventing violations of rights by third parties:

- State Parties must be diligent in protecting persons with disabilities from mistreatment or abuse.
- State Parties must be diligent in protecting persons from domestic and family violence.

How the legislation would apply

The making of laws

New legislation

We submit that the HRA should include a requirement that all State legislation must be compatible with the HRA unless the relevant Parliament intentionally passed the legislation with incompatible provisions.

If the legislation is intentionally passed with incompatible provisions, it is our view that the HRA require that such intention be publicly acknowledged.

We submit that such public acknowledgement include the following:

- a list of human rights that are affected by the legislation, including those suspended by the incompatible provisions;
- the purpose for which the incompatible provisions have been included;
- clear identification of incompatible provisions in the legislation;
- a sunset clause, where appropriate, for the incompatible provisions; and
- a clause that the legislation has effect 'notwithstanding' its incompatibility with the HRA.

The HRA therefore would not apply to the new legislation to the extent of incompatible provisions only.

We also submit that the HRA require that any new Bill presented to Parliament be accompanied by a Statement of Compatibility, setting out:

- what human rights are affected by the proposed Bill;
- how Parliament's obligations with respect to those human rights have been met; and
- confirmation that the Bill has been assessed as compatible with the HRA.

This obligation to assess new legislation could be carried out by a Joint Parliamentary Committee comprised of suitably qualified elected members and support staff, or a new Review Unit established in the ADCQ.

If provisions in the new legislation are found to be incompatible with the HRA, this Committee or Review Unit would issue a Notice/Declaration of Incompatibility (**Declaration**) to the relevant Minister.

We propose that the HRA then require the Minister to table the Declaration in Parliament and take steps to have Parliament amend the relevant provisions to make them compatible with the HRA, or to include the appropriate provisions relating to a 'not withstanding' clause.

Existing legislation

Just as a Federal inquiry (Same-sex: Same entitlements) and audit identified numerous inconsistencies between existing Federal legislation, we propose that a comprehensive review (with community consultation) and audit be conducted to identify where and how existing State legislation is currently incompatible with the proposed HRA. Much of the data (by way of case studies) collected by this committee may serve to form the basis of further targeted consultation.

Parliament can then decide whether to amend the various pieces of legislation to make them compatible with the HRA, or to amend them to include the appropriate provisions relating to a 'not withstanding' clause.

Given the small number of matters that currently result in Court or Tribunal action (from complaints of discrimination first brought to the ADCQ and even fewer that proceed to a final hearing, we do not consider that empowering the State Courts or Tribunals to issue Declarations of Incompatibility as matters arise is likely to be sufficiently effective to achieve a comprehensive update of existing legislation.

In addition, there has been some disquiet over the potential for judicial intervention into Parliamentary sovereignty. It is our submission that a comprehensive review of current legislation and ongoing scrutiny by an ADCQ Review Unit will better serve to ensure compatibility with the HRA without such potential conflict.

Courts and Tribunals

We submit that the HRA should include provisions that all legislation be interpreted and applied in a manner compatible with the HRA, so far as it is possible to do so consistently with the purpose of the particular legislation. This is important, particularly in the transition phase before the review and audit of current legislation has been completed.

We also consider it appropriate for another provision, already included in Victorian Charter and the ACT HRA, to be included in the Queensland HRA to expressly allow the Courts to consider international law, the judgements of domestic, foreign and international Courts and Tribunals relevant to human rights when interpreting and applying the HRA. This will assist the development of human rights jurisprudence to be as consistent as possible across all jurisdictions.

Public authorities and other entities

Section 4 Victorian Charter provides a comprehensive definition of what is a public authority. We support the adoption of that definition into the HRA.

However, we are of the view that the definition should be expanded to include entities funded or performing functions of a public nature within State boundaries, by or on behalf of the Commonwealth.

The largest social policy change in recent history is the roll out of the NDIS across Australia by mid-2019. It specifically supports people with significant disabilities to have more choice and control in the supports they need to live good lives in the community. If people cannot manage the funds themselves, the funds will be managed on their behalf by others, including service providers.

Currently the specialist disability support services are funded by the State and therefore are governed by State laws (which would include the HRA in due course). However, once the roll-out of NDIS is complete, the individuals will receive funding through the National Disability Insurance Agency (NDIA), a Commonwealth body.

A recent update from the Department of Communities, Child Safety and Disability Services included:

Safeguards extended to protect all Queenslanders with disability

Legislative changes have been made to ensure Queenslanders with disability who become participants of the NDIS will have the same level of safeguards as people with disability who currently receive specialist disability services funded by the Department of Communities, Child Safety and Disability Services. The amendments to the Disability Services Act 2006 will ensure that as Queensland transitions to the NDIS from 1 April 2016, legislative safeguards will be in place to ensure all people with disability have the same level of protection.

It would be inconsistent then for the State to ensure that legislative safeguards are maintained through the transition to NDIS, but not protect human rights more generally for the same people.

The State has plenary powers to legislate to protect its citizens. We submit that the State can and should ensure that human rights of Queenslanders are protected, even where the provider is a Commonwealth agency of funded body.

According to the latest Annual Report from the Victorian Equal Opportunity & Human Rights Commission (VEOHRC), the breakdown of the issues raised from enquiries to VEOHRC in the 2014/15 year is as follows:

- General enquiries - 29.7%
- Disability - 23.3%
- No jurisdiction – 14.6%
- Race - 9.1%.
- Sex – 6.3%
- Sexual harassment – 5.8%
- Victimization – 5.3%
- Age – 5.3%

In its 2014-15 Annual Report, the ADCQ identified that the breakdown of the attributes on which allegations of discrimination are made shows that discrimination on the basis of impairment remains the dominant ground, comprising 28.8% of all complaints. Sex and race discrimination allegations also remain significant with each comprising 8.6% and 6.9% of discrimination complaints, followed by family responsibilities (6.2%) and age (5.1%). Religious discrimination complaints have risen to 2.4% of complaints accepted, up from 1.9% last year.

It is clear that people with disabilities, the most vulnerable members in our community, are the largest sector of the population whose human rights are being breached. They should not lose protection of their human rights merely because responsibility for funding their necessary supports is being transitioned to the Commonwealth.

Laws and decision not being consistent with HRA

We addressed the issues of laws being incompatible with the proposed HRA above, by means of scrutiny of Bills, Statements of Compatibility for new legislation, an audit of existing legislation and Notice/Declaration of Incompatibility.

Where Parliament intends to include provisions which breach human rights, it should do so deliberately, with a full explanation of the reasons for this action.

As to decisions made which breach human rights, the very requirement for complying with the HRA would provide grounds for affected individuals to challenge those decisions. It can be done first through an appropriate internal complaints mechanism, with the right to escalate the complaint to outside authorities such as a revamped ADCQ or the QCAT if the matter is not resolved.

Implications for existing statutory complaints processes

Complaint handling

The ADCQ currently handles Complaints of discrimination based on a list of 16 attributes identified in the ADA.

We are of the view that, in addition to investigating and facilitating resolution of complaints lodged under existing anti-discrimination legislation, the ADCQ should also process complaints alleging breaches of human rights under the HRA. The existing process of conciliation conference, and referral to QCAT if the matter cannot be resolved, should continue to be used.

We also propose that the ADCQ be empowered to initiate of its own volition investigations into *systemic* breaches of human rights, without first requiring an aggrieved person to lodge a formal complaint and proceed through the conciliation process.

Associations representing particular vulnerable groups or Advocacy organisations assisting aggrieved persons should also have the right to lodge a complaint with the ADCQ with respect to systemic breaches of the HRA, or to request ADCQ to conduct an investigation.

Examples of where investigations may be warranted are:

- Several families allege breaches of the HRA at a particular school in the suspension and/or exclusion of students with behavioural difficulties which are manifestations of a disability.
- Several clients of the Public Trustee allege that their particular disability needs are not being considered in the management of their finances.
- The impact of government decisions relating to over-the-counter pain medications no longer being available through prescriptions. This policy is having a serious adverse outcome for concession card holders with chronic conditions, who are among the most vulnerable in our society.

We propose that results of ADCQ investigations be passed on to the relevant Ministers and reported to Parliament. A response from the Ministers regarding remedial action taken should be provided to Parliament within a reasonable time frame, taking into account the nature, complexity and urgency of the subject matter.

Promote human rights awareness

We note that the ADCQ already has various educational functions pursuant to the ADA, and generally, has the function to undertake research and educational programs and other programs, on behalf of the State, for the purpose of promoting understanding of and acceptance and public discussion of human rights.

Review unit

As proposed above, we are of the view that the ADCQ should be expanded to include a unit (comprised for example of retired State, Federal or High Court Judges) to scrutinise new legislation to assess compatibility with the HRA.

This unit may also monitor judgments in cases involving human rights to identify any legislation which the judiciary found to be incompatible with the HRA and which did not contain a 'not withstanding' clause. Such legislation may thus become subject of a Declaration to the relevant Minister.

During the transition phase (during which existing legislation would be progressively audited) legislation identified as incompatible in judgments would be notified to the Parliamentary Committee conducting the audit.

Appropriate funding

There can be no doubt that in order for the ADCQ to take on the expanded role required of it in the enactment of the proposed HRA, it must be appropriately funded.

Functions and responsibilities under the HRA

Policy and decisions

We propose that the HRA require each Government Department to consider relevant human rights in:

- developing public policy;
- deciding how to implement that policy; and
- making significant decisions pursuant to that policy.

We also propose to make it unlawful for those bound by the HRA to act in a way which is incompatible with the HRA.

We believe that this will lead to a human rights culture in our society by providing a framework for policy formulation. This will ensure that the needs of all members of our diverse society are appropriately considered by those formulating policy and by those putting it into effect.

The VEOHRC report: *'Emerging change'*, found it very clear that there were substantial, community-wide benefits from adopting human rights principles across government. It resulted in improvements in the responsiveness of State and local government services, in the quality of public sector decision making and in the protection of vulnerable people.

Furthermore the ACT Review Report found that the biggest impact of the ACT HRA has been in influencing the formulation of Government policy and new legislation, through increased awareness of human rights and scrutiny of legislation.

In our view, this beneficial effect can only be enhanced by our proposed formal requirements regarding development and implementation of public policy and decision making.

Human Rights Action Plan

We propose that the HRA require each Government Department and public authority (both statutory and functional) to develop and publish a Human Rights Action Plan (**Action Plan**). It may also be advisable for those Action Plans to be registered with the ADCQ.

We are of the view that such an Action Plan should include the following:

- a list of human rights identified as requiring consideration in the operation of the Department or authority;
- a statement of how those human rights obligations are being met;
- an internal complaints process to address alleged breaches of those human rights;
- advice regarding external complaints options;
 - decisions or procedures by functional authorities to be reviewed by the controlling Governmental authority; and
 - complaints to ADCQ.

We also propose that the HRA require Ministers to report annually to Parliament on the numbers and types of complaints lodged and on how the matters were resolved.

Conclusion

We fully support a legislative HRA for Queensland which protects the rights listed in the Victorian Charter and the ACT HRA. A revamped (and renamed) ADCQ should also have responsibility for scrutiny of legislation and processing complaints of breaches of human rights.


All Government Departments, agencies and public authorities delivering services within the State should have legal obligations to comply with the HRA and to consider provision in the HRA in its policy and decision making processes.

We commend the Government for its commitment to this important inquiry.

We thank you for this opportunity to make a submission to your inquiry. If you have any queries regarding this submission, please direct your enquiries to our office.

Yours faithfully

CAIRNS COMMUNITY LEGAL CENTRE INC



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