



Human Rights Bill 2018

**Submission to Legal Affairs and Community Safety Committee,
Queensland Parliament**

November 2018

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Introduction

The Castan Centre for Human Rights Law thanks the Legal Affairs and Community Safety Committee (the Committee) for the opportunity to comment on its inquiry into the Human Rights Bill 2018.

We welcome the introduction of the Human Rights Bill 2018 into the Queensland Parliament ('the Bill'). The Bill should be celebrated as a significant step towards the protection and fulfilment of the human rights of all Queenslanders. The Bill contains a number of measures which improve upon comparable legislation in the ACT (*Human Rights Act 2004 (ACT)*) ('ACTHRA') and Victoria (*Charter of Human Rights and Responsibilities Act 2006 (Vic)*) ('Victorian Charter'). However, by drawing on the experiences of these comparable jurisdictions, it is clear that some additional amendments would strengthen the Queensland Bill.

In 2016, we made a submission to the Legal Affairs and Community Safety Committee *Inquiry into a possible human rights Act for Queensland*. This submission makes frequent reference to our 2016 submission, which we therefore attach as Annex A.

1. Economic Social and Cultural Rights

We endorse a Human Rights Act that includes all of the rights recognised in both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), including the right of self-determination.¹

We welcome the Human Rights Bill 2018's inclusion of the right to education in s 36, the right to access health services without discrimination in s 37(1), and the right to not be refused emergency medical treatment in s 37(2). As we submitted in 2016, economic social and cultural rights (ESC rights) and civil and political rights are indivisible, interdependent, and equally important.² The inclusion in the Human Rights Bill 2018 of some ESC rights is an important step, however we recommend the Bill include all ESC rights articulated in the International Covenant on Economic, Social and Cultural Rights (ICESCR), to which Australia is a party. This will provide for more robust protection in Queensland of the full range of rights which Australia has committed to fulfil under the ICESCR. A more detailed discussion of the need to include ESC rights alongside civil and political rights can be found in our 2016 submission at page 25.

¹ See Castan Centre submission to the *Inquiry into a possible human rights Act for Queensland*, 2016, p. 25.

² See Castan Centre submission to the *Inquiry into a possible human rights Act for Queensland*, 2016, p. 25.

2. Rights holders

We welcome the restriction of human rights to natural persons in the Human Rights Bill 2018, consistent with the recommendation in our 2016 submission. The exclusion of corporations as rights holders will help to ensure that the Bill has the effect of increasing the capacities of the vulnerable and marginalised while reducing litigation in the field.

3. Limits to rights

We acknowledged that most rights should be protected subject to reasonable limitations.³ As such, a general limitation clause in the Human Rights Bill 2018 is appropriate. However, any general limitation clause must make note of those rights that are considered 'absolute' at the international level, which should be excluded from the operation of the limitation clause. Such rights include the right to be free from torture and other cruel, inhuman and degrading treatment or punishment, and the right to be free from slavery and servitude. No civilised society should countenance limitations to such rights.⁴

We refer the Committee to Dr Julie Debeljak's submission to the present inquiry for a more in depth discussion of limitation provisions.

4. Interpretative clause

In our 2016 submission, we recommended that the interpretive clause instruct that all legislation be interpreted in accordance with human rights, so long as such an interpretation is possible taking into account the purpose of the relevant statute.⁵ We also recommended that that clause specify that international instruments on which the Act is based, and relevant international human rights jurisprudence, may be considered in interpreting the Act. We are pleased to see this included in s 48(3) of the Human Rights Bill 2018.

However we are concerned that s 48 of the Human Rights Bill 2018 as currently drafted does not make clear its effect on secondary legislation. S 48 should make clear that if primary legislation is interpreted compatibly with human rights, yet delegated legislation enacted under that primary legislation cannot be interpreted compatibly, the result will be a judicial finding that the delegated legislation is *ultra vires* and invalid. We refer the Committee to our 2016 submission for further discussion of this issue.⁶

³ See Castan Centre submission to the *Inquiry into a possible human rights Act for Queensland*, 2016, p. 29.

⁴ See further, Julie Debeljak, 'Balancing Rights in a Democracy: The Problems with Limitations and Overrides of Rights under the Victorian *Charter of Human Rights and Responsibilities Act 2006*' (2008) 32 *Melbourne University Law Review* 422, 433-35.

⁵ See Castan Centre submission to the *Inquiry into a possible human rights Act for Queensland*, 2016, p. 31.

⁶ See Castan Centre submission to the *Inquiry into a possible human rights Act for Queensland*, 2016, pp. 31 - 32.

We note the importance of the interpretative provision in s 48 operating as a remedial interpretation provision. On this issue, we refer the Committee to Dr Julie Debeljak's submission to the present inquiry.

5. Independent cause of action

We recommend the insertion of an independent cause of action into the Human Rights Bill 2018. This would be preferable to the 'piggyback' provision contained in s 59 of the Human Rights Bill 2018. We refer the Committee to our 2016 submission for further discussion of the need for a freestanding cause of action.⁷ In particular, we note that the official 2015 review of the Victorian Charter recommended that a direct cause of action be inserted.⁸ We also recommend an amendment to s 59(3) of the Human Rights Bill 2018 to allow access to damages, after a 'cooling off' period giving public authorities time to adjust, as discussed in our 2016 submission.

6. Statements/ Declarations of Inconsistent Interpretation

We reiterate the recommendation from our 2016 submission that where interpretation in accordance with the human rights in the Act is impossible, the higher courts should be empowered to issue Statements of Inconsistent Interpretation.⁹ This is in line with the Victorian/ACT Declarations model. The Human Rights Bill 2018 should include such a provision as well as the requirement that upon issuance of such a Statement, the Minister must respond within six months. An appropriate response might include recommendations for amendment of legislation, or a recommendation to leave things as they are.

7. Override provision

We recommend the removal of the inclusion of the override provision contained in s 43 of the Human Rights Bill 2018. We restate our position in our 2016 submission that there is no need for an override provision where parliamentary sovereignty is preserved, as is the case in the current non-constitutional model before the Committee.¹⁰ Instead, the Bill should adopt the position taken by the ACT, where an override provision was not considered necessary. For further discussion on the need for and operation of override provisions, we refer the Committee to Dr Julie Debeljak's submission to the present inquiry.

⁷ See Castan Centre submission to the *Inquiry into a possible human rights Act for Queensland*, 2016, p. 31.

⁸ See Brett Young, *From Commitment to Culture – The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006*: <http://assets.justice.vic.gov.au/justice/resources/3848843f-afd1-47a5-9279-1a1a87ac2aad/report_final_charter_review_2015.pdf>, Recommendation 27.

⁹ See Castan Centre submission to the *Inquiry into a possible human rights Act for Queensland*, 2016, p. 32.

¹⁰ See Castan Centre submission to the *Inquiry into a possible human rights Act for Queensland*, 2016, p. 32.

8. Legislative Scrutiny

We welcome the inclusion in s 38 of the Human Rights Bill of a requirement that all persons introducing Bills in the Queensland Parliament be required to make a statement of whether the Bill complies or does not comply with human rights, with reasons attached.¹¹ However, we believe that this provision should be strengthened by requiring that reference be made to the evidence base underpinning the statement. We refer to Julie Debeljak's submission to the present inquiry for a detailed discussion of the value of requiring an evidence base for the assessment.

Furthermore, while we welcome ss 39 and 40 of the Human Rights Bill 2018, we reiterate the recommendation in our 2016 submission that separate scrutiny should ideally be carried out by a new committee with the sole responsibility of monitoring compliance with the Human Rights Act.¹² We refer the Committee to our 2016 submission for further discussion on this point.

9. A human rights culture

We welcome the inclusion of building 'a culture in the Queensland public sector that respects and promotes human rights' as a main object of the Human Rights Bill 2018. We reiterate that the experience of Victoria with its Charter has been that creating a human rights culture is even more important than providing legal remedies, and is crucial for the achievement of real improvements in people's lives.¹³ Empirical research has shown that a key factor in successfully creating a culture of human rights is educating people about human rights.¹⁴ Such education should begin early (in primary school) and continue throughout life. The same research also demonstrates that a key to successful human rights education is a domestic Human Rights Act (or equivalent) on which to ground the education. We welcome the Human Rights Bill 2018 for its potential to help create a human rights culture.

¹¹ See Castan Centre submission to the *Inquiry into a possible human rights Act for Queensland*, 2016, p. 32.

¹² See Castan Centre submission to the *Inquiry into a possible human rights Act for Queensland*, 2016, pp. 32 - 33.

¹³ See Castan Centre submission to the *Inquiry into a possible human rights Act for Queensland*, 2016, pp. 32 - 34.

¹⁴ See Paula Gerber, *From Convention to Classroom: The Long Road to Human Rights Education* (2008 VDM Publishers, Germany).