RMT;dgr

23 November 2018

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

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

Dear Committee Secretary

***Re: Human Rights Bill 2018* (Qld)**

The Bar Association of Queensland ('the Association') welcomes the opportunity to provide comment on the *Human Rights Bill 2018* (Qld) ('the Queensland Bill').

The Association supports the Queensland Bill and its proposed recognition of human rights, and compliments the Queensland Government for making the decision to bring the Queensland Bill to the Parliament.

The Association's support is accompanied by two suggestions for improvement in the Queensland Bill. The suggestions are that, firstly, the enforceability of the prohibition of 'unlawful conduct' by public entities against the protected human rights be strengthened. Second, that the proposed amendments to the *Corrective Services Act 2006* (Qld) and the *Youth Justice Act 1992* (Qld) be reconsidered.

Enforceability of the proposed human rights

The Queensland Bill's proposal

Division 2, Part 2 of the Queensland Bill sets out the human rights in Queensland which are proposed to be protected. Clause 58 of the Queensland Bill provides that it is *'unlawful for a public entity to act or make a decision in a way that is not compatible with human rights; or in making a decision, to fail to give proper consideration to a human right relevant to the decision'.*

With respect to the interpretation of cl 58, cl 8 of the Queensland Bill provides that an act or decision will be *'compatible with human rights'* if it *'does not limit a human right; or limits a human right only to the extent that is reasonable and demonstrably justifiable in accordance with section 13'.*

Clause 13(1) defines *'reasonable and demonstrably justifiable'* as *'reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom'.* Clause 13(2) then provides seven factors which *'may be relevant'* to the interpretation of subsection (1), these being:

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(a) the nature of the human right;
(b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom;
(c) the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose;
(d) whether there are any less restrictive and reasonably available ways to achieve the purpose;
(e) the importance of the purpose of the limitation;
(f) the importance of preserving the human right, taking into account the nature and extent of the limitation on the human right;
(g) the balance between the matters mentioned in paragraphs (e) to (f).

The Bill provides for a process of conciliation of human rights complaints by the Human Rights Commission ('the Commission'), but the powers of the Commission to deal with an unresolved complaint are limited to reporting to the parties to the unresolved complaint (cl 88), limited public reporting (cl 90), and annual reporting to the Attorney-General (cl 91(2)). There is no provision for an unresolved complaint to be referred on, e.g. to the Queensland Civil and Administrative Tribunal ('QCAT'), for the complainant to seek a determination of the complaint and, if successful, a remedy.

The only proposed mechanism by which a person complaining of a breach of cl 58 may seek redress is cl 59, which proposes that a person may seek *'any relief or remedy'* on the ground of unlawfulness arising under cl 58 only if the person may also seek any relief or remedy in relation to the act or decision on the ground that it was unlawful. This effectively limits the legal enforceability of the proposed human rights as against unlawful conduct by public entities to 'piggy-backing' actions.[1]

The Victorian experience of 'piggy-backing'

The Committee and the Queensland Parliament may draw guidance from the experience of other Australian jurisdictions with a charter or bill of rights. Section 38(1) of the *Charter of Rights and Responsibilities Act 2006* (Vic) ('the Victorian Charter') is relevantly analogous to cl 58 of the Queensland Bill. Section 39 of the Victorian Charter is also analogous to cl 59 of the Queensland Bill, in that it provides a right to sue for a remedy based on unlawfulness only in circumstances where a remedy based on the unlawfulness of an act or decision of a public authority is being pursued on other grounds.

In 2011 the Scrutiny of Acts and Regulations Committee of the Victorian Parliament ('the SARC') conducted a review of the Victorian Charter ('the SARC review').[2] The SARC review was tabled on 15 September 2011, and found that there was very little measurable data establishing a change in service provision or the performance of functions by public authorities.[3]

Further, in 2015 Mr Brett Young conducted the statutory eight year review of the Victorian Charter ('the Young review').[4] The Young review was tabled on 17

[1] Explanatory Memorandum, Human Rights Bill 2018 (Qld) 8.
[2] Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Review of the Charter of Human Rights and Responsibilities Act 2006* (2010-11).
[3] Ibid 104.
[4] Michael Brett Young, Parliament of Victoria, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (2015).

September 2015, and contained 52 recommendations. The terms of reference of that review were, significantly, directed to enhancing the effectiveness of the Victorian Charter. The Young review recommended that this existing restriction, being that the enforcement of human rights as against public entities only be available where it was 'piggy-backed' onto another cause of action, be removed.[5] The Young review also recommended that the Victorian equivalent to QCAT have an original jurisdiction to hear and determine claims that a public authority has acted incompatibly with human rights protected under the Charter.[6]

Application to the Queensland Bill

The Association considers that the 'piggy-back' provisions in cl 58 and 59 of the Queensland Bill do not go far enough in allowing for the effective enforcement of human rights proposed to be protected. Justice Mark Weinberg, formerly of the Victorian Court of Appeal, provided the following comment on the operation of the analogous ss 38 and 39 of the Victorian Charter (emphasis added):

> *In essence, s 39 operates to ensure that the Charter provides no new remedy for breach of Charter rights, beyond any remedy that would have been available had it not been enacted. In other words, it seems that the legislature intended by the enactment of s 39 to preserve ordinary remedies (including judicial review of administrative action) but not to expand those remedies at all. Accordingly, the weaknesses of judicial review as a basis for effective sanction for breach of Charter rights continue to affect the operation of the Charter itself.*[7]

One of the most effective ways for the Queensland Bill to achieve benefits for ordinary people is to lay down enforceable standards for the way in which public entities carry out their role in administering existing legislation. The importance of enforceability is not so much for the benefit of a particular individual who is affected by the actions of a public entity but to create an enforceable template by which public entities can plan their activities so as to be sensitive and responsive to the rights of the people with whom they interact. It is important that Courts are able to consider whether practices of a particular public entity infringe the Queensland Bill.

The more uncertainty there is with respect to the enforceability of the Queensland Bill, the more likely it is that public entities will test the outer limits of the human rights proposed to be protected. There is a danger that, if the Queensland Bill is perceived as being ineffective, certain practices with shortfalls may persist, rather than be reformed in response to the commencement of the Human Rights Act. Bad practices grow into systemic issues where there is no mechanism by which the law and practices may be independently tested. The Association is concerned that the lack of independent enforceability in the Queensland Bill will result in a lack of motivation, on the part of public entities, to change or reform practices which have the potential to infringe the human rights proposed, in the Bill, to be protected. With independent enforceability, accountability is more likely to be at the forefront of the collective minds of public entities, in turn creating an impetus to challenge and reform practices.

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[5] Ibid 133.
[6] Ibid 128-9.
[7] Justice Mark Weinberg, 'Human Rights, Bill Of Rights, and the Criminal Law' (Speech delivered at the Bar Association of Queensland 2016 Annual Conference, Brisbane, 27 February 2016) 7.

The Association supports the recommendation of the Young review, being that the piggy-backing restriction on effective judicial review for breaches of human rights[8] be removed, be adopted as a recommendation of the Committee and by the Parliament.

For this reason, the Association urges the Committee to consider the broad range of ways, including civil enforcement proceedings in QCAT (with a right to be awarded compensation or damages), whether by referral of unresolved complaints by the Commission or otherwise, and applications for judicial review in the Supreme Court, by which the Queensland Bill may be enforced by people who feel that their treatment by public entities was not in accordance with their rights proposed to be protected under the legislation, independently of any other cause of action.

Amendments to the *Corrective Services Act 2006* (Qld) and the *Youth Justice Act 1992* (Qld)

Division 3 and Division 23 of the Queensland Bill propose amendments to the *Corrective Services Act 2006* (Qld) ('the *CSA*') and the *Youth Justice Act 1992* (Qld) ('the *YJA*'), respectively. Division 3, cl 126 proposes to insert a new s 5A in the *CSA* regarding the consideration of decisions affecting the human rights of prisoners provided by cl 30 of the Bill. Division 23, cl 183 amends s 263 of the *YJA* similarly as regards child detainees.

The Association is opposed to these amendments.

Clause 13(1) of the Queensland Bill provide that human rights (including those of prisoners and child detainees) may be subject to *'reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom'*. Clause 13(2) of the Queensland Bill has been quoted earlier. These provisions will inform the decision-making of the relevant public entities regarding prisoners and child detainees and their human rights pursuant to cl 30.

The provisions of cl 13 already permit relevant decision-makers to consider '*the security and good management of corrective services facilities*' and '*the safe custody and welfare of all prisoners*' (proposed s 5A(2) of the *CSA*) and '*the safety and wellbeing of the child on remand and other detainees*' and '*the chief executive's obligations under this section*' (proposed s 263(8) of the *YJA*). The Association is of the view that the proposed amendments are thus effectively unnecessary. Their inclusion might provide a false impression that relevant decision-makers are not subject to the same human rights obligations as other public entities or that, unlike the other human rights provided by the Queensland Bill, the right of humane treatment when deprived of liberty provided by cl 30 is especially qualified and lessened. Their inclusion might also set an unnecessary and unfortunate precedent for further such qualifications of other human rights in the future. The Association is of the view that these clauses should be removed.

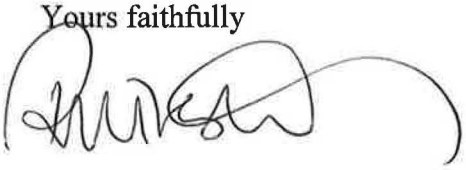
[8] *Human Rights Bill 2018* (Qld) cl 59.

Conclusion

Thank you for the opportunity to provide a submission in relation to the Queensland Bill.

The Association would be pleased to provide further feedback, or answer any queries you may have on this matter.

Yours faithfully



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