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23 November 2018

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

Email: lacsc@parliament.qld.gov.au

Dear Committee Secretary,

Human Rights Bill 2018

Thank you for the opportunity to make a submission to this review of the Queensland Human Rights Bill 2018.

We welcome and support the introduction of the Queensland Human Rights Bill. The Bill is an important step in improving accountability and positive decision-making throughout the Queensland public sector. Not only will a Queensland Human Rights Act enhance Australia's compliance with international human rights obligations, it can bring dignity, respect and fairness to the lives of Queenslanders, including those who are struggling through no fault of their own.

We commend the inclusion of rights to education and health care and endorse the submission of Professor Tamara Walsh, Bridget Burton, Dr Rhonda Faragher and Dr Glenys Mann of the University of Queensland with respect to the right to education and other matters.

The Bill is modelled on existing legislation in jurisdictions including the United Kingdom, New Zealand and, in particular, the ACT and Victoria. It builds on a wealth of experience and is tailored to our Commonwealth system of government. In particular, it maintains the role of the courts in interpreting the law, and preserves the sovereignty of parliament. It is tailored to our existing constitutional structures whilst giving human rights a more appropriate and clear place in that system.

The present submission focuses on specific aspects of the Queensland Human Rights Bill that we suggest could be improved or clarified to enhance its operation. Specifically our recommendations concern:

1. The Complaint Mechanism and Outcomes;
2. Reporting by the Human Rights Commission;
3. Resourcing the Implementation of the Human Rights Act; and
4. Court Proceedings and the Interpretation of Legislation.

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We make this submission jointly, as individual members of the University of Queensland's TC Beirne School of Law. In doing so we draw on our various areas of expertise in law and related fields. We would each welcome the opportunity to elaborate on any aspect of this submission and to assist the Committee however possible.

1. The Complaint Mechanism and Outcomes

1.1. A Standalone Cause of Action

> *We recommend that section 59 of the Bill be amended to provide for a standalone cause of action when a public authority is alleged to have violated its human rights obligations.*

We support the introduction for a standalone cause of action along the lines of section 40C of the *Human Rights Act 2004* (ACT). To this extent we endorse the submission of Dr Janina Boughey and Professor George Williams, the Federal Court of Australia and others in this respect.

1.2. Remedies

We commend the inclusion of a complaints mechanism in the Bill. This inclusion overcomes one of the primary weaknesses in the ACT and Victorian Acts and sets the Queensland Human Rights Bill apart as a more effective form of rights protection.

However, we have strong reservations about a model focused only on dialogue with no independent cause of action and no clear remedy range. The efficacy of the complaints mechanism depends upon individuals engaging with it and on its effectiveness at achieving the aims of the legislation, namely, the enhancement of human rights across Queensland.

The emotional burden placed on complainants in all human rights matters is high. They are already aggrieved by a deeply felt breach of their basic rights, they may have suffered distress, humiliation or economic loss, and they must then agitate within a hostile system to achieve change. This was recognised, for example, in *Skinner v Sully* [2011] QCAT 589. In deciding this straightforward discrimination matter within the high-turnover discrimination jurisdiction in QCAT, Dr Cullen observed that:

> [14] Persons such as Mr Skinner carry an additional burden with them in life – the burden of constantly being put in a position, due to the ignorance of others, of having to play the role of educator… Having to navigate this complex social maze of not wanting to seem impolite, yet having to continually respond to the ignorance of society must be emotionally draining… Yet, here, not only was Mr Skinner put in this uncomfortable position as educator, he was then insulted besides.

In the absence of an effective remedy, complainants may be reluctant to engage with the complaints process.

Further, by the time a breach comes to the Human Rights Commission it will already have been subject to an internal complaint and all efforts at a negotiated outcome will necessarily have failed. It is ambitious, and perhaps unreasonable, to expect a process focused on dialogue with no clear cause of action or remedial outcome to turn that failure around.

We recommend that the Bill be amended to provide remedies for breach, including compensation for economic loss and hurt and humiliation. We also suggest that the Bill be amended to provide a non-exhaustive list of examples of specific remedies to which victims of human rights breaches may be entitled.

1.3. Settlement Agreements

We understand that agreements reached in conciliation at the Queensland Anti-Discrimination Commission are generally reduced to writing and that a Deed of Agreement or similar is executed. Section 87 of the Bill rightly asserts that other legal rights cannot be compromised by participation in a conciliation conference. This is an important protection that should extend to agreements reached in conciliation conferences as the Bill currently does not create a cause of action. However, the Bill is silent on this protection.

We recommend the amendment of section 87 of the Bill to provide that no settlement agreement entered into in resolution of a human rights complaint is capable of limiting, excluding or releasing the parties from any legal rights, obligations or causes of action.

We would reconsider this recommendation in the event that our earlier submission as to remedies is accepted (see [1.3] above).

Section 89 provides that the Commissioner must give the complainant and respondent notice of certain facts following the resolution of the complaint. We suggest that section 89 notices should: remind the parties about their confidentiality responsibilities and make clear that no other obligations other than those agreed in the conciliation conference will flow to either party as a result of their participation in a conciliation conference or any agreement reached.

1.4. Mixed Human Rights and Anti-Discrimination Complaints

There is a strong likelihood of overlap in matters arising under a Human Rights Act and the *Anti-Discrimination Act 1991*. This overlap has the potential to create complex procedural issues about dual or conflicting requirements, which the Bill should be amended to address. The present Bill is unclear on the procedural and other requirements of mixed Human Rights Act and *Anti-Discrimination Act 1991* complaints before the Commission, particularly as regards the requirement to make an internal complaint before coming to the Commission, and in relation to investigations, notices and reporting.

We recommend section 75 be amended to clarify that complaints disclosing causes of action under both the Anti-Discrimination Act 1991 *and the Human Rights Act should:*

- *proceed through the Human Rights Commission in accordance with the processes under the* Anti-Discrimination Act 1991, *and*
- *be reported under section 90 and Division 3 of the Queensland Human Rights Act (as a separate category).*

1.5. Existing Queensland Charters of Rights

There are existing Charters of Rights embedded within other pieces of Queensland legislation. At present, these Charters have no enforceability or complaint mechanisms. The lack of any complaint option undermines the intent of these various Charters of Rights and is a source of general frustration for practitioners and the public.

We can see no legal impediment to providing access to the complaint mechanism under the Human Rights Act for breaches of those other more detailed Charters of Rights and we consider that it would be appropriate to do so. We submit, for example, that a child who alleges that their rights have been breached under the *Charter of Rights of a Child in Care* in Schedule 1 of the *Child Protection Act 1999* should be able to make a complaint to the Queensland Human Rights Commission engaging the processes provided for in the Human Rights Act. This is particularly appropriate as there is likely to be some overlap between their complaint under the *Charter of Rights of a Child in Care* and the *Human Rights Act*.

> *We recommend amending section 63 to add contraventions of specific Charters of Rights in other Queensland legislation.*

Identifying the applicable Charters of Rights would be a matter for the Regulations and should include at least the *Charter of Rights of a Child in Care* in Schedule 1 of the *Child Protection Act 1999*, and the *Charter of Victims' Rights* in Schedule 1AA of the *Victims of Crime Assistance Act 2009*. Neither of these Charters has an existing complaint or enforcement mechanism and both concern the kinds of vulnerable groups that the Human Rights Act framework is designed to protect.

2. Reporting by the Human Rights Commission

We commend the inclusion of the mandated review of the operation of the Act under section 95. We understand that the implementation of a Queensland Human Rights Act will involve an ongoing and incremental process, encompassing all branches of the Queensland government and public sector.

Whilst we can build off the lessons learnt in the ACT and Victoria, some aspects of the Queensland Bill are unique. It follows that these aspects will require closer monitoring, not only for internal review purposes, but in the interests of guiding future developments across Australia.

We suggest a number of reforms to enable meaningful monitoring, research and review of the complaint mechanism in particular.

First, section 90 should be amended to *require* the Commissioner to publish information concerning human rights complaints, subject to the existing exclusion of personal information under section 90(2)(c). Reporting all outcomes is also necessary for the development of a culture of human rights and to avoid inappropriate and unnecessary complaints from being made repeatedly. The requirement for monitoring and reporting should be extended to the implementation of agreed outcomes.

Finally, the Commission should be required and appropriately resourced to maintain a searchable database of all Human Rights Act cases (as distinct from complaints). This database could be similar to the Charter Case Audit database hosted by the Law Institute of Victoria. It is unlikely that this sort of database could be created or managed by any existing Queensland institution or entity without specific funding.

We recommend that section 90 of the Bill be amended to replace all instances of the word 'may' with 'must'.

We recommend that Bill be amended to impose an obligation on the Commissioner to contact complainants and respondents at a specified interval after agreements are reached, in order to monitor the implementation of agreed outcomes, and section 90 should be amended to provide for reporting on same.

We recommend the Commission be required and resourced to maintain a searchable database of all Human Rights Act cases.

3. Resourcing the Implementation of the Human Rights Act

The Explanatory Notes to the Bill indicate funding of $2.4 million over four years, all to the Human Rights Commission. Costs overall, understood in light of benefits and savings generated elsewhere, may (as anticipated) become neutral within individual portfolios over the longer term. However, we submit that a larger initial investment is necessary in order to generate this outcome. Without thoughtful resourcing during the first few years there is a risk that a human rights culture will be slow to develop which will lead to significant spending on 'compliance' costs such as internal legal advice and fighting legitimate claims.

In the interests of improving overall compliance within the human rights framework, understanding of the framework, and the achievement of the aims of the Human Rights Act, there should be provision for specific necessary outlays within the first four years of the life of the Act, in addition to the $2.4 million to the Human Rights Commission. These resourcing concerns include the following.

3.1. Specialist Lawyers within Community Legal Centres

We recommend the resourcing of several specialist lawyers within Community Legal Centres.

In this respect, we refer to, and endorse, the submissions of our colleagues at Caxton Legal Centre, LawRight and others who have detailed the needs of the sector.

3.2. The Development of Practical Resources

The effective implementation of the Human Rights Act will require the development of valuable, practical resources tailored to specific contexts, needs and policy settings. We reiterate our earlier recommendation that the Commission be required and resourced to maintain a searchable database of all Human Rights Act cases.

In addition to this resource, judicial training in the interpretation and application of the Human Rights Act, including in the management of Human Rights Act claims, is imperative. We draw the Committee's attention to the Bench Book developed by the Judicial College of Victoria in respect of the *Charter of Human Rights and Responsibilities Act 2006* (Vic). A similar Bench Book with respect to a Queensland Human Rights Act should be developed with appropriate funding, and accompanied by focussed judicial training. We recommend that a Bench Book be published in 2020/21.

The implementation of a Queensland Human Rights Act will be smoothed considerably by the ongoing development of policy guidelines tailored to specific departments, services and settings. We recommend the development of partnerships, detailed below, to facilitate this outcome.

> *We recommend resources be allocated to provide for the development and maintenance of: a searchable database of all Human Rights Act cases, a Bench Book, judicial training, and policy guidelines.*

3.3. Partnerships

> *We recommend the resourcing of strategic partnerships between government and experts.*

The impact of the Human Rights Act will be felt across the Queensland public sector. Partnerships between government agencies and experts can serve to disseminate existing knowledge from local and interstate researchers and practitioners. This can significantly enhance human rights understanding and compliance, facilitate the development of a human rights culture, and avoid ongoing costs incurred by complaint-handling and litigation, amongst other things. Below, we outline the costs and benefits of two such partnerships already underway at the University of Queensland.

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Example partnership 1
Building a Human Rights Culture Through Collaboration

The TC Beirne School of Law, including the UQ Pro Bono Centre, has partnered with the Queensland Centre for Mental Health Research (QCMHR) Forensic Group to hold a two-day collaborative workshop in late January 2019. The purpose of this workshop is to support decision-makers and leaders who will be responsible for implementing the Queensland Human Rights Act.

Focussing on criminal justice system responses to people with mental health problems, the workshop will bring together leading experts from academia, legal and medical practice, and government.

There will be sessions on mental health and human rights in each of the following sectors:

- Policing;
- Pre-trial decision-making;
- The courts;
- Prisons and punishment; and
- Regulatory responses and legislative design.

Each session will involve an expert panel and open discussion. Panels will be supported by a Human Rights Lawyer and a Clinical Lead Psychiatrist.

As well as meeting an immediate need for information, it is designed to lead directly into ongoing research and the production of tangible and useful resources such as guidelines. Importantly it also facilitates supportive relationships between researchers and agencies over the longer term, which will foster a human rights culture, compliance with and understanding of human rights frameworks, and internal capacity within agencies to respond to future issues.

This two-day workshop will cost less than $10,000 (including travel).

Example partnership 2
Inter-disciplinary Community Education

Academics and other staff from the TC Beirne School of Law are working with inclusive education specialists from the School of Education to provide community legal education and other resources to parents, and training to Principals, on the right to education under a Queensland Human Rights Act.

The 'Right to Education Series' relies on local academics and practitioners with existing knowledge and is very cost effective, at a total cost of less than $2,000.

4. Court Proceedings and the Interpretation of Legislation

4.1. Section 48: The Interpretive Provision

The High Court's decision in *Momcilovic v The Queen* (2011) 245 CLR 1 gave rise to a lack of clarity in the scope and operation of the interpretive provisions of the *Charter of Human Rights and Responsibilities Act 2006* (Vic). We endorse the submission of Dr Boughey and Professor Williams that section 48 should be amended to both strengthen and clarify the operation of the interpretive provision. This can be achieved without risking a 'remedial' interpretation being adopted by the courts (for instance, as occurred in the UK House of Lords in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557). We endorse Dr Boughey and Professor Williams's suggested re-wording of the section.

> *We recommend that section 48 of the Bill be amended to clarify the interpretive role of the courts and to ensure that the Human Rights Act gives the courts an interpretive role that goes beyond the existing common law principle of legality. Specifically we recommend section 48 be amended to read:*
>
> > *So far as it is possible to do so consistently with their language, context and purpose, all statutory provisions must be interpreted in the way that is most compatible with human rights.*

We recognise the fundamental importance of international legal materials as well as precedent in other jurisdictions, including in the ACT and Victoria, to the interpretation of the Queensland Human Rights Act. These materials should play a key role in judicial interpretation of the Human Rights Act, in order to better uphold our international obligations, ensure the most appropriate and legitimate interpretation of the human rights provided for in the Act, and to best achieve the aims of the Human Rights Act. This is presently reflected in section 48(3) of the Bill. However, we recommend that section 48(3) be strengthened to make it clear to courts that these materials are relevant and should be drawn upon in interpreting and applying the Human Rights Act.

We recommend that section 48(3) of the Bill be reworded to ensure that the courts are required to give due consideration to any relevant judgments, decisions or advisory opinions of domestic, foreign and international courts and tribunals. We recommend that s 48(3) be amended to read:

> *International law and the judgments, decisions, declarations or advisory opinions of domestic, foreign or international courts and tribunals, relevant to determining a question which has arisen in connection with a human right, should be considered when it is relevant to proceedings.*

4.2. Interveners in Court Proceedings and Amici Curiae

The Bill confers powers of intervention on the Attorney-General and the Human Rights Commission in sections 50 and 51 respectively. We note that the general judicial discretion to hear an amicus curiae would continue to be available to a court in proceedings in which human rights issues arise. We also note that the *Australian Human Rights Commission Act 1986* (Cth) expressly addresses amici curiae in section 46PV. The Australian Human Rights Commission has also adopted guidelines in respect of an application seeking leave to appear as an amicus. The guidelines are set out at: https://www.humanrights.gov.au/amicus-guidelines

The Australian Human Rights Commission guidelines relevantly provide:

> … a Proposed Amicus Commissioner shall have regard to the following factors:
>
> i. Whether the court would be assisted by an amicus curiae and, in particular, whether the Proposed Amicus Commissioner will be able to raise issues not otherwise before the court or to offer a perspective not raised by the parties.
>
> ii. Whether an amicus curiae would detract from the efficient conduct of the litigation.
>
> iii. Whether the court has indicated that it would be assisted by an amicus curiae.
>
> iv. Whether any party has requested the Proposed Amicus Commissioner or a member of the Commission to seek leave to appear as amicus curiae and whether any party would oppose the application.
>
> v. Whether any other person or organisation is seeking leave to intervene or appear as amicus curiae.
>
> …
>
> vii. Whether the matters sought to be put before the court will not otherwise be adequately and fully argued including whether the parties are represented.
>
> viii. Whether the issue is an interlocutory one or will result in a final determination.
>
> …
>
> x. The resource implications of running the litigation. …"

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We recommend that similar guidance be provided in order to assist persons or bodies seeking to apply for leave to appear as an amicus curiae in respect of human rights issues in Queensland. The functions of the Queensland Human Rights Commission set out in section 61 of the Bill should be amended to expressly include the function of drafting guidelines to assist potential amici curiae.

Yours sincerely

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