



Our mission is to promote, protect and defend, through advocacy, the fundamental needs and rights and lives of the most vulnerable people with disability in Queensland.

Systems and Legal Advocacy for vulnerable people with Disability

Human Rights Bill 2018

**Submission by Queensland Advocacy
Incorporated**

Legal Affairs & Community Safety Committee

26 November 2018

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QAI endorses the objectives, and promotes the principles, of the Convention on the Rights of Persons with Disabilities.

Patron: His Excellency The Honorable Paul de Jersey AC

About Queensland Advocacy Incorporated

Queensland Advocacy Incorporated (QAI) is an independent, community-based systems and individual advocacy organisation and a community legal service for people with disability. Our mission is to promote, protect and defend, through systems and individual advocacy, the fundamental needs and rights and lives of the most vulnerable people with disability in Queensland.

QAI has an exemplary track record of effective systems advocacy, with thirty years' experience advocating for systems change, through campaigns directed to attitudinal, law and policy reform and by supporting the development of a range of advocacy initiatives in this state. We have provided, for almost a decade, highly in-demand individual advocacy through our individual advocacy services – the Human Rights Legal Service, the Mental Health Legal Service and the Justice Support Program and more recently the National Disability Insurance Scheme Appeals Support Program.

QAI has been a long-time campaigner for greater human rights protection in Queensland and Australia. QAI participated as an NGO in the final session of the Ad Hoc Committee in August 2006 when the draft text of the Convention on the Rights of Persons with Disability (CRPD) was finalised, and was actively engaged in working towards the signing and ratification by Australia of the CRPD in 2008 and Optional Protocol to the CRPD in 2009.

QAI developed and published the *Human Rights Indicators for People with Disability: A Resource for Disability Activists and Policy Makers* (Human Rights Indicators). The Human Rights Indicators are based on the elements of the CRPD and are both a reference that describes the human rights of people with disability and a tool for measuring the extent to which those rights have been met. The Human Rights Indicators have been adopted by numerous entities, including the World Bank, government departments and NGO's, as the standard to measure efforts to promote the rights of people with disability.

As a further step to encourage full implementation of the CRPD, QAI was involved in building a coalition to write a 'shadow report' to the 'baseline report' for the CRPD. Submission of the 'baseline report', which outlined Australian compliance with the CRPD, was a requirement of ratification of the CRPD. The 'shadow report' served the same purpose, but was written by NGO's from the perspective of people with disability and their advocates.

In December 2008, the Federal Government launched a national public consultation on how best to protect human rights and responsibilities in Australia (the 'Brennan Inquiry'). QAI was represented at the Bill of Rights consultations in Brisbane on March 2009. QAI made a detailed written submission to the inquiry, and encouraged individuals, families, and organizations to make submissions. More recently, QAI has collaborated with other organisations and academics towards the introduction of a federal Human Rights Act, building on positive momentum generated by our involvement with the Australian NGO delegation to appear before the United Nations Committee Against Torture in Geneva in November 2014.

QAI has been actively involved in the present collective of individuals and organisations working together under the 'Rights 4 Queenslanders Alliance' banner to push for the introduction of a Human Rights Act in Queensland. Our involvement in this regard has included formally auspicing the campaign and active involvement on the campaign steering committee.

Summary of QAI's recommendations:

1. That the Committee recommend that the Human Rights Bill 2018 be passed.
2. That the Committee recommend the following amendments be made to the Bill:
 - a) amendment of Clause 15 of the Bill to establish the right to reasonable adjustments to ensure equitable access to justice;
 - b) amendment of Clause 33 to require that all children who are detained must be segregated from all detained adults, irrespective of whether the child is an accused child, a child detained without charge or a convicted offender;
 - c) amendment of Clause 36 of the Bill to:
 - i. reflect the human right to inclusive, quality and free education without discrimination;
 - ii. require the provision of the support required to facilitate this; and
 - iii. require that school discipline be administered in a manner consistent with every child's human dignity;
 - d) inclusion of a 'standalone' cause of action;
 - e) inclusion of the right to commence proceedings in a court or tribunal in cases where the complaint is not adequately resolved during conciliation at the Human Rights Commission;
 - f) judicial remedies, including declarations, injunctions, damages and orders to cease the offending conduct must be available for a breach of the Act;
 - g) omission of Clause 126 of the Bill, as it is not appropriate (nor necessary in light of Clause 13 of the Bill) to sanction a breach of the human rights of a prisoner detained on remand or without charge in circumstances where this is justified on the basis of consideration of the security and good management of the corrective services facility.
3. That the Queensland Government commit adequate resources to implement and realise the Act.

QAI's response to key issues of inquiry:

QAI supports the introduction of a Human Rights Act

QAI strongly supports the introduction of a Human Rights Act in Queensland. The introduction of this legislation will provide important protection for the fundamental human rights of Queenslanders. It will assist in building a human rights culture in Queensland. It will develop accountability in law-making, which is particularly important in Queensland given our unicameral state parliament.

QAI supports the model of human rights protection proposed

QAI thanks the Government for introducing a Bill that constitutes the strongest model of human rights protection in Australia to date. The Human Rights Bill 2018 (Qld) ('the Bill') surpasses the Government commitment to introduce a Human Rights Act modelled on the *Victorian Charter of Human Rights and Responsibilities 2006* (Vic) and will be the most effective human rights legislation in Australia.

We particularly commend the Government for including the following features in this draft legislation:

- recognition and protection of the cultural rights of Aboriginal and Torres Strait Islander peoples that include not only the right to maintain, but to also enjoy, control, protect and develop identity and culture, language, and kinship ties. The inclusion of the right to self-determination is significant;
- recognition and protection of the economic, social and cultural rights to education and health services, which are treated in the same way as the civil and political rights included in the Bill;
- the inclusion of an accessible complaints mechanism, which provides people with an accessible and inexpensive way to have their human rights issue heard and responded to;
- the right to legal representation at conciliation conferences;
- vesting the Human Rights Commissioner with strong powers, including to investigate, report on and conciliate human rights complaints; intervene in relevant legal proceedings; conduct conciliation (and direct a person to take part in a conciliation); and research and report on compliance and reform. These powers, coupled with the educative functions of the Commissioner, will be instrumental in the creation of a human rights culture in Queensland.

Proposed amendments to the Bill

Table 1: Summary of proposed amendments

Clause	Proposed amendment and rationale
<i>Clause 15 – The right to recognition and equality before the law</i>	<p>QAI supports the inclusion of the civil and political right to recognition and equality before the law in the terms proposed in Clause 15 of the Bill. We propose that this right should be expanded, to include the following sub-clause (which could be placed between current sub-clauses (4) and (5)):</p> <p><i>Every person has the right to equal and effective access to justice, including through the provision of reasonable adjustments, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.</i></p> <p>The inclusion of this additional limb is consistent with Article 13 of the</p>

	<p>CRPD, which prescribes the right to access to justice for persons with disabilities. This right is prescribed in addition to the right to equal recognition before the law.</p> <p>Section 45 of the <i>Equal Opportunity Act 2010</i> (Vic) requires a service provider to make reasonable adjustments for a person with disability and provides an independent basis for a finding of unlawful discrimination. There is no equivalent provision in the <i>Anti-Discrimination Act 1991</i> (Qld) and the defence of ‘unjustifiable hardship’ is often used to defeat a request for reasonable adjustments.</p>
<p><i>Clause 33 – Children in the criminal process</i></p>	<p>QAI submits that clause 33 should be amended to require that all children who are detained must be segregated from all detained adults, irrespective of whether the child is an accused child, a child detained without charge or a convicted offender. While this clause in its current form requires segregation of accused children or a child detained without charge, it only requires that a child convicted of an offence be treated in a way that is ‘appropriate for the child’s age’.</p> <p>QAI considers that permitting detention of children alongside adults is in breach of Australia’s obligations under the Convention on the Rights of the Child (CRC) and other international standards.</p>
<p><i>Clause 36 – The right to education</i></p>	<p>QAI strongly supports the inclusion of the right to education in the Bill. Education is a fundamental human right, with access to education recognised as offering important protection against other vulnerabilities and human rights violations.</p> <p>We propose that the wording of the first limb of this right be amended so that Clause 36 provides:</p> <p><i>Right to education</i></p> <p><i>(1) Every child has the right to have access to primary and secondary education appropriate to the child’s needs.</i></p> <p>...</p> <p>The Explanatory Notes to the Bill note that this clause is modelled on Article 13 of the <i>International Covenant on Economic, Social and Cultural Rights</i> (ICESCR). QAI submits that Article 13 is an appropriate basis for this Clause, but note that a key element of Article 13 is that secondary education is to be made generally available and accessible to all by every appropriate means.</p> <p>Article 28 of the <i>Convention on the Rights of the Child</i> is couched in similar terms, referring to the right of every child to available and accessible education.</p> <p>We submit that education being <i>available</i> and <i>accessible by appropriate means</i> is distinct from having <i>access</i> to education <i>appropriate to the child’s needs</i>. We are concerned that the phrasing of Clause 36(1) of</p>

	<p>the Bill is not consistent with the goal of ensuring <i>inclusive education</i> at <i>all</i> levels that and note that an inclusive approach to is taken in the following laws, treaties and agreements:</p> <ul style="list-style-type: none"> • <i>Convention on the Rights of Persons with Disabilities</i> (CRPD) (Article 24); • <i>Disability Discrimination Act 1992</i> (Cth) (s 22) (and the <i>Disability Standards for Education</i> (2005) made under this Act); • <i>World Declaration on Education for All</i>; • <i>UN Standard Rules on Equalization of Opportunities for Persons with Disabilities</i>; • <i>Salamanca Declaration and Framework for Action</i>; • Council of Australian Government's <i>National Disability Strategy</i> (2011); • <i>Australian Curriculum</i>; • <i>Australian Professional Standards for Teachers</i>; • <i>National Quality Framework</i>; and • <i>Early Years Learning Framework for Australia</i>; • Queensland Department of Education <i>Inclusive Education Policy 2018</i>. <p>We note that the right to education in the <i>Human Rights Act 2004</i> (ACT) provides that every person is entitled to enjoy the right to education 'without discrimination'.¹ In General Comment No.13 issued by the Committee on Economic, Social and Cultural Rights, the Committee stated that education should be available, accessible, acceptable, and adaptable,² which was noted to encompass the non-discriminatory provision and accessibility of education to all students.</p> <p>Many vulnerable Queenslanders, including children with disability, are denied access to an appropriate, inclusive education, which has a fundamental, negative effect on their life trajectory. In 2016, the Committee for the Rights of People with Disabilities commented that 'many millions of persons with disabilities continue to be denied a right to education, and for many more, education is available only in settings where they are isolated from their peers and receive an inferior quality of provision.'³ QAI notes that the definition of inclusive education adopted by the Committee requires provision of modifications to overcome barriers and to provide an equitable and participatory learning environment for children with disabilities.⁴ Placing children with disabilities in mainstream classrooms without accompanying systemic</p>
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¹ Section 29A(3)(a).

² Para 6.

³ Committee on the Rights of Persons with Disabilities General Comment No. 4 (2016) CRPD/C/GC/4.

⁴ UN Committee on the Rights of Persons with Disabilities. General Comment No. 4 (2016) on the right too inclusive education. UN Doc CRPD/C/GC/4. 25 November 2016, [11].

	<p>reform does not constitute inclusion, but is rather considered integration.⁵</p> <p>We propose that Clause 36(1) is amended to provide:</p> <p><i>Every child has the right to have access to an inclusive, quality and free primary education and secondary education on an equitable basis with others in the communities in which they live.</i></p> <p>We propose that Clause 36(2) is amended to provide:</p> <p><i>Every person has the right to have access to further education and training that is equally accessible to all.</i></p> <p>We note that the current drafting of the second limb of this right is consistent with the ‘ability equality’ disability human rights paradigm.⁶ However, we do not consider it appropriate to make a person’s ability the requisite for access to further education and training as this would have the effect of excluding many people and limiting their opportunities.</p> <p>We also propose the inclusion of a further two limbs of Clause 36, as follows:</p> <p>(3) <i>Every child has the right to receive the support required, within the general education system, to facilitate their effective education.</i></p> <p>(4) <i>Every child has the right to only be subjected to school discipline administered in a manner consistent with the child's human dignity and provides reasonable educational consequences.</i>⁷</p>
<p><i>Clause 59 – Legal proceedings</i></p>	<p>The Bill should allow a person whose human rights have been breached to lodge a complaint directly with QCAT and/or the Supreme Court of Queensland.</p> <p>The Bill should provide remedies for breach of Clause 58, including declarations, injunctions and damages.</p> <p>QAI acknowledges that neither the Victorian or ACT models of human rights legislation provide an independent cause of action. We note that the recent review of the Victorian Charter recommended the inclusion of a standalone cause of action.⁸</p>

⁵ UN Committee on the Rights of Persons with Disabilities. General Comment No. 4 (2016) on the right to inclusive education. UN Doc CRPD/C/GC/4. 25 November 2016, [11]; see also Australian Lawyers for Human Rights. *Inclusive Education: ALHR Position Statement – Disability Rights*. November 2018.

⁶ Paul Harpur. (2012). From disability to ability: Changing the phrasing of the debate. *Disability and Society* 27(3) 325-337. <https://doi.org/10.1080/09687599.2012.654985>; Harpur, Paul (2009). Sexism and racism, why not ableism?: Calling for a cultural shift in the approach to disability discrimination. *Alternative Law Journal* 34(3) 163-167.

⁷ This sub-clause is modelled on Article 28(2) of the CRC.

⁸ Brett Michael Young (2015). *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006*, recommendations 23 and 27.

	<p>We consider that a standalone cause of action is important in giving the Act strength that is appropriate having regard to the important content of the Act and also to the equivalent rights to initiate legal action in the event of a contravention established by other legislation</p> <p>Professor George Williams has noted that community consultation demonstrates support for the introduction of consequences for public entities that breach human rights in order for the legislation to have 'legal force'.⁹</p>
<p><i>Part 4, Subdivision 3 – Dealing with human rights complaints</i></p>	<p>The Human Rights Commission should be empowered to:</p> <ol style="list-style-type: none"> 1. refer any complaint made under the <i>Human Rights Act 2018</i> (Qld) to the Queensland Civil and Administrative Tribunal (QCAT) for determination at the Commissioner's discretion; <p>Upon referral, QCAT should be empowered to:</p> <ol style="list-style-type: none"> 1. hear and determine complaints; and 2. award an appropriate remedy, including a declaration, injunction and damages, to address harms caused by a breach of human rights. <p>QAI submits that to give legal force to a complainant's right to commence proceedings in a court or tribunal and to encourage compliance with the Act and deter contraventions, judicial remedies including declarations, injunctions, damages and orders to cease the offending conduct must be available in circumstances where a court or tribunal determines compensation is appropriate.</p> <p>Damages may be awarded in the anti-discrimination jurisdiction and we submit there is no basis on which to differentiate discrimination and human rights complaints in this regard. We note that the anti-discrimination jurisdiction provides helpful precedent which establishes that damages are not routinely awarded and even where they are, the amount awarded is usually quite low, and is often eroded by the legal costs incurred in reaching this point.</p> <p>In 2006, it was noted in a dissenting judgment by former High Court Justice the Hon Michael Kirby AC CMG that the High Court has been increasingly reluctant to provide relief to claimants in the anti-discrimination jurisdiction, with no successful High Court claims in the preceding decade.¹⁰</p>
<p><i>Clause 126 – Consequential amendment to the Corrective</i></p>	<p>QAI does not support the proposed consequential amendments to the <i>Corrective Services Act 2006</i> (Qld) provided for in clause 126 of the Bill. This provision sanctions a breach of the human rights of a prisoner detained on remand or without charge in circumstances where this is</p>

⁹ George Williams and Daniel Reynolds, "A Human Rights Act for Queensland? Lessons from recent Australian experience" (2016) *Alternative Law Journal* 41(2) available at: <https://www.austlii.edu.au/au/journals/UNSWLRS/2016/42.pdf>

¹⁰ *New South Wales v Amery* [2006] HCA 14; (2006) 226 ALR 196; (2006) 80 ALJR 753, [86] – [88].

<p>Services Act 2006 (<i>Qld</i>)</p>	<p>justified on the basis of consideration of the security and good management of the corrective services facility. We do not consider that this consequential amendment is appropriate, nor is it necessary in light of the recognition, in Clause 13 of the Bill, that human rights can be reasonably limited.</p> <p>We note the significant over-representation of people with disability within the Queensland criminal justice system, with research indicating that approximately 10% of Queensland prisoners have intellectual disability.¹¹ We also note the extreme vulnerability of people with disability in this environment, given the current inadequate measures in place to ensure that prisons are a safe, accessible and appropriate environment for people with disability.¹² Of particular concern, people with intellectual can be subjected to solitary confinement within prisons to protect them from harm from other prisoners.</p> <p>QAI submits that Clause 126 should be omitted from the Bill.</p>
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Case studies

We provide the following case studies to demonstrate the potential benefits of the Act for clients of QAI:

Case study #1: rights to education and to protection from torture and cruel, inhuman or degrading treatment

QAI and another community organisation supporting people with disability supported a family in which Susan*, then eight years old and attending a state primary school in Queensland, was on numerous occasions put into a withdrawal room (Susan called this 'the dark room'). Susan was not provided with any form of education or support during the lengthy periods in which she was contained in the withdrawal room and suffered significant, adverse effects from this, including experiencing feelings of fear while left alone in the room, stigma and denial of ordinary educational opportunities.

Susan's mother spoke of her belief that such 'behaviour management' may constitute psychological abuse, deprivation of liberty, physical abuse and assault. The state school, she said, did not provide quality inclusive education and made no reasonable accommodation for her daughter's support requirements.

Susan went on to thrive without any such restrictions in an inclusive and supported learning environment in another state school in Queensland.

¹¹ Queensland Department of Corrective Services. 2002. *Intellectual Disability Survey*. This is consistent with more recent Australia-wide research, which established that 9 – 10% of prisoners approaching release had an intellectual disability in the context of the representation of people with intellectual disability within the general Australian population of 1 – 2%: Australian Institute of Criminology. (2016). 'Transition from prison for people with intellectual disability: A qualitative study of service professionals', 2.

¹² Human Rights Watch. (2017). *"I Needed Help, Instead I Was Punished": Abuse and Neglect of Prisoners with Disabilities in Australia*.

Case study #2: rights to privacy, to humane treatment when deprived of liberty and to protection from torture and cruel, inhuman or degrading treatment

Mark* was diagnosed with an intellectual disability at a young age and placed under the care of Disability Services Queensland (DSQ) at 11 years of age for public safety with the aim of helping him to develop more socially acceptable and less dangerous patterns of behaviour.

Mark was placed on two consecutive Forensic Disability Orders and ultimately found permanently unfit for trial. Mark was placed in the Forensic Disability Service in Queensland following its opening in 2011. The current living conditions consist of a dual occupancy reinforced unit with a secure perimeter fence. Mark is the only resident in this unit and is subject to 24 hour periods of seclusion. Mark's interactions are limited to clinicians and staff working with him. The majority of these interactions occur through a servery window. Within the living area of the unit there are seven CCTV cameras that monitor Mark. This includes a camera in the toilet and shower.

The rights to privacy and to protection against cruel, inhuman or degrading treatment in the Act can be used to argue for better conditions for Mark, including provision of privacy aids in the bathroom and changes to address current solitary confinement practices.

Case study #3: rights to protection of families and cultural rights, freedom of movement and right to health services

Wally* is an Aboriginal man from a regional area who was transferred from a regional hospital to a secure health facility in South-East Queensland. Wally was diagnosed with an acquired brain injury and was admitted to hospital due to a lack of supports and an inadequate NDIS package. Rather than consider local support services and admission to a community care unit, and advocate for an increase to his NDIS package, the health service sought a transfer to another facility, away from Wally's family, supports and his children.

A number of public entities are involved in decisions to transfer people under forensic orders and treatment authorities between health services and districts. The rights to cultural rights, family, freedom of movement and access to health services could be used to ensure proper consideration by entities involved in these transfer decisions. Wally, and the many other Aboriginal and Torres Strait Islander people detained to hospitals and health services away from their communities, could use the Act to advocate for a supported transition back home.

* names have been changed to protect identity

Resourcing is vital

QAI acknowledges and thanks the Government for committing funding to support the operation and administration of the Act.¹³ However, we submit that this funding should be increased.

The resourcing allocated to the Anti-Discrimination Commission in the 2018/2019 state budget, while an important starting point, will require supplementation to ensure proper dissemination of information and training about the Queensland Human Rights Act. Similarly,

¹³ \$2.298 million was committed across a four year period in the 2018/2019 Queensland Budget: <https://budget.qld.gov.au/files/BP4-2018-19.pdf>

we submit that it is vital that each Government Department is adequately resourced to conduct a comprehensive review of its legislation, policy and practices to ensure compliance with the new legislation.

Appropriate resourcing is vital to ensuring opportunities, facilities, training and support levels. QAI submits that a lack of resourcing can be indicative of a lack of commitment from government treasury and the relevant departments and, in a resource-rich country such as Australia, should not be accepted as appropriate justification.

Conclusion

QAI thanks the Committee for the opportunity to make a submission to this inquiry. We strongly support the passage of the *Human Rights Bill 2018* (Qld) at the earliest opportunity.