



Human Rights Bill 2018

**Submission
to
Legal Affairs and Community Safety Committee**

November 2018

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Introduction

1. The Anti-Discrimination Commission is a statutory authority established under the Queensland *Anti-Discrimination Act 1991*.
2. The functions of the Commission include promoting an understanding, acceptance, and public discussion of human rights in Queensland, and dealing with complaints alleging contraventions of the *Anti-Discrimination Act 1991* and of reprisal under the *Public Interest Disclosure Act 2010*. Complaints that are not resolved through conciliation can be referred to a tribunal for hearing and determination. For work-related complaints the tribunal is the Queensland Industrial Relations Commission, and for all other complaints the tribunal is the Queensland Civil and Administrative Tribunal.
3. The Commission provided a comprehensive submission to the inquiry by the Legal Affairs and Community Safety Committee into the appropriateness and desirability of a Human Rights Act for Queensland. The Commission supported a Human Rights Act for Queensland and made a number of recommendations, most of which have been incorporated in the Bill.
4. The Bill would broaden the functions of the Commission to include dealing with human rights complaints, monitoring and reporting, and intervening in proceedings involving questions of law on the application of the Act or interpretation in accordance with the Act.
5. The Commission was consulted during the drafting of the Bill, and provided significant feedback. The consultation process has produced a Bill that the Commission considers reflects the policy objectives of the government, and that includes appropriate and workable functions for the Commission. The Commission commends the Department of Justice and Attorney-General on this achievement and on the way the consultation was conducted.
6. The Commission broadly supports the Bill, and this submission includes a number of recommendations to enhance the Bill.

Objectives

7. The objectives of the Bill 2018 are to:
 - establish and consolidate statutory protections for certain human rights;
 - ensure that public functions are exercised in a way that is compatible with human rights;

- promote a dialogue about the nature, meaning and scope of human rights; and
 - rename and empower the Anti-Discrimination Commission Queensland as the Queensland Human Rights Commission to:
 - ◆ provide a dispute resolution process for dealing with human rights complaints; and
 - ◆ promote an understanding, acceptance and public discussion of human rights.
8. The objectives of the Bill are consistent with the objectives of the *Anti-Discrimination Act 1991*, described in the Preamble and in section 6. The Preamble refers to various international human rights instruments to which Australia is a party, to Commonwealth legislation enacted in respect of obligations under the instruments, to the need to extend the Commonwealth legislation, and to the intention of Parliament to promote equality of opportunity for everyone by protecting them from unfair discrimination in certain areas of activity and from sexual harassment and other objectionable conduct.
9. The Bill will rename the Anti-Discrimination Commission Queensland as the Queensland Human Rights Commission, and give the Commission important functions to support the regulatory model underpinning the Bill.
10. The new functions of the Commission will include:
- dealing with human rights complaints;
 - if asked by the Attorney-General, reviewing the effect of Acts, statutory instruments and the common law on human rights and giving the Attorney-General a written report about the outcome of the review;
 - reviewing public entities' policies, programs, procedures, practices and services in relation to their compatibility with human rights;
 - promoting an understanding and acceptance, and the public discussion, of human rights and the HR Act in Queensland;
 - making information about human rights available to the community;
 - providing education about human rights and the HR Act;
 - assisting the Attorney-General in reviews of the HR Act;
 - advising the Attorney-General about matters relevant to the operation of the Act; and
 - preparing an annual report about the operation of the HR Act during the year.

11. The Commission will also have the power to intervene in proceedings in a court or tribunal where there is a question of law about the application of the Human Rights Act or a question about the interpretation of a statutory provision in accordance with the Human Rights Act. The Attorney-General will also have the same power of intervention.
12. The new intervention power complements the Commission's existing function under the *Anti-Discrimination Act 1991* to intervene in proceedings involving human rights issues, if the Commission considers it appropriate to do so.
13. The Commission supports the objectives of the Bill and the new functions that the Commission would have under the Bill.

Overview of the dialogue model

14. The Bill is based on the Victorian *Charter of Human Rights and Responsibilities Act 2006*, which is referred to as a 'dialogue model'. Rather than enshrining human rights in a constitutional bill of rights, the dialogue model is an ordinary Act of Parliament. Consistent with the doctrine of parliamentary sovereignty, it provides for discourse between the courts and the legislature, with the legislature remaining supreme. The 'discourse' is by way of declarations of incompatibility made by the courts where legislation is incompatible with human rights, and by way of statements of compatibility with human rights or override declarations, both made by the Parliament, in respect of legislation that is introduced.
15. The statutory dialogue model incorporates human rights into the three separate arms of government:
 - making laws by Parliament;
 - interpreting laws by the courts and tribunals; and
 - administering laws and performing government functions by public entities.

The rights

16. The Bill protects twenty-three rights. Twenty rights come from the *International Covenant on Civil and Political Rights* (ICCPR), two rights come from the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), and Property rights comes from the *Universal Declaration of Human Rights*.
17. The two rights from the ICESCR are the right to education and the right to access health services without discrimination. The Victorian *Charter of*

Human Rights and Responsibilities Act 2006, on which the Bill is based, does not include these two rights. The ACT *Human Rights Act 2004* includes the right to education.

18. The Bill includes a distinct cultural right for Aboriginal peoples and Torres Strait Islander peoples, as well as a general cultural right. The Commission welcomes and commends the inclusion of these rights.
19. Whilst the Preamble recognises the importance of the right to self-determination to Aboriginal peoples and Torres Strait Islander peoples, the right is not protected under Part 2.
20. The Commission acknowledges that the scope of a right to self-determination remains unsettled in international law. In light of this uncertainty, the recognition of the 'special importance' of human rights to Queensland's Indigenous communities in the Preamble and the longstanding and continuing over-representation of Aboriginal and Torres Strait Islander people across all socio-economic indices of disadvantage, the Commission recommends that the 'First review of the Act' include consideration of whether additional rights under the Declaration of the Rights of Indigenous Peoples should be included. This would enable the Queensland Government and Queensland's Aboriginal and Torres Strait Islander communities an opportunity over the intervening period for deep engagement on the implications of the practical implementation of the right to self-determination.

Making laws

21. All Bills introduced into Parliament must be accompanied by a statement of compatibility that sets out whether the Bill is compatible with human rights, and if not, the nature and extent of the incompatibility.
22. The portfolio committee responsible for examining a Bill must report on the statement of compatibility and whether the Bill is not compatible with human rights.
23. A similar process is provided for subordinate legislation.
24. The Bill would amend the *Parliament of Queensland Act 2001* to provide that the responsibilities of portfolio committees also include considering Bills, subordinate legislation and other laws and matters as required under the Human Rights Act.
25. There is no requirement for the report to be given before the Bill is debated. Under the Standing Rules and Orders of the Legislative Assembly, a Bill is discharged from consideration by a portfolio committee and set down for its

second reading stage, if the committee has not reported within the time for the report. A Bill can also be declared urgent and not referred to a committee.

26. In its submission to the Human Rights Inquiry, the Commission recommended that legislation be considered by a specialist parliamentary committee for the purpose of reporting to Parliament on whether the legislation is compatible with human rights. In the absence of a specialist parliamentary committee, it is essential that committee members have the resources and specialist knowledge available to them so that they can meaningfully consider the potential impact of legislation on human rights.
27. The functions of the Office of the Queensland Parliamentary Counsel include providing advice to Ministers, Members, and government entities on the application of fundamental legislative principles and alternate ways of achieving policy objectives. It also has the function to provide advices to the Governor in Council, Ministers, and government entities on the lawfulness of proposed subordinate legislation.¹
28. The Commission recommends that the Office of the Queensland Parliamentary Counsel be given the function to provide advice to Ministers and Members of Parliament on human rights.
29. The Parliament will also be able to make override declarations in respect of Acts or provisions of Acts that are incompatible with human rights. The Human Rights Act will not apply to the Act or provision that is the subject of an override declaration while it is in force. A provision of an Act containing an override declaration expires after five years, unless it is re-enacted by the Parliament.
30. The functions of the Commission include preparing an annual report that includes the details of all override declarations made. Recording override declarations made aligns with the functions of the Office of the Queensland Parliamentary Counsel to print and publish Bills, legislation and information relating to Queensland legislation.²
31. The Commission recommends that the Office of the Queensland Parliamentary Counsel be given the function to record and publish details of all override declarations made.

¹ *Legislative Standards Act 1992*, section 7(g),(h) and (i).

² *Legislative Standards Act 1992*, section 7(l) and (m).

Courts and tribunals

32. The Bill would apply to courts and tribunals when they are:
- interpreting statutes;³
 - performing administrative functions;⁴ and
 - performing functions relevant to the human rights.⁵
33. The Supreme Court will also determine questions of law relating to the application of the Bill, and questions in relation to the interpretation of a statutory provision in accordance with the Bill, that are referred to it by another court or tribunal.
34. Both the Attorney-General and the Commission would be able to intervene in proceedings before a court or tribunal in which a question of law arises in relation to the application of the Bill, or a question arises in relation to the interpretation of a provision in accordance with the Bill. Where such questions arise in proceedings in the Supreme Court or District Court, the Attorney-General and the Commission must be notified. Notice must also be given where a question is referred to the Supreme Court.
35. The functions of the courts and tribunals in interpreting legislation is well described in the Explanatory Notes. The provisions describing the meaning of compatibility with human rights (clause 8), and specific reference to international law and other judgments (clause 48(3)), should provide valuable assistance to the courts and tribunals when interpreting laws as required under the Bill.
36. The Supreme Court is able to make a declaration of incompatibility where it considers that a statutory provision cannot be interpreted in a way that is compatible with human rights. A declaration of incompatibility does not affect the validity of the statutory provision, however it would result in the matter being brought before Parliament.
37. The Commission's annual report is to include details of all declarations of incompatibility made.

Obligations on public entities

38. Clause 58 imposes a twofold obligation on public entities:
- to act in a way that is compatible with human rights; and

³ Clause 48.

⁴ Meaning of public entity, clause 9(4)(b).

⁵ Clause 5(2)(a).

- to give proper consideration to human rights when making decisions.
39. There will be three types of public entities that must comply with clause 58:
- core public entities;
 - functional public entities; and
 - optional entities (those that elects under clause 60 to be subject to the obligations).
40. Exceptions to the obligations are also provided for in clause 58, including acts or decisions of a private nature.⁶ The Bill does not define the meaning of 'acts or decisions of a private nature', however clause 10 provides some guidance as to when a *function* is of a public nature.
41. The same exception is contained in the Victorian *Charter*, where it is also not defined. It is considered to be more relevant to core public entities, as they will always be public entities regardless of the functions they are performing.⁷
42. The Commission considers that the exception for private acts and decisions does not include the acts and decisions of the core public entities in employment matters.
43. If it is not the intention of Parliament that the obligations in clause 58 are to apply to the acts and decisions of core public entities in employment matters, the Bill should be amended to clarify this intention.
44. This issue will have particular importance for the Commission in its function of dealing with human rights complaints.

Schools and other educational authorities

45. The Commission conducted a number of information sessions about the Bill after its introduction into Parliament. Some participants had strong views that all schools should be subject the obligations in clause 58.
46. The Explanatory Notes do not address the reason for excluding non-State schools from the obligations to act and make decisions that are consistent with human rights. Education is a State responsibility irrespective of whether it is delivered by public or State educational authorities.
47. In light of the evidence before and findings of the Royal Commission into Institutional Responses to Child Sexual Abuse, there is a strong argument

⁶ Clause 58(4).

⁷ See, Judicial College of Victoria, Charter of Human Rights Bench Book, [3.2.58] 3.2 *Obligations on public authorities (s38)*, <<http://www.judicialcollege.vic.edu/eManuals/CHRBB.htm#57276.htm>>

that all educational authorities should be subject to the obligations in clause 58 to act and make decisions that are compatible with human rights.

48. The Commission recommends that the definition of 'public entity' in clause 9 be amended to include all education authorities.

Remedies

49. As with the Victorian *Charter*, there is no stand-alone cause of action against public entities for failing to comply with the obligations in clause 58 to act and make decisions that are compatible with human rights, and to give proper consideration to a human right relevant to the decision. However, clause 59 provides that if there is relief or remedy available for a different type of unlawfulness, the failure to comply with clause 58 can be an added ground of unlawfulness.
50. Clause 59 is based on section 39 of the Victorian *Charter*, albeit worded a little differently. Section 39 of the Victorian *Charter* is an inelegant provision that has attracted significant criticism from commentators and the courts. It was noted in the 2015 review of the Victorian *Charter* that 'section 39 has been criticised as an "irremediable" remedies provision that is "drafted in terms that are convoluted and extraordinarily difficult to follow"'.⁸
51. Where a provision such as clause 59 is not clear, the focus of legal proceedings is likely to shift to the interpretation of the provision, rather than the substantive human rights issue.
52. The primary cause of action for unlawfulness of an act or a decision of a public entity is judicial review under the *Judicial Review Act 1991*. Judicial review will be the primary means of developing jurisprudence on the application of the Bill. Queensland's Supreme Court is best placed to develop jurisprudence on Queensland law. Restricting judicial review to cases where there is another ground of unlawfulness to the relevant act or decision will unnecessarily impede the development human rights jurisprudence, and the Commission and stakeholders can only rely on jurisprudence from other jurisdictions, where the provisions are not necessarily the same as the Bill.
53. Compensation or damages is not a remedy available under judicial review. Therefore, allowing a breach of clause 58 as a sole ground for judicial review is not inconsistent with the government policy position that there is to be no damages available in respect of breaches of clause 58. It is also not creating a new cause of action. Unlawfulness is an existing ground for

⁸ Michael Brett Young, *From commitment to culture The 2015 Review of the Victorian Charter of Human Rights and Responsibilities Act 2006*, 119.

judicial review. Judicial review is a fundamental component of Queensland's integrity regime and system of open and accountable government. A Human Rights Act would complement transparency and accountability of government, and judicial review for unlawfulness under clause 58 should be available independently of other grounds of review.

54. The Commission's preferred approach is to also allow an independent action in the Supreme Court for breach of clause 58. A provision modelled on section 40C of the *Human Rights Act 2004* (ACT) would allow an independent action as well as a 'piggy back' claim, whilst also maintaining the government's preferred approach of awards of damages being excluded. Section 40C of the *Human Rights Act 2004* (ACT) provides:

Legal proceedings in relation to public authority actions

- (1) This section applies if a person —
 - (a) claims that a public authority has acted in contravention of section 40B; and
 - (b) alleges that the person is or would be a victim of the contravention.
- (2) The person may—
 - (a) start a proceeding in the Supreme Court against the public authority; or
 - (b) rely on the person's rights under this Act in other legal proceedings.
- (3) A proceeding under subsection (2)(a) must be started not later than 1 year after the day (or last day) the act complained of happens, unless a court orders otherwise.
- (4) The Supreme Court may, in a proceeding under subsection (2), grant the relief it considers appropriate except damages.
- (5) This section does not affect—
 - (a) a right a person has (otherwise than because of this Act) to seek relief in relation to an act or decision of a public authority; or
 - (b) a right a person has to damages (apart from this section).

Note See also s18(7) and s23.
- (6) In this section:

'public authority' includes an entity for whom a declaration is in force under section 40D.

Dispute resolution process

55. Unlike the Victorian *Charter*, the Bill includes a dispute resolution process for complaints that a public entity has contravened clause 58 in relation to

an act or decision. A complaint may be made to the Commission, provided a complaint has first been made to the public entity. The Commission will be able to require the parties to participate in conciliation to try to resolve the complaint. The dispute resolution process is consistent with a dialogue model as it encourages resolution through discussion.

56. The Commission will be required to provide reports on both resolved and unresolved human rights complaints, and will be able to publish information about the complaints.

57. Complaints may be transferred to or from other complaint agencies, and the Commissioner may refuse to deal with a complaint if the complaint has been dealt with appropriately, or if there is a more appropriate course of action available. The Commissioner must refuse to deal with a complaint if it is frivolous, trivial, vexatious, misconceived or lacking in substance.

Reviews

58. The Bill provides for two reviews of the operation of the Act, to be carried out by an independent and appropriately qualified person. The first review is to happen as soon as practicable after 1 July 2023, and the second review is to happen as soon as practicable after 1 July 2027.

59. The terms of reference for the reviews are to be decided by the Attorney-General, however the reviews must include consideration of whether additional human rights should be included, whether further or additional provisions should be made for proceedings and remedies, and the operation of amendments to the *Corrective Services Act 2006* and the *Youth Justice Act 1992*.

60. The impost on public entities of compliance, and resourcing generally, are important matters that should be included in the mandatory items to be considered in the review. The Commission recommends including resourcing in clause 95(4) of the Bill.

61. As noted above, clause 95(4) should also include consideration of whether additional rights under the Declaration of the Rights of Indigenous People should be included in the Act.

Conclusion

62. All Queenslanders will benefit from the effective operation of a Human Rights Act. The three arms of government will develop a better understanding of the rights and freedoms of individuals, and laws will be made, interpreted and administered through a prism of human rights. The benefits include greater transparency and accountability.

63. The lives of the more vulnerable Queenslanders will be improved through better service delivery, which in turn will benefit the community as a whole.

Recommendations

64. The Commission recommends that:

- (1) The Bill be amended as follows:
 - (a) Provide for the amendment of the *Legislative Standards Act 1992* to give the Office of the Queensland Parliamentary Counsel the specific functions of:
 - (i) providing advice to Ministers, Members, and government entities on human rights and compatibility of human rights under the Human Rights Act; and
 - (ii) recording and publishing, and making access in electronic form, to details of all override declarations made under the Human Rights Act.
 - (b) In clause 59, remove the restriction on applications under the *Judicial Review Act 1991* to allow the ground of unlawfulness under clause 58 as a sole ground;
 - (c) Include resourcing in clause 95(4) of the Bill;
 - (d) Include the Declaration on the Rights of Indigenous Peoples in clause 95(4)(a); and
 - (e) The definition of public entities in clause 9 to include all educational authorities.
- (2) The Bill be passed as amended.