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The Chairperson
Legal Affairs and Community Safety Committee
Queensland Legislative Assembly
By email: lacsc@parliament.qld.gov.au

26 November 2018

Dear Mr Russo,

Submission in relation to the *Human Rights Bill 2018 (Qld)*

Thank you for the opportunity to make this submission in relation to the above Bill. The introduction of a *Human Rights Act* in Queensland is a significant achievement and represents a crucial reform in ensuring that the rights of all Queenslanders are protected. Because of the era in which Australia's Constitution was drafted, Australia lacks legal recognition and protection for fundamental human rights, which sets us apart from all other liberal democracies. The Bill brings Queensland into line with much of international human right law, and should lead the way for stronger protections in other Australian jurisdictions. The Queensland Government is to be commended for taking this important initiative, which is the product of many years' campaigning by a large group of individuals and community groups.

Executive Summary

While the introduction of the Bill is therefore very welcome, in this submission we make a number of recommendations which we feel would further enhance the protections it provides, and ensure that the most vulnerable members of the Queensland community can fully enjoy the wide range of rights to which they are entitled.

To summarise, these recommendations are:

1. Provide an avenue for individuals to pursue a **legal complaint in a court or tribunal** where there is an alleged violation of their human rights;
2. Empower a court or tribunal to award a range of **effective and enforceable remedies**, including compensation and preventative measures;

3. Expand the protection of **economic, social and cultural rights**, particularly to address the right to an adequate standard of living and the right to fair and favourable conditions of work;
4. Acknowledge the **environmental dimensions of human rights** and the potential for environmental damage to infringe upon their enjoyment;
5. Provide **specific protection for groups with particular human rights needs**, such as older persons and persons with disabilities;
6. Establish a **principled approach to balancing human rights claims** in circumstances where the rights of more than one individual are in competition.

These recommendations are explained in more detail below.

About the authors

The submission has been written by members of the QUT Faculty of Law's [International Law and Global Governance](#) research program, which has considerable expertise in issues relating to international and domestic human rights law.

[Dr Bridget Lewis](#) has a PhD in international human rights law from Monash University and has published widely on issues related to human rights, particularly human rights-based approaches to climate change and environmental justice, Indigenous rights and the rights of older persons.

[Dr Hope Johnson](#) has a PhD on the human right to food security and has published extensive work analysing the human rights implications of food systems law and policy.

[John O'Brien](#) has research expertise in statutory interpretation and the effect of statutory interpretation on other areas of law, namely contracts and torts.

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Yours faithfully,



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1. Cause of Action to Bring Complaints to Court or Tribunal

The establishment and funding of a Human Rights Commission in Queensland is an important contribution of the Bill, highly consistent with international human rights norms and should be commended. The mandate of the Commission set out in Part 4, Division 1, goes a long way to ensuring that human rights are respected in Queensland.

In particular, the power of the Commission to receive complaints from individuals whose human rights have been affected by the act or decision of a public entity (cl 64) represents an **important improvement on the Victorian model**, upon which the Queensland legislation is based. This role is strengthened by the ability of the Commission to compel the provision of information by public entities (cl 78) and attendance at a conciliation conference (cl 81).

For many human rights issues, conciliation can be an effective means of dispute resolution. However, conciliation ultimately relies on the good faith participation of parties. The nature of human rights complaints tends to imply a power imbalance between the parties, and many complainants may already be from marginalised or disadvantaged groups. For these and other reasons, it may not always be possible for conciliation to lead to a resolution. A further avenue is therefore required to enable a complainant whose human rights have been breached to **pursue legal action before a court or tribunal** where they have been unable to reach a resolution through conciliation.¹

As it currently stands, the Act would only permit a court to hear legal arguments relating to human rights where they are part of an ongoing legal claim based on an alternative cause of action (cl 48, 49, 59; following the model in the *Victorian Charter*).² This is inadequate to ensure that human rights breaches can be appropriately addressed, and undermines the importance of the human rights protections found in the Act. A new legal cause of action would recognise the significant harm which can flow from a human rights violation and ensure that an appropriate and enforceable remedy can be awarded (for more recommendations in relation to remedies, see **section 2** below). It would also be consistent with the fundamental principle of **access to justice**.

Further, a complaint to a court or tribunal ought to be available **without a requirement for conciliation to first be attempted** in a situation of an imminent human rights risk. We make this suggestion because there may be circumstances where an act or decision of a public entity, or a proposed act or decision by an entity, creates a risk of a serious human rights violation. Rather than require a person to first complain to the Human Rights Commission

¹ A similar cause of action is available under the *Human Rights Act 2004* (ACT), s40C(2), which states that 'A person may- (a) start a proceeding in the Supreme Court against a public authority'. This section also provides reasonable limitations such as that the proceeding should not be started more than one year after the act complained of occurs.

² A recent review of the *Victorian Charter of Human Rights and Responsibilities Act 2006* recommended that an avenue be created for an individual to bring a standalone complaint before a court or tribunal, rather than limiting the courts' role to hearing human rights arguments as part of other causes of actions. See Michael Brett Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006*, recommendations 23 and 27 <https://www.justice.vic.gov.au/2015-review-of-the-charter-of-human-rights-and-responsibilities-act-2006>

and go through the conciliation process, it should be possible for a legal action to be taken which could prevent the materialisation of that risk to human rights. This would also recognise the fact that some breaches of human rights, particularly those characterised by violations of dignity, cannot easily be compensated for after they have occurred, and should be prevented wherever possible. This recommendation is consistent with Australia's international obligation to protect against human rights violations where possible.³ Further suggestions with respect to responding to imminent human rights risks are found below in **section 2**.

The ability for a court or tribunal to make a legal ruling with respect to alleged human rights violations would also have the benefit of **establishing a body of jurisprudence** interpreting the Act. Judicial interpretation of the rights and responsibilities found in the Act will enable application of the Act to keep pace and adapt with developments in Queensland society, and build a practical understanding of what human rights require in particular contexts.

As a matter of clarity, a further recommendation relates to the wording of the definition of 'complainant' in Schedule 1. The definition currently provided is:

complainant, for a human rights complaint, means the individual who is the subject of the complaint.

'Individual who is the subject of the complaint' could be interpreted as meaning the person to whom the complaint is directed (i.e. the person alleged to have acted inconsistently with human rights). It seems clear from the context of the Bill that 'complainant' is meant to refer to the person who makes a complaint. **This definition should be re-drafted to avoid potential confusion.**

Recommendation 1: A cause of action should be created to enable an individual or group of individuals to seek a legal resolution by a court or tribunal where their rights have been violated and a resolution has not been reached through conciliation.

Recommendation 2: An individual or group of individuals should be able to bring a complaint directly to a court or tribunal where there is an imminent risk of a human rights violation.

Recommendation 3: The definition of 'complainant' should be redrafted to remove confusion.

³ *International Covenant on Civil and Political Rights 1966 ('ICCPR')* art 2.

2. Effective and Enforceable Remedies

International human rights law requires that, where a person has suffered a violation of their human rights, he or she must be able to receive an effective remedy.⁴ What will be considered an 'effective' remedy will vary according to the circumstances, but it is submitted that to ensure an effective remedy can be awarded, the Act must **empower a court or tribunal to provide a range of remedies**, including

- An order to cease conduct which is infringing human rights;
- Monetary compensation for loss or unfair treatment;
- An order requiring that a public entity reconsider its decision having regard to human rights;
- A provisional or preventative order to prevent the materialisation of a risk to human rights.

In its current form, the Bill does not empower the Human Rights Commission to recommend or require the payment of compensation or any other specific action which could be viewed as a legal remedy. In conjunction with the previous recommendations relating to the availability legal action before a court or tribunal, further provision is needed to **enable a court or tribunal to award compensation to ensure an effective remedy**.

The acts and decisions of public entities can cause serious, potentially irreversible consequences for the human rights of those affected. The fundamental nature of human rights protections, which are based on respect for the inherent dignity, autonomy and freedom of individuals, entails that human rights violations should be avoided wherever possible. As noted above, it is recommended that the Act **provide some form of provisional or preventative remedy**. It is suggested that this could be modelled on the approach taken by the European Court of Human Rights, which can issue interim measures it considers appropriate **where there is an imminent risk of irreparable harm**.⁵ Such measures could be imposed on a provisional basis pending the final outcome of the complaint, and would significantly strengthen the ability of the Act to protect against serious human rights breaches.

The remedies granted by a court or tribunal also need to be enforceable. Without enforceability, human rights protections are at risk of being trivialised or ignored. The Bill should therefore be amended to **empower a court or tribunal to issue enforcement orders** in relation to a remedy issued for a human rights violation.

Recommendation 4: A range of effective remedies should be provided in the Act, including compensation and provisional orders.

Recommendation 5: An enforcement procedure should be established to ensure that remedies can be enforced.

⁴ Ibid art 2; *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984* ('CAT') art 14; *Convention on the Rights of the Child 1980* ('CRC') art 39; *International Convention on the Elimination of All Forms of Racial Discrimination 1965* ('CERD') art 6.

⁵ *Rules of Court 2018* rule 39.

3. Expanding the protection of Economic, Social and Cultural Rights

The inclusion of economic, social and cultural rights in Part 2, Division 3 is commended. The right to education and the right to access health services (as a component of the broader human right to health) are key economic, social and cultural rights. Yet, many other economic, social and cultural rights will remain unprotected. It is submitted that in order to be consistent with international human rights law, **the Act should include all the rights found in the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*.**

It is acknowledged that many of these rights require significant commitment of time and resources to be fully realised. However, this fact is recognised under international human rights law, which imposes a reasonable and proportionate standard of performance for economic, social and cultural rights. The duty of governments is:

“to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”⁶

There is already provision for international law and jurisprudence to be considered when interpreting the terms of the Act (cl 48(3)) and as such the economic and other resources required to fulfil economic, social and cultural rights ought not to be viewed as a barrier to their inclusion in the Act.

As a minimum, the Act should recognise the human rights to an **adequate standard of living**,⁷ to **choose and accept work**, and to **fair and favourable conditions of work**.⁸ The right to access health services should be expanded to recognise the right to **the highest attainable standard of health**.⁹

The right to an adequate standard of living includes the rights to **adequate food, water and housing**.¹⁰ In Queensland, homelessness rose by 9% between 2011 and 2016 and there are an estimated 20,000 Queenslanders, or 1 in every 200, who are homeless.¹¹ The data from the Australian Bureau of Statistics also reveals which marginalised groups are most at risk. Women, particularly older women, are increasingly experiencing homelessness, often associated with domestic violence. Older persons also frequently experience inadequate accommodation and care arrangements, a fact which has been acknowledged by the

⁶ ICCPR 1966 art 2.

⁷ *International Covenant on Economic, Social and Cultural Rights 1966* ('ICESCR') art 11.

⁸ *Ibid* art 6.

⁹ *Ibid* art 12.

¹⁰ Committee on Economic Social and Cultural Rights, 'General Comment No. 12: The Right to Adequate Food (Art. 11)' (1999); Committee on Economic Social and Cultural Rights, 'General Comment No. 4: The Right to Housing' (1991) <<https://www.escr-net.org/resources/general-comment-4>>; Committee on Economic Social and Cultural Rights, 'General Comment No. 15: The Right to Water' (2003).

¹¹ Australian Bureau of Statistics, *2016 Census of Population and Housing* (14 March 2018) <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/2049.0>>

Australian Government in establishing the Royal Commission into Aged Care Quality and Safety.

In order to address this problem adequately, **the right of all persons to adequate housing needs to be protected** within the *Human Rights Act*, as part of the right to an adequate standard of living. This would require that new laws and policies can be assessed in terms of their impact on housing availability, accessibility and affordability. It would also enable an individual who has been affected by an act or decision of a public entity in this area to seek review of the decision, which is particularly justified given the serious implications of violations to the right to adequate housing on individual lives.

The right to an adequate standard of living also encompasses **rights to adequate food and water**. In Queensland, 400,000 Queenslanders live in situations of food insecurity, which means they lack the ability to purchase adequate food.¹² As a result, 6% of children in Australia live in hunger for an indefinite period at least once a fortnight.¹³ Having such rights enshrined into law in Queensland would enable a human rights-based approach to governing food and water that is widely considered best practice among international institutions, academia and civil society.¹⁴

In addition, the rights to food and water can also be **affected by pollution, climate change and other environmental factors**. For example, the finding of criminal responsibility for Linc Energy and the water quality issues recently reported in Brisbane and other Queensland towns¹⁵ illustrate the potential for industrial pollution to have significant impacts on food and water supplies.

Such environmental degradation can also have significant implications for **the right to the highest attainable standard of health**. This right does not guarantee a right to be healthy, but rather requires that governments take steps to improve environmental and industrial conditions and to prevent and treat other diseases. The inclusion of a right to access health services is a very welcome component of the Bill, but is only part of the obligation imposed on governments under international human rights law. Recognising the right to the highest attainable standard of health would require that health implications of acts or decisions would be considered, including for example the potential health implications of proposed

¹² FoodBank, Foodbank Hunger Report 2017 (2018) <https://www.foodbank.org.au/wp-content/uploads/2017/10/Foodbank-Hunger-Report-2017.pdf> .

¹³ Rebecca McKechnie, Rebecca Turrell, Gavin Fiskes and Danielle Gallegos, Single-item measure of food insecure in the National Health Survey may underestimate the prevalence in Australia (2018) *Australian and New Zealand Journal of Public Health* 395

¹⁴ For more information, see eg, The United Nations Human Rights Based Approach Portal, *Case Studies* (2017) <https://hrbportal.org/about-the-portal-2>

¹⁵ *Contamination Fears in Town's Drinking Water* (11 January 2018) <https://www.couriermail.com.au/news/queensland/residents-of-queensland-town-told-to-boil-drinking-water/news-story/af608a3ff1a85cd52405e7c1504166eb>; Zoe Coleman, *Popular Brisbane Canoeing Creek Often Dangerously Polluted with Faecal Bacteria* (21 July 2018) ABC News <https://www.abc.net.au/news/2018-07-21/faecal-bacteria-dangerously-high-cabbage-tree-creek-qld/10015276>.

developments. **The potential for environmental factors to impact on human rights should be explicitly recognised** in the Act.

Clause 18 of the Bill guarantees freedom from slavery and forced labour. Violations of these rights are of the most serious concern for international human rights law and they rightly should be protected within Queensland. However, many workers within Queensland have experienced exploitation and wage theft which falls below the threshold of 'slavery or forced labour', but which nonetheless should be considered a breach of their human rights.

For example, a recent study found that almost a third of international students and backpackers in Australia earned only half the minimum wage or less when working in casual employment such as hospitality or fruit-picking.¹⁶ Given the number of backpackers and temporary migrants working casually in Queensland, this problem represents a significant human rights concern and a lost opportunity for the Queensland economy.

Other Queensland workers are facing serious health impacts as a result of unsafe working conditions. This can be seen in the recent rise in the preventable and deadly pneumoconiosis (i.e. black lung) among Queensland coal workers.

It is therefore recommended that the Act include protection of the **right to choose and accept work** and **the right to fair and favourable conditions of work**, which are guaranteed under international law.¹⁷ These rights encompass considerations of fair remuneration for work performed, safe and reasonable conditions of work, and reasonable allowances for leave. Including these rights within the Act would ensure that, to the extent possible within Queensland's legislative powers, vulnerable workers are protected from exploitation and unsafe conditions.

Recommendation 6: The human right to an adequate standard of living, including adequate housing, food and water, should be included in the Act.

Recommendation 7: The environmental dimensions of the rights to food and water and the right to the highest attainable standard of health should be explicitly acknowledged.

Recommendation 8: The right to choose and accept work and to fair and favourable working conditions should be included in the Act.

¹⁶ Laurie Berg and Bassina Farbenblum, 'Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey' [2017] *SSRN Electronic Journal* <<https://www.ssrn.com/abstract=3140071>>.

¹⁷ *ICESCR 1966* art 6.

4. Recognise the human rights needs of particular groups, including older persons and persons with disabilities

A key factor behind the drive to enact human rights protections in Queensland legislation was the understanding that certain groups within our community are more likely to suffer infringements of their human rights and have special needs which must be protected. Among these groups, older persons and persons with disabilities have been recognised at the international level as being deserving of specific human rights protection.¹⁸

For older persons, the problem of elder abuse has been identified as being of significant concern in Australian communities.¹⁹ **Elder abuse represents a violation of a wide number of human rights**, including the right to security of the person,²⁰ to freedom from cruel or degrading treatment,²¹ to freedom of movement, including freedom to choose one's place of residence,²² and to an adequate standard of living.²³ Ageism – discrimination against a person on the basis of their age – is also increasingly prevalent in Australia, and it impinges upon older persons' rights to work (particularly to gain a living by work of their choosing),²⁴ access to justice and equality before the law,²⁵ and the right to health.²⁶ The recent announcement by the Australian Government to conduct a Royal Commission into Aged Care Quality and Safety recognises the particular vulnerability of older persons to human rights abuse while living in aged or residential care.

Persons with disability also have particular human rights needs which require specific protections. This fact was recognised by the international community through the adoption of the *Convention on the Rights of Persons with Disability* (CRPD) which acknowledges that, while persons with disability are entitled to all the same rights as any other individual, they can **require specific adaptations to effectively exercise those rights**. For both persons with disability and older persons, human rights principles demand that they enjoy full respect for their autonomy and dignity, and that they be supported in making decisions about their own lives.

The recent decision by the Australian Human Rights Commission with respect to disability access on Queensland Rail's Next Generation Rollingstock demonstrates the importance of

¹⁸ *Convention on the Rights of Persons with Disabilities 2006* ('CRPD'); *United Nations Open-Ended Working Group on Ageing* <<https://social.un.org/ageing-working-group/>>.

¹⁹ Kelly Purser et al, 'Submission Responding to ALRC Discussion Paper 83, Elder Abuse' (Submission No 298); Australian Law Reform Commission, 'Elder Abuse—A National Legal Response' (Report No 131, 14 June 2017).

²⁰ *ICCPR 1966* art 9.

²¹ *Ibid* art 7.

²² *Ibid* art 12.

²³ *ICESCR 1966* art 11.

²⁴ *Ibid* art 6.

²⁵ *ICCPR 1966* art 26.

²⁶ *ICESCR 1966* art 12.

having specific protections in place for persons with disabilities in Queensland.²⁷ With adequate human rights protections in place, public entities making decisions with respect to transportation or any other goods or services would be required to have specific regard to the impact on persons with disabilities.

The inclusion of the right to equality before the law and to be protected from discrimination (cl 15) is welcome, but does not go far enough to ensure protection of the particular human rights needs of older persons and persons with disabilities. By defining 'discrimination' with reference to s 7 of the *Anti-Discrimination Act 1991*, the Bill sets up an exhaustive list of prohibited grounds for discrimination. This is inconsistent with international law, which recognises that, because human rights belong equally to all individuals, discrimination on any basis is incompatible with human rights. Both the ICCPR and ICESCR therefore require states to guarantee human rights without "distinction of any kind."²⁸ A similarly **non-exhaustive list of prohibited grounds for discrimination should be included in the Act.**

The Act should also include a **specific provision recognising the human rights needs of particular groups, such as older persons and persons with disabilities.**²⁹ Public entities would be required to have particular regard to the impact of their acts and decisions on these groups. Ideally such a provision would specifically recognise the right of these individuals to **participate in decisions which affect them** to the greatest extent possible. This would ensure that the dignity and autonomy of all individuals is respected, and would contribute to preventing discrimination and elder abuse.

Recommendation 9: Articulate a non-exhaustive list of prohibited grounds of discrimination.

Recommendation 10: Specifically recognise the rights of older persons and persons with disabilities, particularly the right to participate in decisions which affect them.

5. Establish a principled approach for balancing competing human rights issues

The Bill does not provide any express provision for a situation where two human rights might conflict with each other. Clause 13 provides the circumstances in which human rights may be limited by law, namely "only to reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom." This approach is also set out as a general principle in the Preamble to the Bill (para 4). The factors which

²⁷ *Notice of Decision on Joint Application for Temporary Exemptions: State of Queensland (acting through the Department of Transport and Main Roads) and Queensland Rail* (Australian Human Rights Commission, 29 March 2018).

²⁸ ICCPR 1966 art 2; ICESCR 1966 art 2.

²⁹ A provision like this could be expanded to include other groups, for example, children, women, LGBTIQA people, refugees etc.

must be considered in determining whether a limitation imposed by law is reasonable are set out in cl 13(2) and are largely consistent with international human rights law.

However, no specific provision is made to guide a decision-maker in striking an appropriate balance where the rights of more than one person might be in conflict. For example, no guidance is given for how a conflict ought to be resolved between freedom of expression (cl 21) and the right to reputation (cl 25(b)). Further, rights such as freedom of expression (cl 21), freedom of assembly (cl 20) and freedom of thought, conscience, religion and belief (cl 20) are commonly defined in international law in terms which clarify the circumstances in which these rights can be limited.³⁰ It is recommended therefore that **these rights be further defined to clarify when they may be limited and on what grounds.**

It is further recommended that the special **status of *jus cogens* rights be recognised** in the Act. These rights are considered to be non-derogable under international law and no violation of them is permitted. They include freedom from torture and freedom from slavery. The inviolable nature of these guarantees should be recognised in the Act, and doing so would help to resolve potential conflict of rights.

Further guidance for balancing competing rights could be achieved through **articulating clear principles of necessity and proportionality.** In a situation where two or more rights conflict, it can be legitimate to limit the enjoyment of one right for the protection of another, but such limitation must be restricted to what is necessary and proportionate to achieving that aim. These requirements are commonly found in international law and are used to strike an appropriate balance between competing rights. Clear principles of necessity and proportionality would assist the Human Rights Commissioner in conciliation processes, and could be employed by courts or tribunals determining human rights claims where issues of conflicting rights arise.

Recommendation 11: Rights which are commonly subject to limitations, such as freedom of expression, freedom of assembly, freedom of religion, should be defined in more detail to make clear when limitations on their enjoyment will be permitted.

Recommendation 12: The *jus cogens* status of freedom from torture and freedom from slavery should be recognised.

Recommendation 13: Clear principles for balancing competing rights should be articulated in the Act, and these should encompass requirements of necessity and proportionality.

³⁰ see eg *ICCPR 1966* arts 18, 19 and 20. It should be noted that freedom of thought, conscience, religion and belief cannot be restricted per se – restrictions are only ever permitted on the *expression* of such thoughts or beliefs.