



Queensland Human Rights Bill 2018

Submission to the Legal Affairs and Community
Safety Committee

November 2018

About the Office of the Public Guardian

The Office of the Public Guardian (OPG) is an independent statutory office which promotes and protects the rights and interests of adults with impaired decision-making capacity for a matter, and children and young people in the child protection system or staying at a visitable site. The purpose of OPG is to advocate for the human rights of our clients.

The OPG promotes and protects the rights and interests of adults with impaired decision-making capacity for a matter through its guardianship, investigations and adult community visitor programs:

- The guardianship program undertakes both supported and substituted decision-making in relation to legal, personal and health care matters, supporting adults to participate in decisions about their life and acknowledging their right to live as a valued member of society.
- The investigations program investigates complaints and allegations that an adult with impaired decision-making capacity is being neglected, exploited or abused or has inappropriate or inadequate decision-making arrangements in place.
- The adult community visitor program independently monitors visitable sites (authorised mental health services, community care units, government forensic facilities, disability services and locations where people are receiving NDIS support, and level 3 accredited residential services), to inquire into the appropriateness of the site and facilitate the identification, escalation and resolution of complaints by or on behalf of adults with impaired decision-making capacity staying at those sites.

When providing services and performing functions in relation to people with impaired decision-making capacity, the OPG will support the person to participate and make decisions where possible, and consult with the person and take into account their views and wishes to the greatest practicable extent.

The OPG provides individual advocacy for children and young people through the following two programs:

- the child community visitor program, which monitors and advocates for the rights of children and young people in the child protection system including out-of-home care (foster and kinship care), or at a visitable site (residential facilities, detention centres, corrective services facilities, authorised mental health services, and disability funded facilities), and
- the child advocacy program, which offers person-centred and legal advocacy for children and young people in the child protection system.

The OPG provides an entirely independent voice for children and young people to raise concerns and express their views and wishes. The OPG's child community visitor program independently monitors visitable locations and facilitates the identification, escalation and resolution of issues by and on behalf of children and young people. The OPG's child advocacy program elevates the voice and participation of children and young people in the child protection system in decisions that affect them. When performing these functions, the OPG is required to seek and take into account the views and wishes of the child to the greatest practicable extent.

The *Public Guardian Act 2014* and *Guardianship and Administration Act 2000* set out the OPG's legislative functions, obligations and powers. The *Powers of Attorney Act 1998* regulates the authority for adults to appoint substitute decision makers under an advance health directive or an enduring power of attorney.

Submission to Human Rights Bill 2018

Position of the Public Guardian

The Office of the Public Guardian (OPG) appreciates the opportunity to provide a submission on the Human Rights Bill 2018 (the Bill) to the Legal Affairs and Community Safety Committee.

The OPG congratulates the Queensland Government on introducing legislation to embed human rights considerations in public sector decision making. Rights-based decision making is at the cornerstone of the work performed by the OPG and a reflection of this fundamental principle in the Bill is a welcome initiative. This Bill will be an invaluable tool for the OPG, in terms of both our decision making and our advocacy for the rights of our clients.

The OPG supports the intent and the rights provided for within the Bill. In particular, those specific rights afforded to children to reflect their legal status under the Convention on the Rights of the Child (CRC) and the application of the Bill to the decisions and actions of service providers funded by the National Disability Insurance Scheme (NDIS).

In this submission the OPG has taken the opportunity to discuss additional issues concerning the Bill as well as a number of recommendations, for further consideration by the Committee.

Summary of recommendations

- 1. The OPG recommends that the rights of people with disabilities be explicitly recognised in the *Human Rights Act* proposed by the Bill.**
- 2. The OPG recommends that the amendments to the *Youth Justice Act* and the *Corrective Services Act 2006* proposed by the Human Rights Bill be reconsidered.**
- 3. The OPG recommends that consideration be given to stand-alone legal remedy for significant breaches of the *Human Rights Act* proposed by the Bill.**
- 4. The OPG recommends that the performance of public entities against the *Human Rights Act* proposed by the Bill be actively monitored and reported on by the QHRC and that the data obtained from this monitoring be utilised to inform future legislation.**
- 5. The OPG recommends that the QHRC actively engage with disability advocacy groups and the Office of the Public Guardian to ensure vulnerable Queenslanders understand their rights under the *Human Rights Act* proposed by the Bill.**
- 6. The OPG recommends that the Queensland Government consider providing the QHRC with investigative powers under the *Human Rights Act* proposed by the Bill.**

1. Rights for people with disability

In the OPG's submission to the Legal Affairs and Community Safety Committee's Human Rights Inquiry in 2016 (Annexure A to this submission), we made several recommendations to the Queensland Government on the content of the Bill. One of which was the inclusion of the full range of rights set out in the Convention on the Rights of Persons with Disabilities (UNCRPD). Through our activities advocating for and supporting vulnerable adults with impaired decision-making capacity, we have a unique insight into the daily obstacles faced by persons with a disability being able to exercise their rights.

The OPG acknowledges the inclusion of a number of provisions in the Bill that would provide coverage for the rights of adults with a disability by virtue of the prohibition of discrimination on the basis of impairment under the *Anti-Discrimination Act 1991*, which is referred to in the Bill. However, we are concerned that the rights of people with disabilities are not explicitly recognised in the Bill. Whilst we note clause 14 of the Bill which provides that rights not explicitly protected by the Charter shall not be limited, we believe that true realisation of the systemic change intended by this legislation would be better achieved through specific reference to the rights of adults with disabilities. Entrenching the rights of people with a disability in a statutory instrument such as the Human Rights Bill would be an invaluable means to ensure the interests of adults with impaired capacity are an ongoing consideration for policy makers and public entities.

If systemic change in the recognition of human rights in decision making is the ultimate goal of the Bill, it is critical that the rights of people with impaired decision-making capacity are overtly recognised in the legislation.

The OPG understands the Queensland Government is exploring the possibility of a Charter of Rights for people with disability in its public consultations on the review of the *Disability Services Act 2006*. The OPG is supportive of this proposal and is hopeful the Bill will operate together with a Charter to ensure the highest standard of rights protection for people with disability in Queensland.

Recommendation 1: The OPG therefore recommends that the rights of people with disabilities be explicitly recognised in the Human Rights Act proposed by the Bill.

2. Amendments to the Youth Justice Act

In the OPG's submission to the Queensland Government's Human Rights Inquiry in 2016, we impressed that a Human Rights Act should unequivocally apply to children and include rights specific to children, given their particular legal status as recognised in the Convention on the Rights of the Child (CRC). While these rights have, to a large extent, been incorporated in the Bill, we are concerned about the proposed amendments to section 263 of the *Youth Justice Act 1992* (YJA), namely the insertion of subsections (7) and (8) which apply to the chief executive's consideration of the human rights of a child and the segregation of children on remand from a child detained on sentence. Subsection (8) will read:

(8)...the chief executive does not contravene the Human Rights Act 2018, section 58(1) only because the chief executive's consideration takes into account—

- (a) the safety and wellbeing of the child on remand and other detainees; and*
- (b) the chief executive's responsibilities and obligations under this section.*

While these are certainly valid considerations in the management of a detention facility, we note that the Bill has an existing provision at clause 30(2) concerning humane treatment when deprived of liberty which provides:

(2) An accused person who is detained or a person detained without charge must be segregated from persons who have been convicted of offences, unless reasonably necessary.

We consider that a decision made by the chief executive regarding segregation based on the additional factors in proposed subsections 263(8)(a) and (b) of the YJA would fall under the ordinary meaning of what is *reasonably necessary* in the context of managing a detention facility. As such, clause 30(2) already provides a mechanism to make decisions about the segregation of detainees that could be contrary to the Human Rights Act proposed by the Bill (the Act), provided a reasonable assessment is undertaken which includes consideration of human rights. For this reason, express provision for a human rights exemption in the YJA, in addition to the existing clause 30(2) of the Bill, appears unnecessary. Of concern is that the amendment risks a weakening of the right to humane treatment when deprived of liberty for youth in detention, both in perception and potentially in practice. The OPG considers that the Bill should uphold the highest standard of human rights and should not be fettered by qualifications in other legislation.

The OPG would suggest instead that if, logistically, the segregation of accused and convicted detainees is an ongoing challenge in the context of youth detention, the Queensland Government should work towards developing a strategy to remedy this particular issue.

The OPG is also concerned that a similar amendment is proposed for the *Corrective Services Act 2006*.

Recommendation 2: The OPG therefore recommends that the amendments to the Youth Justice Act and the Corrective Services Act 2006 proposed by the Human Rights Bill be reconsidered.

3. Legal remedies

The OPG notes the absence of a stand-alone legal remedy for a contravention of the Bill. As indicated above we support the intentions of the Bill in educating and raising awareness of human rights, and are optimistic that these intentions will be achieved by the legislation. However, we believe a stand-alone legal remedy for breaches of the Act is critical to deter public entities from actions that may constitute a significant breach of fundamental human rights.

Recommendation 3: The OPG recommends that consideration be given to stand-alone legal remedy for significant breaches of the Human Rights Act proposed by the Bill.

4. Monitoring and reporting

The OPG notes that the Bill imposes reporting requirements under the Act, including the publication of an Annual Report¹ and a power for the proposed Queensland Human Rights Commissioner to report to the Attorney-General about any matter relevant to the commission's functions under the Act.² We support such requirements as an incentive for public entities to abide by their human rights obligations and avoid any negative consequences associated with public opinion. The same applies to the commissioner's power under the legislation to publish information about a human rights complaint that the commission has finished dealing with.³

As an additional incentive for adherence to human rights obligations, the OPG recommends that the performance of public entities be actively monitored by the proposed Queensland Human Rights Commission (QHRC) to track any industry trends in terms of compliance with human rights legislation, and also to identify entities with a proven record of breaches of the legislation. Ideally, as proposed above, formalised penalties would be in place for any significant breaches of human rights. However, in the absence of a separate legal remedy being enshrined in the Bill for a breach of human rights, we urge the government to commit to regular publication of resolved complaints and clear identification of those entities with a growing track record of complaints made against them.

The data obtained from these monitoring and reporting processes could also inform future legislation to engrain human rights into the decision-making processes of both public and private entities in Queensland. For example, if the data collected indicates a particular industry has recurrent human rights complaints made against entities operating in that sector, this information could form the basis for the inclusion of human rights in legislation specific to that industry. In this way, the Act could achieve true systemic change in the sectors most prone to human rights abuses.

Recommendation 4: The OPG therefore recommends that the performance of public entities against the Human Rights Act proposed by the Bill be actively monitored and reported on by the QHRC and that the data obtained from this monitoring be utilised to inform future legislation.

5. Education and community engagement

Education and public engagement will be critical to the effectiveness of human rights legislation in Queensland. This applies not only to the public entities that will need to be informed of their obligations under the Bill, but also to the public to ensure they are fully cognisant of their rights regarding decisions made by public entities and the avenues available to them to challenge decisions that do not accord with human rights obligations.

To increase public awareness, we recommend that a targeted education campaign be developed with consideration given to the needs of more vulnerable and isolated Queenslanders, such as those with impaired decision-making capacity. Early engagement with disability advocacy bodies and organisations will be vital in this regard to ensure vulnerable Queenslanders have the information and tools available to them to exercise their rights under the Act. This will also require the QHRC working with disability network and advocacy groups to create tailored information for people with impaired decision-making capacity that is readily accessible and easy to understand, including step-by-step processes on pursuing a complaint.

In this regard, the OPG would be eager to work with the QHRC to provide information and guidance to its clients regarding their rights under the Bill. The OPG's community visitors have enquiry and complaint functions under the *Public Guardian Act 2014* which would readily facilitate educating clients on their rights under the Act and guiding them through any complaints process. In order for this to occur, it is essential that the QHRC engage closely with the OPG to ensure its community visitors have the information required to educate people with impaired capacity. It is also advisable that a formalised information sharing arrangement be established between the QHRC and the OPG to allow the reporting of any ongoing issues of human rights abuses, any public entities of particular concern and to provide feedback on the success of the complaints process. This would ensure current information is available to the QHRC on the effectiveness of the Act.

Recommendation 5: The OPG therefore recommends that the QHRC actively engage with disability advocacy groups and the Office of the Public Guardian to ensure vulnerable Queenslanders understand their rights under the Human Rights Act proposed by the Bill.

6. Investigative functions

While not addressed in the Bill for consideration, the OPG considers that a human rights framework in Queensland would be strengthened by the QHRC being provided with additional investigative powers under the Act. This could entail the QHRC having the authority to respond to reports of alleged breaches of the Act by public entities, in the absence of formal action being taken by a member of the public. This would be of particular value should members of the public, specifically more vulnerable Queenslanders, be fearful of, or daunted by, the process of taking formal action regarding a decision made by a public entity. It would also serve as a strong incentive for public entities to ensure human rights are properly considered in decision making.

Recommendation 6: The OPG therefore recommends that the Queensland Government consider providing the QHRC with investigative powers under the Human Rights Act proposed by the Bill.

7. Additional observations

The OPG would also like to raise the following issues on specific clauses of the Bill for the committee's consideration:

- **Clause 13** – Human rights may be limited: It is unclear what role the Bill will play for people subject to mental health orders that authorise involuntary detention, given clause 13 of the Bill which states that “human rights are not absolute and may be subject under law to reasonable limits...”. The test in such cases will presumably be whether it was demonstrably justifiable and reasonable under these concurrent laws that seek to restrict a person’s human rights, however this requires specific attention.
- **Clause 26(2)** – Protection of families and children: Caution may need to be exercised concerning the commission’s interpretation of the “best interests of the child”. This should be clarified so as to ensure that it is balanced against (and does not devalue) a child’s right to participate, or have a contrary view (as to what constitutes their best interests), in matters relating to them.
- **Clauses 32 and 33** – Rights in criminal proceedings and children in the criminal process: Both clauses refer only to a child being treated in a way that is appropriate to their age. However, chronological age may not be the most accurate determination in considering what may be appropriate for a child in criminal proceedings. Research indicates that a child’s chronological age is not as important as a consideration of their capacity, understanding, cognitive development and other factors relevant to the conduct of criminal processes. A child’s functional age can differ significantly from their chronological age.⁴

- Clause 31 – The right to a fair hearing: Consideration may need to be given to the application of this right to proceedings before the Mental Health Review Tribunal (MHRT), given that all MHRT hearings are conducted in private. While clause 31(2) does allow for the exclusion of parties from a hearing in the public interest or in the interests of justice, there remains potential for private hearings to be deemed a breach of human rights under the Act.
- Clause 50 – Intervention by Attorney- General: When considering the role of the Attorney-General, will a process be in place if the Attorney-General is the entity being accused of breaching a human right? In a similar vein, is there potential for a court or tribunal to be considered a public entity and therefore subject to the provisions of the Act?
- Clause 82 – Attendance by complainant: The OPG supports the specific exceptions in clauses 82(a) and (b) for a child or a person with impaired capacity to the requirement that a person must attend a conciliation conference in person. However, while schedule 4 of the *Guardianship and Administration Act 2000* (GAA) is noted in the context of a definition of impaired capacity, there is no mention of the role of a guardian in such proceedings. We believe it would be prudent to make specific reference to the provisions of the GAA regarding the presence of a guardian in such matters to provide guidance on this process.
- Clause 83 – Representation: Clarification will be required as to whether the Commissioner’s consent to representation by another person would extend to legal representation and/or a legal guardian. A further issue concerns the interaction between clauses 82 and 83, namely whether a person represented by another at a conciliation conference will still be required to attend in person as dictated by clause 82(1).

Concluding remarks

The OPG is very supportive of the human rights initiatives currently being undertaken by the Queensland Government, including the Bill and the potential for a Charter of Rights for people with disability. The OPG would be pleased to lend any additional support as required. Should clarification be required regarding any of the issues raised, the OPG would be happy to make representatives available for further discussions.

¹ *Human Rights Bill 2018*, 91(1) “Annual report”.

² *Human Rights Bill 2018*, 92(1) “Other reports”

³ *Human Rights Bill 2018*, clause 90(1) “Commissioner may publish information”.

⁴ Adolescent Maturity and the Brain: The Promise and Pitfalls of Neuroscience Research in Adolescent Health Policy Sara B. Johnson, Ph.D., M.P.H.,*, Robert W. Blum, M.D., Ph.D., and Jay N. Giedd, M.D Published in final edition form *J Adolesc Health*. 2009 September; 45(3): 216–221. doi:10.1016/j.jadohealth.2009.05.016; Neurobiology and the Law: A Role in Juvenile Justice? Staci A. Gruber & Deborah A. Yurgelun-Todd.