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Accessible, Enforceable and Effective:  
Strengthening Queensland's Human Rights Bill  
Submission to the Legal Affairs and Community Safety Committee

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## Human Rights Law Centre

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# 1. Introduction

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A Human Rights Act for Queensland will help to build a society more grounded in the values Queenslanders hold dear: fairness, respect, compassion and equality. It will play an important role in protecting human rights and ensuring that human rights are appropriately considered by all aspects of governmental activity.

The Human Rights Law Centre (**HRLC**) welcomes the Queensland Government's commitment to deliver a Human Rights Act, and the tabling of the Human Rights Bill 2018 (Qld) (**Bill**) for consideration by the Legal Affairs and Community Safety Committee (**Committee**). The Bill builds on the model developed by the *Charter of Human Rights and Responsibilities 2006* (Vic) (**Victorian Charter**), with improvements, including a mediation mechanism, rights to education and health, and clearer drafting in key operative provisions.

The HRLC's submission focuses on three key principles to strengthen the Bill:

**Principle 1 - Accessibility:** Ensuring human rights can be accessed equally by all Queenslanders, including by clarifying and expanding the scope of public entities, removing the youth justice and corrections limitations and the exemption for religious bodies exercising public functions and expanding the range of rights protected in the Bill.

**Principle 2 - Enforceability:** Ensuring a simpler, more accessible way for people to take legal action to enforce their human rights, including by introducing a standalone cause of action, ensuring access to the full suite of judicial remedies, and allowing people to take an unsuccessful Human Rights Commission mediation directly to a court or tribunal.

**Principle 3 - Effectiveness:** Making sure the Bill achieves its key purpose, including by clarifying that an unlawful act or decision by a public entity is invalid and providing adequate funding and resources for education, training and awareness.

For a more detailed explanation of the benefits of introducing a Human Rights Act, we refer to our previous submission *It's Time for a Queensland Human Rights Act* to the Committee's Human Rights Inquiry in March 2016.<sup>1</sup>

## 2. Summary of recommendations

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1. The Committee should recommend that the Bill be passed, with amendments to strengthen the operation of Queensland's Human Rights Act.

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<sup>1</sup> Human Rights Law Centre, *It's Time for a Queensland Human Rights Act: Submission to the Legal Affairs and Community Safety Committee's Human Rights Inquiry* (24 March 2016) <http://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/5812996f1dd4540186f54894/581299f61dd4540186f559b2/1477614070671/HRLC-submission-on-Queensland-Human-Rights-Charter-FINAL.pdf?format=original>.

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2. The non-state school example under clause 9(1)(h) of the Bill should be removed.
3. Aged care and out-of-home care services should be prescribed as functions of a public nature in clause 10(3) of the Bill.
4. The Bill should prescribe that organisations performing the functions in clause 10(3) are public entities when performing the listed public functions.
5. The religious exemption in clause 58(3) of the Bill should be removed.
6. The youth justice and corrections exemptions in clauses 183 and 126 should be removed from the Bill.
7. At a minimum, if recommendation 6 is not implemented, the word "or" at the end of clause 126, section 5A(2)(a) should be replaced with "and".
8. The rights protected in the Bill should be expanded to include other fundamental rights enshrined in the International Covenant on Economic, Social and Cultural Rights.
9. Clause 59 of the Bill should be replaced with a standalone cause of action for breaches of human rights which is justiciable and enforceable in the Queensland Civil and Administrative Tribunal.
10. The Bill should be amended to:
  - (a) empower a court or tribunal to grant such relief or remedy, or make such order, within its powers, as is "just and appropriate", including making an award of damages where appropriate; and
  - (b) make clear that a person who claims that a public entity has made a decision or acted incompatibly with human rights can seek judicial review on the ground that the decision is unlawful, without having to seek review on any other ground.
11. Part 4, Division 1 of the Bill should be amended to allow a person to take legal action in a court or tribunal if the Human Rights Commission is unable to resolve their complaint by mediation.
12. Clause 39 of the Bill should be amended to:
  - (a) provide greater formal opportunity for public submissions and hearings on bills that raise significant human rights concerns;
  - (b) provide that, other than in exceptional circumstances, legislation is not to be passed by Parliament before the portfolio committee has provided its report; and
  - (c) require the responsible Minister to respond substantively to any concerns raised by the portfolio committee prior to the passage of a bill.
13. Clause 58 of the Bill should expressly provide that decisions or acts of public entities that are unlawful under clause 58(1) are invalid.

14. The Queensland Government should allocate additional resources to develop a human rights culture across government, including training and education within government.
15. The Queensland Government should allocate additional resources to engage, educate and empower the community through community awareness campaigns, targeted training to advocates and support workers, and primary and secondary school education.
16. The Queensland Government should provide additional resources to community legal centres, the Queensland Legal Aid Commission and other support services to assist affected individuals to protect and promote their human rights.

### 3. Positive aspects of the Bill

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As the Attorney-General's introductory speech made clear, the Bill is intended to "ensure that respect for human rights is embedded in the culture of the Queensland public sector and that public functions are exercised in a principled way that is compatible with human rights."<sup>2</sup>

A Human Rights Act for Queensland will:

- (a) provide a useful framework for public entities to develop and review policies, programs and practices, and to make decisions to achieve common sense and rights-respecting decisions and outcomes;
- (b) contribute to cultural change within public entities to embed human rights in everyday processes;
- (c) empower people to take action where rights may have been infringed; and
- (d) enhance the accountability of public institutions to the community.

The Bill sets out 23 human rights for protection, most of which are derived from the *International Covenant on Civil and Political Rights (ICCPR)*.<sup>3</sup> The HRLC welcomes the inclusion of rights derived from the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*<sup>4</sup> in the Bill, such as:

- (a) rights to primary and secondary education and access to further vocational education and training;
- (b) a right access to health services without discrimination;
- (c) a right to emergency medical treatment; and

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<sup>2</sup> Attorney-General and Minister for Justice Yvette D'Ath, *First Reading Speech: Human Rights Bill* (31 October 2018) 3184.

<sup>3</sup> UN General Assembly, *International Covenant on Civil and Political Rights* (16 December 1966) UN Treaty Series 999.

<sup>4</sup> UN General Assembly, *International Covenant on Economic, Social and Cultural Rights* (16 December 1966) UN Treaty Series 993.

- (d) the right to enjoy and practice culture, including for Aboriginal and Torres Strait Islander peoples.

The Bill is closely based on the model and drafting of the Victorian Charter but improves on the Victorian Charter in a number of respects. It introduces a complaints mechanism and avenue for mediation of disputes through Queensland's Human Rights Commission. There have also been several drafting improvements in the Bill. The Bill also uses gender neutral language, allows for scrutiny of non-Queensland laws by a portfolio committee for compatibility with human rights, and contains clearer protections for Aboriginal and Torres Strait Islander people's cultural rights.

We welcome the process for an independent review of the Human Rights Act after 1 July 2023, and a further review after 1 July 2027, to consider:

- (a) whether additional human rights should be included;
- (b) proceedings and remedies that may be brought or awarded; and
- (c) amendments to the *Youth Justice Act 1992 (YJA)* and *Corrective Services Act 2006 (CSA)*.

We also acknowledge the Queensland Government's budget commitment of \$2.3 million of funding over four years for the Human Rights Commission to support the administration of the Human Rights Act.

It is positive to see the Queensland Government taking a strong stand to better embed human rights within the political, legal and cultural architecture of the state, and building on the *Human Rights Act 2004 (ACT) (ACT Act)* and Victorian Charter to progress best practice in Australia. The HRLC strongly supports the passage of the Bill through Parliament, although we outline potential amendments to strengthen its operation in practice.

**Recommendation 1:**

*The Committee should recommend that the Bill be passed, with amendments to strengthen the operation of Queensland's Human Rights Act.*

## 4. Strengthening the Human Rights Bill

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Despite these positive aspects, we have concerns about key elements of the Bill which may limit the ability of a Human Rights Act to achieve its intended aims.

As outlined above, we consider elements of the Bill which may interfere with its objectives to be accessible, enforceable and effective.

## Principle 1: Accessibility

### 4.1 Improving the definition of ‘functional’ public entity

An issue that has caused unnecessary confusion in Victoria and the UK is when a non-government organisation performing public services should be considered to be a public authority or public entity and required to comply with the relevant human rights legislation. These organisations are called ‘functional’ public authorities.<sup>5</sup>

The Bill adopts the definition of a functional public authority from the Victorian Charter. This definition provides that an entity is a public entity if it firstly performs *functions of a public nature*, and secondly performs those functions *on behalf of the state* (under contract or otherwise). If these two parts are satisfied, the organisation will be a public entity required to comply with the Bill when it is performing those public functions on behalf of the state.

The definition of public entity in the Bill improves on the Victorian Charter in some respects by providing a non-exhaustive list of functions which are of a public nature; corrective services, emergency services, public health services, public disability services, public education, public transport and certain housing services.<sup>6</sup>

Further amendments to the Bill would provide greater certainty for functional public entities, and ensure that the Human Rights Act provides adequate protection for children in government funded schools and out-of-home care, and for older people receiving aged care services. Given the modern trend of governments contracting out significant areas of public service delivery, it is critical that there is a clear definition of public entity that ensures effective human rights protection for people who receive public services, regardless of the entity that delivers them.

The UK Joint Committee on Human Rights considered the impact of a lack of certainty around the definition of a public authority in the *Human Rights Act 1998* (UK) on public service delivery by private contractors.<sup>7</sup> The Joint Committee stated that it is “unacceptable that service providers and commissioning authorities should continue to enter into contracts for the provision of essential public services without any clarity as to the legal position of the service provider”.<sup>8</sup> In addition, “this ongoing uncertainty has a “chilling” effect and inhibits the development of a proactive approach to the mainstreaming of human rights standards in policy development and service delivery”.<sup>9</sup> This, in turn, has an impact on vulnerable service users and their advocates’ ability to use human rights arguments, as a result of uncertainty about the scope of this definition.

In addition to the amendments set out below, the Queensland Government should consider ensuring that government contracts for outsourced public service delivery require compliance with the Human

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<sup>5</sup> Also commonly referred to as hybrid or quasi-public entities.

<sup>6</sup> Human Rights Bill 2018 (Qld) cl 10(1)(c).

<sup>7</sup> UK Joint Committee on Human Rights, *The Meaning of Public Authority under the Human Rights Act* (2007) <https://publications.parliament.uk/pa/jt200607/jtselect/jtrights/77/77.pdf>.

<sup>8</sup> *Ibid* 50.

<sup>9</sup> *Ibid*.

Rights Act. The 2015 review of the Victorian Charter recommended this, and that it be facilitated by a provision in the Charter.<sup>10</sup>

**(b) Removing the example in clause 9 (h) – non-state schools**

The example under clause 9(1)(h) of the Bill introduces unnecessary uncertainty and confusion into the definition of a public entity. It provides that a “non-state school is not a public entity merely because it performs functions of a public nature in educating students because it is not doing so for the State.” It is not clear what is intended by the inclusion of this example, which is similar to an example in the Victorian Charter.<sup>11</sup>

Non-state schools deliver public education and are normally both funded and regulated by government. It is entirely appropriate for them to be required to comply with human rights in delivering public education services. Further, the inclusion of the example creates confusion as to whether other non-state service providers, such as a private bus company delivering public transport, are required to comply with human rights when delivering public services.

The example should be removed.

**Recommendation 2:**

*The non-state school example under clause 9(1)(h) of the Bill should be removed.*

**(c) Expand the list of functions of a public nature**

The non-exhaustive list of functions of a public nature should be expanded to include other vital public services including aged care and out-of-home care services.

The Australian Aged Care Quality Agency has conducted a number of audits of nursing homes in Queensland which have revealed serious risks to residents, including in access to clinical care, administration of medication as prescribed, access to clean communal areas and action on reportable assaults.<sup>12</sup> The federal Royal Commission into Aged Care Quality and Safety will investigate incidents of older people being harmed by failures of care in residential aged care facilities.<sup>13</sup> However, to safeguard the rights of older Queenslanders in vulnerable situations, and to protect against elder abuse, the Bill should explicitly state that aged care services are functions of a public nature in clause 10(3).

<sup>10</sup> Michael Brett Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (2015) [https://www.justice.vic.gov.au/sites/default/files/embridge\\_cache/emshare/original/public/2018/08/0b/e9a8d9ca9/report\\_final\\_charter\\_review\\_2015.pdf](https://www.justice.vic.gov.au/sites/default/files/embridge_cache/emshare/original/public/2018/08/0b/e9a8d9ca9/report_final_charter_review_2015.pdf), recommendation 14.

<sup>11</sup> This example is similar to the example under s 4(1)(a)(c) of the Victorian Charter.

<sup>12</sup> Australian Aged Care Quality Agency audit reports. See e.g., Blue Care Pioneer Aged Care Facility (Bundaberg); Anglicare SQ Meilene Home for the Aged (Bundaberg); Cooina House (Kippa-Ring); Ozcare Villa Vincent (Mindungburra); Forest Lake Lodge (Forest Lake) [https://www.aacqa.gov.au/publications/reports#b\\_start=15&c5=&c7=Queensland](https://www.aacqa.gov.au/publications/reports#b_start=15&c5=&c7=Queensland).

<sup>13</sup> Australian Government Department of Health, *Royal Commission into Aged Care Quality and Safety* (31 October 2018) <https://agedcare.health.gov.au/royal-commission-into-aged-care-quality-and-safety>.



Out-of-home care services should be similarly prescribed. Thousands of children are in out-of-home care, including a disproportionate number of Aboriginal and Torres Strait Islander children. Children in out-of-home care are inherently vulnerable as they have been removed from their families and experienced childhood violence, abuse or neglect at a young age. The Royal Commission into Institutional Child Sexual Abuse has identified “persistent weaknesses and systemic failures that continue to place children at risk of sexual abuse” in contemporary out-of-home care.<sup>14</sup>

**Recommendation 3:**

*Aged care and out-of-home care services should be prescribed as functions of a public nature in clause 10(3) of the Bill.*

**(d) Entities performing prescribed public functions should be public entities**

Given the need for certainty and in light of the trend of public functions being increasingly contracted out to ‘private’ entities, the Bill should provide that any entity performing the listed functions of a public nature in clause in 10(3), is a public entity when performing those functions (removing the question of whether or not they are performing them on behalf of the state.)

**Recommendation 4:**

*The Bill should prescribe that organisations performing the functions in clause 10(3) are public entities when performing the listed public functions.*

## 4.2 Exemptions for religious bodies

The Bill prohibits public entities from acting or making decisions in a way that is not compatible with human rights. An act or decision is compatible with human rights if it does not limit a human right or limits it only to the extent that is reasonable and demonstrably justifiable.

Despite this, the Bill contains a complete exemption to this obligation for “a body established for a religious purpose if the act or decision is done or made in accordance with the doctrine of the religion concerned and is necessary to avoid offending the religious sensitivities of the people of the religion.”<sup>15</sup> This drafting is very similar to a similar exemption in the *Anti-Discrimination Act 1991* (Qld) (**ADA**)<sup>16</sup> although this exemption in the ADA does not allow religious schools to discriminate against students, teachers or staff on the basis of sexual orientation, gender identity, relationship or marital status or pregnancy.

<sup>14</sup> Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report: Contemporary out-of-home care* (2017) [https://www.childabuseroyalcommission.gov.au/sites/default/files/final\\_report\\_-\\_volume\\_12\\_contemporary\\_out-of-home\\_care.pdf](https://www.childabuseroyalcommission.gov.au/sites/default/files/final_report_-_volume_12_contemporary_out-of-home_care.pdf).

<sup>15</sup> Human Rights Bill 2018 (Qld) cl 58(3).

<sup>16</sup> *Anti-Discrimination Act 1991* (Qld) s 109(1)(d). The only difference is that the Charter refers to an “act” or a “decision”, whereas the Anti-Discrimination Act only refers to an “act”. This distinction reflects the obligations of public entities under the Bill.

Unfortunately, the tests contained within these broad religious exemptions have only rarely been considered by the Queensland Civil and Administrative Tribunal or the courts, and there remains significant uncertainty about how they apply in practice.

This religious exemption bears similarities to an equivalent provision in the Victorian Charter.<sup>17</sup> However, the 2015 review of the Victorian Charter recommended that the Government should consider the exception from public authority obligations as part of a review of religious exceptions and equality measures and apply a consistent approach.<sup>18</sup>

Religious bodies which receive government funding to provide public services should be public entities under the Bill. For example, government funded family violence, disability and housing providers who receive government funding to provide goods and services should be required to take into account human rights and act compatibly with human rights.

Religious exemptions in schools which allow discrimination against students, teachers or staff are clearly out of step with modern community standards, as evident by the public backlash to leaked recommendations to the Federal Government's Religious Freedom Review in October 2018.<sup>19</sup> A number of religious organisations have stated that they do not want to use these exemptions and are committed to providing inclusive and non-discriminatory services to all clients.<sup>20</sup>

The HRLC has heard from lesbian, gay, bisexual, trans and intersex (**LGBTI**) people about the discrimination they face from religious service providers, including from family violence, disability and housing services.<sup>21</sup> For example, transgender people who were turned away from a religious housing provider on the basis of their gender identity and a gay person with a disability whose caseworker at a religious charity refused to transport or accompany him from a rural location to the city to attend a social event for the LGBTI community.<sup>22</sup>

The religious exemption in clause 58(3) of the Bill should be removed. Religious bodies that perform public functions should be required to comply with human rights when performing those functions and should only be lawfully allowed to limit human rights to the extent that is reasonable and demonstrably justifiable.

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<sup>17</sup> Clause 58(3) of the Bill is similar to section 38(3) of the Victorian Charter, which states that the requirement for public authorities to act compatibly with human rights and give proper consideration to relevant human rights does not require "a public authority to act in a way, or make a decision, that has the effect of impeding or preventing a religious body (including itself in the case of a public authority that is a religious body) from acting in conformity with the religious doctrines, beliefs or principles in accordance with which the religious body operates": s 38(4).

<sup>18</sup> Above n 10, recommendation 18.

<sup>19</sup> David Crowe, 'Fairfax-Ipsos poll: Huge majority of Australians oppose laws banning gay students and teachers', *The Sydney Morning Herald* (14 October 2018) <https://www.smh.com.au/politics/federal/fairfax-ipsos-poll-huge-majority-of-australians-oppose-laws-banning-gay-students-and-teachers-20181014-p509kv.html>.

<sup>20</sup> See e.g. Human Rights Law Centre, *Religious family violence services pledge not to discriminate* (30 August 2018) <https://www.hrlc.org.au/news/2018/8/30/religious-family-violence-services-pledge-not-to-discriminate>.

<sup>21</sup> See e.g., Human Rights Law Centre, *Protecting fundamental rights and freedoms in Australia: Submission to the Expert Panel on the Religious Freedom Review* (14 February 2018) <https://static1.squarespace.com/static/580025f66b8f5b2dabbe4291/t/5a837e94c830259ddc66ad53/1518567068245/Religious+Freedom+Review+Submission+-+HRLC.pdf>.

<sup>22</sup> *Ibid*, Part 6.

**Recommendation 5:**

*The religious exemption in clause 58(3) of the Bill should be removed.*

### 4.3 Youth justice and corrections clauses

The Bill contains clauses which seek to limit the application of normal human rights principles in the following circumstances:

- (a) in a youth justice centre when considering whether or not to segregate a child on remand (awaiting trial or sentence) from a child who is sentenced (**youth justice exemption**);<sup>23</sup> and
- (b) in a prison when considering whether or not to segregate an adult on remand from a sentenced adult, or when considering the management of an adult prisoner where it is not practicable to provide them with their own cell (**corrections exemptions**).<sup>24</sup>

We note that the Queensland Government must consider whether these amendments “are operating effectively, or further or different provision should be made for the interrelationship between this Act and those Acts” as part of the 2023 review.<sup>25</sup>

**(a) Youth justice and corrections exemptions should be removed**

The Government should not limit the application of the Human Rights Act in the youth justice and corrections contexts. As the preamble to the Bill states, human rights belong to all individuals. All people, whether in the community or behind bars, should have their human rights protected equally. Any exemption in youth justice or corrections would be wholly inconsistent with international human rights law which explicitly recognises the vulnerability of people behind bars. These issues have particular significance for Aboriginal and Torres Strait Islander peoples and people with a disability who are locked up in youth justice centres and prisons at far higher rates than the general population.

The abuse at Don Dale that was examined by the Northern Territory Royal Commission, and the investigation of abuses at Cleveland Youth Detention Centre, which led to the Government's positive youth justice reform measures, highlight the importance of protecting the human rights of people in detention.

As the Royal Commission noted, in the context of the regulation of the use of force in detention, phrases such as “good order” are imprecise, over-broad and inherently subjective, causing confusion in contexts for which clarity is required. The use of terms including “security” and “good management” in the proposed amendment to the Corrective Services Act are too broad and subjective to be used to limit fundamental human rights protections.

Neither Victoria nor the ACT have created similar carve outs for corrections or youth justice. On the contrary, a human rights framework has assisted both jurisdictions to improve their practice. This

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<sup>23</sup> Human Rights Bill 2018 (Qld) cl 183.

<sup>24</sup> Human Rights Bill 2018 (Qld) cl 126.

<sup>25</sup> Human Rights Bill 2018 (Qld) cl 95(4)(c).

framework recognises that governments can limit human rights but only in a manner which is reasonable and demonstrably justified.

The proposed youth justice and corrections exemptions in the Bill would undermine this framework. While it is very difficult to predict how a court would interpret the clauses given it is unclear what they intend to do, there is a real risk that a court might rule that normal human rights considerations are significantly limited or excluded in the relevant prescribed contexts, seriously undermining human rights in those contexts.

**Recommendation 6:**

*The youth justice and corrections exemptions in clauses 183 and 126 should be removed from the Bill.*

**(b) Drafting of the youth justice and corrections exemptions**

In the corrections exemption, the Bill provides that the chief executive or officer does not contravene section 58(1) of the Human Rights Act for taking into account:

- (a) the security and good management of corrective services facilities; or
- (b) the safe custody and welfare of all prisoners.

As currently drafted, these are alternative considerations. The chief executive or officer should not be allowed to consider 'security and good management' without being required to also take into account the safe custody and welfare of all prisoners. This leaves open the possibility for decisions to be made without taking into account the safety and welfare of prisoners who may be placed in unsafe living conditions due to prison over-crowding.

**Recommendation 7:**

*At a minimum, if recommendation 6 is not implemented, the word "or" at the end of clause 126, section 5A(2)(a) should be replaced with "and".*

#### 4.4 Additional rights requiring protection

Human rights instruments that protect only, or mainly, the traditional civil and political rights identified in the ICCPR fail to explicitly address some of the human rights violations that prevent vulnerable and marginalised communities and individuals from full democratic participation in the first place. The Bill should protect the fundamental rights that are necessary for all people to live with dignity and participate fully and equally in our community.<sup>26</sup>

<sup>26</sup> See e.g., the Victorian Equal Opportunity and Human Rights Commission, *Talking Rights: Consulting with Victorians about economic, social and cultural rights and the Charter* (2011) which examines the need and support for the Charter to enshrine economic, social and cultural rights in the Victorian community.

**(b) The protection of other economic and social rights**

While the Bill does protect a limited number of economic and social rights such as education and culture and a limited form of the right to health, it does not protect other critical ICESCR rights such as the right to housing, to the highest attainable standard of health and to safe and healthy conditions of work.

All economic and social rights should be protected because they are some of the rights that matter most to many Australians<sup>27</sup> and are often the rights that are the most vulnerable. The proper protection of economic and social rights will lead to better policy development and decision making by the Queensland Government, particularly because the Bill obliges public entities to act compatibly with human rights. This is critical to addressing disadvantage and creating a fairer and more compassionate Queensland community.

**Recommendation 8:**

*The protected rights contained in the Bill should be expanded to protect other fundamental rights enshrined in the International Covenant on Economic, Social and Cultural Rights.*

**(c) The protection of other rights**

Consideration should also be given to the inclusion of rights contained in other international treaties that Australia is party to, to the extent that ICCPR and ICESCR rights do not provide sufficient protection, such as:

- (a) Convention on the Elimination of All Forms of Racial Discrimination
- (b) Convention on the Elimination of All Forms of Discrimination against Women
- (c) Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- (d) Convention on the Rights of the Child
- (e) Convention on the Rights of Persons with Disabilities

We note that the CLCQ submission recommends that the Bill be strengthened by recognising the rights of victim / survivors of crime and the right to a healthy environment. If these rights are not included in the Bill at this stage, we recommend that the review of the Human Rights Act starting after 1 July 2023 specifically considers the inclusion of these rights and whether additional rights protections are required arising from the above international treaties and declarations.

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<sup>27</sup> Australian Government, *National Human Rights Consultation* (2009).

## Principle 2: Enforceability

Based on the experience from Victoria, the ACT and overseas jurisdictions like the UK, the model chosen for the Bill will ensure a strong focus on *prevention* of human rights because it will require early consideration of human rights issues in the development of law and policies and in the delivery of services.

However, for the prevention mechanisms to be taken seriously, and to address circumstances where governments breach rights in spite of those mechanisms, it is critical that people have a simple, accessible means to take action to protect their rights. Rights without remedies are not rights at all.

### 4.5 A standalone cause of action

Currently, clause 59 of the Bill requires individuals to establish an existing cause of action before being able to rely on the human rights protected in the Bill in legal proceedings.

This provision is similar to section 39 of the Victorian Charter. The 2015 review of the Victorian Charter identified key problems with this model which prevents access to appropriate legal action, court oversight and judicial remedies. The lack of consequences and a clear way to remedy a breach of someone's human rights means that the impact of the Charter is weakened. The Charter provides indirect and inadequate access to remedies for someone whose rights are breached. Access to justice can be out of reach as the only way for a person to have their human rights considered is to have their matter considered in a superior court. The 'piggy back' provision leads to convoluted litigation which raises complex jurisdictional questions heard in the Supreme Court.<sup>28</sup>

The Bill's requirement to establish an existing cause of action to bring a legal case will make it far harder for people to access an effective remedy for a breach of their rights, particularly if they can't access legal representation. It will mean governments will be less likely to take their human rights obligations seriously, undermining the Bill's preventative mechanisms.

Administrative tribunals and courts should be enabled to grant a relief or remedy within their powers, where they deem it appropriate, independently of whether or not any other grounds for a claim exist. A standalone cause of action would create a simple way for aggrieved individuals to access justice before a court or tribunal. It would ensure that individuals can access effective remedies for human rights breaches.<sup>29</sup> A mechanism empowering people to directly bring court proceedings has been included in the ACT Act<sup>30</sup> and was recommended for inclusion by the 2015 review into the Victorian Charter.<sup>31</sup>

In line with the recommendation by the 2015 review of the Victorian Charter, the Bill should be amended to allow people to take legal action in the accessible Queensland Civil and Administrative

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<sup>28</sup> Above n 10, 11.

<sup>29</sup> See also, above n 1.

<sup>30</sup> *Human Rights Act 2004 (ACT)* s 40C.

<sup>31</sup> Above n 10.



Tribunal, rather than in the Supreme Court where legal cases are typically prohibitively expensive and carry the risk of crushing costs orders if the case is not successful. It is a fundamental access to justice consideration that human rights cases should be able to be heard in a less formal, no-cost jurisdiction that is accessible to individuals.

**Recommendation 9:**

*Clause 59 of the Bill should be replaced with a free-standing direct cause of action for breaches of protected human rights which is justiciable and enforceable in the Queensland Civil and Administrative Tribunal.*

#### 4.6 Access to remedies

The lack of an accessible remedy in the Bill will significantly limit its effectiveness in addressing human rights breaches and enforcing human rights obligations. It is an essential tenet of human rights law that individuals must be able to access an effective remedy where their rights have been infringed. Different types of remedies may be appropriate in different circumstances. However, clause 59(3) of the Bill provides that a person is not entitled to an award of damages on the ground of unlawfulness under clause 58.

It is important to recognise that access to remedies is a matter of last resort where other mechanisms and processes have failed to give proper consideration to human rights. In these instances, access to an effective remedy is an essential aspect of protecting and promoting human rights, including by operating as an incentive and deterrent for public entities to ensure that human rights breaches do not occur in the first place.

The remedies available under the Bill for breaches of protected human rights should be expanded to include such remedies as are “just and appropriate”, including access to compensation.<sup>32</sup> Such judicial remedies are available under domestic human rights frameworks in South Africa, Canada, New Zealand, the United States and the United Kingdom. The experience from the United Kingdom under its similar human rights legislation, is that judges have used the power to award damages carefully and conservatively.

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<sup>32</sup> See e.g., *Human Rights Act (UK)* s 8.

**Recommendation 10:**

*The Bill should be amended to:*

- (a) empower a court or tribunal to grant such relief or remedy, or make such order, within its powers, as is “just and appropriate”, including making an award of damages where appropriate;*
- (b) make clear that a person who claims that a public entity has made a decision or acted incompatibly with human rights can seek judicial review on the ground that the decision is unlawful, without having to seek review on any other ground.*

#### 4.7 Escalating complaints to a tribunal or court

If the Human Rights Commission is unable to resolve a complaint by mediation, a person should be able to take legal action in a court or tribunal. The Commission’s inability to deliver binding outcomes and lack of enforcement mechanisms, combined with the absence of accessible recourse to other legal avenues, may produce a structural disincentive for people to engage with the Commission’s complaint mechanism.

As noted in the CLCQ submission, the stipulated processes and outcomes within the current framework may deter people from bringing a complaint, especially if complainants are forced to independently seek a solution directly with the relevant public entity beforehand. Further, complainant’s engagement with the Commission and their ability to get satisfactory outcomes would be assisted by allowing people to have legal representation present during the Commission’s processes.

**Recommendation 11:**

*Part 4, Division 1 of the Bill should be amended to allow a person to take legal action in a court or tribunal if the Human Rights Commission is unable to resolve their complaint by mediation.*

### Principle 3: Effectiveness

#### 4.8 Scrutiny of bills and statements of compatibility

The Bill empowers the portfolio committee responsible for examining a Bill introduced in the Legislative Assembly to consider a Bill and report on whether the Bill is compatible with human rights.<sup>33</sup> The Queensland Parliament, including through the work of the portfolio committee, has an important role to play in promoting human rights and discharging the state’s legal obligation to respect, protect and fulfil human rights. This is particularly relevant in Queensland’s unicameral parliament.

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<sup>33</sup> Human Rights Bill 2018 (Qld) cl 39(a).



Accordingly, it is critical that legislation is not rushed through Parliament without undertaking the important scrutiny processes played by the portfolio committee. Without a thorough and detailed consideration of the statement of compatibility, the benefits of the Bill will be undermined.

**Recommendation 12:**

*Clause 39 of the Bill should be amended to:*

- *provide greater formal opportunity for public submissions and hearings on Bills that raise significant human rights concerns;*
- *provide that, other than in exceptional circumstances, legislation is not to be passed by Parliament before the portfolio committee has provided its report; and*
- *require the responsible Minister to respond substantively to any concerns raised by the portfolio committee prior to the passage of a Bill.*

#### 4.9 Consequences for failing to act compatibly with human rights

Clause 58(6) of the Bill provides that an act or decision of a public entity is not invalid *merely* because the entity contravenes clause 58(1) by failing to properly consider or act compatibly with human rights.

For clarity, we recommend that the Bill should expressly provide that decisions or acts that are unlawful under clause 58(1) are also invalid. Making it clear that an unlawful act or decision is also invalid will make the Human Rights Act easier to understand and apply both for public entities and people affected by their decisions. It will also promote compliance by public entities with their obligations and help to build a human rights culture in Queensland.

**Recommendation 14:**

*Clause 58 of the Bill should be amended to expressly provide that decisions or acts of public entities that are unlawful under clause 58(1) are invalid.*

#### 4.10 Statutory interpretation consistent with human rights principles

The HRLC again commends the Queensland Government for addressing the ongoing interpretive ambiguities and uncertainty that have arisen in relation to the Victorian Charter. The inclusion of clause 48(2) provides an effective statutory direction to interpret a provision “in a way that is most compatible with human rights” when that provision cannot be interpreted in a manner compatible with human rights. By doing so, the Bill addresses one of the concerns from the 2015 review into the Victorian Charter.<sup>34</sup> Clause 8 of the Bill defines “compatible” with human rights in the context of a statutory provision to mean that the provision either does not limit a human right or limits human rights only to the extent that is reasonable and demonstrably justifiable.

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<sup>34</sup> Above n 10.

Consideration should be given to improving section 48 further by adding steps for interpreting statutory provisions as recommended by the 2015 review into the Victorian Charter.<sup>35</sup>

#### 4.11 Funding and resources

##### **(a) Building a human rights culture within government**

The experience from Victoria, the Australian Capital Territory, the UK and other jurisdictions highlights the need for the Government to invest properly to ensure that public entities, courts and non-profit organisations can understand and apply the Human Rights Act as relevant to their roles. For further information, we refer to the HRLC's 2016 submission which advocated strongly for government investment in the development of a human rights culture through resources, education and empowerment.<sup>36</sup>

The 2015 review of the Victorian Charter also recommended that the government encourage public sector entities to promote a human rights culture in their organisations, including by:

- (a) ensuring the Human Rights Unit with the Department of Justice and Regulation provides centralised expertise on human rights within government;<sup>37</sup>
- (b) ensuring their organisational vision, plans, policies and procedures support good human rights practice; and
- (c) building relevant human rights capabilities into staff position descriptions and ongoing professional development."<sup>38</sup>

##### **Recommendation 15:**

*The Queensland Government should allocate additional resources to develop a human rights culture across government, including training and education within government.*

##### **(b) Community engagement and awareness**

Effective protection of human rights requires a strong human rights culture where people know their rights and have the capacity to enforce those rights. In addition to its operation as a legislative instrument, a range of further measures and initiatives are necessary in order to engage, educate and empower the community to develop a stronger human rights culture. This should be through public awareness raising campaigns on the operation of the Human Rights Act and targeted community education.

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<sup>35</sup> Ibid, recommendation 28.

<sup>36</sup> Above n 1.

<sup>37</sup> Above n 10, recommendation 4.

<sup>38</sup> Ibid, recommendation 3.

**Recommendation 16:**

*The Queensland Government should allocate additional resources to engage, educate and empower the Victorian community through community awareness campaigns, targeted training to advocates and support workers, and primary and secondary school education.*

**(c) Access to Justice**

Access to justice is a fundamental component of the right to a fair hearing and a critical element of the promotion, protection and fulfilment of other human rights. Accordingly, various practical resources are required to develop a stronger human rights culture by supporting individuals to enforce their legal rights. This includes the availability and accessibility of appropriate and affordable legal advice, representation and advocacy services.

**Recommendation 17:**

*The Queensland Government should provide additional resources to community legal centres, the Queensland Legal Aid Commission and other support services to assist affected people to protect and promote their human rights.*

## 5. Conclusion

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The Human Rights Law Centre agrees with the Attorney-General Yvette D'Ath – A Human Rights Act is something we should be proud of and champion. We again commend the Palaszczuk Government for progressing this important commitment to better safeguard the human rights of Queenslanders into the future.

The purpose of a Human Rights Act for Queensland is to increase consideration of human rights in the development of laws and policies, lead to improvements in public service design, delivery and outcomes, and remedy a range of individual and systemic injustices.

While the primary purpose of the legislative dialogue model is not litigation, there are elements of the Bill and implementation process which can be strengthened to improve access to justice, which will in turn strengthen the preventative mechanisms in the Bill. We welcome this opportunity to provide feedback on strengthening aspects of the Bill to remove exemptions, ensure key operative provisions provide certainty and provide simple, effective enforcement mechanisms where human rights are breached.

We strongly support the Bill and urge the Committee to recommend that the Bill be passed, with the amendments outlined in this submission.