



INTERNATIONAL
COMMISSION
OF JURISTS

International Commission of Jurists Queensland Inc

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Committee Secretary
Legal Affairs and Community Safety Committee
Parliament House
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Dear Committee Secretary

Submission on the Human Rights Bill 2018

The International Commission of Jurists (Qld) Inc (**ICJ Qld**) writes in support of the Human Rights Bill 2018 and encourages the Queensland Parliament to enact the proposed bill, with some important amendments, on the basis that it is necessary for the rule of law in parliamentary democracies of the 21st century.

1. Executive Summary

1.1. ICJ Qld urges the Queensland Parliament to enact the Human Rights Bill 2018 because:

- (a) a Human Rights Act in Queensland would preserve and enhance the rule of law and separation of powers in Queensland; and
- (b) there are real gaps in the legal protection of Queenslanders at present.

1.2. ICJ Qld submits that the Human Rights Bill 2018 should be amended to provide for:

- (a) A stand-alone cause of action so that breaches of a person's human rights can be heard before QCAT or the Supreme Court, in the event that the complaint cannot be resolved via conciliation; and
- (b) effective remedies (including, where appropriate, compensation) that are granted and enforceable by QCAT or the Supreme Court.

1.3. ICJ Qld also notes that the proposed Human Rights Commission will need to be adequately funded in order to fulfil the responsibilities given to it, and achieve the purposes of the Human Rights Bill 2018.

2. About ICJ Qld

- 2.1. The International Commission of Jurists (ICJ), founded in Berlin in 1952, is an international non-governmental organisation, dedicated to the primacy, coherence and implementation of international law and principles that advance human rights and the defence of judicial independence through the rule of law.
- 2.2. One of the visions of the ICJ is a world in which everyone is equal before the law and protected from human rights violations by the law and in practice; one in which those in power are held accountable for human rights violations; where justice is administered in accordance with due process of law; where victims have access to effective remedies and justice; and those who come before the courts receive a fair trial and never face the death penalty.
- 2.3. The ICJ holds consultative status with the United Nations Economic and Social Council, the United Nations Educational, Scientific and Cultural Organisation, the Council of Europe, and the African Union. ICJ won the United Nations Award for Human Rights in 1993 and was designated in 1987 as a Peace Messenger by the United Nations General Assembly.
- 2.4. ICJ Qld is a branch of the Australian section of the ICJ; the latter was founded in 1958.

3. A Human Rights Act is a necessary part of modern day democracy

- 3.1. The ICJ Qld welcomes the introduction of the Human Rights Bill 2018 and urges the Queensland Parliament to adopt it, subject to the amendments set out in section 4 below.
- 3.2. The subsequent paragraphs of this section 3 sets out, more fully, the following reasons why a Human Rights Act is necessary for Queensland:
 - (a) It promotes the Rule of Law and enhances Queensland's parliamentary democracy;
 - (b) It fills the gaps which presently exist in our legal system to protect the rights of all Queenslanders.

Promotes the Rule of Law

- 3.3. The Rule of Law is at the cornerstone of our Westminster parliamentary democracy. The United Nations states that the Rule of Law:

*"refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards."*¹ (emphasis added)

- 3.4. A Human Rights Act enhances the Rule of Law in the following ways:

- (a) It provides the benchmark of human rights standards against which new laws can be assessed to ensure all intentional or unintentional effects on human rights are known,

¹ Report of the Secretary-General: The rule of law and transitional justice in conflict and post-conflict societies (S/2004/616).

publicly debated and either consciously approved by Parliament or minimised by amendment;

- (b) It provides an important check and balance in Queensland's uni-cameral system, whereby all legislation can be assessed against a clear and defined list of human rights prior to its introduction to Parliament;
 - (c) It can guide decision-makers within government departments or other public authorities to deliberately consider the human rights of individuals and to exercise their, often wide, powers in a way that is fair and just, and not arbitrary (whether that be intentional or by inadvertence, delay or incompetence);
 - (d) When a government decision impacts on the human rights of an individual, it can provide a mechanism for review that is not limited to the narrow framework of judicial review or anti-discrimination laws;
 - (e) It can provide a language that empowers individuals, and organisations assisting individuals, to engage with government departments and improve their experience of public services without the need to have recourse to litigation; and
 - (f) It can provide the basis for important education of public servants and have positive impacts on culture within government departments and the way in which they engage with, and make decisions about, members of the public.
- 3.5. Further, concerns about the risk to Parliamentary sovereignty have not been borne out in the modern human rights Acts in common law jurisdictions. Proposed sections 13, 43 and 54 of the Human Rights Bill 2018 draw from those other jurisdictions and clearly preserve parliamentary sovereignty and maintain the appropriate separation of powers.
- 3.6. In short, in any form, a Human Rights Act promotes good governance and good decision-making. It ensures that the executive arm of government, in particular, acts according to the Rule of Law and is accountable when they act in a way that is not fair or just. Appropriate provisions have been included in the Human Rights Bill 2018 which preserve Parliamentary sovereignty and avoid the negative effects associated with, for example, the United States' Bill of Rights.

Gaps in current protections

- 3.7. It is often wrongly assumed that if a person is unfairly treated in their dealings with government or publicly funded services in Queensland that they will always have an ability to have that decision reviewed and overturned.
- 3.8. Anti-discrimination laws are specific and the jurisprudence can often be complicated. A person must be treated less favourably substantially because of a particular attribute and this must be less favourable in comparison to all other persons without that particular attribute (not most people, or not people with a different attribute). Alternatively, a person must be able to prove that a term was imposed on them and that persons with the attribute are not able to comply and that a higher proportion of persons without the attribute are able to comply and that term is not reasonable. Many people are not protected by decisions which are made unfairly, arbitrarily, carelessly or without any reason.

3.9. Judicial review is also narrow in its scope. Judicial review:

- (a) only applies to decisions made under an Act of Parliament. It does not apply to all decisions made by persons in government departments, and rarely applies to decisions made by non-governmental/private persons or organisations who may provide publicly funded services, notwithstanding the fact that those decisions can have a profound impact on the lives of a person;
- (b) cannot assess the merits of a decision and focuses only on technical legal errors;
- (c) cannot permit a judicial officer to make a new, better decision, but results in the matter being remitted to the original decision-maker to make again according to law; and
- (d) can rarely impinge a decision-maker with wide discretionary powers, even if their decision resulted in an unfair outcome.

3.10. Further, not all decisions made are subject to internal review processes.

3.11. The gaps in protection can be demonstrated by the following example: an elderly married couple enters a State funded nursing home together and are not permitted to continue to sleep in the same bedroom, or be in the same wing of the building or even perhaps in the same facility. Usually such a decision is an operational decision and not one made pursuant to any legislation; therefore, it would not be amenable to review under the *Judicial Review Act 1991*. Further, the anti-discrimination laws would not apply because their treatment was not because they were married or elderly. It was because a policy was applied strictly and/or without consideration to their right to a private life or family life. Such a couple would not have any legal recourse in Queensland at present; nor would they have any human rights language which they, or others, could use to advocate on their behalf.

3.12. Attached as Table 1 to these submissions are case studies from the first five years of operation of the VCHRR. In all of the examples annexed, other legal recourse was either not available at all or was not easily available or would not have resulted in the same positive outcomes.

4. Further elements that need to be added to the Human Rights Bill 2018

4.1. ICJ Qld commends the inclusion of the complaint and conciliation processes to be conducted by the Human Rights Commission. This is a significant, and commendable, inclusion in the Human Rights Bill 2018, which will provide for cheap and efficient resolution of complaints.

4.2. ICJ Qld is, however, concerned that the Human Rights Commission is only receiving approximately **one-third** of the funds received by the Victorian equivalent on the introduction of the Victorian Charter more than 10 years ago, and in circumstances where the Victorian equivalent did not have this important additional function of conducting conciliations. Sufficient funding for the Human Rights Commission in its pivotal, foundational years is vital to ensure (1) that proper training occurs which facilitates the imbedding of a human rights culture in the government departments bound by the new obligations; and (2) the success of the new Act including through the efficient resolution of complaints.

- 4.3. Further, ICJ Qld submits that additional mechanisms need to be included in the Bill in the event that the conciliation process does not resolve a dispute.
- 4.4. It must be remembered that many persons who seek to protect their human rights are often vulnerable and marginalised. They may not come to a conciliation process in an equal position of power (whether through knowledge, ability to communicate etc) to the sophisticated government respondent to their complaint. A lack of ability to enforce their rights before a judicial body if the conciliation fails puts a complainant in an even more vulnerable position. There is no incentive for a respondent to seek a consensual resolution of the dispute.
- 4.5. For any conciliation process to have the greatest chance to result in consensual resolution, there must exist an ability for a complainant to initiate proceedings before a judicial body, such as QCAT and/or the Supreme Court if the conciliation fails.
- 4.6. Further, sometimes it is necessary for test litigation to occur, in order for clarity to be given to the meaning or application of either the human rights legislation or a public entity's functions under their enabling legislation. This important element of ensuring government accountability and also clarity in the rights of citizens and obligations of public entities cannot occur without a stand alone cause of action under the Human Rights Bill 2018 and commensurate remedies.
- 4.7. For this reason, ICJ Qld submits that the Human Rights Bill 2018 should be amended to provide for:
- (a) a stand-alone cause of action so that breaches of a person's human rights can be heard before QCAT or the Supreme Court, in the event that the complaint cannot be resolved via conciliation; and
 - (b) effective remedies (including, where appropriate, compensation) that are granted and enforceable by QCAT or the Supreme Court.
- 4.8. The *United Nations International Covenant on Civil and Political Rights* obliges States to provide effective remedies for non-compliance with protected rights: article 2(3).
- 4.9. Further, the *2015 Review of the Victorian Charter of Human Rights and Responsibilities Act 2006* included the following recommendations relevant to this issue:²
- (a) that the Victorian Charter be amended to include a stand-alone cause of action in the Victorian Civil and Administrative Tribunal;
 - (b) that if the Tribunal finds that a public authority has acted incompatibly with a Charter right, it should have power to grant any relief or remedy that it considers just and appropriate, excluding the power to award damages;³
 - (c) that a person can seek judicial review of a decision on the ground that the decision is unlawful under the Charter, without having to seek review on any other ground.⁴

² http://assets.justice.vic.gov.au/justice/resources/f7185d30-454f-47bb-944e-14fb51bd699f/report_final_charter_review_2015.docx

³ See recommendation 27(a).

⁴ See recommendation 27(c).

4.10. It is the submission of ICJ Qld that proposed section 59 does not go far enough and does not learn from the experiences in Victoria in this regard.

Yours sincerely



C.J. Klease
President, ICJ Qld

Replies to President (Carla Klease) at [REDACTED]

TABLE 1 – CASE STUDIES FROM VICTORIA

Source: Victoria's Charter of Human Rights and Responsibilities in Action: Case studies from the first five years of operation, Human Rights Law Centre, March 2012.

Young boy not expelled thanks to Charter: p.34

A male student with a learning disability was threatened expulsion by his school due to his behavioural issues. The advocate outlined to both the school itself and to the Department of Education and Early Childhood Development the student's relevant human rights. As a result of the communication, the boy was provided with the supports, which reduced his behavioural issues and consequently, he was allowed to stay on at the school.

Man with physical disability allowed to continue living in family home: p.36

A man suffering from physical disabilities and limited mobility continued to live in his family home after his mother had been admitted in an elderly care unit and placed under a financial administration order by VCAT. In order to prevent the home being sold, the advocate raised the right to property under the Charter. In consideration of this right an agreement was reached whereby the man could continue living in the house as a tenant paying rent.

Man deprived of aids in correctional facility: p.36

A physically disabled person in a corrections facility was frequently deprived of his aids while being moved from one part of the correction facility to another. This would result in him being without aids for weeks at a time and consequently suffering a great amount of pain. The advocate invoked the Charter, specifically right to humane treatment when deprived of liberty. As a consequence, the aids were returned to him and it was assured that they would remain for the period of his sentence.

Refugee afforded appropriate secure housing: p.38

A female refugee and her children had been settled in public housing accommodation in Victoria. She applied for alternative accommodation out of fear for her security but was denied this by the Victorian Office of Housing. The legal service used the Charter to communicate with the Office of Housing, their obligation to uphold the woman's rights, including the right to security of persons and protection of families. As a consequence the woman and her children were relocated to more appropriate accommodation.

Young woman living with cerebral palsy provided with disability support services: p.38

A 19 year old woman living with cerebral palsy was left in her home, alone and unable to leave, while waiting for the government to determine whether or not she was eligible for disability support services. The advocate communicated with the government that this treatment amounted to a breach of freedom from cruel, inhuman and degrading treatment, as protected by the Charter. Additionally, this was a breach of her right to privacy. The consequence of the communication was that the woman was quickly determined eligible to receive support services and placed on a waiting list for case management.

Rehabilitation centre agree to consider Charter obligations when discharging patients: p.39

A disabled centre was seeking to discharge a number of young people suffering from brain injury on the basis that their two-year term in the Centre had come to an end. The plan was to relocate them

to an aged care facility, which would not provide the appropriate services or environment for the young persons. The disability advocate raised Charter rights in negotiations with the Care Centre and as a result, the Centre agreed to take into consideration their obligations under the Charter when determining what action should be taken with regard to these young persons.

Charter invokes understanding and response from TAC : p.39

A 40 year old man suffering from brain injury was living within an aged care home. An opportunity arose for him to assume residence within a more appropriate care facility. However, this needed to be accepted within a 30 day period. His grandparents wrote to the Transport Accident Commission (TAC) for them to service notice on the aged care facility but they failed to do so and the time limit lapsed. Upon appealing to the TAC, the grandparents were told that the Commission was simply required to follow procedure. The grandparents were then assisted to communicate with the TAC about the Charter rights of their grandchild. Within 12 hours of receipt of this communication, the TAC accepted responsibility for the omission and recognised the need to uphold the man's rights.

Charter gives young woman opportunity to find appropriate housing: p.40

A young woman who had settled in Victoria under refugee status was given a notice to vacate at the end of her three-month fixed-term tenancy agreement in transitional housing operated by a private provider. Despite having engaged a caseworker and lodging an application for public housing, she had not received assistance to find appropriate accommodation. Following the expiry of the notice period the private provider applied for a possession order for eviction. HPLC argued that this would be incompatible with the Charter, namely the right not to have home or property unlawfully or arbitrarily interfered with. As a consequence, the provider withdrew the application for possession and signed a second 3-month lease. After this second lease period ended, the young woman had still not found appropriate alternative accommodation. However, with the assistance of HPLC, she was approved for public housing and further, through negotiating with the private provider, was able to stay in the property during the application process.

Charter assists in affording 66 year old woman appropriate accommodation: p.42

A 66 year old woman, suffering various nervous state-type disorders had been applying for alternative accommodation as her public housing property was exacerbating her health conditions. She was told by the Office of Housing (OOH) that a transfer would not be possible for three years. The HPLC communicated with the OOH to remind them of their obligations under the Charter, namely the right to security and the right to life. They requested that the transfer to appropriate accommodation be prioritised. This was successful, with the OOH transferring the woman within 2 weeks.