



SUBMISSION ON HUMAN RIGHTS BILL

26 NOVEMBER 2018

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Recommendations

1. Support for the Bill

We recommend that the Bill be passed and we support the objects of the Bill. The following recommendations are intended to strengthen the Bill. However, we do not support the current drafting of the proposed amendments to the *Youth Justice Act 1992* (Qld) and the *Corrective Services Act 2006* (Qld).

2. Recognise right to overturn a wrongful conviction and receive compensation for wrongful imprisonment

Bill should include: (1) The right not to be subject to an on-going wrongful conviction when evidence is available to demonstrate that a miscarriage of justice has occurred.

- That this right include, but not be restricted to, that a convicted person who has reason to believe that DNA testing or other scientific testing or expert report could raise a reasonable doubt as to that person's guilt, may apply to the Attorney-General or another independent body, for a test or other scientific report to be made, with the results thereof to be provided to the convicted person at the expense of the State Government.
- Further, that if there are grounds for believing that the DNA or other scientific testing or other evidence may raise a reasonable doubt as to a convicted person's guilt, the Attorney-General, or another independent body, shall do all such things as may be necessary for the uncovering of such evidence, including to have such testing or reports undertaken and the results provided.
- That a person convicted of an indictable offence is entitled to pursue an appeal to the intermediate appellate court or final court of appeal of the State, whenever the convicted person becomes aware of fresh evidence or other compelling evidence capable of raising a reasonable doubt as to that convicted person's guilt.

(2) The right to compensation for wrongful conviction.

The Bill should include a section modelled on section 23 of the ACT *Human Rights Act 2004*, which provides:

Compensation for wrongful conviction

This section applies if—

Anyone is convicted by a final decision of a criminal offence; and

The person suffers punishment because of the conviction; and

The conviction is reversed, or he or she is pardoned, on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice.

If this section applies, the person has the right to be compensated according to law.

However, subsection (2) does not apply if it is proved that the nondisclosure of the unknown fact in time is completely or partly the person's own doing.

3. Additional rights to be considered during the review of the Act:

We recommend that the review consider adding the following rights to Division 3: Economic Social and Cultural Rights:

- *The right to a healthy environment*
- *The right to adequate housing, and the Anti-Discrimination Act 1991 should be updated to prohibit discrimination on the attribute of property ownership.*
- *The right to an adequate standard of living*
- *The right of a person to live free from gender-based violence*

The GLS believes that protection from gender-based violence should be an express provision above and beyond the general provision contained in clause 17. We have borrowed wording from the UN Declaration on Violence against Women to create a new clause:

Insert:

Protection from gender-based violence -

A person must not be subjected to gender-based violence.

In this section, gender-based violence means any act of violence or abuse (including threats of such an act) that results in, or is likely to result in, physical, sexual or psychological harm or suffering to the person, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.

4. Refer to additional UN sources for review in section 95

The review should explicitly reference in section 95(4)(a) to following instruments:

- UN Declaration on the Rights of Indigenous Peoples
- UN Declaration on Violence Against Women
- UN declaration on sexual orientation and gender identity
- ILO Conventions and Declarations

5. Double the current budget allocation to invest in prevention and community advocacy

The Act will achieve its objects if it creates an enabling ecosystem or ‘rights regime’.

We urge the Queensland Parliament to provide long-term, meaningful investment to community legal centres and community advocacy organisations, especially disabled peoples organisations, and people with lived experience of mental health, domestic and family violence, sexual and gender minorities foster care, prison, homelessness and poverty. We urge the government to increase financial support

for the work of institutions working against violence against women and children and fund specialised CLCs for women.

We urge the Queensland Parliament to invest in its own resources to bring this Act to life and prevent human rights abuses occurring, including a baseline survey of parliamentarians (Appendix A), the appointment of specialised researchers, the appointment of a Legal Adviser (modelled on the Human Rights Adviser to the Victorian Parliament's Scrutiny of Acts and Regulations Committee), and a seminar series.

An Indigenous Audit Committee should be created. It should be comprised of Indigenous Australians and empowered to examine relevant portfolio estimates from the point of view of impact on Indigenous people. That process might be combined with inclusion of a requirement to consider Indigenous impact in Cabinet Submission process. As noted below, we recommend the establishment of a formal office such as ATSI Social Justice Commissioner within the new Human Rights Commission, to oversee and provide for the realisation of Indigenous rights protections

A Women's Audit Committee or a Standing Committee on Women's Affairs should be created. Australia lacks the kind of parliamentary committees that have responsibility for gender equality matters in European and many other parliaments. In 2008 the Inter-Parliamentary Union (IPU) reported on 80 countries with 93 such parliamentary committees. Queensland could be an Australian pioneer in this regard.

We urge the Queensland Public Service to invest in its expertise and ability to evaluate policy on human rights terms, including the creation of a specialist unit in the Department of Justice and Attorney-General. The Minister should stipulate that the State Budget and Departmental Annual Reports, especially Queensland Police and Correctional Services must be audited annually against standards in both the ICCPR and the ICESCR. The Queensland Government must allocate sufficient resources to ensure that each government department reviews their laws, policies and practices to ensure their compliance with human rights and for community education.

6. Achievement of cultural rights, and recognition of sovereignty/agency for ATSI peoples

The Committee should revisit their own consultations with the Indigenous community in 2016 and the submissions of those representing the Indigenous community to ensure that any proposed rights protections are supported by a broader application of the principles that inhere in international human rights law, enshrined specifically as they are in the ICCPR and the UNDRIP, and represent a more realistic understanding of the position of Aboriginal and Torres Strait Islander peoples in Queensland.

The Bill should include provisions additional to Clause 28 following a further consultation process that would affect the achievement of distinct cultural rights rather than simply their recognition. This would include:

- supplying enough resourcing to ensure protection,
- oversight and enforcement through greater Indigenous representation and consultation

- and an appropriately funded redress scheme to address historical legacies and their impact on contemporary circumstances.

Redress schemes should not be limited to issues such as stolen wages but should retain a broad remit and sufficient resourcing to be able to respond to the broad and complicated nature of the history of Indigenous peoples and their treatment in Queensland. This type of mechanism could be supported by the establishment of a formal office such as Social Justice Commissioner, to oversee and provide for the realisation of Indigenous rights protections.

7. Progressive interpretation of human rights

The Queensland Parliament should amend s 48 to provide:

So far as it is possible to do so consistently with their language, context and purpose, all statutory provisions must be interpreted in the way that is most compatible with human rights.

A clause should be introduced to make the following human rights instruments relevant considerations for all officials exercising any powers delegated to them.

- a. The Human Rights enumerated in Part 2, Divisions 2 and 3
- b. All other rights preserved by clause 12
- c. All individual human rights recognized in international instruments ratified by the Federal Government – less any that are explicitly rejected under ‘federal’ clauses in those instruments

To assist ministers and civil servants, the HRC would draw up a list of relevant instruments and the government departments would develop guidelines of those that are relevant to the department and how they should be taken into account in decision-making. These guidelines would be subject to the approval by HRC and then published. Disputes between the department and the HRC could be resolved in a number of ways – by referring them to the relevant scrutiny committee and then a motion to parliament (retaining its ultimate authority consistent with the central role of parliament in this regime).

8. Remedies for breaches by private entities exercising public functions

Bill should clarify that the legal remedies available against the government will be available against private entities exercising public functions under Section 9(h) of the Bill. Subsection (h) provides that a private organisation is a ‘public entity’ when it performs ‘functions of a public nature when it is performing the functions for the State or a public entity (whether under contract or otherwise)’.

Text similar to Section 40C of the Human Rights Act 2004 (ACT) should be added.

Legal proceedings in relation to public authority actions

(1) This section applies if a person—

- (a) claims that a public authority has acted in contravention of section 40B; and*
- (b) alleges that the person is or would be a victim of the contravention.*

(2) The person may—

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

9. Recognition of Australian South Sea Islanders

The Bill should insert the following text:

Cultural Recognition of Australian South Sea Islanders

- (1) Australian South Sea Islanders have the right to be recognised as a distinct cultural group.***
- (2) Australian South Sea Islanders have the right, with other members of their community to enjoy, maintain, control, protect and continue their identity and cultural heritage.***
- (3) In this section, “Australian South Sea Islanders” means the Australian born descendants of Pacific Island people who were brought to Queensland between 1863 and 1904 to provide cheap or free labour for Queensland’s primary industries.***

Introduction

Palm Island. Wolston Park. Black-birding. Moonlight State. Kilcoy and Whiteside poisonings. VLAD. Protest marches under Bjelke-Petersen.

Queensland has many black spots in its history of times and places where the human rights of citizens were violated. We are in strong support of the introduction of this Bill and will dedicate our resources to the successful implementation of the Act when passed.

As Professor Pene Mathew wrote in her submission to the 2016 inquiry:

In addition to being treated equally, we need protection of our human rights in a positive sense. Anatole France famously said that ‘the law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.’ This aphorism underlines the importance of spelling out the basic rights that we should all enjoy. Among these should be both traditional civil liberties, such as the right to vote, freedom of association, assembly, expression and the right to a fair trial, and economic, social and cultural rights such as the right to an adequate standard of living. People should not have to resort to sleeping under a bridge. These rights should be set out in one piece of legislation that drives the way in which governments and decision-makers work, and in light of which all other legislation should be interpreted.ⁱ

We believe a dialogue about human rights in between elections, particularly in a context of fixed four-year terms and a parliament that does not have an upper house, is vital to protect the rights of Queenslanders.

We believe this Bill if passed would improve the protection of rights and also provide an accessible statement of the rights that are fundamental to a life of dignity and value. The development of a culture of human rights and adherence to the rule of law will be greatly assisted by this legislative protection of rights, noting that Australia is the only Western democracy without a national human rights instrument.

Introducing a Queensland Human Rights Act will:

- enhance Australia’s democracy;
- provide a yardstick by which to measure government, the courts and the community;
- assist disadvantaged people; and
- require government departments to consider the impact of their day-to-day operations on human rights.

By building on the model provided for in Victoria and the ACT, a Queensland HRA can retain parliamentary sovereignty and provide individuals with direct means of redress for overt breaches of civil and political rights. Respect, protection and fulfilment of economic, social and cultural rights can be pursued without exposing Government to liability for its allocation of scarce resources.

We recognise that the intention and premise of this proposed Queensland Human Rights Act is to foster a ‘conversation’ between the three branches of government on one hand, and the public on the other.

Five traditional concerns

There are five traditional concerns about bills of rights (whether constitutionally entrenched or statutory).ⁱⁱ

Many such Bills:

1. are confined to civil and political which effectively privilege them over socio economic rights and favour the former in conflicts with the latter
2. allow corporations to claim such rights over others, and then may engage in litigation to limit government leaving them in a more powerful position
3. do not provide the resources to exercise or defend the rights given
4. do not recognize that the greatest threats to rights are often from corporations and other non-government entities, such as public companies
5. rely too much on formal legal rules rather than a set of mutually supportive (and where necessary, checking) institutions – the institutional ‘rights’ regime.

This Bill is an important step forward in Australian Bills of Rights in addressing these concerns but is well behind some newer constitutions such as South Africa and Kenya. The potential for further improvement during the future review is welcome. However, the initial bill and the next review could address the above concerns more fully.

We are strong supporters of the Human Rights Act For Queensland campaign, and support the submissions of its members.

Recommendation 1: Pass the Bill in its current form

About Griffith Law School

Griffith is the highest ranked Australian university for law in the 2018 [Academic Rankings of World Universities](#). Our law school is dedicated to social justice and helping students learn from award-winning teachers and researchers, who practise what they teach. Like Professor Penelope Mathew, who addressed the United Nations on the topic of refugees, Zoe Rathus, who was instrumental in establishing the Queensland Women's Legal Service, and Kate van Doore, who has helped changed international laws associated with child trafficking.

At Griffith Law School, we believe in the law as a powerful instrument of change. We aim to produce Griffith Law School graduates creating change for good.

- **Associate Professor Sue Harris-Rimmer, Australian Research Council Future Fellow** says: “This is an important bill for Queensland, especially remote and regional Queensland. This bill will focus on equity for all Queenslanders in access to government services.”
- **Professor Penelope Mathew** is a refugee law expert, and was also the Human Rights Legal and Policy Adviser to the Human Rights Commission in the Australian Capital Territory. During her time at the Human Rights Commission, Pene conducted the Human Rights Audit of the ACT’s Correctional Facilities – a year-long empirical project which documented and assessed practises in the ACT’s remand centres against international human rights standards for the treatment of prisoners.
- **Professor Don Anton** looks forward to helping to pioneer research focusing on the Act’s application to the intersection between human rights and the environment.
- **Professor Elena Marchetti** is keen to ensure that the rights of Indigenous Australians are protected particularly when it comes to their involvement with the criminal justice system.
- **Professor Charles Sampford** is interested in the protection of social and economic rights and their interaction with civil and political rights – in drafting, in institutional support and in judicial interpretation.
- **Dr Chris Butler** is interested in following how the new Queensland *Human Rights Act* may: encourage forms of democratic participation in public affairs; enhance procedural protections in relation to public decision-making; and contribute to greater social and economic equality.
- **Dr Tim Cadman** will contribute to exploring the interaction between free, prior and informed consent, the UN Declaration on the Rights of Indigenous Peoples, international environmental policy, and human rights.
- **Mr Shahram Dana**, previously with the United Nations International Criminal Tribunal for the former Yugoslavia and a Commissioner on a torture inquiry commissions, is particularly interesting in observing and monitoring the implementation of the Queensland Human Rights Act to ensure Queenslanders have effective avenues for redress and remedy of human rights violations.
- **Joanne Stagg-Taylor** eagerly anticipates researching how the Act will protect and impact on patient rights, privacy, gender-based issues and the rights of LGBTQI people.

- **Jovana Mastilovic** looks forward to contributing to research focusing on the Act's application to human rights, particularly refugee studies, and how it can improve the lives of displaced people and their access to education and protection.
- **Elizabeth Englezos** is currently reviewing the rights and protections for data subjects and hopes to contribute to the development of a rights-protective framework that is appropriate to the modern online environment.

About The Law Futures Centre

The Law Futures Centre at Griffith Law School aims to understand and prepare for the changes and challenges to law in the 21st century.

Law Futures is reimagining the way we think about Law in the twenty first century. The rapid innovation of the modern world demands a new way of thinking. Our legal profession is being redefined as we experience new technologies, climate change, international trade and mass migration.

At Law Futures we connect an extensive array of cross-disciplinary international scholars and policy makers to solve these problems. Our members are committed to outstanding collaborative research that is responsible for global change.

The Innocence Project Australia

Griffith's Innocence Project is a collaborative pro bono project that brings together lawyers, academics and law students to work to free innocent persons who have been wrongly convicted in Australia. By working to correct failures in our criminal justice system, we foster an Australian legal culture that champions the defence of the innocent, and helps protect the marginalised and oppressed.

The Institute for Ethics, Governance and Law

The Institute for Ethics, Governance and Law (IEGL) fills an important gap in research focusing on the Oceania region and aims to be a globally networked resource for the development of values-based governance through research and capacity building. It aims to engage other academic, non-government organisations, government, business and multilateral institutions and networks to improve governance and build institutional integrity in governments, corporations, non-government organisations and international institutions.

It was established at the suggestion of the United Nations University in 2004, with Griffith University the first university to join IEGL. Two years later the Queensland University of Technology and Australian National University joined. In 2008 the Center for Asian Integrity (CAI) was established in Manila, Philippines, under the auspices of IEGL, with the support of AusAID and USAID funding. The CAI is the Asia-Pacific's first regional centre for research and the prevention of corruption.

Recommendation 2: Wrongful Conviction and Human Rights

As the home of the Griffith University Innocence Project, which operates for wrongful conviction applicants in Queensland and elsewhere in Australia, we recommend adding a section to the Bill that provides for the human rights for individuals who have been wrongfully convicted.

Australia has experienced a number of wrongful convictions.ⁱⁱⁱ Those exonerated have usually fought long and hard over many years, sometimes several decades, to prove their innocence. The consequences flowing from wrongful convictions are not limited to those who experience that wrong. While an innocent person is in prison, the real perpetrator remains free to commit further crimes. In over 140 of the DNA exonerations that have occurred in the United States, the real perpetrator has now been identified. The true offenders committed at least 123 additional violent crimes, including 32 murders and 68 rapes, while the innocent person was in prison.^{iv} Wrongful conviction is not only a terrible injustice, but as the above statistics demonstrate, a public safety issue.

With the growing world-wide acknowledgement of wrongful conviction at levels previously not contemplated, it is submitted that a Human Rights Act should encompass (i) the provision of investigative and corrective measures that enable the identification and correction of wrongful convictions; and (ii) compensation measures for individuals whose wrongful convictions have ultimately been rectified.

It is proposed that this Human Rights Bill incorporate:

(1) The right not to be subject to an on-going wrongful conviction when evidence is available to demonstrate that a miscarriage of justice has occurred.

- That this right include, but not be restricted to, that a convicted person who has reason to believe that DNA testing or other scientific testing or expert report could raise a reasonable doubt as to that person's guilt, may apply to the Attorney-General or another independent body, for a test or other scientific report to be made, with the results thereof to be provided to the convicted person at the expense of the State Government.
- Further, that if there are grounds for believing that the DNA or other scientific testing or other evidence may raise a reasonable doubt as to a convicted person's guilt, the Attorney-General, or another independent body, shall do all such things as may be necessary for the uncovering of such evidence, including to have such testing or reports undertaken and the results provided.
- That a person convicted of an indictable offence is entitled to pursue an appeal to the intermediate appellate court or final court of appeal of the State, whenever the convicted person becomes aware of fresh evidence or other compelling evidence capable of raising a reasonable doubt as to that convicted person's guilt.

(2) The right to compensation for wrongful conviction.

- We note section 23 of the *ACT Human Rights Act 2004*, which provides:

Compensation for wrongful conviction

This section applies if—

- *Anyone is convicted by a final decision of a criminal offence; and*
- *The person suffers punishment because of the conviction; and*
- *The conviction is reversed, or he or she is pardoned, on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice.*
- *If this section applies, the person has the right to be compensated according to law.*
- *However, subsection (2) does not apply if it is proved that the nondisclosure of the unknown fact in time is completely or partly the person's own doing.*

It is acknowledged that supporting legislation will likely need to be implemented to further outline and articulate the steps necessary for the effective provision of the above nominated rights. While there are several options in this regard, the following information briefly summaries why the current situation in Queensland, fails to encompass investigative and corrective measures that would enable the identification and correction of wrongful convictions and supporting reasons for the incorporation of the above rights into the Human Rights Bill.

Provision of investigative and corrective measures that enable the identification and correction of wrongful convictions

(1) The Need for a Second or Subsequent Appeal Avenue to Enable Access to the Courts for the Correction of Wrongful Convictions

In Queensland, people who are convicted at trial but wish to contest that conviction may appeal pursuant to s668D of the *Criminal Code Act 1899*:

Section 668D Right of appeal

(1) A person convicted on indictment, or a person convicted of a summary offence by a court under section 651, may appeal to the Court—

(a) against the person's conviction on any ground which involves a question of law alone; and

(b) with the leave of the Court, or upon the certificate of the judge of the court of trial that it is a fit case for appeal, against the person's conviction on any ground of appeal which involves a question of fact alone, or question of mixed law and fact, or any other ground which appears to the Court to be a sufficient ground of appeal.^v

The standard applied by Australian courts for the overturning of convictions is that the conviction is unreasonable, unsafe or cannot be supported by the evidence, or that there has been a miscarriage of justice.^{vi} The test to be applied by the appeal courts was explained by the High Court in *M v The Queen* (1994) 181 CLR 487, 494, by Mason CJ, Deane J, Dawson J and Toohey J in these terms:

In most cases a doubt experienced by an appellate court will be a doubt which a jury ought also to have experienced. It is only where a jury's advantage in seeing and hearing the evidence is capable of

resolving a doubt experienced by a court of criminal appeal that the court may conclude that no miscarriage of justice occurred. That is to say, where the evidence lacks credibility for reasons which are not explained by the manner in which it was given, a reasonable doubt experienced by the court is a doubt which a reasonable jury ought to have experienced. If the evidence, upon the record itself, contains discrepancies, displays inadequacies, is tainted or otherwise lacks probative force in such a way as to lead the court of criminal appeal to conclude that, even making full allowance for the advantages enjoyed by the jury, there is a significant possibility that an innocent person has been convicted, then the court is bound to act and to set aside a verdict based upon that evidence.^{vii}

There is nonetheless a proviso. Under it, the Court has the ability to dismiss an appeal despite that a ground or grounds of appeal have been made out, if the court is of the belief that no substantial miscarriage of justice has [ultimately] occurred.^{viii} *Mraz v R* (1955) 93 CLR 493 at 514-16; [1955] ALR 929 is the leading case. There Fullagar J stated:

...every accused person is entitled to a trial in which the relevant law is correctly explained to the jury and the rules of procedure and evidence are strictly followed. If there is any failure in any of these respects and the appellant may thereby have lost a chance which was fairly open to him of being acquitted there is, in the eye of the law, a miscarriage. Justice has miscarried in such cases because the appellant has not had what the law says he shall have, and justice is justice according to law. It is for the crown to make it clear that there is no real possibility that justice has miscarried.

The High Court of Australia provides a further, limited option for appeal. To pursue an appeal there an applicant must seek special leave. The High Court has maintained that it does not have constitutional jurisdiction to receive fresh evidence as that would be to treat the court's jurisdiction as original rather than appellate.^{ix} This means that inevitably in a case in which DNA evidence of innocence has become available subsequent to the applicant's exhaustion of the sole appeal, as outlined by Kirby J, in *Re Sinanovic's Application*, the court will not receive or act on the evidence:

By the authority of this Court such fresh evidence, even if it were to show a grave factual error, indeed even punishment of an innocent person, cannot be received by this court exercising this appellate jurisdiction...A good instance of the discovery of such fresh evidence recently arose in the court of appeal of Queensland...There DNA evidence, discovered after trial and before the hearing of the appeal in that Court, conclusively demonstrated that the prisoner was innocent. However, if such evidence were discovered between the hearing in the State or Territory appellate court and this Court...it could not be received. The prisoner would be bereft of protection by the Judicature. He or she would be compelled to seek relief from the Executive.^x

There is no question that at common law, the intermediate courts can receive fresh evidence and do from time to time, but a consequence of the High Court's jurisprudence is that if the fresh evidence only emerges after the State's intermediate courts have dealt with the matter, there is no avenue of appeal that can be pursued. While the High Court remains closed to the reception of fresh evidence, wrongfully convicted applicants in Queensland are wholly reliant on the pardon provisions:

There have been substantial criticisms of reliance on the pardon provision. These criticisms include (but are far from limited to) those expressed by the Attorney-General of Tasmania, the Honourable Vanessa Goodwin, when

introducing the Bill to amend the *Criminal Code Act 1924* (Tasmania) and the Shadow Attorney-General in Tasmania, Laura Giddings.

Currently, once a convicted person's appeal rights before the courts have been exhausted, the only option that person has is to petition the Attorney-General and the Governor to exercise the royal prerogative of mercy...It is my view, and that of many in the community, that this is not the right process. Appeal decisions should be made by the courts, not executive government...The current system of petitioning for the exercise of the royal prerogative of mercy has been criticised by legal commentators on a number of grounds, including the lack of formal process and transparency, and a perception that political rather than legal matters may be determinative.^{xi}

A major benefit of the introduction of a second or subsequent avenue of appeal would be the removal, and appropriate distancing and separation of the consideration of wrongful conviction claims from the Executive Government to the Courts. South Australia introduced legislation enabling a second or subsequent appeal in 2014,^{xii} and Tasmania followed in September 2015.^{xiii} Queensland has to date, no legislation in this regard.

(2) Discovery provisions or mechanisms to enable the identification of wrongful convictions

The Law Council of Australia has previously highlighted the challenges presented to claimants in terms of discovery and obtaining of evidence for a pardon petition:

...The Executive Government makes a decision on whether to refer a matter to the appeal court based on the material submitted by the petitioner, that is, the convicted person. The Executive rarely conducts its own inquiry...

The result is that post-conviction the entire burden, including the financial burden, of identifying, locating, obtaining and analysing further evidence rests entirely with the convicted person...He or she has no particular power or authority to compel the production of information, interview witnesses or conduct scientific testing on relevant materials.^{xiv}

It is the experience of the Griffith University Innocence Project that without the power or authority to compel the production of information, to summon or interview witnesses or conduct scientific testing of relevant materials, applicants (or those working on their behalf) are likely to be thwarted in their attempts to access evidence to support a wrongful conviction claim. Therefore, in order for wrongfully convicted people to access whatever new and compelling evidence becomes available, additional supporting investigative and discovery measures are required.

The availability of investigative powers and measures for discovery are major reasons for the success of the Criminal Cases Review Commission (CCRC) in the United Kingdom. The CCRC is a government-funded, independent body for the investigation and referral of wrongful conviction claims to its Courts of Appeal, established in 1997.^{xv} The importance of discovery in uncovering and correcting wrongful convictions was explained by a former Commissioner of the Criminal Cases Review Commission (CCRC), David Jessel:

That is why the Act that set us up gave us huge powers to dig for information usually denied to the defendant at trial - all the secrets in the files of the police and the Crown Prosecution Service, information from medical and social services files, access into criminal records – including the records of people who may have made false accusations in the past.

Our powers are not a magic key to the chest which holds the smoking gun, but they are critical to the pursuit of new evidence which, sometimes alongside other evidence which didn't convince the original jury – might give our applicants a second chance for justice.

...A belief in innocence is no substitute for a proof of innocence. Proof, however, is not that easy to come by.^{xvi}

In 2010, the South Australian Legislative Review Committee (LRC) within an inquiry into the potential establishment of a CCRC, recommended (in addition to the creation of a second or subsequent appeal avenue), the establishment of a Forensic Review Panel to 'enable the testing or re-testing of forensic evidence which may cast reasonable doubt on the guilt of a convicted person, and for these results to be referred to the Court of Criminal Appeal.'^{xvii} The LRC highlighted:

The Committee notes that the area of scientific evidence is one which has given rise to the most concern regarding the safety of convictions. This is due to the changing nature of opinions about the basis and reliability of science, and the rapid development of new technologies for the testing of evidence. Given the fluidity in the area of scientific research and development, the Committee is of the view that the legal system should allow for a further opportunity for a person to have evidence tested if it may reveal new information that casts reasonable doubt on the guilt of a convicted person.

Even if a convicted person believes that evidence exists that may tend to exonerate them, there is no formal way they can have access to such information or have their case re-investigated.^{xviii}

In terms of existing mechanisms for post-conviction DNA testing, we note that on 5 August 2010, the Queensland Government introduced *Guidelines for applications to the Attorney-General to request post-conviction DNA testing* (Guidelines). This was an important initial step in supporting the potential of DNA evidence to be used for exoneration purposes.^{xix} However, it is submitted that these guidelines need to be reframed to be effective and further, that with the introduction of new DNA testing methods, these Guidelines are in many ways out of date. It is further submitted, that as outlined above, wider measures are required for the review and correction of other forms of scientific evidence.

Ultimately, reform measures are required to facilitate the opportunity for wrongfully convicted individuals, not to remain wrongfully convicted when evidence is available to demonstrate that a miscarriage of justice has occurred. The incorporation of basic human rights as articulated at the beginning of this wrongful conviction submission, would signify the right not to unnecessarily endure this dreadful injustice and that in the effective administration of justice, wrongful convictions will not be tolerated.

Recommendation 3 and 4: More ESCR Rights

We support the inclusion of the right to education and the right to health services. We echo those who urge the Queensland Government to show leadership in supporting the needs of children living with disabilities, or with diverse gender and sexual identities to access education.^{xx} We urge that the right to access mental health services receive particular attention. We refer to committee to Appendix B and the background paper provided by GLS student Anna Stirling.

We wish to draw particular attention to the importance of the rights set out in ICESCR, and argue for their inclusion in a Queensland Human Rights Act immediately or on review.

As the ACT Bill of Rights Consultation Committee observed in its 2003 report:

The distinction between [civil and political rights and economic, social and cultural rights] is in many ways an artificial one. If human rights are concerned with the conditions of a worthwhile human life, rights to health, housing and to education are as integral to human dignity as the right to vote.

Many of the rights in the ICESCR and ICCPR are closely entwined. For example, the ICCPR protects the right to freedom of association, while the ICESCR protects the right to form trade unions.

Similarly, the right to life in the ICCPR is closely related to the ICESCR right to be free from hunger, and the rights in the ICCPR that protect against slavery and servitude are linked to the ICESCR right to work.

Social and economic rights are usually the most expensive to realize (and we acknowledge that two of the most expensive, education and health, are included in the enumerated rights). However, the exercise of civil and political rights is not costless. And it has long been argued that rights that require resources to exercise are, effectively, privileges of those who have the resources. This is probably most evident in ‘freedom of communication’ where the forms of mass communication are very expensive. Freedom of movement beyond walking distance requires money or access to transport.

Where the protection of rights involves legal remedies, the right is limited to those who can afford it, have backers who can afford it or who have access to legal aid.

The WA consultation recommended that any bill incorporate ECSR.

In some ways, economic, social and cultural rights may be more relevant for many Australians because they impact on the quality of day-to-day life, rather than only “kicking in” in relation to criminal offences and court proceedings as many of the rights in ICCPR do. The ICESCR has been ratified by 156 countries – only 4 fewer than the ICCPR. The parity of ICESCR rights with ICCPR is recognised not only in the international treaties but in Australian law. This is indicative of an increasing recognition that economic, social and cultural rights are as fundamental and inherent to the dignity of all people as civil and political rights.

Human rights are interdependent, universal and indivisible. There are a number of precedents for the inclusion of economic, social and cultural rights in national legislative protection. The United Kingdom Human Rights Act includes the right to education whilst South Africa includes rights to education, housing, health care, trade, occupation and the right to a profession.

3(a): The right to adequate housing

If the Anti-Discrimination Act 1991 is not updated to expressly include an anti-discrimination clause to ensure homeless people are not discriminated against, then the introduction of this Bill may be rendered meaningless for thousands of Queenslanders. We refer to committee to Appendix B and the background paper provided by GLS student Jack Carr.

The homeless are perhaps the most marginalised of all Australian citizens. If a person does not have a home they may encounter problems exercising many civil and economic rights.

Walsh and Klease have observed:

It is widely recognised that homeless people are among the most disadvantaged and vulnerable members of Australian society. But further to this, those who are homeless are excluded from participation in a wide variety of socio-political activities that other citizens take for granted. A survey of homeless people conducted in Brisbane in 2003 has confirmed that many homeless people do not identify as Australian citizens, and many believe that they do not enjoy the same citizenship rights as the remainder of the population.

While the Victorian Charter of Human Rights and Responsibilities does not refer to property, the ICCPR, the ICESCR and the Human Rights Act 2004 (ACT) all prohibit discrimination on the attribute of property.

The right to dignity of the person is a well-recognised human right. For a person who is sleeping rough there is a substantially higher chance of violence or detention by law enforcement agencies for vagrancy/public/nuisance offences. (Walsh 2009)

Homeless adults have had problems registering to vote in Australia since Federation. While they are permitted to exercise their right to vote significant barriers remain to registering to vote. Moreover, how can a homeless child exercise their right to education? If they have insufficient food, no way to clean clothes, no finances to purchase educational material and no home in which to do homework?

Recommendation

That the Bill provide for the right to adequate housing, and that the *Anti-Discrimination Act 1991* be updated to prohibit discrimination on the attribute of property ownership.

3(b): The Right to a Healthy Environment in Queensland

[Individuals have] the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and ... bear[] a solemn responsibility to protect and improve the environment for present and future generations.

Principle 1, Stockholm Declaration (1972)

1. Enumerated Rights

The Griffith Law School human rights scholars group makes four points in relation to inextricable synergies that *already* exist between the human rights set out in Part 2 of the *Human Rights Bill 2018* and the environment in Queensland. This is especially so in light of the important bearing that international law and foreign law will have in the interpretation of these rights under clause 48, paragraph 3 of the *Bill*.

a. *Right to life*

The right to life set out in clause 16 of the *Bill* is patterned on Article 6, paragraph 1 of the International Covenant on Civil and Political Rights (ICCPR). In General Comment 6, the Human Rights Committee stated “the protection of this right [under Article 6, paragraph 1] requires that States adopt positive measures”. UN Doc HRI/GEN/1/Rev.7, at 128 (May 12, 2004). These positive measures must include, when necessary, taking action required to ensure that deteriorating environmental conditions do not threaten the right to life.^{xxi} As Judge Weeremantry stated in his separate opinion in the *Gabcíkovo-Nagymaros Case*:

The protection of the environment is . . . a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights such as ... the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in [all] human rights instruments.^{xxii}

This view has been confirmed by a number of foreign courts, including Costa Rica, Pakistan, and India, when interpreting the right to life established in their legal orders. Perhaps most notable has been India. In *M.C. Mehta v. Union of India*, (1986) 2 SCC 176, the Supreme Court found a violation of the right to life as a result of the escape of toxic gas causing death. In 1990, the Supreme Court explicitly recognized the link between healthy environmental quality and the right to life. *Charan Lal Sahu v. Union of India*, AIR 1990 SC 1480. And, in *Subhash Kumar v. State of Bihar*, (1991) 1 SCC 598, the Supreme Court declared that the Indian constitutional right to life ‘includes the right to enjoyment of pollution free water and air for full enjoyment of life’.

As the European Court of Human Rights has made clear, the positive measures required by a state to protect the right to life is not limited to governmental action, but also entails a positive obligation by the government to take steps to safeguard lives within their jurisdiction against private activity.^{xxiii} Thus, when necessary, positive measures required by the government include the denial or revocation of mining permits and other development licences to stop life threatening environmental harm. *Öneryildiz v. Turkey*, no. 48389/99, ECHR 2004-XII 657 [GC] (Nov. 30, 2004).

b. *Right to Take Part in Public Life*

We also call attention to the *right to take part in public life* entailed in clause 23 of the *Bill*, which echoes Article 25 of the ICCPR. International environmental law has made clear that this right includes the right to informed

public participation in environmental decision-making. Almost all contemporary multilateral treaties, regional treaties and even bilateral treaties contain guarantees of environmental public participation. See Anton & Shelton, *Environmental Protection and Human Rights* (Cambridge University Press, 2011) p 381, n 17 for a voluminous citation to these instruments.

For example, The UN Framework Convention on Climate Change, Art. 4(i) obliges Parties to promote public awareness and to 'encourage the widest participation in this process including that of non-governmental organizations'. The Convention on Biological Diversity allows for public participation in environmental impact assessment procedures in Art. 14(1)(a). The 1991 Espoo Convention on Environmental Impact Assessment in a Transboundary Context requires states parties to notify the public and to provide an opportunity for public participation in relevant environmental impact assessment procedures regarding proposed activities in any area likely to be affected by transboundary environmental harm. In a final decision on the proposed activities, the state must take due account of the environmental impact assessment, including the opinions of the individuals in the affected area. The UN Convention to Combat Desertification goes furthest in calling for public participation, embedding the issue throughout the agreement. Art. 3(a) and (c) recognises that there is a need to associate civil society with the actions of the state.

Of course, in order to participate effectively, an individual must be adequately informed. Hence, the right to take part in public life in a meaningful way, in the environmental context, includes access to environmental information. Informational rights are widely found in environmental treaties.^{xxiv} Moreover, human rights treaties generally contain a right to freedom of information or a corresponding governmental duty to inform. The right to information is included in the Universal Declaration of Human Rights (Art. 19), the International Covenant on Civil and Political Rights (Art. 19(2)), the Inter-American Declaration of the Rights and Duties of Man (Art. 10), the American Convention on Human Rights (Art. 13), and the African Charter on the Rights and Duties of Peoples (Art. 9).

All of this is, perhaps, best encapsulated in Principle 10 of the Rio Declaration on Environment and Development, A/CONF.151/26/Rev.1 (Vol. I)(3-14 June 1992), Annex I, which is seen by many as an emerging, if not already, binding norm of customary international law (and also includes access to justice and remedy as part of public participation). Principle 10 provides:

Environmental issues are best handled with participation of all concerned citizens, at the relevant level. ... [E]ach individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

c. *Rights to Property*

Clause 24 of the *Bill* addresses property rights, finding its inspiration in Article 17 of the Universal Declaration of Human Rights. Article 17 reflects binding customary international law today and is this important in the interpretation of property rights under clause 48, paragraph 3 of the *Bill*.

If property rights are threatened or harmed by environmental degradation either directly by government action, or through private action that the government permits or fails to enjoin, the rights are enlivened. For instance, in *Moreno Gomez v. Spain*, no. 4143/02, 41 EHRR 40 (2005), the applicant succeeded in his claim of noise

pollution from 127 bars, pubs and discotheques near his property. The Court unanimously held that the noise levels were such as to amount to a breach of the property rights protected by Article 8. The fact that the city council did not enforce its noise abatement measures was seen as contributing to the repeated flouting of the rules which it had established. The applicant was awarded her full claim of damages as well as costs and expenses.

d. Cultural Rights of Aboriginal and Torres Strait Islander People

Aboriginal and Torres Strait Islander People are uniquely vulnerable to environmental harm because of their cultural and religious links to their territories. The UN Special Rapporteur on Human Rights and the Environment described the relationship between indigenous peoples and their surroundings:

The land is the home of the ancestors, the provider of everyday material needs, and the future held in trust for coming generations. ... Furthermore, indigenous peoples have, over a long period of time, developed successful systems of land use and resource management. These systems, including nomadic pastoralism, shifting cultivation, various forms of agro-forestry, terrace agriculture, hunting, herding and fishing, were for a long time considered inefficient, unproductive and primitive. ... The notion of sustainability is the essence of both indigenous economies and their cultures.^{xxv}

The linkages between environmental protection and human rights are perhaps most obvious and critical in the context of the lands and resources of Aboriginal and Torres Strait Islander People. International human rights jurisprudence has recognised and affirmed this in a number of ways.

The jurisprudence of the Inter-American Human Rights system is especially important. Over time, the Inter-American Commission on Human Rights and the Inter-American Court have evolved a doctrine of unique rights for indigenous and tribal peoples and articulated the special obligations of states towards them. One of the earliest cases bringing the Commission's attention to the environmental plight of indigenous peoples was *Yanomami v. Brazil*, Case 7615 (Brazil), *1984-1985 Annual Report of the Inter-American Commission on Human Rights* 24, OEA/Ser.L/V/II.66, doc. 10, rev. 1 (1985). The petition alleged that the government violated the American Declaration of the Rights and Duties of Man by constructing a highway through Yanomani territory and authorizing exploitation of the territory's resources. These actions led to the influx of non-indigenous who brought contagious diseases which remained untreated due to lack of medical care. The Commission found that the government had violated the Yanomani rights to life, liberty and personal security guaranteed by Article 1 of the Declaration, as well as the right of residence and movement (Article VIII) and the right to the preservation of health and well-being (Article XI). Subsequently, the Commission issued a country report on human rights in Ecuador which expanded on the duties of the State towards indigenous peoples, especially in the context of development projects. The Commission placed its emphasis on the procedural rights of information, participation and redress.

Later cases have added substantive protections. In *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Inter-Am. Court Hum. Rts, Ser. C, No. 79 (Aug. 31, 2001), Inter-American Court in essence held that Nicaragua had breached the Inter-American Convention because: i) the state had neglected to adopt effective measures for the protection of the property rights of the Awas Tingni for land and resources, and ii) had granted concessions over the land without the consent of the community. It also failed to provide an effective remedy in relation to the Awas Tingni claims of violation of their rights. As James Anaya, a former UN Special Rapporteur for the Rights of Indigenous People, has observed, 'the Court ... held that the international human right to enjoy

the benefits of property, particularly as affirmed by the American Convention on Human Rights, includes the right of Indigenous peoples to the protection of their customary land and resource tenure’.

2. A Right to a Healthy Environment

During the first review of the Act under clause 95, serious consideration should be given to amending the Act to include an independent human right to a healthy, safe environment under Part 2. Before he was murdered, Ken Saro-Wiwa, a leader of the Ogoni in Nigeria, rallied his people with the call that “the environment is man’s first right”.^{xxvi} The 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters declares that “every person has the right to live in an environment adequate to his or her health and well-being”. It echoes Principle 1 of the Stockholm Declaration, quoted at the beginning of the section, as well as the American and African regional human rights conventions which have explicit environmental rights.

The San Salvador Additional Protocol to the American Human Rights Convention on Economic and Social Rights provides:

1. Everyone shall have the right to live in a healthy environment and to have access to basic public services.
2. The States Parties shall promote the protection, preservation, and improvement of the environment.^{xxvii}

The African Charter on Human Rights proclaims that “All peoples shall have the right to a general satisfactory environment favorable to their development.”^{xxviii}

A right to a healthy environment has already been legislated and/or affirmed in numerous other countries. As of 2012, ninety-two national constitutions recognize that citizens have a substantive right to live in a healthy environment.^{xxix} We also note the move towards earth stewardship in relation to the Sustainable Development Goals.^{xxx} The salutary impact of these provisions is made clear by the Environmental Defenders Office (EDO Qld) in three points, which we support:

- Through introducing a human right to a healthy environment, the government will be required to consider in a more fulsome way how proposed legislation or policy might impact on people, including the environment those people are dependent on for their livelihoods or health.
- By providing a requirement for the consideration up front of the impact a proposed project, law or policy might have on the human right to a healthy environment, there is *less* chance that litigation might be undertaken to challenge that project, law or policy on the basis of the impacts to the right to a healthy environment.
- Too often the rights of more marginalised Queenslanders are not given as strong a weight as the rights of others; for example, rural Queenslanders, including indigenous people, frequently suffer impacts to their air and water quality which would not be allowed to occur in urban Queensland. A Human Rights Act would help to address this imbalance in the concern for the environmental needs of marginalised people versus those in cities.

3(c): The right to an adequate of living

We refer the Committee to the most recent report by Phillip Alston on this point in the UK context, showing that political decisions can create extreme poverty.^{xxxii}

3(d): Explicit provision on gender-based violence, and progressive interpretation of sections 25 and 26.

It is well-known that violence against women is a specific societal problem with sexual violence and harassment being the subject of major campaigns and violence against women by current and former partners continuing to be a problem that impacts on women in the form of physical injuries and psychological and emotional harm that can impact on a woman's potential to flourish and enjoy life. We recognise violence against women, but also violence against trans people of all genders and intersex people, and hate crimes against intersex and non-cis-gendered people. The rates of violence against such groups are appallingly high, with murder being a leading cause of death against trans people, also the leading cause of death for women aged 18-45. We refer to committee to Appendix B and the background paper provided by GLS student Anna Stirling.

Interpretation of **sections 25 and 26** of the Bill relating to Privacy and Protection of the Family and Children should be interpreted using modern developments under international law. Moreover, section 26(1) should not be interpreted in a manner inconsistent with other rights. In particular, it should not be a shelter for violations of the rights of woman and children or an obstruction to dealing effectively with domestic and family violence. The question of recognition of Torres Strait Islander traditional adoption should still be considered. The existing proposal could also provide a point of dispute for people who have constructed their families outside the frame of a heterosexual couple who have produced natural children. It could also create problems for families constructed by LGBTIQ couples.

Recommendation 5: Invest in Prevention

Citizens should have the right to resources in order to exercise the enumerated rights. The only right to resources is found with respect to legal aid. However, the right to legal aid is merely to that which is already provided for under the Legal Aid Queensland Act 1997 (clause 32.2.f).

The GLS believes that the resources thus far allocated to prevention, education and response should be doubled, and priority given to frontline community organisations, including CLCs.

GLS supports the following analysis from the Human Rights Act for Queensland Campaign regarding the need for sufficient resources to implement the Act.

The Queensland Government has committed \$2.298 million over four years (\$0.6 million per year ongoing) for the Anti-Discrimination Commission to be renamed and to support the operation and administration of the Act. When the Victorian Charter was introduced in the 2006-07 Budget the Victorian Government allocated \$6.7 million over four years to fund the implementation of the Charter. Resources were allocated to their Human Rights and Equal Opportunity Commission and were used to establish a Human Rights Unit within the Department of Justice and assist the Victorian Police and Corrections to understand and embed charter obligations. Grants totalling \$971,362 were made to the community sector and local government so they could undertake work to educate the community and the not-for-profit sector about human rights and the Charter.

GLS agree that the Human Rights Act will only have real impact if each arm of government and the community understands how the act applies to them.

A 'Rights Regime' or Ecosystem approach

Many Bills of Rights place too much reliance on formal rules and court enforcement. While these are essential, the protection and realisation of rights requires mutually ethical and institutional reforms – a 'rights regime'.^{xxxii}

This is a strong feature of the Bill of Rights. The Bill would create a Human Rights Commission. It creates mechanisms for the referral of cases from the HRC to and from the Ombudsman, Health Ombudsman, privacy commissioner and CCC (clauses 66 and 73). Under Clause 74 the HRC can make cooperative arrangements with other organisations.

Other bodies that come to mind include the Public Service Commission which can build awareness of human rights into the ethics and operations of the public service and the Ethical Standards Command.

Recommendation: The operation of the 'rights regime' should be an important part of the Review process.

The role of Parliament

Proponents of human rights protections in the ACT and Victorian debates argue that Australian parliaments are 'inclined to ignore the needs of minorities and the marginalised, to pass legislation that undermines important rights, and to allow political advantage more weight than considerations of rights' (Evans & Evans 2005: 6).

...[U]nlike courts, parliaments are able to be proactive in seeking to protect rights rather than having to wait for a violation of rights to take place. The best rights protection prevents abuses of rights rather than punishes violations (Evans & Evans 2005: 7).

Parliaments have unique advantages in protecting rights:

Parliaments also have a wider range of options open to them in pursuing the protection of rights than do courts. While a court may find that workplace discrimination on the basis of sex is unlawful, it cannot set up an investigation into systemic causes of discrimination against women, nor fund non-discrimination education programmes for employers, nor create advertising campaigns to encourage girls to enter non-traditional employment for women, nor provide for better child-care facilities. The full range of actions necessary for the comprehensive protection of rights can only be achieved by governments and parliaments working with courts and not by courts alone (Evans & Evans 2005: 8).

Recommendations

We urge the Queensland Parliament to provide long-term, meaningful investment to community legal centres and community advocacy organisations, especially disabled peoples organisations, and people with lived experience of mental health, domestic and family violence, sexual and gender minorities foster care, prison, homelessness and poverty. We urge the government to increase financial support for the work of institutions working against violence against women and children and fund specialised CLCs for women.

We urge the Queensland Parliament to invest in its own resources to bring this Act to life and prevent human rights abuses occurring, including a baseline survey of parliamentarians (Appendix A), the appointment of specialised researchers, the appointment of a Legal Adviser (modelled on the Human Rights Adviser to the Victorian Parliament's Scrutiny of Acts and Regulations Committee), and a seminar series.

An Indigenous Audit Committee should be created. It should be comprised of Indigenous Australians and empowered to examine relevant portfolio estimates from the point of view of impact on Indigenous people. That process might be combined with inclusion of a requirement to consider Indigenous impact in Cabinet Submission process.

A Women's Audit Committee or a Standing Committee on Women's Affairs should be created. Australia lacks the kind of parliamentary committees that have responsibility for gender equality matters in European and many other parliaments. In 2008 the Inter-Parliamentary Union (IPU) reported on 80 countries with 93 such parliamentary committees. Queensland could be an Australian pioneer in this regard.

We urge the Queensland Public Service to invest in its expertise and ability to evaluate policy on human rights terms, including the creation of a specialist unit in the Department of Justice and Attorney-General. The Minister should stipulate that the State Budget and Departmental Annual Reports, especially Queensland Police and Correctional Services must be audited annually against standards in both the ICCPR and the ICESCR. The Queensland Government must allocate sufficient resources to

ensure that each government department reviews their laws, policies and practices to ensure their compliance with human rights and for community education.

Recommendation 6: Progressive interpretation

The GLS believes that the rights in the Bill should be interpreted in a manner likely to provide leadership in human rights law globally.

Which 'Human Rights'?

The Bill provides a list of enumerated human rights in Part 2, Divisions 2 and 3.

For the purpose of the Bill these are the only relevant Human Rights (see clause 7 and confirmed in definitions in Schedule 1). While clause 12 preserves any rights provided by other human rights instruments, 'Human Rights' are the enumerated rights only (see clause 7). This has important consequences for scrutiny (clause 39 see below for discussion) and interpretation (clause 48 under which international decisions can only be used in interpreting the enumerated human rights)

The list of economic, social and cultural rights is very limited – much more so than in modern constitutions like South Africa and Kenya. This is despite the fact that the latter constitutions have entrenched rights. Given the capacity for the legislature to pass incompatible legislation if it wants to, it should be easier to recognize more rights with a statutory bill of rights like this one.

Even on review, the rights to be considered for inclusion in the enumerated rights under clause 94.2.a do not include any ILO (International Labour Organization) agreements which Australia has signed.

Recommendation

We favour a much wider recognition of rights in this Bill and for the Review to consider the rights included in all human rights instruments to which Australia is a party.

Threats to rights from other powerful actors

The drafters of the original declarations and bills of rights saw rights as the opportunity for individuals to pursue their aims free from state interference. The gentlemen who drafted them valued 'the space in which to play the game of life'^{xxxiii} or what Rawls would later call the ability to make and pursue 'life plans'. They were all too aware of the state as a threat to doing so. They were not so worried about threats from other individuals or combinations of individuals in corporations, trusts and unions (they might have recognized some as 'over mighty subjects', a phrase originally coined to refer to senior aristocrats). And they were not sensitized to the threats that they posed to their family members, servants and slaves. Professor Sampford has dubbed these 'protective rights'. From the point of view of individual Queenslanders, they largely take the same form as negative rights and are frequently subsumed within them.^{xxxiv} But from the point of view of the state, they are quite different because they provide the basis for a positive duty on the state to prevent interference rather than a negative duty not to interfere.

We note the Bill includes public companies operating within the state exercising public functions as 'public entities'. However, the role of corporations in furthering or retarding human rights needs to be considered and we would recommend that this be given serious attention by the government and placed as a major issue in the review process.

The UN has developed a number of measures relating to corporations, including the United Nations Global Compact, the United Nations Principles of Responsible Investment and most recently the UN Guiding Principles on Business and Human Rights. It is increasingly recognized that the Social License to Operate of corporations is based on not only avoiding human rights abuses by themselves and those in the supply chain but to furthering the rights and interests of those in the communities in which they operate.

Recommendation

Government should consider how to encourage corporations to adopt human rights standards.

Drafting and scrutiny of Legislation

In protecting and fostering of human rights, courts act as something of a backstop, recognizing violations after they occur when they are litigated. Although judicial decisions can provide guidance for future legislation, it has to be reactive and it is difficult for it to be systematic (at least until a number of cases have been litigated).

The post Fitzgerald integrity system included some important pro-active pre-legislative measures. 'Legislative standards' and 'fundamental legislative principles', centred on human rights required human rights to be taken into account:

1. by departments in considering whether legislation was an appropriate response to the issues they were seeking to address
2. by the Office of Parliamentary Counsel in drafting legislation and explanatory memoranda and
3. in legislative scrutiny committees.

With the increased importance placed on human rights, it might be time to revisit the change in committee system in 2010. From 1995 to 2010, there was a separate Legislative Scrutiny Committee (Prof Sampford was the sole and then principal legal advisor to that committee from 1995 to 2002). When the Premier's Integrity and Accountability Roundtable considered a range of integrity system reforms, there was very strong support for a system of 'portfolio' committees so that all legislation would go through one of them with substantive expertise (not least from Prof Sampford who was a member of the roundtable, and chaired most of the state-wide community consultations). This left the position of the LSC in question. Could the scrutiny functions be transferred to the portfolio committees? Could the parliament stand the increased number of committees? It was decided to run with the transfer of responsibility to the portfolio committees (incidentally fully supported by Sampford). However, with the increased emphasis on human rights, it may be time. The Senate has Standing Committees on Scrutiny of Bills and another on Regulations and Ordinance – as well as the recently established Joint Committee on Human Rights. An alternative would be to include have the HRC make submissions to the relevant committees. However, we would argue that it is preferable to build this expertise into parliament itself.

Whether or not the SLS should be reconstituted, it should be noted that the new legislation effectively limits the rights of Queenslanders that can be considered. Under clause 39, the portfolio committees must consider the compatibility of the legislation with human rights. However, 'human rights' is defined restrictively in clause 7 as those rights listed in Part 2, Divisions 2 and 3 (the enumerated rights). The SLC considered a wide range of rights in international instruments to which Australia was a party – including ILO agreements.

We *recommend* strongly that committees scrutinizing bills should be expected to consider all Human Rights included within clause 12 as well.

Recommendation 6: Clause 28 Cultural Rights – Aboriginal peoples and Torres Strait Islander peoples

The recognition of the distinct cultural rights of Aboriginal and Torres Strait Islander peoples is a welcome inclusion in the Human Rights Bill 2018. As noted, Queensland has a particularly long and troubling history with regard to the treatment of Aboriginal and Torres Strait Islander peoples and progressive movement toward the alleviation of this history and the establishment of a human rights culture that avoids past mistakes is an encouraging step.^{xxxv}

The inclusion of the recognition of distinct cultural rights as detailed in Clause 28 is similar to those protections enacted in Victoria and the ACT and responds to important contributions made by members of Queensland's Indigenous community throughout the consultation period.^{xxxvi} Clause 28 is importantly reflective of international principles of human rights law by drawing on explicit sections of the ICCPR and the UNDRIP to inform its understanding of protections for distinct cultural rights.^{xxxvii}

Limitations of Clause 28

Clause 28 however is notably silent on several key issues – such as free, prior and informed consent, justice reinvestment, access to justice and provisions for the recognition and protection of vulnerable members of the Indigenous community including elders, women and youth.^{xxxviii} These priorities were all raised by Queensland's Indigenous community throughout the consultation and submission process. These absences result in Clause 28 being a limited interpretation of the rights of Aboriginal and Torres Strait Islander peoples and of the appropriate resources and mechanisms required for the protection, development and enforcement of distinct cultural rights.

The absence of any overarching mechanism, independent governing body or formal office to ensure the voice of Indigenous peoples is heard and to provide for accountability within the system is also notably absent despite being a key concern of Indigenous representatives and remaining a significant problem for the current protection of Indigenous rights in Queensland.^{xxxix} These absences mean that the rights protections as presented do not reflect the reality of Aboriginal and Torres Strait Islander peoples in Queensland and risk being another ineffective legislative mechanism that will not be able to provide for the substantial recognition and protection of Indigenous rights.^{xl}

This view is supported by the fact that the Explanatory Notes and the Bill refer to limited sections of the ICCPR and the UNDRIP and are silent as to other sections – such as Article 3 and 4 which address Self-Determination and Self-Governance – that are important rights guarantees required to ensure the 'minimum standards for the survival, dignity and well-being of the indigenous peoples of the world'.^{xli}

Community Concerns

Indigenous community concerns were represented throughout the Committee's work in 2016 as detailed in the Committee's Report.^{xlii} These concerns were reiterated to the Committee in the many submissions made by individuals and organisations. Specifically, the Indigenous Lawyers Association of Queensland (ILAQ),^{xliii} Soroptimist International (SI),^{xliiv} the Cape York Institute (CYI),^{xliiv} the Aboriginal and Torres Strait Islander Legal Service (ATSILS)^{xliiv} and the Aboriginal and Torres Strait Islander Women's Legal Service of North Queensland Inc (ATSIWLSNQ)^{xliiv} made detailed submissions to the Committee regarding community concerns and the requirements needed for any human rights regime in Queensland to be meaningful for Indigenous peoples.

It is clear from these representations that community concerns coalesced around issues of powerlessness.^{xlviii} This is a key concern that further supports the position that the Bill as presented is too limited to have a meaningful impact in the lives of Aboriginal and Torres Strait Islander peoples. While it is welcome that the Bill does provide for broader justice measures, these sections including Clause 28, do not appropriately represent the reality of most Aboriginal and Torres Strait Islander peoples in Queensland and do not substantively provide for any greater protection, oversight, or enforcement than that already available.

Specific community concerns that are important to reiterate include:

1. The failure of the Queensland community to address and account for its racist and oppressive history.^{xlix}
2. The importance of the failure to address historical legacies toward understanding the current circumstances of Indigenous peoples.
3. The structural exclusion and powerlessness of Indigenous peoples, including the continued failure to support free, prior and informed consent and consultation, and to provide for appropriate mechanisms to ensure the inclusion of Indigenous peoples in decision making processes.ⁱ
4. The position of the most vulnerable members of the Indigenous community including elders, women, youth, and Indigenous members of the LGBTIQ community.ⁱⁱ
5. The failure of current mechanisms and legislative procedures to offer protection or support for accountability mechanisms, including the lack of enforcement, oversight, and resources to ensure the survival of distinct cultural rights.
6. The continued overrepresentation of the Indigenous community in the criminal justice system, including the importance of proper access and funding for access to justice and the need to address inherent problems in the criminal justice system through justice reinvestment schemes.ⁱⁱⁱ
7. The need for specifically targeted human rights actions plans addressed to the circumstances of Indigenous peoples but also aimed at members of the legal profession, courts, and public authorities.ⁱⁱⁱⁱ
8. The limited scope of the liability of public authorities and the need to gradually expand this to include more characterisations, including the gradual expansion into the private sphere to better represent and be responsive to the reality of Indigenous peoples.^{lv}
9. The access to and availability of public information and resources through enforcement and oversight to ensure that public authorities and measures are responsive to and understanding of the legitimate circumstances of Indigenous peoples.

Community concerns can be summarised as being related to the following priority areas for human rights action through protection, oversight, and enforcement. Notably these extend beyond the limited scope of those 'distinct cultural rights' provided for in Clause 28.

1. The criminal justice system – access, incarceration, interactions, and reinvestment.
2. Vulnerable members of the community – elders, women, youth and LGBTIQ.

3. Historical legacies through truth telling – such as redress mechanisms to further address stolen wages and for a Truth, Justice and Reconciliation Commission.
4. Political, economic, cultural agency and sovereignty – representation, consultation and decision-making input, oversight, and accountability into all areas of public life including but not limited to consumer affairs, health, education, and the environment.

International Standards of Indigenous Human Rights

Indigenous community concerns are further supported by a broader application of the principles of international human rights law enshrined in the ICCPR and the UNDRIP than those currently provided for in the Bill. These principles extend beyond the very specific sections the Government has referred to and are importantly considered the minimal standards needed to be achieved if the intended provision for distinct cultural rights is to be successful and meaningful for Indigenous peoples. The further relevant sections of the UNDRIP that could inform the Bill and that are supportive of community demands include, but are not limited to:

1. Article 3,^{lv} 4^{lvi} and 5^{lvii} relating to self-determination, economic, social, and cultural self-governance, and the right to strengthen political, legal, economic, and cultural institutions.
2. Article 7,^{lviii} 14,^{lix} 22^{lx} and 33^{lxi} relating to guarantees for physical safety and bodily integrity, the right to be educated and control that education in Indigenous cultures and languages, the protection of particularly vulnerable groups such as elders, women and youth, and the ability to control and determine group membership and identity.
3. Article 9,^{lxii} 11,^{lxiii} 19,^{lxiv} 23^{lxv} and 27^{lxvi} relating to the right to nationhood, the right to practice and maintain, protect and develop culture through appropriately resourced redress schemes, the right to be negotiated with in good faith, the right to determine and develop strategic priorities, and the right to a fair, independent and transparent process for the adjudication of laws and negotiations.

Recommendations

The Committee should revisit their own consultations with the Indigenous community in 2016 and the submissions of those representing the Indigenous community to ensure that any proposed rights protections are supported by a broader application of the principles that inhere in international human rights law, enshrined specifically as they are in the ICCPR and the UNDRIP, and represent a more realistic understanding of the position of Aboriginal and Torres Strait Islander peoples in Queensland.

The Bill should include provisions additional to Clause 28 following a further consultation process that would affect the achievement of distinct cultural rights rather than simply their recognition. This would include:

- supplying enough resourcing to ensure protection,
- oversight and enforcement through greater Indigenous representation and consultation
- and an appropriately funded redress scheme to address historical legacies and their impact on contemporary circumstances.

Redress schemes should not be limited to issues such as stolen wages but should retain a broad remit and sufficient resourcing to be able to respond to the broad and complicated nature of the history of Indigenous peoples and their treatment in Queensland. This type of mechanism could be supported by the establishment of a formal office such as Social Justice Commissioner, to oversee and provide for the realisation of Indigenous rights protections.

Recommendation 7: Progressive interpretation of human rights

We agree with the submission of our learned colleagues from UNSW on this point.

The Queensland Parliament should amend s 48 to provide:

So far as it is possible to do so consistently with their language, context and purpose, all statutory provisions must be interpreted in the way that is most compatible with human rights.

A clause should be introduced to make the following human rights instruments relevant considerations for all officials exercising any powers delegated to them.

- d. The Human Rights enumerated in Part 2, Divisions 2 and 3
- e. All other rights preserved by clause 12
- f. All individual human rights recognized in international instruments ratified by the Federal Government – less any that are explicitly rejected under ‘federal’ clauses in those instruments

To assist ministers and civil servants, the HRC would draw up a list of relevant instruments and the government departments would develop guidelines of those that are relevant to the department and how they should be taken into account in decision-making. These guidelines would be subject to the approval by HRC and then published. Disputes between the department and the HRC could be resolved in a number of ways – by referring them to the relevant scrutiny committee and then a motion to parliament (retaining its ultimate authority consistent with the central role of parliament in this regime).

Recommendation 8: Remedies for breaches by private entities exercising public functions

Bill should clarify that the legal remedies available against the government will be available against private entities exercising public functions under Section 9(h) of the Bill. Subsection (h) provides that a private organisation is a ‘public entity’ when it performs ‘functions of a public nature when it is performing the functions for the State or a public entity (whether under contract or otherwise)’.

Text similar to Section 40C of the Human Rights Act 2004 (ACT) should be added.

Legal proceedings in relation to public authority actions

- (1) *This section applies if a person—*
 - (a) *claims that a public authority has acted in contravention of section 40B; and*
 - (b) *alleges that the person is or would be a victim of the contravention.*
- (2) *The person may—*
 - (a) *start a proceeding in the Supreme Court against the public authority; or*
 - (b) *rely on the person's rights under this Act in other legal proceedings.*
- (3) *A proceeding under subsection (2) (a) must be started not later than 1 year after the day (or last day) the act complained of happens, unless the court orders otherwise.*

(4) The Supreme Court may, in a proceeding under subsection (2), grant the relief it considers appropriate except damages.

(5) This section does not affect—

(a) a right a person has (otherwise than because of this Act) to seek relief in relation to an act or decision of a public authority; or

(b) a right a person has to damages (apart from this section).

Recommendation 9: Recognition of Australian South Sea Islanders

In July 2000 the Queensland government signed a recognition statement regarding the special place of Australian South Sea Islanders in Queensland. It acknowledges the slave-like conditions in which many of these people lived and the long legacy of disadvantage that has resulted. We believe that the Human Rights Act should not ignore this important group many of whom also have Indigenous ancestry but who identify as ASSI. This group is very active in the Queensland community generally, including providing the most successful coach for the Queensland State of Origin NRL team, Mal Meninga). ASSI people are also active in their own communities and the Aboriginal and Torres Strait Islander communities. The Bill should insert the following text:

Cultural Recognition

- (4) Australian South Sea Islanders have the right to be recognised as a distinct cultural group.***
- (5) Australian South Sea Islanders have the right, with other members of their community to enjoy, maintain, control, protect and continue their identity and cultural heritage.***
- (6) In this section, “Australian South Sea Islanders” means the Australian born descendants of Pacific Island people who were brought to Queensland between 1863 and 1904 to provide cheap or free labour for Queensland’s primary industries.***

Sources

Australian Human Rights Commission 'gay, lesbian, transgender and intersex people' information sheet available at http://www.hreoc.gov.au/letstalkaboutrights/downloads/HRA_GLBTI.pdf (downloaded on 10 June 2009).

Bailey, Peter. *The Human Rights Enterprise in Australia and Internationally*. Sydney: LexisNexis, Butterworths, 2009.

Charlesworth, Hilary et al., *Towards an ACT Human Rights Act*, Report of the ACT Bill of Rights Consultative Committee, (2003).

Evans, Carolyn M. 2008. *Australian Bills of Rights: The Law of the Victorian Charter and the ACT Human Rights Act* (LexisNexis).

Evans, Carolyn M., 2004. 'Responsibility for Rights: The Act Human Rights Act'. *Federal Law Review*, Vol. 32, No. 2, pp. 291-309. Available at SSRN: <https://ssrn.com/abstract=614685>

Evans, Carolyn M. and Evans, Simon, 2005. 'Evaluating the Human Rights Performance of Australian Legislatures: A Research Agenda and Methodology'. University of Melbourne Legal Studies Research Paper No. 123. Available at SSRN: <https://ssrn.com/abstract=771224> or <http://dx.doi.org/10.2139/ssrn.771224>

Walsh, Tamara and Carla Klease, 'Down and Out? Homelessness and Citizenship' [2004] *Australian Journal of Human Rights* 5.

Walsh, Tamara. 'Dealing with nuisance behaviour: Logical alternatives to traditional sentences': <http://www.isrcl.org/Papers/2006/Walsh.pdf>, 30 April 2009.

Appendix A

Parliamentary Survey

Summary extract: Evans, Carolyn M. and Evans, Simon, Evaluating the Human Rights Performance of Australian Legislatures: A Research Agenda and Methodology. U of Melbourne Legal Studies Research Paper No. 123.

Available at SSRN: <https://ssrn.com/abstract=771224> or <http://dx.doi.org/10.2139/ssrn.771224>

<p>Parliamentarians' understanding of the operation of the rights-oriented elements of the legislative process</p>	<p>Two questions asked respondents to rank the frequency with which rights were raised in particular contexts, such as party room policy debate, parliamentary committees, and parliamentary debate, and to indicate the importance of human rights in each of those contexts</p>
<p>Parliamentarians' views about the concept of human rights — what human rights are, how important they are relative to other concerns, how they are informed about human rights, and how well they are able to identify rights issues</p>	<p>Two questions asked each respondent to indicate how important the protection of human rights was in their work as a parliamentarian and the importance of human rights to the people who elected them. Another question asked about the circumstances in which rights can be limited. A further question asked respondents to rank the three human rights that they believe are most important.</p>
<p>Parliamentarians' views about the overall effectiveness of parliamentary processes for the protection of human rights.</p>	<p>The survey then asked respondents to quantify the usefulness of various sources of information about rights, such as alerts digests, material from non-government sources, petitions from the public and media reports. It also asked how parliamentary or policy making processes could be improved to 'ensure that appropriate account is taken of human rights'.</p> <p>The last two questions asked respondents what the most significant achievement and failure of parliament have been in the protection of rights during their time in parliament.</p>

Appendix B

GLS is proud to profile the research of current students on human rights protection in Queensland.

Homelessness and Human Rights in Queensland

Jack Carr

Article 11 of the International Covenant on Economic, Social, and Cultural Rights ('ICESCR') states that signatories 'Recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing, and housing and to the continuous improvement of living conditions'¹. As a signatory, Australia has an obligation to take steps towards the 'progressive realisation of this goal.'² Australia is a wealthy country with the means for each of its citizens to enjoy an adequate standard of living, ranking second in the world in terms of the human development index.³ However data reveals that many parts of the country it appears that little progress has been made. The nations approximately 116,000 homeless (as of 2016) are a testament to this fact⁴.

According to the Australian Bureau of Statistics ('ABS') 'homeless' people are those with inadequate dwellings, lack of secure tenure, and who have lack of access to space for social reasons.⁵ Beyond the right to adequate housing, this broad group is at an increased risk of having their rights to non-discrimination, social security, health, and personal security violated.⁶ This is an affront to the inherent dignity of the human person as proclaimed in the Universal Declaration of Human Rights, which states the right of everyone to an adequate standard of living.⁷ Having ratified the International Covenant on Civil and Political Rights ('ICCPR'), and the ICESCR, which protect these rights, Australia has an obligation to protect people from this situation.⁸

It is clear that in order to meet its international obligations, Australia must work towards providing this group with the standard of living they are entitled to.⁹ This is a particularly pressing issue in the state of Queensland, where the

¹ *International Covenant on Economic, Social, and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 11.

² *Ibid*, art 2.

³ United Nations Development Program, *The Human Development Report 2016: Human Development for Everyone* (United Nations Development Program, 2016) 198.

⁴ Australian Bureau of Statistics, *Census of Population and Housing: Estimating Homelessness* (No 2049.0, 14 March 2018) <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/2049.0>>

⁵ *Ibid*.

⁶ Australian Human Rights Commission, Submission No 90 to the House of Representative Standing Committee on Family, Community, Housing and Youth, *Inquiry into national homelessness legislation*, 1 September 2009, 8-9.

⁷ *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) art 25(1).

⁸ UN Human Rights Committee, *General Comment No 31: Nature of the General Legal Obligation Imposed on State Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (29 March 2004) [13]; *International Covenant on Civil and Political Rights*, signed 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

⁹ Australian Human Rights Commission, above n 6, 9.

number of homeless individuals has risen from 43.9 person's per 10,000 in 2011, to 46.1 per 10,000 in 2016.¹⁰ Legislative protections in the form of a human rights act for the state are one possible solution to this problem.¹¹

Legislative protections

In other jurisdictions, such as Victoria, such protections have made a positive contribution. The *Charter of Human Rights and Responsibilities Act 2006* (Vic) make it unlawful for a public authority to act contrary to the human rights specified in the charter (unless otherwise specified by law).¹² It puts in statutory form many rights expressed in the ICCPR such as the right to freedom of movement (s12), privacy and reputation (s13), property rights (s20), security of person (s21), and entitlement to humane treatment when deprived of liberty (s22).¹³ In the case of *Metro West v Sudi*, Justice Bell held that the idea of a 'public authority' extends to not-for-profit organisations delivering funded homelessness service, meaning that many private frontline providers must respect these principles.¹⁴ These rights can be relied on in judicial review, and analogous supreme court proceedings, but notably not in eviction proceedings.¹⁵

The Australian Capital Territory's *Human Rights Act 2004* (ACT) remedies this small defect, presenting what is the most comprehensive form of human rights protection in the country.¹⁶ Being based on the ICCPR, it contains similar human rights protections, but notably allows a tenant to rely on human rights in 'legal proceedings' which is inclusive of eviction proceedings.¹⁷ The effect of this was demonstrated in the case of *Canberra Fathers and Children Services Inc v Michael Watson* where an eviction order was not granted on the basis that it would breach the tenants human rights.¹⁸ It was held that removing a family from crisis accommodation where alternative accommodation was unavailable and a substantive waiting list for public housing posed an unacceptable risk of harm to the family in the form of possible homelessness or the forced breakup of the family unit.¹⁹ Extending the protection of a human rights act to Queensland would allow courts in the state to make similar considerations, bringing the state closer to the achievement of our international treaty obligations.

The face of homelessness in QLD

¹⁰ Australian Bureau of Statistics, above n 4.

¹¹ Australian Human Rights Commission, above n 6.

¹² *Charter of Human Rights and Responsibilities Act 2006* (Vic) .

¹³ *Charter of Human Rights and Responsibilities Act 2006* (Vic).

¹⁴ *Metro West v Sudi* [2009] VCAT 2025, [150] (Bell J).

¹⁵ Justice Kevin Bell, 'Protecting public housing tenants in Australia from forced eviction: the fundamental importance of the human right to adequate housing and home' (Speech delivered at the Costello Lecture, Monash University, 18 September 2012) 37 <<http://www.nwhn.net.au/admin/file/content2/c7/Justice%20Kevin%20Bell%20-%20Costello%20Lecture%20-%20September%202012.pdf>>; *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 39(1); *Patrick's Case* [2011] VSC 327, [296]-[299] (Bell J)

¹⁶ Justice Kevin Bell, 'Protecting public housing tenants in Australia from forced eviction: the fundamental importance of the human right to adequate housing and home' (Speech delivered at the Costello Lecture, Monash University, 18 September 2012) 21 <<http://www.nwhn.net.au/admin/file/content2/c7/Justice%20Kevin%20Bell%20-%20Costello%20Lecture%20-%20September%202012.pdf>>

¹⁷ *Human Rights Act 2004* (ACT) s 40C(2)(b).

¹⁸ *Canberra Fathers and Children Services Inc v Michael Watson* [2010] ACAT 74.

¹⁹ *Ibid*, [72].

Consideration of these approaches is important in order to continue to develop the optimal strategy for combating homelessness in the state. Equally important to this consideration is an understanding of the face of homelessness in the state. Over half a million Queenslanders have experienced homelessness at some point in their lives.²⁰ As of 2016 approximately 22,715 people were homeless in the state, a ratio of 46.1 per 10,000 people.²¹

People become homeless for a variety of reasons, with statistics revealing accommodation issues, financial difficulties, and domestic violence to be the largest contributors, with health problems and a range of more minor causes also being of note.²² Homelessness does not strike all people equally however, and data suggests it may disproportionately affect some groups. For example approximately 50% of persons who access homeless services in the state are aged under 25 years.²³ But this group is also the most likely to have their requests for assistance unmet.²⁴ In addition to this Aboriginal and Torres Strait Islander peoples, despite making up only 3% of the population nationally, account for over one third of the persons who access homelessness services in the state.²⁵

There is a diverse range of situations that someone experiencing homelessness can find themselves in. In Queensland, the largest group at 7,601 are those staying in 'severely' overcrowded dwellings.²⁶ These are places which would require four or more bedrooms to adequately accommodate all of their residents.²⁷ This is considered a state of homelessness because such living conditions prevent residents from having control or access to a space for social relations.²⁸ They are characterised by a lack of privacy, insufficient personal living space, and the absence of vital private facilities such as a private bathroom or kitchen. This situation often puts the health of the occupants at risk.²⁹

Person's staying in supported accommodation for the homeless, who number 3,728, lack privacy and access to space in a similar way.³⁰ In addition to this they may lack tenure, or have an initial tenure that is short and not extendable and thus have little to no housing security.³¹ The 4,827 'couch surfers', person's staying temporarily with other households, also lack the fulfillment of their basic rights.³² The size of this group is highly likely to be an underestimate, as people in this group are unlikely to tell their hosts on census night that they cannot go back to their usual address, either due to embarrassment or fear of the consequences of doing so.³³ Many homeless people also reside in boarding houses and other temporary lodgings at 3,616 and 215 respectively, and lack in tenure and access

²⁰ Department of Housing and Public Works, Queensland Government, *Partnering for impact to reduce homelessness in Queensland* (2017) 2.

²¹ Australian Bureau of Statistics, above n 4.

²² Homelessness Australia, *Homelessness in Queensland*, <<https://www.homelessnessaustralia.org.au/fact-sheets>>.

²³ Department of Housing and Public Works, above n 20.

²⁴ Ibid.

²⁵ Ibid.

²⁶ Australian Bureau of Statistics, above n 4.

²⁷ Ibid.

²⁸ Australian Bureau of Statistics, above n 4.

²⁹ Ibid.

³⁰ Ibid.

³¹ Ibid.

³² Ibid.

³³ Ibid.

to space.³⁴ The final group, are those living in improvised dwellings such as tents, or sleeping rough, numbering at 1,738.³⁵ This group is at perhaps the greatest risk of rights violations, having their personal security, privacy, health, and even access to basic facilities under constant threat.³⁶

It is clear from this that homelessness and its causes and effects are a serious and complex issue in Queensland. A human rights act would cut through this complexity to a degree, providing a blanket protection which all people in all situations could rely on.³⁷ It would also serve as recourse against some of the major issues for homeless people in the state.

Current laws and areas requiring reform

The treatment of homeless people in 'public' spaces under the *Summary Offences Act 2005* (Qld) is one such area that raises major concerns from a human rights based perspective.³⁸ The intention of this act is to safeguard the 'quality of community use of public spaces', however, in enforcing its provisions there is a risk socially disadvantaged groups such as the homeless are unfairly targeted.³⁹ A large proportion of prosecutions for public nuisance under the act are against such people.⁴⁰ Subsection 2(b) gives a wide discretion for the use of this power, where a person's behaviour 'is likely to interfere' with the enjoyment of a public place,⁴¹ and per sub-s 4 police are able to instigate proceedings without requiring a complaint.⁴² 'Catch all' offences such as this, punishable by fines and even imprisonment, have the potential to disproportionately affect social minorities such as the homeless, who may be subject to negative biases and spend a large amount of time in the public space.⁴³ This is an infringement of homeless peoples right to freedom of movement and non-discrimination at odds with our international obligations.⁴⁴

Eviction proceedings under the *Housing Act 2003* (Qld) are another area where a human rights act for the state has the potential to make a large positive contribution. Establishing security of tenure for public housing residents is of central importance to fulfilling the right to an adequate standard of living.⁴⁵ The act empowers the chief executive to administer public housing,⁴⁶ with tenancies covered by the *Residential Tenancies and Rooming Accommodation Act 2008* (Qld).⁴⁷ The chief problem with the current system is that it largely fails to treat the public housing provider as a

³⁴ Ibid.

³⁵ Ibid.

³⁶ Australian Bureau of Statistics, above n 4.

³⁷ Australian Human Rights Commission, above n 6.

³⁸ Tamara Walsh, 'Poverty, Police and the Offence of Public Nuisance' (2008) 20(2) *Bond Law Review* 198.

³⁹ Ibid.

⁴⁰ Ibid; *Summary Offences Act 2005* (Qld) s 6.

⁴¹ *Summary Offences Act 2005* (Qld) s 6(2)(b).

⁴² *Summary Offences Act 2005* (Qld) sub-s 6(4).

⁴³ Walsh, above n 38.

⁴⁴ Australian Human Rights Commission, 'Homelessness is a Human Rights Issue' (2008) 6.1
<<https://www.humanrights.gov.au/our-work/rights-and-freedoms/publications/homelessness-human-rights-issue>>

⁴⁵ Bell, above n 15, 1.

⁴⁶ *Housing Act 2003* (Qld) s 11.

⁴⁷ *Residential Tenancies and Rooming Accommodation Act 2008* (Qld).

public authority that has human rights obligations, and does not treat the tenant as an individual who possesses human rights.⁴⁸ It should be noted that there is some degree of protection. Eviction is subject to notice and due procedure, and requires an order from the Queensland Civil and Administrative Tribunal.⁴⁹ The order sought is subject to certain protective discretions which allow human rights to be taken into account indirectly in some circumstances.⁵⁰ However, the limited scope of this disparate and restricted approach leaves a lot to be desired.⁵¹ The act allows a notice to vacate to be given without reason.⁵² Unless the tenant proves such an act is retaliatory the tribunal must only be satisfied that it is 'appropriate' to make the order.⁵³ This piecemeal and limited approach to human rights protection for public housing tenants is at odds with our international obligations.⁵⁴

Analysis

A Queensland human rights act is a viable solution to many of these problems. Anti-poverty efforts, according UN Committee on Economic and Social Rights, are 'more likely to be effective, sustainable, inclusive, equitable and meaningful to those living in poverty if they are based upon international human rights'.⁵⁵ The Australian Human Rights Commission confirmed this view in its submissions to the inquiry into national homelessness legislation, finding that a human rights based approach would be 'the most effective means of helping 'break the cycle' of homelessness'.⁵⁶ This is because human rights give people the freedom to develop their inherent capabilities.⁵⁷ Having clear legislative protections will mean that more people are confident and aware of their rights. It will ensure that at every phase of the process of governance, from the drafting of legislation to service delivery, and the administration of justice, the values of empowerment, dignity, and equality will take center stage.⁵⁸ This will also see Queensland doing its part in meeting Australia's international treaty obligations.⁵⁹ By creating a human rights act analogous to the ACT the state can recognise the inherent worth of each individual, no matter their personal situation, as a bearer of human rights, and human dignity.⁶⁰

⁴⁸ Bell, above n 15, 35.

⁴⁹ Ibid, 36.

⁵⁰ Ibid, 36.

⁵¹ Ibid, 36.

⁵² Ibid, 36.

⁵³ *Residential Tenancies and Rooming Accommodation Act 2008* (Qld) s 291(3), 292, 341(2).

⁵⁴ Bell, above n15, 37.

⁵⁵ UN Committee on Economic and Social Rights, *Substantive Issues arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: Poverty and the International Covenant on Economic, Social and Cultural Rights*, UN Doc E/C.12/2001/10 (10 May 2001), [13] <www2.ohchr.org/english/bodies/cescr/docs/statements/E.C.12.2001.10Poverty-2001.pdf>.

⁵⁶ Australian Human Rights Commission, above n 6, [46].

⁵⁷ Bell, above n 15, 4.

⁵⁸ Australian Human Rights Commission, above n 6, [36].

⁵⁹ *International Covenant on Economic, Social, and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 2.

⁶⁰ Bell, above n 15, 39.

Reference List

Charter of Human Rights and Responsibilities Act 2006 (Vic)

Housing Act 2003 (Qld)

Human Rights Act 2004 (ACT)

Residential Tenancies and Rooming Accommodation Act 2008 (Qld).

Summary Offences Act 2005 (Qld)

International Covenant on Civil and Political Rights, signed 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

International Covenant on Economic, Social, and Cultural Rights, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

Canberra Fathers and Children Services Inc v Michael Watson [2010] ACAT 74.

Metro West v Sudi [2009] VCAT 2025

Patrick's Case [2011] VSC 327

Australian Bureau of Statistics, *Census of Population and Housing: Estimating Homelessness* (No 2049.0, 14 March 2018) <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/2049.0>>

Australian Human Rights Commission, 'Homelessness is a Human Rights Issue' (2008) <<https://www.humanrights.gov.au/our-work/rights-and-freedoms/publications/homelessness-human-rights-issue>>

Australian Human Rights Commission, Submission No 90 to the House of Representative Standing Committee on Family, Community, Housing and Youth, *Inquiry into national homelessness legislation*, 1 September 2009, 8-9.

Department of Housing and Public Works, Queensland Government, *Partnering for impact to reduce homelessness in Queensland* (2017) 2.

Homelessness Australia, *Homelessness in Queensland*, <<https://www.homelessnessaustralia.org.au/fact-sheets>>.

Justice Kevin Bell, 'Protecting public housing tenants in Australia from forced eviction: the fundamental importance of the human right to adequate housing and home' (Speech delivered at the Costello Lecture, Monash University, 18 September 2012) <<http://www.nwhn.net.au/admin/file/content2/c7/Justice%20Kevin%20Bell%20-%20Costello%20Lecture%20-%20September%202012.pdf>>

Tamara Walsh, 'Poverty, Police and the Offence of Public Nuisance' (2008) 20(2) *Bond Law Review* 198.

UN Committee on Economic and Social Rights, *Substantive Issues arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights: Poverty and the International Covenant on Economic, Social and Cultural Rights*, UN Doc E/C.12/2001/10 (10 May 2001) <www2.ohchr.org/english/bodies/cescr/docs/statements/E.C.12.2001.10Poverty-2001.pdf>.

UN Human Rights Committee, *General Comment No 31: Nature of the General Legal Obligation Imposed on State Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add.13 (29 March 2004) [13]

Universal Declaration of Human Rights, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) art 25(1).

The State of Domestic and Family Violence as a Human Rights Violation in Queensland

Anna Stirling

Domestic violence as a human rights issue

Domestic and family violence is the abusive or violent behavior of one person that is experienced in an intimate or family relationship or informal care in order to coerce, control and maintain power over another person.⁶¹ As highlighted in the *Domestic and Family Violence Prevention Strategy 2016-2026* released by the Queensland Government, 1 in 6 Australian women and 1 in 19 Australian men have experienced abuse from a current or former partner that is of a physical nature.⁶² The *National Plan to Reduce Violence Against Women and their Children 2010-2022* further notes that domestic and family violence is one of the two major types of violence perpetrated against Australian women, with sexual assault being the other.⁶³ The *United Nations Declaration on the Elimination of Violence Against Women in December 1993* recognises that the eradication of violence perpetrated against women must be prioritised so that women can experience the entire benefit of the rights outlined in the United Nation's *Universal Declaration of Human Rights*.⁶⁴

Indeed, domestic and family violence violates a number of fundamental human rights. As outlined in Articles 5 and 3 of the *Universal Declaration of Human Rights*, two elementary and essential human rights are freedom from violence, including physical, sexual and emotional violence, and the right to 'liberty and security of person'.⁶⁵ This has also been recognised in numerous agreements concerning the protection of human rights including the *International Covenant on Civil and Political Rights*, the *Convention on the Rights of the Child*, the *Convention on the Rights of Persons with Disabilities* and the *Convention on the Elimination of all Forms of Discrimination against Women*.⁶⁶ Further rights that are infringed upon through domestic and family violence are the right to life, freedom from punishment or treatment that is cruel or degrading, to obtain an education and decent work, to hold and express opinions freely and without interference, to attain the highest possible level of physical and mental wellbeing and health and the right for children to experience leisure and play.⁶⁷

The United Nations Human Rights Office of the High Commissioner expresses that under international law, States assume the mandatory duty to fulfill and promote human rights, with an obligation to protect the individual and collective from abuse of their human rights.⁶⁸ States therefore have a responsibility to take active and positive steps towards the facilitation and enjoyment of these fundamental rights and must/should abstain from actions that will impede upon the fulfillment of human rights.

⁶¹ Parliament of Queensland, *Domestic and Family Violence Prevention Strategy 2016-2026* 1.

⁶² Parliament of Queensland, *Domestic and Family Violence Prevention Strategy 2016-2026*.

⁶³ Council of Australian Governments, *The National Plan to Reduce Violence against Women and their Children 2010-2022* (2011) 1.

⁶⁴ United Nations General Assembly, *Declaration on the Elimination of Violence against Women* (1993).

⁶⁵ United Nations General Assembly, *Universal Declaration of Human Rights* (1948).

⁶⁶ Australian Human Rights Commission, *Why is domestic violence a human rights issue?* <<https://www.humanrights.gov.au/our-work/family-and-domestic-violence/why-domestic-violence-human-rights-issue>>.

⁶⁷ *Ibid.*

⁶⁸ United Nations Human Rights Office of the High Commissioner, *Your Human Rights* <[website](#)>.

Legislative human rights protections against domestic and family violence in other jurisdictions

The state of Victoria (VIC) and the Australian Capital Territory (ACT) have each enacted an individual Charter of Human Rights, otherwise known as a 'Human Rights Act'.⁶⁹ These are titled the *Charter of Human Rights and Responsibilities 2006* (VIC) and the *Human Rights Act 2004* (ACT).⁷⁰ The Tasmanian and Western Australian governments authorised public consultation exercises in 2006 and 2007 with the aim of achieving a similar formation/creation/enactment of human rights legislation, however, to date this has not yet been accomplished.⁷¹ Both the *Charter of Human Rights and Responsibilities 2006* (VIC) and the *Human Rights Act 2004* (ACT) contain sections that act as protective measures against domestic and family violence. Sections 9 and 10 of both Acts address the fundamental rights to life and the 'protection from torture and cruel, inhuman or degrading treatment' and sections 17 of the *Charter of Human Rights and Responsibilities 2006* (VIC)⁷² and 11 of the *Human Rights Act 2004* (ACT)⁷³ address the 'protection of families and children'.

Regarding legislative human rights protections against domestic violence on a nation-wide level, there is no national Charter of Human Rights. However, the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), acted to establish a new Parliamentary Joint Committee to focus on the subject of Human Rights and created a requirement for all new Bills introduced into Parliament to have an attached statement assessing its level of compatibility with human rights.⁷⁴ However, this 'statement of compatibility' does not carry as much weight as a Human Rights Act would in ensuring that human rights are upheld in legislative decisions. This is due to the fact that this aforementioned statement is not binding in courts or tribunals and that enacted Bills that have not complied with the requirements of the 'statement of compatibility' will still be entirely valid and endorsed.⁷⁵

The face of domestic violence in Queensland

There are certain groups of people in Queensland that can be noted to be particularly affected by domestic and family violence; these being women, Indigenous communities, migrants and refugees, the elderly and individuals living in prison and with disabilities. Contributing factors to violence in Queensland include past trauma, poverty, substance abuse, unemployment, ill-health, language difficulties/obstacles/hindrances/in-proficiency, social isolation and limited responsive services and education regarding Queensland's domestic and family violence laws.⁷⁶

⁶⁹ UNSW Sydney, Gilbert and Tobin Centre of Public Law, *Charters of Human Rights in Australia: An Overview* <<http://www.gtcentre.unsw.edu.au/node/3070>>.

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² *Charter of Human Rights and Responsibilities 2006* (VIC).

⁷³ *Human Rights Act 2004* (ACT).

⁷⁴ *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

⁷⁵ UNSW Sydney, Gilbert and Tobin Centre of Public Law, *Charters of Human Rights in Australia: An Overview* <<http://www.gtcentre.unsw.edu.au/node/3070>>.

⁷⁶ Parliament of Queensland, *Domestic and Family Violence Prevention Strategy 2016-2026*.

The current Queensland Courts' statistics on domestic and family violence reveal that 27,983 'initiating' (new) domestic violence protection orders (DVOs) were lodged in 2017-18 in Queensland, compared to 32,072 in 2016-17 and 32,252 in 2015-16.⁷⁷ Here, out of the total 27,983 initiating applications from 2017-18 20,764 (84.2%) were female, 7,187 (25.68%) were male and 32 were unknown (0.11%); 20,802 of the total applications (74.34%) were from intimate personal relationships, 7,101 (25.38%) were from family, and 80 (0.29%) were from informal care.⁷⁸ The Queensland city of Southport has consistently had the highest amount of DVO initiating applications in the past few years, peaking at 3,515 in 2015-16, then dropping by 4.81% to 3,346 in 2016-17 and then decreasing again to 2,663 in 2017-18.⁷⁹ The second and third highest Queensland cities for DVO initiating applications are Beenleigh and Ipswich, and the three lowest are Mt Isa, Sandgate and Gladstone. It can be noted that 13 out of the 20 Queensland cities experienced a decrease in DVO applications from 2015-16 to 2016-17.⁸⁰ The *Domestic and Family Violence Prevention Strategy 2016-2026* released by the Queensland Government revealed that 1 in 6 Australian women and 1 in 19 Australian men have experienced abuse from a current or former partner that is of a physical nature.⁸¹ Further, from 2014-15, the Queensland police received reports of 71,775 domestic violence incidents, which cost an estimated 2.7 to 3.2 billion dollars to the state economy.⁸²

The report released in 2015 by the 'Special Taskforce on Domestic and Family Violence' titled *Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland* revealed that Aboriginals and Torres Strait Islanders suffer from disproportionately high rates of domestic violence.⁸³ Compared to the general female populace in Queensland, an Aboriginal and Torres Strait Islander woman has a 35 times higher chance of being hospitalized for domestic assault.⁸⁴ In turn, this has resulted in devastating effects on especially women and children's wellbeing, mental and bodily health. The effects of this abuse has also contributed to the high levels of poverty, homelessness and lack of education amongst Aboriginal and Torres Strait Islander communities.⁸⁵ The aforementioned *Domestic and Family Violence Prevention Strategy* by the Queensland Government also notes that the elderly are more susceptible to violence as a result of their vulnerability and dependence on others, and includes psychological, financial and physical abuse and isolation.⁸⁶ Further, the vulnerability that arises from having a disability means that those with disabilities experience higher rates of domestic and family violence, with women more likely to suffer sexual abuse. Their dependence on others for seeking assistance is a further barrier to achieving help from support services.⁸⁷

⁷⁷ Queensland Courts, *Queensland Courts' domestic and family violence (DFV) statistics* (14 June 2018) <<http://www.courts.qld.gov.au/court-users/researchers-and-public/stats>>.

⁷⁸ Ibid.

⁷⁹ Ibid.

⁸⁰ Ibid.

⁸¹ Parliament of Queensland, *Domestic and Family Violence Prevention Strategy 2016-2026*.

⁸² Ibid.

⁸³ Queensland Government, *Domestic and Family Violence Taskforce* <<https://www.datsip.qld.gov.au/programs-initiatives/domestic-family-violence-taskforce>>.

⁸⁴ Ibid.

⁸⁵ Ibid.

⁸⁶ Parliament of Queensland, *Domestic and Family Violence Prevention Strategy 2016-2026*.

⁸⁷ Ibid.

The current laws and areas requiring reform

As of 30 May 2017, the amendments to the *Domestic and Family Violence Protection Act 2012 (Qld)* ('Act') came into effect to assist victims of domestic and family violence by improving the protection and safety of victims.⁸⁸ The *Domestic and Family Violence Protection and Other Legislation Bill 2016 (Qld)* ('Bill') contained new provisions intended to facilitate safer processes and treatment of victims. The amendments to the Act allow a police protection notice to be issued with less restrictions and in more circumstances (clauses 19, 24 and 26 of the Bill and sections 101, 112 and 107B of the Act) and broaden the powers of the court regarding protection orders (clauses 7, 17 and 53 of the Bill and sections 31, 57, 58, 97 of the Act).⁸⁹ This includes the recognition in other states of protection orders issued in Queensland without the victims having to register the orders in the courts. Furthermore, as of 1 December 2015, criminal actions that happen in the area of DFV that are flagged can be recorded by notation as per the *Penalties and Sentences Act 1992*.⁹⁰ This allows unlawful behavior to be clearly brought to the attention of police officers and courts. As of 5 May 2016, non-fatal strangulation in a domestic environment is a 'stand-alone offence under (s315A of) the *Criminal Code 1899*, with a maximum penalty of 7 years imprisonment'.⁹¹

To further protect domestic and family violence victims, a reform needs to be made regarding the current tenancy law. In Queensland a victim must go through a tribunal or court to receive an order to terminate their property lease.⁹² If their lease agreement is terminated before the end of the contract without an appropriate order, the victim is potentially liable to their landlord for compensation and risks being cited on the databases for private tenants as an unsuitable tenant.⁹³ In the *Residential Tenancies and Rooming Accommodation Act 2008 (Qld)*, there are no provisions to protect victims who have breached a tenancy agreement from having their details unfairly listed on tenancy databases, despite if the breach can be ascribed to the perpetrator.⁹⁴ Stricter regulations are required for the listing of information on sites, not just to make a means for removal.

The 2010-2022 *National Plan to Reduce Violence Against Women and their Children* addresses violence and sexual assault in the domestic and family realm through establishing 6 outcomes for the nation to achieve over a period of 12 years. This plan includes prevention measures and also a community response to support victims to reestablish their lives.⁹⁵ The strategy references the Council of Australian Governments (COAG), who have agreed upon a 'national domestic violence order scheme' in which 'domestic violence orders will be automatically recognised and enforceable in any state or territory of Australia'.⁹⁶ The COAG are working towards creating a nationwide system to share

⁸⁸ Miller Harris Lawyers, *Queensland Government reforms to domestic violence laws to increase victim protection* (18 July 2017) <<http://www.millerharris.com.au/news/queensland-government-reforms-domestic-violence-laws-increase-victim-protection/>>.

⁸⁹ Ibid.

⁹⁰ Queensland Courts, *Queensland Courts' domestic and family violence (DFV) statistics* (14 June 2018) <<http://www.courts.qld.gov.au/court-users/researchers-and-public/stats>>.

⁹¹ Ibid.

⁹² Bianca Fernandez, *Tenancy law reform urgently required to help domestic and family violence victims*, ABC News (6 January 2018) <<http://www.abc.net.au/news/2018-01-06/domestic-violence-tenancy-laws-trapping-women/9259566>>.

⁹³ Ibid.

⁹⁴ *Residential Tenancies and Rooming Accommodation Act 2008 (Qld)*.

⁹⁵ Parliament of Queensland, *Domestic and Family Violence Prevention Strategy 2016-2026*.

⁹⁶ Ibid.

information amongst the courts and police of different states concerning active domestic violence orders. This has the purpose of holding all perpetrators accountable to the same standard nationwide. The report further highlights that reform is required to address the issue of the utilization and application of technology to violate and abuse women, in order to ensure that there are appropriate legal protections concerning this violation of human rights.⁹⁷ Reform is also required to improve and expand upon the responses of services towards children and their families impacted by domestic and family violence is necessary and is an area of focus for Queensland's Child and Family Reform.⁹⁸ It is necessary for domestic violence reforms to further align with the interests of children in a situation of family violence due to the interconnectedness and correlation between family violence and child harm. Further, stricter laws are required regarding domestic and family violence as well as appropriate services to facilitate the reform process for perpetrators.⁹⁹ It is needed for the legal system to become more effective through increased efficiency, support and coordination to ensure that it is fair and safe. A stronger response from the justice system that will uphold the safety of victims, whilst taking into response the trauma that they suffer from. Systems also need to be further developed so that perpetrators are given appropriate sanctions to help prevent further violence.¹⁰⁰

⁹⁷ Ibid.

⁹⁸ Ibid.

⁹⁹ Ibid.

¹⁰⁰ Ibid.

The *Second Action Plan of the Domestic and Family Violence Prevention Strategy 2016-17 to 2018-19* highlights a number of steps that need to be taken to achieve the creation of a stronger system of justice in Queensland.¹⁰¹ These can be seen in the tables below.

The table below outlines the actions that will contribute to achieving **Foundational element 3: A stronger justice system response that will prioritise victim safety and hold perpetrators to account.**

WHAT WE WILL DO	LEAD AGENCY	OUTCOME NO.	REC NO.
Pilot a new intervention model for fathers who expose their children to domestic and family violence in Mount Isa, Sunshine Coast and Moreton Bay areas.	Department of Communities, Child Safety and Disability Services	6 7	80
Expand the number of perpetrator intervention services to increase their capacity to respond to more perpetrators, and engage new services where there are identified gaps (including where high risk teams are being rolled out as part of an integrated service response to domestic and family violence).	Department of Communities, Child Safety and Disability Services	6 7	80, 83
Review and update the Professional Practice Standards: Working with men who perpetrate domestic and family violence, broadening the scope to include individual counselling, culturally appropriate approaches to Aboriginal and Torres Strait Islander clients, young offenders and provision of information to respondents appearing at court.	Department of Communities, Child Safety and Disability Services	6 7	82
Develop a quality assurance framework and audit process to ensure ongoing compliance with the Professional Practice Standards for working with perpetrators of domestic and family violence.	Department of Communities, Child Safety and Disability Services	6 7	82
Introduce legislation to give effect to the National Domestic Violence Order Scheme and continue to actively support the work of CrimTrac in developing and implementing the (short and long-term) supporting information sharing system.	Department of Justice and Attorney-General	6	90, 112
including communications focusing on Queensland's Aboriginal and Torres Strait Islander peoples and diverse communities.			

Figure 1: Action Plan Response by the Queensland Government to Domestic and Family Violence. Accessed from <<https://www.csyw.qld.gov.au/resources/gateway/campaigns/end-violence/dfv-second-action-plan.pdf>>.

¹⁰¹ Queensland Government, *Second Action Plan of the Domestic and Family Violence Prevention Strategy 2016-17 to 2018-19*.

WHAT WE WILL DO	LEAD AGENCY	OUTCOME NO.	REC NO.
Work with community justice groups in discrete communities to develop and maintain culturally appropriate domestic and family violence justice and service responses in each community. Engage with community justice groups in each community to build local authority structures.	Department of Justice and Attorney-General	6 7	92
Subject to the results of the independent evaluation of the Southport specialist domestic and family violence court trial, the Queensland Government will invest in the specialist domestic and family violence court program prioritising high needs locations. The evaluation will inform government on best practice elements for the specialist domestic and family violence court approach. We will undertake work on how to achieve a specialist approach for rural and remote areas.	Department of Justice and Attorney-General	6 7	96, 97, 98, 100
Advice from the Law Council of Australia regarding a national approach to extending the safeguards applying to victims of sexual assault to alleged victims of domestic and family violence, will be considered, and if not supported, relevant Queensland bodies will be asked to consider this reform.	Department of Justice and Attorney-General	7	111
Refine further relevant policies and guidelines in accordance with the revised Queensland Language Services Guidelines to strengthen engagement of interpreters in domestic and family violence occurrences.	Queensland Police Service	6 7	113
Continue to identify opportunities to streamline systems for engagement of interpreters for civil domestic and family violence court proceedings.	Department of Justice and Attorney-General	7	116
Consider strategies to increase perpetrators' participation in intervention programs as part of the development of integrated service response pilots.	Department of Justice and Attorney-General	6	122
Conduct research on options to monitor high-risk perpetrators of domestic and family violence.	Department of Justice and Attorney-General	6	123
Continue to fund non-government organisations to provide court based assistance and support.	Department of Communities, Child Safety and Disability Services	7	124

Figure 2: Action Plan Response by the Queensland Government to Domestic and Family Violence. Accessed from <<https://www.csyw.qld.gov.au/resources/gateway/campaigns/end-violence/dfv-second-action-plan.pdf>>.

WHAT WE WILL DO	LEAD AGENCY	OUTCOME NO.	REC NO.
Develop formal position descriptions for court support workers and information/liaison officers to support people through domestic and family violence proceedings.	Department of Communities, Child Safety and Disability Services	6 7	125
Introduce legislation to create a Sexual Assault Counselling Privilege and, subject to the passage of legislation, establish a supporting legal assistance service.	Department of Justice and Attorney-General	7	130
Implement legislative amendments related to domestic and family violence that enhance the investigative and evidence-gathering capabilities available to the Queensland Police Service.	Queensland Police Service	6 7	131
Lead the coordination of improved justice supports for victims of domestic and family violence in criminal proceedings through incremental and continuous improvement as part of the integrated response pilots.	Department of Justice and Attorney-General	7	132
Consider whether there should be a process to allow the use of video-recorded police interviews as the evidence of victims of domestic violence in criminal matters.	Department of Justice and Attorney-General	7	133
Continue to develop and refine operational policy and procedures to ensure the safety of the victim is prioritised and perpetrators of domestic and family violence are held to account for their actions.	Queensland Police Service	6 7	134, 86(b)
Build capacity in the Domestic and Family Violence Coordinator Network by engaging a mix of resources to support the delivery of integrated domestic and family violence services to the community.	Queensland Police Service	6 7	135
Develop and further refine police-administered training packages related to domestic and family violence delivered to frontline police officers and civilians working in a community contact role, based on the outcomes from the external independent audit of domestic and family violence training products.	Queensland Police Service	6 7	138
Consider relevant recommendations in the final Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems Report by the Family Law Council.	Department of Justice and Attorney-General	7	139

Figure 3: Action Plan Response by the Queensland Government to Domestic and Family Violence. Accessed from

WHAT WE WILL DO	LEAD AGENCY	OUTCOME NO.	REC NO.
The Domestic and Family Violence Death Review Board to report to the Domestic and Family Violence Implementation Council on any findings or recommendations.	Department of Justice and Attorney-General	7	Enabling action
Use the Queensland Police Service State Domestic and Family Violence Coordinator role to affect and shape the future direction of the Queensland Police Service in Queensland in line with the Domestic and Family Violence Prevention Strategy.	Queensland Police Service	7	Enabling action
Use the Queensland Police Service State Domestic and Family Violence Coordinator role as an advocate for the Domestic and Family Violence Coordinator Network by providing leadership and guidance, and facilitating opportunities where the network is able to contribute to shaping the future direction of domestic and family violence policing.	Queensland Police Service	7	Enabling action
Implement the National Outcome Standards for Perpetrator Interventions.	Department of Communities, Child Safety and Disability Services	7	Enabling action

Figure 4: Action Plan Response by the Queensland Government to Domestic and Family Violence. Accessed from

<https://www.csyw.qld.gov.au/resources/gateway/campaigns/end-violence/dfv-second-action-plan.pdf>.

What difference would a Queensland Human Rights Act make?

A Human Rights Act in Queensland is essential for the clear and coherent expression of our intrinsic and foundational human rights compiled into one document, of which the Queensland government will have a legal duty to comply.¹⁰² This will increase and enhance the government's accountability and transparency towards the public in its decisions and policy making. The Act will create an obligation for the Queensland government and all public authorities including the Queensland Police, public servants and local councils to consider and comply with human rights in their policy, law and decision making and performance of services.¹⁰³ The Human Rights Act would be referenced and referred to in the making of all new laws to ensure their compatibility with the Act. This will help to prevent possible future difficulties from arising that concern unjust and inconsistent policies and violations/infringements of human rights in Queensland. It would also provide the opportunity for members of the public to pose a human rights argument to the appropriate governing body.¹⁰⁴

Further, the enactment of a Human Rights Act in Queensland would signify a long-term commitment from the government and will enact positive change to achieve the eradication of violence in our communities; and would demonstrate strong leadership in doing so.¹⁰⁵ This is a prevalent issue in Queensland society, which requires more awareness to be raised and a change of behavior and attitudes. Prioritising this issue not only is a platform to recognise the inherent human rights of Queensland citizens, but will substantially contribute to creating safer communities and homes that are free of/from abuse and violence, which will subsequently benefit our economy and workplaces, whilst reducing deaths, homicides and instances of violence related hospitalisations.¹⁰⁶ This will result in the state of Queensland being a safer place through the improvement of living conditions, wellbeing and health.

¹⁰² Victorian Equal Opportunity and Human Rights Commission, *Victoria's Charter of Human Rights and Responsibilities* <<https://www.humanrightscommission.vic.gov.au/human-rights/the-charter#what-are-the-benefits-of-having-the-charter>>.

¹⁰³ Ibid.

¹⁰⁴ Ibid.

¹⁰⁵ Parliament of Queensland, *Domestic and Family Violence Prevention Strategy 2016-2026*.

¹⁰⁶ Ibid.

The State of the Right to Health Services in Queensland

Anna Stirling

Health as a human rights issue

The right to health is recognised internationally as a fundamental human right, with every State worldwide having ratified at least one international treaty that contains an expression of the right to health.¹⁰⁷ Indeed, numerous human rights treaties have given expression to this right.¹⁰⁸ The Constitution of the World Health Organisation (WHO) in 1946 expressed that *'the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition'*.¹⁰⁹ Further, Article 12(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1966 expresses that *'The State Parties to the present Covenant recognise the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.'* Additionally/moreover, Article 25(1) of the Universal Declaration of Human Rights (UDHR) in 1948 states that *'everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care'*.¹¹⁰ Australia has recognised this right to health by signing and ratifying the WHO Constitution,¹¹¹ the ICESCR¹¹² and by voting in favour for the UDHR¹¹³, and is therefore required by international law to comply to the principles of these documents regarding health protection.¹¹⁴

Health is defined in the WHO Constitution as *'a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity'*.¹¹⁵ There are multiple aspects to the right to health, as it is an inclusive right which contains freedoms and entitlements. It includes a broad array of factors that are seen to be fundamental for the achievement of a healthy life – with factors including access to safe drinking water and food, freedoms such as the right to be free from torture or non-consensual medical treatment, and entitlements

¹⁰⁷ OHCHR and WHO, *The Right to Health, Fact Sheet No. 31* (2008) 1.

¹⁰⁸ *Ibid.*

¹⁰⁹ WHO, *Constitution of the World Health Organisation* (1946) 1.

¹¹⁰ *Universal Declaration of Human Rights*, GA Res 217A (III), UNA GAOR, UN Doc A/810 (10 December 1948) art 25(1).

¹¹¹ United Nations, 'Chapter IX' *United Nations Treaty Collection* (Web Page, status as at 15 November 2018) <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IX-1&chapter=9&clang=en>.

¹¹² United Nations, 'Chapter IV' *United Nations Treaty Collection* (Web Page, status as at 15 November 2018) <https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtdsg_no=iv-3&chapter=4&clang=en>.

¹¹³ Parliament of Australia, '2. International Human Rights Law' *Parliament of Australia* (Web Page, n.d.) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Foreign_Affairs_Defence_and_Trade/Freedomofreligion/Interim_Report/section?id=committees%2Freportjnt%2F024110%2F25199>.

¹¹⁴ Katie Jukes, 'There Is A Human Right To Health, And This Is How It Works', *Human Rights News, Views & Info* (Web Page, 7 April 2016) <<https://rightsinfo.org/is-there-a-right-to-health/>>.

¹¹⁵ WHO, *Constitution of the World Health Organisation* (1946) 1.

such as access to essential medicines and the right to treatment of diseases.¹¹⁶ A key human rights principle that is applicable to the right to health is the necessary adherence to non-discriminatory principles, meaning that health services and facilities must be sufficiently available and accessible to all without discrimination.¹¹⁷ Further, the right to health is not an immediately realisable right (like the right to be free from torture), but is a 'progressively realisable' right, meaning that Australia is obligated to take proactive steps to see its achievement.¹¹⁸ Broadly, States have three types of obligations to ensure the fulfillment of the right to health. These include the obligation to respect (by refraining from direct or indirect interference with the right), to protect (by preventing the interference of third parties with the right), and to fulfil (by adopting appropriate measures to ensure the full realisation of the right).¹¹⁹

Legislative right to health services in other jurisdictions

The state of Victoria (VIC) and the Australian Capital Territory (ACT) have each enacted human rights legislation, titled the *Charter of Human Rights and Responsibilities 2006* (VIC) and the *Human Rights Act 2004* (ACT).¹²⁰ However, it can be seen that these Charters do not contain a general provision expressing the internationally recognised human right of the right to health, and therefore cannot be examined to provide an assessment of the legislative right to health services in their relevant jurisdictions, as well as a discussion concerning the effects of such a provision.¹²¹ Therefore, Section 37 (titled 'Right to health services') of the *Human Rights Bill 2018* is an unprecedented provision where human rights legislation is concerned within Australia.

Regarding legislative human rights protections against violations of the right to health on a nation-wide level, there is no national Charter of Human Rights. However, as mentioned previously, Australia is a party to several fundamental human rights treaties on an international level, of which/ and from these the right to health is mentioned in article 12(1) of the ICESCR, article 5(iv) of the Convention on the Elimination of All Forms of Racial Discrimination, articles 24-25 of the Convention of the Rights of the Child, articles 10(h), 11(1)(f), 12, 14(2)(b) and 16(1)(e) of the Convention on the Elimination of All Forms of Discrimination Against Women, and articles 23(1)(c) and 25 of the Convention on the Rights of Persons with Disabilities.¹²²

It can be seen that the right to health is protected in a range of Commonwealth laws, including the *Health Insurance Act 1973* (by laying the foundation for Medicare support), the *National Health Act 1953* (by making provision for medical, dental, hospital, pharmaceutical and sickness benefits and provisions and for the

¹¹⁶ OHCHR and WHO (n 1) 3.

¹¹⁷ Ibid 4.

¹¹⁸ Jukes (n 8).

¹¹⁹ OHCHR and WHO, *The Right to Health, Fact Sheet No. 31* (2008) 25-27

¹²⁰ UNSW Sydney, Gilbert and Tobin Centre of Public Law, *Charters of Human Rights in Australia: An Overview* <<http://www.gtcentre.unsw.edu.au/node/3070>>.

¹²¹ *Human Rights Act 2004* (ACT); *Charter of Human Rights and Responsibilities Act 2006* (VIC).

¹²² Australian Government Attorney-General's Department, 'Right to health', *Australian Government Attorney-General's Department* (Web Page, n.d.) <<https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/PublicSectorGuidanceSheets/Pages/Righttohealth.aspx>>.

operation of aged care homes), the *Aged Care Act 1997* (with provisions to promote high quality aged care services to protect the health of the elderly), the *Disability Services Act 1986* (with provisions to ensure the wellbeing of the disabled), the *Veterans' Entitlements Act 1986* and the *Military Rehabilitation and Compensation Act 2004* (with provisions for the health treatment of eligible veterans, current and former Defence Force members and their dependants), and the *Australian Institute of Health and Welfare Act 1987* (which established the Australian Institute of Health and Welfare and contains provisions to improve the health of Australians through collecting and providing data and statistics).¹²³

Certain Australian cases have further established the right to health in the common law. *Castles v Secretary of Dept of Justice*¹²⁴ allowed a female prisoner to access IVF treatment whilst imprisoned for the preservation of her reproductive health. In *Nursing and Midwifery Board of Australia v Roe*¹²⁵ a nurse health practitioner was convicted of professional misconduct and was reprimanded, issued a fine, and disqualified from applying to be registered for 12 months. Further, *PBU & NJE v Mental Health Tribunal*¹²⁶ addressed the case of whether two patients that were mentally unwell were unable to give informed consent about their treatment and subsequently whether they should be compulsorily subjected to electroconvulsive treatment (ECT). It held that the previous determination to administer ECT was incompatible with the human right to self-determination and that the two patients were able of giving informed consent. (Note: under the *Mental Health Act 2014 (Vic)*, unless the Mental Health Tribunal or (upon review) the Victorian Civil and Administrative Tribunal is satisfied that a patient is unable to give informed consent, the choice of a compulsory patient to not undergo electroconvulsive treatment legally has to be adhered to).¹²⁷

Unlike Australia, New Zealand (NZ) has human rights legislation at a national level, with the *Human Rights Act 1993 (NZ)* and the *New Zealand Bill of Rights Act 1990 (NZ)*, however, these pieces of legislation do not contain a provision explicitly expressing the human right to health.¹²⁸ Though, health protections are ensured by the *New Zealand Bill of Rights Act 1990*, through its provision of the right to be free from discrimination, refuse medical treatment and to not be subjected to scientific or medical experimentation.¹²⁹

Like Australia, NZ has ratified the ICESCR, and as a result has enacted various pieces of legislation to comply with its obligation to ensure the progressive realisation of the right to health.¹³⁰ These following Acts of Parliament directly relate to the provision of health services and include the *New Zealand Public Health and Disability Act 2000*, the *Health and Disability Services (Safety) Act 2001*, the *Health Practitioners Competence Assurance Act*

¹²³ Ibid.

¹²⁴ (2010) 28 VR 141.

¹²⁵ [2018] WASAT 92.

¹²⁶ [2018] VSC 564.

¹²⁷ Ibid [1].

¹²⁸ *Human Rights Act 1993 (NZ)*; *New Zealand Bill of Rights Act 1990 (NZ)*.

¹²⁹ Human Rights Commission (NZ), '11. Right to Health' (Report, 2010) 156
<https://www.hrc.co.nz/files/9714/2388/0506/HRNZ_10_Right_to_health.pdf>.

¹³⁰ Ibid.

2003, and the *Health Act 1956*.¹³¹ Further pieces of legislation that have more specific areas of focus include the *Mental Health (Compulsory Assessment and Treatment) Act 1992*, the *Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003*, and the *Alcoholism and Drug Addiction Act 1966*.¹³²

The United Kingdom (UK) is also a signatory to the ICESCR and is bound to protect and uphold the right to health by international law.¹³³ Regarding domestic law, the UK does not have the right to health explicitly protected within its legislative framework.¹³⁴ However, the *Human Rights Act 1998* (UK) functions to 'give further effect to rights and freedoms guaranteed under the European Convention on Human Rights' (ECHR),¹³⁵ and therefore requires all public authorities to respect the human rights that are outlined in the ECHR.¹³⁶ In turn, this requirement has resulted in an approach to health care in the UK that is increasingly based around human rights, and which places weight upon protecting equality and the vulnerable within society.¹³⁷ Though this acknowledgement of and widespread protection of human rights has for example resulted in (for the most part), patients being able to decide what is within their best interests and the mentally ill being able to retain legally enforceable rights, there is still inconsistency and unequal treatment in the system, with the UK Court of Appeal recently re-affirming the stance of the European Court of Human Rights in the cases of *D v United Kingdom* (1997) 24 EHRR 423 and *N v United Kingdom* [2008] ECHR 453, where it was determined that (excluding exceptional cases), foreign nationals subject to deportation are prohibited from remaining to receive medical assistance if they are suffering from a serious medical condition.¹³⁸

Access to mental health services in Queensland

Queensland Health released an annual report (2017-2018) from the Chief Psychiatrist as per section 307 of the *Mental Health Act 2016* (Qld), titled 'Chief Psychiatrist Annual Report 2017-2018'.¹³⁹ This report highlights the new endeavours that have been undertaken since the commencement of the Act, including training and education for numerous staff in government agencies and the development of resources and information for consumers of mental health services and of extensive policy.¹⁴⁰ Certain key activities and achievements realised by the Office of the Chief Psychiatrist in the reporting period include an allocation of \$9.6 million to the Suicide

¹³¹ Ibid.

¹³² Ibid.

¹³³ Jukes (n 8).

¹³⁴ Ibid.

¹³⁵ *Human Rights Act 1998* (UK) 1.

¹³⁶ Jukes (n 8).

¹³⁷ Ibid.

¹³⁸ Jukes (n 8).

¹³⁹ *Mental Health Act 2016* (Qld) s 307.

¹⁴⁰ John Reilly, *Chief Psychiatrist Annual Report 2017-2018* (Report, September 2018) 2.

Prevention in Health Services Initiative, the training of emergency department clinicians in an area of the 'Suicide Risk Assessment and Management in Emergency Department' training, and current work on a Queensland Health response focusing on early intervention, prevention and monitoring of patients.¹⁴¹ This response will be achieved through and will require '*various initiatives including: building a clinical workforce that is informed and supported by stepped escalation and review processes; the development of specific knowledge and skills and greater engagement, support and safety planning for families and others who may be at risk; and access to specialist support and services to identify, assess and manage violence risk.*'¹⁴²

The need for '*quality assurance oversight and improvement of mental health, alcohol and other drugs service delivery*' was addressed by the establishment of the 'Mental Health, Alcohol and Other Drugs Quality Assurance Committee' in September 2017.¹⁴³ Further needs in the area of access to mental health services in Queensland have been recognised by the 'Mental Health, Alcohol and Other Drugs Statewide Clinical Network', whose priorities from 2017-2018 included '*mental health and alcohol and other drugs service integration; models of care; consumer and carer engagement; recovery-oriented care and least restrictive practice; care planning and supporting the implementation of the Aboriginal and Torres Strait Islander Mental Health Strategy 2016-2021.*'¹⁴⁴ It should be noted that a number of these key objectives were achieved in the reporting period. Another need concerning the safety and quality of delivery of electroconvulsive therapy is currently being addressed by the 'Queensland Electroconvulsive Therapy Committee'.¹⁴⁵ Another factor that needs to be further addressed is the seclusion of mental health patients. In the last six years Queensland Health has greatly lowered the annual rate of seclusion, but this rate, and that of restraint, still needs to be lowered further.¹⁴⁶

Further needs highlighted by the 2016 '*Queensland Health response to the Final Report- When mental health care meets risk: A Queensland sentinel events review into homicide and public sector mental health services*' include the reduction of fatal events involving individuals with mental illnesses and the importance of giving recommendations to aid the strategic directions of the public mental health services.¹⁴⁷ It is noted that the first factor can be improved through refining and enhancing risk assessment and management concerning individuals who have been assessed for their risk of violence due to their mental illness, and also to further engage and

¹⁴¹ Ibid 7-8.

¹⁴² Ibid 8.

¹⁴³ Ibid.

¹⁴⁴ Ibid 9.

¹⁴⁵ Ibid 10.

¹⁴⁶ Ibid 33.

¹⁴⁷ Queensland Health, *Queensland Health response to the Final Report – When mental health care meets risk: A Queensland sentinel events review into homicide and public sector mental health services* (Report, 2016) ii.

support families.¹⁴⁸ This report identified 11 key areas with 63 recommendations and two considerations, all of which have been accepted ‘in-principle’ by Queensland Health.¹⁴⁹

The 11 key areas are as follows: (1) a state-wide forensic mental health service model, (2) family engagement, (3) the consumer journey, (4) consumers with co-morbid conditions, (5) clinical systems and information, (6) key area: building competencies and capabilities, (7) support services and linkages with other agencies, (8) mental health literacy and access, (9) the Queensland Police Service, (10) mental health quality assurance, (11) consideration: Aboriginal and Torres Strait Islander peoples mental health and social and emotional wellbeing.¹⁵⁰

The current laws and areas requiring reform

The *Mental Health Act 2016* (Qld) replaced the *Mental Health Act 2000* (Qld) and commenced on 5 March 2017, and contains updates to improve patient rights and clinical practice, with a key objective being the improvement of the wellbeing and health of individuals who are mentally unwell and void of capacity to consent to treatment.¹⁵¹ Important changes include a new, more relevant and precise definition of the ‘capacity of consent to be treated’, provisions to ensure that patients will better understand oral information from doctors and treaters, safeguards surrounding the use of seclusion, a statement of rights to be prepared by the Chief Psychiatrist, the further establishment of ‘nominated support persons’ and advance health directives, provisions outlining the right of the patient to receive visitors, health practitioners and legal advisors, and the right to communicate with other persons by phone or electronic device.¹⁵² The *Mental Health Amendment Act 2017* amended several sections, including section 32 concerning the powers of the authorised mental health practitioner or the doctor, section 53 concerning the nature and extent of treatment and care, and the insertion of section 167A concerning individuals subject to existing treatment support order.¹⁵³ The changes to the Act are currently being evaluated.¹⁵⁴

De-stigmatisation of mental illnesses is a crucial area that requires reform. In a study by the Mental Health Council of Australia (MHCA) almost 29% percent of mental health patients stated that their health professionals treating them had shunned them, which rose to more than 54% and 57% respectively if the patient had post-

¹⁴⁸ Ibid 1-2.

¹⁴⁹ Ibid 2. Connecting care to recovery: 2016-2021 available at https://www.health.qld.gov.au/__data/assets/pdf_file/0020/465131/connecting-care.pdf

¹⁵⁰ Ibid 18.

¹⁵¹ Queensland Health, ‘Mental Health Act 2016: the important changes that will affect Queenslanders’, *Queensland Government* (Web Page, 23 August 2017) <<https://www.health.qld.gov.au/news-alerts/news/mental-health-act-2016>>.

¹⁵² Ibid.

¹⁵³ *Mental Health Amendment Act 2017* (Qld), 5, 7, 9.

¹⁵⁴ Mental Health Act 2016 Evaluation website - <https://www.health.qld.gov.au/clinical-practice/guidelines-procedures/clinical-staff/mental-health/act/evaluation>

traumatic stress disorder or borderline personality disorder.¹⁵⁵ The study also found that these levels of stigma experienced by the mental health patients surveyed was similar to that experienced amongst the general population. This evident stigmatisation amongst the general population and amongst medical professionals needs to shift to a culture of acceptance and support, for as the report highlighted, such a high level of stigma is a 'substantial risk to the wellbeing of consumers with a mental illness. It is a potential barrier to vital help-seeking from health professionals. It can further exacerbate a consumer's psychological distress and it may reduce career opportunities.'¹⁵⁶ In order for those with mental health issues to admit that they require assistance and to actively seek out help, there needs to be a change of the prevalent attitude in society towards mental health illness.

What difference would a Qld Human Rights Act make?

A Human Rights Act in Queensland will enable the clear and coherent expression of our intrinsic and foundational human rights compiled into one document, of which the Queensland government will have a legal duty to comply.¹⁵⁷ The Act will create an obligation for the Queensland government and all public authorities including the court system, Queensland Police, public servants and local councils to consider and comply with human rights in their policy, law and decision making and performance of services.¹⁵⁸ The Human Rights Act would be referenced and referred to in the making of all new laws to ensure their compatibility with the Act. This will help to prevent possible future difficulties from arising that concern unjust and inconsistent policies and violations/infringements of human rights in Queensland. It would also provide the opportunity for members of the public to pose a human rights argument to the appropriate governing body.¹⁵⁹ It is important that the successes and flaws of the relevant Human Rights Acts in NSW and the ACT be fully examined in order to ensure the success of Human Rights legislation within Queensland.

It is a positive step that Queensland has recognised the inherent right to health in its drafting of a Human Rights Bill. As previously mentioned, this is an unprecedented decision for an Australian state, for the Human Rights Acts in the ACT and VIC do not include the right to health. Though it can be seen that there are many safeguards within national and state legislation and case law to protect the right to health, the inclusion of this right into the Bill of Human Rights will help to ensure its protection, will allow for human rights complaints in this area to be easily made, and will draw further attention to the importance of this right and will ensure that future legislation will not contradict this right.

¹⁵⁵ [Australian Medical Association, 'Mental health stigma' AMA – Australian Medical Association \(16 January 2012\) <https://ama.com.au/ausmed/mental-health-stigma>.](https://ama.com.au/ausmed/mental-health-stigma)

¹⁵⁶ Ibid.

¹⁵⁷ Victorian Equal Opportunity and Human Rights Commission, *Victoria's Charter of Human Rights and Responsibilities* <<https://www.humanrightscommission.vic.gov.au/human-rights/the-charter#what-are-the-benefits-of-having-the-charter>>.

¹⁵⁸ Victorian Equal Opportunity and Human Rights Commission, *Victoria's Charter of Human Rights and Responsibilities* <<https://www.humanrightscommission.vic.gov.au/human-rights/the-charter#what-are-the-benefits-of-having-the-charter>>.

¹⁵⁹ Ibid.

ⁱ Submission 398, April 2016, at p. 1, available at

<https://www.parliament.qld.gov.au/documents/committees/LACSC/2015/14-HumanRights/submissions/398.pdf>

ⁱⁱ "The Dimensions of Rights and their protection by Statute", in Sampford, C. and Galligan, D. (eds) Law Rights and the Welfare State, Croom Helm, London, 1986 and Sampford, C and Galligan, B. (eds) Rethinking Human Rights, Federation Press, Sydney, 1997

ⁱⁱⁱ See: Rachel Dioso-Villa, 'A Repository of Wrongful Convictions in Australia: First Steps toward Estimating Prevalence and Causal Contributing Factors' (2015) 17 Flinders Law Journal 163.

^{iv} James R. Acker, 'The Flipside Injustice of Wrongful Convictions: When the Guilty Go Free' (2012/2013) 76 Albany Law Review 1629, 1632.

^v Criminal Code Act 1899 (QLD).

^{vi} For legislation around Australia, please see: Criminal Code Act 1899 (QLD) s 668E; Criminal Appeal Act 1912 (NSW) s 6; Crime Act 1958 (VIC) s 568; Criminal Law Consolidation Act 1935 (SA) s 353; Criminal Code (NT) s 411; Criminal Code Act 1924 (TAS) s 404(1); Criminal Code Act Compilation Act 1913 (WA) s 687.

^{vii} This test was later affirmed in *Jones v The Queen* (1997) 72 ALJR 78.

^{viii} For example, Criminal Code Act 1899 (QLD) s 668E(1A) states: However, the Court may, notwithstanding that it is of the opinion that the point or points raised by the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

^{ix} See: Commonwealth of Australia Constitution Act (1900) s (73), (75)

^x Per Justice Kirby in: *Re Sinanovic's Application* (2001) HCA 40; (2001) 180 ALR 448 (11 July 2001) (HCA 2001).

^{xi} Attorney-General Vanessa Goodwin, Right to Appeal legislation to be released for consultation in coming weeks (2015) Tasmanian Government

<http://www.premier.tas.gov.au/releases/right_to_appeal_legislation_to_be_released_for_consultation_in_coming_weeks> at 14 September 2016>.

^{xii} See: Criminal Law Consolidation Act 1935 (SA) s 353A(1), (3), available at:

<<http://www.legislation.sa.gov.au/LZ/C/A/CRIMINAL%20LAW%20CONSOLIDATION%20ACT%201935/CURRENT/1935.2252.UN.PDF>>

^{xiii} See: Criminal Code Amendment (Second or Subsequent Appeal for Fresh and Compelling Evidence) Bill 2015 (TAS), available at:

<http://www.justice.tas.gov.au/__data/assets/pdf_file/0015/311262/Criminal_Code_Amendment_Second_or_Subsequent_Appeal_for_Fresh_and_Compelling_Evidence_Bill_2015.pdf>

^{xiv} Policy Statement on a Commonwealth Criminal Cases Review Commission (2012) Law Council of Australia

<<http://www.lawcouncil.asn.au/lawcouncil/index.php/library/policies-and-guidelines>> at 14 September 2016.

^{xv} See: About Us Criminal Cases Review Commission <<http://www.ccrcc.gov.uk/about-us/>> at 14 September 2016.

^{xvi} David Jessel, 'Innocence or safety: Why the wrongly convicted are better served by safety', *The Guardian*, 15 December 2009.

^{xvii} *Ibid* [Recommendations 4 and 5].

^{xviii} *Ibid* p84.

^{xix} Please see: Department of Justice and Attorney-General, Guidelines for applications to the Attorney-General to request post-conviction DNA testing (2010) Queensland Government

<http://www.justice.qld.gov.au/__data/assets/pdf_file/0008/58283/dna-guidelines-august2010.pdf> at 14 September 2016.

^{xx} See further Tamara Walsh and Kathryn Taylor, 'Children with special needs and the right to education', UQ Report, 2015.

^{xxi} See also Fatima Ksentini, Special Rapporteur, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Review of Further Development in fields with which the Sub-Commission has been concerned, Human Rights and the Environment*, E/CN.4/Sub.2/1994/9 (6 July 1994) at pp.7, 22, 31, 36 and 49.

^{xxii} *Case Concerning the Gabcikovo-Nagymaros Project* (Hungary v. Slovakia), 1997 I.C.J. 7, 91-92.

^{xxiii} *Paul & Audrey Edwards v. the United Kingdom*, no. 46477/99, ¶ 54, ECHR 2002-II.

^{xxiv} See Anton & Shelton, *Environmental Protection and Human Rights* (Cambridge University Press, 2011) p 357, n 1 for a voluminous citation to these instruments.

^{xxv} E/CN.4/Sub.2/1990/12, ¶33 and n. 9.

^{xxvi} Ken Saro-Wiwa, *Stand by Me and the Ogoni People*, 10 Earth Island Journal 35 (No. 3, 1995).

^{xxvii} Article 11, Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights, O.A.S.T.S. 69, reprinted in, 28 I.L.M. 156 (1989).

^{xxviii} Article 24, African Charter on Human and Peoples Rights, African Charter on Human and Peoples Rights, OAU Doc. CAB/LEG/67/3 Rev. 5, reprinted in, 21 I.L.M. 58 (1982).

^{xxix} See Boyd, David R. *The Environmental Rights Revolution : A Global Study of Constitutions, Human Rights, and the Environment* (UBC Press, 2012), p 59 and Table 3.2.

^{xxx} On 10 December 2018, the “Hague Principles for a Universal Declaration on Responsibilities for Human Rights and Earth Trusteeship” will be launched at the Earth Trusteeship Forum in the Peace Palace, The Hague, Netherlands, to mark the 70th anniversary of the Universal Declaration of Human Rights. See further https://www.iucn.org/sites/dev/files/invitation_to_eci_to_support_the_hague_principles_.pdf

^{xxxi} <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23881&LangID=E>

^{xxxii} The idea of a rights regime evolved from the concept of an ‘ethics regime’, the initial term which Sampford used to describe the range of legal, institutional and ethics reforms implemented by Queensland following the Fitzgerald Report (an idea picked up by the OECD which renamed it an ‘ethics infrastructure’ and Transparency international which called it an ‘integrity system’).

^{xxxiii} K Minogue (1978) ‘Natural rights, ideology and the game of life in E Kamenka and AES Tay (eds) *Human Rights*, Edward Arnold, p 21.

^{xxxiv} See R Cranston (1986) ‘Rights in Practice’ in Sampford and Galligan (eds). On the other hand some insist on the distinction, for example, C Fried (1978) *Right and Wrong*, Harvard University Press, p 111.

^{xxxv} See Submission 446 to the Committee by the Indigenous Lawyers Association of Queensland. ILAQ specifically emphasises the importance of a ‘Statutory enactment, which adequately addresses and enforces Human Rights responsibilities in Queensland’ and builds toward the establishment of a health human rights culture.

^{xxxvi} See the Legal Affairs and Community Safety Committee, Report No. 30, Inquiry into a possible Human Rights Act for Queensland, June 2016 at pages xxvii-xxx with specific reference to Indigenous consultations; *Human Rights Act 2004* (ACT); *Charter of Human Rights and Responsibilities Act 2006* (VIC).

^{xxxvii} Article 27 of the *International Covenant on Civil and Political Rights*; Articles 8, 25, 29 and 31 of the *United Nations Declaration of the Rights of Indigenous Peoples*.

^{xxxviii} These were all issues raised by most Indigenous peoples consulted by the committee as per their 2016 report and within submission made to the Committee. The consultation period and submission detail specific examples of issues faced by Indigenous peoples and why these should be areas of priority for any rights protection regime.

^{xxxix} This was especially a concern of those presenting to the Committee in North Queensland. See pages xxvii-xxx of the 2016 Committee Report. Submission 389 by the Cape York Institute (CYI), Submission 439 by the Aboriginal and Torres Strait Islander Women’s Legal Service of North Queensland Inc (ATSIWLSNQ) and Submission 431 by the Aboriginal and Torres Strait Islander Legal Service of Queensland (ATSILS) were especially critical of this failure in the current rights protection space and the need for this to be addressed in any new regime.

^{xi} This point too was reiterated by the CYI and ATSILS in their respective submissions, especially with reference to Queensland's long history of legislative action toward Indigenous peoples.

^{xlii} Article 43 of the *United Nations Declaration of the Rights of Indigenous Peoples*.

^{xliii} Legal Affairs and Community Safety Committee, Report No. 30, Inquiry into a possible Human Rights Act for Queensland, June 2016, pp xxvii-xxx.

^{xliiii} Submission 446.

^{xliiii} Submission 420.

^{xliiii} Submission 389.

^{xliiii} Submission 431.

^{xliiii} Submission 439.

^{xlviii} One representative at the community consultations specifically said that continued 'structural exclusion and discrimination' was the main element continuing to hold Indigenous peoples back. See Legal Affairs and Community Safety Committee, Report No. 30, Inquiry into a possible Human Rights Act for Queensland, June 2016, p xxvii. This position is broadly representative of the sentiment of the above-mentioned Submissions.

^{xlix} This was a persistent theme in both the consultations and the submissions.

^l This was a persistent theme in both the consultations and the submissions. The CYI in their submission specifically mentioned the need for a representative body to be set up, and ATSILS and ATSIWLSNQ both detailed at length the centrality of this issue for understanding the position of Indigenous peoples within the criminal justice system. See submission 431 and 439.

^{li} This was an especially important theme for ATSIWLSNQ who noted in their submission the need to understand the 'chronically disadvantaged' position of Indigenous women and the requirement for 'access to justice and legal assistance services' to be enshrined as a right for Indigenous peoples. See submission 439 at pp 6-7.

^{lii} Ibid.

^{liii} This was detailed by ATSIWLSNQ in particular. Submission 439 represents a detailed and progressive concern with the particular place of Indigenous peoples within rights regimes and the risk of that particularity becoming lost without appropriate planning, provision and resourcing.

^{liv} See submissions 431 and 439.

^{lv} **Article 3:** *Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.*

^{lvi} **Article 4:** *Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.*

^{lvii} **Article 5:** *Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their rights to participate fully, if they so choose, in the political, economic, social and cultural life of the State.*

^{lviii} **Article 7:** *1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person.: 2. Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.*

^{lix} **Article 14:** *1. Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.: 2. Indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination.: 3. States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language.*

^{lx} **Article 22:** 1. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration.

2. States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.

^{lxi} **Article 33:** 1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.: 2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

^{lxii} **Article 9:** Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.

^{lxiii} **Article 11:** 1. Indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature. 2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

^{lxiv} **Article 19:** States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

^{lxv} **Article 23:** Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

^{lxvi} **Article 27:** States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.