

Queensland Family and Child Commission Submission

To: Legal Affairs and Community Safety Committee

Date: 29 March 2016

Topic: Human Rights Inquiry

Queensland Family and Child Commission

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The Queensland Family and Child Commission (QFCC) is pleased to provide a submission to the Legal Affairs and Community Safety Committee to assist with their deliberations in relation to the Human Rights Inquiry. The QFCC has developed a succinct statement for the Committee's consideration which will specifically address human rights matters relating to children and young people.

Contextualising human rights in Australia

International human rights law began as a response to the horrors of war, particularly the atrocities experienced within World War II.¹ The subsequent formulation of the United Nations and the prescription of the *United Nations Charter* by many countries, formed the legitimacy of human rights at the international level.² Today, the United Nations High Commissioner plays a pivotal role in representing the world's commitment to universal ideals of human dignity, and functions within a unique mandate to promote and protect human rights.³

International human rights law is founded on the principle of universality and demands that 'human rights be inherent to all human beings whatever our nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status'.⁴ This universality is expressed and guaranteed by law in the form of treaties, customary law, and general principles.⁵ Universality is also expressed in other sources of international law which prescribe obligations of Governments to act in particular ways and commit to the promotion and protection of human rights and fundamental freedoms for individuals and groups.⁶ Australia has further embedded human rights in the Australian political discourse by supporting key United Nations Declarations including the *United Nations Declaration on the Rights of Indigenous Peoples* (the Declaration). While the Declaration does not create a legally binding obligation, it does reflect a (Australian) political commitment to the principles in the Declaration and establishes an 'impetus to work together in trust and good faith to

¹ Cornell University Law School, *Human Rights*, https://www.law.cornell.edu/wex/human_rights, Accessed 10/03/2016

² Cornell University Law School, *Human Rights*, https://www.law.cornell.edu/wex/human_rights, Accessed 10/03/2016

³ United Nations Human Rights, Office of the High Commissioner, *Who are we*, <http://www.ohchr.org/EN/AboutUs/Pages/WhoWeAre.aspx>, Accessed 11/03/2016

⁴ United Nations Human Rights, Office of the High Commissioner, *What are human rights?* <http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx>, Accessed 11/03/2016

⁵ United Nations Human Rights, Office of the High Commissioner, *What are human rights?* <http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx>, Accessed 11/03/2016

⁶ United Nations Human Rights, Office of the High Commissioner, *What are human rights?* <http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx>, Accessed 11/03/2016

advance human rights and close the gap⁷ of disadvantage for Aboriginal and Torres Strait Islander peoples in Australia.

While the various international human rights treaties, to which Australia is a signatory, set up the international framework for human rights their guiding principles do not form part of Australia's domestic law, unless the treaties are, or have been, specifically and purposely developed and included in Australian law (Commonwealth or State) through legislation.

Inquiry Terms of Reference 2(a).

The committee consider the effectiveness of current laws and mechanisms for protecting human rights in Queensland and possible improvements to these mechanisms.

QFCC's position:

The QFCC recommends, the Queensland Government develop a single Human Rights Act to demonstrate a commitment to human rights principles, develop a level of increased scrutiny and define standards for agency and service provider compatibility.

The development of a formal Human Rights Charter in Queensland would provide an opportunity to:

- establish broad, foundational rights and freedoms that may not be adequately addressed within existing provisions;
- enable us to address all principles and rights protection statements referenced in international human rights law and UN Declarations;
- develop stringent scrutiny processes for new Bills and legislation, implementation frameworks and a process for assessing compatibility;
- drive community and professional education on human rights matters; and
- demonstrate a partnership and joint focus between political leadership and community.

The QFCC also wishes to highlight that the current Queensland practice of including 17 year olds in the adult corrections system is in contradiction to Article 37 of the United Nations Convention on the Rights of the Child:

*Children who break the law should not be treated cruelly. **They should not be put in a prison with adults** and should be able to keep in contact with their family.⁸*

This matter, regardless of the outcome of this Inquiry, must be addressed as a critical priority.

Supporting QFCC's position

As already discussed, human rights is of relevance and importance to all, yet Australia's implementation of human rights has not been consistent.⁹ This lack of consistency establishes a weakness where human rights protections have been reduced or lost¹⁰. Indeed, Queensland is not the only state in Australia to not have a single human rights document or bill which explicitly details the expectations of government and the community in relation to human rights protections.

⁷ Jenny Macklin in Australian Human Rights Commission, 2010, *The Community Guide to the UN Declaration on the Rights of Indigenous Peoples*, p12

⁸ UNICEF, 1996, *A simplified version of the United Nations Convention on the Rights of the Child*, <http://www.unicef.org.au/Upload/UNICEF/Media/Our%20work/childfriendlycr.pdf>, Accessed 22/03/2016

⁹ Public Interest Advocacy Centre, Pettitt, A., Ranaldm P., 2004, *Protecting Human Rights in Australia: A Community Education Kit*, Fact Sheet 1

¹⁰ Public Interest Advocacy Centre, Pettitt, A., Ranaldm P., 2004, *Protecting Human Rights in Australia: A Community Education Kit*, Fact Sheet 1

Currently Queensland legislation addresses a range of human rights considerations through provisions included within individual legislative instruments. However, this approach to addressing human rights is not always clear or overt. This approach does not always communicate the specific responsibilities of agencies and service providers in relation to human rights protections, or establish extensive scrutiny and compatibility reviews for new Bills, policies or procedures.

Of direct relevance (and importance) to the mandated functions of the QFCC, is the rights of the child as provided for under the United Nations Convention on the Rights of the Child (UNCRC) and the application of these in current state legislation. The *Child Protection Act 1999* (the CP Act) addresses a number of human rights protections throughout the CP Act (in its entirety) and specifically references duties and responsibilities related to the 'Charter of rights for a child in care,' with the full Charter included under Schedule 1, section 74. The Department of Communities, Child Safety and Disability Services (DCCSDS), who has ownership of the CP Act, recently conducted a public consultation process to inform the establishment of a new legislative framework. The QFCC submission to this consultation process discussed human rights considerations and urged DCCSDS to consider:

Historically the children's rights discussion at its foundation, focused on children's vulnerability and their developmental needs rather than their autonomy. However, UNCRC has been a significant impetus in shifting the focus of children's rights from a singular view of the child as the subject of policies relating to their wellbeing, development and protection to including the child as an active participant in constructing goals and how to achieve them.¹¹ This change in view is evidenced in a variety of legislative responses relevant to children across Australia. In the rights space however, the difficulty for child protection legislation is balancing the complexities of navigating the relationship between state, parent/family and the individual child in context of rights and freedoms¹² are managed, legislatively, both nationally and internationally in a variety of ways.

Additionally we also strongly recommended (to the DCCSDS) that any revisions made to the existing CP Act focus on promoting the rights of the child and include outlining the Chief Executive's (Child Safety), services and/or persons acting under the authority of the legislation, responsibilities in relation to supporting the rights of the child in regular activities and processes.¹³

While the QFCC is pleased to see the focus on reflecting and promoting rights principles in individual Queensland legislation frameworks, we do recognise this approach may not be the most practical in communicating individual responsibilities (of Parliament, Government/non-government agencies, service providers) and promoting a consistent, compliance framework. It could also be argued the establishment of a single Human Rights Charter for Queensland would reduce (or negate entirely) the risks associated with relying on individual Act compatibility, including the financial implications of multiple individual legislative reviews to bring together a consistent approach to human rights management under the existing structure.

¹¹ Australian Institute of Family Studies (1996), *Citizen Child: Australian law and children's rights*, Children's rights: setting the scene, Availability: <https://aifs.gov.au/publications/citizen-child-australian-law-and-childrens-rights/1-childrens-rights-setting-scene>

¹² Australian Institute of Family Studies (1996), *Citizen Child: Australian law and children's rights*, The child protection and welfare system, Availability: <https://aifs.gov.au/publications/citizen-child-australian-law-and-childrens-rights/6-child-protection-and-welfare-system>

¹³ Queensland Family and Child Commission, 2016, *Submission to Department of Communities, Child Safety and Disability Services: Supporting families and protecting children in Queensland: a new legislative framework (Public Consultation for the review of the Child Protection Act 1999*, p11.

In support of this recommendation, the Public Interest Advocacy Centre (PIAC), states there are a number of ways Australia could best improve the protection of human rights for their citizens and suggests Governments pass more legislation to protect specific rights and that human rights focussed education to politicians, judges and the broader communities. However, PIAC notes while these steps may assist in expanding some human rights protections, on their own would not provide a legal guarantee to protect human rights consistently. Rather PIAC suggest that the most effective way to ensure full and ongoing protection is to establish and adopt a Charter or Bill of rights which is based on the fundamental rights standards of international human rights law.¹⁴ This approach has already been adopted and tested within Victoria (see Appendix One) and the Australian Capital Territory (ACT).

Inquiry Terms of Reference 2(b).

The committee consider the operation and effectiveness of human rights legislation in Victoria, the Australian Capital Territory (ACT) and by ordinary statute internationally.

QFCC's position:

The QFCC recommends the agency charged with developing a single Human Rights Act, give significant attention to the findings of these reviews and consider, in particular, the submissions made by the Victorian Equal Opportunity and Human Rights Commission.

Supporting QFCC's position

The Victorian *Charter of Human Rights and Responsibilities Act 2006* (the Vic Charter) and the ACT *Human Rights Act 2004* (the ACT Act) have both assisted in developing a legislative foundation to embedding a human rights culture in their respective state communities. Of distinct benefit to Queensland is that both the ACT Act and the Vic Charter have undertaken significant reviews or inquiries into the effectiveness of each respective Act and assessed the effect on human rights within the community and government. These inquiries have additionally sought community opinion on how the legislative instruments could be better developed to support human rights.

¹⁴ Public Interest Advocacy Centre, Pettitt, A., Ranaldm P., 2004, *Protecting Human Rights in Australia: A Community Education Kit*, Fact Sheet 1

APPENDIX

Table 1 – 20 Human rights principles contained within the *Charter of Human Rights and Responsibilities Act 2006*

Fundamental human right	Short description ¹⁵
RECOGNITION AND EQUALITY BEFORE THE LAW (The Charter, Part 2, s8)	The right of all people to have equal and effective protection against discrimination and to enjoy their human rights without discrimination.
RIGHT TO LIFE (The Charter, Part 2, s9)	Every person has the right to life and has the right to not have that life taken away.
RIGHT TO PROTECTION FROM TORTURE AND CRUEL, INHUMAN OR DEGRADING TREATMENT (The Charter, Part 2, s10)	People must not be tortured or treated and punished in a cruel, inhuman or degrading manner and includes protection where treatment is used to humiliate the person.
RIGHT TO FREEDOM FROM FORCED WORK (The Charter, Part 2, s11)	A person must not be held in slavery or servitude and must not be made to perform forced or compulsory labour.
RIGHT TO FREEDOM OF MOVEMENT (The Charter, Part 2, s12)	A person can freely live within or leave Victoria (if done lawfully) and has the freedom to choose where they want to live.
RIGHT TO PRIVACY AND REPUTATION (The Charter, Part 2, s13)	Everyone has the right to keep their lives private and not have their personal information, family or home interfered with, unless allowable by law.
RIGHT TO FREEDOM OF THOUGHT, CONSCIENCE, RELIGION AND BELIEF (The Charter, Part 2, s14)	People have the right to think and believe in what they want to believe.
RIGHT TO FREEDOM OF EXPRESSION (The Charter, Part 2, s15)	People are free to say what they want to say or what they think and to share and receive information and ideas.
RIGHT TO PEACEFUL ASSEMBLY AND FREEDOM OF ASSOCIATION (The Charter, Part 2, s16)	People have the right to join groups (including Unions) and meet peacefully.
RIGHT TO PROTECTION OF FAMILIES AND CHILDREN (The Charter, Part 2, s17)	Families are entitled to protection. Children are to have the same rights as adults and be provided with protection according to their best interests.
RIGHT TO TAKING PART IN PUBLIC LIFE (The Charter, Part 2, s18)	All people have the right to public life including the right to vote or to run for public office.

¹⁵ Taken from: Victorian Equal Opportunity and Human Rights Commission, *Rights under the Charter*, <http://www.humanrightscommission.vic.gov.au/index.php/the-charter/rights-under-the-charter>, Accessed 02/03/2016

CULTURAL RIGHTS (The Charter, Part 2, s19)	People can have different family, religious or cultural backgrounds and are able to enjoy their culture, declare and practice their religion and speak their languages. There are distinct cultural rights for Aboriginal and Torres Strait Islander people.
PROPERTY RIGHTS (The Charter, Part 2, s20)	Protection is provided to people to not have their property taken, unless the law allows for it to be taken.
RIGHT TO LIBERTY AND SECURITY OF PERSON (The Charter, Part 2, s21)	Liberty - People have the right to freedom and safety, which includes the right to not be detained or arrested except when done in accordance with the law. Security – reasonable steps must be taken to protect the physical safety of people who are in danger of physical harm.
RIGHT TO HUMANE TREATMENT WHEN DEPRIVED OF LIBERTY (The Charter, Part 2, s22)	People have the right to be treated with humanity if they are accused of breaking the law and are detained.
RIGHTS OF CHILDREN IN THE CRIMINAL PROCESS (The Charter, Part 2, s23)	Children who are charged with a crime (or has been detained without charge) should not be held with adults. They should be brought to trial quickly and treated in a manner that is appropriate for their age. Whilst in detention, children should be provided with education and rehabilitation.
RIGHT TO A FAIR HEARING (The Charter, Part 2, s24)	A person has a right to have civil proceedings or criminal charges considered by a competent, independent and impartial court or tribunal through a fair and public hearing.
RIGHTS IN CRIMINAL PROCEEDINGS (The Charter, Part 2, s25)	A person should be afforded minimum guarantees when they are charged with a criminal offence.
RIGHT NOT TO BE PUNISHED MORE THAN ONCE (The Charter, Part 2, s26)	A person will only be tried in court once for a crime and will only be punished once if found guilty.
RETROSPECTIVE CRIMINAL LAWS (The Charter, Part 2, s27)	A person cannot be prosecuted or punished for things that were not criminal offences at the time they were committed.