



Human Rights Bill 2018

Report No. 26, 56th Parliament
Legal Affairs and Community
Safety Committee
February 2019

Legal Affairs and Community Safety Committee

Chair	Mr Peter Russo MP, Member for Toohey
Deputy Chair	Mr James Lister MP, Member for Southern Downs
Members	Mr Stephen Andrew MP, Member for Mirani
	Mr Jim McDonald MP, Member for Lockyer
	Mrs Melissa McMahon MP, Member for Macalister ¹
	Ms Corinne McMillan MP, Member for Mansfield

Committee Secretariat

Telephone	+61 7 3553 6641
Fax	+61 7 3553 6699
Email	lacsc@parliament.qld.gov.au
Technical Scrutiny Secretariat	+61 7 3553 6601
Committee Web Page	www.parliament.qld.gov.au/lacsc

Acknowledgements

The committee acknowledges the assistance provided by the Department of Justice and Attorney-General and the Queensland Parliamentary Library.

¹ On 1 November 2018, the Leader of the House appointed the Member for Capalaba, Don Brown MP, as a substitute member of the committee for the Member for Macalister, Melissa McMahon MP, to attend the committee's public briefing held on Monday 12 November 2018.

Contents

Abbreviations	iii
Chair’s foreword	v
Recommendation	vi
1 Introduction	1
1.1 Role of the committee	1
1.2 Inquiry process	1
1.3 Policy objectives of the Bill	1
1.4 Government consultation on the Bill	2
1.5 Should the Bill be passed?	2
2 Examination of the Bill	3
2.1 Objects of the Act	3
2.1.1 The dialogue model	3
2.2 Interpretation	8
2.2.1 Meaning of public entity and when a function is of a public nature	8
2.3 Application of human rights	13
2.3.1 Who has human rights	13
2.3.2 Human rights may be limited	15
2.3.3 Conflicting human rights	19
2.4 Civil and political rights	20
2.4.1 Recognition and equality before the law	20
2.4.2 Right to life	23
2.4.3 Protection from torture and cruel, inhuman or degrading treatment	24
2.4.4 Freedom from forced work	25
2.4.5 Freedom of movement	26
2.4.6 Freedom of thought, conscience, religion and belief	26
2.4.7 Freedom of expression	27
2.4.8 Peaceful assembly and freedom of association	29
2.4.9 Taking part in public life	31
2.4.10 Property rights	31
2.4.11 Privacy and reputation	32
2.4.12 Protection of families and children	33
2.4.13 Cultural rights – generally	36
2.4.14 Cultural rights – Aboriginal peoples and Torres Strait Islander peoples	37
2.4.15 Right to liberty and security of person	40
2.4.16 Humane treatment when deprived of liberty	41
2.4.17 Fair hearing	42
2.4.18 Criminal proceedings	43
2.4.19 Children in the criminal process	47
2.4.20 Right not to be tried or punished more than once (double jeopardy)	49
2.4.21 Retrospective criminal laws	49
2.5 Economic, social and cultural rights	50
2.5.1 Education	50

2.5.2	Health services	57
2.6	Application of human rights in Queensland	59
2.6.1	Statements of compatibility and human rights certificates	59
2.6.2	Role of portfolio committees	61
2.6.3	Override declarations	64
2.6.4	Statutory interpretation	67
2.6.5	Declaration of incompatibility	73
2.6.6	Obligations on public entities	75
2.7	Queensland Human Rights Commission	92
2.7.1	Proposed law	92
2.7.2	Functions and powers	92
2.7.3	Human rights complaints	96
2.7.4	Making a human rights complaint	97
2.7.5	Dealing with or referring a human rights complaint	100
2.7.6	Conciliation of a human rights complaint	102
2.7.7	Giving Information for complaints	106
2.7.8	Resolved and unresolved human rights complaints	107
2.7.9	Reporting requirements	110
2.8	Amendment of legislation	111
2.8.1	Proposed amendments	112
2.8.2	Amendment of <i>Anti-Discrimination Act 1991</i>	113
2.8.3	Amendment of <i>Corrective Services Act 2006</i> and <i>Youth Justice Act 1992</i>	114
2.9	Stakeholder views on expanding human rights protected by the Bill	117
2.9.1	Issues raised in submissions	118
2.9.2	Departmental response	120
3	Compliance with the <i>Legislative Standards Act 1992</i>	122
3.1	Fundamental legislative principles	122
3.1.1	Rights and liberties of individuals	122
3.1.2	Institution of Parliament	123
3.2	Explanatory notes	124
Appendix A – Submitters		125
Appendix B – Officials at public departmental briefing held on 12 November 2018		133
Appendix C – Witnesses at public hearing held on 4 December 2018		134
Statement of Reservation		137

Abbreviations

AASW (Qld)	Australian Association of Social Workers (Qld)
ACL	Australian Christian Lobby
ACLS	Australian Christian Legal Society Ltd
ADCQ	Anti-Discrimination Commission Queensland
AIA	Amnesty International Australia
ALA	Australian Lawyers Alliance
ALHR	Australian Lawyers for Human Rights
BAQ	Bar Association of Queensland
Bill	Human Rights Bill 2018
CCHRL	Castan Centre for Human Rights Law
CLC	Caxton Legal Centre
CLCQ	Community Legal Centres Queensland
Code/Criminal Code	Schedule 1 to the <i>Criminal Code Act 1899</i>
CSA	<i>Corrective Services Act 2006</i>
committee	Legal Affairs and Community Safety Committee
CYDA	Children and Young People with Disability Australia
DDA	<i>Disability Discrimination Act 1992</i> (Cwth)
department / DJAG	Department of Justice and Attorney-General
ECCQ	Ethnic Communities Council of Queensland
EDO	Environmental Defenders Office (Qld) Inc
FLP	fundamental legislative principle
HR Act	Human Rights Act
HRLC	Human Rights Law Centre
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ Qld	International Commission of Jurists Queensland
ILGG research program	QUT Faculty of Law's International Law and Global Governance research program
LGAQ	Local Government Association of Queensland
LSA	<i>Legislative Standards Act 1992</i>
OQPC	Office of the Queensland Parliamentary Counsel

PACT	Protect All Children Today Inc.
PWDA	People with Disability Australia
QAI	Queensland Advocacy Incorporated
QCAT	Queensland Civil and Administrative Tribunal
QCCL	Queensland Council for Civil Liberties
QCIE	Queensland Collective for Inclusive Education
QCOSS	Queensland Council of Social Service
QCU	Queensland Council of Unions
QFCC	Queensland Family and Child Commission
QHRC	Queensland Human Rights Commission
QLS	Queensland Law Society
QMHC	Queensland Mental Health Commission
QNMU	Queensland Nurses and Midwives' Union
QTU	Queensland Teachers' Union
SELB	Student Engagement, Learning and Behaviour Research Group
TCLS	Townsville Community Legal Service Inc.
UDHR	Universal Declaration of Human Rights
UNCRC	United Nations Convention on the Rights of the Child
UNCRPD	United Nations Convention on the Rights of Persons with Disabilities
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
Victorian Charter	<i>Charter of Human Rights and Responsibilities 2006 (VIC)</i>
VOCA	<i>Victims of Crime Assistance Act 2009</i>
WLSQ	Women's Legal Service Queensland
YAC	Youth Advocacy Centre Inc
YJA	<i>Youth Justice Act 1992</i>

Chair's foreword

This report presents a summary of the Legal Affairs and Community Safety Committee's examination of the Human Rights Bill 2018.

The committee's task was to consider the policy to be achieved by the legislation and the application of fundamental legislative principles – that is, to consider whether the Bill has sufficient regard to the rights and liberties of individuals, and to the institution of Parliament.

On behalf of the committee, I thank those individuals and organisations who made written submissions and who attended our public briefing and public hearing on the Bill. I also thank our Parliamentary Service staff and the Department of Justice and Attorney-General for their assistance throughout this inquiry.

I commend this report to the House.



Peter Russo MP

Chair

Recommendation

Recommendation

2

The committee recommends that the Human Rights Bill 2018 be passed.

1 Introduction

1.1 Role of the committee

The Legal Affairs and Community Safety Committee (committee) is a portfolio committee of the Legislative Assembly which commenced on 15 February 2018 under the *Parliament of Queensland Act 2001* and the Standing Rules and Orders of the Legislative Assembly.²

The committee's primary areas of responsibility include:

- Justice and Attorney-General, and
- Police, Fire and Emergency Services, and Corrective Services.

Section 93(1) of the *Parliament of Queensland Act 2001* provides that a portfolio committee is responsible for examining each bill and item of subordinate legislation in its portfolio areas to consider:

- the policy to be given effect by the legislation
- the application of fundamental legislative principles, and
- for subordinate legislation – its lawfulness.

The Human Rights Bill 2018 (Bill) was introduced into the Legislative Assembly and referred to the committee on 31 October 2018. The committee is to report to the Legislative Assembly by 4 February 2019.

1.2 Inquiry process

On 2 November 2018, the committee invited stakeholders, subscribers and the public to make written submissions on the Bill. The committee accepted 149 written submissions, as well as 135 form submissions including variants thereof. See Appendix A for a list of submitters.

The committee received a public briefing about the Bill from the Department of Justice and Attorney-General (department or DJAG) and Queensland Corrective Services on 12 November 2018; see Appendix B for a list of officials.

The committee also received written advice from the department in response to matters raised in submissions.

The committee held a public hearing on 4 December 2018 (see Appendix C for a list of witnesses).

The submissions, correspondence from the department and transcripts of the briefing and hearing are available on the committee's webpage.

1.3 Policy objectives of the Bill

The objectives of the Bill are to:

- establish and consolidate statutory protections for certain human rights;
- ensure that public functions are exercised in a way that is compatible with human rights;
- promote a dialogue about the nature, meaning and scope of human rights; and
- rename and empower the Anti-Discrimination Commission Queensland (ADCQ) as the Queensland Human Rights Commission (QHRC) to:
 - provide a dispute resolution process for dealing with human rights complaints; and
 - promote an understanding, acceptance and public discussion of human rights.

² *Parliament of Queensland Act 2001*, section 88 and Standing Order 194.

1.4 Government consultation on the Bill

As set out in the explanatory notes, a range of stakeholders were consulted on the Bill prior to finalisation, including the ADCQ. The explanatory notes state that overall stakeholders were supportive of the Bill being based on the model of the Victorian Charter with the addition of social and economic rights. Stakeholders also supported the disputes resolution function for the proposed QHRC.³

However, some stakeholders considered that the Bill should include a stand-alone cause of action for the failure of a public entity to act or make a decision in a way that is compatible with human rights. Many stakeholders also expressed concern at the potential impact of the proposed amendments to the *Youth Justice Act 1992* and the *Corrective Services Act 2006*.⁴

The explanatory notes for the Bill also refer to the content of submissions made to the previous Legal Affairs and Community Safety Committee of the 55th Parliament, which inquired into the appropriateness and desirability of a Human Rights Act for Queensland.⁵ These submissions were not however commenting on the Bill currently before the committee.

1.5 Should the Bill be passed?

Standing Order 132(1) requires the committee to determine whether or not to recommend that the Bill be passed.

After examination of the Bill, including consideration of the policy objectives to be implemented, stakeholders' views and information provided by the department, the committee recommends that the Bill be passed.

Recommendation

The committee recommends that the Human Rights Bill 2018 be passed.

³ Explanatory notes, p 10.

⁴ Explanatory notes, p 10.

⁵ Explanatory notes, p 10.

2 Examination of the Bill

The aim of the Bill is to consolidate and establish statutory protections for certain human rights recognised under international law including those drawn from the International Covenant on Civil and Political Rights (ICCPR), as well as the rights to health services and education drawn from the International Covenant on Economic, Social and Cultural Rights (ICESCR), and property rights drawn from the Universal Declaration of Human Rights (UDHR).⁶

The majority of stakeholders expressed support for the Bill, however many made recommendations for amendments to the Bill. This section discusses issues raised during the committee's examination of the Bill.

2.1 Objects of the Act

Clause 3 of the Bill sets out the main objects of the Act:

- (a) to protect and promote human rights; and
- (b) to help build a culture in the Queensland public sector that respects and promotes human rights; and
- (c) to help promote a dialogue about the nature, meaning and scope of human rights.

Clause 4 establishes how the objects are to be achieved. This includes through:

- stating the human rights Parliament seeks to protect and requiring that public entities act and make decisions compatible with those human rights
- when a new Bill is proposed in Parliament, requiring the tabling of a corresponding statement of compatibility with human rights, for a parliamentary portfolio committee to consider the Bill's compatibility with human rights, and in exceptional circumstances, allowing Parliament to override the application of the Human Rights Act to a statutory provision
- requiring courts and tribunals to interpret statutory provisions in a way compatible with human rights to the extent possible that is consistent with the provision's purpose
- granting the Supreme Court jurisdiction to declare when a statutory provision cannot be interpreted in a way compatible with human rights, and providing for a Minister and portfolio committee to report about declarations of incompatibility to the Legislative Assembly
- setting out how to resolve human rights complaints, and
- setting out the functions of the QHRC.

2.1.1 The dialogue model

The 'dialogue model', which is reflected in a number of jurisdictions that have implemented human rights legislation, including the *Charter of Human Rights and Responsibilities 2006* (VIC) (Victorian Charter),⁷ is proposed under the Bill.

The explanatory notes state:

The 'dialogue model' of human rights protection as represented in this Bill... is considered to represent a good middle ground. Under this model each of the three arms of government – the

⁶ Explanatory notes, p 2.

⁷ The department advised that other jurisdictions that have adopted the dialogue model include the Australian Capital Territory, United Kingdom, New Zealand, and Canada (which has a mixed dialogue and constitutional model).

*executive, the legislature (parliament) and the courts – have a legitimate role to play, while the parliament maintains sovereignty.*⁸

Further:

The Bill aims to promote a discussion of ‘dialogue’ about human rights between the three arms of government (the judiciary, the legislature and the executive).

*Each of the three arms of government will have an important role to play: the judiciary through interpretation of laws and adjudicating rights; the legislature through scrutinising legislation and making laws; and the executive through developing policy and administrative decision-making.*⁹

The explanatory notes provide that parliament has the role and obligations imposed under Part 3, Division 1 and 2 of the Bill, the courts under Part 3, Division 3 of the Bill, and the executive (or public entities) under Part 3, Division 4 of the Bill.¹⁰

2.1.1.1 Issues raised in submissions – the dialogue model

A number of submitters considered the proposed dialogue model under the Bill.

In attaching her submission to the 2016 inquiry, Dr Julie Debeljak supported the inclusion of the dialogue model in Queensland. With reference to the Victorian Charter she explained the interaction between the different arms of government under the dialogue model.¹¹

Broadly, Dr Debeljak states ‘the pre-legislative rights-scrutiny roles of the executive and the parliament generate dialogue’, referring to the consideration of rights by the executive in formulating policy and drafting legislation, and in the parliament (legislature), during the consideration of rights in proposed legislation, including the role of the committee, debating of proposed legislation and the enactment of laws.¹²

The judiciary becomes involved in the dialogue through interpreting whether legislation is compatible with human rights, and through the Supreme Court making a declaration of incompatibility (noting it cannot invalidate a law).¹³ Dr Debeljak notes ‘[t]he judicial opinion continues the dialogue loop, with the executive and parliament having a range of responses to the judicial opinion’. Such responses include deciding to amend the law to make it compatible or expressly retaining the incompatibility in the law.¹⁴

(a) Comments on the dialogue model

Commenting generally, Professor Williams AO and Dr Boughey from the Faculty of Law, University of New South Wales, submitted that the Bill:

... follows the same general model as the human rights legislation in the United Kingdom, New Zealand, the ACT and Victoria. It does not seek to fundamentally alter the roles of, or relationships between, the three branches of government. Rather, it aims to encourage dialogue about human rights protection between the branches, and foster a human rights culture within government.

⁸ Explanatory notes, p 10.

⁹ Explanatory notes, p 6.

¹⁰ Explanatory notes, pp 6-7.

¹¹ Submission 14, pp 32-34.

¹² Submission 14, p 33.

¹³ Submission 14, pp 33-34.

¹⁴ Submission 14, p 34.

*The Bill builds on the experience of the human rights legislation in those jurisdictions, and the ACT and Victoria in particular. It is the best drafted and most effective shield of people's rights yet seen in Australia.*¹⁵

Similarly, the joint submission received from academics from the University Of Queensland's (UQ's) TC Beirne School of Law stated:

*The Bill is modelled on existing legislation in jurisdictions including the United Kingdom, New Zealand and, in particular, the ACT and Victoria. It builds on a wealth of experience and is tailored to our Commonwealth system of government. In particular, it maintains the role of the courts in interpreting the law, and preserves the sovereignty of parliament. It is tailored to our existing constitutional structures whilst giving human rights a more appropriate and clear place in that system.*¹⁶

However, some submitters raised concerns with the dialogue model.

Professor Nicholas Aroney and Professor Richard Ekins, who do not support the Bill, stated with respect to the dialogue model:

*... as four justices of the High Court of Australia pointed out in *Momcilovic v The Queen*, to describe the relationship between the three branches in terms of 'dialogue' is 'inapposite', 'inaccurate' and 'apt to mislead' because it suggests that non-judicial functions are being conferred on the courts in a manner that is unconstitutional.*¹⁷

Conversely, in response to the statements made about the dialogue model in *Momcilovic v the Queen* (relating to the Victorian Charter) and concerns about the role of courts under the model, Associate Professor Sue Harris Rimmer, ARC Future Fellow, Griffith Law School, Griffith University stated:

*... at the moment the Victorian [A]ct stands. The High Court did not strike it down. It did not say to the Victorian parliament that what it was doing was unconstitutional and so there you have it. It was a judge having an opinion about that particular issue but it was not law. I think Professor Aroney is quite right to say that these are always live issues and in the particular case it could be a particular live issue, but at the moment we have not had any particular problems with politicisation. There is a lot of politicisation in other areas of the law—social security law, criminal law, parliamentary entitlements. There are endless political issues involved in what our High Court deals with and what our Supreme courts deal with. I do not see this as an order of magnitude different from the current issues that the courts deal with all the time.*¹⁸

The Queensland Council for Civil Liberties (QCCL), while rebutting concerns about diminishing parliamentary sovereignty through the enactment of a Human Rights Act and involving the courts in public controversy, also stated:

In respect of the first concern, the Council agrees with opponents to a Human Rights Act who state that the final say in matters should lie with elected officials. It is for this reason that a statutory Human Rights Act is an appropriate means of both protecting human rights and maintaining parliamentary sovereignty. Under this model a court cannot strike down legislation. It can only make a ruling of incompatibility and refer the matter to the Parliament. This leaves the final say on the issue to the parliament. In fact, the model proposed here is even more favourable to parliamentary sovereignty than, for example, the Canadian Charter of Rights where the parliament must take a positive step in order to overturn a decision of the court that

¹⁵ Submission 8, p 1.

¹⁶ Submission 39, p 1.

¹⁷ Submission 107, p 5.

¹⁸ Public hearing, Brisbane, 4 December 2018, p 30.

a piece of legislation breaches the Charter. Under the statutory model the parliament can do absolutely nothing and the law will not change.

In regards to the second concern, the Council notes that the courts have always had to make difficult policy decisions. Some of them have been quite radical including the reform of the common law to accommodate the laissez faire economic and industrial system of the eighteenth century. Even the daily work of the courts in determining negligence questions has the potential to draw the courts into controversial areas. The Council does not believe that the courts will lose public confidence through the implementation of a Human Rights Act.¹⁹

(b) Comments on the constitutional model

Some submitters suggested consideration could be given to implementing a constitutional model, whereby human rights are constitutionally entrenched and enforceable through the courts (including laws being subject to a declaration of invalidity by the courts).

Private submission number 55 raised concerns with the operation of the dialogue model in a unicameral parliamentary system as operates in Queensland, recommending that ‘the Human Rights Bill 2018 should be amended to enact a ‘constitution’/entrenched model of Human Rights in Qld’.²⁰ In this respect, the submitter stated:

In the context of this Bill, both the ACT and Victoria have parliamentary houses of review – therefore a dialogue model of a Charter of Human Rights may be appropriate in those jurisdictions – because there already exists a parliamentary body and process that has authority to act as a check on the legislature and the executive.

In the absence of a parliamentary upper house in Qld that has the power to fulfil a review role and, as such, ensure that legislation does not excessively override Human Rights, it becomes essential for a Human Rights Bill to give this authority to the Judiciary – as the only other arm of government capable of exercising prudent authority to ensure that both the legislature and the executive do not unnecessarily or excessively exercise authority that is incompatible with Human Rights.

While appreciating that it is less than ideal to hand authority to the judiciary (non-elected people) over the legislature/parliament (elected representatives), in the absence of proposing restoration of Qld parliament’s Upper House as a House of Review, a Human Bill of Rights that instils and ensures entrenched Human Rights (ie like the United States’ ‘Constitutional’ model) would be much more appropriate than the dialogue model and the specific model outlined in the current Bill.²¹

While also supporting that the ‘constitutional recognition of human right[s] would be preferable, and commensurate with the importance of these rights’, the Environmental Defenders Office (Qld) Inc (EDO) also stated ‘in the absence of such protection it is appropriate and desirable for our human rights to be protected through legislation.’²²

The EDO also noted some jurisdictions, Canada and Hong Kong, have now moved to ‘enshrine their human rights commitments into their constitutions’.²³

Dr David Solomon AM referred to the recommendation of the former Electoral and Administrative Review Commission to enact a Bill of Rights initially as ordinary legislation for five years, after which

¹⁹ Submission 93, p 4. See also Public hearing, Brisbane, 4 December 2018, p 18.

²⁰ Submission 55, p 1.

²¹ Submission 55, p 1.

²² Submission 122, p 4.

²³ Submission 122, p 4.

the question should be put by way of referendum as to whether it should be entrenched in the Constitution,²⁴ and stated in relation to the Bill:

... five years after it comes into effect the Government should consider whether some or all of the rights it covers should be better protected by making them enforceable in the courts and entrenching the Bill constitutionally. If it were to do so it should adopt a provision similar to that in the New Zealand and Canadian rights legislation that the rights are 'subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society' (Canadian Charter of Rights and Freedoms, s. 1).²⁵

(c) The dialogue model under a unicameral parliamentary system

As noted above, some submitters also raised concerns about the effectiveness of the dialogue model in a unicameral system, where there is no house of review and the executive have more power.

In this respect, other submitters proposed that the introduction of the Human Rights Act will be beneficial to the unicameral parliamentary system, including in improving the effectiveness of the dialogue model.

For example, the EDO suggested that the proposed Human Rights Bill will provide an extra check and balance to protect human rights in the unicameral parliamentary system in Queensland, stating:

Human rights are above the politics of the day and provide a fundamental reference against which legislation can be tested.

This role is particularly important in Queensland's unicameral parliamentary system as there is not a house of review to guard against legislative overreach.²⁶

Similarly, Professor Don Anton, from the Law Futures Centre, Griffith Law School, Griffith University stated:

With reference to the submission and statement made by Professor Aroney and his concern about legislation passed in the absence of an upper house in Queensland, we believe having the legislative context of a human rights act would ensure dialogue about human rights and legislation that might impact on human rights, which is particularly important in a context of fixed four-year terms and a parliament that does not have an upper house.²⁷

(d) The dialogue model and specific clauses

Concerns were also raised in relation to the inclusion or otherwise of provisions in the Bill where the dialogue model is used:

- The academics from UQ's TC Beirne School Of Law raised concerns 'about a model focused only on dialogue with no independent cause of action and no clear remedy range.' Further stating, '[t]he efficacy of the complaints mechanism depends upon individuals engaging with it and on its effectiveness at achieving the aims of the legislation, namely, the enhancement of human rights across Queensland.'²⁸
- The Australian Lawyers Alliance (ALA) questioned the inclusion of the parliamentary override provision at cl 43 in the context of the dialogue model, stating 'in a statutory bill of rights that

²⁴ Submission 13, p 1.

²⁵ Submission 13, p 2.

²⁶ Submission 122, p 4.

²⁷ Public hearing, Brisbane, 4 December 2018, p 28.

²⁸ Submission 39, p 2.

incorporates a dialogue model of human rights protection, and which by its nature preserves parliamentary sovereignty, the provision for an override declaration is not necessary.²⁹

These concerns are discussed in more detail in other sections of the report.

2.1.1.2 Departmental response

The department did not provide a response to the specific concerns raised by some submitters around the use of the dialogue model.

2.2 Interpretation

Part 1, Division 2 of the Bill defines a number of key terms in the Bill, including the meaning of ‘human rights’, ‘compatible with human rights’, and ‘public entity’. Submitters who provided comment generally supported the interpretation provisions,³⁰ although a number of submitters did raise concerns with the meaning of a ‘public entity’ and what constitutes a ‘function of a public nature’.

2.2.1 Meaning of public entity and when a function is of a public nature

Clause 9 defines the term ‘public entity’ and cl 10 sets out when a function is of a public nature; a feature of a type of public entity under cl 9.

2.2.1.1 Proposed law

Subclause (1) of cl 9 lists what entities constitute a public entity within the Bill.³¹ This includes ‘core public entities’, such as:

- a government entity within the meaning of s 24 of the *Public Service Act 2008*, public service employees, the Queensland Police Service, and local governments (including councillors and employees) (at cl 9(1)(a)-(d))
- ministers, and a person not otherwise mentioned who is a staff member or executive officer of a public officer (at cl 9(1)(e) and (i)), and

‘functional public entities’, such as:

- entities established under an Act when the entity performs functions of a public nature (cl 9(1)(f)), and
- an entity whose functions are or include functions of a public nature when performing the functions for the State or a public entity (whether under contract or otherwise) (cl 9(1)(h)).

Clause 9(1)(h) includes an example of entities not performing a function of a public nature for the State, specifically private schools, which are not public entities merely because they perform a function of a public nature, because they are not doing so for the State.

The explanatory notes provide that functional public entities:

*... reflects the modern operation of the government, where non-government entities, including non-government organisations, private companies and government owned corporations, are engaged, in various ways, to deliver services to the public on behalf of the government or another public entity. An example of a functional public entity is a private company managing a prison, or a non-government organisation providing a public housing service.*³²

²⁹ Submission 24, p 13. See pp 11-13 generally.

³⁰ See for example submissions 14, 19 and 26.

³¹ Explanatory notes, pp 14-15.

³² Explanatory notes, pp 14-15.

Members of portfolio committees (when the Committee is acting in an administrative capacity) are also included as public entities at cl 9(1)(g).

Subclauses (2) and (3) further state that a public entity includes a registered provider when performing a function of a public nature in the State, a non-State police officer in stated circumstances, and entities for which a declaration under cl 60 is in force (relating to entities being able to opt-in as a public entity under the Bill).³³

Subclause (4) provides that a public entity does not include the Legislative Assembly, a person performing functions connected to proceedings in the Assembly, or a court or tribunal, except when acting in an administrative capacity. Further, it does not include an entity prescribed by regulation not to be a public entity.³⁴

Subclause (5) states that an entity means an entity in and for Queensland, and a registered provider means a registered provider of supports or a registered National Disability Insurance Scheme (NDIS) provider under the *National Disability Insurance Scheme Act 2013* (Cth).³⁵

Clause 10, subcl (1) and (2) state that in deciding whether a function of an entity is of a public nature, consideration may be given to (although is not limited to) whether the function is conferred on the entity under a statutory provision, is connected to or generally identified with functions of government, or is of a regulatory nature. Consideration is also given to whether the entity is publicly funded to perform the function or it is a government owned corporation.³⁶

Subclause (3), without limiting subcl (1) and (2) states that functions of a public nature include:

- the operation of corrective service facilities under the *Corrective Services Act 2006* or another place of detention, and
- the provision of services including emergency, public health and public disability services, public education, including tertiary and vocational, public transport, and housing services by a funded provider or the State under the *Housing Act 2003*.³⁷

2.2.1.2 Issues raised in submissions – the scope of public entities under the Bill

A number of submitters proposed amendments to the meaning of public entity and what a function of a public nature constitutes. In this respect the QCCL stated:

*It is our view, that the definition of public entity is too narrow. In an age of increasing outsourcing of the provision of fundamental government services, it is our submission that the committee should recommend that the legislation be amended to apply to all bodies, whether public or private, which provide government services under contract with government or using government funds. If a broad definition is not used, the risk is run the legislation will be increasingly ineffectual because its scope of application will reduce as outsourcing increases.*³⁸

Similarly, the Queensland Mental Health Commission (QMHC) suggested ‘the Bill should include non-public entities that receive Government funding and provide services similar to those provide[d] by public entities’.³⁹

³³ Explanatory notes, p 15.

³⁴ Explanatory notes, p 15.

³⁵ Explanatory notes, p 15.

³⁶ Explanatory notes, p 15.

³⁷ Explanatory notes, pp 15-16.

³⁸ Submission 93, p 3. See also Public hearing, Brisbane, 4 December 2018, p 17.

³⁹ Submission 94, p 3.

Submitters also recommended and/or expressed concerns that specific entities/functions be included in the definition of public entity or as a function of a public nature:

The Queensland Branch of the Royal Australian and New Zealand College of Psychiatrists (RANZCP QLD Branch) with respect to children's rights stated that 'the right to education should not be determined by whether they attend a public or private school'. Further:

Given that private schools and private hospitals receive substantial public funding, and arguably provide a public function, it is not clear why they are not considered public entities. The RANZCP QLD Branch is concerned that the exclusion of private schools from the Bill, will allow private schools to continue to exclude children with additional support needs. A Queensland Human Rights Act should protect the right of all children to access education appropriate to their needs, regardless of whether the education is being provided by a private or public entity.⁴⁰

The ADCQ also noted:

The Explanatory Notes do not address the reason for excluding non-State schools from the obligations to act and make decisions that are consistent with human rights. Education is a State responsibility irrespective of whether it is delivered by public or State educational authorities.⁴¹

With respect to private hospitals, the RANZCP QLD Branch also stated they were concerned that such private entities did not appear to be captured by the Bill, and that they considered:

... patients' human rights, especially vulnerable patients such as those with mental illness, should be protected by the Bill and not be dependent upon whether they are being treated in a public or private entity.⁴²

The Townsville Community Legal Service Inc. (TCLS) proposed the inclusion of approved providers under the *Aged Care Act 1997* (Cth) as a registered provider in cl 9(5) noting:

- parallels with NDIS providers, and that older persons are the largest single cohort of Queenslanders with disability, and
- the vulnerability of older persons in care given the prevalence of elder abuse in institutional settings.

Similarly, TCLS proposes that public ageing services be included in cl 10(3) as a function of a public nature.⁴³

Micah Projects suggested that the definition of 'public entity' be amended to 'ensure there is greater clarity about NGO's working with people and schools (including non-government schools) being bound by the Act'.⁴⁴

Spinal Life Australia stated 'the Act will need to be sufficiently clear in its content to deal with Public Private Partnerships (PPP) that involve funders and suppliers in a partnership contract with government' noting that 'That all persons and entities exercising government power should therefore be bound to protect and promote human rights while they are exercising such power'.⁴⁵

The ALA proposed that cl 10(3):

⁴⁰ Submission 85, p 2. See also submissions 15, 80, 82, 93 and 95, and Public hearing, Brisbane, 4 December 2018, pp 2, 17, 43, 51-52, 56.

⁴¹ Submission 80, p 7. See also Public hearing, Brisbane, 4 December 2018, p 2.

⁴² Submission 85, p 2. See also submission 94.

⁴³ Submission 35, pp 9-10. See also submissions 75, 88, 93, 101 and 117, Public hearing, Brisbane, 4 December 2018, p 49.

⁴⁴ Submission 96, p 3.

⁴⁵ Submission 124, p 3.

*... should also include the provision of gas, electricity and water supply as functions which are to be taken to be of a public nature. This ... acknowledges that services which were once provided by government authorities, but are now being provided by non-government or private entities, are still essential public services being provided on behalf of the State.*⁴⁶

2.2.1.3 Departmental response

Broadly, the department advised:

*In determining whether entities, other than core public entities, are captured by the legislation, it will be necessary to consider the particular characteristics of the entity, its relationship with the State government, and the nature of the functions that are being performed (i.e. are they public functions).*⁴⁷

In relation to specific inclusions proposed, the department advised:

*Consistent with the Victorian Charter, it is intended that the Bill not capture private or non-state schools within the definition of 'public entity' on the basis that they are not delivering services on behalf of the State even though the functions of the non-state school may be of a public nature.*⁴⁸

The department advised with respect to the inclusion of aged care services:

Aged care service providers may be captured by the definition of 'public entity' depending on whether they fall within the definition in the Bill, i.e. the entity is in and for Queensland; and the functions are of a public nature; and the functions are being performed on behalf of the State (Qld) or a public entity.

The Bill includes matters that may be considered in deciding whether a function is of a public nature and provides a nonexhaustive list of functions of a public nature, including public health services and public disability services. Although not specifically included in the list, 'public aged care' and 'public out-of-home and residential care' will be captured where the other criteria of the definition are met, and depending on the circumstances.

*For example state government operated aged care facilities will be captured by the definition of public entity.*⁴⁹

Finally, with respect to proposed additions to cl 10(3)(b), the department advised:

*The current list of functions of a public nature is a non-exhaustive list and not intended to exclude particular categories that are omitted.*⁵⁰

2.2.1.4 Issues raised in submissions – entity performing functions of a public nature for the State

Submitters also raised concerns about the meaning of cl 9(1)(h) and the example provided of an entity which would not be performing functions of a public nature, that is, private schools.

(a) Lack of clarity in the meaning of 'performing functions for the State or a public entity'

The ALA noted there was a lack of clarification around the term 'performing functions for the State or a public entity' in cl 9(1)(h) and referred to the Victorian Charter which uses a similar phrase, however, also includes further provisions to clarify its meaning. The ALA stated they were concerned that without additional clarifying material the interpretation of the statutory example, relating to private

⁴⁶ Submission 24, p 10.

⁴⁷ Department of Justice and Attorney-General, correspondence dated 3 December 2018, attachment, p 38.

⁴⁸ Department of Justice and Attorney-General, correspondence dated 3 December 2018, attachment, p 36.

⁴⁹ Department of Justice and Attorney-General, correspondence dated 3 December 2018, attachment, p 37.

⁵⁰ Department of Justice and Attorney-General, correspondence dated 3 December 2018, attachment, p 40.

schools, may result in a narrower interpretation of the phrase ‘on behalf of the State’ and the potential exemption of activities of other entities that perform functions of a public nature.⁵¹

ALA proposed that in the absence of supportive clarifying material such as in the explanatory memorandum and explanatory speech, the example relating to private schools in cl 9(1)(h) should be removed. Alternatively, if the example is retained, additional subclauses as provided in the Victorian Charter should be included in the Bill.⁵²

(b) Uncertainty created by the insertion of the example at cl 9(1)(h)

With regard to the example provided at cl 9(1)(h), the Human Rights Law Centre (HRLC) noted that it ‘introduces unnecessary uncertainty and confusion in the definition of a public entity’ and recommends the removal of the example.⁵³ The HRLC stated:

Non-state schools deliver public education and are normally both funded and regulated by government. It is entirely appropriate for them to be required to comply with human rights in delivering public education services. Further, the inclusion of the example creates confusion as to whether other non-state service providers, such as a private bus company delivering public transport, are required to comply with human rights when delivering public services.⁵⁴

Professors Aroney and Ekins noted that cl 9(1)(h) could ‘readily be interpreted to include a very wide array of entities to which it is considered the Bill should not apply’.⁵⁵ Consequently, they supported the inclusion of the example in cl 9(1)(h) as settling the question of the application of the Bill to non-State schools. However, Professors Aroney and Ekins raised concerns that the ‘specific exclusion of non-State schools may generate uncertainty about whether any particular entity falls within the general definition or is somehow analogous to non-State schools.’⁵⁶

(c) Clarifying the effect on entities that constitute public entities when performing a function of a public nature

The HRLC, referring to the need for certainty and the trend of public functions being contracted to private entities, recommended that the Bill be amended to state that any entity performing a function listed as being of a public nature in cl 10(3) is a public entity when performing those functions. This would remove the question of whether or not they are performing them on behalf of the State.⁵⁷

The Griffith Law School recommended that the Bill ‘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’, noting that such organisations become public entities when performing a function of a public nature for the State or a public entity.⁵⁸

2.2.1.5 Departmental response

In response to the concerns raised by the ALA around the meaning of ‘performing functions for the State or a public entity’, the department stated:

It was not considered that subsections 4(4) and (5) of the Victorian Charter assisted in further clarifying the relationship between the State and an entity given the great variety in

⁵¹ Submission 24, pp 7-9. See also submission 117 and Public hearing, Brisbane, 4 December 2018, p 55.

⁵² Submission 24, p 9.

⁵³ Submission 101, p 7.

⁵⁴ Submission 101, p 7.

⁵⁵ Submission 107, p 5. See also Public hearing, Brisbane, 4 December 2018, p 24.

⁵⁶ Submission 107, p 5. See also Public hearing, Brisbane, 4 December 2018, p 24.

⁵⁷ Submission 101, p 8.

⁵⁸ Submission 116, pp 33-32.

*arrangements that might exist between the State and other entities in delivering public functions.*⁵⁹

The department did not specifically address the concern about the confusion created by the inclusion of the example in cl 9(1)(h) relating to private schools, although as noted at 2.2.1.3, the department did provide advice as to the basis for excluding private schools from being a public entity generally.

With respect to entities performing a function of a public nature the department advised:

*Private entities whose functions include functions of a public nature will be captured by the definition of ‘public entity’ when they are performing those functions on behalf of the State or a public entity.*⁶⁰

Committee comment

The committee notes the concerns raised by submitters regarding the potential ambit of cl 9 and believes it would be beneficial for the QHRC to monitor complaints raised against private corporations undertaking public functions.

2.2.1.6 Issues raised in submissions – public entity exclusions

With respect to cl 9(4), LawRight suggested that cl 9(4)(b) be amended to provide clarity around the meaning of ‘an administrative capacity’ (relating to when a court or tribunal is not considered as a public entity).⁶¹

2.2.1.7 Departmental response

The department advised:

The meaning of when a court is acting in ‘an administrative capacity’ will be a matter for the courts to determine in practice and in the context of the specific circumstances.

*While courts will be captured as public entities when acting in an administrative capacity, cl 5 of the Bill also provides that the Act will apply to Courts (regardless of whether they are acting in an administrative capacity or not) to the extent that they are performing functions under part 2 and part 3, division 3 of the Bill.*⁶²

2.3 Application of human rights

Part 2, Division 1 of the Bill establishes how human rights are applied under the Bill, including defining who has human rights, that human rights are in addition to other rights and freedoms, that human rights may be limited and that they are protected. In this respect, submitters identified some concerns around who has human rights and the limitation of human rights.

More broadly, some submitters also raised concerns about how conflicting rights would be addressed under the Bill.

2.3.1 Who has human rights

Clause 11 defines who has human rights under the Bill.

2.3.1.1 Proposed law

Clause 11 provides that all individuals in Queensland have human rights, however, that only individuals have human rights, expressly excluding corporations from having human rights.

⁵⁹ Department of Justice and Attorney-General, correspondence dated 3 December 2018, attachment, p 38.

⁶⁰ Department of Justice and Attorney-General, correspondence dated 3 December 2018, attachment, p 38.

⁶¹ Submission 25, p 3.

⁶² Department of Justice and Attorney-General, correspondence dated 3 December 2018, attachment, pp 37-38.

2.3.1.2 Issues raised in submissions – who has human rights

A number of submitters commented on cl 11, some suggesting it should be amended to recognise corporations as having human rights.

The Castan Centre for Human Rights Law (CCHRL) welcomed the restriction of human rights to natural persons, noting '[t]he exclusion of corporations as rights holders will help to ensure that the Bill has the effect of increasing the capacities of the vulnerable and marginalised while reducing litigation in the field'.⁶³

Conversely, the QCCL stated:

*... the fact that a body is a corporation and has commercial interests does not mean that it should not share in the human rights of natural persons where in the modern context it is necessary that corporations share in those rights to ensure that everyone fully benefits from those rights. The obvious example is, the right of freedom of speech. Almost all modern media, whether mainstream or not is conducted by or through corporations.*⁶⁴

Elaborating on this during the public hearing on 4 December 2018, the QCCL further stated:

Almost every time – unless you go out and stand in a park – you exercise your free speech right you are relying upon some corporation, be it Channel 9, the ABC, Google or Facebook. They are all corporations. The Council for Civil Liberties is a corporation.

*There are no doubt other rights that, to some extent, will depend upon them being partially exercised by corporations. If you do not allow in certain circumstances for corporations to have access to these rights, people will not be able to exercise them fully.*⁶⁵

The QCCL recommended the Bill be amended 'to provide for, the situational model for determining whether or not a corporation is entitled to human rights contained in the South African Constitution and the New Zealand Bill of Rights.'⁶⁶

Similarly, Professors Aroney and Ekins noted:

*Much of social life is undertaken through corporate form, not only for-profit arrangements, but also many not-for-profit social, religious and charitable organisations. This appears to be acknowledged by cl 20(1)(b) in so far as it recognises that freedom of religion includes freedom to demonstrate one's religion 'as part of a community' and cl 22(2) in so far as it recognises the right to 'freedom of association'. Social, religious and charitable groups often use the corporate form to organise themselves. It is through such corporations that they exercise their rights to associate and pursue their religious, social or charitable goals. As a consequence, it is often such corporations that are best placed to assert and to insist upon respect for rights. The Bill's unqualified statement that corporations do not have human rights risks undermining the effective exercise of individual human rights because it is through corporations that individual rights to freedom of association and freedom of religion are often realised. It also creates uncertainty as to whether a corporation may be able to benefit from rights-protective provisions of the Bill when it is the means by which individuals are exercising their communal and associational rights as recognised in clauses 20 and 22.*⁶⁷

The Australian Christian Legal Society Ltd (ACLS) and the Australian Christian Lobby (ACL) supported the extension to corporations in the context of religious freedom rights. In this respect the ACLS, with

⁶³ Submission 26, p 2.

⁶⁴ Submission 93, p 3.

⁶⁵ Public hearing, Brisbane, 4 December 2018, p 18.

⁶⁶ Submission 93, p 3.

⁶⁷ Submission 107, p 6.

reference to the guarantee of religious freedom under the ICCPR, stated that a failure to protect corporate entities:

*... would be to fail to give effect to human rights recognised under international law, with the consequent prospect that the Charter actually removes human rights in application. This is an unacceptable proposition for any Charter that purports to protect human rights. Any proposed Bill should not derogate from the standards implemented in international law.*⁶⁸

Dr Geralyn McCarron suggested expanding the types of individuals who have human rights, stating she believed ‘the Bill would be improved if it were to specify not only that all individuals in Queensland have human rights, but also that all individuals seeking asylum in Queensland have human rights protected under Queensland as well as international law’.⁶⁹

2.3.1.3 Departmental response

With respect to the proposal to permit corporations to have human rights, the department stated:

*While some human rights legislation confers rights on corporations, the restriction of the application of human rights to natural persons in this Bill is consistent not only with the Victorian Charter, upon which the Bill is based, but also human rights legislation in other common law and Commonwealth jurisdictions (such as the Australian Capital Territory and United Kingdom).*⁷⁰

In response to Dr McCarron’s suggestion, the department similarly advised:

*The application of human rights in the Bill to people in Queensland is consistent with the Victorian Charter, and other Commonwealth jurisdictions (such as the Australian Capital Territory and United Kingdom).*⁷¹

2.3.2 Human rights may be limited

Clause 13 provides that human rights provided for under the Bill may be subject under law to reasonable limitations, meaning the rights under the Bill are not absolute and are to be balanced against the rights of others and public policy issues of significant importance. The clause also sets out a framework for deciding when and how a right may be limited in such a way that an incompatibility is not created.⁷²

2.3.2.1 Proposed law

Subclause (1) sets out the basic test to be applied in determining how to limit a human right, providing that a right may be reasonably limited under law where it can be demonstrated that the limit is justified in a ‘free and democratic society based on human dignity, equality and freedom’.⁷³ All human rights set out in the Bill are subject to limitation under the Bill.⁷⁴

The explanatory notes provide:

*The phrase ‘under law’ refers to a limitation imposed by a law; for example, an Act, subordinate legislation or the common law.*⁷⁵

⁶⁸ Submission 68, p 2. See also submission 106 and submission 107 (discussing freedom of religion under the Bill and corporations).

⁶⁹ Submission 4, p 1.

⁷⁰ Department of Justice and Attorney-General, correspondence dated 3 December 2018, attachment, p 35.

⁷¹ Department of Justice and Attorney-General, correspondence dated 3 December 2018, attachment, p 36.

⁷² Explanatory notes, p 16.

⁷³ Clause 13(1).

⁷⁴ Explanatory notes, p 18.

⁷⁵ Explanatory notes, p 16.

Further:

*Because the justification must be ‘demonstrable’, the onus is on the State or public entity seeking to limit a human right to demonstrate that the limit is justified in the circumstances. Consistent with international case law, the reasonableness and justification criteria are examined together.*⁷⁶

Subclause (2) sets out the considerations when determining whether a limit on a human right is reasonable and justified. The factors are not exhaustive, may not be relevant in all matters, are intended to be used as a guide and are intended to ‘generally align with the principle of proportionality, a test applied by courts in many other jurisdictions to determine whether a limit on human rights is justifiable’.⁷⁷

The factors/considerations include:

- subclause (2)(a), the nature of the human right; this involves looking at the purpose and underlying values of the human right
- subclause (2)(b), the nature of the purpose of the limitation (including consistency with a free and democratic society based on human dignity, equality and freedom); it may be relevant to consider whether the purpose is sufficiently important to justify limiting a right or the purpose must relate to concerns which are pressing and substantial in a free and democratic society
- subclause (2)(c), the relationship between the limitation and its purpose (including if the limitation helps achieve the purpose); this includes considering whether the law goes some way towards furthering the purpose, and
- subclause (2)(d), whether there are less restrictive and reasonably available ways to achieve the purpose; it may be relevant to consider if the purpose of the law can be achieved reasonably in more than one way, including in a way that has less impact on human rights.⁷⁸

Consideration is also given to the importance of the purpose of the limitation to the human right subcl (2)(e), the importance of preserving the human right (taking into account the nature and extent of the limitation on the human right) (subcl (2)(f)), and the balance between those rights (subcl (2)(g)). The comparison is to consider whether the limiting law strikes a fair balance, noting that the more important the right and the greater imposition on the right, the more important the purpose of the proposed limitation will need to be to justify it.⁷⁹

2.3.2.2 Issues raised in submissions – human rights may be limited

Submitters generally appear to support the inclusion of cl 13, although a number suggested amendments, to provide greater clarity and to recognise the existence of absolute or non-derogable rights.

Raising concerns about the inclusion and construction of cl 13, Professors Aroney and Ekins stated:

The Bill adopts a vague and open-ended limitations clause which provides significantly less protection for certain rights and which allows the courts much wider leeway in determining where the balance should lie (cl 13). For example, article 18.3 of the ICCPR states that ‘freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others’. Further, article 19.3 of the ICCPR states that the right to freedom of expression ‘carries with it special duties and responsibilities’ and ‘may therefore be subject to

⁷⁶ Explanatory notes, p 16.

⁷⁷ Explanatory notes, pp 17 - 18.

⁷⁸ Explanatory notes, p 17.

⁷⁹ Explanatory notes, pp 17-18.

certain restrictions’; however, these restrictions ‘shall only be such as are provided by law and are necessary: (a) for respect of the rights or reputations of others; or (b) for the protection of national security or of public order (ordre public), or of public health or morals’. Clause 13 is much more open-ended and does not focus on the requirement that limitations and restrictions be ‘necessary’ and does not include the particular purposes for which they may be enacted, including the protection of the fundamental rights and freedoms of others.⁸⁰

Further:

The rights the Bill affirms are all qualified by the limitation provision in cl 13. This provision is a laundry list of considerations that might be relevant to the reasonableness of a limit on a right. Strikingly, however, it includes no mention of the need to protect the rights of others, even though this is often a justifiable reason why the state limits a right. However, the range of considerations set out in cl 13 do not stipulate a particular legal test which judges may apply by way of legal training or technique to determine how a law might be interpreted compatibly with human rights, or whether it is capable of being so interpreted. Instead, cl 13 offers judges an open-ended framework for lawmaking choice, for reasoning about what should be done by way of statute and administrative action, and about the standards of justice and decency that should govern our public life. These are political questions that are properly the domain of elected branches of the government.⁸¹

Other submitters welcomed the provision.

Protect All Children Today Inc. (PACT) appears to support cl 13, although suggested that cl 13 clarify that ‘the human rights protected by the Bill are not absolute and must be balanced against the rights of others and significant public policy.’⁸²

Dr Debeljak supported the inclusion of an external limitation provision operating across rights within the Bill (rather than having limitations internal to each provision), and the inclusion of explicit direction regarding the proportionality test. However, she also stated that such a provision must take into account ‘absolute rights’, and that ‘[a]t international law, absolute rights are not susceptible to limitation and/or balancing, and ought not be subject to the external limitations provisions.’⁸³

Dr Debeljak stated that cl 13 should be amended to not apply to a number of absolute rights, including the prohibition on genocide, torture or cruel, inhuman and degrading treatment or punishment, slavery and servitude, prolonged arbitrary detention, imprisonment for a failure to fulfil a contractual obligation; and others.⁸⁴

Similarly, Amnesty International Australia (AIA):

... acknowledges that not all human rights are absolute and may reasonably be limited on certain, defined grounds.

However, certain rights such as freedom from slavery and torture are so fundamental to the liberty and dignity of all people that they are non-derogable, and should be protected without limitation.

This principle is supported by the ICCPR which forbids derogation from articles 6 (right to life), 7 (torture or to cruel, inhuman or degrading treatment or punishment), 8 (slavery), 11 (contractual

⁸⁰ Submission 107, p 4.

⁸¹ Submission 107, p 7.

⁸² Submission 19, p 2.

⁸³ Submission 14, pp 2-3.

⁸⁴ Submission 14, p 2.

obligations), 15 (criminal offences), 16 (recognition before the law) and 18 (freedom of thought, conscience and religion) under any circumstances, including in a public emergency.

Accordingly, an exemption to section 13 of the Bill should be made in relation to sections 16 (right to life), 17 (protection from torture and cruel, inhuman or degrading treatment), 18 (freedom from forced work), 20 (freedom of thought, conscience, religion and belief), 31 (a fair hearing), 34 (right to not be tried or punished more than once) and 35 (retrospective criminal laws) of the Bill which must be protected as non-derogable civil and political rights.⁸⁵

The Queensland Law Society (QLS) and LawRight supported the inclusion of cl 13, however, also proposed the clause be amended to reflect the existence of absolute or non-derogable rights.⁸⁶

The ACLS also noted that ‘any proposed Bill should not derogate from the standards implemented in international law.’⁸⁷ In this respect, the ACLS refer to the Victorian Charter, stating that the adoption of a similar model would ‘effectively weaken the human rights protections offered under international law, which when applied in particular circumstances, may again amount to an effective withdrawal of the human rights of individuals or corporate entities.’⁸⁸ Again with reference to the Victorian Charter, the ACLS used the example of the guarantee of religious freedom in the ICCPR, noting that the introduction of the concept of ‘reasonable’ limitations, derogates from the standard of ‘necessary’ limitations referred to in the ICCPR at Article 18(3).⁸⁹

The issue of absolute rights and derogation was also raised in discussions on the provision providing for an override declaration (see section 2.3.6).

2.3.2.3 Departmental response

With respect to the inclusion of cl 13 as drafted, the department advised:

The Bill recognises that human rights are not absolute and must be balanced against other rights and public policy issues of significant importance.

The general limitations clause (cl 13) sets out a framework for deciding when and how a human right may be limited by providing that a human right may be limited if it is authorised by law and reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

*The general limitations clause sets out the factors that may be relevant in deciding if a limit is reasonable and justified. These factors are intended to broadly align with the principle of proportionality in international human rights jurisprudence and also structured proportionality as reflected in numerous High Court cases in testing whether a limit on the implied freedom of political communication can be justified (e.g. in *McCloy v New South Wales*; *Brown v Tasmania*).*

The reference to ‘demonstrably justified in a free and democratic society’ means that a law is not permitted that would be inconsistent with our system of law and government.

Implied legitimate reasons for limiting rights (as drawn from human rights jurisprudence) that are consistent with a free and democratic society include:

- *public interest considerations (including national security and community safety); and*
- *protection of the rights of others (for example, children and domestic violence victims).*

⁸⁵ Submission 69, p 8.

⁸⁶ Submission 103, p 8 and submission 25, p 3. See also submission 89 at page 11, supporting the recognition of *jus cogens* rights as non-derogable under international law (including freedom from torture and slavery).

⁸⁷ Submission 68, p 1.

⁸⁸ Submission 68, p 2.

⁸⁹ Submission 68, p 1.

The approach taken in cl 13 in setting out the factors that may be relevant in determining whether a limit on a human right is reasonable and justifiable, is proposed to both provide guidance but also to allow flexibility, so that a certain approach is not mandated and the approach can develop over time.

This approach allows for a greater degree of transparency and a more structured approach to analysing when and how rights can be limited. It will also allow for a flexible judgement that takes into account all the circumstances of the case.⁹⁰

In relation to submissions that certain rights should be excluded from limitation, the department stated:

While it is acknowledged that international law provides that some rights are non-derogable, and are acknowledged as absolute, a policy decision was made to include a general limitations provision.

This is the approach also taken in the Victorian Charter and the ACT Human Rights Act.

While the limitations clause provides that rights may be limited, this is restricted to limitations that:

- *are lawful; and*
- *can be justified in a free and democratic society based on human dignity, equality and freedom.*

It is expected that in interpreting whether an act, decision or statutory provision was compatible with a human right that is acknowledged as absolute in human rights jurisprudence (such as the prohibition on torture) that courts would consider international jurisprudence and whether the limitation of such rights could be demonstrably justified in a free and democratic society.⁹¹

2.3.3 Conflicting human rights

Some submitters also raised concerns about how human rights under the Bill will be managed when a conflict arises.

2.3.3.1 Issues raised in submissions – conflicting human rights

The Queensland Teachers' Union (QTU) expressed concerns that the rights as expressed in the Bill are too broad, which will result in the courts being required to interpret their intent, including where a conflict arises:

There are numerous inconsistencies in the Bill which arise from the extremely broad nature in which the rights are expressed. For example, the right to freedom of expression may conflict with the right to privacy or reputation. The difficulties in navigating these inconsistencies will be vast, as previously acknowledged by Justice Keane:

"The balancing process ... involved the Courts in balancing different values expressed so broadly that the balancing process requires judges to leap into a legal space without guidance. They were required to span a chasm so broad that it divides political parties. The cases illustrate that, even the ablest judges, doing their best with these statements of broad political aspirations, struggle to span this chasm in a way that does not leave at least one side of the political divide with misgivings as to whether justice would not be better served if the abstract declarations were translated into concrete outcomes by judges with different political view". [Justice Patrick Keane (2011), 2 NTLJ 77 at 84.]

⁹⁰ Department of Justice and Attorney-General, correspondence dated 3 December 2018, attachment, pp 40-42.

⁹¹ Department of Justice and Attorney-General, correspondence dated 3 December 2018, attachment, p 42.

It is the submission of the Queensland Teachers' Union that the Parliament should not pass laws that will require a Supreme Court determination in order to understand.

Minor amendments can avoid the need for the State to respond to Supreme Court proceedings.⁹²

Dr Bridget Lewis, Dr Hope Johnson and Mr John O'Brien of the QUT Faculty of Law's International Law and Global Governance research program (ILGG research program) noted that no provision is made in the Bill to guide how conflicts of rights should be managed:

Clause 13 provides the circumstances in which human rights may be limited by law, namely "only to reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom." This approach is also set out as a general principle in the Preamble to the Bill (para 4). The factors which must be considered in determining whether a limitation imposed by law is reasonable are set out in cl 13(2) and are largely consistent with international human rights law.

However, no specific provision is made to guide a decision-maker in striking an appropriate balance where the rights of more than one person might be in conflict. For example, no guidance is given for how a conflict ought to be resolved between freedom of expression (cl 21) and the right to reputation (cl 25(b)). Further, rights such as freedom of expression (cl 21), freedom of assembly (cl 20) and freedom of thought, conscience, religion and belief (cl 20) are commonly defined in international law in terms which clarify the circumstances in which these rights can be limited. It is recommended therefore that these rights be further defined to clarify when they may be limited and on what grounds.⁹³

The ILGG research program suggested:

Further guidance for balancing competing rights could be achieved through articulating clear principles of necessity and proportionality. In a situation where two or more rights conflict, it can be legitimate to limit the enjoyment of one right for the protection of another, but such limitation must be restricted to what is necessary and proportionate to achieving that aim. These requirements are commonly found in international law and are used to strike an appropriate balance between competing rights. Clear principles of necessity and proportionality would assist the Human Rights Commissioner in conciliation processes, and could be employed by courts or tribunals determining human rights claims where issues of conflicting rights arise.⁹⁴

2.3.3.2 Departmental response

The department did not provide a response to the concerns raised about how conflicts that arise in relation to different human rights will be managed.

2.4 Civil and political rights

The human rights protected by the Bill are in Part 2, Divisions 2 and 3. The Bill primarily protects civil and political rights drawn from the ICCPR.⁹⁵ The explanatory notes state that the Bill also explicitly recognises '...cultural rights and, in particular, the distinct cultural rights of Aboriginal peoples and Torres Strait Islander peoples'.⁹⁶

2.4.1 Recognition and equality before the law

Clause 15 provides for the right to recognition and equality before the law.

⁹² Submission 142, p 3.

⁹³ Submission 89, pp 10-11.

⁹⁴ Submission 89, p 11.

⁹⁵ Explanatory notes, p 3.

⁹⁶ Explanatory notes, p 3.

2.4.1.1 *Proposed law*

Subclause (1) provides that every person has the right to recognition as a person before the law. The explanatory notes state that the provision is ‘...modelled on article 16 of the ICCPR’.⁹⁷

Subclause (2) provides that every person has the right to enjoy their human rights without discrimination. According to the explanatory notes:

*This provision is modelled on article 26 of the ICCPR. The definition of discrimination in the Bill includes direct or indirect discrimination within the meaning of the Anti-Discrimination Act 1991, including on the basis of an attribute set out in section 7 of that Act. The accompanying note to the definition of discrimination in schedule 1 lists some of these attributes, however the list is not exhaustive.*⁹⁸

Subclause (3) provides the right to legal personality: ‘Every person is equal before the law and is entitled to the equal protection of the law without discrimination’.⁹⁹ According to the explanatory notes, this is based on article 16 of the ICCPR and ‘...is closely linked to the principle of non-discrimination’.¹⁰⁰

Subclause (4) provides the right to equality: ‘Every person has the right to equal and effective protection against discrimination’.¹⁰¹ According to the explanatory notes, it is modelled on article 26 of the ICCPR and:

*...reflects the essence of human rights: that every person holds the same human rights by virtue of being human and not because of some particular characteristic or membership of a particular social group.*¹⁰²

Subclause (5) provides that: ‘Measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination’. The explanatory notes state that:

The purpose of this provision is to recognise that substantive equality is not necessarily achieved by treating every person equally, and in some situations special measures are required to achieve equality for groups of disadvantaged persons.

*The right to equality and freedom from discrimination is a stand-alone right, but also permeates all human rights in the Bill.*¹⁰³

2.4.1.2 *Issues raised in submissions - recognition and equality before the law*

Whilst supporting cl 15, Queensland Advocacy Incorporated (QAI) recommended that the right to recognition and equality before the law should be expanded to include the right to reasonable adjustments to ensure equitable access to justice.¹⁰⁴

QAI proposed that cl 15 be amended to include the following sub-clause (to be inserted between sub-clauses (4) and (5)):

Every person has the right to equal and effective access to justice, including through the provision of reasonable adjustments, in order to facilitate their effective role as direct and indirect

⁹⁷ Explanatory notes, p 18.

⁹⁸ Explanatory notes, p 18.

⁹⁹ Clause 15(3).

¹⁰⁰ Explanatory notes, p 18.

¹⁰¹ Clause 15(4).

¹⁰² Explanatory notes, pp 18-19.

¹⁰³ Explanatory notes, p 19.

¹⁰⁴ Submission 76, p 3.

*participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.*¹⁰⁵

*In QAI's view, the inclusion of this additional limb is consistent with Article 13 of the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD): '...which prescribes the right to access to justice for persons with disabilities. This right is prescribed in addition to the right to equal recognition before the law.'*¹⁰⁶

Further, QAI observed that:

*Section 45 of the Equal Opportunity Act 2010 (Vic) requires a service provider to make reasonable adjustments for a person with disability and provides an independent basis for a finding of unlawful discrimination. There is no equivalent provision in the Anti-Discrimination Act 1991 (Qld) and the defence of 'unjustifiable hardship' is often used to defeat a request for reasonable adjustments.*¹⁰⁷

Similarly, Australian Lawyers for Human Rights (ALHR) supported cl 15, but sought an extension to the clause to include: '...the right to equal and effective access and adjustments, which incorporates the provision of reasonable adjustments, to ensure equitable access to justice'.¹⁰⁸

People with Disability Australia (PWDA) recommended that cl 15(5) be amended to include '...a specific guarantee to procedural and age-appropriate accommodations (reasonable adjustments) in all legal proceedings including, as witnesses, in investigations and other preliminary stages'.¹⁰⁹

Other submissions:

- expressed concerns regarding the definition of 'persons',¹¹⁰
- sought protection for the right to breathe clean air, in the context of animal waste issues identified by rural residents, including farmers,¹¹¹
- recommended that cl 15 provide that persons accused of crime and persons directly affected by that crime are afforded human rights,¹¹² and
- highlighted the lack of recognition of Indigenous rights and the equality of Indigenous people before the law.¹¹³

2.4.1.3 Departmental response

In response to issues raised in submissions, DJAG noted recommended changes to the drafting of the rights in the Bill, thanked submitters for providing feedback, and advised that:

DJAG will consider this feedback.

*In addition, DJAG notes the operation of the Act will be reviewed as soon as possible after 1 July 2023, pursuant to cl 95.*¹¹⁴

¹⁰⁵ Submission 76, p 4.

¹⁰⁶ Submission 76, pp 4-5.

¹⁰⁷ Submission 76, p 5.

¹⁰⁸ Submission 91, p 2.

¹⁰⁹ Submission 67, p 4.

¹¹⁰ Eric Raymond, submission 38.

¹¹¹ Brenton Hall, submission 49, p 1.

¹¹² Dr Robyn Holder, submission 95, p 4.

¹¹³ Monique Bond, submission 139, p 1.

¹¹⁴ Department of Justice and Attorney General, correspondence dated 3 December 2018, attachment, p 29, in reference to submissions 67, 76 and 91.

2.4.2 Right to life

Clause 16 provides for the right to life.

2.4.2.1 Proposed law

Clause 16 provides that: ‘Every person has the right to life and has the right not to be arbitrarily deprived of life’.¹¹⁵ The explanatory notes state that this clause is ‘...modelled on article 6(1) of the ICCPR’.¹¹⁶

According to the explanatory notes, the right not to be deprived of life is limited to arbitrary deprivation of life:

Not every action that results in death will be arbitrary. This right reflects the positive obligation on states in article 6(1) of the ICCPR to take positive steps to protect the lives of individuals through, for example, appropriate laws that prohibit arbitrary killing and positive measures to address other threats to life such as malnutrition and infant mortality.

This clause is to be read with the savings provision in cl 106, which states that nothing in the Act affects any law relating to termination of pregnancy or the killing of an unborn child.¹¹⁷

2.4.2.2 Issues raised in submissions – right to life

Various submitters expressed or reflected views that the *Termination of Pregnancy Act 2018* and/or the Bill’s proposed savings provision (cl 106) were inconsistent with the Bill’s proposed right to life (cl 16).¹¹⁸

Expressing an alternative view, Professor Heather Douglas offered support for cl 106:

It is particularly pleasing to note that cl 106 protects the reproductive rights of women ensuring that nothing in the (proposed) Human Rights Act affects any law relating to termination of pregnancy or the killing of an unborn child.¹¹⁹

2.4.2.3 Departmental response

In response to submissions, the department stated that:

Under Queensland law, a child becomes a person capable of being killed when it has completely proceeded in a living state from the body of the mother.

There are a number of rights that could potentially create confusion about who is a person and the right to a termination of pregnancy.

The right to life is provided in cl 16, which states that every person has the right to life and has the right not to be arbitrarily deprived of life. It is not intended that this right provide a determining statement as to when life begins.

The right to privacy has also been associated with the right to a termination of pregnancy.

The savings provision at cl 106 is intended to clarify that the Bill does not affect any law relating to termination of pregnancy or the killing of an unborn child.¹²⁰

¹¹⁵ Clause 16.

¹¹⁶ Explanatory notes, p 19.

¹¹⁷ Explanatory notes, p 19.

¹¹⁸ For example, submissions 29, 47, 48, 50, 54, 78, 79, 107 and 110.

¹¹⁹ Submission 46, p 1.

¹²⁰ Department of Justice and Attorney General, correspondence dated 3 December 2018, attachment, p 86, in reference to submissions 27, 29, 43, 46, 47, 48, 50, 54, 78, 79, 98, 106, 107, 110 and 143.

2.4.3 Protection from torture and cruel, inhuman or degrading treatment

Clause 17 provides for the right to protection from torture and cruel, inhuman or degrading treatment and is '...modelled on article 7 of the ICCPR'.¹²¹

2.4.3.1 *Proposed law*

The explanatory notes state that:

Subclause (a) prohibits torture, which is understood as acts that intentionally inflict severe physical or mental pain or suffering.

Subclause (b) prohibits cruel or inhuman treatment, which also involves severe pain or suffering, but not necessarily intentionally inflicted.

Subclause (b) also prohibits degrading treatment, which is focused less on severity of suffering but on humiliation, which is a subjective test.

Whether an act or omission amounts to torture or one or more of the elements of prescribed treatment (cruel, inhuman or degrading) will be a question of degree and turn on the circumstances of the case.

Subclause (c) provides that a person must not be subjected to medical or scientific experimentation or treatment without giving their full, free and informed consent. This subclause expands on article 7 of the ICCPR by providing that consent must be given for medical treatment, and that consent must be informed.¹²²

2.4.3.2 *Issues raised in submissions - protection from torture and cruel, inhuman or degrading treatment*

The QMHC was pleased at the inclusion of the right to protection from torture and cruel, inhuman or degrading treatment in the Bill:

We believe human rights legislation together with the implementation [of the] Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) currently underway will improve human rights protections for all Queenslanders.¹²³

PACT considered that cl 17 was particularly relevant for offences against children and young people:

...who are particularly vulnerable purely because of their age, lack of physicality to protect themselves, their limited maturity and knowledge/confidence to remove themselves from a dangerous situation or environment. This is particularly challenging in cases of interfamilial abuse. We do not believe that anyone under the age of 16 years has the capacity to provide informed consent.¹²⁴

Health Consumers Queensland (HCQ) supported subclause (c) and the expansion of article 7 of the ICCPR by providing that consent must be given for medical treatment, and that consent must be informed:

It is our experience in hearing feedback and complaints from health consumers that an inherent lack of informed decision making is often at the heart of their poor experience of health care and subsequent poor outcomes. This occurs through people not being given evidence based

¹²¹ Explanatory notes, p 19.

¹²² Explanatory notes, p 19.

¹²³ Submission 94, pp 3 and 7.

¹²⁴ Submission 19, p 2.

information about their health care options, the opportunity to ask questions, and being given adequate time to consider the benefits and risks of options.

Legislation must be underpinned by more clinician and community education in order to support true, informed health decision making for all Queenslanders.¹²⁵

Monique Bond considered that the protection of Aboriginal and Torres Strait Islander people from torture and cruel, inhuman or degrading treatment is too often ignored and needs to be much more carefully monitored:

There are many videos of Indigenous people being kicked on the ground by people with heavy boots. Also there is evidence of long terms of isolation. This is known and yet it is allowed to continue.¹²⁶

Jennifer Faulkner considered the right to protection from torture and cruel, inhuman or degrading treatment as a fundamental right and identified various forms of abuse and violence perpetrated against (and various forms of harassment and treatment of) women, children and certain people who identify as LGBTIQ.¹²⁷

2.4.4 Freedom from forced work

Clause 18 provides for the right to freedom from forced work and is ‘...modelled on article 8 of the ICCPR’.¹²⁸

2.4.4.1 Proposed law

According to the explanatory notes:

Subclause (1) provides that a person must not be held in slavery or servitude. Like freedom from torture, freedom from slavery refers to practices of extreme expressions of power human beings can possess over other human beings, representing a direct attack on bodily integrity and security, human personality and dignity.

Subclause (2) provides that a person must not be made to perform forced or compulsory labour.

Subclause (3) recognises that forced or compulsory labour does not include certain forms of work or service such as:

(a) work or service required of a person who is detained because of a lawful court order, or who, under an order has been conditionally released from detention or ordered to perform work in the community;

(b) work or service performed under a work and development order under the State Penalties Enforcement Act 1999;

(c) work or service required because of an emergency in the Queensland community; or

(d) work or service that forms part of normal civil obligations (such as jury service under the Jury Act 1995 for example).¹²⁹

¹²⁵ Submission 135, p 5.

¹²⁶ Submission 139, p 1.

¹²⁷ Submission 17, pp 1 and 5-6.

¹²⁸ Explanatory notes, p 19.

¹²⁹ Explanatory notes, pp 19-20.

2.4.4.2 Issues raised in submissions - freedom from forced work

The Queensland Nurses and Midwives' Union (QNMU) supported the clause, contending that these provisions would enhance the industrial protections currently in place: 'As a trade union, we denounce any direct attack on the security, human personality and dignity of workers'.¹³⁰

2.4.5 Freedom of movement

Clause 19 provides for the right to freedom of movement: '...specifically that every person lawfully within Queensland has the right to move freely within Queensland, enter or leave Queensland, and choose where they live'.¹³¹

The explanatory notes state that this clause is modelled on article 12 of the ICCPR:

*It reflects the negative obligation on the State under article 12 of the ICCPR to not act in a way that would unduly restrict the freedom of movement, but is not intended to impose positive obligations on the State to take positive actions to promote free movement (e.g. the provision of free public transport services).*¹³²

2.4.6 Freedom of thought, conscience, religion and belief

Clause 20 provides for the right to freedom of thought, conscience, religion and belief.

2.4.6.1 Proposed law

Clause 20 is modelled on article 18 of the ICCPR and '...refers to the right of everyone to develop autonomous thoughts and conscience, to think and believe what they want and to have or adopt a religion, free from external influence'.¹³³

According to the explanatory notes:

Subclause (1) provides for two rights. Subclause (1)(a) provides for the freedom to have or adopt a religion or belief. It requires states to refrain from interfering with an individual's spiritual or moral existence.

Subclause (1)(b) provides for the freedom to demonstrate religion or belief in worship, observance, practice and teaching. The freedom to demonstrate religion or belief can be exercised either individually or as part of a community, in public or in private.

*Subclause (2) provides that a person must not be coerced or restrained in a way that limits their freedom to have or adopt a religion or belief.*¹³⁴

2.4.6.2 Issues raised in submissions - freedom of thought, conscience, religion and belief

The Ethnic Communities Council of Queensland (ECCQ) endorsed the inclusion of this clause '...that strongly affirms the freedoms intrinsic to a harmonious multicultural society'.¹³⁵

Monique Bond commented that:

*The rights of Indigenous Peoples to hold ceremonies, including at funerals and rites of development at certain age groups... are often ridiculed or ignored, particularly when ability of people to exercise these rights is made very difficult, for example for people on parole.*¹³⁶

¹³⁰ Submission 31, p 6.

¹³¹ Explanatory notes, p 20.

¹³² Explanatory notes, p 20.

¹³³ Explanatory notes, p 20.

¹³⁴ Explanatory notes, p 20.

¹³⁵ Submission 148, p 1.

¹³⁶ Submission 139, p 2.

Alison Courtices and Julia Mizuno submitted that ‘belief’ is not defined and should be defined as including ‘non-religious beliefs’ to avoid any uncertainty that non-religious beliefs have equal protection to religious beliefs.¹³⁷ The latter argued that this would constitute a simple, yet powerful, amendment to the definitions schedule to avoid any uncertainty:

*If the word ‘religion’ is considered necessary to include then why wouldn’t it also be necessary to include non religious beliefs, otherwise just call them beliefs without mention of ‘religious’? I understand that those words are not included in the International Covenant on Civil and Political Rights and this has led to uncertainty and differing opinions of signatories to the Convention. A simple clarification in the Human Rights Act will ensure there is no uncertainty in our state.*¹³⁸

The ACL observed the following fundamental differences between cl 20 and Article 18:

- the limitation of the ability to abrogate the right found in Article 18 is to be contrasted with the wide range of factors which may be used to limit the right in cl 7 (to which cl 20 is subject), and
- the silence in cl 20 as to the rights of parents or guardians to ensure the religious and moral education of their children is in conformity with their own convictions.¹³⁹

The ACL contended that the Bill provides weak protection to the fundamental right of freedom of thought, conscience and religion and recommended it be amended to be consistent with ICCPR Article 18.¹⁴⁰

Mr Eric Raymond submitted that people ‘also need the freedom to not be subjected to unwanted and unasked for views’.¹⁴¹

2.4.6.3 Departmental response

In response to issues raised in submissions, DJAG noted recommended changes to the drafting of the rights in the Bill, thanked submitters for providing feedback, and advised that:

DJAG will consider this feedback.

*In addition, DJAG notes the operation of the Act will be reviewed as soon as possible after 1 July 2023, pursuant to cl 95.*¹⁴²

2.4.7 Freedom of expression

Clause 21 provides for the right to freedom of expression.

2.4.7.1 Proposed law

The explanatory notes state that this clause is modelled on article 19 of the ICCPR:

Freedom of expression covers both the right to hold and express an opinion, through speech, art, writing (or other forms of expression) and to seek out and receive the expressions of others’ opinions. The right is central to the fulfilment of other rights such as cultural rights and freedom of thought, conscience and religion.

¹³⁷ Submissions 52 and 53, respectively.

¹³⁸ Submission 52, p 1.

¹³⁹ Submission 106, p 7.

¹⁴⁰ Submission 106, pp 6-7.

¹⁴¹ Submission 38, p 1.

¹⁴² Department of Justice and Attorney General, correspondence dated 3 December 2018, attachment, p 29, in reference to submissions 52, 53 and 106.

Subclause (1) provides that every person has the right to hold an opinion without interference. The right to hold an opinion is considered a fundamental component of an individual's privacy, requiring absolute protection without external interference.

Subclause (2) upholds the right to seek, receive and impart information and ideas orally, in writing, in print, by way of art, or in another medium, within or outside of Queensland.

There is an acknowledgement in international law that this right may be limited. The general limitations clause (cl 13), will provide for this.¹⁴³

2.4.7.2 Issues raised in submissions – freedom of expression

The QTU expressed concern that this right may be used to justify cyberbullying of State Government employees, particularly teachers, and cyberbullying between students:

A bully may assert their cyberbullying conduct is an expression of their opinion and an exercise of their right to "seek out and receive" the opinions of others.

The "right" as it is presently expressed may prevent state schools from expressing dissatisfaction with cyberbullying by parents and prevent state schools from disciplining students for cyberbullying.

The effectiveness of the Department of Education's Cybersafety & Reputation Management Unit could be weakened.¹⁴⁴

QTU suggested a minor amendment to the Bill 'to preserve the right of the Department of Education to engage with their parent[s] and community around cyber activity and the right of schools to discipline students where appropriate for cyberbullying.'¹⁴⁵

ALHR argued that the clause does not address the intended relationship between the protected right and elements in the external legal order, specifically, the rights and reputation of others and the protection of national security, public order, public health and public morality:

Section 15(3) of the Victorian Charter, which does not find a counterpart in the Bill, explicitly limits the right to freedom of expression by attaching special duties and responsibilities to the right.

Again, we suggest that the principles of international human rights law in relation to the interrelated, interdependent and indivisible nature of human rights should be the guiding force here.¹⁴⁶

ALHR's strong recommendation is that:

...the Bill should be amended to incorporate a section equivalent to section 15(3) of the Victorian Charter, identifying particular considerations relevant to the inquiry under section 13 of the Bill by making it clear that the right to freedom of expression involves responsibilities.¹⁴⁷

Professor Nicholas Aroney and Professor Richard Ekins observed that Article 19.3 of the ICCPR states that:

...the right to freedom of expression 'carries with it special duties and responsibilities' and 'may therefore be subject to certain restrictions'; however, these restrictions 'shall only be such as are

¹⁴³ Explanatory notes, pp 20-21.

¹⁴⁴ Submission 142, p 2.

¹⁴⁵ Submission 142, p 2.

¹⁴⁶ Submission 91, p 10.

¹⁴⁷ Submission 91, p 10.

*provided by law and are necessary: (a) for respect of the rights or reputations of others; or (b) for the protection of national security or of public order... or of public health or morals’.*¹⁴⁸

Professors Aroney and Ekins state that, rather than adopt the carefully-defined limitations clauses that appear in particular provisions of the ICCPR, the Bill:

*...adopts a vague and open-ended limitations clause which provides significantly less protection for certain rights and which allows the courts much wider leeway in determining where the balance should lie (cl 13).*¹⁴⁹

Whilst noting the importance and necessity of cl 21(2), the Indigenous Lawyers Association of Queensland Inc. expressed concern that abuse of this freedom will occur to the detriment of Aboriginal peoples and Torres Strait Islanders:

In particular, where Aboriginal peoples or Torres Strait Islanders are menaced, harassed, offended or where hatred or violence is directed towards our people purely on the basis of race or the effect of colonisation, in circumstances where the other individual is asserting their right to expression. Consequently we do not believe that clauses 13, 14 or 17 will offer sufficient protection or act as a deterrent from such behaviour.

*Current protection for Aboriginal people and Torres Strait Islanders has existed in section 18C of the Racial Discrimination Act 1975 (Cth). However there is a growing movement of people who would have this section repealed. If this were to occur there would be no protection if cl 21(2) remains open without the necessary protections in place.*¹⁵⁰

Mr Raymond commented that: ‘Presumably this right is limited by many other laws’.¹⁵¹

2.4.7.3 Departmental response

The department responded to issues raised:

The general limitations clause (cl 13) will ensure that the right to freedom of expression can be limited in accordance with the law and in ways that can be justified in a free and democratic society based on human dignity, equality and freedom.

The independent review of the Victorian Charter, conducted by Michael Brett Young, tabled in the Victorian Parliament in September 2015 – From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006 (the Young Review) recommended that the right to freedom of expression not include an internal limitation, as this would duplicate the effect of the general limitations clause and create confusion.

*Not including a specific internal limitation in the right to freedom of expression is also consistent with the approach taken to the right to freedom of thought, conscience, religion and belief (cl 20).*¹⁵²

2.4.8 **Peaceful assembly and freedom of association**

Clause 22 provides for the right of peaceful assembly and freedom of association.

¹⁴⁸ Submissions 107, p 4.

¹⁴⁹ Submissions 107, p 4.

¹⁵⁰ Submission 137, p 1.

¹⁵¹ Submission 38, p 1.

¹⁵² Department of Justice and Attorney General, correspondence dated 3 December 2018, attachment, p 27, in reference to submissions 37, 91, 107 and 142.

2.4.8.1 Proposed law

The explanatory notes state that this right protects not only the right to meet but to join or form a group with like-minded people:

Subclause (1) provides for the right of peaceful assembly. This right is expressly limited to peaceful assemblies, such as assemblies that do not involve violence. This provision is modelled on article 21 of the ICCPR. It covers both the preparing for and conducting of the assembly by the organisers and the participation in the assembly. Not every assembly of individuals is protected by this right. In international law, 'assembly' in this context means the intentional, temporary gathering of several persons for a specific purpose.

Subclause (2) provides for freedom of association and is modelled on article 22 of the ICCPR. While it is important for political purposes and trade unions, it extends to all forms of association with others. It includes the freedom to choose between existing organisations and form new ones.

The freedom to join and form trade unions is merely a special case of the freedom of association.

There is an acknowledgement in international law that this right may be limited. The general limitations clause (cl 13), will provide for this.¹⁵³

2.4.8.2 Issues raised in submissions - peaceful assembly and freedom of association

In QNMU's view, the Bill should not conflate these rights, although there is an interrelationship between the two:

While these rights protect peoples' ability to come together for a common purpose, peaceful assembly may not necessarily lead to collective action under freedom of association. A comprehensive regulatory environment governs the activities of registered trade unions and their ability to take collective action. Peaceful assembly may be one means by which union members seek to gather, but they can also associate in other ways.¹⁵⁴

Respect Inc and Scarlet Alliance recommended that cl 22(1) be amended to include:

...allowing any person of any occupation in Queensland to associate, support one another, and share resources without unnecessary police intervention. In addition, 22 (2) should be extended to include professional bodies and representative organisations.¹⁵⁵

In Queensland Council of Unions' (QCU) submission the rights to collectively bargain and freedom of association are inextricably linked:

Freedom of association is devalued in the absence of a right to collectively bargain (Owens et al 2011:528). For this reason, we would advocate the extension of the rights that are protected by the Bill to expressly include the right to collectively bargain.¹⁵⁶

Eric Raymond stated that the right '...should not be taken away with "bikie" and similar laws'.¹⁵⁷

2.4.8.3 Departmental response

In response to issues raised in submissions, DJAG noted recommended changes to the drafting of the rights in the Bill, thanked submitters for providing feedback, and advised that:

¹⁵³ Explanatory notes, p 21.

¹⁵⁴ Submission 31, p 6.

¹⁵⁵ Submission 136, p 7.

¹⁵⁶ Submission 119, pp 2-3.

¹⁵⁷ Submission 38, p 1.

DJAG will consider this feedback.

In addition, DJAG notes the operation of the Act will be reviewed as soon as possible after 1 July 2023, pursuant to cl 95.¹⁵⁸

2.4.9 Taking part in public life

Clause 23 provides for the right to take part in public life.

2.4.9.1 Proposed law

The explanatory notes state that this clause is modelled on article 25 of the ICCPR:

It provides for the right to take part in public affairs, either directly or through chosen representatives and for every citizen to vote. It basically confers a right to a democratic system.

Subclause (1) provides that every person in Queensland has the right and opportunity without discrimination to participate in the conduct of public affairs, either directly or through a freely chosen representative. This subclause does not provide a right to a specific outcome from such participation.

Subclause (2) provides that every eligible person has the right and opportunity, without discrimination, to vote and be elected at elections and to have access, on general terms of equality, to the public service and public office. The limitation of this right to eligible persons allows for limitations attached to the right to vote, such as residence and age, as well as specific legislative limitations such as the eligibility of prisoners to vote that is restricted under section 106 of the Electoral Act 1992.¹⁵⁹

2.4.10 Property rights

Clause 24 provides for property rights.

2.4.10.1 Proposed law

The explanatory notes state that this clause is modelled on article 17 of the UDHR:

The right essentially protects a person from having their property unlawfully removed.

Subclause (1) provides that all persons have the right to own property alone or with others.

Subclause (2) provides that a person must not be arbitrarily deprived of their property. This clause does not provide a right to compensation. The protection against being deprived of property is internally limited to arbitrary deprivation of property.¹⁶⁰

According to the explanatory notes, cl 107 ensures that:

...the Bill does not affect native title rights and interests otherwise than in accordance with the Native Title Act 1993 (Cwlth) (subcl (1)). Further, a provision of the Bill must be interpreted in a way that does not prejudice native title rights and interests to the extent the rights and interests are recognised and protected under the native title legislation (subcl (2)). The definition of 'affects' and 'native title rights and interests' for the purposes of the clause are linked to the definitions in the Native Title Act 1993 (Cwlth) (subcl (3)). This clause is intended to make it clear that the introduction and passage of the Bill is not intended to be a 'future act' as this is defined under the Native Title Act 1993 (Cwlth).¹⁶¹

¹⁵⁸ Department of Justice and Attorney General, correspondence dated 3 December 2018, attachment, p 29, in reference to submissions 31 and 136.

¹⁵⁹ Explanatory notes, p 21.

¹⁶⁰ Explanatory notes, pp 21-22.

¹⁶¹ Explanatory notes, p 47.

2.4.10.2 Issues raised in submissions - property rights

AgForce Queensland recommended the Queensland Government:

- make provision for the review of existing Acts in the Queensland Parliament to deal with the implications of s 24, specifically that it is a human right for a person to own property and not be arbitrarily deprived of the person's property, and
- ensure clear provisions are outlined for the requirement of providing different forms of compensation to landholders for whom their property has been arbitrarily deprived.¹⁶²

In relation to property rights, AgForce Queensland stated that:

*The expropriation of property value and the diminution of property rights by Queensland Acts of Parliament such as the Vegetation Management Act 1999, the Nature Conservation Act 1992 and the Environmental Protection Act 1994 to varying extents need to be scrutinized regarding their individual and collective influence on property rights and property value.*¹⁶³

Additionally, it observed that compensation for loss of human rights is not clearly mentioned within the Bill:

*Enduring instruments that seek to provide some forms of compensation, either financially or through other credit or land-use agreements will surely be in the interests of ongoing value and preservation of human rights relating to land, particularly with reference to Section 24.*¹⁶⁴

Monique Bond submitted that 'Indigenous people are now allowed to buy property but many cannot afford to buy any. They also often find it difficult to rent just because they are known to be Indigenous'.¹⁶⁵

Eric Raymond contended that cl 24(2) 'Should say "Not deprived of their property"'.¹⁶⁶

2.4.10.3 Departmental response

In response to issues raised in submissions, DJAG noted recommended changes to the drafting of the rights in the Bill, thanked submitters for providing feedback, and advised that:

DJAG will consider this feedback.

*In addition, DJAG notes the operation of the Act will be reviewed as soon as possible after 1 July 2023, pursuant to cl 95.*¹⁶⁷

2.4.11 Privacy and reputation

Clause 25 provides for the rights to privacy and reputation.

2.4.11.1 Proposed law

The explanatory notes state that this clause is modelled on article 17 of the ICCPR:

The scope of the right to privacy is very broad. It protects privacy in the narrower sense including personal information, data collection and correspondence, but also extends to an individual's private life more generally. For example, the right to privacy protects the individual against interference with their physical and mental integrity; freedom of thought and conscience; legal

¹⁶² Submission 134, p 1.

¹⁶³ Submission 134, p 2.

¹⁶⁴ Submission 134, p 3.

¹⁶⁵ Submission 139, p 2.

¹⁶⁶ Submission 38, p 1.

¹⁶⁷ Department of Justice and Attorney General, correspondence dated 3 December 2018, attachment, p 29, in reference to submission 134.

personality; individual identity, including appearance, clothing and gender; sexuality; family and home.

This provision contains internal limitations. The protection against interference with privacy, family, home or correspondence is limited to unlawful or arbitrary interference. The notion of arbitrary interference extends to those interferences which may be lawful, but are unreasonable, unnecessary and disproportionate. The protection against attack on reputation is limited to unlawful attacks. It prohibits attacks on a person's reputation that are unlawful and intentional, based on untrue allegations.

While privacy has a very broad scope, it is a right that must be balanced against other rights and competing interests. Clause 13, the general limitation clause, will provide for this.¹⁶⁸

2.4.11.2 Issues raised in submissions - privacy and reputation

QNMU believed this clause can be enhanced to incorporate the privacy of workers, particularly in the use of technology: 'Whether it is online privacy or the use of surveillance mechanisms, legislation must provide appropriate safeguards to protect a person's privacy and reputation'.¹⁶⁹

QNMU noted that, despite the UDHR, the ICCPR and international law recognising privacy as a basic human right, the '...domestic legal rights of staff members in respect to workplace surveillance are limited'.¹⁷⁰ It stated that, unlike some other states, Queensland does not have specific workplace surveillance legislation, concluding that '...Queensland has less privacy coverage than other jurisdictions'.¹⁷¹

Eric Raymond argued that cl 25 did not create a right: 'The word "unlawfully" simply undoes the right entirely'.¹⁷²

2.4.11.3 Departmental response

In response to issues raised in submissions, DJAG noted recommended changes to the drafting of the rights in the Bill, thanked submitters for providing feedback, and advised that:

DJAG will consider this feedback.

In addition, DJAG notes the operation of the Act will be reviewed as soon as possible after 1 July 2023, pursuant to cl 95.¹⁷³

2.4.12 Protection of families and children

Clause 26 provides for the right to protection of families and children.

2.4.12.1 Proposed law

The explanatory notes state that this clause, which recognises two rights (both the protection of the family and children), is modelled on articles 23(1) and 24(1) of the ICCPR:

Both rights are stronger than non-interference and extend to the guarantee of institutional protection of the family and positive measures for protection of children by the society and the State.¹⁷⁴

¹⁶⁸ Explanatory notes, p 22.

¹⁶⁹ Submission 31, p 6.

¹⁷⁰ Submission 31, p 7.

¹⁷¹ Queensland Nurses and Midwives' Union, submission 31, p 7.

¹⁷² Submission 38, p 1.

¹⁷³ Department of Justice and Attorney General, correspondence dated 3 December 2018, attachment, p 29, in reference to submission 31.

¹⁷⁴ Explanatory notes, p 22.

Subclause (1) provides that families are the fundamental group unit of society and are entitled to be protected by society and the State. According to the explanatory notes: 'The term 'family' is understood broadly in international law, extending to different cultural understandings of family and small family units with or without children'.¹⁷⁵

Subclause (2) provides that every child has the right, without discrimination, to protection that is needed by the child and is in their best interests as a child:

This right recognises the special protection that must be afforded to children based on their particular vulnerability. Such protection is to be afforded to the child by the child's family, society and the State.

The CRC [United Nations Convention on the Rights of the Child] has elaborated on the rights of children, including the protection that should be afforded to children. The underlying principle in the CRC is that 'the best interests of the child' shall be a primary consideration in all actions concerning children.¹⁷⁶

Subclause (3) provides that every person born in Queensland has a right to a name and to registration of birth as soon as practicable after being born:

This subclause is modelled on article 24(2) of the ICCPR. The right to a name and registration is primarily directed at the child's parents and guardians. It also reflects the positive obligation on the State in article 24(2) to establish an appropriate legal framework and to provide services of registration.

This right is intended to operate consistently with the Births, Deaths and Marriages Registration Act 2003 and is not intended to place any positive obligations on the Registrar of Births, Deaths and Marriages to take active steps to register a birth or name a child if a parent does not lodge a registration, beyond any obligations already imposed by the Births, Deaths and Marriages Registration Act 2003.¹⁷⁷

2.4.12.2 Issues raised in submissions – protection of families and children

The Youth Advocacy Centre (YAC) recommended that the views of children be given due weight in decisions made about them:

...the United Nations Convention on the Rights of the Child... affirms that children are entitled to the same rights in terms of their economic, social, cultural, civil and political rights as adults but have additional rights to recognize their dependence on adults.

Article 12 of CROC provides that a child "who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child" and it would be appropriate for this to be included in cl 26, not least as a response to the far too many occasions when children have suffered at the hands of adults and systems because they have not had the ability to be heard.¹⁷⁸

Similarly, the Office of the Public Guardian considered that the views of the child should be taken into account, submitting that caution may need to be exercised concerning the commission's interpretation of the 'best interests of the child':

¹⁷⁵ Explanatory notes, p 22.

¹⁷⁶ Explanatory notes, p 22.

¹⁷⁷ Explanatory notes, p 23.

¹⁷⁸ Submission 41, pp 5-6.

*This should be clarified so as to ensure that it is balanced against (and does not devalue) a child's right to participate, or have a contrary view (as to what constitutes their best interests), in matters relating to them.*¹⁷⁹

Yourtown welcomed the inclusion of the right, recommending that consideration be had to:

*...the work currently being undertaken in the Australian Government's review of the family law system in relation to the term 'best interests' and whether further qualification is required to ensure no unintended consequences in the use of the term.*¹⁸⁰

UNICEF Australia welcomed the recognition of the principle of the best interests of the child in cl 26(2), calling it a 'significant inclusion', but recommended that:

*...consistent with the Convention on the Rights of the Child, section 26 should be amended to state that best interests of the child should be a primary consideration in decisions concerning children and, when decisions are made about the adoption of a child, the best interests of the child should be the paramount consideration.*¹⁸¹

The Queensland Family and Child Commission (QFCC) observed that the UNCRC, and the additional two optional protocols, are each underpinned by four core principles:

- non-discrimination - the UNCRC must be respected regardless of the child's race, colour, sex, ethnic origin or status, or that of the child's legal guardians
- the best interests of the child - which must be at least a primary consideration in decisions made by legislative bodies or administrative authorities
- the right to life, survival and development - the government must ensure that children survive and develop healthily, and
- respect for the views of the child – such views must be given due weight in all matters that affect the child.¹⁸²

QFCC identified these principles as the core requirements for any and all rights to be realised:

*The QFCC strongly recommends these core principles be clearly articulated in the proposed HR Bill. This small amendment acknowledges the responsibility of government broadly without needlessly seeking to prescribe the entire rights platform of the full UNCRC.*¹⁸³

Bravehearts also recommended that the rights in cl 26 be more explicitly set out, in line with the rights defined in the UNCRC, with a particular concern about the rights of children to be safe from sexual, physical and psychological abuse and neglect.¹⁸⁴

AASW (Qld) recommended that the clause be expanded to specify that: 'Every person has the right, without discrimination, to the protection that is needed to keep them safe from domestic and family violence'.¹⁸⁵

In relation to Aboriginal and Torres Strait Islander people, Monique Bond observed that a surprising number of children are removed from their families and are not placed with families who are part of their kin group:

¹⁷⁹ Submission 90, p 7.

¹⁸⁰ Submission 130, p 2.

¹⁸¹ Submission 133, pp 9-10.

¹⁸² Submission 120, p 3.

¹⁸³ Submission 120, p 3.

¹⁸⁴ Submission 125, p 1.

¹⁸⁵ Submission 40, p 3.

*This then lessens the ties of the children with their culture and their ability to develop knowledge and understanding of their culture. For adults, especially women, they often get short term prison sentences and time spent on remand. As well they lose their housing while waiting to be charged, and then often lose their children as they no longer have housing for them. It is a disaster for many families and is of GREAT concern to Indigenous people today.*¹⁸⁶

Various other submitters generally supported the inclusion of the right to protection of families and children.¹⁸⁷ However, in Hannah Berardi's opinion, cl 26 is inconsistent with the *Termination of Pregnancy Act 2018*.¹⁸⁸

2.4.12.3 Issues raised in submissions - right to a name and registration of birth

Jennifer Faulkner expressed concern about the proposed wording of cl 26(3), contending that it needs to be amended to also recognise customary law of the Aboriginal and Torres Strait Islander peoples, in the event that First Nations parents either choose not to register a birth under State law and subscribe to Australian citizenship, or fail to do so for reasons of circumstance:

*Aboriginal and Torres Strait Islander peoples have never ceded sovereignty of this land and there have been fears expressed to me that such registration may risk them doing so. Additionally, some hold beliefs that in registering the birth of their children, they then lose their independence and become government property. The government must work in consultation with the indigenous elders before imposing such law upon them.*¹⁸⁹

Eric Raymond queried whether '...this a right that can be claimed at any time during a person's life if not registered at the time?'¹⁹⁰

2.4.12.4 Departmental response

In response to issues raised in submissions, DJAG noted recommended changes to the drafting of the rights in the Bill, thanked submitters for providing feedback, and advised that:

DJAG will consider this feedback.

*In addition, DJAG notes the operation of the Act will be reviewed as soon as possible after 1 July 2023, pursuant to cl 95.*¹⁹¹

2.4.13 Cultural rights – generally

Clause 27 provides for cultural rights of all persons with a particular cultural, religious, racial or linguistic background.

2.4.13.1 Proposed law

The explanatory notes state that this clause is modelled on article 27 of the ICCPR:

*This clause protects the rights of these persons to enjoy their culture, to declare and practise their religion and to use their language, in community with other persons of that background. This right is directed towards not only protecting the right to individual practice or expression but also the survival and continued development of cultural heritage.*¹⁹²

¹⁸⁶ Submission 139, p 3.

¹⁸⁷ For example, submissions 19 and 31.

¹⁸⁸ Submission 54, p 1.

¹⁸⁹ Submission 17, pp 4-5.

¹⁹⁰ Submission 38, p 1.

¹⁹¹ Department of Justice and Attorney General, correspondence dated 3 December 2018, attachment, p 29, in reference to submissions 17, 41, 90, 120, 125 and 133.

¹⁹² Explanatory notes, p 23.

2.4.13.2 *Issues raised in submissions – cultural rights (general)*

Various stakeholders welcomed the inclusion of cultural rights in the Bill.¹⁹³

ECCQ commended the inclusion of this clause:

*Enshrining the values and beliefs that bring communities together regardless of cultural, religious, racial or linguistic background into legislation is recognition of the valuable contribution of multicultural diversity to everyday life in Queensland.*¹⁹⁴

HCQ saw this right as underpinning the successful delivery of safe, culturally appropriate care:

*This requires culturally competent health staff, with the skills and time to communicate with patients from particular cultural, religious, racial and linguistic backgrounds, health services having access to timely and appropriate interpreter services, and respect and provision being given to needs which may arise.*¹⁹⁵

Dr Nicky Jones and Dr Jeremy Patrick proposed that cl 27 be moved to Part 2 Division 3 of the Bill, which is titled 'Economic, social and cultural rights'.¹⁹⁶

Whilst supporting the inclusion of the right, Immigrant Women's Support Service suggested the clause be broadened to include '...persons' right to full and meaningful participation in all aspects of society, including fair access to the justice system as a defendant or as a victim'.¹⁹⁷

AASW (Qld) sought to expand cl 27 to include:

*...the right, in community, with other persons of that background, with any other member of the community, including social and other forms of media, to enjoy their culture, to declare and practise their religion and to use their language.*¹⁹⁸

Eric Raymond submitted that the words 'in community with other persons of that background' seems 'inappropriate'.¹⁹⁹

2.4.14 Cultural rights – Aboriginal peoples and Torres Strait Islander peoples

Clause 28 provides for the distinct cultural rights held by Aboriginal peoples and Torres Strait Islander peoples as Australia's first people.

2.4.14.1 Proposed law

The explanatory notes state that this clause is modelled on article 27 of the ICCPR, but also articles 8, 25, 29 and 31 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), which recognise that Indigenous peoples and individuals have the right:

- not to be subjected to forced assimilation or destruction of their culture (article 8)
- to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas (article 25)
- to conserve and protect the environment and the productive capacity of their lands, territories and waters (article 29), and

¹⁹³ For example, submissions 24 and 31.

¹⁹⁴ Submission 152, p 1.

¹⁹⁵ Submission 135, p 5.

¹⁹⁶ Submission 104, p 6.

¹⁹⁷ Submission 132, p 3.

¹⁹⁸ Submission 40, p 3.

¹⁹⁹ Submission 38, p 1.

- to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions (article 31).²⁰⁰

Like cl 27, this right is also directed towards ensuring the survival and continual development of culture.²⁰¹

According to the explanatory notes:

Subclause (1) recognises that Aboriginal peoples and Torres Strait Islander peoples hold distinct cultural rights.

Subclause (2) recognises the rights of Aboriginal peoples and Torres Strait Islander peoples to live life as an Aboriginal or Torres Strait Islander person who is free to practise their culture. The practise of culture includes, for example: the right to enjoy and maintain identity and culture; to maintain and use Indigenous languages; to maintain kinship ties; a freedom to teach cultural practices and educations to their children; the right to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs.

*Subclause (3) provides that Aboriginal peoples and Torres Strait Islander peoples have the right not to be subjected to forced assimilation or destruction of their culture.*²⁰²

The explanatory notes state that: ‘This provision is intended to be read with the savings provision at cl 107, which provides that the Bill does not affect native title rights and interests’.²⁰³

Separate to cl 28, the Bill includes a Preamble, which states that:

In enacting this Act, the Parliament of Queensland recognises –

6. *Although human rights belong to all individuals, human rights have a special importance for the Aboriginal peoples and Torres Strait Islander peoples of Queensland, as Australia’s first people, with their distinctive and diverse spiritual, material and economic relationship with the lands, territories, waters, coastal seas and other resources with which they have a connection under Aboriginal tradition and Ailan Kastom. Of particular significance to Aboriginal peoples and Torres Strait Islander peoples of Queensland is the right to self-determination.*²⁰⁴

2.4.14.2 Issues raised in submissions - cultural rights (Aboriginal peoples and Torres Strait Islander peoples)

Various stakeholders welcomed the inclusion of distinct cultural rights held by Aboriginal peoples and Torres Strait Islander peoples in the Bill.²⁰⁵

The QLS welcomed the specific inclusion of Aboriginal and Torres Strait Islander peoples to have their particular cultural rights recognised and protected:

We understand that Indigenous peoples specifically are interested in their rights to self-determination being recognised, and we note that the inclusion of the right to self-determination is referenced in the preamble of the Bill.

The rights provided for in Part 2 Division 2 are, in our view, a great leap forward in the promotion and protection of human rights in Queensland. The listed rights are reasonable and appropriate,

²⁰⁰ Explanatory notes, p 23.

²⁰¹ Explanatory notes, p 23.

²⁰² Explanatory notes, p 23.

²⁰³ Explanatory notes, p 24.

²⁰⁴ Preamble, p 10.

²⁰⁵ For example, submissions 24, 41, 94 and 128.

*being similar in nature to the Victorian regime, and consistent with the spirit of the international instruments to which these rights derive much of their wording and ambit.*²⁰⁶

HCQ contended that this right underpins the delivery of safe, culturally appropriate care to Aboriginal and Torres Strait Islander people:

*This clause also supports the inclusion of six Aboriginal and Torres Strait Islander specific actions in the revised version of the Australian Commission on Safety and Quality in Health Care's National Standards of Safety and Quality in Health Care.*²⁰⁷

Monique Bond commented that:

*There is a great deal of evidence that Aboriginal and Torres Strait Island people are able to live in greater peace and freedom in Australia when their cultural rights, and the importance of maintaining these rights, are supported by both Governments and the general population.*²⁰⁸

Griffith University noted that cl 28 is 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:

*These priorities were all raised by Queensland's Indigenous community throughout the consultation and submission process. These absences result in cl 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.*²⁰⁹

Additionally, Griffith University submitted that:

...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. 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.

*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'.*²¹⁰

Although strongly endorsing the introduction of preamble 6 and cl 28 to recognise the unique human rights of Aboriginal people and Torres Strait Islanders, Indigenous Lawyers Association of Queensland submitted that:

Whilst the preamble mentions the right to self-determination, the full extent of this right is not reflected in cl 28 and otherwise should be included. Further that the United Nations Declaration

²⁰⁶ Submission 103, p 3.

²⁰⁷ Submission 135, p 6.

²⁰⁸ Submission 139, p 3.

²⁰⁹ Submission 116, p 29.

²¹⁰ Submission 116, p 29.

*on the Rights of Indigenous Peoples be adopted in full to adequately address those unique human rights as Australians First Peoples.*²¹¹

QNMU suggested that:

*...the government provide additional resources to enable Queensland parliamentary committees to compare 'fundamental legislative principles' with the Human Rights Bill 2018 (when enacted) giving sufficient and meaningful regard to Aboriginal and Island tradition and custom.*²¹²

Contrary to cl 28(3), Jennifer Faulkner expressed concern that cl 26(3)²¹³ increases the risk of, or actually imposes, forced assimilation:

*These people have a right to choose whether to become Australian citizens. I do not believe it is consistent with human rights to enforce this upon them, and certainly not without proper consultation with the elders of each community.*²¹⁴

Dr Nicky Jones and Dr Jeremy Patrick proposed that cl 28 be moved to Part 2 Division 3 of the Bill, which is titled 'Economic, social and cultural rights'.²¹⁵

2.4.14.3 Departmental response

In response to issues raised in submissions, DJAG noted recommended changes to the drafting of the rights in the Bill, thanked submitters for providing feedback, and advised that:

DJAG will consider this feedback.

*In addition, DJAG notes the operation of the Act will be reviewed as soon as possible after 1 July 2023, pursuant to cl 95.*²¹⁶

2.4.15 Right to liberty and security of person

Clause 29 provides for the right to liberty and security of person.

2.4.15.1 Proposed law

The explanatory notes state that this clause is modelled on articles 9 and 11 of the ICCPR, being the right to liberty and security of person and the prohibition of detention for debt, respectively:

*The right [in Article 9] protects personal liberty but is focused on the requirement that due process is followed when state authorities exercise their powers of arrest and detention. It is not deprivation of liberty that is prohibited but rather that which is arbitrary or unlawful.*²¹⁷

The explanatory notes state that:

Subclause (1) provides for a person's right to liberty and security.

Subclause (2) provides that a person must not be subject to arbitrary arrest or detention.

The concept of arbitrariness includes elements of inappropriateness, injustice, lack of predictability and due process of the law.

²¹¹ Submission 137, p 1.

²¹² Submission 31, p 8.

²¹³ Clause 26(3) is dealt with earlier in this report. The clause provides that every person born in Queensland has a right to a name and to registration of birth as soon as practicable after being born.

²¹⁴ Submission 17, p 5.

²¹⁵ Submission 104, p 6.

²¹⁶ Department of Justice and Attorney General, correspondence dated 3 December 2018, attachment, p 29, in reference to submissions 17, 103 and 116.

²¹⁷ Explanatory notes, p 24.

Subclause (3) provides that a person's liberty may only be denied on grounds and in accordance with procedures established by law.

Lawfulness is understood in the strict sense of either statute law or common law.

Subclause (4) provides that a person who is arrested or detained must be given a reason when they are arrested or detained and must be informed about any proceedings to be brought against them.

Subclause (5) provides for certain rights for a person who is arrested or detained on a criminal charge. It provides that a person who is arrested or detained on a criminal charge must be promptly brought before a court and has the right to be brought to trial without unreasonable delay. Subclause (5)(c) states that the person must be released if these requirements are not complied with.

Subclause (6) provides for certain rights for a person who is awaiting trial. It reflects the principle that pre-trial detention should not be the general rule. It provides that a person who is awaiting trial must not be automatically detained in custody, but the person's release may be subject to certain guarantees.

Subclause (7) provides that a person deprived of liberty by arrest or detention has the right to apply to court for a declaration regarding the lawfulness of the person's detention and requires that the court makes a decision without delay and orders the person's release if it finds that the detention is unlawful.

Subclause (8) makes clear that a person must not be imprisoned because of their inability to perform a contractual obligation. This reflects article 11 of the ICCPR which prohibits detention for debt.²¹⁸

2.4.15.2 Issues raised in submissions - liberty and security of person

Dr Robyn Holder recommended that the liberty and security of persons as victim be expressly recognised in the clause, in a manner similar to the accused:

That is, where a person's criminal victimisation is subject to criminal proceedings she must be informed about her rights and responsibilities and must be promptly informed about any proceedings that directly affect her including applications by a person deprived of liberty by arrest or detention regarding the lawfulness of their detention. Victimised persons shall be heard on such applications by the accused.²¹⁹

2.4.16 Humane treatment when deprived of liberty

2.4.16.1 Proposed law

Clause 30 provides that all persons deprived of liberty²²⁰ must be treated with humanity and with respect for the inherent dignity of the human person. Clause 30 also provides that an accused person who is detained, or a person detained without charge, must be segregated from persons who have been convicted of offences, unless reasonably necessary; and an accused person who is detained or a person detained without charge must be treated in a way that is appropriate for a person who has not been convicted.²²¹

2.4.16.2 Issues raised in submissions – humane treatment when deprived of liberty

The AASW (Qld) commented that:

²¹⁸ Explanatory notes, p 24.

²¹⁹ Submission 95, p 4.

²²⁰ For example, detainees, persons on remand, prisoners.

²²¹ Explanatory notes, p 25.

*Section 30 relates to the humane treatment of individuals when deprived of liberty. In particular, this Section refers to the humane treatment of ‘an accused person who is detained or a person detained without charge’. We suggest that this Section should be strengthened to ensure that those who have been charged or convicted of crimes also receive humane treatment while in detention. This recommendation is made in light of recent human rights abuses investigated in Don Dale Youth Detention Centre and the reported abuse of detainees with disabilities in prisons across Australia by Human Rights Watch.*²²²

2.4.16.3 Departmental response

In response to issues raised in submissions, DJAG advised that:

*The rights to humane treatment when deprived of liberty (cl 30) and children in the criminal process (cl 33), as they are currently drafted, reflect the wording of the equivalent rights in the Victorian Charter as well as the ACT Human Rights Act 2004 (the ACT Human Rights Act). Whilst the rights, as drafted, do not explicitly state that a convicted child must be segregated from a detained adult (convicted or unconvicted), that may be implied through the application of the third limb of the right of children in the criminal process (cl 33), which provides that a convicted child must be treated in a way that is appropriate for the child’s age.*²²³

2.4.17 Fair hearing

2.4.17.1 Proposed law

Clause 31 provides that a person charged with a criminal offence or a party to a civil proceeding has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing. It also allows a court or tribunal to exclude members of media organisations, other persons, or the general public from all or part of a hearing in the public interest or in the interests of justice. All judgments or decisions made by a court or tribunal in a proceeding must however be made publicly available.

2.4.17.2 Issues raised in submissions – fair hearing

The Townsville Community Legal Service Inc (TCLS) suggested the addition of the word “expeditious” to the requirement for a ‘fair and public hearing’ in cl 31(1). They submitted that the ‘justification for this inclusion includes European human rights law and jurisprudence.’ They further submitted that:

*The right to fair hearing might also include a right to competent counsel. The Law Council said that “the right to a fair trial and effective access to justice is undermined by a failure of successive governments to commit sufficient resources to support legal assistance services, as evidenced by increasingly stringent restrictions on eligibility for legal aid.”*²²⁴

PACT submitted that ‘courts should be closed for all matters involving children and young people, whether they be the accused or the victim in order to protect their anonymity.’²²⁵

Women’s Legal Service Queensland (WLSQ) submitted that as well as the right to a fair hearing currently set out for an accused under cl 31(1), that provision should be amended to expressly recognise the rights of crime victims, as participants in criminal proceedings, to also have a right to a fair hearing.²²⁶

²²² Submission 40, p 4.

²²³ Department of Justice and Attorney-General, correspondence dated 3 December 2018, attachment, p 28.

²²⁴ Submission 35, p 10.

²²⁵ Submission 19, p 2.

²²⁶ Submission 36, p 4

2.4.17.3 Departmental response

In response to issues raised in submissions, DJAG advised that:

While the Bill contains rights that relate to defendants (such as the right to a fair hearing and rights in criminal proceedings), these rights are not absolute and are subject to the general limitations clause (cl 13). The general limitations clause sets out a framework for deciding when and how a human right may be limited by providing that a human right may be limited if it is authorised by law and reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.²²⁷

2.4.18 Criminal proceedings

2.4.18.1 Proposed law

Clause 32 provides for rights of an accused in a criminal proceeding, including that a person charged with a criminal offence has the right to be presumed innocent until proved guilty according to law.

It further provides for an accused's rights in the criminal justice system, specifically that a person charged with a criminal offence is entitled without discrimination to the following minimum guarantees –

- (a) to be informed promptly and in detail of the nature and reason for the charge in a language or, if necessary, a type of communication the person speaks or understands;
- (b) to have adequate time and facilities to prepare the person's defence and to communicate with a lawyer or advisor chosen by the person;
- (c) to be tried without unreasonable delay;
- (d) to be tried in person, and to defend themselves personally or through legal assistance chosen by the person or, if eligible, through legal aid;
- (e) to be told, if the person does not have legal assistance, about the right, if eligible, to legal aid;
- (f) to have legal aid provided if the interests of justice require it, without any costs payable by the person if the person is eligible for free legal aid under the *Legal Aid Queensland Act 1997*;
- (g) to examine, or have examined, witnesses against the person;
- (h) to obtain the attendance and examination of witnesses on the person's behalf under the same conditions as witnesses for the prosecution;
- (i) to have the free assistance of an interpreter if the person can not understand or speak English;
- (j) to have the free assistance of specialised communication tools and technology, and assistants, if the person has communication or speech difficulties that require the assistance; and
- (k) not to be compelled to testify against themselves or to confess guilt.

Other protections provided for in cl 32 are that a child charged with a criminal offence has the right to a procedure that takes account of the child's age and the desirability of promoting the child's rehabilitation and that a person convicted of a criminal offence has the right to have the conviction and any sentence imposed in relation to it reviewed by a higher court in accordance with law.

2.4.18.2 Issues raised in submissions – criminal proceedings

The WLSQ submission suggested that cl 32 be amended to particularise victim's rights in the criminal process, so that a victim reporting a criminal offence and throughout the criminal process has a right:

²²⁷ Department of Justice and Attorney-General, correspondence dated 3 December 2018, attachment, p 17.

- to be treated with courtesy, compassion, respect and dignity, taking into account the victim's needs,
- to be provided with information about the criminal process in a reasonable and timely manner,
- to privacy and confidentiality of information and for personal information to not be released unless authorised by law,
- to safety from the perpetrator,
- to an interpreter if the person does not speak English,
- to have free assistance of specialised communication tools and technology and assistants, if a person has communication or speech difficulties that require assistance,
- to obtain legal information about the process,
- to be informed at the earliest practicable opportunity about services and remedies available to the victim,
- to be informed in a reasonable and timely manner if there is any material change in the criminal process involving them including for example, the types of charges, bail conditions, the matter not proceeding or if charges are dropped, and
- to have the matter proceed without unreasonable delay (including the investigation).²²⁸

2.4.18.3 Departmental response

In response to issues raised in submissions, DJAG advised that:

*With the exception of the rights for children in the criminal process and cultural rights for Aboriginal Peoples and Torres Strait Islander Peoples, the Bill does not contain specific rights for groups of people, nor are particular groups of people, such as women, people with a disability, victims of crime or others specifically named. The Bill does however include the right to recognition and equality before the law and this right to equality permeates all human rights in the Bill. The right to equality means every person is equal before the law and is entitled to equal protection of the law without discrimination.*²²⁹

2.4.18.4 Victims' Rights

Queensland currently has a 'Charter of victims' rights' provided for in s 6B and Schedule 1AA of the *Victims of Crime Assistance Act 2009* (VOCA). The charter recognises a number of victims' rights however the charter is not enforceable.²³⁰ The Bill does not make specific provision about victims of crime. A number of submissions referred to the absence of express protection for victims in the Bill.

2.4.18.5 Issues raised in submissions – victims' rights

The submission of Dr Robyn Holder of the Griffith Criminology Institute at Griffith University noted that international advances in rights recognition show that 'human rights are not static but are progressive' and her recommendation for 'greater and express recognition of rights of persons as victim in criminal proceedings – whether adult or child, male or female, regardless of racial or ethnic identity, level of ability, age or sexuality – is founded on this assumption of progressive realisation of rights.'²³¹

Dr Holder comments that, in her experience, 'the human rights of persons as victim(s) whose matter proceeds into the criminal justice system tend to be overlooked.' She notes the reasons for this as

²²⁸ Submission 36, p 4.

²²⁹ Department of Justice and Attorney-General, correspondence dated 3 December 2018, attachment, p 17.

²³⁰ Submission 46, p 2.

²³¹ Submission 95, p 2.

including that criminal justice entities have legislated duties in respect of an accused, but not for victims/Crown witnesses, and that victims of crime have no legally enforceable rights in the criminal justice system. Dr Holder's submission states:

The Queensland Victims of Crime Charter is, like in other Australian jurisdictions, largely a statement of standards of service. Persons as victims of crime have no independent statutory commissioner or body to protect and promote what are presently described as 'victims' rights'. Therefore, there is no readily identifiable entity with authority to protect victims' rights. The current complaints process within Victim Assist Queensland has not, to my knowledge, reported publicly on the complaints received, their nature and manner of their resolution.²³²

The WLSQ submission was concerned about the rights afforded to an accused by the Bill, when contrasted with the Charter of victim's rights under VOCA. Their submission stated:

Women's Legal Service Queensland is concerned however that the rights of victims of crime have not been appropriately acknowledged in the bill, while the rights of criminal defendants in criminal trials are explicitly upheld. We acknowledge that the right to a fair trial is a fundamental right in our society, as it should be – however, this right to fairness should also be extended to victims, particularly in relation to their interactions with government bodies, agencies and the police service.

We are concerned that the bill does not give recognition to the many circumstances in justice proceedings where people are not treated with dignity, are not treated with equality, and are not afforded equal protection. Furthermore, we are concerned that the proposed Bill does not recognise that a victim's right to dignity, privacy and reputation is routinely ignored or abrogated in a criminal proceeding. For example, where women report a sexual assault to the police and they do not receive follow up phone calls or are not told where the investigation is up to, if it has concluded and the outcome. This is a very standard experience of sexual violence complainants who seek advice from WLSQ.²³³

.....

The current protection for victims in Queensland contained in the "The Victim's Charter of Rights" has no legal implication or consequence what so ever, having no legal enforceability. At best, it is aspirational, providing mere guidance on what should be standard practice. It does not have the same complaints process, level of protections or avenues for redress as provided by this new bill.

If this Bill is passed as currently drafted, a defendant's right to fairness in criminal trials will be legislatively elevated as a human right over and above those of victims.²³⁴

The submission of Professor Heather Douglas, TC Beirne School of Law, University of Queensland, focused on the need for specific recognition of victims' rights, commenting:

It is imperative that all defendants charged with a criminal offence or any person who is a party to a civil proceeding has the right to have the charge or proceeding decided by a competent, independent and impartial court after a fair and public hearing. It is also important that those charged with a criminal offence are provided with adequate information, time, facilities and legal support to defend their case. However, it is of equal importance that victims of crime should have a fair hearing. I am concerned that the rights of victims in the criminal process are not sufficiently recognised in the current draft of the Bill.

²³² Submission 95, p 2.

²³³ Submission 36, p 2.

²³⁴ Submission 36, p 3.

.....

*In contrast to those who are charged with a criminal offence (see cl 32) the Bill provides no express rights to victims to receive information, free assistance of interpreters, or support of any kind. Furthermore while those who are deprived of liberty (see cl 30) have a right to be treated with humanity and respect for the inherent human dignity of the person, no such rights are expressed in the Bill for victims of crime.*²³⁵

2.4.18.6 Departmental response

In response to issues raised in submissions, DJAG advised that:

With the exception of the rights for children in the criminal process and cultural rights for Aboriginal Peoples and Torres Strait Islander Peoples, the Bill does not contain specific rights for groups of people, nor are particular groups of people, such as women, people with a disability, victims of crime or others specifically named.

The Bill does however include the right to recognition and equality before the law and this right to equality permeates all human rights in the Bill. The right to equality means every person is equal before the law and is entitled to equal protection of the law without discrimination.

While the Bill contains rights that relate to defendants (such as the right to a fair hearing and rights in criminal proceedings), these rights are not absolute and are subject to the general limitations clause (cl 13).

The general limitations clause sets out a framework for deciding when and how a human right may be limited by providing that a human right may be limited if it is authorised by law and reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

Implied legitimate reasons for limiting rights (as drawn from human rights jurisprudence) that are consistent with a free and democratic society include:

- public interest considerations (including national security and community safety); and
- protection of the rights of others (for example, children and domestic violence victims).

Therefore, rights relating to defendants will be interpreted with respect to other considerations, including the rights of victims and public safety considerations.

As provided above, cl 12 clarifies that the human rights included in the Bill are in addition to other rights and freedoms included in other laws, meaning victims' rights contained in other sources of law will continue to apply.

*The first review of the operation of the Human Rights Act, as soon as practicable after 1 July 2023, and the further review of the Act, will include consideration of whether additional human rights should be included under the Act.*²³⁶

Committee Comment

The committee notes that an issue was raised regarding the potential unenforceability of the Victims' Rights Charter in the *Victims of Crime Assistance Act 2009*, however the committee also notes that there is a complaints mechanism within the existing Victims' Rights Charter.

²³⁵ Submission 46, pp 1-2.

²³⁶ Department of Justice and Attorney-General, correspondence dated 3 December 2018, attachment, pp 17-18.

2.4.19 Children in the criminal process

2.4.19.1 *Proposed law*

Clause 33 covers the rights of children in the criminal process. It provides that an accused child who is detained, or a child detained without charge, must be segregated from all detained adults. An accused child must also be brought to trial as quickly as possible; and a child who has been convicted of an offence must be treated in a way that is appropriate for the child's age.²³⁷

2.4.19.2 *Issues raised in submissions – children in the criminal process*

PACT submitted that, in relation to a child charged with a criminal offence –

*..They have the right for their age to be taken into consideration, because often crimes are committed due to lack of maturity and the inability to consider the long-term consequences of such behaviour. Adequate rehabilitation options should also be available to young offenders to deter them from recidivism.*²³⁸

WLSQ submitted that cl 32(3) should be amended 'to refer to *any child* charged with or a victim of a criminal offence has the right to a procedure that takes account of the child's age and the desirability of promoting the child's rehabilitation, both child accused and child victim.'²³⁹

WLSQ further submitted that cl 33 should be amended to reflect that:

- A child accused of and a child victimised by a criminal offence must have trial proceedings brought as quickly as possible; and
- A child who has been convicted of an offence and a child victimised by a criminal offence must be treated in a way that is appropriate for the child's age.²⁴⁰

Dr Robyn Holder submitted:

*The rights of children in criminal proceedings are of particular concern and I applaud those provisions protecting children accused of crime. However, these special concerns should extend to children as victims and witnesses in criminal proceedings.*²⁴¹

The QFCC submitted:

*The QFCC is pleased to note the inclusion of cl 33 which aligns to the Victorian Charter when applied with the Charter of youth justice principles. However the practical implementation and success of Cl 33 will also be reliant on the development and integration of purposeful policy and procedural framework responses to address known issues in the criminal process.*²⁴²

A number of submitters also expressed concern that cl 33 might permit integration of convicted adults with children convicted of offences.

The submission from ALHR expressed concern that cl 33 of the Bill 'requires that an accused child or a child detained without charge must be segregated from all detained adults. However the same requirements with respect to segregation are not imposed with respect to convicted children, which makes it permissible for a convicted child to be imprisoned alongside adults.'²⁴³

²³⁷ Explanatory notes, p 27.

²³⁸ Submission 19, p 2.

²³⁹ Submission 36, p 4. See also submission 96, Micah Projects, advocating this position.

²⁴⁰ Submission 36, p 5. See also submission 96, Micah Projects, advocating this position.

²⁴¹ Submission 95, p 5.

²⁴² Submission 120, p 6.

²⁴³ Submission 91, p 8.

QAI submitted that:

..cl 33 should be amended to require that all children who are detained must be segregated from all detained adults, irrespective of whether the child is an accused child, a child detained without charge or a convicted offender. While this clause in its current form requires segregation of accused children or a child detained without charge, it only requires that a child convicted of an offence be treated in a way that is 'appropriate for the child's age'.

QAI considers that permitting detention of children alongside adults is in breach of Australia's obligations under the Convention on the Rights of the Child (CRC) and other international standards.²⁴⁴

Amnesty International Australia (AIA) was concerned 'that the lack of clarity in section 33(3) will enable the Queensland Government to continue to violate the Convention of the Rights of the Child by detaining children alongside adults in prison.'²⁴⁵

AIA was also concerned about clauses 182-183 of the Bill, submitting:

The protection of the human rights of youth on remand is rendered illusory by virtue of sections 182-183 of the Bill which seek to amend the Youth Justice Act 1992. The practical effect of these sections is that a decision to detain children not yet convicted of an offence together with those children who have been convicted would not infringe the Bill.

This exemption contravenes the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules') which states that untried detainees should be separated from convicted juveniles.²⁴⁶

2.4.19.3 Departmental response

In response to issues raised in submissions, DJAG advised that:

The rights to humane treatment when deprived of liberty (cl 30) and children in the criminal process (cl 33), as they are currently drafted, reflect the wording of the equivalent rights in the Victorian Charter as well as the Human Rights Act 2004 (ACT) (the ACT Human Rights Act).

Whilst the rights, as drafted, do not explicitly state that a convicted child must be segregated from a detained adult (convicted or unconvicted), that may be implied through the application of the third limb of the right of children in the criminal process (cl 33), which provides that a convicted child must be treated in a way that is appropriate for the child's age.

*In Victoria, the Victorian Charter rights were relied upon to successfully overturn a decision to transfer children (aged 16 and 17 years) into an adult prison, part of which had been purportedly excised and declared a youth justice centre (see *Certain Children v Minister for Families and Children & Ors (No 2)* [2017] VSC 251). Although the equivalent right to cl 33(3) was not engaged, because the plaintiffs in the case were not convicted at the time of the hearing, the case illustrates the extent to which the other rights in the Charter (in particular, the right to protection of families and children contained in section 17(2) and the right to humane treatment when deprived of liberty contained in section 22(1)) were able to be relied upon in order to ensure the humane treatment of the detained children and secure their return to a properly established and functioning youth detention facility.*

²⁴⁴ Submission 76, p 5.

²⁴⁵ Submission 69, p 6.

²⁴⁶ Submission 69, pp 5-6.

2.4.20 Right not to be tried or punished more than once (double jeopardy)

2.4.20.1 Proposed law

Currently in Queensland, s 16 of Schedule 1 to the *Criminal Code Act 1899* (the Criminal Code or the Code) provides that –

A person can not be twice punished either under the provisions of this Code or under the provisions of any other law for the same act or omission, except in the case where the act or omission is such that by means thereof the person causes the death of another person, in which case the person may be convicted of the offence of which the person is guilty by reason of causing such death, notwithstanding that the person has already been convicted of some other offence constituted by the act or omission.

Section 17 of the Code provides that:

It is a defence to a charge of any offence to show that the accused person has already been tried, and convicted or acquitted upon an indictment on which the person might have been convicted of the offence with which the person is charged, or has already been acquitted upon indictment, or has already been convicted, of an offence of which the person might be convicted upon the indictment or complaint on which the person is charged.

Note—

This section does not apply to the charge mentioned in section 678B (Court may order retrial for murder—fresh and compelling evidence) or 678C (Court may order retrial for 25 year offence—tainted acquittal).

Clause 34 of the Bill also provides for a right not to be tried or punished more than once for an offence in relation to which the person has already been finally convicted or acquitted in accordance with law.

2.4.20.2 Issues raised in submissions - right not to be tried or punished more than once

This issue received little comment in submissions, with Legal Aid Queensland submitting:

Legal Aid Queensland supports the Bill, particularly the articulation of important rights in relation to the criminal justice system, namely the right to a fair hearing, the right not to be tried or punished more than once, the right to protection against retrospective criminal laws, the rights of children in the criminal process and the minimum guarantees that a person charged with a criminal offence is entitled without discrimination to receive.²⁴⁷

Eric Raymond submitted:

34 This is all wrong. Innocent people convicted of a crime need to be able to prove their innocence if compelling new evidence is found. Similarly guilty people found not guilty need to be able to be prosecuted if compelling new evidence is found.²⁴⁸

2.4.20.3 Departmental response

The departmental response did not specifically address the above submissions on cl 34.

2.4.21 Retrospective criminal laws

2.4.21.1 Proposed law

The protection against retrospective criminal laws embodied in cl 35 provides that a person must not be found guilty of a criminal offence because of conduct that was not a criminal offence when it was engaged in. In addition, a penalty must not be imposed on any person for a criminal offence that is

²⁴⁷ Submission 129.

²⁴⁸ Submission 38.

greater than the penalty that applied to the offence when it was committed. If a penalty for an offence is reduced after a person committed the offence, but before the person is sentenced for the offence, the person is eligible for the reduced penalty. The provision also states that ‘Nothing in proposed s 35 will affect the trial or punishment of any person for any act or omission that was a criminal offence under international law at the time it was done or omitted to be done’.

2.4.21.2 Issues raised in submissions - retrospective criminal laws

As noted above, Legal Aid Queensland supports ‘the right to protection against retrospective criminal laws’.²⁴⁹ Monique Bond was also in favour of the cl 35 protection against retrospective criminal laws.²⁵⁰

2.4.21.3 Departmental response

The departmental response did not specifically address the above submissions on cl 35.

2.5 Economic, social and cultural rights

The Bill protects two rights drawn from the ICESCR, being the right to education and right to health services.²⁵¹

2.5.1 Education

Clause 36 provides for the right to education.

2.5.1.1 Proposed law

The explanatory notes state that this provision is intended to be consistent with the *Education (General Provisions) Act 2006* and to provide rights in respect of the aspects of education service delivery for which the State is responsible.²⁵² According to the explanatory notes:

Subclause (1) provides for the right of every child to have access to primary and secondary education appropriate to their needs.

Subclause (2) provides for the right of every person to have access, based on the person’s abilities, to further vocational education and training that is equally accessible to all.

*This clause is modelled on article 13 of the ICESCR.*²⁵³

2.5.1.2 Issues raised in submissions - education

A number of submitters expressed support for the inclusion of a right to education in the Bill.²⁵⁴ For example, QAI stated that ‘Education is a fundamental human right, with access to education recognised as offering important protection against other vulnerabilities and human rights violations’.²⁵⁵ Groups that are anticipated to benefit from such a provision include young people with a disability²⁵⁶ and child victims of crime.²⁵⁷

Ms Jennifer Faulkner raised the issue of equality in education, submitting:

²⁴⁹ Submission 129

²⁵⁰ Submission 139, p 4.

²⁵¹ Explanatory notes, p 3.

²⁵² Explanatory notes, p 21.

²⁵³ Explanatory notes, p 21.

²⁵⁴ See for example submissions 24, 66, 71, 73, 76, 91, 95, 116, 123, 126 and 135.

²⁵⁵ Submission 76, p 5.

²⁵⁶ See for example submissions 73, 97 and 126.

²⁵⁷ Submission 95, p 5.

*Educational equality cannot be effected without due consideration of, and action in accordance with, human rights. It is time that law is enacted, and educational institutions become responsible for ensuring they are a place where children feel safe, respected and heard.*²⁵⁸

The wording of cl 36 was raised as a concern by a number of submitters. Some submitters took issue with the use of the term 'to have access' in sub clauses (1) and (2) of cl 36. Community Legal Centres Queensland (CLCQ), stated it is unclear why this right is framed as right to access, rather than simply a right to education,²⁵⁹ and YAC expressed a concern that such wording may be a lessening of the right.²⁶⁰ QUT's Student Engagement, Learning and Behaviour (SELB) Research Group also questioned the inclusion of the word 'access' in both subclauses of cl 36, referring to it as 'problematic', and stating:

*Experts in inclusive education have long twinned "access" with "participation". This is because access to education is often interpreted as mere enrolment or physical presence, however, this alone does not enable participation in a program of instruction.*²⁶¹

Submitters also took issue with the specific wording 'education appropriate to the child's needs' in cl 36(1).²⁶² While SELB stated that they recognised that the reference to 'education appropriate to the child's needs' may be a form of positive discrimination aimed at securing the necessary support for students with a disability to realise their human right to an education,²⁶³ concerns were raised by a number of submitters that cl 36(1) as currently drafted will perpetuate discrimination and lead to segregation, as has been experienced in the past by students with a disability.²⁶⁴

For example, the Queensland Collective for Inclusive Education (QCIE) and All Means All stated that the adoption of the term 'appropriate to the child's needs' will:

(a) perpetuate discriminatory treatment and inequality based upon the use of segregated settings for some students; and

(b) "justify" explicit and implicit prejudice in educational administration in qualifying the concepts of "non-discrimination", "full participation" and "equality of opportunity";

*and thereby has great potential to undermine the right of children, particularly children with disabilities, to education, which is expressed to be the right to inclusive education in regular (non-segregated) settings (see Article 24 of the CRPD and General Comment No. 4 - Right to Inclusive Education).*²⁶⁵

Similarly, SELB submitted:

...the current wording appears dangerously unaware of the historical denial of quality education to students with disabilities, leading to inequity in educational opportunity through the provision of severely deficient learning opportunities in the belief that students with disabilities cannot profit from age-appropriate academic content.

*There still exist today many Australian students with intellectual disability who are provided only with limited "life skills" curricula because this is considered "appropriate to the child's needs". We are concerned that current wording in Section 36(1) risks reinforcing this latent view.*²⁶⁶

²⁵⁸ Submission 17, p 3.

²⁵⁹ Submission 117, p 4.

²⁶⁰ Submission 41, p 7.

²⁶¹ Submission 63, p 2.

²⁶² See for example submissions 63, 71, 73 and 97.

²⁶³ Submission 63, p 2.

²⁶⁴ See for example submissions 63, 71, 73 and 97.

²⁶⁵ Submission 73, p 3; submission 97, p 1.

²⁶⁶ Submission 63, p 2.

Children and Young People with a Disability Australia (CYDA) submitted a concern that the term ‘appropriate to the child’s needs’ will ‘create different expectations and rights for individual students, based on assumptions about what will be appropriate for a child’s needs’ and ‘could act to justify and further embed discriminatory practices, experiences and outcomes in education for children and young people with disability’.²⁶⁷

Professor Tamara Walsh, Dr Rhonda Faragher, Ms Bridget Burton and Dr Glenys Mann from the University of Queensland also raised a concern with the use of the word ‘appropriate’ in cl 36(1), stating that what constitutes ‘appropriate’ education in respect of a child with disabilities or special needs is often contested. They advise that ‘in practice, the focus of education providers is not on ensuring a child with disabilities or special needs has access to an ‘appropriate’ education, but rather on promoting inclusive education’.²⁶⁸

Submitters also observed that the clause omits the term ‘without discrimination’.²⁶⁹ Ms Sara Davies noted that this was in contrast to the Bill’s provision on the right to access health services, which does include that phrase. Ms Davies also referred to the updated General Comments attached to the ICESCR on the Right to Education, which contains specific reference to ‘without discrimination’ as being an obligation in relation to the right to education. Ms Davies raised a concern that without the term ‘without discrimination’, cl 36 is ambiguous and could be interpreted as limiting the obligation to provide resources that support the child, potentially to the point of justifying exclusion on the grounds that a school is not resourced to support the child.²⁷⁰

Similarly, ALHR submitted:

the Bill omits an important protection found in section 29A(3)(a) of the ACT Act, namely that every person is entitled to enjoy the right to education ‘without discrimination’. Protection from discrimination is of vital importance for students with disability, as it is the basis for the right to inclusive education.⁶ ALHR holds concerns that the language of cll 36 of the Bill may be interpreted to support a segregated approach to education, and the exclusion from mainstream schooling of students with disability, by creating the right to access education ‘appropriate to the child’s needs’ (in the context of primary and secondary education) and linked to the person’s ‘abilities’ (in the context of further vocational education and training).²⁷¹

Submitters questioned whether cl 36 appropriately reflects the wording and intent of article 13 of the ICESCR on which the clause is based, as well as the intent and wording of other international instruments and domestic disability discrimination²⁷² and human rights laws, suggesting that the wording of cl 36 be amended to reflect these instruments.²⁷³

For example, All Means All stated that the Bill does not reflect the expression of the right to education as set out in relevant international treaties ratified by Australia, including Article 13 of the ICESCR, nor does it reflect key elements of the right to education recognised and clarified in other relevant Conventions, namely the UNCRC, and the UNCRPD, and stated:

we believe that the proposed wording in Section 36 (1) and (2) may have the unintended consequences of increasing discrimination in education against persons with disabilities, including in breach of the Commonwealth’s Disability Discrimination Act 1992 (DDA),

²⁶⁷ Submission 71, p 3.

²⁶⁸ Submission 66, p 3.

²⁶⁹ Submissions 1, 91.

²⁷⁰ Submission 1, pp 1-2.

²⁷¹ Submission 91, p 4.

²⁷² Such as the *Disability Discrimination Act 1992* (DDA) and the *Standards for Education 2005* (DSE).

²⁷³ See for example submissions 71, 73 and 76.

*undermining the realisation of their right to education and leading to serious human rights violations.*²⁷⁴

CYDA specifically referred to the UNCRPD, stating:

*the right to education, as articulated in this clause, does not specifically mention or reflect the right to inclusive education as set out in the CRPD³ and further defined by United Nations General Comment No. 4, Article: Right to inclusive education 4 (General Comment No.4). As a State Party to the CRPD, Australia and by extension Queensland, have an obligation to ensure the right to an inclusive education is upheld for children and young people with disability.*²⁷⁵

QAI similarly submitted that while the clause is modelled on Article 13 of the ICESCR, and Article 28 of the UNCRC is couched in similar terms, education being available and accessible by appropriate means is distinct from having access to education appropriate to the child's needs. QAI raised a concern that the phrasing of cl 36 is not consistent with the goal of ensuring inclusive education at all levels, and also referred to the equivalent clause in the ACT's Human Rights Act which provides that every person is entitled to enjoy the right to education 'without discrimination'.²⁷⁶

Submitters also referred to the policies and practices of the Queensland Department of Education, such as the new 'Inclusive Education' policy, which submitters advised demonstrates the Queensland Government's commitment to inclusive education and is in keeping with the provisions of the UNCRPD.²⁷⁷ SELB submitted that 'It is critical that the language in the proposed QLD Bill of Rights aligns with and provides support to the Queensland Government's own policy'.²⁷⁸

Submitters made a range of recommendations for changes to the wording of cl 36(1). ALHR recommended that amendment is required to ensure this right is provided without discrimination and in a way that requires inclusive education.²⁷⁹

CYDA submitted that cl 36(1) be amended to remove the qualifying term 'appropriate to the child's needs' and to include the right to inclusive education.²⁸⁰ Ms Davies recommended that cl 36 be amended to include the phrase 'without discrimination' to ensure the right 'asserts the right to education in the best interest of the child and protects children who may face discrimination on grounds of disability, gender, or race'.²⁸¹

All Means All proposed that cl 36 should incorporate the concepts of freedom from discrimination, equality of opportunity, accessibility and inclusive education.²⁸²

Similarly, SELB recommended that cl 36 of the Bill be amended to:

*...reflect the intent of relevant international Conventions and national legislation by referring to key terms, including discrimination (DDA), equality of opportunity (CRC), accessible (ICESCR), and inclusive (CRPD).*²⁸³

Both SELB and the QCIE recommended that cl 36 of the Bill be replaced with the following wording:

²⁷⁴ Submission 73, p 1.

²⁷⁵ Submission 71, p 4.

²⁷⁶ Submission 76, p 6.

²⁷⁷ See for example submissions 63, 66, 71 and 74.

²⁷⁸ Submission 63, p 1.

²⁷⁹ Submission 91, p 2.

²⁸⁰ Submission 71, p 4.

²⁸¹ Submission 1, pp 1-2.

²⁸² Submission 73, p 3.

²⁸³ Submission 63, p 2.

36. Right to education

*Every person has the right to education without discrimination and on the basis of equality of opportunity. To realise this right, every person has the right to access quality early childhood, primary and secondary school education, and further education and training that is accessible and inclusive of all.*²⁸⁴

Professor Walsh et al made the following recommendations:

Recommendation 1: cl 36(1)

That cl 36(1) be re-drafted, so that it reads:

Every child has the right to have access to primary and secondary education that is appropriate to the child's age and inclusive of their needs.

Recommendation 2: cl 36(1A)

That an additional sub-cl (1A) be added which reads:

In this section-

Appropriate means enabling students to access and fully participate in learning, supported by reasonable adjustments and teaching strategies tailored to meet their individual needs, with the goal of full inclusion.

needs means educational, social, physical, intellectual and emotional needs on an equal basis with others in the communities in which they live.²⁸⁵

Submitters also raised issues with the wording of subcl (2) regarding access to vocational education and training, with concerns again being raised that the wording could allow for discrimination and suggestions that the clause does not reflect contemporary post-school educational offerings.²⁸⁶ For example, Professor Walsh et al raised a concern with the terms 'based on the person's abilities' and 'equally accessible to all' in cl 36(2), suggesting there is potential for the wording in the Bill to allow for discrimination against a person based on impairment by making a person's right to access vocational education and training conditional on their 'abilities' (making it also inconsistent with Queensland's anti-discrimination legislation).²⁸⁷

Professor Walsh et al also contended that the provision seems internally inconsistent because vocational education and training cannot be 'equally accessible to all' whilst also being conditional on 'ability'.²⁸⁸

SELB questioned the inclusion of the words 'based on the person's abilities' and the reference only to 'vocational education and training' and not further education and training, stating:

While we recognise that this wording may reflect the competitive entry status of university higher education, specific reference only to vocational education and training limits options and does not adequately reflect the diversity of contemporary post-school educational offerings. Nor does it recognise that all education providers, including universities, are obligated to make reasonable adjustments under the DDA and DSE [Standards for Education 2005].

...the reference to "based on the person's abilities" in Section 36(2), acts as a further limiter and has direct and distinctly negative implications for students with a disability. It is important to

²⁸⁴ Submission 63, p 2; submission 97, p 1.

²⁸⁵ Submission 66, p 3.

²⁸⁶ See for example submissions 53, 63, 66 and 76.

²⁸⁷ Submission 66, p 3.

²⁸⁸ Submission 66, pp 3-4.

*note that people with disability can succeed in education if provided with reasonable adjustments to curriculum, pedagogy and assessment, as per the DDA and DSE.*²⁸⁹

Similarly, All Means All took issue with the specific wording ‘based on the person’s abilities’ in the second subclause, stating that it:

*is also likely to lead to discriminatory outcomes for persons with disabilities potentially in breach of the DDA. Rather, access to further education should be guaranteed on the basis of equality of opportunity, without discrimination. We also find the reference to “vocational”, as opposed to “further” education and training, to be outdated and inappropriate.*²⁹⁰

QAI proposed that cl 36(2) be amended to provide ‘Every person has the right to have access to further education and training that is equally accessible to all’ because they believe the clause as it currently stands makes a person’s ability the requisite for access to further education and training, which ‘would have the effect of excluding many people and limiting their opportunities’.²⁹¹

QAI also advocated for the inclusion of a further two limbs to cl 36:

(3) Every child has the right to receive the support required, within the general education system, to facilitate their effective education.

*(4) Every child has the right to only be subjected to school discipline administered in a manner consistent with the child's human dignity and provides reasonable educational consequences.*²⁹²

Professor Walsh et al advised their preference is for the Queensland provision to mirror s 27A of the *Human Rights Act 2004* (ACT), so that it reads ‘Everyone has the right to have access to further education and vocational and continuing training without discrimination’.²⁹³

To address concerns with the wording of cl 36, the YAC submitted:

*Education and training is critical to children and young people’s success in life (and therefore to the community as a whole). We would therefore propose the Review of the Act in 2023, as per cl 95 of the Bill (the first Review), consider whether the wording has had any detrimental or unintended impact which should be remedied.*²⁹⁴

In addition to the wording of cl 36, a number of submitters made further suggestions on what the clause should cover.

Monique Bond contended that the right to education should include education for Indigenous children in their own languages:

*In fact, they should be taught in their local languages until they are two or three years old, and then have English language added in. This means a real push to assist the training of local people in rescuing their local languages and using them. It also means that people working with Indigenous people should show respect as they would in another country and learn at least some of the major local language.*²⁹⁵

Dr Louise Phillips and Professor Peter Renshaw raised a concern that cl 36 does not include early childhood education, and recommended that the clause be amended to read ‘Every child has the right to have access to early childhood, primary and secondary education appropriate to their needs’.

²⁸⁹ Submission 63, p 2.

²⁹⁰ Submission 73, p 5.

²⁹¹ Submission 76, p 7.

²⁹² Submission 76, p 7.

²⁹³ Submission 66, pp 3-4.

²⁹⁴ Submission 41, p 7.

²⁹⁵ Submission 139, p 4.

Dr Phillips and Professor Renshaw also submitted that the Bill does not include any mention of the right to know human rights as defined in article 42 of the UNCRC, and stated that:

*Without such inclusion, knowledge and enactment of the human rights defined in the Bill are reliant only on those who are required to know the legislation as part of their professional practice. Human rights are everyone's right and responsibility.*²⁹⁶

Dr Phillips and Professor Renshaw recommended that cl 36 be amended to include the statement 'Every person has the right to education of human rights as defined in the United Nations Human Rights instruments'.²⁹⁷

Dr Phillips and Professor Renshaw also raised the issues of exclusion and corporal punishment, recommending that an additional statement be added to cl 36 that 'protects children from the excessive exclusion from education that the Queensland *Strengthening Discipline in State Schools Act 2013* enabled' by providing:

*Every child has the right to not be excluded from education and to fair treatment administered in a manner consistent with the child's human dignity.*²⁹⁸

They also submitted that there is not adequate legislation to protect children from punishment, and recommended that Article 37 of the UNCRC needs to be explicitly included in the Bill so that it reads:

*a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age.*²⁹⁹

On the topic of exclusion, the QTU raised a concern that one student's right to access appropriate education could be infringed by other students' behaviour, yet excluding a student denies them of their right to access education. The QTU then submitted that it is likely the Supreme Court would find the right to exclude should prevail in this situation, and recommended that the Bill be amended to avoid the need to have the Supreme Court determine this question.³⁰⁰

The QTU also expressed a concern that the current drafting of the provision on the right to education may restrict the ability of the Department of Education to make decisions which are necessary to protect the health and safety of QTU members and other students, and recommended the clause be amended to read 'Every child has the right to have access to primary and secondary education appropriate to the child's needs, according to law'. The QTU also recommended that an amendment be made to the *Education (General Provisions) Act 2006* (Qld) to ensure that Education Queensland is able to exclude students who create a risk for the health and safety of others.³⁰¹

Mr Eric Raymond submitted that the wording of cl 36(2) implies that all tertiary institutions must be free.³⁰²

2.5.1.3 Departmental response

In response to issues raised in submissions, DJAG advised:

²⁹⁶ Submission 82, p 1.

²⁹⁷ Submission 82, p 1.

²⁹⁸ Submission 82, p 2.

²⁹⁹ Submission 82, p 2.

³⁰⁰ Submission 142, pp 1-2.

³⁰¹ Submission 142, pp 3-4.

³⁰² Submission 38, p 1.

The right to education is modelled on article 13 of the International Covenant on Economic, Social and Cultural Rights. Internationally, this right has been interpreted as including a requirement that education must be accessible to all persons without discrimination.

Whilst the words ‘without discrimination’ are not explicitly included in the right to education in the Bill, cl 15 of the Bill (recognition and equality before the law) states that every person has the right to enjoy their human rights without discrimination. It is intended that the rights in the Bill, read with cl 15, are to be enjoyed by all persons without discrimination.

In addition, cl 12 of the Bill clarifies that the human rights included in the Bill are in addition to other rights and freedoms included in other laws. This means that provisions in the Anti-Discrimination Act 1991 will continue to operate to protect vulnerable Queenslanders from unfair discrimination.³⁰³

2.5.2 Health services

Clause 37 provides for the right to health services.

2.5.2.1 Proposed law

The explanatory notes state that this clause is modelled on article 12 of the ICESCR:

Subclause (1) provides for the right of every person to access health services without discrimination.

Subclause (2) provides that a person must not be refused emergency medical treatment that is immediately necessary to save their life or to prevent serious impairment.

This clause provides certain rights in relation to health services and is not intended to encompass rights in relation to underlying determinants of health, such as food and water, social security, housing and environmental.³⁰⁴

2.5.2.2 Issues raised in submissions – health services

Support was expressed for the inclusion of the right to health services in the Bill by a number of submitters.³⁰⁵ Submitters stated that it is important that the proposed Human Rights Act protects rights to health services because access to health services can sometimes be limited, particularly for those with a disability,³⁰⁶ those living in rural and remote areas,³⁰⁷ for persons victimised by crime and violence (especially child victims),³⁰⁸ and for children living with families in conflict or with a high level of dysfunction who may not be able to rely on a carer to ensure they receive adequate medical attention.³⁰⁹

Hon. Matt Foley submitted that the right to health services is also important for people with mental health problems, and expressed a hope that this clause ‘will help to protect access to health care and avoid such tragedies as the closure in 2014 of the Barrett Adolescent Centre and the resultant lack of

³⁰³ Department of Justice and Attorney General, correspondence dated 3 December 2018, attachment, p 29, in reference to submissions 1, 41, 61, 63, 66, 71, 73, 76, 82, 91, 97, 133 and 142.

³⁰⁴ Explanatory notes, p 28.

³⁰⁵ See for example submissions 1, 14, 19, 24, 94, 95, 117, 123, 126 and 135.

³⁰⁶ Submission 126, p 3.

³⁰⁷ Submission 123, p 3.

³⁰⁸ Submission 95, p 5.

³⁰⁹ Submission 19, p 3.

access to health care for adolescents with mental illness'.³¹⁰ Similarly, Griffith Law School stated 'We urge that the right to access mental health services receive particular attention'.³¹¹

A number of submitters questioned why the right is expressed as a right 'to access' health services.³¹² Some submitters expressed a concern that it constrains or narrows the focus of the right from the broader right contained in international instruments (such as the ICESCR and the UNCRC) which refer to a right to the enjoyment of the highest attainable standard of health.³¹³

Similarly, CLA questioned why the right was not simply expressed as a right to health care, rather than referring to access to health services.³¹⁴

To address the perceived narrower focus, the TCLS suggested that this provision be amended to reflect the broader context of health care, such as the right to health and access to health.³¹⁵ Likewise, Dr Debeljak, UNICEF Australia and members of the ILGG research program, recommended that the Bill be amended to expand the scope of the protection of the right to health to recognise the right to the highest attainable standard of health.³¹⁶

The ILGG research program also submitted that the inclusion of a right to access health services, while welcome, is only part of the obligation imposed on governments under international human rights law, and contended that the potential for environmental factors to impact on human rights should be explicitly recognised in the Act.³¹⁷ Further, CLA noted that the position under international law explicitly extends the scope to include underlying determinants of health, such as food and nutrition.³¹⁸

CLA also questioned what greater protection, if any, the proposed formulation in the Bill provides patients over and above existing protections provided by existing anti-discrimination laws.³¹⁹

As a means of addressing the concerns regarding the wording and coverage of the clause, the YAC submitted that the first review of the proposed legislation consider whether the wording has had any detrimental or unintended impact which should be remedied, given the narrower focus placed on the right.³²⁰

The QNMU noted that, as the provision is written in the passive voice, they assume that it applies to health practitioners administering treatment in the public sector. If that is the case, they raise the concern that an unqualified individual right to health services may compromise the health and safety of another person, stating:

While we are confident our members would not hesitate to provide medical assistance in a 'normal' emergency situation where the patient needed immediate treatment, our members are increasingly exposed to persons who are behaving violently towards them even when the person's own condition is life threatening. Drugs such as crystal methamphetamine (ice) can produce psychotic, life-threatening episodes where the individual is unaware of the extent of

³¹⁰ Submission 42, pp 3-4.

³¹¹ Submission 116, p 17.

³¹² See for example submissions 35, 41, 57 and 117.

³¹³ See for example submissions 35, 41 and 57.

³¹⁴ Submission 35, p 11.

³¹⁵ Submission 35, p 11.

³¹⁶ Submission 14, p 2; submission 89, p 6; submission 133, p 5.

³¹⁷ Submission 89, pp 7-8.

³¹⁸ Submission 57, p 2.

³¹⁹ Submission 57, p 2.

³²⁰ Submission 41, p 7.

*their own injuries/condition. These types of emergency presentations are becoming more common in the health community and more distressing to our members.*³²¹

To address this concern, the QNMU recommended that the *Hospital and Health Boards Act 2011* be amended to include the following, to clarify its relationship with the proposed Human Rights Act:

Relationship with Human Rights Act 2018

This section applies to the health practitioner's consideration of the Human Rights Act 2018, sections 37(1) and 37(2).

(1) To remove any doubt, it is declared that a health practitioner does not contravene sections 37(1) and 37(2) of the Human Rights Act 2018, which provide

- (i) every person has the right to have access to health services without discrimination; and*
- (ii) a person must not be refused emergency medical treatment that is immediately necessary to save their life or to prevent serious impairment to the person providing the person's actions or behaviour do not endanger the health and safety of the health practitioners who are giving treatment.*³²²

2.5.2.3 Departmental response

The department noted the suggestions for further amendments and responded to issues raised:

Like the Charter of Human Rights and Responsibilities Act 2006 (Victorian Charter), the rights in the Bill are primarily drawn from the International Covenant on Civil and Political Rights (ICCPR).

The protection of civil and political rights is often the first step in human rights Acts, therefore human rights legislation usually protect a common selection of those rights enumerated in the ICCPR. Many of the civil and political rights in the ICCPR are also recognised as important common law rights (such as the right to liberty and security).

The Bill goes beyond the Victorian Charter by including the rights to health services and education drawn from the International Covenant on Economic, Social and Cultural Rights, and a stand-alone provision recognising the cultural rights of Aboriginal peoples and Torres Strait Islander peoples, which is informed by provisions in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).

*Clause 12 clarifies that the human rights included in the Bill are in addition to other rights and freedoms included in other laws, for example rights and freedoms included in the common law, a law of the Commonwealth, or under international conventions. These existing rights and freedoms should not be taken to be abrogated or limited only because they are not included in the Bill.*³²³

2.6 Application of human rights in Queensland

2.6.1 Statements of compatibility and human rights certificates

2.6.1.1 Proposed law

The Bill provides that all bills introduced into the Legislative Assembly, regardless of whether the bill is a government or private member's bill, must be accompanied by a statement of compatibility. The statement of compatibility must state whether, in the member's opinion, the bill is compatible with

³²¹ Submission 31, p 5.

³²² Submission 31, p 4.

³²³ Department of Justice and Attorney General, correspondence dated 3 December 2018, attachment, p 14, in reference to submissions 14, 57, 117.

human rights, and if so, how it is compatible. If the bill is not compatible with a human right, the statement of compatibility must state the nature and extent of the incompatibility.³²⁴

The explanatory notes advise that ‘The intention is that the statement will do more than merely assert compatibility or otherwise. It should provide detailed reasons and justification in respect of any human rights that may be impacted by the Bill which is the subject of the statement.’³²⁵

However, the statement of compatibility is not binding on any court or tribunal. According to the explanatory notes, the purpose of the statement of compatibility ‘is to elevate the consideration of human rights in legislative debate and to increase the transparency and accountability of Parliament’.³²⁶

For subordinate legislation, a human rights certificate must be prepared and tabled by the responsible Minister and must state whether, in the responsible Minister’s opinion, the subordinate legislation is compatible with human rights and, if so, how it is compatible. Alternatively, if in the responsible Minister’s opinion, a part of the subordinate legislation is not compatible with human rights, the certificate must also state the nature and extent of any incompatibility.³²⁷

Despite the above, the Bill also provides that a failure to comply with the requirements of Part 3, Division 1 in relation to a bill that becomes an Act, a non-Queensland law or subordinate legislation does not affect the validity of the Act, law, subordinate legislation or any other law.

2.6.1.2 Issues raised - statements of compatibility and human rights certificates

Some submitters, while supporting the provision requiring a statement of compatibility, made suggestions regarding the content of the statement. Monash University’s Castan Centre for Human Rights Law (CCHRL) and AIA proposed that the parliamentary scrutiny provisions in the Bill should be strengthened to ensure that statements of compatibility are of a high quality, evidence based standard and reference is made to the evidence base underpinning the statement.³²⁸

Dr Debeljak recommend amendment of cl 38 (2) so that it reads as follows:

‘The statement of compatibility must state—

(a) whether, in the member’s opinion, the Bill is compatible with human rights and, if so, how it is compatible by reference to s 7(2) providing evidence for the assessment; and

(b) if, in the member’s opinion, any part of the Bill is not compatible with human rights, the nature and extent of the incompatibility by reference to s 7(2) providing evidence for the assessment.’³²⁹

Professors Aroney and Ekins raised a concern that the Bill does not address the risk that the statements of compatibility may be relied on in litigation, advising:

In the UK, courts have at times reasoned that because the Minister certified that proposed legislation conformed to rights judges were entitled to impose a very strained meaning on the statute in order to secure the result the judges thought respected rights. In other words, the provision of a certificate emboldened more radical interpretation.’³³⁰

³²⁴ Clause 38; Explanatory notes, p 28.

³²⁵ Explanatory notes, p 28.

³²⁶ Explanatory notes, p 29.

³²⁷ Clause 41; explanatory notes, p 29

³²⁸ Submission 26, p 4; submission 69, p 9.

³²⁹ Submission 14, p 6.

³³⁰ Submission 107, p 9.

CYDA raised a concern that the statement of compatibility is not binding on any court or tribunal and that a failure to comply with this requirement does not impact on the validity of an Act, a non-Queensland law or subordinate legislation. CYDA contended that the ‘lack of accountability’ risks undermining the ability of the Bill to ensure human rights are upheld and critical cultural change takes place.³³¹

Concerns were also raised by a few submitters that allowing for exceptions to compatibility in certain cases diminishes the concept of human rights for every individual and makes it possible for government to exploit the statement of compatibility provision to the detriment of certain “profiled” groups in society.³³²

2.6.1.3 Departmental response

In response to proposals regarding the content of the statement of compatibility, the department advised:

*The intention is that the statement of compatibility will do more than merely assert compatibility or otherwise. It should provide detailed reasons and justification in respect of any human rights that may be impacted by the Bill which is the subject of the statement.*³³³

The department responded to the concerns of Professors Aroney and Ekins, stating:

It is not unusual for extraneous material, including documents tabled in Parliament accompanying a bill (such as explanatory notes) to be used as an aid in statutory interpretation, although they are not determinative.

*...the interpretative provision (cl 48) has been drafted with the policy intention of avoiding a remedial approach by the courts associated with human rights legislation in some international jurisdictions. The emphasis on giving effect to the legislative purpose means that the provision is not intended to authorise a court to depart from Parliament’s intention.*³³⁴

2.6.2 **Role of portfolio committees**

2.6.2.1 Proposed law

Portfolio committees responsible for examining a bill referred by the Legislative Assembly must consider the bill and report to the Assembly about any incompatibility with human rights. The explanatory notes states that it is the intention that the portfolio committee will consider whether any limits on human rights have been sufficiently justified within the meaning of the general limitations clause (see cl 13). A portfolio committee must also consider and report on the statement of compatibility tabled for the bill.³³⁵

Under the Bill, the Legislative Assembly may also refer a non-Queensland law that applies in Queensland³³⁶ to a portfolio committee, and the portfolio committee must consider the law and report to the Assembly about whether the law is not compatible with human rights.³³⁷

The portfolio committee responsible for examining subordinate legislation may also consider the human rights certificate.³³⁸

³³¹ Submission 71, p 4.

³³² Submission 6, p 2; submission 16, p 2.

³³³ Department of Justice and Attorney-General, correspondence dated 3 December 2018, attachment, p 43.

³³⁴ Department of Justice and Attorney-General, correspondence dated 3 December 2018, attachment, p 44.

³³⁵ Clause 39; explanatory notes, p 29.

³³⁶ Such as laws under a national scheme or regulations under those laws.

³³⁷ Clause 40.

³³⁸ Clause 41; explanatory notes, p 29.

2.6.2.2 *Issues raised – role of portfolio committees*

A number of submitters raised concerns about portfolio committees being given the role of examining and reporting on the compatibility of legislation with human rights, and instead recommended that a new committee be established with sole responsibility for that task.³³⁹ For example, Dr Julie Debeljak contended that assessing laws for compatibility with human rights is a ‘unique, time consuming and difficult task’, and therefore suggested that a stand-alone committee would be better placed to conduct the task.³⁴⁰

One particular concern raised by submitters about the responsibility for human rights scrutiny being allocated to portfolio committees was a portfolio committee’s ability to develop expertise in human rights scrutiny.³⁴¹

However, Professor Williams AO and Dr Boughey, who raised this concern, also suggested that there may be an advantage to including human rights scrutiny in a portfolio committee’s jurisdiction as portfolio committees may have greater expertise on the policy area of legislation they are scrutinising.³⁴²

The issue of portfolio committees being provided with sufficient time to consider a bill’s human rights compatibility was also raised. The HRLC stated:

The Queensland Parliament, including through the work of the portfolio committee, has an important role to play in promoting human rights and discharging the state’s legal obligation to respect, protect and fulfil human rights. This is particularly relevant in Queensland’s unicameral parliament.

*Accordingly, it is critical that legislation is not rushed through Parliament without undertaking the important scrutiny processes played by the portfolio committee. Without a thorough and detailed consideration of the statement of compatibility, the benefits of the Bill will be undermined.*³⁴³

Dr Debeljak raised a concern that there is no provision in the Bill for ensuring the portfolio committee has adequate time to consider and report on bills for compatibility with human rights.³⁴⁴

Some submitters, such as the ADCQ, raised a concern that the Bill does not specifically provide the requirement for a portfolio committee’s report to be tabled before the Bill is debated and passed.³⁴⁵

To address concerns about the time needed by portfolio committees to undertake their consideration of the legislation and the subsequent timing of the debate on a bill, some submitters recommended that the Bill should contain a requirement that no bill proceed to debate,³⁴⁶ be passed by Parliament³⁴⁷

³³⁹ See for example submissions 14, 26, 80, 116 and 122.

³⁴⁰ Submission 14, p 7. Dr Debeljak also recommended that a practice be established that during the legislative development phase, the relevant department, in confidence, consult the human rights committee on draft policy and legislative proposals pre-Cabinet approval.

³⁴¹ Submission 8, p 2; submission 14, p 7.

³⁴² Submission 8, p 2.

³⁴³ Submission 101, pp 15-16.

³⁴⁴ Submission 14, p 7.

³⁴⁵ See for example submissions 8, 14, 80 and 101. The ADCQ noted in its submission (submission 80, pp 4-5) that under the Standing Rules and Orders of the Legislative Assembly, a bill is discharged from consideration by a portfolio committee and set down for its second reading stage, if the committee has not reported within the time for the report. A bill can also be declared urgent and not referred to a committee.

³⁴⁶ Submission 8, p 2.

³⁴⁷ Submission 101, p 16.

or be considered valid³⁴⁸ until the portfolio committee has reported. It was suggested that this would ensure that the relevant parliamentary committee has the time it needs to conduct its analysis.³⁴⁹

AIA recommended that parliamentary procedures be reformed to ensure bills cannot be passed without adequate consideration of the statements of compatibility and relevant committee reports.³⁵⁰ Similarly, Dr Debeljak recommended that the Bill should provide that no bill can become a valid Act until the Parliament has 'properly considered' the Committee's report.³⁵¹ The HRLC also recommended that the Bill be amended to require the responsible Minister to respond substantively to any concerns raised by the portfolio committee prior to the passage of a bill.³⁵²

The ADCQ, while supporting a specialist human rights committee, recommended that in the absence of a specialist parliamentary committee, 'it is essential that committee members have the resources and specialist knowledge available to them so that they can meaningfully consider the potential impact of legislation on human rights'.³⁵³ As an alternative to a specialist committee, the ADCQ recommended that the Office of the Queensland Parliamentary Counsel be given the function to provide advice to Ministers and Members of Parliament on human rights.³⁵⁴

The ADCQ elaborated on this suggestion at the public hearing, stating:

*... we thought it would be helpful in the development of legislation if the Office of the Queensland Parliamentary Counsel...developed an expertise in human rights so it could alert departments, which also have a responsibility to identify human rights, early in the drafting process. It could alert the department to say, 'If you haven't noticed, you are touching on a human right here. Have you turned your mind properly to it?' We think that turning your mind to human rights issues in legislation at the very beginning is the best process, rather than way down the track when the legislation is passed, so that the drafting can be done in a very thoughtful and responsible way. Human rights issues are identified early; Parliamentary Counsel has the expertise to talk with departments that are doing the drafting; and then under the fundamental legislative principles act, which has been mentioned already this morning, the Parliamentary Counsel would have responsibility for identifying those in the explanatory notes to the bill.*³⁵⁵

To ensure a portfolio committee is able to effectively consider the human rights compatibility of a bill, the HRLC recommended that the Bill be amended to provide greater formal opportunity for public submissions and hearings on bills that raise significant human rights concerns.³⁵⁶

At the public hearing, the Griffith Law School advised that the former Scrutiny of Legislation Committee of the Queensland Parliament considered a wide range of international instruments to which Australia was a party. They compared this situation to the Bill which provides that a portfolio committee's role is to consider the compatibility of legislation with human rights as defined by cl 7 of the Bill (the rights listed in the Bill). The Griffith Law School recommended that if a stand-alone committee is not created, portfolio committee's should be expected to consider all human rights, including those in international treaties that are not listed in the Bill.³⁵⁷

³⁴⁸ Submission 14, p 7

³⁴⁹ Submission 8, p 2.

³⁵⁰ Submission 69, p 9.

³⁵¹ Submission 14, p 7.

³⁵² Submission 101, p 16.

³⁵³ Submission 80, p 5.

³⁵⁴ Submission 80, p 5.

³⁵⁵ Public hearing transcript, Brisbane, 4 December 2018, p 4.

³⁵⁶ Submission 101, p 16.

³⁵⁷ Submission 116, p 28.

2.6.2.3 Departmental response

In response to the recommendations that a stand-alone committee be established to scrutinise the human rights compatibility of legislation, the department advised:

*All Parliamentary committees play an important role in facilitating parliamentary and broader public debate about proposed laws. In the context of human rights legislation, they can assist Parliament in assessing the human rights implications of new laws, expose legislation to effective scrutiny independent of the Executive and allow for public participation in the human rights dialogue and debate. It is intended that portfolio committees will play an important role in promoting greater awareness of human rights.*³⁵⁸

In response to suggestions regarding the timing of a committee's consideration of a bill and the passing of the legislation, the department advised:

*A provision requiring Parliament to delay the passing of legislation until the portfolio committee has had adequate time to consider a bill's compatibility with human rights is not considered necessary in Queensland, as most bills introduced into the Legislative Assembly are referred to a parliamentary committee which is required to report on the bill within a specified period of time (between six weeks and six months). This allows the parliamentary committee adequate opportunity to consider the compatibility of a bill with human rights before the bill is debated.*³⁵⁹

2.6.3 **Override declarations**

2.6.3.1 Proposed law

Part 3 Division 1 of the Bill provides for override declarations. Proposed cl 43 provides that Parliament may expressly declare in an Act that the Act or another Act, or a provision of the Act or another Act, has effect despite being incompatible with one or more human rights or despite anything else in this Act (an override declaration). If an override declaration is made, the declaration extends to any subordinate instrument made under or for the purpose of that Act or provision.³⁶⁰

Clause 43 also provides that it is the intention of Parliament that an override declaration will only be made in exceptional circumstances. Examples of exceptional circumstances given include war, a state of emergency or an exceptional crisis situation constituting a threat to public safety, health or order.³⁶¹

If a member of Parliament introduces a bill containing an override declaration, the member must make a statement to the Legislative Assembly when introducing the bill explaining the exceptional circumstances that justify the inclusion of the override declaration. The requirement extends to any override declaration that is contained in an amendment moved after a bill is introduced, to ensure that a statement of exceptional circumstances accompanies any amendments made to a bill during consideration in detail.³⁶²

If an override declaration is made in relation to an Act or a provision in an Act, the proposed Human Rights Act will not apply to the Act or provision to the extent of the override declaration. Furthermore, for an Act or a provision for which an override declaration exists, the Supreme Court cannot make a declaration of incompatibility in relation to the Act or provision and the requirement under s 48 to interpret the Act or provision in a way that is compatible with human rights does not apply. A provision of an Act containing an override declaration expires five years after the day on which the provision

³⁵⁸ Department of Justice and Attorney-General, correspondence dated 3 December 2018, attachment, p 45.

³⁵⁹ Department of Justice and Attorney-General, correspondence dated 3 December 2018, attachment, p 45.

³⁶⁰ Explanatory notes, pp 29-30.

³⁶¹ Explanatory notes, p 30.

³⁶² Explanatory notes, p 30.

commences or on an earlier day stated in the Act.³⁶³ However, Parliament may re-enact an override declaration at any time, and must follow the same procedures for a re-enacted declaration as for the initial override declaration.³⁶⁴

As with the scrutiny of legislation, failure to comply with the procedural requirements in the Bill for an override declaration will not affect the validity, operation or enforcement of the Act or statutory provision.³⁶⁵

2.6.3.2 *Issues raised – override declarations*

The submission from PACT acknowledged that there may be instances where Parliament may expressly declare that an Act has effect despite being incompatible with one or more human rights and it recognised the need that a clear statement is made to the Legislative Assembly explaining the exceptional circumstances that justify the inclusion of the override declaration.³⁶⁶

However, a number of submitters opposed the override declaration provision in the Bill.³⁶⁷ Some submitters advised that they believed the override declaration clause was unnecessary because the dialogue model which underpins the Bill preserves Parliamentary sovereignty.³⁶⁸ The ALA also suggested that such a provision serves to undermine the institutional dialogue that legislative human rights charters were designed to create.³⁶⁹ Furthermore, the ALA advised that in situations where there is a public interest in enacting legislation that is not compatible with the proposed Human Rights Act, the Queensland Parliament can still enact legislation that it acknowledges is incompatible with the human rights contained in the Bill, under cl 38, which also preserves the principle of parliamentary sovereignty and removes the need for an override declaration.³⁷⁰

The QLS took the view that the override provisions are unnecessary because the Bill (if enacted) would not affect constitutionally entrenched rights and therefore Parliament has the ability to pass any legislation regardless of its compatibility. However, the QLS also referred to the benefits of having and using the override provisions, particularly in relation to making Parliament's intention clear, namely, that it recognises that the laws being passed are incompatible, or potentially incompatible, under the Bill.³⁷¹

Some submitters expressed a concern that an override provision provides the Government with an easy way to circumvent the principles of the Bill, diminishing the human rights the Bill is seeking to uphold.³⁷² For example, CLCQ recommended removing Parliament's ability to override the proposed Human Rights Act because any laws should be consistent with human rights.³⁷³

Dr Debeljak and CYDA recommended that if the override declaration provision is kept in the Bill, cl 43 should be acknowledged to operate like derogation at the international level, and should be amended to align with provisions under article 4 of the ICCPR regarding State Parties' ability to take measures derogating from their human rights obligations in times of public emergency.³⁷⁴ Article 4 outlines

³⁶³ Clause 45; explanatory notes, p 31.

³⁶⁴ Clause 46.

³⁶⁵ Clause 47; explanatory notes, p 30.

³⁶⁶ Submission 19, p 3.

³⁶⁷ See for example submissions 6, 14, 16, 22, 24, 26, 45, 60, 71, 87, 107, 111 and 117.

³⁶⁸ For example see submissions 14, 24 and 26.

³⁶⁹ Submission 24, p 11.

³⁷⁰ Submission 24, p 12.

³⁷¹ Submission 103, p 9.

³⁷² See for example submissions 6, 16, 22, 45 and 117.

³⁷³ Submission 117, p 9.

³⁷⁴ Submission 14, pp 5-6; submission 71, p 4.

certain rights that States Parties must uphold in all circumstances, referred to as non-derogable rights.³⁷⁵ Submitters called for cl 43 to be amended to include non-derogable rights in line with article 4 of the ICCPR, including:

- clause 15 – Recognition and equality before the law;
- clause 16 – Right to life;
- clause 17 – Protection from torture and cruel, inhuman or degrading treatment;
- clause 18 – Freedom from forced work;
- clause 20 – Freedom of thought, conscience, religion and belief; and
- clause 29 – Right to liberty and security of person.³⁷⁶

Dr Debeljak also advised that for the override provision to be consistent with international human rights law obligations, exercises of derogation must be limited in time (temporary measures), limited by circumstances (there must be an emergency threatening the life of the nation) and limited in effect (the derogating measure must be no more than the exigencies of the situation require and not violate international law standards). Dr Debeljak stated that the Bill only limits the use of the override provision by circumstance, such as through war or state of emergency, and suggests that the sunset provision of five years under cl 45 of the Bill is not sufficient to meet the limitation of time under the ICCPR because a derogation should be lifted at the earliest point in time possible, not just re-visited in five-yearly intervals. Dr Debeljak further stated that the fact that cl 46 sanctions the re-enactment of override declarations reinforces that the limitation on time is not sufficiently guaranteed. Dr Debeljak recommended that the Bill be amended to be consistent with international human rights law obligations in terms of limiting the time an override declaration is in force and limiting its effect.³⁷⁷

Professors Aroney and Ekins advised of two problems they perceive with the provisions regarding override declarations. Firstly, they raised the issue that cl 43 does not contemplate the situation where the Supreme Court and a future Parliament have formed different views as to whether legislation is compatible with human rights. The note to cl 43(4) says that override declarations will only be made in exceptional circumstances such as war, state of emergency or similar crisis. Professors Aroney and Ekins suggest that this magnifies the significance of court-made declarations of incompatibility and limits the scope for parliamentary override declarations. In this respect, the submitters contend that the Bill goes much further than the Victorian Charter, which refers only to Supreme Court declarations of ‘inconsistent interpretation’.³⁷⁸

Secondly, Professors Aroney and Ekins submitted that the scheme also implies that at the expiry of the five-year period the meaning of the legislation may change, when the interpretive direction comes into operation. The professors then stated:

*This suggests that the interpretive direction is envisaged as a lawmaking power. It is startling that the Bill contemplates the meaning of a statute changing without further legislative action. This, too, would be productive of uncertainty and potential confusion.*³⁷⁹

The ADCQ did not comment on the value of an override declaration provision, but instead submitted that recording override declarations made, aligns with the functions of the OQPC to print and publish

³⁷⁵ <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.

³⁷⁶ Submission 14, pp 5-6; submission 71, p 5.

³⁷⁷ Submission 14, pp 5-6.

³⁷⁸ Submission 107, pp 9-10.

³⁷⁹ Submission 107, pp 9-10.

bills, legislation and information relating to Queensland legislation, and recommended that the OQPC be given the function to record and publish details of all override declarations made.³⁸⁰

2.6.3.3 Departmental response

In response to the concerns and suggestions from submitters, the department advised:

*The provision reflects the clear position that, under this model of human rights legislation, Parliament remains sovereign and may, if it wishes, intentionally pass legislation that is not consistent with human rights.*³⁸¹

2.6.4 **Statutory interpretation**

2.6.4.1 Proposed law

Division 3 of Part 3 provides for the interpretation of laws. Clause 48 requires all statutory provisions to be interpreted in a way that is compatible with human rights, to the extent that it is possible to do so, consistent with the provision's purpose. If a statutory provision cannot be interpreted in a way that is compatible with human rights, the provision must be interpreted in a way that is most compatible with human rights, to the extent possible that is consistent with its purpose.³⁸² According to the explanatory notes, the emphasis on giving effect to the legislative purpose means that cl 48 does not authorise a court to depart from Parliament's intention, however a court may depart from the literal or grammatical meaning of the words used in exceptional circumstances.³⁸³ No examples of exceptional circumstances are given.

The explanatory notes also state that the provision uses the term 'compatible with human rights', which is a defined term for the Bill (see cl 8), to make it clear that the court must apply a proportionality analysis when interpreting a statutory provision under cl 13. If a provision can be interpreted in more than one way but none of the options would be compatible with human rights, then the court should apply the analysis required under cl 13 to each of the available options and select the option that is most compatible. International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision.³⁸⁴

However, cl 48 does not affect the validity of an Act or provision of an Act that is not compatible with human rights. Clause 48 also does not affect the validity of a statutory instrument or provision of a statutory instrument that is not compatible with human rights if the Act under which it was made empowered the making of a statutory instrument which is incompatible with human rights. This section also does not apply to a statutory provision which is the subject of an override declaration that is in force.³⁸⁵

The Bill provides an avenue of referral to the Supreme Court if in a proceeding before a court or tribunal a question of law arises that relates to the application of, or in relation to the interpretation of a statutory provision in accordance with, the proposed Human Rights Act. The question may be referred to the Supreme Court if a party to the proceeding has made an application for referral and the court or tribunal considers the question is appropriate to be decided by the Supreme Court. Both of these requirements need to be satisfied for a referral to occur.³⁸⁶

³⁸⁰ Submission 80, p 5.

³⁸¹ Department of Justice and Attorney-General, correspondence dated 3 December 2018, attachment, p 46.

³⁸² Clause 48; explanatory notes, p 30.

³⁸³ Explanatory notes, p 30.

³⁸⁴ Explanatory notes, p 31.

³⁸⁵ Clause 48; explanatory notes, p 31.

³⁸⁶ Clause 49; explanatory notes, p 31.

The Bill provides that the Attorney-General and the QHRC may intervene in and be joined as a party to a proceeding before a court or tribunal in which a question of law arises that relates to the application of the Bill or a question arises in relation to the interpretation of a statutory provision in accordance with the Bill. The clause also provides that where the Attorney-General or QHRC intervenes in a proceeding, the Attorney-General or QHRC is taken to be a party to that proceeding for the purpose of any appeal from an order made in the proceeding.³⁸⁷

2.6.4.2 *Issues raised – approach to interpretation of laws*

Submissions on this element of the Bill had differing views on the approach that should be taken by the judiciary when interpreting laws. Professor Williams AO and Dr Boughey raised the issue of the courts taking a ‘remedial’ approach and questioned its consistency with the judicial function, advising that a ‘remedial approach’ allows courts to strain the meaning of the words used in legislation so as to make the legislation consistent with human rights.³⁸⁸ Professor Williams AO and Dr Boughey referred to two court cases in relation to the Victorian Human Rights Charter:

*In the early years of the Victorian Charter, there was a view amongst some judges and scholars that s 32 permitted courts to adopt a ‘remedial’ approach to interpreting legislation, as occurred in the UK House of Lords’ decision in Ghaidan v Godin-Mendoza.*³⁸⁹

In Momcilovic v The Queen, six members of the High Court found that the Victorian Charter’s interpretive provision does not permit courts to take a ‘remedial approach’ to interpretation. Four justices suggested that a ‘remedial approach’ might be inconsistent with the judicial function.

*Since Momcilovic, Victorian courts have taken the view that s 32 simply codifies the common law principle known in Australia as the ‘principle of legality’ and extends its application to a wider range of rights. The ‘principle of legality’ is a presumption that Parliament does not intend to limit fundamental human rights. In order to rebut the presumption, Parliament must express its intention to limit rights with sufficient clarity.*³⁹⁰

Professor Williams AO and Dr Boughey advised that they do not suggest attempting to give courts the power to interpret legislation in a ‘remedial’ way, and recommended that the Queensland Parliament should strengthen the effect of cl 48 to give it more effect than its ACT and Victorian equivalents by amending it 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. ...where there are multiple possible interpretations of a provision, the courts should prefer the interpretation that best protects human rights, over all other interpretations.*³⁹¹

This amendment was supported by academics from the Griffith Law School and the TC Beirne School of Law at the University of Queensland.³⁹²

In contrast, Dr Benedict Coxon argued against the proposal by Professor Williams AO and Dr Boughey, stating that this would be even further from what the explanatory notes suggest cl 48 was designed to achieve. As an alternative if no substantial amendment is made to cl 48, Dr Coxon suggested that the clause be amended by substitution of the words ‘least incompatible’ for ‘most compatible’ in subsection (2), stating ‘The subsection in its current form is illogical; if a statutory provision ‘can not

³⁸⁷ Clauses 50 and 51; explanatory notes, p 32.

³⁸⁸ Submission 8, pp 3-4.

³⁸⁹ Ghaidan v Godin-Mendoza [2004] UKHL 30.

³⁹⁰ Submission 8, pp 3-4.

³⁹¹ Submission 8, pp 3-4.

³⁹² Submission 116, p 33; submission 39, p 8.

be interpreted in a way that is compatible with human rights', then it will be impossible to interpret it 'in a way that is most compatible with human rights.'" Dr Coxon then suggested that if the drafting occurred as a result of a desire to use the phrase 'compatible with human rights' because that is a defined phrase for the purposes of the Bill, it would be preferable to substitute 'nearest to being' for 'most' in cl 48(2).³⁹³

Dr Coxon also submitted that cl 48 may have a broader operation than its drafters envisaged because of its reference to the concept of legislative purpose as opposed to the concept of the intention of Parliament, and recommended the following potential amendments:

- substitution of a reference to legislative intention for the references to purpose;
- deletion of the clause in its entirety; or
- an insertion making the clause subject to the provision of the Acts Interpretation Act 1954 (Qld) that provides that 'the interpretation that will best achieve the purpose of [an] Act is to be preferred to any other interpretation.'³⁹⁴

Dr Debeljak also took a different approach to Professor Williams AO and Dr Boughey, submitting that it is important to approach the interpretative provision as a remedial interpretation provision, quoting from her submission to the 2016 inquiry in which she stated:

*Under statutory instruments, rights-compatible interpretation becomes the remedy. If a law unreasonably and/or unjustifiably limits a right, a complete remedy is to give the law an interpretation that avoids the unreasonable and/or unjustifiable limitation. In other words, a rights-compatible interpretation is a complete remedy to an otherwise rights-incompatible law.*³⁹⁵

Dr Debeljak highlighted that a remedial approach to interpretation offers something more than an ordinary approach to interpretation, with the latter merely being a codification of the principle of legality. Dr Debeljak indicated that it was the intention of the Parliament in Victoria to introduce a remedial interpretation, however this intention has not been reflected in the jurisprudence regarding s 32 of the Victorian Charter.³⁹⁶

Dr Debeljak recommended that cl 48 needs to be clear that it enacts remedial interpretation rather than codifies the principle of legality by explicit statutory language in the Bill itself, and bolstered by explicit language in the extrinsic materials, including the Explanatory Memorandum and second reading speech, and debate on the Bill.³⁹⁷

Dr Debeljak also recommended that cl 48 be drafted to clearly establish that the rights-compatible interpretation provision must be given a strong remedial reach similar to *Ghaidan v Godin-Mendoza* in order to properly protect and promote rights in Queensland because:

- Given that judges are not empowered to invalidate laws that unreasonably and/or unjustifiably limit the protected rights, s 48 rights-interpretation must provide a remedy;
- Given the limited remedies available against public entities under Division 4 of Part 3 of the Human Rights Bill, and the ability of a public entity to rely on statutory provision that are not compatible with human right under s 58(2), s 48 must provide a strong remedy via interpretation to protect the rights of individuals from unlawful conduct of public entities under Division 4 of Part 3; and

³⁹³ Submission 102, pp 7-8.

³⁹⁴ Submission 102, pp 7-8.

³⁹⁵ Submission 14, p 3.

³⁹⁶ Submission 14, p 3.

³⁹⁷ Submission 14, p 4.

- Judges do not have the final say, and parliament remains sovereign. The executive and parliament can respond to any s 48 interpretation by way of legislative amendment.³⁹⁸

The CCHRL supported Dr Debeljak's submission regarding the importance of the interpretative provision in cl 48 operating as a remedial interpretation provision.³⁹⁹

The academics from UQ's TC Beirne School of Law also recommended that cl 48(3) of the Bill be reworded to ensure that the courts are required to give due consideration to any relevant judgments, decisions or advisory opinions of domestic, foreign and international courts and tribunals so that cl 48(3) be amended to read:

*International law and the judgments, decisions, declarations or advisory opinions of domestic, foreign or international courts and tribunals, relevant to determining a question which has arisen in connection with a human right, should be considered when it is relevant to proceedings.*⁴⁰⁰

2.6.4.3 Departmental response

The department provided a detailed response to these submissions, stating:

The interpretative provision in the Bill (cl 48) has been drafted in light of criticism and interpretations of the equivalent provision in the Victorian Charter, particularly the decision of the High Court in Momcilovic v The Queen.

The provision in the Bill makes it clear that the principle of proportionality has a role to play in interpretation (which was a point of contention in Momcilovic). This is done by clarifying the relevance and connection to the general limitations provision (cl 13). The meaning of 'compatible with human rights' in cl 8 provides that an act, decision or statutory provision is compatible with human rights if it limits a human right only to the extent that is reasonable and demonstrably justifiable in accordance with section 13 (the general limitations provision). Clause 13 improves on the Victorian limitations provision by providing further clarification about the factors that go to proportionality by drawing on the test of 'structured proportionality' that has been adopted by the High Court.

The provision has been drafted with the policy intention of avoiding a remedial approach by the courts associated with human rights legislation in some international jurisdictions. The emphasis on giving effect to the legislative purpose means that the provision is not intended to authorise a court to depart from Parliament's intention.

Therefore it is not intended that the provision empower courts to remedy deficient legislation, by changing the meaning of legislation so as to make it compatible with human rights.

This is reflected in the emphasis on giving effect to the purpose of the statute. It is expected that the approach under cl 48 would be similar in nature to the common law principle of legality (that is, that absent words of clear intent, that a statutory provision should be interpreted in a way that is compatible with fundamental rights). Nevertheless, it is still considered that the statutory requirement in the Bill would point to a stronger approach, and may for example involve a court departing from the literal or grammatical meaning of the words in a statute in exceptional circumstances.

Clause 48 clarifies that if the court is unable to interpret a statutory provision compatibly with human rights, the provision must, to the extent possible that is consistent with its purpose, be interpreted in a way that is 'most compatible' with human rights.

³⁹⁸ Submission 14, pp 4-5.

³⁹⁹ Submission 26, p 4.

⁴⁰⁰ Submission 39, p 9.

Unlike the Victorian provision, cl 48(2) makes it clear that the interpretative provision has work to do in directing the court to select the option which is most compatible with human rights, even though none of the options available are compatible with human rights. This means that if a provision can be interpreted in more than one way but none of the options would be compatible with human rights, then the court should apply proportionality to each of the available options and select the option that is most compatible with human rights.

This clause also makes it clear that if a court cannot interpret a provision in a way that is compatible with human rights that this does not affect the validity of an Act, provision of an Act or a statutory instrument empowered by an Act. This is important under a 'dialogue' model as it maintains the sovereignty of Parliament.⁴⁰¹

2.6.4.4 Issues raised - intervention

Some submitters recommended that intervention by others, in addition to the Attorney-General or QHRC, should be provided for in the Bill.⁴⁰² For example, the TCLS noted that the common law and court rules both allow for intervention by non-parties from formal 'interveners' through to less formal such as *amicus curiae*⁴⁰³ and suggested that a provision could be included to allow an intervener to assume a special interest or contradictor role in limited situations in matters of public interest before the courts.⁴⁰⁴ At the public hearing, Mr Bill Mitchell from the TCLS further explained:

It is quite typical in matters of high public interest to have subject matter experts intervening to give their views on the way laws might be looked at or to give information about the particular impacts on particular persons. Certainly, all of the courts and tribunals already have the power to allow interveners, but in cases such as human rights laws we think it is important not only that the Attorney-General and the commission have a right to intervene but also, where one of them has intervened, that there be an opportunity for other parties to be involved.

It is very important that we are understood that we do not recommend something that would allow for any kind of delay or complication of the proceedings. The role of an intervener is meant to be very brief—a subject matter assistant... We are suggesting that there should be a broader intervention power than is there already.⁴⁰⁵

The WLSQ similarly suggested that advocacy groups with the specialised skills and expertise should have the ability with leave to intervene in matters concerning human rights.⁴⁰⁶

Academics from UQ's TC Beirne School of Law noted that the general judicial discretion to hear an *amicus curiae* would continue to be available to a court in proceedings in which human rights issues arise, and recommended that guidance similar to the guidelines adopted by the Australian Human Rights Commission be provided in order to assist persons or bodies seeking to apply for leave to appear as an *amicus curiae* in respect of human rights issues in Queensland.⁴⁰⁷

⁴⁰¹ Department of Justice and Attorney-General, correspondence dated 3 December 2018, attachment, pp 49-51.

⁴⁰² See for example submissions 35, 36, 39, 117.

⁴⁰³ An *amicus curiae* is a "friend to the court" who assists the court on points of law in a particular case. Amicus are generally not parties to the proceedings, do not file pleadings or lead evidence and they may not lodge an appeal (<https://www.humanrights.gov.au/our-work/legal/submissions/submission-court-intervener-and-amicus-curiae>).

⁴⁰⁴ Submission 35, p 11.

⁴⁰⁵ Public hearing transcript, Brisbane, 4 December 2018, p 49.

⁴⁰⁶ Submission 36, p 5.

⁴⁰⁷ Submission 39, p 9.

2.6.4.5 Departmental response

In response to the suggestions to allow others to intervene, the department advised:

Allowing the QHRC to intervene in relevant proceedings will enable it to act, in some way, as an independent and expert advocate in relation to the interpretation of the Bill and its application to the particular circumstances before the court or tribunal.

In the absence of a specific provision in the Bill, it is arguably open to the relevant court or tribunal to exercise its discretion as to whether leave should be granted to a person seeking leave to intervene in a proceeding (or leave to appear as amicus curiae).⁴⁰⁸

2.6.4.6 Issues raised - secondary legislation

Submitters also commented on the Bill providing that cl 48 does not affect the validity of a statutory instrument or provision of a statutory instrument that is not compatible with human rights and is empowered to be so by the Act under which it is made. Professors Aroney and Ekins stated:

This cl 48(4)(b) purports to secure the validity of secondary legislation but does not address the risk that empowering statutes will routinely be read down so that secondary legislation is held to be outside its scope and invalid. This practice is common in other jurisdictions.⁴⁰⁹

The CCHRL contended that cl 48 as currently drafted does not make clear its effect on secondary legislation, and it should be amended to clarify that if primary legislation is interpreted compatibly with human rights, yet delegated legislation enacted under that primary legislation cannot be interpreted compatibly, the result will be a judicial finding that the delegated legislation is *ultra vires* and invalid.⁴¹⁰

2.6.4.7 Other suggestions

Other suggestions made by submitters regarding the statutory interpretation provisions included:

- all existing legislation and policies in Queensland be reviewed and amended upon commencement of the legislation as a proactive measure in reducing the need for an independent right of referral to the Supreme Court for declarations of incompatibility.⁴¹¹
- Part 3, Division 3, or alternatively the definition of "statutory provision", in the context of Part 3, Division 3, should be amended to clarify that Part 3, Division 3 does not apply to a local law or subordinate local law of a local government.⁴¹²
- the Bill be reworded to ensure that the courts are required to give due consideration to any relevant judgments, decisions or advisory opinions of domestic, foreign and international courts and tribunals⁴¹³ or that all officials exercising any powers delegated should consider the Human Rights enumerated in Part 2, Divisions 2 and 3, all other rights preserved by cl 12 and all individual human rights recognised in international instruments ratified by the Federal Government – less any that are explicitly rejected under 'federal' clauses in those instruments.⁴¹⁴

⁴⁰⁸ Department of Justice and Attorney-General, correspondence dated 3 December 2018, attachment, pp 52-53.

⁴⁰⁹ Submission 107, p 10.

⁴¹⁰ Submission 26, p 2.

⁴¹¹ Australian Lawyers Alliance, submission 24, p 13; Respect Inc and Scarlet Alliance, submission 136, p 7.

⁴¹² Local Government Association of Queensland, submission 33, pp 1-2.

⁴¹³ Joint submission of UQ Law Academics, TC Beirne School of Law, submission 39, p 9.

⁴¹⁴ Griffith Law School, submission 116, p 33.

2.6.5 Declaration of incompatibility

2.6.5.1 *Proposed law*

The Bill provides that the Supreme Court or Court of Appeal may make a declaration of incompatibility to the effect that the court is of the opinion that a statutory provision cannot be interpreted in a way compatible with human rights, unless an override declaration is in force in relation to the provision.⁴¹⁵ The explanatory notes advise that the proportionality analysis in cl 13 is relevant to the exercise of the court's power to make a declaration, and 'will effectively narrow the scope of the court's power to issue a declaration since the court may only issue a declaration after the court has first considered whether a limit on a human right is reasonable and demonstrably justifiable in accordance with cl 13, and concluded that it is not'.⁴¹⁶

If the Supreme Court is considering making a declaration of incompatibility, the court must give notice of that fact in the approved form to the Attorney-General and the QHRC. The Supreme Court must not make a declaration of incompatibility unless the court is satisfied that a notice has been given to the Attorney-General and the QHRC and a reasonable opportunity has been given to the Attorney-General and the QHRC to intervene in the proceeding or to make submissions about the proposed declaration.⁴¹⁷

A declaration of incompatibility does not affect the validity of the statutory provision for which the declaration was made, nor does it create any legal right or give rise to any civil cause of action.⁴¹⁸ The explanatory notes state that 'the court does not have the power to invalidate legislation by making a declaration of incompatibility'.⁴¹⁹

The Supreme Court must give a copy of the declaration of incompatibility to the Attorney-General within seven days after the end of any appeal period or finalisation of any appeal, and the Attorney-General must then give a copy to the relevant Minister as soon as practicable, unless the Minister is the Attorney-General.⁴²⁰ The relevant Minister must then table a copy of the declaration of incompatibility within six sitting days, and table a written response to the declaration within six months, after receipt. The Minister must consider the portfolio committee's report in respect of the declaration of compatibility in preparing the response.⁴²¹

Once the declaration of incompatibility is tabled, the Legislative Assembly must refer a tabled declaration of incompatibility to a portfolio committee to consider the declaration and report to the Legislative Assembly within three months of the referral. The portfolio committee's report may include any recommendations about the declaration it considers appropriate.⁴²²

The explanatory notes state that actions taken upon the making of a declaration of incompatibility is consistent with a dialogue model of human rights, 'ensuring the integrity of each limb of government is maintained'.⁴²³

⁴¹⁵ Clause 53; explanatory notes, p 32.

⁴¹⁶ Explanatory notes, p 33.

⁴¹⁷ Clause 53; explanatory notes, p 35.

⁴¹⁸ Clause 54; explanatory notes, p 33.

⁴¹⁹ Explanatory notes, p 33.

⁴²⁰ Clause 55; explanatory notes, p 33.

⁴²¹ Clause 56; explanatory notes, p 33.

⁴²² Clause 57; explanatory notes, p 33.

⁴²³ Explanatory notes, p 34.

2.6.5.2 Issues raised – declaration of incompatibility

Dr Debeljak supported the provision providing that the portfolio committee consider the declaration and report on the declaration to the Legislative Assembly within three months.⁴²⁴

The CCHRL submitted that ‘where interpretation in accordance with the human rights in the Act is impossible, the higher courts should be empowered to issue Statements of Inconsistent Interpretation’ in keeping with the Victorian and ACT models, in addition to the requirement that the Minister must respond within six months to the issuance of such a Statement. The CCHRL also submitted that an appropriate response might include recommendations for amendment of legislation.⁴²⁵

CYDA raised concerns that the declaration has no effect on the validity of the statutory provision and does not create a legal right or give rise to any civil cause of action, as well as there appearing to be few consequences for government if they fail to amend the provision to ensure it is compatible with human rights. CYDA submitted that a lack of accountability and enforcement mechanisms undermines the capacity of the Bill to effect change.⁴²⁶

The QLS recommended that all statements of incompatibility, and the corresponding government response, be provided as a requirement to the Human Rights Commissioner, who should be empowered to publish these statements and the corresponding response as part of their annual report or on a public register of human rights issues. The QLS stated this recommendation was made in the hope that the presentation of, and responses to, incompatibility statements, are not seen as a simple formality.⁴²⁷

The QLS also raised a concern that the function of making a declaration of incompatibility and the subsequent referral of those declarations to the Attorney-General and relevant parliamentary committees might be perceived not to fit within a judicial officer’s role, and submitted that the substance of a declaration of incompatibility can instead be contained within a judicial officer’s judgement.⁴²⁸

Professors Aroney and Ekins again raised concerns about the Bill politicising the judiciary and court system, submitting that authorising the Supreme Court to issue a declaration of incompatibility to the effect that the court is of the opinion that a statutory provision cannot be interpreted in a way compatible with human rights will constitute a significant change in the relationship between the Supreme Court, the Parliament and the executive. They stated ‘It will politicise litigation, arming courts to participate in democratic politics, exposing them to political criticism’.⁴²⁹

Professors Aroney and Ekins also submitted their concern that:

Some parties, campaigning groups and others, will frame disputes in order to provide the courts with the opportunity or responsibility to denounce legislation. And the courts are likely to permit de facto applications for such declarations, especially if a declaration becomes understood to be a kind of remedy for a rights breach, as in other jurisdictions. Earlier this month the NZ Supreme Court held that it had jurisdiction to declare legislation incompatible with the NZ Bill of Rights, notwithstanding the absence of any statutory power to this effect. It is likely that Queensland courts, whom the Bill would empower to this end, would permit applications to secure a declaration. The effect of this would inevitably be to make court processes a secondary means of political contest. This is partly

⁴²⁴ Submission 14, p 7.

⁴²⁵ Submission 26, p 3.

⁴²⁶ Submission 71, p 5.

⁴²⁷ Submission 103, pp 12-13.

⁴²⁸ Submission 103, pp 12-13.

⁴²⁹ Submission 107, p 3.

the point of a statutory bill of rights. The cost is that it politicises the courts and legalises political discourse (privileging lawyers in democratic life).⁴³⁰

2.6.5.3 Departmental response

In response to these issues, the department advised:

The provisions, while based on the Victorian Charter, have been drafted taking into account jurisprudence and the 2015 independent review of the Victorian Charter – the Young Review.

The meaning of the term ‘compatible with human rights’ is set out in cl 8 of the Bill. This makes it clear that the proportionality analysis in cl 13 is relevant to the exercise of the court’s power to make a declaration. This effectively narrows the scope of the court’s power to issue a declaration since the court may only issue a declaration after the court has first considered whether a limit on a human right is reasonable and demonstrably justifiable in accordance with cl 13, and concluded that it is not.

The relationship between the legislature and the judiciary is maintained under the provision because the court is not empowered by the Act to invalidate legislation even if a declaration of incompatibility is made. This is consistent with the dialogue model of the Bill.

Allowing a court to invalidate legislation that was not compatible with human rights would be incompatible with this model of human rights legislation i.e a dialogue model where parliament remains sovereign.⁴³¹

2.6.6 **Obligations on public entities**

2.6.6.1 Proposed law

The Bill provides that it is unlawful for a public entity to act or make a decision in a way that is not compatible with human rights (a substantive obligation), or when making a decision, to fail to give proper consideration to a human right relevant to the decision (a procedural obligation). However, these obligations do not apply:

- if a public entity could not have acted differently or made a different decision because of a statutory provision, a law of the Commonwealth or another State or otherwise under law. Public entities must give effect to legislation (interpreted in accordance with the interpretive rules under the Bill), even if it is incompatible with human rights,
- to a body established for religious purposes if the act or decision is done or made in accordance with the doctrine of the religion concerned and is necessary to avoid offending the religious sensitivities of the people of the religion, or
- to an act or decision of a public nature.⁴³²

Furthermore, an act or decision of a public entity is not invalid merely because, by doing the act or making the decision, the entity contravenes these obligations, nor does a person commit an offence merely because the person acts or makes a decision in contravention of these obligations.⁴³³

Clause 59 sets out certain rights a person may have to seek a remedy or relief in relation to an act or decision of a public entity that is unlawful as per the obligations of public entities. These rights apply if a person may seek relief or a remedy in relation to an act or decision of a public entity on the ground that the act or decision was unlawful on some other ground other than under cl 58 (an independent ground of unlawfulness). If this applies, then a person may also seek the same relief or remedy on the

⁴³⁰ Submission 107, p 11.

⁴³¹ Department of Justice and Attorney-General, correspondence dated 3 December 2018, attachment, p 54.

⁴³² Explanatory notes, p 34.

⁴³³ Explanatory notes, p 34.

ground of unlawfulness arising under cl 58 (obligations on public entities). A person may seek this remedy or relief even if the person may not be successful in obtaining the relief or remedy in relation to the independent ground of unlawfulness.⁴³⁴

In practice, this means that:

*The Bill will not create a stand-alone right of action for non-compliance with the HR Act, but will provide an additional 'ground of unlawfulness under the HR Act' so that a remedy for a breach of human rights may be sought where a person has an existing right to seek a remedy or relief on a ground of unlawfulness. This is referred to as a 'piggy-back' cause of action, and aligns with the Victorian model. In practice this new ground for seeking a remedy will mean that when individuals have an existing cause of action against a public entity (for example, the right to seek a judicial review of a decision of a public entity, or a claim of discrimination), then a claim of unlawfulness under the HR Act will be able to be added to or 'piggy-backed' onto that existing claim.*⁴³⁵

However, a person is not entitled to an award of damages on the ground of unlawfulness arising under the above. The Bill does provide for a model of dispute resolution.

Legal proceedings that may be undertaken under cl 59 of the Bill do not affect a right a person has, other than under the Bill, to seek any relief or remedy in relation to an act or decision of a public entity, including a right:

- to seek judicial review under the *Judicial Review Act 1991* or the Uniform Civil Procedure Rules 1999, and
- to seek a declaration of unlawfulness and associated relief, including an injunction, a stay of proceedings, or an exclusion of evidence.

The Bill also provides that an entity that is not captured by the definition of a public entity under the Bill may choose to be subject to the obligations of a public entity by asking the Minister, in writing, to declare that the entity is subject to the obligations of a public entity under Part 3, Division 4. If asked, the Minister must make a declaration, by gazette notice, that the entity is subject to the obligations of a public entity in the Bill, and must revoke the declaration in the same way, if asked in writing by the entity.⁴³⁶ According to the explanatory notes, the intention of this provision is 'to contribute to the dialogue of corporate social responsibility by providing an avenue to build a human rights culture across the State that is potentially wider than the definition of public entity in the Bill.'⁴³⁷

2.6.6.2 Issues raised – conduct of public entities (substantive and procedural obligations)

Support was expressed by some submitters for ensuring that public authorities must think about human rights when delivering services and making decisions.⁴³⁸ Professor Williams AO and Dr Boughey stated that the Bill is an improvement on the Victorian human rights legislation as it clarifies that the substantive obligation applies to both *actions* and *decision-making*.⁴³⁹

Professors Aroney and Ekins again raised concerns that making it unlawful for a public entity 'to act or make a decision in a way that is not compatible with human rights' or 'in making a decision, to fail to give proper consideration to a human right relevant to the decision' will constitute a significant change

⁴³⁴ Explanatory notes, pp 34-35.

⁴³⁵ Department of Justice and Attorney-General, correspondence dated 7 November 2018, p 3.

⁴³⁶ Clause 60; explanatory notes, p 35.

⁴³⁷ Explanatory notes, p 35.

⁴³⁸ Submission 9, p 1; submission 31, p 8; submission 88, p 2.

⁴³⁹ Submission 8, p 4.

in the relationship between the courts and the executive, particularly because such unlawfulness can be a ground on which a person may seek relief from a court pursuant to the requirements of cl 59.⁴⁴⁰

Professors Aroney and Ekins also submitted that the Bill makes it unlawful for a public body to fail to give proper consideration to a human right, even if its decision and action is entirely consistent with that human right, which would ‘cast a shadow of legal doubt over the actions of public bodies and is likely to force them to think and act like human rights lawyers in the course of deciding how best to act... The risks to the rule of law in this provision are very real; so is the risk of distorting public deliberation’.⁴⁴¹

2.6.6.3 Departmental response

In response to these concerns, the department stated:

*The Bill, if enacted, will create a new ground of unlawfulness on the basis of contravention of the HR Act, however, in order to seek remedy or relief through the courts, the complainant will need to establish a separate or independent claim to which the ground of unlawfulness under the HR Act may be attached. In this way, the court already has an existing/independent role to play in reviewing the decisions and acts of the executive (public entities).*⁴⁴²

2.6.6.4 Issues raised – conduct of public entities (unlawful decisions or acts)

Some submitters raised concerns with the Bill’s provision that an act or decision of a public entity is not invalid merely because, by doing the act or making the decision, the entity contravenes these obligations. They recommended that the Bill be amended so that decisions or acts that are unlawful under the proposed Human Rights Act are also considered invalid.⁴⁴³ For example, the HRLC stated that making decisions or acts that are unlawful under cl 58(1) invalid as well would make the proposed Human Rights Act ‘easier to understand and apply both for public entities and people affected by their decisions and to promote compliance by public entities with their obligations and help to build a human rights culture in Queensland’.⁴⁴⁴

Professor Williams AO and Dr Boughey stated that while cl 58 expressly provides that a breach of this clause does not result in the relevant decision or action being invalid:

But it does not resolve many of the technicalities or uncertainties that come from this position. In particular, the question of whether a Court may quash a decision that breaches s 58(1) will depend on whether or not the public entity’s error ‘appears on the face of the record’. There are a range of technicalities associated with determining this.

*Indeed, the position in Queensland may turn out to be even more complicated than in Victoria, because the remedies under the Judicial Review Act 1991 (Qld) do not depend on whether the breach results in invalidity. Yet the remedies themselves are otherwise the same as those under the common law. This might simplify legal proceedings and remedies compared with Victoria. Or it may add yet another layer of complexity.*⁴⁴⁵

2.6.6.5 Departmental response

In response to this concern, the department stated:

⁴⁴⁰ Submission 107, p 3.

⁴⁴¹ Submission 107, p 11.

⁴⁴² Department of Justice and Attorney-General, correspondence dated 3 December 2018, attachment, p 55.

⁴⁴³ See for example submissions 11, 24 and 101.

⁴⁴⁴ Submission 101, p 16.

⁴⁴⁵ Submission 8, p 7.

*The intention is that an act or decision that is unlawful under cl 58(1) is not automatically rendered invalid. To alter this position would risk removing certainty and undermining confidence in relation to public sector decision-making.*⁴⁴⁶

2.6.6.6 Issues raised – legal proceedings (judicial review)

The QLS identified the limitations of a judicial review, submitting:

*...bringing a judicial review application instead of a specific breach of human rights complaint cannot always provide access to justice for all breaches of the Bill, because judicial reviews can be expensive and focused only on certain errors. Even if a breach of human rights is objectively ‘unreasonable’ such as to enliven administrative law remedies, these remedies generally apply to regulate procedural aspects, rather than the substantive aspects, of public decision-making. For the person or persons concerned, the administrative remedy may be unable to effectively right the wrong... The absence of a direct cause of action for a breach of human rights is a barrier to accessible, just and timely remedies for infringements of people’s basic human rights.*⁴⁴⁷

In contrast, the ADCQ proposed allowing a judicial review for unlawfulness under cl 58 independently of other grounds of review under the Bill, stating:

*Compensation or damages is not a remedy available under judicial review. Therefore, allowing a breach of cl 58 as a sole ground for judicial review is not inconsistent with the government policy position that there is to be no damages available in respect of breaches of cl 58. It is also not creating a new cause of action. Unlawfulness is an existing ground for judicial review. Judicial review is a fundamental component of Queensland’s integrity regime and system of open and accountable government. A Human Rights Act would complement transparency and accountability of government, and judicial review for unlawfulness under cl 58 should be available independently of other grounds of review. The Commission’s preferred approach is to also allow an independent action in the Supreme Court for breach of cl 58.*⁴⁴⁸

2.6.6.7 Issues raised – legal proceedings (limitations of the ‘piggy-back’ clause)

Professor Williams AO and Dr Boughey raised concerns about how the piggy-back cause of action will work, asking:

*While the Bill makes it clear (in s 59(2)) that a person does not need to prove that they are entitled to a remedy otherwise than because of s 58, questions still remain about exactly what they will need to demonstrate. For instance, will an individual need to demonstrate that they have standing to challenge the action otherwise than because of s 58? Do they need to demonstrate that their non-human rights argument for unlawfulness is plausible? Or do they simply need to demonstrate that the act or decision is the kind of act or decision that would otherwise be amenable to relief.*⁴⁴⁹

Professor Williams AO and Dr Boughey also raised concerns about legal remedies against private entities, stating:

It is not clear that any or all of the legal remedies that are available against the government will be available against private entities exercising public functions (hereinafter ‘government contractors’). As noted above, s 59 provides that a person must be able to seek a remedy under the common law or another statute on the grounds that a decision or action is unlawful, in order to seek that same remedy for the breach of their human rights (subject to the uncertainties discussed above). The remedies associated with judicial review of administrative action under

⁴⁴⁶ Department of Justice and Attorney General, correspondence dated 3 December 2018, attachment, p 57.

⁴⁴⁷ Submission 103, pp 5-6.

⁴⁴⁸ Submission 80, pp 8-9.

⁴⁴⁹ Submission 8, p 5.

common law and the Judicial Review Act 1991 (Qld) may not be available against government contractors.

This application of common law judicial review remedies (ie mandamus, certiorari, prohibition, injunction and declaration) against government contractors has not yet been resolved in Australia. But there is a strong possibility that they would not apply. It is also unlikely that the Judicial Review Act 1991 (Qld) applies to the actions of government contractors, as that Act only applies to decisions made ‘under an enactment’ and those of officers or employees of ‘the State or a State authority or local government authority’. Decisions made by government contractors are not usually made ‘under an enactment’, but find the legal source of their power under contract. And government contractors are not officers or employees of ‘the State [etc]’.

The result is that, while government contractors have obligations to consider and act compatibly with human rights, individuals affected by the unlawful actions of government contractors may have no legal recourse to enforce those obligations.⁴⁵⁰

2.6.6.8 Issues raised – legal proceedings (enforcement of human rights)

A number of submitters raised a concern that the Bill does not contain adequate enforcement mechanisms for unlawful action to enhance the protection of human rights, hold public entities accountable and effect cultural change in public entities.⁴⁵¹ Instead, submitters suggested that the lack of enforcement mechanisms may diminish respect for human rights.⁴⁵² For example, LawRight submitted:

‘To legitimise the protection of human rights provided in the Bill, and to ensure accountability for human rights breaches when they occur, it is vital that victims have appropriate and adequate recourse.’⁴⁵³

Similarly, the QCCL submitted:

As we have said on a number of occasions, it would be a tragedy to pass legislation designed to enhance the protection of human rights, if the effect of that legislation was to diminish respect for human rights. It remains our concern, that a Human Rights Act that does not contain an adequate enforcement mechanism runs that very risk.⁴⁵⁴

The Bar Association Queensland (BAQ) referred to the need to ensure public entities are sufficiently motivated to change or reform practices, stating:

One of the most effective ways for the Queensland Bill to achieve benefits for ordinary people is to lay down enforceable standards for the way in which public entities carry out their role in administering existing legislation. The importance of enforceability is not so much for the benefit of a particular individual who is affected by the actions of a public entity but to create an enforceable template by which public entities can plan their activities so as to be sensitive and responsive to the rights of the people with whom they interact. It is important that Courts are able to consider whether practices of a particular public entity infringe the Queensland Bill.

The more uncertainty there is with respect to the enforceability of the Queensland Bill, the more likely it is that public entities will test the outer limits of the human rights proposed to be protected. There is a danger that, if the Queensland Bill is perceived as being ineffective, certain practices with shortfalls may persist, rather than be reformed in response to the commencement of the Human Rights Act. Bad practices grow into systemic issues where there is no mechanism

⁴⁵⁰ Submission 8, pp 5-6.

⁴⁵¹ See for example submissions 24, 32, 71, 89, 93, 96, 101, 103, 136 and 138.

⁴⁵² See for example submissions 32 and 93.

⁴⁵³ Submission 25, p 4.

⁴⁵⁴ Submission 93, p 2.

*by which the law and practices may be independently tested. The Association is concerned that the lack of independent enforceability in the Queensland Bill will result in a lack of motivation, on the part of public entities, to change or reform practices which have the potential to infringe the human rights proposed, in the Bill, to be protected. With independent enforceability, accountability is more likely to be at the forefront of the collective minds of public entities, in turn creating an impetus to challenge and reform practices.*⁴⁵⁵

2.6.6.9 Issues raised – legal proceedings (stand-alone cause of action)

As a means of enforcing the legislation, a significant number of submissions called for the Bill to be amended to include a stand-alone cause of action, allowing people to make a human rights complaint against a public entity to a court or tribunal, such as the Queensland Civil and Administrative Tribunal (QCAT) or the Supreme Court.⁴⁵⁶ The QLS advised that a stand-alone cause of action is:

*A right to bring proceedings against a public entity in the event of an unlawful breach of human rights. These proceedings are brought by a person with standing (a victim), in an appropriate court, and will provide traditional remedies (including damages) and means of enforcement. Proceedings can be brought as a freestanding right of action and do not require ‘piggybacking’ with another action or claim...Domestic models include the ACT’s Human Rights Act 2004 at section 40C. International models include the United Kingdom’s Human Rights Act 1998 at sections 7-9.*⁴⁵⁷

Some submitters argued that providing for a stand-alone cause of action is in keeping with the dialogue model of the Bill. For example, Sisters Inside Inc., argued that the ability to commence stand-alone proceedings for unlawful breaches of human rights is consistent with the main objects of the Bill.⁴⁵⁸ The Caxton Legal Centre (CLC) also argued that a stand-alone cause of action does not obstruct the dialogue model or prevent dialogue between the judiciary, executive and legislature, and used the *Human Rights Act 1998* (UK) and the *Human Rights Act 2004* (ACT) as examples of Acts based on the dialogue model which include enforceable rights and monetary remedies.⁴⁵⁹

Submitters also argued that while conciliation may be an appropriate course of action for some people, it may not assist all complainants. For example, ALHR stated that conciliation conferences may not be an effective or appropriate remedy for all complainants and all types of complaints, and will not always resolve the issue or dispute.⁴⁶⁰ At the public hearing, Ms Aimee McVeigh from A Human Rights Act for Queensland supported this view, stating ‘There are going to be situations where complaints are not resolved and where that person still has a legitimate human rights complaint. In those circumstances those people should be able to approach a court or a tribunal and have that court properly consider their human rights complaint’.⁴⁶¹

Similarly, submitters with the ILGG research program noted:

For many human rights issues, conciliation can be an effective means of dispute resolution. However, conciliation ultimately relies on the good faith participation of parties. The nature of human rights complaints tends to imply a power imbalance between the parties, and many complainants may already be from marginalised or disadvantaged groups. For these and other

⁴⁵⁵ Submission 32, p 3.

⁴⁵⁶ See for example submissions 3, 9, 12, 15, 24, 25, 26, 35, 37, 39, 40, 44, 46, 52, 53, 57, 58, 65, 66, 67, 69, 70, 71, 73, 75, 76, 77, 85, 89, 90, 91, 92, 93, 96, 101, 103, 104, 105, 117, 123, 126, 127, 133, 145 and Form submission A.

⁴⁵⁷ Submission 103, p 6.

⁴⁵⁸ Submission 127, p 2.

⁴⁵⁹ Submission 75, p 4.

⁴⁶⁰ Submission 91, p 7.

⁴⁶¹ Public hearing transcript, Brisbane, 4 December 2018, p 9.

reasons, it may not always be possible for conciliation to lead to a resolution. A further avenue is therefore required to enable a complainant whose human rights have been breached to pursue legal action before a court or tribunal where they have been unable to reach a resolution through conciliation'...It would also be consistent with the fundamental principle of access to justice.⁴⁶²

The ICJ (Qld) also referred to the potential for an imbalance of power, especially for vulnerable and marginalised people, stating that:

A lack of ability to enforce their rights before a judicial body if the conciliation fails puts a complainant in an even more vulnerable position. There is no incentive for a respondent to seek a consensual resolution of the dispute. For any conciliation process to have the greatest chance to result in consensual resolution, there must exist an ability for a complainant to initiate proceedings before a judicial body, such as QCAT and/or the Supreme Court if the conciliation fails.⁴⁶³

Some submitters called for a stand-alone cause of action to be available if a person's complaint to the QHRC is not able to be resolved through conciliation.⁴⁶⁴ However, submitters from the ILGG research program argued that the Bill should also provide the option of making a complaint to a court or tribunal without a requirement for conciliation to first be attempted. The latter argument was suggested for circumstances where an act or decision of a public entity, or a proposed act or decision by an entity, creates a risk of a serious human rights violation, that is, a situation of an imminent human rights risk. They contended that this would also recognise the fact that some breaches of human rights, particularly those characterised by violations of dignity, cannot easily be compensated for after they have occurred, and should be prevented wherever possible, as is consistent with Australia's international obligation to protect against human rights violations where possible.⁴⁶⁵

Some submitters contended that QCAT would be the most appropriate mechanism for a person to bring proceedings for a breach of the proposed Human Rights Act, rather than through the Supreme Court.⁴⁶⁶ Submitters cited a number of reasons for preferring QCAT to the court system, including its accessibility,⁴⁶⁷ extensive experience making determinations involving people with a disability,⁴⁶⁸ and low-cost.⁴⁶⁹ However, there was also some concern raised about this proposal.⁴⁷⁰

For example, Lindsey Stevenson-Graf and Narelle Bedford from the Faculty of Law at Bond University submitted that:

A simple and effective option would be for complainants to be provided recourse to QCAT in a similar manner to that which is available for discrimination cases...It is submitted that QCAT would be a preferable review mechanism compared to a court, as it is more accessible to those most vulnerable members of our society.⁴⁷¹

Similarly, the HRLC submitted:

In line with the recommendation by the 2015 review of the Victorian Charter, the Bill should be amended to allow people to take legal action in the accessible Queensland Civil and Administrative Tribunal, rather than in the Supreme Court where legal cases are typically prohibitively expensive

⁴⁶² Submission 89, p 3.

⁴⁶³ Submission 105, p 5.

⁴⁶⁴ See for example submissions 37, 44, 91, 105, 126 and 133.

⁴⁶⁵ Submission 89, p 3.

⁴⁶⁶ See for example submissions 24, 101, 126 and 138.

⁴⁶⁷ Submission 138, p 1.

⁴⁶⁸ Submission 126, p 3.

⁴⁶⁹ See for example submissions 24 and 145.

⁴⁷⁰ Form submission D, p 2.

⁴⁷¹ Submission 138, p 1.

*and carry the risk of crushing costs orders if the case is not successful. It is a fundamental access to justice consideration that human rights cases should be able to be heard in a less formal, no-cost jurisdiction that is accessible to individuals.*⁴⁷²

The BAQ and CLC advised that the review of the *Charter of Human Rights and Responsibilities Act 2006* (Victorian Charter) also recommended that the Victorian Civil and Administrative Tribunal (VCAT, the Victorian equivalent to QCAT) have an original jurisdiction to hear and determine claims that a public authority has acted incompatibly with human rights protected under the Victorian Charter.⁴⁷³

In support of the call for a stand-alone cause of action, some submitters pointed to the standalone cause of action provided for in the *Human Rights Act 2004* (ACT) and the recommendation made to include such a cause in the review of the Victorian Charter.⁴⁷⁴

Some submitters referred to the experience in Victoria and other jurisdictions, regarding the intent of the provision to only allow a rights-based cause of action on the back of existing legal claims.⁴⁷⁵ These submitters advised that while the intention of the ‘piggy-back’ clause was to reduce litigation, it has resulted in lengthier and more complex cases, including complex jurisdictional questions heard in the Supreme Court.⁴⁷⁶

ALHR advised that the practical effect of the similar clause in the Victorian Charter has been to make litigation lengthier and more complex, requiring resources to be spent resolving preliminary jurisdictional questions, by bringing judicial review proceedings in courts rather than in more accessible forums such as VCAT, and by individuals raising what may be weak claims even though stronger claims exist due to a clear breach of the Charter.⁴⁷⁷

Similarly, the HRLC submitted:

*The 2015 review of the Victorian Charter identified key problems with this model which prevents access to appropriate legal action, court oversight and judicial remedies. The lack of consequences and a clear way to remedy a breach of someone’s human rights means that the impact of the Charter is weakened. The Charter provides indirect and inadequate access to remedies for someone whose rights are breached. Access to justice can be out of reach as the only way for a person to have their human rights considered is to have their matter considered in a superior court. The ‘piggy back’ provision leads to convoluted litigation which raises complex jurisdictional questions heard in the Supreme Court.*⁴⁷⁸

The ADCQ referred to the review of the Victorian Charter which noted that the similar provision regarding remedies was found to be ‘drafted in terms that are convoluted and extraordinarily difficult to follow’. The ADCQ stated that ‘Where a provision such as clause 59 is not clear, the focus of legal proceedings is likely to shift to the interpretation of the provision, rather than the substantive human rights issue.’⁴⁷⁹

CYDA advised in their submission that feedback from young Victorians with disability and families indicates that the lack of a stand-alone cause of action under the Victorian Charter has made accessing remedies an extremely difficult, frustrating and convoluted process which often prevents people from ensuring their rights are upheld. The Victorian experience, as reported to CYDA, was also suggested to

⁴⁷² Submission 101, pp 13-14.

⁴⁷³ Submission 32, p 3; submission 75, p 5.

⁴⁷⁴ See for example submissions 24, 25, 26, 32, 44, 69, 75, 76, 103, 105 and 123.

⁴⁷⁵ See for example submissions 80, 91, 93 and 101.

⁴⁷⁶ See for example submissions 80, 91, 93 and 101.

⁴⁷⁷ Submission 91, p 7.

⁴⁷⁸ Submission 101, p 13.

⁴⁷⁹ Submission 80, p 8.

demonstrate that the absence of strong, enforceable consequences for unlawful actions has not resulted in significant cultural change among public entities.⁴⁸⁰

In addition, CLC advised that the review of the Victorian Charter observed that the ‘confusing and limited availability of remedies under the Charter has held back the development of a human rights culture’ and observed that ‘providing for human rights without corresponding remedies sends mixed messages to the public sector and the community about the importance of those rights.’⁴⁸¹

To address potential concerns about the resulting litigation if a stand-alone cause of action was to be included in the Bill, submitters referred to the experience of other jurisdictions whose human rights acts contain provision for a stand-alone cause of action, stating there has not been a resulting flood of litigation. For example, Professor Williams AO and Dr Boughey advised that there is no evidence that the freestanding cause of action in s 40 of the ACT’s Human Rights Act has resulted in a flood of human rights litigation.⁴⁸²

The QCCL similarly advised:

*In 2008, the ACT introduced section 40C(2) into their Charter which permitted an individual right of action. Based on research conducted by Professor George Williams AO, while there was a spike in the number of cases concerning breach of the Charter in 2009, this was not sustained. Prior to the introduction of section 40C(2), the percentage of ACT cases mentioning the Charter was just below 8%, and as of 2015 it sits just below 10%. This refutes arguments that an individual cause of action in a human rights charter would lead to a flood of litigation.*⁴⁸³

Dr Louis Schetzer of the ALA advised that the option of a stand-alone cause of action in the ACT has ‘facilitated early dispute negotiation.’⁴⁸⁴

In terms of an appetite for litigation, Ms McVeigh from A Human Rights Act for Queensland told the committee:

*In terms of remedies, I think it is really important to say up-front that most of the clients I have acted for in this type of area are not after damages; what they are after is for the problem to be fixed. For example, my client in the child protection proceedings wanted supports made available to her so she could keep her baby with her. People dealing with public housing issues just want a safe and comfortable place to live. In relation to the example out of Victoria where a woman with a disability living in supported accommodation was being showered in full view of all the other residents, all she wanted was a shower curtain. People are after practical solutions to the issues that mean that their lives are not characterised by dignity. I guess what I am trying to say is that it will be in some small instances that damages are the appropriate remedy, and that is where there is no other way of fixing the problem.*⁴⁸⁵

In the absence of a stand-alone cause of action, it was submitted that the first review of the legislation should consider whether such a cause should be introduced (and also allow for compensation).⁴⁸⁶ The CLC submitted that if a standalone cause of action is not included in the Bill, then a 12-month statutory review should be inserted into the Bill for the purpose of considering a standalone cause of action and

⁴⁸⁰ Submission 71, pp 5-6.

⁴⁸¹ Submission 75, p 6.

⁴⁸² Submission 24, p 14.

⁴⁸³ Submission 93, p 2.

⁴⁸⁴ Public hearing transcript, Brisbane, 4 December 2018, p 54.

⁴⁸⁵ Public hearing transcript, Brisbane, 4 December 2018, p 10.

⁴⁸⁶ See for example submissions 41 and 103.

remedies or that it be a requirement of the first statutory review that the inclusion of a standalone cause of action and damages be considered.⁴⁸⁷

The Local Government Association of Queensland (LGAQ) raised a concern that a person may seek relief or remedy in relation to an act or decision of a public entity on a relatively speculative basis, simply for the purpose of triggering a right to seek relief or remedy on the ground of unlawfulness arising under cl 58. The LGAQ recommended the Bill be amended to tighten the threshold for legal proceedings against a public entity, to prevent a person from seeking relief or remedy in relation to an act or decision of a public entity on a relatively speculative basis.⁴⁸⁸

2.6.6.10 Departmental response

In response to the call by submitters for a stand-alone cause of action, the department advised:

Consistent with the Victorian Charter, the Bill does not provide a stand-alone (or 'independent') cause of action for a breach of the HR Act. The Bill does however establish a new ground of unlawfulness under the HR Act which is available whenever an applicant has an existing right to claim a remedy on a separate ground of unlawfulness (a 'piggy-back' claim). The remedy available for a 'piggy-back' claim is the one the person would have been entitled to on the basis of the existing claim.

This approach is consistent with the regulatory model established under the HR Act which aims to build a human rights culture in the Queensland public sector. It favours discussion, awareness raising and education to encourage compliance with human rights – rather than a strong enforcement and compliance model.

Unlike the Victorian Charter, the Bill provides another avenue for people to have their human rights complaints dealt with by the Queensland Human Rights Commission (QHRC).

The QHRC on accepting a complaint, may require a complainant and respondent to attend a conciliation conference. This model of disputes resolution aims to provide an accessible, independent and appropriate avenue for members of the community to raise human rights concerns with public entities with a view to reaching a practical resolution.⁴⁸⁹

Committee comment

The committee notes the concerns raised by submitters regarding the absence in the Bill of a stand-alone cause of action, however considers that, in keeping with the dialogue model utilised by the Bill, the Bill provides a sufficiently effective mechanism to address grievances.

2.6.6.11 Issues raised – legal proceedings (jurisprudence)

Some submissions suggested that the ability for a court or tribunal to make a legal ruling with respect to alleged human rights violations via a stand-alone cause of action would assist in establishing a body of jurisprudence on the application of the Bill, including clarifying the scope of human rights protected in the Bill and a public entity's functions under the Bill.⁴⁹⁰

The ADCQ submitted:

The primary cause of action for unlawfulness of an act or a decision of a public entity is judicial review under the Judicial Review Act 1991. Judicial review will be the primary means of developing jurisprudence on the application of the Bill. Queensland's Supreme Court is best placed to develop jurisprudence on Queensland law. Restricting judicial review to cases where there is another ground

⁴⁸⁷ Submission 75, pp 5-6.

⁴⁸⁸ Submission 33, p 4.

⁴⁸⁹ Department of Justice and Attorney-General, correspondence dated 3 December 2018, pp 57-58.

⁴⁹⁰ See for example submissions 80, 89, 105 and 127.

*of unlawfulness to the relevant act or decision will unnecessarily impede the development of human rights jurisprudence, and the Commission and stakeholders can only rely on jurisprudence from other jurisdictions, where the provisions are not necessarily the same as the Bill.*⁴⁹¹

At the public hearing, the ADCQ further stated:

...the commission is concerned that clause 59, which is closely modelled on section 39 of the Victorian charter, will unnecessarily and unduly restrict access to the Queensland Supreme Court, which stands to play an important role in the development of a high-quality human rights jurisprudence in Queensland.

*That jurisprudence will be important in establishing the nature and scope of particular human rights and in providing guidance to public entities about how to act and make decisions that are compatible with human rights in the context of Queensland's prevailing contemporary standards. The commission has recommended amendments that would provide for a direct cause of action to the Supreme Court for a breach of clause 58 and by clarifying that a breach of clause 58 would fall within the 'otherwise contrary to law' ground for review under the Judicial Review Act 1991.*⁴⁹²

Submitters from the ILGG research program contended that 'judicial interpretation of the rights and responsibilities found in the Act will enable application of the Act to keep pace and adapt with developments in Queensland society, and build a practical understanding of what human rights require in particular contexts.'⁴⁹³

2.6.6.12 Issues raised – legal proceedings (remedies)

Entwined with the call for a stand-alone cause of action, a significant number of submitters contended that effective remedies should form part of the provisions in the Bill as a means of enforcing and protecting human rights.⁴⁹⁴ For example, ALHR submitted that enabling the court to order remedies will have significant symbolic and practical impact, including in deterring future contraventions of the legislation.⁴⁹⁵

Some submitters stated that under international human rights law people who have suffered a violation of their human rights have the right to seek remedies.⁴⁹⁶ A number of these submitters referred to Article 2 of the ICCPR to support this statement, which provides:

Each State Party to the present Covenant undertakes:

- a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
- b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
- c) To ensure that the competent authorities shall enforce such remedies when granted.⁴⁹⁷

⁴⁹¹ Submission 80, p 8.

⁴⁹² Public hearing transcript, Brisbane, 4 December 2018, p 2.

⁴⁹³ Submission 89, p 4.

⁴⁹⁴ See for example submissions 3, 9, 12, 15, 19, 25, 32, 39, 40, 44, 52, 53, 57, 65, 69, 70, 73, 75, 76, 85, 89, 91, 92, 93, 96, 101, 104, 105, 122, 127, 133 and 134.

⁴⁹⁵ Submission 91.

⁴⁹⁶ See for example submissions 25, 89, 105 and 133.

⁴⁹⁷ <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.

UNICEF Australia stated that in addition to the ICCPR, remedies are required under the Universal Declaration of Human Rights and are also implicit in the Convention on the Rights of the Child, including for breaches of economic, social and cultural rights.⁴⁹⁸

The HRLC submitted:

*It is important to recognise that access to remedies is a matter of last resort where other mechanisms and processes have failed to give proper consideration to human rights. In these instances, access to an effective remedy is an essential aspect of protecting and promoting human rights, including by operating as an incentive and deterrent for public entities to ensure that human rights breaches do not occur in the first place.*⁴⁹⁹

Submitters stated that remedies should be determined by a tribunal or court so they are enforceable, and a range of remedies should be made available to prevent, stop or provide redress for rights abuses.⁵⁰⁰ For example, submitters from the ILGG research program stated that an 'effective' remedy will vary according to the circumstances, but submitted that to ensure an effective remedy can be awarded, the Act must empower a court or tribunal to provide a range of remedies. They also contended that the remedies granted by a court or tribunal need to be enforceable and that without enforceability, human rights protections are at risk of being trivialised or ignored. They contended that the Bill should empower a court or tribunal to issue enforcement orders in relation to a remedy issued for a human rights violation.⁵⁰¹

In relation to the types of remedies that should be available, specific mention was made by a number of submitters of the need for the Bill to enable a court or tribunal to award compensation or damages to a person who has not been treated fairly in accordance with their human rights.⁵⁰² In addition to recognising when someone has not been treated fairly, the CLC submitted that the availability of damages is crucial to driving cultural change within public entities.⁵⁰³ Micah Projects suggested that a cap could be placed on compensation and remedies,⁵⁰⁴ while the CCHRL recommended the Bill allow access to damages after a 'cooling off' period giving public authorities time to adjust.⁵⁰⁵

In support of awarding damages, ALHR submitted:

*Monetary remedies may be necessary where violations of rights have caused ongoing damage, and where financial compensation will have a real impact on an individual's life. For example, where breaches of human rights have resulted in serious loss of quality of life due to factors such as lack of access to appropriate health services or safe accommodation, violation of rights to security or liberty, or discrimination based on religious beliefs or cultural practices, financial compensation will be a remedy that is fair and necessary to support that individual to overcome the loss of quality of life that a breach of their human rights has directly caused.*⁵⁰⁶

The ALA referred to the policy underpinning this provision from the establishment of the Victorian Charter, which was that remedies should focus on practical outcomes rather than monetary compensation. The ALA advised that it supports the position of the Law Institute of Victoria which

⁴⁹⁸ Submission 133, p 14.

⁴⁹⁹ Submission 101, p 14.

⁵⁰⁰ See for example submissions 24, 44, 89 and 96.

⁵⁰¹ Submission 89, p 5.

⁵⁰² See for example submissions 25, 39, 40, 89, 92, 93, 101, 127 and Form submission A.

⁵⁰³ Submission 75, p 6.

⁵⁰⁴ Submission 96, p 2.

⁵⁰⁵ Submission 26, p 3.

⁵⁰⁶ Submission 91, p 7.

highlighted that, while practical outcomes are important, damages are sometimes the only way to fairly compensate a person for a breach of their human rights.⁵⁰⁷

The ILGG research program suggested that awarding compensation or damages could be modelled on the approach taken by the European Court of Human Rights, which can issue interim measures it considers appropriate where there is an imminent risk of irreparable harm.⁵⁰⁸

The HRLC advised that such judicial remedies are available under domestic human rights frameworks in South Africa, Canada, New Zealand, the United States and the United Kingdom, and stated ‘The experience from the United Kingdom under its similar human rights legislation, is that judges have used the power to award damages carefully and conservatively’.⁵⁰⁹ Dr Debeljak submitted that the Bill should model the remedies available against public entities for unlawfulness on the human rights legislation from the ACT or the United Kingdom.⁵¹⁰

Other types of remedies suggested by submitters included:

- an order to cease conduct which is infringing human rights
- halting a proposed law or action which would breach human rights
- an order requiring that a public entity reconsider its decision having regard to human rights
- a provisional or preventative order to prevent the materialisation of a risk to human rights.⁵¹¹

LawRight submitted that reparation can also include restitution, rehabilitation, and measures of satisfaction such as public apologies, public memorials, guarantees of non-repetition, changes in relevant laws and practices, as well as bringing perpetrators to justice.⁵¹²

LawRight and academics from UQ’s TC Beirne School of Law suggested that the Bill be amended to provide a non-exhaustive list of examples of specific remedies to which victims of human rights breaches may be entitled.⁵¹³

2.6.6.13 Departmental response

The department, in response to the call for remedies including damages/compensation, advised the following:

Consistent with the Victorian Charter, the Bill does not provide a right to monetary damages or compensation on the grounds of a breach of the HR Act alone.

This reflects a measured approach to the introduction of a new human rights framework in Queensland and the regulatory model of the Bill - which aims to build a human rights culture in the Queensland public sector. It favours discussion, awareness raising and education to encourage compliance with human rights – rather than a strong enforcement and compliance model.

*The provisions in respect of proceedings and remedies are identified as provisions to be considered in the first review of the HR Act in 2023.*⁵¹⁴

⁵⁰⁷ Submission 24, p 15.

⁵⁰⁸ Submission 89, p 5.

⁵⁰⁹ Submission 101, p 14.

⁵¹⁰ Submission 14, p 7.

⁵¹¹ See for example submissions 40, 89, 91, 92 and 96.

⁵¹² Submission 25, p 4.

⁵¹³ Submission 25, p 4; submission 39, p 3.

⁵¹⁴ Department of Justice and Attorney-General, correspondence dated 3 December 2018, attachment, p 60.

2.6.6.14 Issues raised – legal proceedings (exemptions to unlawful conduct of public entities)

Professors Aroney and Ekins raised the provision regarding bodies established for religious purposes, submitting that the religious exemption raises two issues: firstly it implies that some religious bodies may fall within the definition of public entity; further it colours the interpretation of the right to freedom of religion. Professors Aroney and Ekins asked:

*If the body acts in accordance with its religious doctrine why is that not sufficient to justify its action? Why also require the need to avoid offence? Although Australian legislation sometimes makes provision along these lines in particular contexts, there is no warrant in international human rights law for it.*⁵¹⁵

The HRLC noted that the current drafting in the Bill regarding an exemption for a body established for religious purposes is very similar to an exemption in the *Anti-Discrimination Act 1991*, although the exemption in the *Anti-Discrimination Act 1991* does not allow religious schools to discriminate against students, teachers or staff on the basis of sexual orientation, gender identity, relationship or marital status or pregnancy. The HRLC submitted that the religious exemption in cl 58(3) of the Bill should be removed because religious bodies that perform public functions should be required to comply with human rights when performing those functions and should only be lawfully allowed to limit human rights to the extent that is reasonable and demonstrably justifiable.⁵¹⁶

The ADCQ submitted that it is unclear what is covered by the exemption for acts or decisions of a private nature and the Bill should clarify the exemption.⁵¹⁷ The ADCQ advised that it considers that the exceptions to the obligation regarding acts or decisions of a private nature do not include the acts and decisions of the core public entities in employment matters, and if it is not the intention of Parliament that the obligations in cl 58 are to apply to the acts and decisions of core public entities in employment matters, the Bill should be amended to clarify this intention.⁵¹⁸

2.6.6.15 Departmental response

Regarding exemptions for acts or decisions of a private nature, the department advised:

*...the obligations on public entities will only apply when they are acting or making decisions of a public nature, as distinct from decisions of a private nature (for example decisions that a public servant decision maker may make about how they spend their personal time; or a decision of a private company operating a prison about another aspect of their business unrelated to their public functions).*⁵¹⁹

In response to the issues raised regarding exemptions for religious bodies from the obligations, the department advised:

This exception is consistent with the exception contained in other Queensland legislation, i.e. the Anti-Discrimination Act 1991. In Victoria, a similar exemption for religious bodies has received some criticism. However the 2015 review of the Charter (the Young review) recognised the need for a consistent approach across legislation, and recommended that the issue be considered alongside a review of the religious exemptions in the Victorian Equal Opportunity Act 2010. To ensure consistency with other Queensland laws, it is not proposed to remove the exemption at this stage.

⁵¹⁵ Submission 107, p 11.

⁵¹⁶ Submission 101, p 9.

⁵¹⁷ Submission 80, p 7.

⁵¹⁸ Submission 80, p 7.

⁵¹⁹ Department of Justice and Attorney-General, correspondence dated 3 December 2018, attachment, pp 56-57.

2.6.6.16 *Issues raised - resourcing*

Many submitters raised the importance of adequate resources being allocated to the implementation of the Bill to ensure public entities meet their obligations and the community understands these obligations and their rights. For example, the Griffith Law School and A Human Rights Act for Queensland submitted that the Bill will only have real impact if each arm of government and the community understands how the act applies to them.⁵²⁰

Some submitters referred to the amount being allocated to the implementation of the Bill. For example, academics from UQ's TC Beirne School of Law submitted that without sufficient resourcing during the first few years 'there is a risk that a human rights culture will be slow to develop which will lead to significant spending on 'compliance' costs such as internal legal advice and fighting legitimate claims'.⁵²¹

The ICJ Qld raised concerns about the specific amount being allocated, submitting that the QHRC is receiving approximately one third of the funds received by the Victorian equivalent on the introduction of the Victorian Charter more than 10 years ago, and in circumstances where the Victorian equivalent did not have the additional function of conducting conciliations. They argued that sufficient funding for the QHRC in its pivotal, foundational years is vital to ensure (1) that proper training occurs which facilitates the embedding of a human rights culture in the government departments bound by the new obligations; and (2) the success of the new Act including through the efficient resolution of complaints.⁵²²

A number of submissions recommended that adequate resourcing be provided to government departments to support the development of a human rights culture, including training and education within government.⁵²³ The QLS supported the view of the Law Institute of Victoria which found that it is necessary to raise awareness and provide information to enable all types of government 'duty-holders' to engage with and apply the Human Rights Act in their work (duty holders being: elected representatives and unelected government officers and employees developing and making laws and policy); and public authorities (across central government, statutory authorities and outsourced service providers).⁵²⁴

A Human Rights Act for Queensland also submitted that 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.⁵²⁵

The Public Advocate advised that the legislative reviews conducted in the ACT and Victoria (at five and eight years respectively) found that government agencies demonstrated inconsistent engagement with, and understanding of, their obligations under human rights legislation, and stated 'A significant amount of time and an ongoing commitment of resources are required to build a human rights culture throughout government.'⁵²⁶

The LGAQ referred in its submission to the expense that will be incurred by local governments and the disruption to their normal processes if each councillor and local government employee is subjected to a new obligation to make sure that each act and decision undertaken for or on behalf of a local government is compatible with human rights, and gives proper consideration to human rights. The

⁵²⁰ Submission 44, p 4; submission 116, p 24.

⁵²¹ Submission 39, p 5.

⁵²² Submission 105, p 4.

⁵²³ See for example submissions 33, 39, 40, 44, 88, 94, 101, 116, 117 and 123.

⁵²⁴ Submission 103, p 14.

⁵²⁵ Submission 44, p 4.

⁵²⁶ Submission 88, p 3.

LGAQ recommended that the Government should allocate resources or funding to the local government sector to facilitate discussion, awareness raising, or education about human rights.⁵²⁷

Submitters also recommended that resources be allocated to assisting support services, such as community legal centres, advocates and community groups, to enable those groups to provide advice and assistance to people whose legal rights may have been infringed.⁵²⁸ For example, CLCQ stated that community legal centres and other advocates need to be resourced to provide advice to people whose rights are infringed, and to provide representation in conciliations.⁵²⁹

QCOSS similarly submitted that resources and training should be devoted specifically to ensuring people experiencing vulnerability understand their rights and the mechanisms available to ensure those rights are protected. To achieve this QCOSS advised that an awareness of the legislation and its implications will need to be embedded throughout the community service sector, community sector organisations must be clear on their obligations under the legislation, and staff must receive targeted training to enable an embedding of human rights principles in organisational planning and practice.⁵³⁰

Yourtown submitted that organisations that are recognised as public entities under the Bill because they provide some services funded by government may need assistance with recognising their status under the Bill and their roles and responsibilities in light of that status. Yourtown advised that feedback from the Victorian Council of Social Services in 2015 showed that some non-government organisations continued to be unaware of the Human Rights' Charter and its implications for them. Yourtown also noted that 'a potential implementation concern that needs to be monitored and addressed relates to the associated compliance costs for public entities.'⁵³¹

Academics from UQ's TC Beirne School of Law also submitted that there should be provision for specific necessary outlays within the first four years of the life of the Act, in addition to the \$2.4 million to the QHRC. These resourcing concerns include the following:

- the resourcing of several specialist lawyers within Community Legal Centres
- that resources be allocated to provide for the development and maintenance of: a searchable database of all Human Rights Act cases, a Bench Book, judicial training, and policy guidelines
- the resourcing of strategic partnerships between government and experts.⁵³²

The importance of educating the community on human rights was also raised by submitters.⁵³³ The AASW(Qld) recommended that the Queensland Government develop a robust implementation strategy that is informed by experts in the relevant fields to ensure the whole community understands the implications of the Act, using a universal education framework which is culturally appropriate and is accompanied by appropriate resources.⁵³⁴

Similarly, Mr Eugene White and Brisbane North Community Legal Service submitted:

Beyond the legal framework, human rights recognition requires social acceptance and cultural change. There needs to be sufficient resourcing to include a comprehensive public education program which will facilitate a substantive permanent cultural and social growth which in itself will ultimately lead to less complaints or at least earlier and better resolution to them. Prevention

⁵²⁷ Submission 33, p 2.

⁵²⁸ See for example submissions 101, 114, 116, 117 and 126.

⁵²⁹ Submission 117, p 8.

⁵³⁰ Submission 84, pp 2-3.

⁵³¹ Submission 130, p 2.

⁵³² Submission 39, pp 5-6.

⁵³³ See for example submissions 40, 44 and 136.

⁵³⁴ Submission 40, p 6.

*and early intervention before escalation of issues will lead to revenue saving plus nonfinancial benefits [such] as greater social and community harmony.*⁵³⁵

Training for the courts and the judiciary was also raised as an issue relating to resourcing.⁵³⁶ The Public Advocate advised that following the implementation of human rights legislation in the ACT and Victoria, follow-up reviews found that further training of the judiciary on the legislation was needed due to a lack of training when the legislation was first implemented and a subsequent lack of engagement with the legislation. Opportunities for further training were also identified in Victoria for the legal profession generally, especially in relation to building human rights components into existing forums on various areas of law, such as criminal law.⁵³⁷

2.6.6.17 Issues raised - opt in provision

Submitters also commented on the provision allowing entities not captured by the definition of a public entity to opt-in to the obligations of a public entity. Support was expressed by a few submitters for the provision.⁵³⁸ For example, the ALA stated that the opt-in provision can:

*Assist in promoting cultural change by developing a 'rights consciousness' across Queensland, encouraging broader, voluntary compliance with human rights standards, promoting a meaningful human rights dialogue within the community and cultural change by developing human rights consciousness within Queensland.*⁵³⁹

The ALA also submitted that the opt-in provision contained in the ACT Charter, while having only attracted non-government, not-for-profit organisations that have a long-standing commitment to human rights values so far, has had an important influence in the development of a human rights culture within the ACT, given the example provided by the opt-in organisations to other organisations in terms of practical incorporation of human rights practice into their operations.⁵⁴⁰

The ALA made recommendations to strengthen the influence of the provision, including:

- *comprehensive promotion and encouragement of the opportunity to voluntarily elect to be subject to the Human Rights Act under s 60, in order to enhance corporate social responsibility within the operations of private and corporate bodies;*
- *developing a government tender pre-qualification process in which prospective tenderers for government contracts have to satisfy, among other things, their capacity to adhere to the Human Rights Act, with an exemption to this requirement provided for organisations that voluntarily elect to be subject to the Act under s 60.*⁵⁴¹

The Queensland Mental Health Commission (QMHC) raised a concern regarding whether the opt-in provision of the Bill is sufficient to ensure, for example, the human rights protection of people being treated in private hospital settings.⁵⁴²

In contrast, Professors Aroney and Ekins submitted that the opt-in provision 'would have unpredictable consequences on the law applicable to such bodies, for it would engage the interpretive obligation and the procedural obligations concerning human rights litigation.' They also described the provision as 'unnecessary and perverse', and stated that private bodies:

⁵³⁵ Submission 77, p 2; Submission 145, p 1.

⁵³⁶ See for example submissions 88 and 103.

⁵³⁷ Submission 88, p 3.

⁵³⁸ Submission 17, p 6; 24, p 16.

⁵³⁹ Submission 24, p 18.

⁵⁴⁰ Submission 24, p 18.

⁵⁴¹ Submission 24, p 18.

⁵⁴² Submission 94, p 3.

*should not be invited to bind themselves to the state, even with the option of withdrawal, in ways that invite and require further state supervision and control, often by way of adjudication. Inevitably this would place political pressure on private bodies to bind themselves in this way, with the false inference being that unless they submitted to state control in this way they disdained human rights.*⁵⁴³

2.7 Queensland Human Rights Commission

2.7.1 Proposed law

Part 7 Division 2 of the Bill amends the *Anti-Discrimination Act 1991* to rename the Anti-Discrimination Commission Queensland (ADCQ) as the Queensland Human Rights Commission (the QHRC or the commission), with the current Anti-Discrimination Commissioner becoming the Human Rights Commissioner (the commissioner).⁵⁴⁴

2.7.2 Functions and powers

The current ADCQ is a statutory authority with functions that include:

*promoting an understanding, acceptance, and public discussion of human rights in Queensland, and dealing with complaints alleging contraventions of the Anti-Discrimination Act 1991 and of reprisal under the Public Interest Disclosure Act 2010. Complaints that are not resolved through conciliation can be referred to a tribunal for hearing and determination. For work-related complaints the tribunal is the Queensland Industrial Relations Commission, and for all other complaints the tribunal is the Queensland Civil and Administrative Tribunal.*⁵⁴⁵

The Bill broadens the functions of the ADCQ/new QHRC to include dealing with human rights complaints, monitoring and reporting.

Part 4 of the Bill gives the commissioner power to do all things necessary or convenient in performing the commission's functions under the Act. Those commission functions are set out in Part 4 cl 61 as:

- (a) to deal with human rights complaints under this part;
- (b) if asked by the Attorney-General, to review the effect of Acts, statutory instruments and the common law on human rights and give the Attorney-General a written report about the outcome of the review;
- (c) to review public entities' policies, programs, procedures, practices and services in relation to their compatibility with human rights;
- (d) to promote an understanding and acceptance, and the public discussion, of human rights and this Act in Queensland;
- (e) to make information about human rights available to the community;
- (f) to provide education about human rights and this Act;
- (g) to assist the Attorney-General in reviews of this Act under sections 95 and 96;
- (h) to advise the Attorney-General about matters relevant to the operation of this Act;
- (i) another function conferred on the commission under this Act or another Act.

⁵⁴³ Submission 107, p 6.

⁵⁴⁴ Clause 118, replacing s 234 of the *Anti-Discrimination Act 1991* and see also cls 277-278.

⁵⁴⁵ Submission 80, p 1.

2.7.2.1 *Issues raised in submissions – functions and powers*

The submission from the ADCQ ‘supports the objectives of the Bill and the new functions that the Commission would have under the Bill.’⁵⁴⁶

The Environmental Defenders Office (EDO) submitted that ‘the Human Rights Commission will assist in increasing access to justice for those not willing or able to bring actions before the court. A broader range of complaints will therefore be considered than that which would potentially be brought before a court. It will also help to filter complaints so that fewer matters are likely to be taken to the court.’⁵⁴⁷

Submitters from the ILGG research group noted that:

The establishment and funding of a Human Rights Commission in Queensland is an important contribution of the Bill, highly consistent with international human rights norms and should be commended. The mandate of the Commission set out in Part 4, Division 1, goes a long way to ensuring that human rights are respected in Queensland.

In particular, the power of the Commission to receive complaints from individuals whose human rights have been affected by the act or decision of a public entity (cl 64) represents an important improvement on the Victorian model, upon which the Queensland legislation is based. This role is strengthened by the ability of the Commission to compel the provision of information by public entities (cl 78) and attendance at a conciliation conference (cl 81).⁵⁴⁸

ALHR was also supportive of the intended functions of the QHRC:

ALHR strongly commends the inclusion of a complaints mechanism in the Bill. A complaints mechanism is essential in ensuring that individuals are provided with the opportunity to enforce their rights under a human rights legislative framework, as well as necessary in providing substance and weight to a Human Rights Act as a meaningful and operative law. The establishment of the Queensland Human Rights Commission as the body to receive and conciliate complaints offers an accessible and inexpensive way for a person who has experienced a human rights violation to have this issue heard and responded to.

ALHR also supports the role of the Human Rights Commissioner under the Bill including their power to examine and report on human rights issues and their authority to request or direct a public entity to provide the Commissioner with information about a complaint. The Bill will effectively allow the Human Rights Commission to call into question government or public entity actions or decisions which have potentially breached human rights. These powers, coupled with the educative functions of the Commissioner, will be instrumental in the creation of a human rights culture in Queensland.⁵⁴⁹

The submission from the Public Advocate also favoured creation of a human rights commission:

The Public Advocate welcomes the creation of the Human Rights Commission in Queensland and the unique powers and functions established by the Bill. Neither the ACT nor Victoria has created a single entity that deals with issues regarding human rights in terms of complaints, education and promotion, as well as reviewing public entities’ policies and practices in relation to their compatibility with human rights.⁵⁵⁰

PeakCare Queensland Inc., was supportive, but was concerned about the limits to the powers of the commission:

⁵⁴⁶ Submission 80, p 3.

⁵⁴⁷ Submission 122, p 12.

⁵⁴⁸ Submission 89, p 3.

⁵⁴⁹ Submission 91, p 6.

⁵⁵⁰ Submission 88, p 3.

PeakCare strongly supports and commends provisions contained within the Bill that allow for the establishment and empowerment of a Human Rights Commission to:

- *investigate, report on and conciliate human rights complaints*
- *intervene in relevant legal proceedings*
- *conduct conciliation, and*
- *conduct research and publicly report on compliance and reform*

PeakCare recognises the benefits to be achieved by allowing parties access to non-judicial avenues to resolve disputes about breaches of human rights. Whilst doing so, PeakCare also contends that the Bill unnecessarily limits powers of the Commission by not allowing it to:

- *make a legally binding finding about whether a government agency or body, or a particular law, breaches human rights, or*
- *award remedies to address the harms caused by a breach of human rights.*⁵⁵¹

Dr Nicky Jones and Dr Jeremy Patrick of the USQ School of Law and Justice recommended additional powers for the QHRC:

We recommend that robust enforcement mechanisms should be added to the legislation. For example, the Queensland Human Rights Commission should be given powers to issue binding orders (judicially reviewable) to circumscribe unlawful practices or policies and to refer unresolved complaints to a court or tribunal for resolution, along similar lines to complaint resolution procedures under Queensland anti-discrimination law.

*A successful complainant would benefit from a range of remedies similar to those available in section 209 of the Anti-Discrimination Act 1991 (Qld). Appropriate remedies could include the award of compensation for loss or damage caused by a human rights breach (statutorily capped if necessary), orders requiring a public entity not to commit a further human rights breach against a complainant or other specified persons, orders requiring a public entity to do specified things to redress loss or damage suffered by a complainant or other persons because of a breach, orders requiring a public entity to make a private or public apology or retraction in relation to a breach, orders requiring a public entity to implement programs to increase human rights awareness and compliance, and mandated training in human rights for employees of public entities found to have acted unlawfully under the legislation.*⁵⁵²

The QLS commented on the proposed functions and powers of the commissioner:

Clause 61(b) and (c) state that two of the Commissioner's functions are 'if asked by the Attorney-General, to review the effect of Acts, statutory instruments and the common law on human rights and give the Attorney-General a written report about the outcome of the review' and 'review public entities' policies, programs, procedures, practices and services in relation to their compatibility with human rights'. However, there is no accountability following such reviews. All Queensland legislation should be reviewed by the Commissioner against the Human Rights Act, and the Commissioner's recommendations based on such a review should be sent to the Attorney-General for consideration. Similarly, all Queensland government agencies should be required to submit a compatibility statement to the Commissioner and receive recommendations from the Commissioner regarding their compliance.

Clause 62 lists the Commissioner's powers but it is too vague. We recommend a list all of the Commissioner's powers, as they are currently understood, and lastly include a catch all phrase

⁵⁵¹ Submission 92, p 7.

⁵⁵² Submission 104, p 3.

as per what is currently listed in clause 62 of the Bill, such as 'and to do all things necessary and convenient to be done for the performance of the commission's functions under the Act'.⁵⁵³

LawRight recommended that the commission be given an own-initiative investigative function in respect of suspected systemic human rights violations, noting:

We also recommend that the Queensland Human Rights Commission should have the power to instigate investigations into, and prepare independent reports on, systemic human rights violations. Our experience is that many vulnerable cohorts are unable to self-represent or are not likely to pursue legal claims or complaints that may be available to them. It is important that human rights violations are nonetheless attended to by the Commission.⁵⁵⁴

The Office of the Public Guardian supported additional investigative powers for the commission:

While not addressed in the Bill for consideration, the OPG considers that a human rights framework in Queensland would be strengthened by the QHRC being provided with additional investigative powers under the Act. This could entail the QHRC having the authority to respond to reports of alleged breaches of the Act by public entities, in the absence of formal action being taken by a member of the public. This would be of particular value should members of the public, specifically more vulnerable Queenslanders, be fearful of, or daunted by, the process of taking formal action regarding a decision made by a public entity. It would also serve as a strong incentive for public entities to ensure human rights are properly considered in decision making.⁵⁵⁵

CYDA also supported enabling systemic complaints to be received and investigated by the commission:

In addition, it appears from the wording of clause 64, that a systemic human rights complaint could not be made to the commissioner under this Bill. CYDA believes this could be further clarified and that consideration should be given to allowing organisations and others to raise systemic complaints with the commissioner as a means of facilitating broader, system wide change.⁵⁵⁶

2.7.2.2 Departmental response

The powers and functions of the QHRC in the Bill are those considered necessary and appropriate in order to fulfil the intended purpose of the legislation, that is, to provide an accessible, independent and appropriate avenue for individuals to raise human rights concerns with public entities with a view to reaching a practical resolution.

Once a complaint has been accepted, the QHRC may require a public entity to attend a conciliation conference. If the complaint is not resolved, there is no appeal or review mechanism, however, the Commissioner may publish information about the complaint, including any action taken to try to resolve an unresolved complaint (clause 90). In addition, in its annual report, the Commissioner may name public entities and provide details (without revealing personal information) of human rights complaints that have not been resolved (clause 91).

Funding of \$2.298 million over four years (\$0.6 million per year ongoing) has been committed as part of the 2018-19 Budget process for the ADCQ (to be rebranded as the QHRC) to support the operation and administration of the HR Act.⁵⁵⁷

⁵⁵³ Submission 103, p 15.

⁵⁵⁴ Submission 25, p 5.

⁵⁵⁵ Submission 90, p 7.

⁵⁵⁶ Submission 71, p 7.

⁵⁵⁷ Department of Justice and Attorney General, correspondence dated 3 December 2018, attachment, pp 62-63

2.7.3 Human rights complaints

2.7.3.1 *Proposed law*

Proposed s 58(1) makes it unlawful for a public entity –

- (a) to act or make a decision in a way that is not compatible with human rights; or
- (b) in making a decision, to fail to give proper consideration to a human right relevant to the decision.

That prohibition does not apply where the entity could not reasonably have acted differently or made a different decision because of a statutory provision, a law of the Commonwealth or another State or otherwise under law.⁵⁵⁸

Proposed s 63 of the Bill allows a ‘human rights complaint’ to be made to the commissioner when a complainant alleges that there has been a contravention of s 58(1) by a public entity, in relation to an act or decision of that entity.

2.7.3.2 *Issues raised in submissions – human rights complaint function*

A number of submissions were in favour of the complaints function proposed for the QHRC.

Aimee McVeigh from A Human Rights Act for Queensland contended that:

Queenslanders want rights that can be enforced. The incorporation of a complaints mechanism in the Bill, allowing people to complain to Queensland’s Human Rights Commission (‘the Commission’), makes the Bill the most powerful human rights legislation in Australia.⁵⁵⁹

The submission of the ALA similarly supported the complaints mechanism initiative, noting:

The ALA also welcomes the inclusion of an accessible complaints mechanism for alleged contraventions by a public entity (Part 4, Division 2). The ALA notes that the statutory eight-year review of the Victorian Charter recommended that the Charter be amended to include such a complaints mechanism. The Review accepted the statement from the Victorian Equal Opportunity and Human Rights Commission’s submission that the confusing and limited availability of remedies under the Charter has held back the development of a human rights culture, and creates a disincentive for compliance as there are no obvious consequences of a breach. The provision in the Bill for a complaint to be made to the Human Rights Commissioner (the Commissioner) is a significant advancement on the Charter and the ACT HRA, and will encourage the development of a human rights culture across government and the community in Queensland.⁵⁶⁰

Professor Williams AO and Dr Boughey also supported the QHRC complaints function, noting:

Effective independent oversight and complaints mechanisms are important to ensure that public entities comply with their human rights obligations.

The Bill recognises this by providing for two avenues for members of the public to seek redress where they believe a ‘public entity’ has unlawfully infringed their rights: a complaint to the Queensland Human Rights Commissioner; and review by the Supreme Court.

One of the main problems with the Victorian and ACT human rights Acts is the absence of an accessible, affordable and effective complaints mechanism. The Bill overcomes this problem by

⁵⁵⁸ Clause 58(2). Subclause (1) will also not apply to a body established for a religious purpose if the act or decision is done or made in accordance with the doctrine of the religion concerned and its necessary to avoid offending the religious sensitivities of the people of the religion (see cl 58(3)).

⁵⁵⁹ Submission 44, p 2.

⁵⁶⁰ Submission 24, p 6.

*providing for a low-cost mechanism of resolving complaints through the Human Rights Commission. This is an excellent feature of the Bill.*⁵⁶¹

Similarly, YAC ‘welcomes the ability to lodge complaints with the new Human Rights Commission as well as the ability to include human rights breaches in any proceedings where they may be relevant, thus improving on both the Victorian and ACT models.’⁵⁶²

The submission from People with Disability Australia (PDA) noted that (even with the complaints function), the QHRC cannot make a legally binding finding about whether a government agency, body or a particular law breaches human rights nor can it award remedies to address the harms caused by a breach of human rights.⁵⁶³

2.7.3.3 Departmental response

The powers and functions of the QHRC in the Bill are those considered necessary and appropriate in order to fulfil the intended purpose of the legislation, that is, to provide an accessible, independent and appropriate avenue for individuals to raise human rights concerns with public entities with a view to reaching a practical resolution.

Once a complaint has been accepted, the QHRC may require a public entity to attend a conciliation conference. If the complaint is not resolved, there is no appeal or review mechanism, however, the Commissioner may publish information about the complaint, including any action taken to try to resolve an unresolved complaint (clause 90). In addition, in its annual report, the Commissioner may name public entities and provide details (without revealing personal information) of human rights complaints that have not been resolved (clause 91).

*Funding of \$2.298 million over four years (\$0.6 million per year ongoing) has been committed as part of the 2018-19 Budget process for the ADCQ (to be rebranded as the QHRC) to support the operation and administration of the HR Act.*⁵⁶⁴

2.7.4 Making a human rights complaint

2.7.4.1 Proposed law

Persons who may make a complaint include the individual who is the subject of the action or decision, an agent of that individual, or another person authorised to make the complaint on the individual’s behalf. Two or more persons may jointly make a human rights complaint.⁵⁶⁵ Complaints must be written and, if needed, the commissioner must give reasonable help to a complainant to enable them to put their complaint in writing.⁵⁶⁶

Complaints can only be made to the commissioner where the complainant has already complained to the public entity about the alleged contravention, at least 45 business days prior, and is either yet to receive a response to the complaint or has received a response the complainant considers to be inadequate.⁵⁶⁷

2.7.4.2 Issues raised in submissions – making a human rights complaint

CYDA submitted in respect of who may make a human rights complaint under cl 64:

⁵⁶¹ Submission 8, p 4.

⁵⁶² Submission 41, p 8.

⁵⁶³ Submission 67, p 3.

⁵⁶⁴ Department of Justice and Attorney General, correspondence dated 3 December 2018, attachment, pp 62-63

⁵⁶⁵ Clause 64.

⁵⁶⁶ Clause 67.

⁵⁶⁷ Subclause 65(1).

CYDA believes that the term ‘agent of the individual’ under subcl (1)(b) lacks clarity and that a definition of the term should be provided.

In addition, it appears from the wording of cl 64, that a systemic human rights complaint could not be made to the commissioner under this Bill. CYDA believes this could be further clarified and that consideration should be given to allowing organisations and others to raise systemic complaints with the commissioner as a means of facilitating broader, system wide change.⁵⁶⁸

The QLS noted the absence of a direct complaints avenue to the commission:

Clause 65 provides that there is no avenue for making a human rights complaint directly to the QHRC. We recognise the desirability, in most cases, of allowing a relevant government department to receive and try to resolve human rights complaints. However, in some circumstances, a person should be able to make a human rights complaint directly to the QHRC. The requirement that a person must first make a complaint to the public entity may deter potential complainants from making such complaints due to fear of reprisal from the entity alleged to have contravened the Human Rights Act.

A requirement imposed by cl 65(1)(b) [is] that a person must first make a complaint with the relevant public entity and then after a period of 45 days make a complaint to the QHRC. It is our submission that this will cause significant and unnecessary delays. The only exception to this is if there is ‘exceptional circumstances’. In our view, the term ‘special reasons’ would be preferable to the phrase ‘exceptional circumstances’. We also suggest reducing the timeframe from 45 days to 28 days, in line with other review timeframes. Administrative review processes generally have 21 days or 28 days review and appeal timeframes.⁵⁶⁹

Sisters Inside submitted that the unique vulnerabilities of persons in prison warrants their being able to make complaints direct to the QHRC, rather than first going through the relevant public entity:

We support the establishment of the Human Rights Commission and the procedure for the Commission to resolve complaints.

We note cl 65 of the Bill does not allow for direct complaints to the Human Rights Commission, unless the complainant has first made a complaint to the relevant public entity and 45 days has elapsed since the internal complaint was made. In exceptional circumstances, the Commission may consider complaints before the 45 day internal complaint period has elapsed.

In our submission, women and girls in prison experience significant difficulties making complaints and raising issues about human rights violations. The requirement to make an internal complaint may unreasonably limit the Commission’s flexibility and ability to consider important complaints from adults and children in prison.

We recommend the Bill is amended to allow complaints by adults and children in youth and adult prisons and police watch houses to be raised directly with the Commission, without the need for an internal complaint first. This would recognise the uniquely vulnerable position of people in these situations and the need for a prompt, flexible and independent mechanism to address emerging issues.

Alternatively, the timeframe for a response to an internal complaint must be significantly reduced from 45 days; the timeframe must be aligned with decision making timeframes for Government agencies in other legislation (generally between 21-28 days).⁵⁷⁰

⁵⁶⁸ Submission 71, p 7.

⁵⁶⁹ Submission 103, p 16.

⁵⁷⁰ Submission 127, p 2.

The HRLC was concerned that the stipulated processes and outcomes in the complaint framework may discourage complainants, noting:

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

As noted in the CLCQ submission, the stipulated processes and outcomes within the current framework may deter people from bringing a complaint, especially if complainants are forced to independently seek a solution directly with the relevant public entity beforehand. Further, complainant's engagement with the Commission and their ability to get satisfactory outcomes would be assisted by allowing people to have legal representation present during the Commission's processes.⁵⁷¹

Academics from UQ's TC Beirne School of Law were concerned about the efficacy of the proposed complaints mechanism, commenting:

We commend the inclusion of a complaints mechanism in the Bill. This inclusion overcomes one of the primary weaknesses in the ACT and Victorian Acts and sets the Queensland Human Rights Bill apart as a more effective form of rights protection.

However, we have strong reservations about a model focused only on dialogue with no independent cause of action and no clear remedy range. The efficacy of the complaints mechanism depends upon individuals engaging with it and on its effectiveness at achieving the aims of the legislation, namely, the enhancement of human rights across Queensland.

The emotional burden placed on complainants in all human rights matters is high. They are already aggrieved by a deeply felt breach of their basic rights, they may have suffered distress, humiliation or economic loss, and they must then agitate within a hostile system to achieve change.

...

In the absence of an effective remedy, complainants may be reluctant to engage with the complaints process.

Further, by the time a breach comes to the Human Rights Commission it will already have been subject to an internal complaint and all efforts at a negotiated outcome will necessarily have failed. It is ambitious, and perhaps unreasonable, to expect a process focused on dialogue with no clear cause of action or remedial outcome to turn that failure around.⁵⁷²

The Ethnic Communities Council of Queensland (ECCQ) was supportive of the provisions requiring the commissioner to offer assistance in making a complaint to people if required and the ability to use interpreters in conciliation conferences. The ECCQ submitted:

Section 67(2) (Form of human rights complaint): ECCQ is particularly pleased to see in s 67(2) that the Commissioner must give reasonable help to the complainant to put the complaint in writing - this is potentially very valuable to people from a culturally and linguistically diverse background and is strongly supported.

Section 84 (Use of interpreters and other persons): ECCQ strongly endorses this section as a valuable means of ensuring complainants from multicultural backgrounds are provided with the

⁵⁷¹ Submission 101, p 15.

⁵⁷² Submission 39, p 2.

*relevant assistance to fully articulate their complaint by way of an interpreter or other person with the appropriate cultural or social knowledge and experience.*⁵⁷³

2.7.4.3 Departmental response

It is not intended to extend the complaints process to matters outside the scope of the HR Act.

*Issues raised by submitters that are non-legislative in nature but may improve the disputes resolution process, will be raised with the QHRC, once established, for their consideration.*⁵⁷⁴

2.7.5 Dealing with or referring a human rights complaint

2.7.5.1 Proposed law

The commissioner must refuse to deal with complaints the commissioner considers to be frivolous, trivial, vexatious, misconceived or lacking in substance.⁵⁷⁵ The commissioner also has discretion to refuse to deal with complaints that the commissioner considers have been appropriately dealt with by another entity, where the requirements for making a complaint have not been met, or where the complaint was not made or referred to the commissioner within one year after the alleged contravention the subject of the complaint happened.⁵⁷⁶

If other entities such as the ombudsman, the health ombudsman, the information commissioner or the crime and corruption commission receive a complaint that they consider may also be a human rights complaint, those entities may deal with the complaint under their legislation or, with the consent of the complainant, may refer the complaint to the (human rights) commissioner.⁵⁷⁷ Conversely, if a complaint about a subject relevant to one of those entities, or a complaint under the National Disability Insurance Scheme, is made to the (human rights) commissioner, and the commissioner considers it would be more appropriately dealt with by the other relevant entity, the commissioner may refer the human rights complaint to that entity and provide the entity with information obtained about the complaint, but again this is only possible with the complainant's consent.⁵⁷⁸

If the commissioner considers a human rights complaint would be more appropriately dealt with as a complaint against the *Anti-Discrimination Act 1991* the commissioner may, with the complainant's consent, deal with the complaint under s 141 of that Act, as an alleged contravention of that Act.⁵⁷⁹

Where a human rights complaint is accepted for QHRC resolution, notice of the acceptance is given by the commissioner to the complainant and to the respondent. The notice must advise of the role of the commission in trying to resolve the complaint and the powers the commission may exercise in trying to resolve the complaint. The notice to the respondent must also advise the substance of the complaint, and that the respondent will have an opportunity to make written submissions in response to the complaint. The respondent is also advised that the commission may seek information or documents from them in relation to the complaint.⁵⁸⁰

If the commissioner decides to accept a human rights complaint for resolution by the commission, the commissioner may take appropriate action to try to resolve the complaint, including seeking submissions in response to the complaint from the respondent, seeking further information from the

⁵⁷³ Submission 152, pp 1-2.

⁵⁷⁴ Department of Justice and Attorney General, correspondence dated 3 December 2018, attachment, p 70.

⁵⁷⁵ Clause 69.

⁵⁷⁶ Clause 70(2).

⁵⁷⁷ Clause 66.

⁵⁷⁸ Clause 73; and see also cl 74 which permits the commissioner to enter into arrangements with other entities for how they will deal with complaints that are relevant to both the entity and the QHRC.

⁵⁷⁹ Clause 75.

⁵⁸⁰ Clause 76.

complainant or respondent, making enquiries of and discussing the complaint with the parties, or causing the complaint to be conciliated.⁵⁸¹

2.7.5.2 Issues raised in submissions – dealing with or referring a human rights complaint

The QLS submitted in respect of both the issue of complaint referrals and the timeframe for making a complaint, noting:

We are concerned that clause 66(2) provides potential for the referral avenue to be a mechanism for relevant referral entities delaying or avoiding consideration of a complaint. We recommend including a clause that safeguards the interests of the complainant and ensures due process before any referral, particularly since the referral entity must seek consent from the complainant to refer the complaint to the Commissioner.

Clause 70(1)(d) limits the timeframe for making a complaint or referral to the commissioner within one year after the alleged contravention to which the complaint relates. Vulnerable and marginalised persons may not have the resources to facilitate making a complaint within such a short time frame, particularly if they have been required to wait significant time to receive a response from the relevant public entity. Placing such a restrictive timeframe on the making of complaints is likely to be a prohibitive barrier for vulnerable and marginalised populations. In turn undermining the purpose of the bill. We recommend extending the period of time from one year after the alleged contravention to at least five years.⁵⁸²

CYDA was concerned that there might be no review of, or appeal from, the commissioner's decision to not deal with a complaint:

Under clause 69 the commissioner 'must' refuse to deal with particular complaints which it considers to be 'trivial, vexatious, misconceived or lacking in substance'. Additionally, clause 70 provides that the commissioner 'may' refuse to deal or continue to deal, or defer dealing, with a complaint under certain circumstances. For example, if the commissioner considers that the complaint has been appropriately dealt with by another entity.

From available information, it appears as though there is no explicit process set out for appealing a decision made by the commissioner under these sections. CYDA maintains it is critical to ensuring fair process, that a decision by the commissioner to not deal with a complaint can be appealed/reviewed.⁵⁸³

2.7.5.3 Departmental response

Once a complaint has been accepted, the QHRC may require a public entity to attend a conciliation conference. If the complaint is not resolved, there is no appeal or review mechanism, however, the Commissioner may publish information about the complaint, including any action taken to try to resolve an unresolved complaint (clause 90). In addition, in its annual report, the Commissioner may name public entities and provide details (without revealing personal information) of human rights complaints that have not been resolved (clause 91).⁵⁸⁴

⁵⁸¹ Clause 77

⁵⁸² Submission 103, p 16.

⁵⁸³ Submission 71, p 7.

⁵⁸⁴ Department of Justice and Attorney General, correspondence dated 3 December 2018, attachment, pp 62-63

2.7.6 Conciliation of a human rights complaint

2.7.6.1 *Proposed law*

If the commissioner decides to accept a human rights complaint for resolution by the commission, the commissioner may conduct a conciliation conference to conciliate the complaint.⁵⁸⁵ The purpose of conciliation is ‘to promote the resolution of the complaint in a way that is informal, quick and efficient’.⁵⁸⁶

The commissioner may direct a person to participate in a conciliation conference. The direction can become enforceable by the commissioner filing it with a court of competent jurisdiction.⁵⁸⁷ Adult complainants with capacity must attend the conciliation conference in person⁵⁸⁸ and may, with the commissioner’s consent, be accompanied by a support person.

A person may be represented by another person (a representative) at a conciliation conference, with the commissioner’s consent, where the commissioner is satisfied that it is appropriate in the circumstances for the person to be represented, the person’s representation by the representative would help the conciliation, and provided that the representative has sufficient knowledge of matters relating to the complaint to effectively represent the person.⁵⁸⁹ A person may also be helped at a conciliation conference by an interpreter or another person with appropriate cultural or social knowledge and experience to make the conciliation conference intelligible to the person.⁵⁹⁰

Conciliation conferences must be held in private and are not bound by the rules of evidence.⁵⁹¹ Nothing said or done in the course of a conciliation conference is admissible in any criminal, civil or administrative proceeding, unless the complainant and the respondent agree.⁵⁹² Participation in a conciliation conference does not affect the right of a person to seek any relief or remedy they may have in relation to a contravention of s 58(1) (a public entity unlawfully acting or making a decision in a way that is incompatible with human rights, or, in making a decision, failing to give proper consideration to a human right relevant to the decision).⁵⁹³

2.7.6.2 *Issues raised in submissions – conciliation conferences*

The submission from the Office of the Public Guardian looked at issues regarding representation at conciliation conferences, noting:

Clause 82 – Attendance by complainant: The OPG supports the specific exceptions in clauses 82(a) and (b) for a child or a person with impaired capacity to the requirement that a person must attend a conciliation conference in person. However, while schedule 4 of the Guardianship and Administration Act 2000 (GAA) is noted in the context of a definition of impaired capacity, there is no mention of the role of a guardian in such proceedings. We believe it would be prudent to make specific reference to the provisions of the GAA regarding the presence of a guardian in such matters to provide guidance on this process.

⁵⁸⁵ Clause 79.

⁵⁸⁶ Clause 80.

⁵⁸⁷ Clause 81.

⁵⁸⁸ Complainants must attend a conciliation conference in person unless they are a child or a person with impaired capacity or if the commissioner consents to another person attending the conciliation conference for the complainant, (see cl 82).

⁵⁸⁹ Clause 83.

⁵⁹⁰ Clause 84.

⁵⁹¹ Clause 85.

⁵⁹² Clause 86.

⁵⁹³ Clauses 58(1) and 87.

*Clause 83 – Representation: Clarification will be required as to whether the Commissioner’s consent to representation by another person would extend to legal representation and/or a legal guardian. A further issue concerns the interaction between clauses 82 and 83, namely whether a person represented by another at a conciliation conference will still be required to attend in person as dictated by cl 82(1).*⁵⁹⁴

The submission from the Immigrant Women’s Support Service argued that cl 84 should ‘be amended to stipulate that a person who has limited or no proficiency in English must be helped at a conciliation conference by a credentialed interpreter, while anyone who is not a credentialed interpreter should not assist communication in a conciliation conference due to potential conflict of interest, unequal power dynamics and lack of knowledge of legal terminology’.⁵⁹⁵

The submission from the QUT School of Law acknowledged that successful conciliation relies on the good faith participation of parties to the conciliation:

For many human rights issues, conciliation can be an effective means of dispute resolution. However, conciliation ultimately relies on the good faith participation of parties. The nature of human rights complaints tends to imply a power imbalance between the parties, and many complainants may already be from marginalised or disadvantaged groups. For these and other reasons, it may not always be possible for conciliation to lead to a resolution.

....

*Further, a complaint to a court or tribunal ought to be available without a requirement for conciliation to first be attempted in a situation of an imminent human rights risk. We make this suggestion because there may be circumstances where an act or decision of a public entity, or a proposed act or decision by an entity, creates a risk of a serious human rights violation. Rather than require a person to first complain to the Human Rights Commission and go through the conciliation process, it should be possible for a legal action to be taken which could prevent the materialisation of that risk to human rights. This would also recognise the fact that some breaches of human rights, particularly those characterised by violations of dignity, cannot easily be compensated for after they have occurred, and should be prevented wherever possible.*⁵⁹⁶

ALA was supportive of the complaints mechanism –

The ALA welcomes the provision in s64(1) for an individual who has been the subject of an alleged contravention of protected human rights to make a complaint to the Queensland Human Rights Commission (the Commission). The ALA also welcomes the provision for a human rights complaint that is accepted by the Commissioner to be referred to a conciliation conference (s79). As noted above, this is a significant advancement on the Charter and the ACT HRA.

But concerned about the absence of binding outcomes from the conciliation process:

The ALA notes that under s80, the purpose of conciliation of a human rights complaint is to promote the resolution of the complaint in an informal, quick and efficient manner. However, the ALA is concerned that the process of conciliation is deficient as there is no binding or clear outcome from a complaint being brought to the Commission. Even if the outcome of the conciliation is an acknowledgment by the respondent public entity that it has acted unlawfully under s58(1), there is no provision in the Bill that obliges the public entity, or gives powers to the Commission to compel the entity, to remedy the breach or provide some redress to the complainant.

⁵⁹⁴ Submission 90, p 8.

⁵⁹⁵ Submission 132, p 4.

⁵⁹⁶ Submission 89, pp 3-4.

The ALA notes that if the conciliation fails to resolve the complaint, the Bill states that the Commissioner must prepare a report about the complaint for the complainant and the respondent, which sets out the substance of the complaint and the actions taken to try and resolve the complaint (s88). The ALA submits that the Commissioner should have the power to direct a public entity to address the issues raised in the complaint that have been acknowledged by the respondent or which the Commissioner considers to have been substantiated.

The ALA is concerned that a complaints and conciliation process that does not provide for a clear or binding outcome, or provide for enforcement of the rights that are protected in the legislation, will result in individuals who allege human rights abuses losing confidence in the complaints and conciliation process and ultimately the Commission itself. This will undermine the role of the Commission and the ability of the Act to fulfil its main object as outlined in s 3.⁵⁹⁷

ICJ (Qld) supported the complaints process but was concerned in the event of an unsuccessful conciliation:

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

....

Further, ICJ Qld submits that additional mechanisms need to be included in the Bill in the event that the conciliation process does not resolve a dispute.

It must be remembered that many persons who seek to protect their human rights are often vulnerable and marginalised. They may not come to a conciliation process in an equal position of power (whether through knowledge, ability to communicate etc) to the sophisticated government respondent to their complaint. A lack of ability to enforce their rights before a judicial body if the conciliation fails puts a complainant in an even more vulnerable position. There is no incentive for a respondent to seek a consensual resolution of the dispute.

For any conciliation process to have the greatest chance to result in consensual resolution, there must exist an ability for a complainant to initiate proceedings before a judicial body, such as QCAT and/or the Supreme Court if the conciliation fails.⁵⁹⁸

Academics from UQ's TC Beirne School of Law expressed this concern about conciliation conferences:

Section 87 of the Bill rightly asserts that other legal rights cannot be compromised by participation in a conciliation conference. This is an important protection that should extend to agreements reached in conciliation conferences as the Bill currently does not create a cause of action. However, the Bill is silent on this protection.

We recommend the amendment of section 87 of the Bill to provide that no settlement agreement entered into in resolution of a human rights complaint is capable of limiting, excluding or releasing the parties from any legal rights, obligations or causes of action.⁵⁹⁹

CLCQ was concerned about the absence of binding outcomes from the conciliation process:

We are concerned the Bill's conciliation provisions do not deliver binding outcomes or provide for enforcement of the rights set out in the Bill in any way. Specifically, if a conciliation fails, the Bill merely provides that the Commissioner is required to prepare a report for the complainant and the respondent setting out the substance of the complaint and the actions taken to resolve the complaint.

⁵⁹⁷ Submission 24, pp 18-19.

⁵⁹⁸ Submission 105, pp 4-5.

⁵⁹⁹ Submission 39, p 3.

We believe where there is no binding or clear outcome from a complaint being brought to the Human Rights Commission, aggrieved individuals will be disincentivised from raising concerns about breaches of their human rights by public entities. This is particularly the case given the structural power imbalance that naturally exists between individuals (who have human rights) and public entities with significant power (including the coercive power of the State).⁶⁰⁰

Some submitters expressed concern about perceived ambiguities in respect of the right to representation during a conciliation conference.

CYDA noted, in respect of clause 83:

Under this clause, people may be represented by another person at the conciliation conference. CYDA understands from the Department of Justice and Attorney General Briefing Paper that this includes legal representation. CYDA is aware through feedback from young people with disability, families and advocates that the use of legal representation in similar circumstances by government departments and agencies can often undermine procedural fairness. Experiences reported to CYDA include government departments sending multiple lawyers to attend dispute resolution where the complainant was representing themselves. This is reported to CYDA as an incredibly intimidating experience which creates significant power imbalances. Many people undertaking the conciliation process will not have the resources to access legal representation.⁶⁰¹

The Office of the Public Guardian noted in respect of clauses 82 and 83:

Clause 82 – Attendance by complainant: The OPG supports the specific exceptions in clauses 82(a) and (b) for a child or a person with impaired capacity to the requirement that a person must attend a conciliation conference in person. However, while schedule 4 of the Guardianship and Administration Act 2000 (GAA) is noted in the context of a definition of impaired capacity, there is no mention of the role of a guardian in such proceedings. We believe it would be prudent to make specific reference to the provisions of the GAA regarding the presence of a guardian in such matters to provide guidance on this process.

Clause 83 – Representation: Clarification will be required as to whether the Commissioner's consent to representation by another person would extend to legal representation and/or a legal guardian. A further issue concerns the interaction between clauses 82 and 83, namely whether a person represented by another at a conciliation conference will still be required to attend in person as dictated by clause 82(1).⁶⁰²

2.7.6.3 Departmental response

The QHRC will have the discretion to allow a complainant to be legally represented at a conciliation conference.

A complainant must attend a conciliation conference in person unless they are a child or a person of impaired capacity, or if the commissioner consents to another person attending for the complainant.

The commissioner may give consent for the complainant to be represented at a conciliation conference if it is appropriate in the circumstances; the representation would help the conciliation and the representative has sufficient knowledge of matters relating to the complaint to effectively represent the complainant.

⁶⁰⁰ Submission 117, p 4.

⁶⁰¹ Submission 71, p 7.

⁶⁰² Submission 90, p 8.

The commissioner may give consent for a complainant to be represented subject to conditions the commissioner considers reasonable and may withdraw the consent if the conditions are not complied with.

This approach to legal representation is considered appropriate, as it is intended that conciliation is a relatively informal process where vulnerable parties are not disadvantaged by the formality of the proceedings.

In addition to a representative, a person may be helped at a conciliation conference by an interpreter, or another person necessary or desirable to make the conference intelligible to the person (for example, a person with appropriate cultural or social knowledge). (see clauses 82, 83, and 84).

The impact of any agreement made at a conciliation conference conducted by the QHRC under the HR Act on the legal rights of the parties will be determined by the nature and terms of the agreement. However, the Bill expressly provides (cl 87) that a person's participation in conciliation does not affect a right the person may have in relation to a contravention of section 58(1).

It is not intended to extend the complaints process to matters outside the scope of the HR Act.

Issues raised by submitters that are non-legislative in nature but may improve the disputes resolution process, will be raised with the QHRC, once established, for their consideration.⁶⁰³

2.7.7 Giving Information for complaints

2.7.7.1 Proposed law

Where the commission is making preliminary inquiries about a human rights complaint or dealing with such a complaint, the commissioner may, by notice to a relevant entity⁶⁰⁴ for the complaint, ask or direct the entity to give the commissioner information about the complaint within the reasonable period specified in the notice. The notice must state the purpose for the request. An entity is required to comply with a direction unless they have a reasonable excuse for failing to comply, such as, where compliance with the direction would require the entity to disclose information that is the subject of legal professional privilege. The commissioner may enforce a direction by filing a copy of it with a court of competent jurisdiction. The direction is then enforceable as if it were an order of that court.⁶⁰⁵

A person who gives information to the commissioner or another entity in relation to a human rights complaint is not liable, civilly, criminally or under an administrative process, for giving the information, provided they have acted honestly in giving that information. Also, the mere giving of the information is not grounds to find that the person has breached any code of professional etiquette or ethics, or departed from accepted standards of professional conduct.⁶⁰⁶

If the commissioner considers that the preservation of anonymity of a person involved with a complaint (whether as complainant, respondent or information provider) is necessary to protect the work security, privacy or any human right of the person, the commissioner may give a direction prohibiting the disclosure of information that identifies, or is likely to lead to the identification of, the person. Compliance with such a direction is mandatory, absent reasonable excuse for a failure to

⁶⁰³ Department of Justice and Attorney-General, correspondence dated 3 December 2018, attachment, pp 69-70.

⁶⁰⁴ A **relevant entity** for a human rights complaint means the complainant or respondent for the complaint, or another entity the commissioner considers has information relevant to the complaint in the entity's possession or control. (cl 78(9)).

⁶⁰⁵ Clause 78.

⁶⁰⁶ Clause 99.

comply. The maximum penalty for non-compliance is 35 penalty units for an individual, or 170 penalty units for a corporation.⁶⁰⁷

2.7.7.2 Issues raised in submissions – giving information for complaints

The Public Advocate discussed information seeking powers of the commission:

The Human Rights Commissioner has legislated powers to require further information from public entities in order to exercise the Commissioner’s complaints functions, however, the Commission’s functions go beyond dealing with human rights complaints. They have a more systemic function to ‘review public entities’ policies, programs, procedures, practices and services in relation to their compatibility with human rights’. This would require the Commission to obtain information from public entities when conducting such reviews, and given that such entities include service providers and contractors, they may not necessarily be cooperative in providing all relevant information unless compelled to do so.

The Bill should extend the information powers available to the Commissioner to apply to all functions of the Commission that may require information to be obtained, not simply its complaints functions. This would be similar to the scope of the information power given to the Public Advocate under the Guardianship and Administration Act.⁶⁰⁸

The ECCQ submitted:

Section 90 (2)(c) (Commissioner may publish information): ECCQ is pleased the protection of identity within this section has been included and this may encourage genuine complainants who might otherwise be reluctant to complain if their identity is published.

Section 99 (Giving of information protected) and Section 100 (Anonymity): These sections are strongly supported as they are particularly pertinent to many newly arrived settlers who are often reluctant to report complaints due to their experiences and fear of reprisal by authorities or offenders.⁶⁰⁹

2.7.7.3 Departmental response

The department’s response did not address the issue of information seeking powers.

2.7.8 Resolved and unresolved human rights complaints

2.7.8.1 Proposed law

Clause 88 requires the commissioner to prepare a report about a human rights complaint if the commissioner accepts the complaint for resolution and considers that the complaint has not been resolved by conciliation or otherwise:

Subclause (2) requires that the report is prepared as soon as practicable after the commissioner has finished dealing with the complaint.

Subclause (3) provides that the report must include:

- *the substance of the complaint (paragraph (a)); and*
- *the actions taken to try to resolve the complaint (paragraph (b)).*

⁶⁰⁷ Clause 100. The value of a penalty unit in Queensland as of January 2019 is \$130.55, with yearly increases for inflation from 1 July. See s 5A(1) *Penalties and Sentences Act 1992* and s 3 *Penalties and Sentences Regulation 2015*.

⁶⁰⁸ Submission 88, p 3.

⁶⁰⁹ Submission 152, p 2.

Subclause (4) provides that the report may include details of the action the commissioner considers should be taken by the respondent, to ensure its acts and decisions are compatible with human rights.

Subclause (5) requires the commissioner to give a copy of the report to the complainant and respondent.

*Subclause (6) provides that the report is not admissible in a proceeding in relation to a contravention of the Bill, unless the complainant and respondent agree.*⁶¹⁰

Clause 89 provides that if the commissioner considers that a human rights complaint has been resolved, the commissioner must, as soon as practicable after dealing with the complaint, give the complainant and respondent a notice stating the outcome of the resolution of the complaint and that the commissioner has finished dealing with the complaint.⁶¹¹

Clause 90 allows the commissioner to publish information about a human rights complaint that the commission has finished dealing with:

*Subclause (2) provides that the publication may include the substance of the complaint and may draw on information about the complaint contained in a report prepared under cl 88 or a notice given under cl 89 (paragraphs (a) and (b)). However, the publication must not include personal information about an individual unless the information has previously been published, or given for the purpose of publication, by the individual (paragraph (c)).*⁶¹²

2.7.8.2 Issues raised in submissions – resolved and unresolved human rights complaints

The submission from the BAQ noted that the powers of the QHRC to deal with an unresolved complaint are limited to reporting to the parties to the unresolved complaint, limited public reporting and annual reporting to the Attorney-General, with no provision for an unresolved complaint to be referred on, for example, to QCAT for determination and/or remedy.⁶¹³

CYDA observed that requirements placed on the commissioner in subclauses (2) and (5) of cl 88, to prepare a report and to provide a copy of the report, respectively, include a timeframe that utilises the words ‘as soon as practicable’.⁶¹⁴ It felt that the term ‘as soon as practicable’ lacks clarity: ‘Feedback from young people with disability and families indicates that the use of clear timeframes is critical to ensuring prompt action and providing certainty for all involved’.⁶¹⁵ CYDA recommended that ‘...cl 88 and cl 89 are amended to include clear timeframes for the provision of reports and notices to complainants and respondents’.⁶¹⁶

QLS commented that the requirement in cl 89 that the Commissioner must give notice to the human rights complainant and respondent that the complaint has been resolved is an important natural justice safeguard:

*This section should be amended to include that the notice to the human rights complainant and respondent that the complaint has been resolved must be provided in writing to the complainant to ensure accountability and support the complainant’s access to justice.*⁶¹⁷

⁶¹⁰ Explanatory notes, p 43.

⁶¹¹ Explanatory notes, p 43.

⁶¹² Explanatory notes, p 43.

⁶¹³ Submission 32, p 2.

⁶¹⁴ Submission 71, p 8.

⁶¹⁵ Submission 71, p 8.

⁶¹⁶ Submission 71, p 8.

⁶¹⁷ Submission 103, p 17.

The academics from UQ's TC Beirne School of Law suggested a number of reforms to enable meaningful monitoring, research and review of the complaint mechanism in particular:

First, section 90 should be amended to require the Commissioner to publish information concerning human rights complaints, subject to the existing exclusion of personal information under section 90(2)(c). Reporting all outcomes is also necessary for the development of a culture of human rights and to avoid inappropriate and unnecessary complaints from being made repeatedly. The requirement for monitoring and reporting should be extended to the implementation of agreed outcomes.

*Finally, the Commission should be required and appropriately resourced to maintain a searchable database of all Human Rights Act cases (as distinct from complaints). This database could be similar to the Charter Case Audit database hosted by the Law Institute of Victoria. It is unlikely that this sort of database could be created or managed by any existing Queensland institution or entity without specific funding.*⁶¹⁸

The TC Beirne School of Law academics also made the following recommendations:

We recommend that section 90 of the Bill be amended to replace all instances of the word 'may' with 'must'.

We recommend that [the] Bill be amended to impose an obligation on the Commissioner to contact complainants and respondents at a specified interval after agreements are reached, in order to monitor the implementation of agreed outcomes, and section 90 should be amended to provide for reporting on same.

*We recommend the Commission be required and resourced to maintain a searchable database of all Human Rights Act cases.*⁶¹⁹

Although supportive of the requirements for reporting and providing notice by the commissioner in clauses 89 and 90, the CLC considered that: '...the Commissioner should be required to publish a de-identified summary of all mediated matters in an easily searchable database of problems and outcomes'.⁶²⁰ It identified the Australian Human Rights Commission conciliation register as:

*...an excellent example of a simple to use register which manages to balance confidentiality with appropriate reporting. The AHRC has indicated the benefits of the register include assisting potential complaints to make decisions about options for resolving a complaint, increase the transparency of the conciliation process and assist people to prepare for conciliation 'by giving them information on how other similar matters have been resolved.' Such a register would ensure transparency and accountability and would also assist complainants to understand possible remedies and what to expect in mediation.*⁶²¹

2.7.8.3 Departmental response

*It is not intended to extend the complaints process to matters outside the scope of the HR Act. Issues raised by submitters that are non-legislative in nature but may improve the disputes resolution process, will be raised with the QHRC, once established, for their consideration.*⁶²²

⁶¹⁸ Submission 39, pp 4-5.

⁶¹⁹ Submission 39, p 5.

⁶²⁰ Submission 75, p 11.

⁶²¹ Submission 75, p 11.

⁶²² Department of Justice and Attorney General, correspondence dated 3 December 2018, attachment, p 70.

2.7.9 Reporting requirements

2.7.9.1 *Proposed law*

Clause 91 requires the commission to prepare an annual report for the Attorney-General on the operation of the HR Act as soon as practicable after the end of each financial year: 'This report will provide a resource for government, parliament and the community on the operationalisation of the HR Act and the degree to which it is achieving its objectives'.⁶²³

Subclause (2) sets out the following information that must be included in the annual report for the financial year:

- details of any examination of the interaction between the HR Act and other Acts, statutory instruments and the common law (paragraph (a))
- details of all declarations of incompatibility (paragraph (b))
- details of all override declarations (paragraph (c))
- details of all interventions by the Attorney-General or the commission under cl 50 or 51 (paragraph (d))
- the number of human rights complaints made or referred to the commissioner (paragraph (e))
- the outcome of human rights complaints accepted by the commissioner, including the numbers resolved and the number of conciliation conferences (paragraphs (f), (g) and (h))
- the number of public entities that were asked or directed to take part in a conciliation conference and the number that failed to comply with a direction to take part (paragraph (i)), and
- the number of human rights complaints received by particular public entities decided by the commissioner (paragraph (j)).⁶²⁴

The explanatory notes state that the report:

...may include other information that the commissioner considers appropriate and may include the names of public entities and details of action, mentioned in cl 88(4), relating to human rights complaints that have not been resolved (subcl (3)). However, the report must not include personal information about an individual unless the information has previously been published, or the information was given for the purpose of publication, by the individual (subcl (4)).

*Subclause (5) requires the commissioner to give the report to the Attorney-General as soon as practicable after it is prepared.*⁶²⁵

Clause 92 provides that the commissioner may report to the Attorney-General as required about any matter relevant to the performance of the commission's or the commissioner's functions under the Bill.

Clause 93 requires the commissioner to:

...provide a person with the opportunity to make submissions about any adverse comment which the commissioner proposes to make in a report about an unresolved human rights complaint (cl 88) or another report prepared under division 3 (subclauses (1) and (2)). If the person makes submissions and the commissioner still proposes to make the adverse comments, the

⁶²³ Explanatory notes, p 44.

⁶²⁴ Explanatory notes, p 44.

⁶²⁵ Explanatory notes, p 44.

commissioner must ensure that the person's submissions are fairly stated in the report (subcl (3)).

Subclause (4) provides that for cl 93, an adverse comment does not include a statement that a public entity did not participate in resolving a human rights complaint.⁶²⁶

The commission's annual report and reports prepared under cl 92 must be tabled by the Attorney-General (see cl 94).

2.7.9.2 Issues raised in submissions – reporting requirements

CYDA submitted that it appears the commissioner does not have the power to direct public entities to take action either as a part of, or separate to, the conciliation process:

Further, the Bill appears not to include any processes or consequences if public entities fail to implement actions they have agreed to during the conciliation process.

Without clear enforcement mechanisms and without clear consequences for failing to adhere to agreements made during conciliation, CYDA is of the view that this could limit incentives for public entities to change their practices.⁶²⁷

CYDA therefore recommended that:

...clause 91 is amended to include an obligation to include information regarding entities that have failed to adhere to actions agreed to during conciliation as part of reporting requirements.⁶²⁸

ECCQ stated that the content and detail of cl 91 appears comprehensive and is very much supported, and that:

The possibility of a data base of de-identified cases searchable in a variety of ways such as date, issue, etc. and placed on a website for public access is seen as a valuable addition with the recommendation that this material be kept up to date.⁶²⁹

Endeavour Foundation supported the requirement of the commission to prepare a report or notice of the outcome of human rights complaints, which it believed serves public transparency and will provide a small deterrent to human rights abuses: 'Combined with powers to obtain relevant information from public entities, the Human Rights Commissioner will be well situated to drive cultural change in Queensland'.⁶³⁰

PACT supported the proposed reporting requirements as outlined in clauses 91 to 94.⁶³¹

2.8 Amendment of legislation

Part 7 of the Bill provides for amendments of other legislation, including Acts, Regulations and Rules, in relation to the operation of the proposed Human Rights Act.

The Bill proposes to amend:

- *Anti-Discrimination Act 1991*
- *Corrective Services Act 2006*

⁶²⁶ Explanatory notes, pp 44-45.

⁶²⁷ Submission 71, p 8.

⁶²⁸ Submission 71, p 8.

⁶²⁹ Submission 152, p 2.

⁶³⁰ Submission 126, p 3.

⁶³¹ Submission 19, p 3.

- Corrective Services Regulation 2017
- *Disability Services Act 2006*
- *Family and Child Commission Act 2014*
- *Financial Accountability Act 2009*
- *Health Ombudsman Act 2013*
- *Industrial Relations Act 2016*
- Industrial Relations (Tribunals) Rules 2011
- *Information Privacy Act 2009*
- *Integrity Act 2009*
- *Ombudsman Act 2001*
- *Parliament of Queensland Act 2001*
- Prostitution Regulation 2014
- *Public Guardian Act 2014*
- Public Sector Ethics Regulation 2010
- *Public Service Act 2008*
- Public Service Regulation 2018
- Queensland Civil and Administrative Tribunal Rules 2009
- Statutory Bodies Financial Arrangements Regulation 2007
- *Statutory Instruments Act 1992*, and
- *Youth Justice Act 1992*.

2.8.1 Proposed amendments

Many of the proposed amendments are consequential and relate to the replacing of existing references to:

- the 'Anti-Discrimination Commission' with the 'Queensland Human Rights Commission', and
- the 'anti-discrimination commissioner' with the 'human rights commissioner'.

The remaining proposed amendments, some of which are also consequential, are:

- amendment of the *Anti-Discrimination Act 1991* (detailed below)
- amendment of the *Corrective Services Act 2006* (detailed below)
- clause 137 of the Bill amends s 63(1) of the *Financial Accountability Act 2009* to insert a note to the provision referring to s 97 of the proposed Human Rights Act for 'particular information relating to human rights that must be included in an annual report'⁶³²
- clause 160 inserts a new subsection in s 93 of the *Parliament of Queensland Act 2001* to reflect the responsibilities of the portfolio committee under the Bill, i.e. considering Bills, subordinate legislation and other laws and matters as required under the Bill, clauses 39 (Scrutiny of Bills

⁶³² Explanatory notes, p 51.

and statements of compatibility), 40 (Scrutiny of non-Queensland laws), and 57 (Action by portfolio committee on declaration of incompatibility)⁶³³

- clause 168 amends s 219A(3) of the *Public Service Act 2008* to insert a note to the provision which provides that details of customer complaints that are human rights complaints must, under s 97 of the HR Act, be included in the department's annual report,⁶³⁴ and
- amendment of the *Youth Justice Act 1992* (detailed below).

2.8.2 Amendment of *Anti-Discrimination Act 1991*

According to the explanatory notes, the Bill's proposed amendments to the *Anti-Discrimination Act 1991* are consequential in nature.⁶³⁵

In addition to updating terminology to refer to the proposed commission and commissioner, the amendments include:

- inserting various references to the proposed HR Act, in addition to existing references to the *Anti-Discrimination Act 1991*⁶³⁶
- clause 120 amends s 244 to replace references to 'power' with 'power or function'⁶³⁷
- clause 121 amends s 263C to replace the reference to 'post office box address' with 'post office box address or an email address',⁶³⁸ and
- clause 123 inserts a new chapter 11, part 6 in (ss 277 and 278) to insert transitional provisions that provide continuity for the commission and commissioner in the transition from being the Anti-Discrimination Commission to the Queensland Human Rights Commission.⁶³⁹

Additionally, cl 113 inserts a new s 140A to provide for dealing with a complaint under the proposed HR Act:

New section 140A provides that the commissioner may, with the consent of the complainant, deal with a complaint under the HR Act as an alleged contravention of the HR Act if the commissioner considers that a complaint made or referred to the commissioner under the Anti-Discrimination Act 1991 would be more appropriately dealt with as an alleged contravention of the HR Act.

Subclause (3) provides that, if the commissioner decides to deal with the complaint in this way, the complaint:

- *is taken to be a complaint about an alleged contravention of the HR Act that is accepted by the commissioner under s 76 (paragraph (a)); and*
- *is taken to be made on the day the complaint was made or referred under the Anti-Discrimination Act 1991 (paragraph (b)).*⁶⁴⁰

⁶³³ Explanatory notes, p 52.

⁶³⁴ Explanatory notes, p 53.

⁶³⁵ Explanatory notes, p 48.

⁶³⁶ Explanatory notes, pp 48-49.

⁶³⁷ Explanatory notes, p 49.

⁶³⁸ Explanatory notes, p 49.

⁶³⁹ Explanatory notes, p 49.

⁶⁴⁰ Explanatory notes, p 48. References to the 'HR Act' are references to the proposed Human Rights Act.

2.8.3 Amendment of *Corrective Services Act 2006* and *Youth Justice Act 1992*

Amendments to the *Youth Justice Act 1992* (YJA) and the *Corrective Services Act 2006* (CSA) are intended to:

...clarify that other factors, relevant to determining how to act or make a decision under the YJA or the CSA, may be taken into account in addition to human rights considerations under the Bill.

*The effect of the amendments to both the YJA and the CSA will mean that an act or decision made under these Acts, taking into consideration the additional factors, will not be unlawful under the HR Bill, only because these additional factors were considered.*⁶⁴¹

2.8.3.1 Proposed law

Clause 126 inserts a new s 5A in the CSA:

New section 5A(1) provides that section 5A applies to the chief executive's or a corrective services officer's consideration of section 30(2) of the HR Act in relation to a prisoner admitted to a corrective services facility for detention on remand or a prisoner detained without charge; or section 30 of the HR Act in relation to managing a prisoner in a corrective services facility where it is not practicable for the prisoner to be provided with the prisoner's own room under section 18.

New section 5A(2) provides that, to remove any doubt, it is declared that the chief executive or officer does not contravene section 58(1) of the HR Act⁶⁴² only because the chief executive's or officer's consideration takes into account:

- *the security and good management of corrective services facilities; or*
- *the safe custody and welfare of all prisoners.*⁶⁴³

Clause 183 inserts new subsections (7) and (8) in s 263 of the YJA:

New section 263(7) provides that subsection (8) applies in relation to the chief executive's consideration of:

- *section 30(2) of the HR Act in relation to a child detained in a detention centre on remand; and*
- *the segregation of a child mentioned in paragraph (a) from a child detained on sentence.*

New section 263(8) provides that, to remove any doubt, it is declared that the chief executive does not contravene cl 58(1) of the HR Act only because the chief executive's consideration takes into account:

- *the safety and wellbeing of the child on remand and other detainees (paragraph (a)); and*
- *the chief executive's responsibilities and obligations under section 263 (paragraph (b)).*

*The chief executive's responsibilities and obligations under existing section 263 include providing services that promote the health and wellbeing of children detained at the centre; maintaining the security and management of the centre; and ensuring certain principles of the Charter of youth justice principles under the Youth Justice Act 1992 are complied with.*⁶⁴⁴

⁶⁴¹ Explanatory notes, p 9.

⁶⁴² Clause 58(1) of the Bill provides that it is unlawful for a public entity to act or make a decision in a way that is not compatible with human rights.

⁶⁴³ Explanatory notes, pp 49-50.

⁶⁴⁴ Explanatory notes, p 54.

2.8.3.2 Issues raised in submissions – amendment of Corrective Services Act 2006 and Youth Justice Act 1992

In relation to the proposed amendments set out in Part 7 of the Bill, PACT stated that: ‘We appreciate the need to amend aspects of the identified existing Acts to ensure they reflect human rights considerations and are supportive of this legislative reform’.⁶⁴⁵

However, numerous submitters expressed views and concerns in relation to the amendments to the CSA and/or the YJA.⁶⁴⁶

The ALA expressed concern about the wording of cl 126 of the Bill, contending that ‘...new section 5A of the CSA will have the effect of diminishing the rights of prisoners who come within the circumstances detailed in section 5A(1)(a) and (b)’.⁶⁴⁷

It argued that under the current wording, the new s 5A(2) of the CSA may be interpreted in a fashion that will mean that:

*...prisoners that come within the circumstances of s5A(1)(a) and (b) will have their rights diminished, as decisions affecting their circumstances will not specifically be subject to human rights considerations in the same way as will be the case for other Queensland citizens.*⁶⁴⁸

The ALA recommended that the wording of the new s 5A(2) of the CSA be amended as follows:

- that the word ‘or’ at the end of s 5A(2)(a) be replaced with the word ‘and’ – so that the chief executive is compelled to consider the safe custody *and* the welfare of all prisoners when making decisions, and
- that the word ‘also’ be inserted into s 5A(2) after the word ‘consideration’- so that the chief executive or officer does not contravene cl 58(1) ‘only because the chief executive’s or officer’s consideration *also* takes into account’ the factors listed in (2)(a) and (b), *together with* the factors in cl 13 of the Bill.⁶⁴⁹

CLCQ made similar recommendations.⁶⁵⁰

The ALA expressed similar concern in relation to the amendments to the YJA, asserting that, as the new s 263 currently reads: ‘...the effect will be to diminish the rights of child detainees who come within the circumstances detailed in s 263(7)(a) and (b)’.⁶⁵¹

It suggested that:

*...the word ‘also’ should be inserted in cl 263(8) after the word ‘consideration’, to ensure that the chief executive does not contravene cl 58(1) ‘only because the chief executive’s consideration also takes into account the factors listed in (8) (a) and (b) together with the factors in cl 13 of the Bill.*⁶⁵²

However, CLCQ did not share the same concerns, noting that proposed amendments to the YJA are:

...limited only to the chief executive, which can be specifically and clearly delegated (such that the exemption is much more narrowly applied) We also appreciate there are instances in which

⁶⁴⁵ Submission 19, p 3.

⁶⁴⁶ Including submissions 24, 31, 32, 41, 67, 69, 75, 76, 90, 91, 93, 101, 103, 117 and 127.

⁶⁴⁷ Submission 24, p 20.

⁶⁴⁸ Submission 24, p 21.

⁶⁴⁹ Submission 24, p 21. Clause 13 includes the proposed general human rights limitation.

⁶⁵⁰ Submission 117, pp 5-6.

⁶⁵¹ Submission 24, p 22.

⁶⁵² Submission 24, p 22.

*it is appropriate to segregate children for their own protection, such as separating younger offenders from older offenders. However... the Bill should be amended to provide that detention is a last resort for children, as set out in article 37 of the Convention on the Rights of the Child, which is otherwise incorporated into the Bill.*⁶⁵³

QNMU submitted that proposed s 5A(2)(b) of the CSA should be extended to allow consideration of safe custody and welfare of all prisoners, '...staff, visitors and volunteers'.⁶⁵⁴

The BAQ opposed the amendments to the CSA and YJA, submitting that cl 13 (the general limitations provision) already permits relevant decision-makers to consider these factors:

*The Association is of the view that the proposed amendments are thus effectively unnecessary. Their inclusion might provide a false impression that relevant decision-makers are not subject to the same human rights obligations as other public entities or that, unlike the other human rights provided by the Queensland Bill, the right of humane treatment when deprived of liberty provided by cl 30 is especially qualified and lessened. Their inclusion might also set an unnecessary and unfortunate precedent for further such qualifications of other human rights in the future. The Association is of the view that these clauses should be removed.*⁶⁵⁵

QCCL also submitted that cl 13 of the Bill was sufficient, but that if the amendments were to remain, they should be subject to a sunset clause:

We understand, that both these provisions are designed to deal with particular difficulties facing the government at the current time. Section 183 deals with the need to segregate some children in detention centres and section 126 is to deal with the current overcrowding in prisons.

We accept that the government has some difficulties in these areas. The argument has been put, that if these provisions do not exist, the government will have no choice but to build more prisons. We would certainly not want that result.

Having said all that, it seems to us that the factors which these provisions allow the relevant decision makers to take into account, are fully accommodated in section 13 of the Bill. For that reason, our starting point is that the specific provisions are unnecessary. Having said that, we acknowledge that these provisions are narrowly tailored.

*However, if they are to remain, it is our submission that the committee should recommend that the sections be limited to a specific time period by a sunset clause and that the government should commit itself to a clear program for overcoming the issues which have made these provisions necessary during that period of time.*⁶⁵⁶

Similarly, YAC supported a sunset date for the proposed amendments to the YJA:

*...we note the exemption in relation to the segregation of children on remand from those who are on sentence. We would have preferred to see a sunset clause on this provision and in its absence, the first Review must consider the need for segregation to occur as a priority.*⁶⁵⁷

In relation to the amendments, HRLC stated that neither Victoria nor the ACT have created similar carve outs for corrections or youth justice:

⁶⁵³ Submission 117, p 6.

⁶⁵⁴ Submission 31, pp 8-9.

⁶⁵⁵ Submission 32, p 4.

⁶⁵⁶ Submission 93, p 2.

⁶⁵⁷ Submission 41, p 6.

On the contrary, a human rights framework has assisted both jurisdictions to improve their practice. This framework recognises that governments can limit human rights but only in a manner which is reasonable and demonstrably justified.

The proposed youth justice and corrections exemptions in the Bill would undermine this framework. While it is very difficult to predict how a court would interpret the clauses given it is unclear what they intend to do, there is a real risk that a court might rule that normal human rights considerations are significantly limited or excluded in the relevant prescribed contexts, seriously undermining human rights in those contexts.⁶⁵⁸

HRLC suggested the amendments be removed, or if they remain, be redrafted so that the decision maker must also take into account the safe custody and welfare of all prisoners when considering the security and good management of corrective services facilities.⁶⁵⁹

Other submitters who objected to the amendments to the CSA and/or YJA, included:

- ALHR, QAC, QLS and Sisters Inside, who considered that the amendments are not necessary and/or appropriate, due to cl 13⁶⁶⁰
- CLC, who submitted that the amendments should be removed to avoid the erosion of rights of prisoners, or, alternatively, should be time-limited, and⁶⁶¹
- QFCC, who recommended ‘...clear policy and procedural frameworks be established for chief executive decision making in the best interests of the child’.⁶⁶²

2.8.3.3 Departmental response

In response to issues raised in submissions, DJAG advised that:

The Bill proposes to amend the YJA and the CSA to clarify that other factors, relevant to determining how to act or make a decision under the YJA or the CSA, may be taken into account in addition to human rights considerations under the Bill.

The intended effect of the amendments to both the YJA and the CSA is that an act or decision made under these Acts, taking into consideration the additional factors, will not be unlawful under the HR Bill, only because these additional factors were considered.

The submissions indicating a view that the amendments are not necessary in light of cl 13 (the general limitations provision) in the Bill are noted.

The specific recommendations to amend the drafting of the proposed amendments to the CSA and the YJA contained in clauses 126 and 183 of the Bill will be further considered.

The first review of the HR Act requires consideration of the amendments to the YJA and CSA (see cl 95(4)) and in particular whether the amendments are operating effectively, or further or different provision should be made for the interrelationship between this Act and those Acts.⁶⁶³

2.9 Stakeholder views on expanding human rights protected by the Bill

Numerous submitters sought to expand the scope and type of human rights protected under the Bill.

⁶⁵⁸ Submission 101, pp 10-11.

⁶⁵⁹ Submission 101, p 11.

⁶⁶⁰ Submission 91, p 9; submission 76, p 9; submission 103, p 8; and submission 127 p 3, respectively.

⁶⁶¹ Submission 75, p 3.

⁶⁶² Submission 120, pp 7-8.

⁶⁶³ Department of Justice and Attorney General, correspondence dated 3 December 2018, attachment, p 74.

2.9.1 Issues raised in submissions

Submissions sought to include:

- all economic, social and cultural rights in the ICESCR⁶⁶⁴
- all rights in the ICESCR⁶⁶⁵
- all rights in the ICCPR⁶⁶⁶
- additional rights from the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)⁶⁶⁷
- principles of the UDHR in its entirety⁶⁶⁸
- all of the human rights prescribed by the international covenants and conventions to which Australia is a signatory, in particular:
 - the right to work
 - the right to just and favourable conditions of work
 - the right to social security
 - the right to an adequate standard of living
 - the right to enjoy the highest attainable standard of physical and mental health, and
 - the right to take part in cultural life and benefit from scientific progress⁶⁶⁹
- the Convention on the Rights of Persons with Disabilities⁶⁷⁰
- Articles 37 and 40 of the United Nations Convention on the Rights of the Child (UNCRC) to protect children from corporal punishment and to protect children in the penal system⁶⁷¹
- the Yogyakarta Principles in the meaning of human rights in cl 12 of the Bill⁶⁷²
- the right to a healthy environment⁶⁷³
- rights of victims (see this report at 2.4.18.4)
- workplace rights, including specific rights for public servants⁶⁷⁴

⁶⁶⁴ Dr Julie Debeljak, submission 14, CCHRL, submission 26, and Griffith Law School, submission 116.

⁶⁶⁵ Civil Liberties Australia, submission 57; HRLC, Submission 101 and EDO, submission 122.

⁶⁶⁶ EDO, submission 122.

⁶⁶⁷ CLCQ, submission 117 and Respect Inc and Scarlet Alliance, submission 137.

⁶⁶⁸ Name suppressed, submission 5.

⁶⁶⁹ AIA, submission 69.

⁶⁷⁰ John Tracey, submission 83.

⁶⁷¹ Dr Julie Debeljak, submission 14 and CCHRL, submission 26.

⁶⁷² LGBTI Legal Service Inc, submission, 131. The Yogyakarta Principles recast existing international human rights law in a manner that ensure these rights are more inclusive of concepts of sex and gender.

⁶⁷³ Form Submissions B and C; and submissions - Dr Geralyn McCarron, submission 4, Shay Dougall, submission 9, Jennifer Faulkner, submission 17, Lock the Gate Alliance, submission 108, Pat Coleman, submission 109, Griffith Law School, submission 116, CLCQ, submission 117 and EDO, submission 122.

⁶⁷⁴ Don Willis, submission 10, ILGG research group, submission 89, United Voice, submission 113 and QCU, submission 119.

- all human rights, and⁶⁷⁵
- other specific rights, including:
 - the right to self-determination⁶⁷⁶
 - the right to education on human rights⁶⁷⁷
 - procedural rights⁶⁷⁸
 - the right to protection from domestic and family violence⁶⁷⁹
 - the rights of trans and gender diverse people⁶⁸⁰
 - the right to housing⁶⁸¹
 - rights of people with disability or mental illness⁶⁸²
 - rights of older persons and persons with disabilities, particularly the right to participate in decisions which affect them⁶⁸³
 - access to palliative care and appropriate pain relief⁶⁸⁴
 - rights of older persons in aged care, and a right to freedom from violence, abuse and neglect⁶⁸⁵
 - protection from the reversal of the onus of proof in criminal proceedings, search or seizure without a warrant or being compelled to provide information to a government body⁶⁸⁶
 - protection against unlawful Indigenous incarceration⁶⁸⁷
 - compensation for miscarriages of justice/wrongful conviction⁶⁸⁸
 - right to an adequate standard of living, including adequate housing, food and water⁶⁸⁹
 - right to freedom from violence, abuse and neglect⁶⁹⁰
 - right to autonomy and independence⁶⁹¹

⁶⁷⁵ Derek Sheppard, submission 99.

⁶⁷⁶ QCOS, submission 84 and Indigenous Lawyers Association of Queensland Inc, submission 137.

⁶⁷⁷ Dr Phillips and Professor Renshaw, submission 82.

⁶⁷⁸ EDO, submission 122.

⁶⁷⁹ AASW, submission 40.

⁶⁸⁰ AASW, submission 40.

⁶⁸¹ TCLS, submission 35, AASW, submission 40, QLS, submission 103, Dr Jones and Dr Patrick, submission 104, Griffith Law School, submission 116, CLCQ, submission 117 and Sisters Inside Inc, submission 127.

⁶⁸² CYDA, submission 71, RANZCP, submission 85 and Office of the Public Guardian, submission 90.

⁶⁸³ Jennifer Faulkner, submission 17 and ILGG research group, submission 89.

⁶⁸⁴ Palliative Care Queensland, submission 86.

⁶⁸⁵ Caxton Legal Centre, submission 75.

⁶⁸⁶ Luke Geurtsen, submission 62.

⁶⁸⁷ Michael O'Keefe, submission 81.

⁶⁸⁸ Michael O'Keefe, submission 81 and Chris Jenkinson, submission 100.

⁶⁸⁹ TCLS, submission 35, ILGG research group, submission 89 and Griffith Law School, submission 116.

⁶⁹⁰ TCLS, submissions 35, WLSQ, submission 36 and QLS, submission 103.

⁶⁹¹ TCLS, submission 35.

- right to legal assistance⁶⁹²
- right to adequate food and clothing⁶⁹³
- right to judicial hearing and legal representation⁶⁹⁴
- right to overturn a wrongful conviction⁶⁹⁵
- right of a person to live free from gender based violence⁶⁹⁶
- cultural rights of Australian South Sea Islanders⁶⁹⁷
- rights of twins and higher order multiples, and⁶⁹⁸
- rights of LGBTQIP people to ensure they are not discriminated against.⁶⁹⁹

2.9.2 Departmental response

In response to issues raised in submissions, DJAG advised that:

Like the Charter of Human Rights and Responsibilities Act 2006 (Victorian Charter), the rights in the Bill are primarily drawn from the International Covenant on Civil and Political Rights (ICCPR).

The protection of civil and political rights is often the first step in human rights Acts, therefore human rights legislation usually protect a common selection of those rights enumerated in the ICCPR. Many of the civil and political rights in the ICCPR are also recognised as important common law rights (such as the right to liberty and security).

The Bill goes beyond the Victorian Charter by including the rights to health services and education drawn from the International Covenant on Economic, Social and Cultural Rights, and a stand-alone provision recognising the cultural rights of Aboriginal peoples and Torres Strait Islander peoples, which is informed by provisions in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).

Clause 12 clarifies that the human rights included in the Bill are in addition to other rights and freedoms included in other laws, for example rights and freedoms included in the common law, a law of the Commonwealth, or under international conventions. These existing rights and freedoms should not be taken to be abrogated or limited only because they are not included in the Bill.

The first review of the operation of the Human Rights Act (HR Act), as soon as practicable after 1 July 2023, and the further review of the Act, must include consideration of whether additional human rights should be included under the Act.⁷⁰⁰

In response to submissions which sought the inclusion of the right to a healthy environment, DJAG advised that:

⁶⁹² WLSQ, submission 36.

⁶⁹³ Civil Liberties Australia, submission 57.

⁶⁹⁴ Micah Projects, submission 96.

⁶⁹⁵ Griffith Law School, submission 116.

⁶⁹⁶ Griffith Law School, submission 116.

⁶⁹⁷ Griffith Law School, submission 116.

⁶⁹⁸ Sandy Horwood, submission 28.

⁶⁹⁹ Julian Gallimore, submission 20.

⁷⁰⁰ Department of Justice and Attorney General, correspondence dated 3 December 2018, attachment, pp 14-15, in response to submissions 5, 14, 57, 69, 83, 99, 101, 116, 117, 122, 131 and 137.

While based closely on the Victorian Charter the Bill includes some modest additions including the distinct cultural rights of Aboriginal Peoples and Torres Strait Islander Peoples and the right to Health Services and the right to Education.

*The first review of the operation of the Human Rights Act (HR Act), as soon as practicable after 1 July 2023, and the further review of the Act, must include consideration of whether additional human rights should be included under the Act.*⁷⁰¹

In response to submissions which sought the inclusion of workplace rights, DJAG advised that:

Clause 12 clarifies that the human rights included in the Bill are in addition to other rights and freedoms included in other laws. This means that existing rights in legislation such as the Industrial Relations Act 2016, the Work Health and Safety Act 2011 and the Anti-Discrimination Act 1991 will continue to be protected.

*The first review of the operation of the Human Rights Act (HR Act), as soon as practicable after 1 July 2023, and the further review of the Act, must include consideration of whether additional human rights should be included under the Act.*⁷⁰²

In response to submissions which sought the inclusion of specific workplace rights for public servants, DJAG advised that:

*Clause 23 of the Bill provides the right to take part in public life, including the right for every eligible person to have the opportunity, without discrimination to have access, on general terms of equality, to the public service and to public office (cl 23(2)(b)). In the case of *Hermoza v Peru*, a member of the UN Human Rights Committee observed that suspension and discharge of someone arbitrarily, from public service and refusal to reinstate was a violation of the person's right under the equivalent provision in the Convention (i.e. article 25(c) of the ICCPR).*⁷⁰³

In response to submissions which sought the inclusion of other specific rights, DJAG advised that:

...the Bill primarily seeks to protect a selection of fundamental civil and political rights drawn from the ICCPR. The protection of these civil and political rights is often a first step in human rights legislation.

These rights are in addition to other rights and freedoms included in other laws, for example rights and freedoms included in the common law, a law of the Commonwealth, or under international conventions. These existing rights and freedoms are not abrogated or limited only because they are not included in the Bill.

With the exception of the right for children in the criminal process and cultural rights for Aboriginal peoples and Torres Strait Islander peoples, the Bill does not contain specific rights for groups of people, nor are particular groups of people, such as women, people with a disability, victims of crime or others specifically named. The Bill does however include the right to recognition and equality before the law and this right to equality permeates all human rights in the Bill.

*The first review of the operation of the HR Act, as soon as practicable after 1 July 2023, and the further review of the Act, must include consideration of whether additional human rights should be included under the Act.*⁷⁰⁴

⁷⁰¹ Department of Justice and Attorney General, correspondence dated 3 December 2018, attachment, p 16.

⁷⁰² Department of Justice and Attorney General, correspondence dated 3 December 2018, attachment, p 20.

⁷⁰³ Department of Justice and Attorney General, correspondence dated 3 December 2018, attachment, pp 20-21.

⁷⁰⁴ Department of Justice and Attorney General, correspondence dated 3 December 2018, attachment, pp 21-22.

3 Compliance with the *Legislative Standards Act 1992*

3.1 Fundamental legislative principles

Section 4 of the *Legislative Standards Act 1992* (LSA) states that ‘fundamental legislative principles’ are the ‘principles relating to legislation that underlie a parliamentary democracy based on the rule of law’. The principles include that legislation has sufficient regard to:

- the rights and liberties of individuals, and
- the institution of Parliament.

The committee has examined the application of the fundamental legislative principles (FLPs) to the Bill. The committee brings the following to the attention of the Legislative Assembly.

3.1.1 Rights and liberties of individuals

Section 4(2)(a) of the LSA requires that legislation has sufficient regard to the rights and liberties of individuals.

3.1.1.1 *Immunity from proceedings*

Clause 99 applies where a person, acting honestly, gives information under the proposed HR Act to the commissioner or another entity in relation to a human rights complaint. The clause provides that such a person is not liable - civilly, criminally or under an administrative process - for giving the information.

Further, the person cannot, by the mere giving of the information, be held to have breached any code of professional ethics or departed from accepted standards of professional conduct.

Clause 122 extends the scope of the existing immunity provision in s 265 of the *Anti-Discrimination Act 1991*. Section 265 currently gives to the commissioner and commission staff immunity from civil action for any honest act or omission in the performance (or purported performance) of functions or powers under the *Anti-Discrimination Act 1991*. Any liability that would otherwise arise in the absence of this immunity attaches instead to the State. Clause 122 extends this immunity to apply to acts done in exercise of the powers and functions conferred under the Bill.

Generally, legislation should not confer immunity from proceeding or prosecution without adequate justification.⁷⁰⁵ The OQPC Notebook states:

*... a person who commits a wrong when acting without authority should not be granted immunity. Generally a provision attempting to protect an entity from liability should not extend to liability for dishonesty or negligence. The entity should remain liable for damage caused by the dishonesty or negligence of itself, its officers and employees. The preferred provision provides immunity for action done honestly and without negligence ... and if liability is removed it is usually shifted to the State.*⁷⁰⁶

Committee comment

The committee notes that immunity clauses such as the above are quite common in legislation. They generally serve to allow public servants, officials, statutory officers and the like, to make decisions and exercise powers and functions without being unduly concerned that they may be held personally liable for acts done or omissions made in the course of carrying out their duties (providing that those actions or omissions are made honestly and without negligence or malice).

The explanatory notes make no reference to this FLP issue.

⁷⁰⁵ Legislative Standards Act 1992, s 4(3)(h).

⁷⁰⁶ Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: The OQPC Notebook*, p 64.

The committee notes that the shifting of liability to the State for actions or omissions of officials means aggrieved persons are able to make a claim against the State for loss or damage suffered as a result of actions taken by officials under the proposed HR Act. This is a feature of the cl 122 immunity, but is absent from the cl 99 provision.

Both provisions are predicated on a person acting honestly. There is no requirement for the action to be done without negligence. The OQPC notebook states:

*The preferred provision provides immunity for action done honestly and without negligence ... and if liability is removed it is usually shifted to the State.*⁷⁰⁷

The committee considers that the Bill's immunity provisions are adequately justified in the circumstances.

3.1.2 Institution of Parliament

Section 4(2)(b) of the LSA requires legislation to have sufficient regard to the institution of Parliament.

3.1.2.1 *Delegation of legislative power*

Clause 9(1) provides for the meaning of the term 'public entity'. It sets out a number of specific bodies, classes of bodies, and individuals who are to be 'public entities'. Clause 9(1)(j) provides that the term includes 'an entity prescribed by regulation to be a public entity'.

Clause 9(4) sets out some bodies that are not included in the term 'public entity'. Clause 9(4)(c) provides that the term does not include 'an entity prescribed by regulation not to be a public entity'.

Clause 105 confers a regulation-making power. It is in these very wide and general terms: 'The Governor in Council may make regulations under this Act'.

Section 4(4) of the LSA provides that whether a bill has sufficient regard to the institution of Parliament depends on whether, for example, the bill:

- (a) allows the delegation of legislative power only in appropriate cases and to appropriate persons; and
- (c) authorises the amendment of an Act only by another Act.

The Office of the Queensland Parliamentary Counsel's notebook regarding fundamental legislative principles states:

This matter is concerned with the level at which delegated legislative power is used.

*The greater the level of political interference with individual rights and liberties, or the institution of Parliament, the greater the likelihood that the power should be prescribed in an Act of Parliament and not delegated below Parliament.*⁷⁰⁸

Committee comment

In considering cl 9, it can be noted that, in relation to lists set out in a statute being able to be varied by regulation, the notebook states:

It is often convenient to insert in an Act a list of matters to which the Act relates together with a power to insert more by a statutory instrument, for example, a regulation. The effect is to delegate to an entity other than Parliament a power to change the application or effect of the legislation. This obviously gives rise to issues about the institution of Parliament. Good reasons

⁷⁰⁷ Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: The OQPC Notebook*, p 64.

⁷⁰⁸ Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: The OQPC Notebook*, p 145.

*are therefore required to include the power, for example, the impracticality of listing everything in the Act and safety concerns if the ability to add is not included.*⁷⁰⁹

Such an approach has caused committees to be more particularly concerned: ‘...when relevant powers in the legislation would mean that any addition to a pivotal list by statutory instrument would have far reaching consequences’.⁷¹⁰

In relation to cl 105, the breadth of the provision raises the possibility that it might be regarded as a ‘Henry VIII clause’. Such clauses have been criticised by Parliamentary committees on the basis that they inappropriately authorise changes to the application of legislation by means of regulation.⁷¹¹

The explanatory notes make no comment on these FLP issues.

The committee notes that any regulation that might be made under these clauses is subject to scrutiny of the Parliament though the disallowance procedure.⁷¹²

The committee considers that, on balance, the proposed delegation of legislative power is appropriate and the clauses thus have sufficient regard to the institution of Parliament.

3.2 Explanatory notes

Part 4 of the LSA requires that an explanatory note be circulated when a bill is introduced into the Legislative Assembly, and sets out the information an explanatory note should contain. Explanatory notes were tabled with the introduction of the Bill. The notes are fairly detailed and contain the information required by Part 4 and a reasonable level of background information and commentary to facilitate understanding of the Bill’s aims and origins.

However the committee notes that, under the heading ‘Consistency with fundamental legislative principles’ the following statement appears: ‘The Bill is generally consistent with fundamental legislative principles’.⁷¹³

Such an imprecise statement as ‘generally consistent’ implies that the Bill is not wholly consistent with the FLPs. In this respect, the statement does not meet the requirement in section 23(1)(f) of the LSA that explanatory notes for a bill include:

[A] brief assessment of the consistency of the Bill with fundamental legislative principles and, if it is inconsistent with fundamental legislative principles, the reasons for the inconsistency.

To comply with this statutory requirement, the committee notes that explanatory notes should either state that a bill is consistent with fundamental legislative principles, or set out any areas of inconsistency, with reasons for any inconsistency.

⁷⁰⁹ Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: The OQPC Notebook*, p 148.

⁷¹⁰ Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: The OQPC Notebook*, p 148.

⁷¹¹ See the discussion in the Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: The OQPC Notebook* at pp 159-161 and the Scrutiny of Legislation Committee’s report *The Use of “Henry VIII Clauses” in Queensland Legislation*, January 1997.

⁷¹² See s 50 of the *Statutory Instruments Act 1992*.

⁷¹³ Explanatory notes, p 10.

Appendix A – Submitters

Sub #	Submitter
001	Sara Davies
002	Holly Acquisto
003	Gillian Hall
004	Geralyn McCarron
005	Name suppressed
006	Odin’s Warriors Motorcycle Club Australia
007	Marcel Reverter-Rambaldi
008	Professor George Williams AO and Dr Janina Boughey
009	Shay Dougall
010	Don Willis
011	Bill Tait
012	Phil Browne
013	David Solomon
014	Dr Julie Debeljak
015	Ann Kreger
016	Kim Graham
017	Jennifer Faulkner
018	Disability Law Queensland Limited
019	Protect All Children Today Inc.
020	Julian Gallimore
021	Rodney Crisp
022	Steve Clancy
023	Confidential
024	Australian Lawyers Alliance
025	Law Right
026	Castan Centre for Human Rights Law, Monash University

- 027 Grace Field
- 028 Sandy Horwood
- 028 Sandy Horwood – Supplementary
- 029 Christine Hodgkinson
- 030 Scott James
- 031 Queensland Nurses & Midwives’ Union
- 032 Bar Association of Queensland
- 033 Local Government Association of Queensland
- 034 Office of the Information Commissioner
- 035 Townsville Community Legal Service Inc
- 036 Women’s Legal Service Inc
- 037 Cairns Community Legal Centre Inc
- 038 Eric Raymond
- 039 Joint University of Queensland Law Academics, TC Beirne School of Law
- 040 Australian Association of Social Workers – Queensland Branch
- 041 Youth Advocacy Centre
- 042 Hon. Matt Foley
- 043 Dr Timothy Coyle
- 044 A Human Rights Act for Queensland
- 045 Christopher Merans
- 046 Professor Heather Douglas
- 047 Rev. Stefan Slucki
- 048 Em. Professor Colin Apelt
- 049 Brenton Hall
- 050 Unborn Children’s Advocacy Network
- 051 knowmore
- 052 Alison Courtice
- 053 Julia Mizuno

054	Hannah Berardi
055	Name suppressed
056	Bulimba Electorate Youth Advisory Panel
057	Civil Liberties Australia
058	Amnesty International Australia – Queensland Branch and Northern New South Wales Branch Committee
059	Catholic Women’s League State of Queensland
060	Russell Wattie
061	Michelle O’Flynn
062	Luke Geurtsen
063	Student Engagement, Learning & Behaviour Research Group, Faculty of Education, QUT
064	Fair Go for Queensland Women
065	Townsville Amnesty International Action Group
066	Professor Tamara Walsh, Bridget Burton, Dr Rhonda Faragher, Dr Glenys Mann
067	People with Disability Australia
068	Australian Christian Legal Society Ltd
069	Amnesty International Australia
070	True – Relationship & Reproductive Health
071	Children and Young People with Disability Australia
072	Office of the Health Ombudsman
073	All Means All
074	Uniting Church in Australia – Queensland Synod
075	Caxton Legal Centre
076	Queensland Advocacy Incorporated
077	Eugene White
078	Jaime Hungerford-Morgan
079	Ian Joyner
080	Anti-Discrimination Commission Queensland

- 081 Michael O’Keefe
- 082 Dr Louise Phillips and Professor Peter Renshaw
- 083 John Tracey
- 084 Queensland Council of Social Service Ltd
- 085 The Royal Australian & New Zealand College of Psychiatrists – Queensland Branch
- 086 Palliative Care Queensland
- 087 Petros Khalesirad
- 088 The Public Advocate
- 089 Dr Bridget Lewis, Dr Hope Johnson and John O’Brien – QUT Faculty of Law’s International Law and Global Governance research program
- 090 Office of the Public Guardian
- 091 Australian Lawyers for Human Rights
- 092 PeakCare Queensland Inc
- 093 Queensland Council for Civil Liberties
- 094 Mental Health Commissioner
- 095 Dr Robyn Holder
- 096 Micah Projects
- 097 Queensland Collective for Inclusive Education
- 098 Graham Preston
- 099 Derek Sheppard
- 100 Chris Jenkinson
- 101 Human Rights Law Centre
- 102 Dr Benedict Coxon
- 103 Queensland Law Society
- 104 Dr Nicky Jones and Dr Jeremy Patrick
- 105 International Commission of Jurists Qld Branch
- 106 Australian Christian Lobby
- 107 Professor Nicholas Aroney and Professor Richard Ekins

108	Lock the Gate Alliance
109	Pat Coleman
110	Cherish Life Queensland
111	Andrea Gray
112	The Australian Family Association
113	United Voice
114	Women’s International League for Peace and Freedom – Australian Section
115	Sarah Ann Newman
116	Griffith Law School
117	Community Legal Centres Queensland
118	United Nations Association of Australia Queensland
119	Queensland Council of Unions
120	Queensland Family and Child Commission
121	Victorian Ombudsman
122	Environmental Defenders Office (Qld) Inc.
123	ANTar Q Inc
124	Spinal Life Australia
125	Bravehearts Foundation
126	Endeavour Foundation
127	Sisters Inside Inc.
128	Aboriginal & Torres Strait Islander Legal Service (Qld) Ltd
129	Legal Aid Queensland
130	yourtown
131	LGBTI Legal Service Inc.
132	Immigrant Women’s Support Service
133	UNICEF Australia
134	AgForce Queensland
135	Health Consumers Queensland

- 136 Respect Inc. and Scarlet Alliance
- 137 Indigenous Lawyers Association of Queensland Inc.
- 138 Lindsay Stevenson-Graf and Narelle Bedford
- 139 Monique Bond
- 140 Catherine Collins
- 141 Janelle Maree
- 142 Queensland Teachers' Union
- 143 Maggie Travers
- 144 Luke Grayson
- 145 Brisbane North Community Legal Service
- 146 Brad Byquar
- 147 Form A Submissions and Variants
- 148 Form B Submissions
- 149 Form C Submissions and Variant
- 150 Form D Submissions
- 151 Queensland Integrity Commissioner
- 152 Ethnic Communities Council of Queensland
- 153 Court Network, PACT and Queensland Homicide Victims' Support Group (joint submission)

FORM A Submissions

- Alani Tenaglia
- Alex Skinner
- Amanda Whittington
- Andy Studwick
- Angela Boyd
- Anita Wilson
- Anna Voss
- Annie Humphries
- Brett Jones
- Canice Curtis
- Carrie Halling
- Cassie Crosby
- Catherine Longworth
- Cheryl Viellaris
- Chin Yeung
- Jonathon Peter
- Jonathon Woodgate
- Josey McMahon
- Josh Dutrow
- Judith Griffith
- Julie McGlone
- Karen Cate
- Karla Petersen
- Kate Costigan
- Kelly Lawn
- Koni Hanlon
- Laura Ridley
- Lynn Kennedy
- Malcolm Campbell
- Marc Uccello

- Chris Connors
- Christine Haydock
- Damian James
- Darryl Nelson
- David Dill
- Deidre Davies
- Diane Bos
- Dioala Crompton
- Douglas Turnbull
- Elizabeth Slowey
- Emma Scott
- Fotini Hardy
- Friederike Robinson
- Gaby Heuft
- Gary Rafferty
- Grace Stevenson
- Helen Fogarty
- Ildi Putnoki
- Ilona Wildauer
- India de Vienne
- Iqbal Khan
- Ivy Reynolds
- Jackie Chen
- Jaki Daley
- Jamie Blake
- Jessica Stibbard
- Margaret Ferguson
- Margaret Woodgate
- Marisha Tuialii
- Martin Knox
- Monica Mesch
- Naomi Paerau
- Natasha Hayes
- Nicholas Kautai
- Paul Toner
- Peter Lockwood
- Philip Benjamin
- Richard Gault
- Ron Deane
- Samuel Green
- Sara Hair
- Sarah Bensen
- Sarah Cook
- Sean Corrigan
- Shannon Smith
- Shayne Warburton
- Sheri Enk
- Sonia Caton
- Sophie McNamara
- Sue Vetma
- Virginia Allen
- Yu Liu

FORM A Submissions (Variants)

- Angela Casey
- Azure Rigney
- Bob Kelly
- Bonney Corbin
- Caitlin De Cocq Van Delwijnen
- Craig Cunningham
- David Frampton
- David Kearney
- Diana Glynn
- Dr Michael Furtado
- Eashwar Alagappan
- George Stan
- Hanne Gudiksen
- Hemal Senarath Rathnayake
- Jan Bowman
- Janette Gillies
- Jeff Carter
- Jenny Whitworth
- Jo Wynter
- John Emmett Valkyrie
- Josephine Prowse
- Julie Jansen
- Katherine Gough
- Kerry Brady
- Mark Postles
- Melissa Costin
- Peter Chlonta
- Raymond Courtney
- Rosemary Anne Lynch
- Sabina Nowak
- Sam MacBean
- Sara Goodson
- Stefan Preissler
- Stephen Baggaley
- Sue Hutchinson
- Sue Shepherd
- Tamzyn Davey
- Therese McLeod
- Tracey Naylor
- Veronica Lever-Shaw

FORM B Submissions

- Denis Ravenscroft
- Estelle Blair
- Gai Podberscek
- Georgia Burkin
- Helen Tynan

FORM C Submissions

- Eleanor Smith
- Gaye Nial
- Gwen Beacham
- Narelle Debney
- Will Booth

FORM C Submissions (Variant)

- Philip Best

FORM D Submissions

- Doug Young
- Simone and Robert Lea

Appendix B – Officials at public departmental briefing held on 12 November 2018

Department of Justice and Attorney-General – Strategic Policy and Legal Services

- Mrs Leanne Robertson, Assistant Director-General
- Ms Kim Chandler, Director
- Ms Therese Oxenham, Acting Principal Legal Officer

Appendix C – Witnesses at public hearing held on 4 December 2018

Anti-Discrimination Commission Queensland

- Commissioner Scott McDougall
- Deputy Commissioner Neroli Holmes
- Julie Ball, Principal Lawyer

A Human Rights Act for Queensland

- Aimee McVeigh, Campaign Coordinator

Bar Association of Queensland

- Stephen Keim, SC, Barrister and Member of the Criminal Law Committee

Queensland Law Society

- Ken Taylor, President
- Bill Potts, Deputy President
- Dan Rogers, Chair of the Human Rights Working Group
- Kirsty Mackie, Councillor, Queensland Law Society Council

Queensland Council for Civil Liberties

- Michael Cope, Special Counsel

Community Legal Centres

- James Farrell, Director

TC Beirne School of Law, University of Queensland

- Professor Nicholas Aroney, Professor
- Dr Rebecca Ananian-Welsh, Senior Lecturer
- Bridget Burton, Director, UQ Pro Bono Centre
- Professor Tamara Walsh, Professor

Griffith Law School, Griffith University

- Associate Professor Sue Harris Rimmer, ARC Future Fellow
- Associate Professor Therese Wilson, Dean
- Professor Don Anton, Director, Law Futures Centre

Faculty of Law, University of New South Wales

- Dr Janina Boughey, Senior Lecturer (via teleconference)

Faculty of Law & Castan Centre for Human Rights Law, Monash University

- Dr Julie Debeljak, Associate Professor (via teleconference)

Office of the Information Commissioner

- Rachael Rangihaeata, Information Commissioner
- Susan Shanley, Principal Policy Officer

Indigenous Lawyers Association of Qld

- Avelina Tarrago, President
- Cassie Lang, Vice President

Aboriginal & Torres Strait Islander Legal Service (Qld) Ltd

- Shane Duffy, Chief Executive Officer

Qld Advocacy Incorporated

- Emma Phillips, Senior Lawyer – Law Reform & Systems Advocacy

Spinal Life Australia

- John Mayo, Chief Advisor - Government

Townsville Community Legal Services

- Bill Mitchell, Principal Solicitor (via teleconference)

Student Engagement, Learning & Behaviour Research Group, Faculty of Education, QUT

- Dr Jenna Gillett-Swan, Lecturer

Australian Lawyers Alliance

- Dr Louis Schetzer, Policy & Advocacy Manager (via teleconference)

Griffith Criminology Institute

- Dr Robyn Holder, Postdoctoral Research Fellow

Cherish Life Queensland

- Teeshan Johnson, Executive Director

Women's Legal Service Queensland

- Angela Lynch, Chief Executive Officer
- Julie Sarkozi, Sexual Violence Solicitor

Luke Geurtsen

Statement of Reservation

Opposition members of the Committee note the strong support for the Bill from the vast majority of submitters. There is no doubt that our community's most vulnerable must be offered as much legal protection as possible. Opposition members note the existing robust system guarding the public from poor bureaucratic decision making in Queensland.

There is concern from Opposition members of the Committee as to whether the Bill appropriately adds any additional substantive legal protection for our community's most vulnerable to what already exists in Australian law.

There are benefits to identifying certain rights but there are also concerns in connection with practical absurdities and the potential misuse of the rights that will become obvious as the Bill is implemented in the years ahead. It is imperative that there is a timely review of the operation of the Bill.

There are also concerns regarding the potential for frivolous complaints being lodged with the Human Rights Commission.

Sitting above all these concerns, is the philosophical concern that goes to the very heart of the separation of powers. The introduction of a declaration of incompatibility will significantly alter the relationship between the court, the parliament and the executive - which will distort the separation of powers. What follows is the likely politicisation of litigation and the embroiling of the judiciary in political decision making. The QLS and University Professors also raised concerns about the declarations of incompatibility and the altering of the judicial officers role.

Opposition members affirm their commitment to the protection of the most vulnerable in our community. However, questions remain in relation to the content and likely operation of the Bill as stated above.



James Lister MP
Deputy Chair
Member for Southern Downs



James (Jim) McDonald
Member for Lockyer