

Human Rights Bill 2018

Submission to the Legal Affairs and Community
Safety Committee

November 2018

Introduction

The position of Public Advocate is established under chapter 9 of the *Guardianship and Administration Act 2000* (Qld) to promote and protect the rights and interests of Queensland adults with impaired decision-making capacity through systemic advocacy.

More specifically, the Public Advocate has the following functions:

- promoting and protecting the rights of adults with impaired capacity (the adults) for a matter;
- promoting the protection of the adults from neglect, exploitation or abuse;
- encouraging the development of programs to help the adults reach the greatest practicable degree of autonomy;
- promoting the provision of services and facilities for the adults; and
- monitoring and reviewing the delivery of services and facilities to the adults.¹

The Public Advocate welcomes the opportunity to make this submission regarding the introduction of the *Human Rights Bill 2018* (the Bill). This office has had a long-standing interest in the introduction of a Human Rights Act in Queensland, and we look forward to working with government and its various agencies to protect and promote the rights of Queenslanders into the future.

Position of the Public Advocate

The Public Advocate fully supports the Bill and its objectives which will make the protection of human rights part of Queensland's legal framework. A Human Rights Act will provide a key reference point for the values and rules that should be applied by government and public service agencies in the way they develop legislation and policy and treat members of our community. It will also offer an appropriate frame of reference for community expectations and behavior.

Equality before the law in combination with equal and effective protection against discrimination, and other rights proposed in the Bill, is essential in promoting and protecting the rights of Queenslanders with impaired decision-making capacity.

The proposed 'dialogue' model, as established under human rights legislation in the Australian Capital Territory (ACT) and Victoria, will create positive obligations for public entities to uphold the rights of all Queenslanders, and will ultimately be a positive development for our State. The intention of such a model is to embed a 'culture' of respect of human rights in the public sector,² which should prevent breaches of human rights.

Importantly, a Human Rights Act would bring Queensland into line with the rest of the developed world, as Australia is the only democratic nation without a national bill of rights.³ It is hoped that Queensland's adoption of a Human Rights Act — following the ACT and Victoria — will provide further momentum for human rights legislation to be adopted in other Australian jurisdictions and nationally.

Although the Public Advocate generally supports the Bill, there are a number of additional actions that could be taken to better achieve the objects the Bill. These are discussed below.

¹ *Guardianship and Administration Act 2000* (Qld) s 209.

² *Human Rights Bill 2018* (Qld) Explanatory Notes 5; ACT Department of Justice and Community Safety (JACS), 'Human Rights Act 2004 Twelve Month Review Report' (2006) 34; Australian National University, 'The Human Rights Act 2004 (QCT): The First Five Years of Operation' (2009) 67; Michael Brett Young, 'From Commitment to Culture: The 2015 Review of the *Charter of Human Rights and Responsibilities Act 2006*' (2015).

³ Williams, George 'The Victorian Charter of Human Rights and Responsibilities: Origins and Scope' (2006) 30(3) Melbourne University Law Review 880.



Application of the Bill

Publicly-funded aged care

The Public Advocate unreservedly supports the requirement for all public entities to apply human rights in their actions and decisions.⁴ Importantly, the Bill specifically applies to registered National Disability Insurance Scheme (NDIS) service providers. This issue had not been fully anticipated at the time of the introduction of the ACT and Victorian human rights legislation, although it was identified as a consideration in Victoria during its 2015 legislative review.⁵

The Public Advocate strongly suggests that the definition of 'registered provider'⁶ be specifically expanded to include publicly-funded aged care providers in addition to registered NDIS service providers. There are undeniable similarities between the publicly-funded aged care system and the NDIS. Both service systems are administered and regulated by the Australian Government, operate within Queensland and many of the recipients of both service types are vulnerable members of our community. Unfortunately, human rights abuses have occurred in Queensland under both the disability and aged care systems. If the definition of registered provider does not include publicly-funded aged care providers there will be a significant gap in the potential protections available to vulnerable older Queenslanders.

The Public Advocate has actively campaigned for the Australian Government to regulate the use of restrictive practices⁷ in residential aged care settings for some time. The unregulated use of restrictive practices to manage the challenging behaviours of people in the aged and disability sectors is a key human rights issue in Queensland, and Australia more broadly.⁸ The Australian Government has initiated at least three recent inquiries that have each recommended the regulation of restrictive practices in residential aged care⁹, however, despite acting on some of the recommendations of these inquiries, the government has still not committed to regulation. The use of unregulated restrictive practices in aged care settings, without legal justification or excuse, amounts to institutional elder abuse and cannot be allowed to continue.

There is an urgent need to protect the human rights of older Queenslanders who are supported by the publicly-funded aged care system. The inclusion of publicly-funded aged care providers in the definition of 'registered provider' in the *Human Rights Act* will send a clear message that the Queensland Government will act to protect the human rights and dignity of older Queenslanders.

Application within the community

Consideration should be given to additional actions to encourage the community to apply and promote human rights. Although the Bill should not bind members of the community, a further provision could be included in the Bill similar to a provision in the *Guardianship and Administration Act* that encourages the community to apply its general principles.¹⁰

The inclusion of a provision that encourages the community to apply the rights in the Bill could help to build a culture that protects and promotes human rights and promotes a dialogue about the nature, meaning and scope of human rights within the broader Queensland community.

⁴ *Human Rights Bill 2018* (Qld) cl 58.

⁵ Michael Brett Young, 'From Commitment to Culture: The 2015 Review of the *Charter of Human Rights and Responsibilities Act 2006*' (2015) 203.

⁶ *Human Rights Bill 2018* (Qld) cl 9(5).

⁷ Restrictive practices include seclusion, restricted access to objects, physical, chemical and mechanical restraint (as well as electronic forms of restraint such as tracking bracelets, camera surveillance, or restrictions on media devices).

⁸ Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* Report No 124 (2014) 243; Australian Law Reform Commission, *Elder Abuse-A National Legal Response*, Report No 131 (2017) 142.

⁹ Australian Law Reform Commission, *Elder Abuse-A National Legal Response*, Report No 131 (2017); Kate Carnell, Ron Paterson, 'Review of National Aged Care Quality Regulatory processes' (2017); House of Representatives Standing Committee on Health, Aged Care and Sport, Parliament of Australia, *Report on the Inquiry into the Quality of Care in Residential Aged Care Facilities in Australia* (2018).

¹⁰ *Guardianship and Administration Act 2000* (Qld) s 11(3).



Queensland 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.¹¹

Information powers

The Human Rights Commissioner has legislated powers to require further information from public entities in order to exercise the Commissioner's complaints functions,¹² 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'.¹³ 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*.¹⁴

Resourcing of the Commission and other agencies

As identified in the ACT and Victoria, proper resourcing will be required for the successful implementation of human rights legislation in Queensland. This resourcing is required not just for the Human Rights Commission, but also for existing agencies that will now be required to comply with the legislation and consider all of their actions to ensure they protect the human rights of Queenslanders.

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.¹⁵ One of the recommendations in the Victorian review was to implement simpler training about the steps required to comply with the obligation to properly consider human rights in decision-making processes.¹⁶

A significant amount of time and an ongoing commitment of resources are required to build a human rights culture throughout government. In Victoria, there was some concern that there had been a deprioritisation of their *Charter of Human Rights* a few years after its enactment, which set back the development of a human rights culture and required the government to review their Charter implementation strategy.¹⁷

Further training for the judiciary was also identified as an issue. The ACT's five-year review concluded that the engagement of the courts and tribunals with human rights legislation was 'patchy and relatively unsophisticated', and the judiciary had only received a limited amount of training regarding the legislation.¹⁸ In Victoria, even after eight years, there was still a need to further educate the judiciary so there was a better understanding of how human rights legislation

¹¹ *Human Rights Bill 2018* (Qld) cl 61.

¹² *Ibid* cl 78.

¹³ *Ibid* cl 61.

¹⁴ *Guardianship and Administration Act 2000* (Qld) s 210A(1).

¹⁵ Australian National University, 'The Human Rights Act 2004 (ACT): The First Five Years of Operation' (2009) 42; Michael Brett Young, 'From Commitment to Culture: The 2015 Review of the *Charter of Human Rights and Responsibilities Act 2006*' (2015) 22-23.

¹⁶ Australian National University, 'The Human Rights Act 2004 (ACT): The First Five Years of Operation' (2009) 8.

¹⁷ Michael Brett Young, 'From Commitment to Culture: The 2015 Review of the *Charter of Human Rights and Responsibilities Act 2006*' (2015) 23.

¹⁸ Australian National University, 'The Human Rights Act 2004 (ACT): The First Five Years of Operation' (2009) 49.



affected various areas of practice. It was ultimately recommended that the Judicial College of Victoria be responsible for educating judicial officers.¹⁹ 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.²⁰

The above reviews demonstrate how proper resourcing must be allocated to not only the Human Rights Commission for its education and promotion functions, but to other public agencies to support the effective implementation of human rights legislation.

Concluding comments

The introduction to the Parliament of the *Human Rights Bill* is a landmark moment in Queensland's history. It represents an important opportunity to bring Queensland into line with the rest of the developed world in ensuring that human rights are at the forefront of government decision-making. The Public Advocate commends the Queensland Government and fully supports the Bill's introduction in Queensland.

The Public Advocate recommends that the Parliament consider amending the Bill to specifically expand its protections to the human rights of older Queenslanders who are receiving publicly-funded aged care, in line with the protections provided to people receiving services from registered NDIS providers. The inclusion of publicly-funded aged care providers aligns with the Queensland Government's Age Friendly Community strategy and would demonstrate a true commitment to protect the human rights of older Queenslanders.

Given that Queensland has had the benefit of being able to consider similar human rights legislation in the ACT and Victoria and the thorough legislative reviews that those jurisdictions have undertaken, it is hoped that we will be able to anticipate and overcome some of the implementation issues identified in those jurisdictions.

It is also hoped that a Human Rights Act will build a human rights culture in not only public agencies but also in the broader Queensland community.

The Public Advocate thanks the Committee for the opportunity to provide a submission in relation to the *Human Rights Bill*.

¹⁹ Michael Brett Young, 'From Commitment to Culture: The 2015 Review of the *Charter of Human Rights and Responsibilities Act 2006*' (2015) 51.

²⁰ *Ibid* 50.

