

Queensland Family and Child Commission Submission

To: Legal Affairs and Community Safety Committee

Date: 26 November 2018

Topic: Human Rights Bill 2018

Submission summary:

The Queensland Family and Child Commission (QFCC) is pleased to provide a submission to the Legal Affairs and Community Safety Committee in relation to the Human Rights Bill 2018 (the HR Bill).

The QFCC supports the policy objectives of the HR Bill to promote human rights with a particular focus on ensuring that public functions are compatible with human rights.

The QFCC's submission will make particular reference to, and propose further consideration of, strengthening the representation of the rights of children in the proposed HR Bill. This submission will also highlight, where relevant, opportunities for agencies to respond to the requirements of the HR Bill in an effective, efficient and transparent way.

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The QFCC strongly supports the introduction of a Human Rights Act in Queensland. Formalising requirements to comply with human rights principles is a critical part of recognising our collective responsibilities under international treaties, protocols and conventions (international law).

As highlighted in the QFCC's 2016 submission to the Human Rights Inquiry, Queensland should consider the experiences of Victoria and the Australian Capital Territory in developing, implementing and evaluating a human rights legislative framework.

Since the 2006 release of the Victorian *Charter of Human Rights and Responsibilities Act 2006* (the Victorian Charter), the Victorian Ombudsman and the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) have publicly released evaluations of the policy and procedural implications for agencies post-enactment.

In a 2011 report to support the operation of the Victorian Charter, the VEOHRC stated:

*'...the Charter has changed the landscape in Victoria around human rights. Where the Charter has been applied well, its impact is demonstrable and positive. Across departments and agencies, the adoption of human rights principles is recognised increasingly as a driver of good corporate governance, robust and accountable practices, and high quality services – as well as an important means of enhancing open, democratic and responsive government.'*¹

Recommendation

The QFCC recommends:

- a clearer articulation of the international human rights foundations to be included in the Human Rights Bill
- amendments to include a provision that references the four principles underpinning the United Nations Convention on the Rights of the Child (*non-discrimination, devotion to the best interests of the child, right to life, survival and development and respect for the view of the child*)

Articulating the founding international human rights (linked to Clause 8)

Knowledge and a specific understanding of human rights under international law is considerably varied within the community, and to some extent, across government and non-government agencies. To effectively implement a human rights framework in Queensland the community and agencies will be required to develop capacity to understand and apply prescribed human rights principles under international law. Agencies will also be required to identify rights holders relevant to the services delivered, and make appropriate and proportionate decisions about balancing competing individual rights.²

¹ Victorian Equal Opportunity and Human Rights Commission 2011, *Talking rights: compilation report > Resource materials to accompany the 2010 report on the operation of the Charter of Human Rights and Responsibilities*, p175

² Victorian Equal Opportunity and Human Rights Commission 2011, *Talking rights: compilation report > Resource materials to accompany the 2010 report on the operation of the Charter of Human Rights and Responsibilities*, p182

The VEOHRC has noted the benefits to articulating foundational international human rights concepts in the Victorian Charter:

‘a clearer articulation of the international human rights foundation of the Charter may also help to clarify one issue that seems to be creating a great deal of misunderstanding in reports provided to the Commission (VEOHRC) – namely, the difference between human rights and social justice’³....despite their complementary nature.

The QFCC recommends the proposed Bill be amended to include a clarifying provision/s to explicitly entrench the founding international human rights framework.

Part 2, Division 2, Clause 26 – Protection of families and children

Clause 26(2) *every child has the right, without discrimination, to the protection that is needed by the child, and is in the child’s best interests, because of being a child.*

Children and young people have the same general human rights as adults, however also have specific rights recognising their special needs and protections as children.⁴ These specific rights are prescribed in the 54 articles of the United Nations Convention on the Rights of the Child (UNCRC).

While not all individual rights are able to be, or need to be, prescribed in the HR Bill, greater reference to specific rights must be included. 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 guardians⁵
- **The best interests of the child** - The best interests of the child must be at least a primary consideration in decisions made by legislative bodies or administrative authorities⁶
- **The right to life, survival and development** - The government must ensure that children survive and develop healthily⁷
- **Respect for the views of the child** – the views of the child must be given due weight in all matters that affect the child⁸

These principles are the core requirements for any and all rights to be realised.⁹ 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.

The Office of the Child Safety Commissioner (Victoria) suggested a similar approach in the 2011 review of the Victorian Charter, saying *‘a more detailed description of rights from the convention into*

³ Victorian Equal Opportunity and Human Rights Commission 2011, *Talking rights: compilation report > Resource materials to accompany the 2010 report on the operation of the Charter of Human Rights and Responsibilities*, p182

⁴ Unicef 2018, “Article 1: If you are under 18 years of age, you are a child, and you have rights”, <https://www.unicef.org.au/our-work/information-for-children>, Accessed 14 November 2018

⁵ Unicef 2014, *Rights under the Convention on the Rights of the Child*, https://www.unicef.org/crc/files/Guiding_Principles.pdf, Accessed 8 November 2018

⁶ *ibid*

⁷ *ibid*

⁸ *ibid*

⁹ Unicef 2018, “Article 1: If you are under 18 years of age, you are a child, and you have rights”, <https://www.unicef.org.au/our-work/information-for-children>, Accessed 14 November 2018

*the Victorian Charter would further assist in promoting the rights of children, particularly those most vulnerable’.*¹⁰

Recommendation

The QFCC recommends:

- amending Clause 31 to include ‘unless in the best interests of the child’

Part 2, Division 2, Clause 31 – Fair hearing

The QFCC recommends Clause 31(3) be amended to allow courts or tribunals to not make a judgement or decision available if it is in the best interests of a child. This is an important inclusion under the principles of the UNCRC. Failure to amend the provision may result in harmful, unintended circumstances for children involved in court or tribunal proceedings.

The Victorian Charter on which the Queensland HR Bill is modelled, includes reference to a child’s best interests in their own ‘Fair hearing’ provisions, as follows:

*All judgements or decisions made by a court or tribunal in a criminal or civil proceeding must be made public **unless the best interests of a child otherwise requires** or a law other than this Charter otherwise permits.*¹¹

Recommendation

The QFCC recommends:

- policy and procedural frameworks for human rights complaints are responsive to and inclusive of the perspectives of children and young people

Part 4, Subdivision 2, Making and referring human rights complaints

The QFCC is not proposing legislative amendments to this section, however will highlight the opinions and perspectives of some children and young people to be considered by the Queensland Human Rights Commission.

Complaints mechanisms can be a difficult process for adults to negotiate and often require a level of assertion in the pursuit of a resolution.¹² However, complaints mechanisms are an important part of correcting mistakes and for protecting people against abuse and mistreatment.¹³ For children, formal complaints systems can present a number of barriers which may prevent them from formally raising their concerns.

Children identified 5 core artefacts of a child-friendly complaints system during a consultation session led by the Western Australian Commission for Children and Young People on children’s engagement with complaint mechanisms:

¹⁰ Victorian Equal Opportunity and Human Rights Commission 2011, *Talking rights: compilation report > Resource materials to accompany the 2010 report on the operation of the Charter of Human Rights and Responsibilities*, p181

¹¹ Victorian Government 2006, *Charter of Human Rights and Responsibilities Act 2006*, Part 2, Section 24(3)

¹² Western Australia Commission for Children and Young People 2013, *Are you listening?*, p.5

¹³ Western Australia Commission for Children and Young People 2013, *Are you listening?*, p.5

1. Make the system accessible

- visible, easily accessible, clear and well-communicated complaints and feedback processes

2. Take them seriously

- agencies must take steps to ensure complaints raised by children are taken seriously

3. Make the system responsive

- agencies must be flexible in how they receive complaints, including allowing children to make a complaint face to face

4. Support advocates for children and young people

- many children may use an advocate to make a complaint. Agencies must therefore ensure their complaints processes are well promoted and communicated to the community

5. Be respectful and avoid additional barriers

- children who wish to make a complaint must receive a respectful and clear explanation of the boundaries of confidentiality¹⁴

Barriers to children accessing complaints mechanisms, particularly in relation to protection matters, has also been identified in many reviews that have occurred overtime in Queensland. Steps have been, or are being, taken to address some of these issues. For example, the QFCC was tasked with developing child friendly information about the child protection system and complaints processes following recommendations made by the Queensland Child Protection Commission of Inquiry.

In early 2018, the QFCC spoke to children detained in the Brisbane Youth Detention Centre and the Cleveland Youth Detention Centre about their use and knowledge of complaints mechanisms. The children we spoke with reported that they were aware of their rights while in detention and were able to speak with staff and youth workers, as well as accessing the complaints systems in place. However, they also told us that they frequently do not receive feedback about what happens after they raise a complaint¹⁵ and flagged this as a key issue for adapting complaints processes.

The QFCC encourages the new Queensland Human Rights Commission to include the perspectives and experiences of children in developing a complaints model for human rights.

¹⁴ Western Australia Commission for Children and Young People 2013, *Are you listening?*, p.7

¹⁵ Queensland Family and Child Commission, 'Options for Youth Detention Oversight A model for inspecting places of detention in Queensland – to guide the implementation of recommendations from the Independent Review of Youth Detention', Confidential paper, 2018

Recommendation

The QFCC recommends:

- consideration be given to strengthening information sharing provisions on human rights matters in the HR Bill
- the development of transparent policy and procedural frameworks, particularly in regards to chief executive decision making under Clause 183

Youth justice provisions (Part 2, OPCAT and Part 7)

The QFCC is responsible for promoting the safety and wellbeing of children and young people, particularly children in the youth justice system.¹⁶ In exercising this responsibility the QFCC continues to advocate for human rights focused matters. These include:

- raising the minimum age of criminal responsibility
- the detention of children must be a last resort¹⁷
- children in youth detention should be provided with supports and services that respond to the drivers of their offending, promote their development and meet their needs¹⁸
- prohibiting the use of restraints, force and isolation on a child, except when necessary to prevent an imminent and serious threat of injury to the child or others¹⁹

A number of these issues are represented in the HR Bill, however there are opportunities to strengthen their representation or provide comment on agency policy responses.

Part 2, Division 3, Clause 33 – Children in the criminal process

The QFCC is pleased to note the inclusion of Clause 33 which aligns to the Victorian Charter when applied with the Charter of youth justice principles.²⁰ However, the practical implementation and success of Clause 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.

Clause 33(3) also highlights an opportunity for the Minimum Age of Criminal Responsibility to be considered as a human rights matter. The United Nations Committee on the Rights of the Child have previously recommended Australia's MACR be raised to an internationally acceptable level (12 years of age at an absolute minimum)²¹ and the public discourse about raising MACR is increasing nationally.

OPCAT – relevance to Clause 29 and Clause 30

Since the release of the Victorian Charter, Australia has ratified the *Operational Protocol to the Convention Against Torture (OPCAT)*.

The ratification of OPCAT has obliged Queensland to a series of agreed provisions related to closed environments. Implementing OPCAT in Queensland requires the introduction of more rigorous

¹⁶ Queensland Government 2014, *Family and Child Commission Act*, Part 2, Division 2, Section 9(1)(b)(ii)

¹⁷ Also a position of the Australian Children's Commissioners and Guardians (ACCG) group; Australian Children's Commissioners and Guardians 2017, *Statement on conditions and treatment in youth justice detention*, p5

¹⁸ *ibid*

¹⁹ *ibid*

²⁰ Queensland Government, *Youth Justice Act 1992*, Schedule 1

²¹ Queensland Family and Child Commission 2017, *The age of criminal responsibility in Queensland*, p6

standards for inspecting places of detention²² and assessing compliance with human rights articles. It will also require the establishment of a legislative framework providing specific inspection agencies with the authority to inspect all relevant places of detention, including facilities used to detain young people including youth detention centres, watch-houses and psychiatric hospitals.

The United Nations Subcommittee on the Prevention of Torture has also recommended that the independent reports of inspection agencies should be based on a human rights framework rather than the compliance of government with their own policies.²³ Under the human rights framework the oversight body is able to make recommendations about human rights infringements on young people in detention and can make recommendations outside of government policy and practice.²⁴

In its review of the necessary changes to accommodate OPCAT in Victoria, the Victorian Ombudsman found monitoring bodies should have *legislative authority to share information so they can work collaboratively in the interest of human rights*.²⁵

Similarly in Queensland, the QFCC suggests providing the Human Rights Commissioner with legislative authority to share information and data with other human rights monitoring bodies, such as National Preventive Mechanisms under OPCAT. This will allow these bodies to work collaboratively in relation to human rights infringements such as assisting with inspections or with systemic oversight, monitoring and reporting.

Part 7, Division 23, Clause 183 – Amendment of s263 (Management of detention centres)

The QFCC recommends clear policy and procedural frameworks be established for chief executive decision making in the best interests of the child.

Clause 183 proposes amendment to section 263 of the *Youth Justice Act 1992* to allow for the chief executive to not contravene the *Human Rights Act 2018* where a decision has taken into account the safety and wellbeing of the child (on remand and other detainees), and in regard to the responsibilities under section 263 (*Youth Justice Act 1992*).

For the purposes of transparent and consistent decision making, and in the interests of promoting human rights compliance, a decision making framework for use by the chief executive or delegates must be developed and broadly communicated to stakeholders, including children and young people.

The decision making framework ought to outline how these types of decisions will be made and what elements of safety and wellbeing could be considered. It should also promote the involvement and perspectives of the child, where appropriate, and include consultation and consideration of the unique perspectives of Aboriginal and Torres Strait Islander communities, where relevant.

²² Victorian Ombudsman 2017, *Implementing OPCAT in Victoria: report and inspection of the Dame Phyllis Frost Centre*, <https://www.ombudsman.vic.gov.au/getattachment/432871e4-5653-4830-99be-8bb96c09b348>, Accessed 8 November 2018, p6

²³ Queensland Family and Child Commission, 'Options for Youth Detention Oversight A model for inspecting places of detention in Queensland – to guide the implementation of recommendations from the Independent Review of Youth Detention', Confidential paper, 2018

²⁴ Queensland Family and Child Commission, 'Options for Youth Detention Oversight A model for inspecting places of detention in Queensland – to guide the implementation of recommendations from the Independent Review of Youth Detention', Confidential paper, 2018

²⁵ Victorian Ombudsman 2017, *Implementing OPCAT in Victoria: report and inspection of the Dame Phyllis Frost Centre*, <https://www.ombudsman.vic.gov.au/getattachment/432871e4-5653-4830-99be-8bb96c09b348>, Accessed 8 November 2018, p6

Recommendation

The QFCC recommends:

- amending the title of Division 3 to better reflect the intent of the provisions

Part 3, Division 3 Economic, social and cultural rights

The QFCC suggests reconsidering the title of Division 3 to better capture the intent of Clause 36, Right to Education, and Clause 37, Right to Health.

Cultural rights are addressed in line with the Victorian Charter under Clause 27 and Clause 28, HR Bill.

Recommendation

The QFCC recommends:

- minor amendment to Clause 61 to require accessible information for the community which includes targeted information for discrete community groups

Part 4, Division 1, Clause 61 - Functions (Queensland Human Rights Commission)

Clause 61(e) *to make information about human rights available to the community*

The QFCC suggests amending this clause to specifically require information be easily accessible. Amendments should also include reference to targeted information being made available for discrete community groups including children and young people, people with a disability, and culturally and linguistically diverse groups.

The Australian Human Rights Commission (AHRC) has recently released the *Information relating to Australia's joint fifth and sixth report under the Convention on the Rights of the Child, second report on the Optional Protocol the sale of children, child prostitution and child pornography and second report on the Optional Protocol on the involvement of children in armed conflict, Submission to the Committee on the Rights of the Child* (the Report). The Report details the perspectives of governments, children and young people about our (Australia's) progress in implementing the rights prescribed under international law.

When children were asked about how their experiences had impacted on their safety, relationships and self-esteem, they emphasised '*the importance of improving the system's capacity to provide children with relevant information and allow them to participate in meaningful ways*'.²⁶ Building knowledge and understanding of human rights, in a way that is appropriate to the age and developmental level of children, is an important responsibility of government under the UNCRC.

²⁶ Australian Human Rights Commission 2018, *Information relating to Australia's joint fifth and sixth report under the Convention on the Rights of the Child, second report on the Optional Protocol the sale of children, child prostitution and child pornography and second report on the Optional Protocol on the involvement of children in armed conflict, Australian Human Rights Commission, Submission to the Committee on the Rights of the Child*, https://www.humanrights.gov.au/sites/default/files/document/publication/AHRC_CRC_Report2018.pdf, Accessed 7 November 2018, p17

Aboriginal and Torres Strait Islander children told the AHRC that they felt their rights were being met 'most of the time'.²⁷ However, they also revealed that access to accurate information was one of the rights that was least likely to be met.²⁸

Statement of compatibility

The QFCC is pleased to note the statement of compatibility process discussed in the original Legal Affairs and Community Safety Committee's (2016) *Human Rights Inquiry* report has been retained in the subsequent Bill. The implementation of the statement of compatibility was noted by Victoria as being a significant driver of cultural change and the integration of human rights considerations across Victoria²⁹ and will help drive the way government considers the application of rights in law.

The QFCC is currently developing a Child Rights Impact Assessment (CRIA) tool for use by government agencies and non-government organisations. The CRIA is a General Measure for Article Three and Article Four of the UNCRC as recommended by the United Nations Committee on the Rights of the Child.

On completion, the CRIA tool will assist agencies to identify and consider how a potential law or policy may impact on children and young people's rights now and into the future. Part of this includes asking the agency or organisation to consider whether there are more suitable alternatives based on the perspectives of children and young people (where applicable). The CRIA tool may also be able to be further developed by relevant agencies to support their responsibilities in relation to developing statements of compatibility.

²⁷ *ibid*

²⁸ *ibid*, p18

²⁹ Victorian Equal Opportunity and Human Rights Commission 2011, *Talking rights: compilation report > Resource materials to accompany the 2010 report on the operation of the Charter of Human Rights and Responsibilities*, p177