LEGAL AFFAIRS AND COMMUNITY SAFETY COMMITTEE

Members present:

Mr PS Russo MP (Chair)
Mr JP Lister MP
Mr SSJ Andrew MP
Mr JJ McDonald MP
Mr DJ Brown MP
Ms CP McMillan MP

Staff present:

Ms R Easten (Committee Secretary)
Ms K Longworth (Assistant Committee Secretary)
Ms M Westcott (Assistant Committee Secretary)

PUBLIC BRIEFING—INQUIRY INTO THE HUMAN RIGHTS BILL 2018

TRANSCRIPT OF PROCEEDINGS

MONDAY, 12 NOVEMBER 2018

Brisbane

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The committee met at 9.30 am.

CHAIR: I declare open this public briefing for the committee's inquiry into the Human Rights Bill 2018. My name is Peter Russo. I am the member for Toohey and chair of the committee. With me here today are James Lister, member for Southern Downs and deputy chair; Stephen Andrew, member for Mirani; Jim McDonald, member for Lockyer; Corrine McMillan, member for Mansfield; and Don Brown, member for Capalaba, who is substituting for Melissa McMahon, member for Macalister, who is unable to be here this morning.

On 31 October 2018 the Attorney-General and Minister for Justice, the Hon. Yvette D'Ath, introduced the Human Rights Bill 2018 into the parliament. The parliament referred the bill to the committee for examination, with a reporting date of 4 February 2019. The purpose of the briefing today is to assist the committee with its examination of the bill.

The committee's proceedings are proceedings of the Queensland parliament and are subject to the standing rules and orders of the parliament. The proceedings are being recorded by Hansard and broadcast live on the parliament's website. Media may be present and will be subject to my direction at all times. The media rules endorsed by the committee are available from committee staff if required. All those present today should note that it is possible that you might be filmed or photographed during the proceedings. These images may be posted on the parliament's website or social media sites.

Only the committee and invited officers may participate in the proceedings. As parliamentary proceedings, any person may be excluded from the hearing at my discretion or by order of the committee. I remind committee members that witnesses are here to provide factual or technical information. Any questions seeking an opinion about policy should be directed to the minister or left to debate on the floor of the House. I ask everyone present to turn mobile phones off or to silent mode.

CHANDLER, Ms Kim, Director, Strategic Policy and Legal Services, Department of Justice and Attorney-General

HUMPHREYS, Mr Tom, General Manager, Strategy and Governance, Queensland Corrective Services

OXENHAM, Ms Therese, Acting Principal Legal Officer, Strategic Policy and Legal Services, Department of Justice and Attorney-General

ROBERTSON, Mrs Leanne, Assistant Director-General, Strategic Policy and Legal Services, Department of Justice and Attorney-General

CHAIR: I welcome representatives from the Strategic Policy and Legal Services Unit of the Department of Justice and Attorney-General who have been invited to brief the committee on the bill. I invite you to brief the committee after which the committee will have some questions for you.

Mrs Robertson: Thank you for the opportunity to speak to the Human Rights Bill 2018. The bill is consistent with the government's 2017 commitment to the introduction of a human rights act for Queensland based on the Victorian Charter of Human Rights and Responsibilities Act 2006. The bill protects 23 human rights. Like the Victorian charter, the rights in the bill are primarily civil and political rights drawn from the International Covenant on Civil and Political Rights as well as one property right from the Universal Declaration of Human Rights. The bill also 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 standalone 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.

The primary aim of the bill is to ensure that respect for human rights is embedded in the culture of the Queensland public sector and that public functions are exercised in a principled way that is compatible with human rights. The term 'compatible with human rights' is used throughout the bill. It

is a unifying concept which is central to many of the bill's provisions. The bill provides that an act, decision or statutory provision is compatible with human rights if the act, decision or provision does not limit a human right or limits a human right only to the extent that is reasonable and demonstrably justifiable in accordance with clause 13 of the bill. Therefore, and importantly, the bill acknowledges that human rights are not absolute and may be balanced against the rights of others and public policy issues of significant importance. Clause 13, which we refer to as the general limitations clause, sets out the factors that may be relevant in deciding whether a limit on a human right is reasonable and justifiable.

The bill aims to promote a discussion or a dialogue about human rights between the three arms of government: the judiciary, the legislature and the executive. Importantly, in this model in the bill, parliament remains sovereign and may, if it wishes, intentionally pass legislation that is not compatible with the human rights in the bill. Part 3 of the bill sets out the application of human rights in Queensland to the parliament, the courts and the executive.

Turning to the role of parliament, parliament will scrutinise all legislative proposals, bills and subordinate legislation for compatibility with human rights. The bill requires all bills introduced into parliament to be accompanied by a statement of compatibility and statements of compatibility to state whether, in the opinion of the member who introduces the bill, the bill is compatible with human rights. The portfolio committee responsible for examining the bill must consider the statement of compatibility and the bill and report back to the Legislative Assembly about the statement and whether the bill is not compatible with human rights. The bill also provides for parliament, in exceptional circumstances, to make an override declaration in relation to an act or a provision in an act. If an override declaration is made, to the extent of that declaration the human rights act does not apply to the act or the provision.

Turning now to the role of the courts under the bill, with respect to courts and tribunals the bill requires all statutory provisions, to the extent possible consistent with their purpose, to be interpreted in a way that is compatible with human rights and if a statutory provision cannot be interpreted in a way that is compatible with human rights the provision must, to the extent possible consistent with its purpose, be interpreted in a way that is most compatible with human rights. The bill also provides that the Supreme Court may, in a proceeding, 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.

Turning now to the bill's provisions regarding public entities, the bill places an obligation on public entities to act and make decisions in a way that is compatible with human rights and in making decisions to give proper consideration to a human right that is relevant to the decision. The term 'public entity' is defined in clause 9 of the bill. There are essentially two types of public entities: core public entities and functional public entities, although these are not terms that are used in the bill. An entity means an entity in and for Queensland. Core public entities are relatively easy to identify. The list set out in the legislation includes state government departments, local government, ministers and public servants as well as statutory office holders. Functional public entities are entities that are captured within the definition only when they are performing functions of a public nature. The inclusion of functional entities reflects that many public services are delivered by non-government organisations and even private companies. Examples of a functional public entity include a private company managing a prison or a non-government organisation providing a public housing service. Registered providers of supports or a registered NDIS provider under the National Disability Insurance Scheme Act 2013 of the Commonwealth are also public entities when they are performing functions of a public nature in Queensland. Courts and tribunals are public entities but only when acting in an administrative capacity and also, if needed for certainty, the Attorney-General under the bill can, by regulation, prescribe an entity as either a public entity or not a public entity for the purposes of the human rights act.

As in Victoria, there is no standalone legal remedy for contravention of this bill. The bill adopts an enforcement mechanism which is commonly known as a piggyback cause of action. A contravention of the Human Rights Bill in itself will not create a right to any new remedies but it will create a new ground of unlawfulness—that is, a breach of the Human Rights Bill will be unlawful. Where an applicant has an existing right to claim for a remedy on another independent ground of unlawfulness, then the person can piggyback the human rights claim onto that existing claim. The remedy in these circumstances is the one that the person would have been entitled to anyway on the basis of the existing claim. There is no right to monetary damages on the basis of a breach of the Human Rights Bill alone. What this means in practice is that if a person believes that they have

grounds for a claim of unlawfulness under the Human Rights Bill they may only bring such a claim together with a cause of action on a different ground of unlawfulness if one exists in relation to the same act or decision. A person will be entitled to any remedy arising from the independent cause of action except if it is damages, even if the person is successful on the human rights claim alone and not the other cause of action.

The regulatory model for this bill favours discussion, awareness raising and education about human rights rather than actual litigation. Consistent with this approach, but unlike the Victorian model, the bill includes a dispute resolution process. The Anti-Discrimination Commission Queensland will be rebranded under the bill as the Queensland Human Rights Commission and will, importantly, be responsible for promoting an understanding and acceptance and a public discussion of human rights and performing a dispute resolution process for human rights complaints. The aim of the dispute resolution function of the commission is 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.

The bill requires that the act be periodically reviewed to ensure its effective operation. The review must be conducted by an independent and appropriately qualified person. The first review will consider the operation of the act up to 1 July 2023. A subsequent review will examine its operation from 2023 to 1 July 2027 or an earlier date at the discretion of the Attorney-General.

The bill also makes some consequential amendments. The bill amends the Youth Justice Act 1992 and the Corrective Services Act 2006 to make it clear that other factors relevant to determining how to act or make a decision under these acts will apply in addition to the human rights considerations under the bill. The effect of these amendments is that an act or decision made under those acts, taking into consideration these additional factors, will not be unlawful under the bill only because these additional factors were considered.

In relation to the Youth Justice Act, the amendments relate to decisions about whether to segregate children who are detained on remand from children detained on sentence in youth detention centres with reference to the right to humane treatment in detention. In relation to the Corrective Services Act, the amendments relate to decisions about the segregation of convicted and non-convicted prisoners and the management of prisoners where it is not practicable for a prisoner to be provided with his or her own room, also with reference to the right to humane treatment in detention.

Thank you again for the opportunity to address the committee about the bill. We are happy to take questions from the committee and in this regard I note that colleagues from the Department of Child Safety, Youth and Women and the Department of Corrective Services are present here this morning should there be specific questions about the consequential amendments.

CHAIR: Thank you. Mr Lister?

Mr LISTER: I will defer to the member for Lockyer.

Mr McDONALD: Thank you very much for the presentation, Mrs Robertson. I have read a lot of the material. I am really proud to be an elected member of our Legislative Assembly. The representative style of human rights protections that we provide and the flexibility that we have in terms of adjustments to different bills is something that I hold very dear. I struggle with the concept of having another layer of legislation that can be interpreted by courts and by other people. I really would like you to satisfy my curiosity in that space. This is going to create a huge workflow. Have you made preparations for the impost that that workflow might have?

Ms Chandler: Implementation of the bill the Attorney has announced is proposed to be delayed. It would commence in two stages. If passed, parts of the bill would commence on 1 July 2019. They would be the parts that put in place the rebranded Anti-Discrimination Commission Queensland as the Human Rights Commission. That would enable the Human Rights Commission to start their community education and public education functions. There would be a lead-in so that that commission could start educating the public, including parts of the Public Service, on the act and on human rights. It is proposed to commence the remainder of the act six months later, when all the obligations on public entities would commence. During that delay of up to about 12 months would be the time when the public sector would have an opportunity to get ready for the implementation of the bill, to participate in or look at any training materials or education materials provided by the Human Rights Commission and have an opportunity to review all of their processes, legislation and policy in readiness for the commencement.

Mr McDONALD: In light of the workload that I was talking about and coming back to the discretion that others may have, in Victoria we have seen court cases thrown out where police have been judged to be breaching somebody's human rights, even though they were following their procedures and protocols. What do you think the impact will be on similar cases in Queensland because of some other discretion that a judge may have here?

Ms Chandler: It is impossible to give a definitive answer on what will happen in all scenarios with regard to the exercise of police powers. The starting point is that anything any public servant or public entity—police or otherwise—does will have an impact on human rights, whether it is positive or negative. On the face of it, the bill looks as if those rights are absolute but, as Mrs Robertson said during her statement, they are not absolute. Human rights jurisprudence well recognises that there are good public policy reasons for limiting human rights, which includes public safety and national security. A number of Commonwealth and common law countries have human rights acts and they also have police powers and national security powers which allow the limitation on human rights.

The thing to note about the rights in the bill—for example, the right to liberty and security of the person: it is about arrest and detention, which is not an absolute right. Really, it prohibits unlawful detention or arrest, or without the proper due process of the law. Similarly, with the exercise of police powers around searching, it is not an absolute prohibition on impacting on a person's privacy. It is a bit like what parliamentary committees do now in terms of examining the law for consistency with fundamental legislative principles. One of those principles is the rights and liberties of the individual. This bill, because it focuses on those civil and political rights, really unpacks in a more systematic way what those civil and political rights are for individuals. I guess it demands a more systematic and transparent examination of those particular rights. It is complementary, really, to the task that is undertaken at the moment.

Ms McMILLAN: Certainly this is a very historic moment in Queensland. I have a question in relation to both the Victorian charter and the ACT Human Rights Act, which adopt a dialogue model, as does this bill. Can you please tell us about the dialogue model and contrast it with other models for human rights legislation?

Ms Chandler: Yes, we have adopted a dialogue model in Queensland. Again, that is drawing on the Victorian model and the ACT model, which in turn drew on the UK model of human rights. Other models are constitutionally entrenched, more as a bill of rights, I guess like the United States Constitution which has the bill of rights. Those models arguably give a much stronger role to the judiciary, so under those models the balance is in favour of the courts and the judiciary, which can invalidate legislation that is not consistent with those constitutional rights.

On the other hand, the dialogue model aims to give a balance between the three arms of government—the judiciary, the executive and the legislature—but really in favour of parliament, so parliament remains sovereign under the dialogue model. It can purposely pass laws that are incompatible with human rights. Because of its scrutiny of legislation role, it also takes a forefront role in the dialogue or talking—examining bills for their consistency or compatibility with human rights.

The three arms of government do have a particular role to play under the dialogue model and are supposed to discuss or debate the notion of human rights together whilst maintaining that parliamentary sovereignty. Courts have a role in interpreting legislation in a way that is compatible with human rights; parliament scrutinises bills to determine their compatibility with human rights; and the public sector, public entities or the executive are obliged to make decisions and act in a way that is compatible with human rights. In the bill there are in-built mechanisms for those three arms of government to talk to each other, if you like, about the scope and the limitation of human rights.

Mr ANDREW: As this bill attempts to state what Queensland's human rights are, whatever it fails to include would seem automatically to be no longer a right of Queenslanders under the act, resulting in the potential for Queenslanders having to defend themselves against this act using federal and international laws to show evidence of contradictions. Could you please elaborate on that, so that we can understand how that will affect us?

Ms Chandler: The bill started with a select group of human rights. It protects a select group of civil and political rights from the International Covenant on Civil and Political Rights, one property right from the Universal Declaration on Human Rights and two social and economic rights. It explicitly states that, just because we have put these rights into statute, it does not impact on the rights people already have, whether it is at common law, in other statutes or under international law. Really, the process that this bill puts in place is just those mechanisms around scrutiny for those particular rights, but it does not impact on the rights that you may already have at common law, under international law or in other human rights treaties.

Mr ANDREW: Public entities will not be able to make decisions that can limit human rights?

Ms Chandler: Under this bill it will be unlawful for them to make decisions that limit the human rights that are in this bill. If there are other human rights that are not included in this bill, the normal processes would apply. If they are common law rights, I suppose that is a matter for adjudication before the courts. If there are international human rights from treaties, and if Australia is a party to that treaty and is also signed up to the optional protocol that usually underpins that treaty, then you go through the normal avenues that you would go through to complain about a contravention of your human right. The ICCPR, for example, requires you to exhaust your domestic possibilities for complaining about a breach of your right, which would be to the Australian Human Rights Commission. If those avenues were exhausted, you can make a complaint to the Human Rights Committee of the United Nations.

Mr ANDREW: Clause 14 attempts to protect human rights from being destroyed, but it does not seem to be limited by the bill itself. Would I be correct in assuming that the act attempts to protect human rights but only from being destroyed, not from being limited by the bill itself?

Ms Chandler: Because we were given those rights which are already in the common law and are a part of international law statute protection, we did not want this bill to impact negatively on those rights that you have. We did not want to limit those rights any further than would normally be the case under international law.

Mr BROWN: If the member does not present the statement about capability during the introduction of the bill, what is the effect of that?

Ms Chandler: There is a specific provision in the bill that says that that does not impact on the validity of the legislation.

Mr BROWN: The clauses say 'must', but you are saying that if they go ahead and give us the bill like this and the explanatory notes then that is still a valid bill?

Ms Chandler: Yes, it is.

Mr BROWN: With the court ruling—sorry, I will just move to the section.

Ms Chandler: Clauses 53 and 54.

Mr BROWN: Yes, thank you. When the Supreme Court makes a declaration of incapability, notification needs to be given to the Attorney-General before that declaration is made, to give the government an opportunity to address that?

Ms Chandler: Yes, that is right. The purpose of the notice is so that the Attorney-General has an opportunity to make representation.

Mr BROWN: In regard to the actions of ministers, they have six months to address that. Does that include the declaration going to the committee for three months? Are three of those months taken up by the committee?

Ms Chandler: Yes, that is right.

Mr BROWN: It is not nine months; it is six months?

Ms Chandler: That is right.

Mr McDONALD: I am not a lawyer, so you might have to forgive me if my parlance is a little bit rough around the edges. Ms Chandler, you spoke about one of the purposes of the Human Rights Bill being to protect against arbitrary detention, arrest and so forth. Can you cite any specific examples where the existing habeas corpus principle enshrined in our law has failed and where this bill would be definitely necessary? I imagine that might have been one of the motives to embark on this legislation.

Ms Chandler: I cannot cite any specific examples of that, no. As you have seen in that right around security and liberty, this bill does protect that right of habeas corpus. Part of that right is the right to challenge the legality of your detention. That right goes further than that and talks about the procedural or other aspects of the law that are in part around detention and arrest. No, I cannot cite a specific example.

Mr McDONALD: What consultation has occurred between your department and other departments—and I note Corrective Services and police, for example—concerning this bill?

Ms Chandler: We have consulted with all departments around the drafting of the bill, including Corrective Services and police. The Attorney-General also led two round tables with legal stakeholders and community stakeholders. We have also briefed the heads of jurisdiction at the courts.

Mr McDONALD: Did those consultations result in changes to the original draft form of the bill that you were putting together?

Mrs Robertson: I think, as always, the consultation process does result in various changes being made.

Mr McDONALD: What about specifically in the case of police and Corrective Services?

Mrs Robertson: In relation to the amendments to the Corrective Services Act, it is probably better that I defer to my colleague from Corrective Services.

Mr McDONALD: Mr Humphreys, in the consultation phase with the Department of Justice and Attorney-General, what concerns did your department have with the draft form of the bill? What feedback did you provide to get us to this point today?

Mr Humphreys: As my colleagues in the justice department said, all departments were consulted. Queensland Corrective Services was consulted as part of the normal consultation process under the *Cabinet Handbook*. For the most part, our discussions with the justice department have been how the human rights act would operate, what effect it would have on our specific operations, particularly in terms of the management of prisoners, and how it would intersect with our existing legislation.

Mr LISTER: Can you give me some idea of what that feedback from your department involved—what changes you sought to get us to this point today?

Mr Humphreys: The changes are really reflected in the consequential amendments in the bill. There are two particular scenarios that are reflected in the consequential amendments, one of which is about the separation of people who are on remand and people who are sentenced. The other scenario is about our management of people in a correctional centre operating above the built capacity. The consequential amendment with respect to those two scenarios relates to the right to humane treatment under the bill.

Mr LISTER: Does your department anticipate that additional resources will be required in order to comply with the bill if it is passed?

Mr Humphreys: The act creates rights for the people of Queensland and it creates duties for public entities. If I may, I will refer to the Corrective Services Act.

Mr LISTER: I am specifically referring to the resource requirements you foresee being necessary in order to comply with the bill should it be passed.

Mr Humphreys: The humane treatment of prisoners is something that we take very seriously. In fact, we have taken it seriously for many decades. The Human Rights Bill reflects existing international instruments, some of which have been in place for decades. Queensland legislation with respect to corrective services has been reviewed quite regularly over time, and the legislation does reflect contemporary standards for the management of prisoners. Section 3(2) of the Corrective Services Act states—

This Act recognises that every member of society has certain basic human entitlements, and that, for this reason, an offender's entitlements, other than those that are necessarily diminished because of imprisonment or another court sentence, should be safeguarded

Mr LISTER: I specifically want an answer to this question: does your department foresee any additional resource requirements in order to comply with the bill? If the bill was passed tomorrow, in order to comply fully would the department require greater resources from the parliament—financial and so forth—to build new prisons or alter the way things are done: yes or no?

CHAIR: Mr Humphreys, if that question is not within your remit because it asks about resources—

Mr Humphreys: I am happy to answer the question. The reality is that we regularly review our procedures. We regularly conduct training with our staff. Every staff member who commences with us receives significant training in custodial operations, and we already provide information to prisoners on what their avenues of complaint are. We regularly review and update all of those things, and we will be doing that as part of the implementation of this act. As my colleagues said, with respect to the parts that affect Corrective Services my understanding is that they will not commence until 2020, and that is ample time for us to make those preparations.

CHAIR: Does the introduction of the charter prevent people making civil claims against actions by the police, for example?

Ms Chandler: No, that is right.

CHAIR: The upshot of the charter is not that there will be more civil claims brought, because civil claims stand on their own.

Ms Chandler: Yes, that is right.

Ms McMILLAN: I want to ask a question in relation to awareness raising and the education process. Obviously Queensland is a state of five million people. We have a significant service. What sorts of campaigns or education models would you look at between now and the start of 2020 to ensure that we bring about a consistent understanding of human rights in Queensland?

Ms Chandler: That will be a matter for the Anti-Discrimination Commission Queensland because they have received funding to fulfil the public education role. I cannot say what specific types of campaigns they have in mind, but they already perform that function in relation to discrimination and anti-discrimination. Without speaking for them, I imagine it will be similar to the types of mechanisms they use at the moment around education for discrimination and anti-discrimination.

Ms McMILLAN: Would that begin in July 2019?

Ms Chandler: That is right.

CHAIR: During the preparation of the bill the department looked at what has occurred in other jurisdictions; is that correct?

Ms Chandler: Yes.

CHAIR: Are you able to inform the committee, for example, what the general consensus is about the operation of the Victorian charter? It has been operating for a number of years. Has the outcome been positive or negative?

Ms Chandler: We have had the benefit of looking at the Victorian act in particular because that is the model that the Queensland bill is based on. A lot of what we have heard from Victoria has been positive. The 2015 review by Michael Brett Young about the implementation of the act was also positive. That gave us a lot of opportunities to make enhancements, so we have been able to do that to ensure that the bill we have has more clarity and some enhanced provisions.

Since the commencement of the charter in Victoria the court has made only one declaration of incompatibility, and that was in the case of Momcilovic. Reported cases to the Supreme Court and the Court of Appeal, which is compiled by the Judicial College of Victoria, indicate just over 100 charter case related decisions since the commencement of the charter in 2008. It has been operating for around 10 years, so that is 100 cases over 10 years. In Victoria, as is the plan here, bills are referred to the Scrutiny of Acts and Regulations Committee. It is a bipartisan parliamentary committee that is required to report to parliament under the charter. The number of bills found by the SARC to be incompatible with human rights has decreased significantly in the last two years. In 2015, 23 bills were found to be incompatible; there were four in 2016 and one in 2017.

With respect to the non-government sector, at the first review of the charter the Victorian Council of Social Services did not talk about any very significant impacts on non-government organisations, just that they were continuing to do what they should do, and that is to make sure their policies and procedures were consistent with human rights. In their survey of non-government organisations they found that many organisations had already adopted a rights based approach before the charter. Around 38 per cent of those organisations indicated they were making or in the process of making changes to their policies, and that was after three years of operation of the charter. We have not had any indications there have been significant impacts in terms of resources and the way things operate normally.

Mr McDONALD: In terms of my opening comment, I am really struggling with the additional layer that this seems to be adding. We have heard that there were no issues in terms of arrest procedures or people being taken into custody. Are there any other situations or examples you can point to in Queensland where human rights have been breached, or is this just about us feeling good about implementing something that sounds right? We have had international conventions for a long time. As a former responsible person and manager, this just seems to be over the top. I do not understand the justification for introducing this bill.

Ms Chandler: I suppose one of the arguments for a human rights act is that, although we have these rights anyway in the common law and international law, it is a way of giving them statutory protection and particular mechanisms around forcing the public sector to examine the impacts of acts and decisions on human rights in a more systematic and transparent way. In that way it joins the suite of legislation that we already have around enhancing public accountability and principle based

decision-making. We have right-to-information legislation, privacy legislation and the crime and corruption legislation. It joins that suite of legislation, which really is about enhancing the accountability and transparency of public decision-making.

Mr McDONALD: Can you give us any examples of breaches that have driven this?

Ms Chandler: I cannot give you any specific examples off the top of my head, but they are the policy arguments for having a human rights bill.

CHAIR: You spoke about the Victorian model. The feedback in relation to how that has been operating over the last 10 years has been positive. Are you able to outline to the committee the expected benefits to Queenslanders if the bill is passed?

Ms Chandler: To reiterate, human rights are already there in the background. Courts are obliged to interpret legislation in a way that is consistent with human rights. They already have to do that because of the principle of legality. The courts, absent clear words, will need to interpret laws in a way that is consistent with fundamental rights. This bill will focus that interpretive role. It is not a remedial role like in other jurisdictions. Courts cannot strike down legislation and they cannot change parliament's intention. It will mean that they need to go through a more focused and transparent interpretive process to determine if the limits the legislation has put on human rights are justifiable.

As my colleagues from Corrective Services said, we already review our policies and procedures, but this will add a more structured process in that review of policy, procedures and decision-making frameworks for public entities so they really fine-tune and hone their attention to how policies, procedures and decisions impact on human rights. Parliamentary committees already scrutinise laws for compatibility with fundamental legislative principles, and one of those is the rights and liberties of individuals. This bill unpacks that in a more systematic way.

Ms McMILLAN: Am I right in saying that this bill, if passed, will be present throughout our laws in Queensland rather than just another layer? Having worked in one of our biggest organisations, there really does need to be a level of consistency. The bigger the system, the more urgent the overarching principle or understanding about how we operate in Queensland. Am I right in suggesting that this bill, if passed, will be present throughout our laws rather than an extra layer?

Ms Chandler: Yes, that is right. It will permeate. As jurisprudence and case law develop, you would expect to have a greater degree of consistency across the way laws and decisions are interpreted.

Mrs Robertson: I guess it creates, as I think I said in the opening statement, that dialogue model. It is pushing to the fore that ongoing dialogue between the three arms of government in a much more positive way.

CHAIR: The explanatory notes state at page 11 that some stakeholders thought the bill should include a separate right of action for the failure of a public entity to act or make a decision in a way that is compatible with human rights. Are you able to elaborate on that statement?

Ms Chandler: Yes. The model of enforcement in this bill creates a new ground of unlawfulness. There is no standalone right of action. If you are a public person and you believe that your human rights have been breached by an action of a department or a public entity, this bill does not give you the right to go straight to the court, for example, and make that complaint. You have to already have another action or remedy on a ground of unlawfulness. That is often going to be a ground for judicial review of an administrative action or it may be a discrimination claim. Then you can 'piggyback' a human rights claim onto that existing action for a remedy. Even if you are not successful in that original claim for judicial review, for example, but you are successful in proving that there has been a breach of your human rights under this bill, you have a right to the existing remedy that you would have got for that judicial review. That may be, for example, that the court remits the decision back to the decision-maker and, in the case of human rights, ask that decision-maker to give proper consideration to your human rights when making the decision. That was a policy decision not to give a standalone right of action. It was made because we are following the Victorian charter's model and it is seen as a good starting point for bringing such a big change as a human rights bill.

Ms Oxenham: In the absence of a standalone action, in our legislation we have the disputes resolution process which allows people to have some sort of meaningful way of raising a complaint with a public entity and finding a resolution to that.

CHAIR: Bearing in mind how civil litigation in this state works—all litigation has to go to mediation before it is able to go to court—is it fair to say that it is a better model than the Victorian model, without blowing our trumpet? We have not passed it yet.

Mrs Robertson: I guess it builds on the Victorian experience. I think the Young review itself actually recommended something along these lines. It is building on the learnings from that particular review.

Mr LISTER: In my understanding of things there are broadly two kinds of bills which come forward: those that originate from the department and are considered machinery of government, where you say, 'Minister, we would like you to consider taking this to parliament,' and those that are driven from the government. It is part of their manifesto: 'Department, draft us this. This is what we want to do.' In which category does this bill fall?

CHAIR: This is about policy and it is not for the department to be answering policy questions. I rule that question out of order. This is probably getting into the workings of the bill if passed. As we all know, there can be the capacity for people to become serial complainants. Are there measures to deal with that type of scenario if it does arise?

Ms Chandler: Yes, there are. There are two avenues through which a person may bring their complaint of a breach of human rights. The first is a complaint to the Human Rights Commission. The commissioner must refuse to deal with a complaint if they believe the complaint is frivolous or trivial, vexatious, misconceived or lacking in substance. The bill provides for that. Otherwise, an individual may attach a piggyback claim of unlawfulness under the human rights act to an independent claim of unlawfulness. There is not that right to commence a standalone right of action. You cannot go to the courts just for a standalone right of action of breach of human rights; you have to find that independent action.

You do have to have standing to bring that independent action. Case law has developed in Victoria so that it is believed that independent action would have to survive a strike-down application. You do have to have standing. You just cannot make up a frivolous claim in order to piggyback a human rights claim on top of that. Also, the court you take that independent action to has to already have the jurisdiction to hear that independent action if it is to hear the human rights claim. You cannot go to QCAT with a judicial review and piggyback a human rights claim. There are a number of protections in the bill against frivolous or vexatious claims.

CHAIR: I take this opportunity to deal with clause 73(6). In relation to the Human Rights Commissioner being able to refer matters of human rights complaints to other agencies such as the Ombudsman, the CCC and the Office of Information Commissioner with the complainant's consent, if the complainant does not consent will that mean that the Human Rights Commissioner will have to deal with it even though it could more appropriately have been dealt with by another agency?

Ms Chandler: As we said, because this bill is going into that suite of legislation which is about public decision-making, pretty much all public decisions are going to impact in some way on human rights and it really will not be until the complaint is unpacked a little that you will be able to determine whether it is best dealt with as a human rights complaint or by the Health Ombudsman or the Privacy Commissioner. Once the commissioner makes preliminary inquiries and believes it might be better dealt with under one of those other suites of legislation they can, with the complainant's consent, make that referral and there are provisions in the bill to enable the commissioner to make those more practical day-to-day arrangements with those other bodies to facilitate that referral.

However, there is also provision under clause 70(3) which provides that the commissioner can defer dealing with a complaint if the complainant has complained to the public entity but the commissioner considers the public entity has not had an adequate chance to look at the complaint or the commissioner considers it would be necessary to defer the complaint to ensure the complaint is dealt with appropriately under another law. You would not need the consent of the complainant to defer dealing with the complaint, for example, if it is a complaint that might be more about corrupt conduct and would be better dealt with by the CCC.

Ms Oxenham: Clause 70(1) allows the commissioner to refuse to deal with or continue to deal with a complaint if the commissioner considers there is a more appropriate course of action available under another law to deal with the subject of the complaint.

Mr McDONALD: I am still coming to grips with why we are doing this and not focusing on other important things such as saving people in the community money. Perhaps some things might have a higher priority in my mind. We have heard that there are not some great examples of breaches of human rights in Queensland and we know that every bill that is introduced will create a cost to the community. I have had discussions with some lawyers who are already rubbing their hands together seeing this opportunity to be involved in another process of resolving precedents which they tell me are already established albeit under different legislation. When this bill is passed, what will be the improvement to Queenslanders' lives? Secondly, what might be some unintended consequences of the bill?

Mrs Robertson: I think, Chair, some of the issues raised by the member's question are coming towards the policy rationale of government for the bill. I guess, however, there are probably a couple of clarifying things to perhaps reiterate. We have talked previously about the benefits for Queensland. It is to bring front and centre a dialogue across the three arms of government about human rights. Secondly, I guess the important thing is that it does not create a separate, standalone cause of action. People have to have an existing cause of action onto which the unlawfulness under the Human Rights Bill can piggyback. Thirdly, another remedy people may want to pursue is by making a complaint to the public sector entity—people already complain to public sector entities about things—and that will be subject to consideration by the rebranded Anti-Discrimination Commission and there will be an ability for that complaint to be conciliated in a fairly low, informal way. There is not an automatic right of representation by lawyers; that is a matter for the commission itself. I feel to take it any further is trespassing onto government's policy.

Mr McDONALD: Could I ask, then: what are the potential consequences of this act? Have you thought about any unintended consequences of the introduction of the act?

Mrs Robertson: I think the consequences, based on the positive experience coming out of Victoria, would be that probably across the three arms of government—again, to repeat the language that has already been used—there will be this ongoing dialogue and awareness in relation to human rights in decision-making and lawmaking.

Ms McMILLAN: Proposed section 40 provides that if a non-Queensland law is referred to a portfolio committee the committee must consider the law and report to the Legislative Assembly about whether the law is not compatible with human rights. If a committee finds that a law is not compatible with human rights, what happens then?

Ms Chandler: It can then report to the Legislative Assembly. That provision is an enhancement on the Victorian charter and a recommendation of the 2015 review. A non-Queensland law would include a law that is in force in Queensland because under the Constitution we have referred powers to the Commonwealth to legislate or, if it is an applied law, another state makes a law and we apply that law in Queensland. Once that law is amended it usually means that the Legislative Assembly or parliament does not have an opportunity to continue to scrutinise that law. It is not a must; the Legislative Assembly may refer that non-Queensland law to a parliamentary committee that then examines the law and reports to the Legislative Assembly.

Ms McMILLAN: Can you give me any examples of any federal laws where, had we had this Human Rights Bill, that may have happened?

Ms Chandler: I can you give you a couple of examples of referrals and applied laws. The occupational licensing system is applied law that was passed in 2010. Amendments may have been made to that law after it was passed, although I have not looked into that in any detail. In 2003 all states referred a limited power to allow the enactment of the Criminal Code Amendment (Terrorism) Act. The agreement was that that act not be amended without consultation with other states. I suppose any amendments to that act could have been scrutinised by the parliamentary committee.

CHAIR: It appears that the committee does not have any further questions. Thank you to Mrs Robertson, Ms Chandler and Ms Oxenham for your appearance this morning to brief the committee. Thank you to our parliamentary and secretariat staff. A transcript of these proceedings will be available on the committee's parliamentary web page in due course. I declare this public briefing for the committee's inquiry into the Human Rights Bill 2018 closed.

The committee adjourned at 10.30 am.