

# Human Rights Bill 2018

## Explanatory Notes

### Short title

The short title of the Bill is the Human Rights Bill 2018.

### Policy objectives and the reasons for them

The objectives of the Human Rights Bill 2018 (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 as the Queensland Human Rights Commission to:
  - provide a dispute resolution process for dealing with human rights complaints; and
  - promote an understanding, acceptance and public discussion of human rights.

### Human rights in Australia and Queensland

The modern idea of human rights is based on the *Universal Declaration of Human Rights* (UDHR) adopted by the United Nations General Assembly in 1948. A key aim of the UDHR was to reaffirm faith in human rights following the experience of the preceding world wars. It was the first time countries, including Australia, agreed on a comprehensive statement of human rights – to be enjoyed by all people.

Since the UDHR, Australia has ratified many human rights treaties including:

- the International Covenant on Civil and Political Rights (ICCPR);
- the International Covenant on Economic, Social and Cultural Rights (ICESCR);
- the Convention on the Elimination of all Forms of Discrimination Against Women;
- the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;
- the Convention on the Rights of the Child (CRC);
- the Convention on the Rights of Persons with Disabilities; and
- the International Convention on the Elimination of All Forms of Racial Discrimination.

Whilst not a party to the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), the Australian Government supports the declaration as a non-legally binding document.

By virtue of ratifying these treaties, Australia has accepted legal obligations under international law. However, a treaty only becomes a direct source of individual rights and obligations when it is directly incorporated into domestic legislation.

Victoria and the Australian Capital Territory (ACT) have enacted human rights legislation – the *Charter of Human Rights and Responsibilities 2006* (Vic) (the Victorian Charter) and the *Human Rights Act 2004* (ACT) (the ACT Human Rights Act).

In Queensland, some human rights are reflected in legislation: for example, the *Anti-Discrimination Act 1991* prohibits discrimination on the basis of numerous grounds including race, sex, age and impairment. Other human rights, particularly civil and political rights, are recognised common law rights, including the right to liberty and security of the person, the right to a fair trial, freedom of peaceful assembly, freedom of association, and freedom of expression.

Social and economic rights (as reflected in the ICESCR) grew out of the recognition that access to certain basic conditions of living is necessary to live well and freely.

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 ICCPR, as well as the rights to health services and education drawn from the ICESCR, and property rights drawn from the UDHR.

### **The Legal Affairs and Community Safety Committee Inquiry**

In 2015, the Legislative Assembly directed the Legal Affairs and Community Safety Committee (LACSC) to inquire into the appropriateness and desirability of a Human Rights Act for Queensland. The LACSC tabled the report *Inquiry into a possible Human Rights Act for Queensland* (the LACSC report) on 30 June 2016. The LACSC was unable to agree on whether it would be appropriate and desirable to have a Human Rights Act in Queensland. The government members supported a Human Rights Act (similar to the Victorian Charter but with a right to education included) and the non-government members opposed the introduction of a Human Rights Act for Queensland.

In the LACSC report, the government members made the following five recommendations:

- that the Queensland Parliament move to legislate for a Human Rights Act in Queensland;
- that where a Human Rights Act is legislated, all Bills proposed by parliament be accompanied with a ‘statement of compatibility’;
- that where it is deemed by a parliamentary portfolio committee that a Bill be inconsistent with a ‘statement of compatibility’ this in itself does not limit the Bill being passed by Parliament;
- that the judiciary have no part in any complaint process where a person is perceived to have suffered a human rights matter; and
- that the objectives of a Human Rights Act (should it be legislated) contain, as a minimum, right to recognition and equality, right to life, right to freedom of movement, right to privacy and reputation, right to religion and belief, right to peaceful assembly and freedom of association, cultural rights (right to enjoy culture, declare and practise religion and use language), rights to education and rights of children in the criminal process.

## Achievement of policy objectives

### The model of the Bill

The Bill will be an ordinary Act of Parliament. That is, it will maintain the existing relationship between the courts, the Parliament and the executive (government). The courts cannot invalidate legislation that is not compatible with human rights. Parliament remains sovereign, and may, if it wishes, intentionally pass legislation that is not compatible with human rights in the Bill.

### The human rights to be protected

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. The Bill also protects two rights drawn from the ICESCR (right to education and right to health services), and one right drawn from the UDHR (property rights). The Bill will also explicitly recognise cultural rights and, in particular, the distinct cultural rights of Aboriginal peoples and Torres Strait Islander peoples.

Clause	Right protected	Drawn from	Explanation
Clause 15	Recognition and equality before the law	Articles 16 and 26 of the ICCPR	Every person has the right to recognition as a person before the law and the right to enjoy their human rights without discrimination. Every person is equal before the law and is entitled to equal protection of the law without discrimination. Every person is entitled to equal and effective protection against discrimination.
Clause 16	Right to life	Article 6(1) of the ICCPR	Every person has the right to life and the right not to be deprived of life. The right not to be deprived of life is limited to <i>arbitrary</i> deprivation of life.
Clause 17	Protection from torture and cruel, inhuman or degrading treatment	Article 7 of the ICCPR	A person must not be tortured or treated in a way that is cruel, inhuman or degrading. This includes that a person must not be subjected to medical or scientific experimentation or treatment unless they have given their full, free and informed consent.
Clause 18	Freedom from forced work	Article 8 of the ICCPR	A person must not be made a slave or forced to work. Forced work does not include certain forms of work or service, such as work or service required of a person who is detained because of a lawful court order.
Clause 19	Freedom of movement	Article 12 of the ICCPR	Every person lawfully within Queensland has the right to move freely within Queensland, enter or leave Queensland, and choose where they live.
Clause 20	Freedom of thought, conscience, religion and belief	Article 18 of the ICCPR	Every person has the right to think and believe what they want and to have or adopt a religion, free from external influence. This includes the freedom to demonstrate a religion individually or as part of a group, in public or in private.
Clause 21	Freedom of expression	Article 19 of the ICCPR	Every person has the right to hold and express an opinion, through speech, art, writing (or other forms of expression) and to seek out and receive the expression of others' opinions.

<i>Clause 22</i>	Peaceful assembly and freedom of association	Articles 21 and 22 of the ICCPR	Every person has the right to join or form a group and to assemble. The right to assembly is limited to <i>peaceful</i> assemblies.
<i>Clause 23</i>	Taking part in public life	Article 25 of the ICCPR	Every person in Queensland has the right and opportunity without discrimination to take part in public life. Every eligible person has the right to vote, be elected, and have access on general terms of equality to the public service and public office.
<i>Clause 24</i>	Property rights	Article 17 of the UDHR	All persons have the right to own property alone or in association with others. A person must not be arbitrarily deprived of their property.
<i>Clause 25</i>	Privacy and reputation	Article 17 of the ICCPR	A person's privacy, family, home and correspondence must not be unlawfully or arbitrarily interfered with. A person has the right not to have their reputation unlawfully attacked.
<i>Clause 26</i>	Protection of families and children	Articles 23(1), 24(1) and 24(2) of the ICCPR	Families are recognised as the fundamental unit of society and are entitled to protection. Every child has the right, without discrimination, to the protection that is in their best interests as a child. Every person born in Queensland has the right to a name and to registration of birth.
<i>Clause 27</i>	Cultural rights—generally	Article 27 of the ICCPR	All persons with particular cultural, religious, racial and linguistic backgrounds have a right to enjoy their culture, declare and practise their religion, and use their language, in community with other persons of that background.
<i>Clause 28</i>	Cultural rights—Aboriginal peoples and Torres Strait Islander peoples	Article 27 of the ICCPR and Articles 8, 25, 29 and 31 of the UNDRIP	Aboriginal peoples and Torres Strait Islander peoples hold distinct cultural rights as Australia's first people. They must not be denied the right, with other members of their community, to live life as an Aboriginal or Torres Strait Islander person who is free to practise their culture.
<i>Clause 29</i>	Right to liberty and security of person	Articles 9 and 11 of the ICCPR	Every person has the right to liberty and security. This right protects against the unlawful or arbitrary deprivation of liberty. If a person is arrested or detained, they are entitled to certain minimum rights, including the right to be brought to trial without unreasonable delay.
<i>Clause 30</i>	Humane treatment when deprived of liberty	Article 10(1) and 10(2)(a) of the ICCPR	A person must be treated with humanity and respect when deprived of liberty. An accused person who is detained must not be detained with convicted persons unless reasonably necessary, and must be treated in a way that is appropriate for a person who has not been convicted.
<i>Clause 31</i>	Fair hearing	Article 14(1) of the ICCPR	A person has the right to have criminal charges or civil proceedings decided by a competent, independent and impartial court or tribunal after a fair and public hearing. There is an exception to the right to a public hearing, whereby a court or tribunal may exclude certain people from a hearing if it is in the public interest or the interests of justice.
<i>Clause 32</i>	Rights in criminal proceedings	Article 14 of the ICCPR	A person charged with a criminal offence has the right to be presumed innocent until proven guilty according to law, and is entitled without discrimination to receive certain minimum guarantees. A person has the right to appeal a conviction in accordance with law. A child charged with a

			criminal offence has the right to a procedure that takes into account their age and the desirability of promoting rehabilitation.
<i>Clause 33</i>	Children in the criminal process	Article 10(2)(b) and 10(3) of the ICCPR	Children in the criminal process are entitled to special protections on the basis of their age. An accused child must not be detained with adults and must be brought to trial as quickly as possible. A convicted child must be treated in a way that is appropriate for their age.
<i>Clause 34</i>	Right not to be tried or punished more than once	Article 14(7) of the ICCPR	A person must not be tried or punished more than once for an offence in relation to which they have already been finally acquitted or convicted according to law.
<i>Clause 35</i>	Retrospective criminal laws	Article 15 of the ICCPR	A person must not be prosecuted or punished for conduct that was not a criminal offence at the time the conduct was engaged in. A person must not receive a penalty that is greater than the penalty that applied at the time they committed the offence.
<i>Clause 36</i>	Right to education	Article 13 of the ICESCR	Every child has the right to have access to primary and secondary education appropriate to their needs. Every person has the right to have access, based on their abilities, to further vocational education and training that is equally accessible to all.
<i>Clause 37</i>	Right to health services	Article 12 of the ICESCR	Every person has the right to access health services without discrimination. A person must not be refused necessary emergency medical treatment.

### **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 provisions.

The Bill provides (clause 8) 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.

### **Human rights are not absolute**

The Bill acknowledges that human rights are not absolute and may be subject under law to reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom (clause 13). Clause 13 (**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. While these factors are only a guide they are intended to align generally with the principle of proportionality – a test applied by courts in many other jurisdictions to determine whether a limit on a right is justifiable.

### **Obligations imposed on government**

The Bill aims 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. In this way the Bill will form part of the suite of other

administrative law obligations and oversight mechanisms that aim to hold the government accountable, such as the:

- *Right to Information Act 2009*;
- *Information Privacy Act 2009*;
- *Judicial Review Act 1991*;
- *Ombudsman Act 2001*;
- *Anti-Discrimination Act 1991*; and
- *Crime and Corruption Act 2001*.

The Bill also aims to ensure human rights are given proper consideration in public sector decision-making and in the development of policy and legislation in Queensland.

The Bill aims to promote a discussion or ‘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. Part 3 of the Bill sets out the application of human rights in Queensland.

Parts of Bill	Role and obligations imposed by Bill
<b>Parliament</b>	
Part 3, Divisions 1 and 2	<p>Parliament will scrutinise all legislative proposals (Bills and subordinate legislation) for compatibility with human rights. The Bill requires:</p> <ul style="list-style-type: none"> <li>• all Bills introduced into Parliament to be accompanied by a <b>statement of compatibility</b> (clause 38);</li> <li>• statements of compatibility to state whether, in the opinion of the member who introduces the Bill, the Bill is compatible with human rights and the nature and extent of any incompatibility (clause 38);</li> <li>• the portfolio committee responsible for examining a Bill to report to the Legislative Assembly about any incompatibility with human rights (clause 39);</li> <li>• a Minister responsible for subordinate legislation to prepare a <b>human rights certificate</b> to accompany the legislation when it is tabled in the Legislative Assembly (clause 41); and</li> <li>• a human rights certificate to state whether in the Minister’s opinion the subordinate legislation is compatible with human rights (clause 41(2)).</li> </ul> <p>The Bill also provides for Parliament, in exceptional circumstances, to make an <b>override declaration</b> in relation to an Act or a provision in an Act (clause 43). If an override declaration is made, the Human Rights Act (HR Act) does not apply to the Act or provision to the extent of the declaration while the declaration is in force (clause 45).</p>

Parts of Bill	Role and obligations imposed by Bill
<b>Courts</b>	
Part 3, Division 3	<p>So far as is possible to do so, courts and tribunals must interpret legislation in a way that is compatible with human rights. The Bill requires:</p> <ul style="list-style-type: none"> <li>• all statutory provisions, to the extent possible consistent with their purpose, <b>be interpreted in a way that is compatible with human rights</b> (clause 48(1)); and</li> <li>• 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, <b>be interpreted in a way that is most compatible with human rights</b> (clause 48(2)).</li> </ul> <p>The Bill also provides that the Supreme Court may, in a proceeding, make a <b>declaration of incompatibility</b> to the effect that the court is of the opinion that a statutory provision cannot be interpreted in a way compatible with human rights (clause 53).</p>
<b>Executive (or public entities)</b>	
Part 3, Division 4	<p><b>Public entities</b> (defined in clause 9) must act and make decisions in a way that is compatible with human rights. The Bill provides (with some exceptions) that it is unlawful for a public entity:</p> <ul style="list-style-type: none"> <li>• to <b>act or make a decision</b> in a way that is not compatible with human rights (clause 58(1)(a)); or</li> <li>• in making a decision, to fail to <b>give proper consideration to</b> a human right relevant to the decision (clause 58(1)(b)).</li> </ul>

## Remedies

There is no stand-alone legal remedy for a contravention of the Bill. The regulatory model for the Bill favours discussion, awareness raising and education about human rights. There is also a model of dispute resolution that 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 (see human rights complaints and dispute resolution below).

There is however a limited enforcement mechanism. The Bill will provide that it is 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 (clause 58(1)). However, a person may only seek relief or remedy for this unlawfulness under clause 58(1) of the Bill if the person may seek relief or remedy in relation to an act or decision of the public entity on a ground of unlawfulness other than under clause 58(1). In practice this will mean where individuals have an independent cause of action against a public entity (for example, the right to seek judicial review of a decision of a public entity),

a claim of unlawfulness under the Bill can be added to that existing claim. This is what is colloquially known as a ‘piggy-back’ cause of action.

Monetary damages will not be available for a contravention of the Bill itself, but a person will be entitled to any other relief or remedy they could have obtained in relation to an independent cause of action (for example, in the case of judicial review, quashing or setting the decision aside, or referring the decision back to the original decision maker for further consideration and redetermination). There is an entitlement to this remedy (except if it is damages) even if the person is not successful in their independent cause of action.

### **Queensland Human Rights Commission**

The Bill will rename the Anti-Discrimination Commission Queensland (ADCQ) as the Queensland Human Rights Commission (QHRC) and provide the QHRC with important functions to support the regulatory model underpinning the Bill.

These functions will include:

- dealing with human rights complaints;
- if asked by the Attorney-General, reviewing the effect of Acts, statutory instruments and the common law on human rights and giving the Attorney-General a written report about the outcome of the review;
- reviewing public entities’ policies, programs, procedures, practices and services in relation to their compatibility with human rights;
- promoting an understanding and acceptance, and the public discussion, of human rights and the HR Act in Queensland;
- making information about human rights available to the community;
- providing education about human rights and the HR Act;
- assisting the Attorney-General in reviews of the HR Act;
- advising the Attorney-General about matters relevant to the operation of the Act; and
- preparing an annual report about the operation of the HR Act during the year.

### **Human rights complaints and dispute resolution**

The Bill also creates a **system for dealing with human rights complaints**. The QHRC will have a dispute resolution (complaints handling and conciliation) function.

In the first instance, individuals who are the subject of a public entity’s alleged failure to act or make a decision in a way that is compatible with human rights may make a complaint to the relevant public entity.

If the complaint cannot be resolved with the public entity, a person may make a human rights complaint to the QHRC. The QHRC may try to resolve the complaint, through either discussing the complaint with the complainant and the public entity or, if appropriate, through conciliation. The aim is to seek meaningful resolution of the human rights complaint in a way that is relatively informal.

### **Statutory review**

To ensure the effective operation of the HR Act, the Bill requires that the Act is periodically reviewed. The first review will consider the operation of the Act up to 1 July 2023. The



subsequent review will involve a review of the operation of the Act from 1 July 2023 to 1 July 2027 (or an earlier date at the discretion of the Attorney-General).

### **Amendments to other Acts in relation to the operation of the proposed Human Rights Act 2018**

The Bill will amend the *Youth Justice Act 1992* (YJA) and the *Corrective Services Act 2006* (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 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.

For the YJA this will be limited to the chief executive's consideration of clause 30(2) of the Bill and a decision about whether to segregate accused children from convicted children in youth detention centres. The other factors to be considered by the chief executive include:

- the safety and wellbeing of a child on remand and other detainees; and
- the chief executive's responsibilities and obligations under existing section 263.

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 YJA are complied with.

For the CSA the amendment will be limited to acts and decisions relating to 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 their own room. The other factors to be considered include:

- the security and good management of corrective services facilities; and
- the safe custody and welfare of all prisoners.

### **Alternative ways of achieving policy objectives**

There are a number of alternative models for Human Rights Acts including:

- **the constitutional (or entrenched) models:** as represented by the United States Constitution. It depends primarily on judicial review of legislative and executive actions. The judiciary is empowered to invalidate legislation and executive actions that violate the rights in the United States Constitution. This model arguably gives the judiciary the final word on human rights; and
- **the representative (or parliamentary) models:** as represented by the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cwlth) which involves an extension of existing parliamentary scrutiny mechanisms, with the establishment of a specific Human Rights Committee which has an explicit focus on international human rights. It gives the legislature a prominent role in the protection of human rights, justified on the basis that elected representatives are best placed to temper legislative agendas in relation to human rights considerations, rather than the judiciary.

Alternatively given some human rights (particularly civil and political rights) are also part of the common law, reliance could be placed on enforcing existing common law rights alongside education and awareness raising about human rights more generally.

The ‘dialogue model’ of human rights protection as represented in this Bill, and the Victorian Charter, is considered to represent a good middle ground. Under this model each of the three arms of government – the executive, the legislature (parliament) and the courts – have a legitimate role to play, while the parliament maintains sovereignty.

## **Estimated cost for government implementation**

The Queensland Government has committed \$2.298 million over four years (\$0.6 million per year ongoing) for the ADCQ (to be renamed the QHRC) to support the operation and administration of the HR Act.

Any other costs to departments and agencies from the implementation of the legislation will be met from existing resources.

## **Consistency with fundamental legislative principles**

The Bill is generally consistent with fundamental legislative principles.

## **Consultation**

In its 2016 inquiry, the LACSC received over 480 submissions, including oral submissions at public hearings held across Queensland, and incorporated the views of individuals, organisations and interstate agencies in the report.

The majority of submissions to the LACSC supported a Human Rights Act in Queensland.

The majority of the legal stakeholders supported a Human Rights Act for Queensland. Legal stakeholders who supported a Human Rights Act supported a dialogue model similar to the Victorian Charter and the ACT Human Rights Act, with a stand-alone cause of action.

Those legal stakeholders who did not support a Human Rights Act argued that it was unnecessary given the existing protection of rights and that it gave an inappropriate role to the judiciary.

Queensland statutory bodies and officers that made a submission (including for example the Anti-Discrimination Commissioner; the Office of the Information Commissioner; the Queensland Ombudsman; the Public Guardian and the Public Advocate) were supportive of a Human Rights Act for Queensland based on the models present in Victoria and the ACT. There was a focus in some of these submissions on the need for community education and awareness around human rights.

The Australian Family Association, Family Voice Australia, and Christian churches and organisations indicated human rights are adequately protected in Queensland, noted a perceived failure of the Victorian Charter (to deliver the cultural change that it promised), and noted a potential for the transference of power from elected members of parliament to unelected members of the judiciary.

The ADCQ and the following stakeholders were consulted on the Bill prior to finalisation: A Human Rights Act for Queensland Campaign, Caxton Legal Centre, Community Legal Centres Queensland, Queensland Council for Civil Liberties, Bar Association of Queensland, Queensland Law Society, Aboriginal and Torres Strait Islander Legal Service, LGBTI Legal Service, Sisters Inside, Prisoners Legal Service, Human Rights Law Centre, Micah Projects, Queensland Aboriginal and Torres Strait Islander Child Protection Peak, Tenants Queensland, Queensland Alliance for Mental Health, Council on the Ageing Qld, Community Services Industry Alliance, PeakCare, Queensland Council of Social Services, Queenslanders with Disability Network, National Disability Services, Queensland Advocacy Incorporated, Endeavour Foundation, Youth Advocacy Centre, Create Foundation.

Overall stakeholders were very supportive of the Bill based on the model of the Victorian Charter. Stakeholders were also supportive of the additional social and economic rights including the right to education and the right to health services as well as a disputes resolution function for the QHRC. Some stakeholders did however consider that, unlike the Victorian Charter, the Bill should include a stand-alone 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. Many stakeholders also expressed concern at the potential impact of the amendments to the YJA and CSA.

## **Consistency with legislation of other jurisdictions**

The Bill is specific to the State of Queensland, and is not uniform with or complementary to legislation of the Commonwealth or another State.

While the Bill is not intended to achieve uniformity with human rights legislation in other jurisdictions, it is based on a model of human rights legislation that is broadly consistent with the Victorian Charter and the ACT Human Rights Act.

The Victorian Charter adopts the ‘dialogue’ model; that is, a framework for dialogue between the three arms of government (the executive, the legislature, and the courts) about human rights, and enshrines the same rights as those included in the Bill, with the exception of the rights to education and health services.

The ACT Human Rights Act also adopts the dialogue model and incorporates similar rights to those included in the Bill, with the exception of the right to health services and property rights. The ACT legislation also includes a right to compensation for wrongful conviction.

# Notes on provisions

## Preamble

The *Preamble* reflects the philosophy which underpins the Bill. It also provides a link to the key human rights instruments that are underpinned by the same philosophy, in particular the UDHR. The preamble recognises that human rights are essential in a democratic and inclusive society that respects the rule of law. It also recognises that human rights must be exercised in a way that respects the human rights of others, and should be limited only after careful consideration and only in a way that can be justified.

The *Preamble* acknowledges that the right to self-determination is of particular significance for Aboriginal peoples and Torres Strait Islander peoples of Queensland.

## Part 1 Preliminary

### Division 1 Introduction

*Clause 1* states that, when enacted, the Bill will be cited as the *Human Rights Act 2018*.

*Clause 2* provides for commencement of the Bill on a date to be fixed by proclamation.

*Clause 3* provides that the objects of the Bill are to:

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

*Clause 4* provides that the main objects of the Bill are mainly achieved by:

- stating the human rights Parliament specifically seeks to protect and promote;
- requiring public entities to act and make decisions in a way compatible with human rights;
- requiring statements of compatibility with human rights to be tabled in the Legislative Assembly for all Bills introduced in the Legislative Assembly;
- providing for a portfolio committee responsible for examining a Bill introduced in the Legislative Assembly to consider whether it is compatible with human rights;
- providing for Parliament, in exceptional circumstances, to override the application of the Bill to a statutory provision;
- requiring courts and tribunals to interpret statutory provisions, to the extent possible that is consistent with their purpose, in a way compatible with human rights;
- conferring jurisdiction on the Supreme Court to declare that a statutory provision cannot be interpreted in a way compatible with human rights;
- providing for a Minister and a portfolio committee to report to the Legislative Assembly about declarations of incompatibility;
- providing for how to resolve human rights complaints; and
- providing for the Queensland Human Rights Commission to carry out particular functions including, for example, to promote an understanding and acceptance of human rights and the Bill in Queensland.

*Clause 5* provides that the Bill binds all persons including the State of Queensland and, as far as the legislative power of the Parliament permits, the Commonwealth and the other States.

Subclause (2) makes it clear that the Bill applies to courts and tribunals, the Parliament and public entities to the extent that they have a function under specific parts of the Bill, that is:

- for a court or tribunal – a function under part 2 and part 3, division 3;
- for the Parliament – a function under part 3, division 1, 2 or 3; and
- for a public entity – a function under part 3, division 4.

Clause 5 also provides that:

- the application of the Bill to certain functions of courts, tribunals, the Parliament and public entities as set out in clause 5(2), does not limit or otherwise affect another function conferred by the Bill on the entity or another entity; and
- nothing in the Bill makes the State liable to be prosecuted for an offence.

## **Division 2            Interpretation**

This division defines some of the key terms for the Bill.

*Clause 6* states that the dictionary for particular words used in the Bill is in schedule 1 of the Bill.

*Clause 7* defines the term ‘human rights’. Human rights means the rights stated in part 2, divisions 2 and 3 of the Bill.

*Clause 8* defines the term ‘**compatible with human rights**’. An act, decision or statutory provision is compatible with human rights if it:

- 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.

Clause 13 elaborates on the ‘reasonable and demonstrably justifiable’ limb of compatibility in clause 8, including by setting out factors that may be relevant in deciding whether a limit on a human right is reasonable and demonstrably justifiable.

The term ‘compatible with human rights’ is a unifying concept for the Bill and a term central to the following provisions:

- the general limitations provision, which allows for limitations on human rights that are reasonable and demonstrably justifiable (clause 13);
- the obligations on public entities to act in a way and make decisions that are compatible with human rights (part 3, division 4);
- the obligation on members of Parliament to ensure that a Bill that is introduced into Parliament is accompanied by a statement of compatibility (part 3, division 1);
- the obligation on portfolio committees to scrutinise a Bill for compatibility with human rights (part 3, division 1);

- the requirement on the responsible Minister for subordinate legislation to prepare a human rights certificate for the legislation addressing compatibility with human rights (part 3, division 1);
- the ability of a portfolio committee to scrutinise subordinate legislation for compatibility with human rights (part 3, division 1);
- the ability for Parliament to expressly declare (via an ‘override declaration’) that an Act or a provision of an Act has effect despite being incompatible with one or more human rights or despite anything else in the HR Act (part 3, division 2);
- the obligation to interpret statutory provisions in a way that is compatible with human rights (part 3, division 3); and
- the ability of the Supreme Court to make a declaration of incompatibility to the effect that the court is of the opinion that a statutory provision can not be interpreted in a way that is compatible with human rights (part 3, division 3).

References to ‘compatible’ or ‘compatibility’ with human rights in these provisions are intended to refer to an act, decision or statutory provision which is ‘compatible with human rights’ as that term is defined in clause 8. Likewise, references to ‘incompatible’, ‘not compatible’ or ‘incompatibility’ with human rights in these provisions are intended to refer to an act, decision or statutory provision which is not ‘compatible with human rights’ as that term is defined in clause 8.

Clause 9 defines ‘**public entity**’.

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).

‘Core public entities’ are entities that fall within the definition of public entity in clause 9 at all times, regardless of the functions they are performing. The core public entities listed in the definition are:

- a government entity within the meaning of the *Public Service Act 2008*, section 24 (paragraph (a));
- a public service employee (paragraph (b))
- the Queensland Police Service (paragraph (c));
- a local government, a councillor of a local government, or a local government employee (paragraph (d));
- a Minister (paragraph (e)); and
- a staff member or executive officer of a public entity (paragraph (i)).

‘Functional public entities’ are entities that fall within the definition of ‘public entity’ in clause 9 only when they are performing certain functions. The functional public entities listed in the definition are:

- an entity established under an Act when the entity is performing functions of a public nature (paragraph (f)); or
- an entity whose functions are, or include, functions of a public nature when it is performing the functions for the State or a public entity (whether under contract or otherwise) (paragraph (h)).

The inclusion of 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.

A member of a portfolio committee when the committee is acting in an administrative capacity (paragraph (g)) is also a public entity for the purposes of the Bill.

Subclause (1) includes in the meaning of a public entity an entity prescribed by regulation to be a public entity (paragraph (j)).

Subclause (2) includes in the meaning of public entity, registered providers of supports or a registered NDIS provider under the *National Disability Insurance Scheme Act 2013* (Cwlth) when they are performing functions of a public nature in the State (paragraph (a)).

Subclause (2) also includes in the meaning of public entity, a non-State police officer, under the *Police Service Administration Act 1990*, section 5.17, while the officer is: appointed as a special constable under section 5.16(1) of that Act; authorised under section 5.17(2) of that Act to exercise the powers of a police officer; or if exercising a power under another law of the State (paragraph (b)).

A public entity also includes an entity for which a declaration is in force under clause 60 (subclause (3)). Clause 60 allows an entity to ‘opt in’ to be a public entity for the Bill.

Subclause (4) states that the following entities are not a public entity for the purposes of the Bill, except when acting in an administrative capacity:

- the Legislative Assembly or a person performing functions in connection with proceedings in the Assembly; or
- a court or tribunal.

Further, a public entity does not include an entity prescribed by regulation not to be a public entity for the purposes of the Bill.

Subclause (5) provides definitions for clause 9. In particular, the term ‘entity’ is defined to make it clear that in clause 9 the term means an entity ‘in and for Queensland’.

*Clause 10* provides guidance about when a function of an entity is of a public nature by setting out a non-exhaustive list of factors which may be considered to determine whether a function of an entity is a function of a public nature. These include:

- whether the function is conferred on the entity under a statutory provision;
- whether the function is connected to or generally identified with functions of government;
- whether the function is of a regulatory nature; and
- whether the entity is a government owned corporation.

Subclause (3) provides (without limiting the factors which may be considered to determine whether a function of an entity is a function of a public nature) a non-exhaustive list of functions which are taken to be functions of a public nature. These include:

- emergency services;
- public health services;

- public disability services;
- public education, including public tertiary education and public vocational education;
- public transport; and
- a housing service provided by a funded provider or the State under the *Housing Act 2003*.

Depending on the circumstances of the case, there may be other factors, or other functions that are relevant in determining whether the function is of a public nature.

## **Part 2 Human rights in Queensland**

### **Division 1 Preliminary**

*Clause 11* provides that all individuals in Queensland have human rights, and clarifies that only natural persons have human rights. This means that artificial persons, such as corporations, do not have human rights.

*Clause 12* clarifies that a right or freedom that arises or is recognised under another law must not be taken to be abrogated or limited because it is not included or only partly included in the Bill. Examples of rights or freedoms which are not abrogated or limited include rights under international law or the common law that are not human rights which are protected under the Bill: i.e. not rights contained in part 2, division 2 and 3 of the Bill. This is relevant, for example, to the extent that a right or freedom not protected under the Bill may remain a consideration for the purposes of a particular administrative decision under another law or adjudication of rights by the courts.

*Clause 13* is the **general limitations clause**. All human rights in the Bill may be subject to a limitation in accordance with clause 13. This means that the human rights protected by the Bill are not absolute and may be balanced against the rights of others and public policy issues of significant importance. Clause 13 provides a framework for deciding when and how a human right may be limited in a way which does not result in incompatibility under clause 8.

Subclause (1) sets out the basic test for how a human right may be limited. It provides that a human right may be subject under law only to reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

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

Subclause (1) imposes a requirement that the limitation is a reasonable limitation that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

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.

Subclause (2) sets out the factors that may be relevant in deciding whether a limit is reasonable and justifiable. The factors enumerated in subsection (2) are not exhaustive and are intended to



be used as a guide. They are also intended to align generally with the principle of proportionality, a test applied by courts in many other jurisdictions to determine whether a limit on a human right is justifiable.

The factors set out in subclause 13(2)(a) to (g) are:

The nature of the human right: 13(2)(a)	It is important to first consider the nature of the human right. This involves looking at the purpose and underlying values of the human right.
The nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom: 13(2)(b)	Not every purpose can justify a limitation on a human right. Whether the purpose of a law limiting a human right is consistent with the values of a free and democratic society may be relevant in considering whether the limit is reasonable and justified. Another way of saying this is that 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. Examples of such purposes include the protection of the rights of others and public interest considerations, including the protection of the democratic nature of the society. In proportionality analysis, this element is sometimes called legitimate purpose or proper purpose.
The relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose: 13(2)(c)	Having identified the purpose of the limitation, it may be relevant to consider the relationship between the limitation and the purpose. This inquiry includes considering whether the law goes some way towards furthering that purpose. In proportionality analysis this is sometimes called rational connection or suitability.
Whether there are any less restrictive and reasonably available ways to achieve the purpose: 13(2)(d)	It may be relevant to consider whether the purpose of the law can be reasonably achieved in more than one way, and whether other options have less impact on human rights. In proportionality analysis this element is sometimes called necessity.
The importance of the purpose of the limitation: 13(2)(e)	The last three factors involve a balancing exercise. It may be relevant to consider whether the benefits gained by fulfilling the purpose of the limitation outweigh the harm caused to the human right.  The importance of the purpose of limiting the human right may be considered on one side of the scales.
The importance of preserving the human right, taking into account the nature and extent of the limitation on the human right: 13(2)(f)	The importance of the human right and the extent of the limitation of the right may be considered on the other side of the scales.

The balance between the matters mentioned in paragraphs (e) and (f): 13(2)(g)	The balancing exercise involves comparing the importance of the purpose of limiting the human right with the importance of the human right and the extent of the limitation. This comparison considers whether the limiting law strikes a fair balance. The more important the right and the greater the incursion on the right, the more important the purpose will need to be to justify the limitation.
---	--

All human rights protected under the Bill may be subject to a limitation imposed in accordance with the general limitations clause. In addition, some rights are also subject to internal limitations; for example the right to humane treatment when deprived of liberty (clause 30) 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* (subclause 30(2)).

In some cases, the scope of a right is qualified by a term within the clause itself, that is, some rights are qualified by the concept of ‘arbitrariness’, for example, the right not to be arbitrarily deprived of life (clause 16).

Not all of the factors which are listed in subclause (2) will be relevant in all cases but the factors can be used by public entities as well as courts and tribunals to assist in their assessment of whether any limits on human rights are justified.

*Clause 14* provides that nothing in the Bill gives a person or other entity a right to limit a human right of any person to a greater extent than is provided for under the Bill or destroy a human right. The purpose of this provision is to ensure that the Bill is not used to negatively impact the human rights of a person, other than to the extent provided for under the Bill.

## Division 2 Civil and political rights

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

Subclause (1) provides that every person has the right to recognition as a person before the law. This provision is modelled on article 16 of the ICCPR.

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

Subclause (3) provides the right to legal personality. This is based on article 16 of the ICCPR, which provides that every person is equal before the law and entitled to equal protection of the law without discrimination. It is closely linked to the principle of non-discrimination.

Subclause (4) provides the right to equality. It is modelled on article 26 of the ICCPR which provides that every person is entitled to equal and effective protection against discrimination. It 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.

However, subclause (5) makes it clear that measures taken to assist persons who are particularly vulnerable, do not count as discrimination. 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.

*Clause 16* provides for the **right to life**. This clause is modelled on article 6(1) of the ICCPR.

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 clause 106, which states that nothing in the Act affects any law relating to termination of pregnancy or the killing of an unborn child.

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

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*.

*Clause 18* provides for the **right to freedom from forced work**. This clause is modelled on article 8 of the ICCPR.

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).

*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. 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).

*Clause 20* provides for the **right to freedom of thought, conscience, religion and belief**. This clause is modelled on article 18 of the ICCPR.

It 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.

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.

*Clause 21* provides for the **right to freedom of expression**. 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 fulfillment of other rights such as cultural rights and freedom of thought, conscience and religion.

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 (clause 13), will provide for this.

*Clause 22* provides for **the right of peaceful assembly and freedom of association**. 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 (clause 13), will provide for this.

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

*Clause 24* provides for **property rights**. 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.

*Clause 25* provides for the **rights to privacy and reputation**. 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 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.

*Clause 26* provides for the **right to protection of families and children**. This recognises two rights both the protection of the family and children, 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.

Subclause (1) provides that families are the fundamental group unit of society and are entitled to be protected by society and the State. This subclause is modelled on article 23(1) of the ICCPR.

The term 'family' is understood broadly in international law, extending to different cultural understandings of family and small family units with or without children.

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 subclause is modelled on article 24(1) of the ICCPR.

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 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.

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*.

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

*Clause 28* provides for the **distinct cultural rights held by Aboriginal peoples and Torres Strait Islander peoples** as Australia's first people. This clause is modelled on article 27 of the ICCPR, but also articles 8, 25, 29 and 31 of the UNDRIP. These articles 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 to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions (article 31).

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

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.

This provision is intended to be read with the savings provision at clause 107, which provides that the Bill does not affect native title rights and interests.

*Clause 29* provides for the **right to liberty and security of person**. This clause is modelled on articles 9 and 11 of the ICCPR.

Article 9 of the ICCPR is the right to liberty and security of person. The right 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.

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.

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.

*Clause 30* provides for the **right to humane treatment when deprived of liberty**. This clause is modelled on articles 10(1) and 10(2)(a) of the ICCPR, and expands on article 10 by requiring



certain treatment of an accused person or a person who is detained without charge under subclause (3).

This right requires that certain minimum standards of treatment are accorded to those who are deprived of liberty. The underlying principle is that a person's rights should only be curtailed to the extent necessary due to the confinement, reflecting that the punishment is intended to be limited to the deprivation of liberty.

Subclause (1) provides for the right of all persons deprived of liberty to be treated with humanity and with respect for the inherent dignity of the human person.

This right not only applies to detention in prison but also other places of detention, such as psychiatric facilities.

Subclause (2) provides for the right of an accused person or a person who is detained without charge to be segregated from persons who have been convicted of offences, unless reasonably necessary. This right is internally limited by providing that a limitation on the right to segregated detention will be justified if it is reasonably necessary.

Subclause (3) provides for the right of an accused person or a person who is detained without charge to be treated in a way that is appropriate for a person who has not been convicted. This subclause is an expansion on article 10 of the ICCPR.

*Clause 31* provides for the **right to a fair hearing**. This clause is modelled on article 14(1) of the ICCPR. It applies to criminal trials but also civil proceedings. This right and the right in clause 32 (certain rights in criminal proceedings) reflects the common law tradition of the 'due process of the law'.

Subclause (1) provides for the right of a person charged with a criminal offence or a party to a civil proceeding to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing.

It reflects the obligation on the State in article 14(1) ICCPR to set up by law independent and impartial courts and tribunals and provide them with the competence to hear and decide on criminal charges and rights and obligations in civil proceedings.

Subclause (2) provides an exception to the right to a public hearing, whereby a court or tribunal may exclude members of media organisations, other persons or the general public from all or part of the hearing if it is in the public interest or the interests of justice.

Subclause (3) provides that all judgments or decisions made by a court or tribunal in a proceeding must be publicly available. There is an acknowledgement in international law that certain proceedings or circumstances will justify a court suppressing all or part of a judgment. The general limitations clause (clause 13), will provide for this.

There is a logical relationship between subclause (3) and subclause (2). For example, if it is in the interests of justice to exclude the public from a trial under subclause (2) to protect the identity of a party, there may also be a legitimate need to withhold certain parts of a judgment that would identify that party.

Clause 32 provides for **certain rights in criminal proceedings**. This right is also modelled on article 14 of the ICCPR, but on those provisions regarding the right to certain minimal procedural guarantees in criminal trials.

Subclause (1) provides for the right of a person charged with a criminal offence to be presumed innocent until proved guilty according to law.

Subclause (2) sets out the minimum guarantees that a person charged with a criminal offence is entitled without discrimination to receive. These include:

- (a) to be informed promptly and in detail of the nature and reason for the charge against the person;
- (b) to have adequate time and facilities to prepare a 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 oneself personally or through legal assistance chosen by the person or, if eligible, through legal aid;
- (e) to be informed, if the person does not have representation, about the right, if eligible to legal aid;
- (f) to have access, if eligible, and if the interests of justice require it, to free legal aid;
- (g) to examine, or have examined, witnesses against the person;
- (h) to obtain the attendance of, and examine 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 cannot 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 this assistance; and
- (k) not to be compelled to testify against themselves or to confess guilt.

Nothing in subclause (2) entitles a person, if eligible for legal aid, to choose a particular lawyer to provide legal assistance through legal aid.

Subclause (3) provides for the right of a child charged with a criminal offence to a procedure that takes account of the child's age and the desirability of promoting rehabilitation.

Subclause (4) provides for the right of a person convicted of a criminal offence to have a higher court review the conviction and any sentence imposed, in accordance with law.

Subclause (5) clarifies that reference to legal aid in this provision means legal aid given under the *Legal Aid Queensland Act 1997*. References to legal aid have been made in paragraphs (d), (e) and (f) of subclause (2). It is the intention that the rights of a person to legal aid under this provision are consistent with existing rights under the *Legal Aid Queensland Act 1997*, and are conditional upon the person being eligible for legal aid under that Act. Where a person's eligibility for legal aid is dependent on a favorable exercise of discretion by Legal Aid Queensland, this provision does not confer an entitlement to legal assistance independent of the exercise of discretion by Legal Aid Queensland.

This clause is modelled on article 14 of the ICCPR. Article 14(6) of the ICCPR provides a right to compensation in certain circumstances where a person has been wrongly convicted and punished for a crime. Article 14(6) has intentionally not been reflected in this clause as it would

be inconsistent with clause 59(3) which provides that a person is not entitled to an award of damages on the ground of unlawfulness arising under clause 58.

*Clause 33* provides for **rights of children in the criminal process**. This clause recognises that children are entitled to special protections on the basis of their age. This clause is modelled on articles 10(2)(b) and 10(3) of the ICCPR.

Subclause (1) provides that an accused child who is detained, or a child detained without charge, must be segregated from all detained adults.

Subclause (2) provides that an accused child must be brought to trial as quickly as possible. This is a more onerous obligation than the requirement of a trial ‘without delay’ or ‘without unreasonable delay’ provided in clause 29(5), 29(7) and clause 32(2)(c).

Subclause (3) provides that a child who has been convicted of an offence must be treated in a way that is appropriate for the child’s age.

*Clause 34* provides for the **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 according to law. This clause is modelled on article 14(7) of the ICCPR. This clause does not apply to civil proceedings.

*Clause 35* provides for the **right to protection against retrospective criminal laws**. This clause is modelled on article 15 of the ICCPR.

Subclause (1) provides that a person must not be found guilty of an offence for conduct which was not an offence at the time it was engaged in. This reflects the prohibition not only on retrospective criminal laws but also the general duty on states reflected in article 15 of the ICCPR to define precisely by law all criminal offences in the interests of legal certainty and to preclude criminal laws from being extended by analogy.

Subclause (2) prohibits a penalty being imposed on a person for a criminal offence that is greater than the penalty that applied at the time the offence was committed.

Subclause (3) provides that if a penalty for an offence is reduced after a person has committed the offence but before they have been sentenced, the person is eligible for the reduced penalty.

Subclause (4) clarifies that nothing in this clause affects the trial or punishment of any person for any act or omission which was a criminal offence under international law at the time it was done or omitted to be done. This would include for example war crimes or crimes against humanity that were not crimes under domestic law but were crimes under customary international law at the time they were committed. It would allow these and similar crimes against international law such as slavery or torture to be punished by retrospective domestic criminal laws.

### **Division 3 Economic, social and cultural rights**

*Clause 36* provides for the **right to education**.

Subclause (1) provide 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.

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

*Clause 37* provides for the **right to health services**.

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 is modelled on article 12 of the ICESCR. 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 factors.

## **Part 3      Application of human rights in Queensland**

### **Division 1 Scrutiny of legislation**

*Clause 38* provides that all Bills introduced into Parliament must be accompanied by a **statement of compatibility**.

Subclause (2) provides that the statement of compatibility must state whether, in the opinion of the member who is responsible for the Bill, the Bill is compatible with human rights and if so, how it is compatible (paragraph (a)).

If the Bill is not compatible with a human right, the statement of compatibility must state this clearly, and must explain the nature and extent of the incompatibility (paragraph (b)).

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.

Statements of compatibility are required not only for government Bills, but also for private members' Bills. The statement must be tabled in the Legislative Assembly when the Bill is introduced (subclause (3)).

Subclause (4) provides that a statement of compatibility is not binding on any court or tribunal.

The purpose of the statements of compatibility is to elevate the consideration of human rights in legislative debate and to increase the transparency and accountability of Parliament.

*Clause 39* provides that the portfolio committee responsible for examining a Bill introduced into the Legislative Assembly must report to the Assembly about any incompatibility with human rights. Paragraph (b) also requires the portfolio committee to consider and report on the statement of compatibility.

It is intended that the portfolio committee will consider the statement of compatibility and also, whether any limits on human rights have been sufficiently justified within the meaning of the general limitations clause (clause 13).

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.

*Clause 40* enables the Legislative Assembly to refer amendments to non-Queensland laws that apply in Queensland (for example laws under a national scheme or regulations under those laws) to a portfolio committee to consider the law and report to the Legislative Assembly about whether the law is not compatible with human rights. This provides the Parliament with a discretionary referral mechanism in order to ensure that non-Queensland laws are able to be scrutinised for human rights compatibility even when any legislation that applies the scheme in Queensland is not being amended.

*Clause 41* requires a Minister responsible for subordinate legislation to prepare a **human rights certificate** for the legislation and table that certificate in the Legislative Assembly.

Subclause (2) provides that the human rights certificate must state:

- whether, in the opinion of the Minister, the subordinate legislation is compatible with human rights and if so, how it is compatible; and
- if, in the opinion of the Minister, a part of the subordinate legislation is not compatible with human rights, the nature and extent of the incompatibility.

When the subordinate legislation is tabled, it must be accompanied by a human rights certificate (subclause (3)), and the portfolio committee may also consider the certificate when examining the legislation (subclause (4)). ‘Responsible Minister’ is defined for the purpose of the clause as the Minister who administers the law or provision of the law under which the subordinate legislation is made (subclause (5)).

*Clause 42* clarifies that a failure to comply with the requirements of part 3, division 1 in relation to certain instruments does not affect the validity of those instruments.

## **Division 2          Override declarations**

*Clause 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 the HR Act (subclause (1)). The declaration is called an **override declaration** (subclause (2)). If an override declaration is made, the declaration extends to any subordinate instrument made under or for the purpose of that Act or provision (subclause (3)).

Subclause (4) states that it is the intention of Parliament that an override declaration will only be made in exceptional circumstances. Examples of exceptional circumstances are included in clause 43 and include war, a state of emergency or an exceptional crisis situation constituting a threat to public safety, health or order.

*Clause 44* provides that a member of Parliament who is introducing a Bill containing an override declaration must make a statement to the Legislative Assembly explaining the exceptional circumstances that justify the inclusion of the override declaration (subclause (1)). The statement must be made when introducing the Bill (subclause (2)). 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 (subclause (3)).

*Clause 45* provides that the effect of an *override declaration* is that, to the extent of the declaration, the HR Act will not apply to the Act or provision in respect of which the override declaration has been made.

In recognition of the exceptional nature of an override declaration, subclause (2) states that the override declaration has effect for five years after the day on which the provision commences or an earlier day stated in the relevant Act.

*Clause 46* provides that Parliament may re-enact an override declaration at any time. It also establishes that all of part 3, division 2 (Override declarations) will apply to any re-enacted override declarations. This means that for a re-enacted declaration Parliament must follow the same procedures as for the initial override declaration.

*Clause 47* provides that 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.

### **Division 3 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 (**interpretative provision**).

There are a number of important features to note about the interpretative provision.

First, the emphasis on giving effect to the legislative purpose means that the provision 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.

Second, the provision uses the term ‘compatible with human rights’ which is a defined term for the Bill (see clause 8). This means that it is clear that the court must apply a proportionality analysis when interpreting a statutory provision under clause 13.

Finally, subclause (2) clarifies that if the court is unable to interpret a statutory provision compatibly with human rights the court should adopt the interpretation which is most compatible with human rights, even though none of the options 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 the analysis required under clause 13 to each of the available options and select the option that is most compatible.

Subclause (3) also provides that international law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered when interpreting a statutory provision.

The intention is that Queensland courts and tribunals will be able to draw upon an existing body of human rights jurisprudence, including the decisions of United Nations treaty monitoring bodies such as the Human Rights Committee, supranational courts such as the European Court of Human Rights and the Inter-American Court of Human Rights, as well as the decisions in relation to human rights of domestic courts of other jurisdictions such as Canada, South Africa, the United Kingdom, New Zealand, the ACT and Victoria. The purpose of subclause (3) is to recognise that international law and jurisprudence may be considered in interpreting a statutory provision, while also recognising that not all international law and jurisprudence will be relevant to human rights as they are recognised and protected in Queensland.

Subclause (4) clarifies that the provision does not affect the validity of legislation or statutory instruments. This means that legislation will remain valid even if the court or tribunal cannot interpret the Act or provision in a way which is compatible with human rights. Incompatible statutory instruments will also remain valid, provided that the Act under which it was made empowered the making of a statutory instrument which is incompatible with human rights.

*Clause 49* provides an avenue of referral to the Supreme Court of certain questions arising in a proceeding before a court or tribunal in relation to the application of the Bill or the interpretation of a statutory provision in accordance with the Bill. Subclause (1) provides that a question of law that relates to the application of the Bill or a question in relation to the interpretation of a statutory provision in accordance with the Bill arising in a proceeding may be referred to the Supreme Court, or, where the question is referred by the Trial Division of the Supreme Court, to the Court of Appeal.

In order for a question to be referred a party must first make an application for referral to the court or tribunal. The (original) court or tribunal hearing the matter must then consider whether the question is appropriate for determination by the Supreme Court. A referral can only be made if both of these requirements are satisfied (subclause (2)).

Subclause (3) outlines the process that is to occur if a referral is made to the Supreme Court. It provides that if a question has been referred to the Supreme Court, the court or tribunal which made the referral must not make a decision to which the question is relevant while the referral

is pending or proceed in a way or make a decision that is inconsistent with the Supreme Court's decision of the question.

Subclause (5) makes it clear that a question may only be referred to the Supreme Court under this section, despite anything contained in another Act.

*Clause 50* provides that the Attorney-General 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 intervenes in a proceeding, the Attorney-General is taken to be a party to that proceeding for the purpose of any appeal from an order made in the proceeding.

*Clause 51* allows the QHRC to intervene and be joined as a party to a proceeding before a court or tribunal in which there is a question of law relating to the application the Bill, or a question in relation to the interpretation of a statutory provision in accordance with the Bill. If the QHRC intervenes, the commission is a party to the proceeding for the purpose of any appeal from an order made in the proceeding.

*Clause 52* sets out the circumstances in which notice, in the approved form, must be given to the Attorney-General and the QHRC, that is, in a proceeding in the Supreme or District Court where 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; or for another proceeding, a question is referred to the Supreme Court under clause 49.

Subclause (2) clarifies that notice need not be given to the Attorney-General if the State is already a party to the proceeding, and similarly, to the QHRC if the commission is already a party.

The provision does not require a court or tribunal to adjourn a proceeding in relation to which the notice is given (subclause (3)).

*Clause 53* sets out when the Supreme Court may make a **declaration of incompatibility**, that is, a declaration that the court is of the opinion that a statutory provision cannot be interpreted in a way that is compatible with human rights.

The meaning of the term 'compatible with human rights' is set out in clause 8 of the Bill. This makes it clear that the proportionality analysis in clause 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 clause 13, and concluded that it is not.

A declaration does not affect the validity of the law, is not binding on the parties, nor does it create legal rights or a civil cause of action (clause 54), but it does trigger a procedure whereby the incompatibility is brought to the attention of the Attorney-General and parliament (see clauses 55 and 56).

Clause 53 only permits the Supreme Court or a Court of Appeal to issue a declaration of incompatibility. A lower court or tribunal may refer certain questions to the Supreme Court



under clause 49 in certain circumstances. The Trial Division of the Supreme Court may also refer such questions to the Court of Appeal in certain circumstances (clause 49).

Subclause (1) states the circumstances in which a declaration of incompatibility can be made:

- in a proceeding in the Supreme Court, or in the Court of Appeal where the proceeding is an appeal, 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 (paragraphs (a) and (c)); or
- a question is referred to the Supreme Court under clause 49 (paragraph (b)).

Clause 53 also sets out the notice requirements, and provides that where the Supreme Court is considering making a declaration of incompatibility, the court is responsible for giving notice to the Attorney-General and the QHRC (subclause (4)).

The Supreme Court must not make the declaration unless satisfied that the notice has been given and that the Attorney-General and QHRC have been given a reasonable opportunity to intervene in the proceedings or make submissions about the proposed declaration (subclause (5)).

Subclause (6) provides that a declaration of incompatibility is taken to be an order of the court in the Trial Division for the purpose of section 62 of the *Supreme Court of Queensland Act 1991*. This has the effect that the declaration may be appealed to the Court of Appeal.

*Clause 54* clarifies that the declaration of incompatibility does not affect the validity of the statutory provision in respect of which the declaration was made, nor does it create any legal right or give rise to any civil cause of action.

The court does not have the power to invalidate legislation by making a declaration of incompatibility.

*Clause 55* requires the Supreme Court to give a copy of the declaration of incompatibility to the Attorney-General within 7 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.

*Clause 56* requires the relevant Minister to table a copy of the declaration of incompatibility within 6 sitting days, and a written response to the declaration within 6 months, after receipt.

Clause 56 also provides that the Minister must consider the portfolio committee's report under clause 57 in respect of the declaration of compatibility in preparing the response.

Subclause (3) clarifies that the declaration of incompatibility is not proceedings in the Assembly under section 9 of the *Parliament of Queensland Act 2001*. Although a declaration of incompatibility is tabled in the Legislative Assembly, it is not intended that parliamentary privilege would apply to the declaration.

*Clause 57* requires the Legislative Assembly to refer a declaration of incompatibility tabled under clause 56 to a portfolio committee, to consider the declaration and report on it to the Legislative Assembly within 3 months after it is referred. The report may include recommendations.

Clauses 55, 56 and 57 ensure that appropriate action is taken upon the making of a declaration of incompatibility in a timely way. The process is consistent with the dialogue model, ensuring the integrity of each limb of government is maintained.

## **Division 4            Obligations on public entities**

*Clause 58* places obligations on public entities to act and make decisions in a way that is compatible with human rights. The term ‘compatible with human rights’ is defined in clause 8.

The provision makes it unlawful for public entities 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 the human right relevant to the decision (subclause (1)).

These obligations are both substantive and procedural:

- substantive obligation – under clause 58(1)(a), it is unlawful for a public entity to act or make a decision in a way that is incompatible with a human right; and
- procedural obligation – under clause 58(1)(b), it is unlawful for a public entity, in making a decision, to fail to give proper consideration to a relevant human right.

Subclause (2) makes it clear, however, that 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.

Subclause (1) does not apply 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 (subclause (3)).

The provision does not apply to an act or decision of a private nature (subclause (4)).

Subclause (5) provides further guidance about the meaning of giving proper consideration to a human right in making a decision, by stating that the reference includes but is not limited to:

- identifying the human rights that may be affected by the decision; and
- considering whether the decision would be compatible with human rights.

Subclause (6) declares 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 subclause (1).

Subclause (6) also declares that a person does not commit an offence merely because the person acts or makes a decision in contravention of subclause (1).

*Clause 59* sets out the 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 under clause 58.

Subclause (1) provides that subclause (2) applies 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 clause 58 (an independent ground of unlawfulness).

If subclause (2) applies, then a person may also seek the same relief or remedy on the ground of unlawfulness arising under clause 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.

Subclause (3) provides that a person is not entitled to an award of damages on the ground of unlawfulness arising under clause 58.

Subclause (4) clarifies that the clause does not affect a right a person has, other than under this 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.

Subclause (5) clarifies that a person may only seek relief or a remedy on a ground of unlawfulness arising under clause 58, under this clause. That is, clause 59 is intended to deal exhaustively with a person's right to seek relief or a remedy in respect of an act or decision that is unlawful because of clause 58.

Subclause (6) provides that nothing in the provision affects a right a person may otherwise have to damages.

*Clause 60* allows an entity, not otherwise captured by the definition of a public entity in the Bill, to choose to be subject to the obligations of a public entity in the Bill. Clause 60 allows an entity to 'opt in' to be a public entity for the Bill 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 (subclause (2)), and must revoke the declaration in the same way, if asked in writing by the entity.

Public entity is defined in clause 9(3) to include an entity for which a declaration has been made, and has not been revoked, under clause 60.

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.

## **Part 4                      Queensland Human Rights Commission**

### **Division 1                Functions and powers of commission and commissioner under this Act**

*Clause 61* sets out the functions of the Queensland Human Rights Commission (QHRC) under the Bill. That is:

- to deal with human rights complaints under this part;

- 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;
- to review public entities' policies, programs, procedures, practices and services in relation to their compatibility with human rights;
- to promote an understanding and acceptance, and public discussion, of human rights and the HR Act in Queensland;
- to make information about human rights available to the community;
- to provide education about human rights and the HR Act;
- to assist the Attorney-General in reviews of the HR Act under clauses 95 and 96;
- to advise the Attorney-General about matters relevant to the operation of the HR Act;
- another function conferred on the commission under the HR Act or another Act.

The ADCQ, which will be renamed the QHRC by the Bill, is established under the *Anti-Discrimination Act 1991*.

*Clause 62* provides broad powers to the QHRC to do all things that are necessary or convenient to be done for or in connection with the performance of its functions under the Bill. This will ensure that the QHRC has sufficient powers to perform its functions under the Bill.

## **Division 2      Human rights complaints**

### **Subdivision 1      Preliminary**

*Clause 63* defines 'human rights complaint', for the purposes of the Bill, to mean a complaint about a public entity's alleged contravention of clause 58(1) of the Bill (conduct of public entities). The complainant and respondent to a human rights complaint are defined in schedule 1, Dictionary.

### **Subdivision 2      Making and referring human rights complaints**

*Clause 64* provides that an individual who is the subject of a public entity's alleged contravention of the HR Act may make a complaint to the QHRC about the public entity's conduct (subclause (1)(a)). The provision also permits an agent of the individual (paragraph (b)) or another person authorised in writing by the commissioner to make a complaint for the individual (paragraph (c)) if the commissioner is satisfied the complainant cannot make the complaint (subclause (2)).

Subclause (3) provides that two or more persons may jointly make a human rights complaint.

*Clause 65* sets out certain requirements that a complainant must satisfy before making a human rights complaint to the QHRC. The clause states that a person may make a human rights complaint only if:

- the commissioner is satisfied the person has made a complaint to the public entity about the alleged contravention the subject of the complaint (paragraph (a));
- at least 45 business days have elapsed since the complaint mentioned in paragraph (a) was made (paragraph (b)); and
- the person has not received a response to the complaint or has received a response the person considers to be an inadequate response (paragraph (c)).

The commissioner has the discretion to accept a complaint before the expiration of the 45 business day period referred to in paragraph (b) if the commissioner considers it appropriate because of exceptional circumstances (subclause (2)).

The intention of the provision is to ensure a complainant first attempts to resolve the complaint directly with the particular public entity before making a complaint to the QHRC.

Public entities should ensure an appropriate complaints handling procedure, including to deal with human rights complaints, is in place to allow for the early resolution of disputes where possible.

*Clause 66* provides that when their existing jurisdiction is enlivened, certain administrative law bodies may deal with a complaint if they consider the complaint may also be a human rights complaint, or may, with the consent of the person who could have made a human rights complaint, refer the complaint to the commissioner.

This provision applies to:

- the ombudsman receiving a complaint under the *Ombudsman Act 2001*;
- the health ombudsman receiving a complaint under the *Health Ombudsman Act 2013*;
- the Crime and Corruption Commission receiving a complaint under the *Crime and Corruption Act 2001*; and
- the information commissioner receiving a privacy complaint under the *Information Privacy Act 2009*.

Each of the ombudsman, health ombudsman, Crime and Corruption Commission and the information commissioner is a ‘referral entity’ for the purposes of the Bill (schedule 1, Dictionary).

The provision is intended to clarify that the referral entities are not precluded from dealing with a complaint under the Act under which the complaint was made if the complaint may also be a human rights complaint. The provision recognises the continued role which these administrative bodies will play in investigating, addressing and resolving people’s complaints about the administration of government, including where the complaint involves human rights.

The intention is that the administrative body (the referral entity) may deal with the human rights component of a complaint at the same time as the original complaint provided the original complaint was within its jurisdiction. This is to avoid individuals having to deal with multiple bodies in respect of the one matter.

Alternatively, the referral entity may refer the complaint to the commissioner, if the person who made the human right complaint consents (subclause (2)(b)).

The note to clause 66 refers to clause 74, under which the commissioner and referral entity may enter into an arrangement about referring complaints under a referral Act or dealing with complaints that are not referred (but which may have a human rights component).

*Clause 67* provides for the way in which a human rights complaint must be made to the QHRC: that is, a human rights complaint made or referred to the commissioner must:

- be in writing;
- state the complainant's name and address for service; and
- include enough details to indicate the alleged contravention.

Subclause (2) provides that the commissioner must give reasonable help to the complainant to put the complaint in writing if the commissioner is satisfied the complainant needs that help.

### **Subdivision 3      Dealing with human rights complaints**

*Clause 68* provides the commissioner with the power to make preliminary inquiries about a human rights complaint in order to determine how to deal with the complaint. The intention is that this may include making enquiries of a complainant, a potential respondent, or another public entity.

*Clause 69* provides for the circumstances in which the commissioner must refuse to deal with a complaint: that is, where the commissioner considers that the complaint is frivolous, trivial, vexatious, misconceived or lacking in substance.

*Clause 70* provides the commissioner with discretion to refuse to deal or continue to deal with a human rights complaint in the following circumstances (subclause (1)):

- the commissioner considers there is a more appropriate course of action available, for example, the complaint is substantially within the jurisdiction of another administrative body and would be better dealt with in that forum (paragraph (a));
- the commissioner considers the matter has been appropriately dealt with by another entity (paragraph (b));
- the commissioner considers the way in which the complaint has been made does not comply with the requirements of clause 65; for example, the complaint has not first made a complaint to the public entity (the respondent) (paragraph (c)); or
- the complaint was not made or referred to the commissioner within 1 year after the alleged contravention (paragraph (d)).

This clause allows the commissioner to ensure that complaints are dealt with in a timely way and the commission does not deal with matters where the public entity has not been provided with an earlier opportunity to respond to a complaint, or where it is more appropriate for another body to deal with the complaint.

In addition, subclause (2) sets out the circumstances in which the commissioner may exercise discretion to refuse to continue to deal with a human rights complaint, that is, if:

- the complainant does not comply with a reasonable request made by the commissioner in dealing with the complaint (paragraph (a));
- the commissioner is satisfied on reasonable grounds the complainant, without reasonable excuse, has not cooperated with the complaint process (paragraph (b)); or
- the commissioner is unable to contact the complainant (paragraph (c)).

Subclause 3 provides that the commissioner may defer dealing with a complaint if:

- the complainant has complained to the respondent as required by clause 65, but the commissioner considers the public entity has not had an adequate opportunity, i.e. a reasonable amount of time, to deal with the complaint (paragraph (a)); or
- if the commissioner considers that a complaint should be deferred to ensure it is dealt with appropriately under another law (paragraph (b)).

For the purposes of the clause, ‘law’ is defined to include the *National Disability Insurance Scheme Act 2013* (Cwlth) or another law of the Commonwealth and a law of another State.

*Clause 71* provides that if the commissioner refuses to deal with, or continue dealing with, a complaint, or defers dealing with a complaint, the commissioner must give notice to the complainant and the respondent.

Subclause (2) provides that the commissioner is not required to give the notice to the respondent if the commissioner considers it is not appropriate to do so in the circumstances.

*Clause 72* provides that a complaint lapses if the commissioner refuses to deal, or continue to deal, with the complaint. In those circumstances, the complainant cannot make a further complaint relating to the alleged contravention of clause 58(1), except where the commissioner has refused to deal with the complaint under subclause 70(1)(c).

The provision is intended to prevent repeat complaints in respect of the same matter in circumstances where the commissioner refuses to deal with the complaint (except under subclause 70(1)(c) e.g. where the complaint has not previously been raised with the public entity, in which case the complainant would have the opportunity to return to the commission once the requirements of clause 65 have been met) or to continue to deal with a complaint. This provision does not preclude any other legal recourse the complainant may have in respect of the alleged contravention, i.e. under clause 59(2) of the Bill (Legal proceedings).

*Clause 73* provides that the commissioner may refer a complaint to an entity if in the commissioner’s opinion the complaint would be better dealt with by that entity and the complainant consents to the referral (subclause (6)).

The entities to which a human rights complaint may be referred are:

- the ombudsman, where the subject of a human rights complaint could be the subject of a complaint under the *Ombudsman Act 2001* (subclause (1));
- the health ombudsman, where the subject of a human rights complaint could be the subject of a health service complaint under the *Health Ombudsman Act 2013* (subclause (2));
- the Crime and Corruption Commission, where the subject of a human rights complaint could be the subject of a complaint about crime and corruption under the *Crime and Corruption Act 2001* (subclause (3));
- the information commissioner, where the subject of a human rights complaint could be the subject of a privacy complaint under the *Information Privacy Act 2009* (subclause (4));
- the NDIS commissioner, where the subject of a human rights complaint could be the subject of an NDIS complaint (subclause (5)).

Subclause (7) allows the commissioner to provide the entity with any information about the complaint that the commission has obtained under this part, provided the complainant consents to the information being provided. The commissioner must also give the complainant a notice stating the complaint has been referred to the entity (paragraph (b)).

*Clause 74* provides that the commissioner and a referral entity may enter into an arrangement about certain matters relating to complaints under the Bill or complaints which may be referred to the commissioner under a referral Act.

The types of matters the commissioner and the referral entity may enter into an arrangement about are:

- the types of human rights complaints the commissioner would refer to the entity;
- the complaints the entity should refer to the commissioner;
- how to deal with a complaint or other matter under a referral Act that could also form the basis of a human rights complaint; or
- cooperating in the performance of the commissioner's or the entity's functions.

The provision also clarifies that the commissioner and the NDIS commissioner may enter into an arrangement about referral of complaints to the NDIS commissioner or cooperating in the performance of the commissioner's and the NDIS commissioner's functions to ensure the effective operation of part 4 of the Bill and the *National Disability Insurance Scheme Act 2013* (Cwlth).

Subclause (3) provides that the arrangements should deal with how the referral made under the clause is to be made. The commissioner and the entity may perform their functions in accordance with the arrangements (subclause (4)).

The intention of this provision is to ensure that the appropriate arrangements are put in place between the QHRC and the other entities for referral of complaints with a focus on ensuring that from the individual complainant's perspective, there is a cohesive and streamlined approach to dealing with the complaint.

*Clause 75* provides that the commissioner may, with the consent of the complainant, deal with a complaint under the *Anti-Discrimination Act 1991* if the commissioner considers that a human rights complaint would be more appropriately dealt with as an alleged contravention of the *Anti-Discrimination Act 1991*.

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 *Anti-Discrimination Act 1991* that is accepted by the commissioner under section 141 of that Act (paragraph (a)); and
- is taken to be made on the day the human rights complaint was made or referred (paragraph (b)).

*Clause 76* provides that if the commissioner decides to accept a human rights complaint the commissioner must give the complainant and the respondent notice that the QHRC has accepted the complaint (subclause (1)).



Subclause (2) requires the notice must state:

- the role of the commissioner in trying to resolve the complaint (paragraph (a)); and
- the powers the commissioner may exercise in trying to resolve the complaint (paragraph (b)).

Subclause (3) provides that a notice given to the respondent must also state the substance of the complaint, that the respondent will be given an opportunity to make submissions in writing in response to the complaint; that the respondent must provide an address for service; and that the commissioner may seek information or documents from the respondent.

*Clause 77* provides the commissioner with the power to take reasonable action that the commissioner considers appropriate to attempt to resolve a human rights complaint. Without limiting the reasonable action the commissioner considers appropriate, subclause (2) provides some action the commissioner may take, including:

- asking the respondent to make submissions to the commission in writing (paragraph (a));
- giving the complainant a copy of the respondent's written submissions (paragraph (b));
- asking or directing the complainant or respondent to give relevant information including under clause 78 (paragraph (c));
- making enquiries of and discussing the complaint with the complainant and the respondent (paragraph (d)); or
- causing the complaint to be conciliated under the Bill (paragraph (e)).

*Clause 78* provides that a commissioner may, by notice, ask or direct a relevant entity for a human rights complaint to give the commissioner information about the complaint within the reasonable period stated in the notice. The commissioner may exercise this power for the purposes of making preliminary inquiries under clause 68 or dealing with a human rights complaint under this division. For the purposes of the clause, 'relevant entity' for a human rights complaint is defined as the complainant or respondent or another entity the commissioner considers has information relevant to the complaint in the entity's possession or control.

Subclause (3) requires that the notice must state the purpose for making the request.

Subclause (4) clarifies that for information in an electronic document, a clear image or written version of the document must be given.

Subclause (5) provides that the entity must comply with a direction unless the entity has a reasonable excuse. For example, it is a reasonable excuse for failing to comply if complying with the direction would mean disclosing information that is the subject of legal professional privilege (subclause (6)).

The clause also allows the commissioner to enforce a direction made under the clause by filing a copy of it with a court of competent jurisdiction (subclause (7)). The direction is then enforceable as if it were an order of the court (subclause (8)).

For the purpose of the clause, 'information' is defined as including a document.

---

## **Subdivision 4      Conciliation of human rights complaints**

*Clause 79* provides that if the commissioner decides to accept a human rights complaint for resolution by the commission, the commissioner may conduct a conference (a conciliation conference) under this subdivision for the purpose of conciliating the complaint.

*Clause 80* provides that the purpose of conciliation of a human rights complaint is to promote the resolution of the complaint in a way that is informal, quick and efficient.

*Clause 81* allows the commissioner to direct a person to take part in a conciliation conference (subclause (1)). The commissioner may enforce the direction by filing a copy in a court of competent jurisdiction (subclause (2)). The direction is then enforceable as if it were an order of the court (subclause (3)).

*Clause 82* provides that the complainant is required to attend the conciliation conference of a human rights complaint unless certain circumstances apply. A complainant is not required to attend a conciliation conference if the complainant is a child or a person with impaired capacity, or if the commissioner consents to another person attending the conciliation conference for the complainant. For the purposes of this clause, ‘impaired capacity’ is defined by reference to the *Guardianship and Administration Act 2000*, schedule 4.

Subclause (2) provides that the commissioner may consent to the complainant being accompanied by a support person.

*Clause 83* provides that the commissioner may consent to a person being represented by another person at a conciliation conference.

Subclause (2) provides that the commissioner may consent to a person being represented by another person at conciliation conference if satisfied:

- it is appropriate in the circumstances (paragraph (a));
- this would help the conciliation (paragraph (b)); and
- the representative has sufficient knowledge of matters relating to the complaint (paragraph (c)).

Subclause (3) provides that consent given under subclause (2) may be subject to conditions considered reasonable by the commissioner (paragraph (a)), and the consent may be withdrawn if the conditions are not complied with (paragraph (b)).

This provision gives the commissioner the discretion to allow a complainant or respondent to be represented by another person, including a lawyer or government legal officer. It is intended that the commissioner will exercise this discretion where it would be in the interests of justice to do so, including, for example, where the respondent is a State government department or agency, the complaint is complex, or where the parties are agreeable to consent to legal representation being given because it will assist in reaching a resolution to the dispute.

*Clause 84* provides that a person may be assisted at a conciliation conference by an interpreter or another person to assist with communication or to assist a party to understand the process of the conciliation. For example, a person with appropriate cultural or social knowledge may be suitable to provide assistance.

*Clause 85* provides that in conducting a conciliation conference, the commissioner is not bound by the rules of evidence.

Subclause (2) provides that a conciliation conference must be held in private.

*Clause 86* provides that nothing said or done in the course of a conciliation conference is admissible as evidence in any criminal, civil or administrative proceeding, unless the complainant and respondent agree.

*Clause 87* provides that participation in a conciliation conference does not affect a person's right to seek any remedy or relief the person may have in relation to a contravention of clause 58(1) of the Bill.

## **Subdivision 5                      Action on dealing with human rights complaint**

*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)).

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.

*Clause 89* provides that if a 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.

*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 clause 88 or a notice given under clause 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)).

### Division 3 Reporting requirements

*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.

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 clause 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)).

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 clause 88(4), relating to human rights complaints that have not been resolved (subclause (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 (subclause (4)).

Subclause (5) requires the commissioner to give the report to the Attorney-General as soon as practicable after it is prepared.

*Clause 92* provides that the commissioner may report to the Attorney-General about any matter relevant to the performance of the commission's or the commissioner's functions under the Bill (subclause (1)). The clause provides that if requested by the Attorney-General, the commissioner must prepare a report about any matter relevant to the performance of the commission's or the commissioner's functions under the Bill and must give the report to the Attorney-General as soon as practicable after it is prepared (subclauses (2) and (3)).

Subclause (4) clarifies that any report must not include personal information unless the information has been previously published, or given for the purposes of publication, by the individual.

*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 (clause 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 commissioner must ensure that the person's submissions are fairly stated in the report (subclause (3)).

Subclause (4) provides that for clause 93, an adverse comment does not include a statement that a public entity did not participate in resolving a human rights complaint.

*Clause 94* requires the Attorney-General to table a copy of each annual report and each report prepared by the commissioner in accordance with clause 92(3) within 6 sitting days after receiving the report.

## **Part 5      General**

*Clause 95* requires the Attorney-General to cause an independent review of the operation of the HR Act up to 1 July 2023 to be undertaken as soon as practicable after that date (subclauses (1) and (2)) and to table a copy of the reviewer's report in the Legislative Assembly within 14 sitting days after receiving the report (subclause (5)).

Although the terms of reference for the review are not fixed and are to be decided by the Attorney-General (subclause (3)), the matters set out in subclause (4) must be considered by the independent review, that is:

- whether additional human rights should be included in the HR Act (paragraph (a));
- whether further or different provision should be made in the HR Act about proceedings that may be brought or remedies that may be awarded in relation to acts or decisions of public entities made unlawful because of the HR Act (paragraph (b));
- whether the amendments made by the HR Act to the *Corrective Services Act 2006* and the *Youth Justice Act 1992* are operating effectively, or further or different provision should be made for the interrelationship between the HR Act and those Acts (paragraph (c)).

The matters listed in subclause (4) will ensure the Bill continues to reflect the values and aspirations of the Queensland community.

*Clause 96* requires the Attorney-General to cause a second independent review of the operation of the HR Act for the period 1 July 2023 to 1 July 2027 to be undertaken as soon as practicable after 1 July 2027 (subclauses (1) and (2)) and to table a copy of the reviewer's report in the Legislative Assembly within 14 sitting days after receiving the report (subclause (5)). This clause does not preclude the Attorney-General from causing the second review to be undertaken at any time after the first review (see clause 95) and before 1 July 2027, if necessary (subclause (1)(b)).

As with the first review, the terms of reference are to be determined by the Attorney-General (subclause (3)) and the review must take into consideration those matters mentioned in clause 95(4), that is, whether additional human rights should be included in the HR Act, whether further or different provision should be made about proceedings that may be brought and remedies, and whether the amendments made by the HR Act to the *Corrective Services Act 2006* and the *Youth Justice Act 1992* are operating effectively (subclause (4)).

The report on the further review must also include a recommendation about whether a further review of the HR Act is necessary (subclause (6)).

*Clause 97* applies to a public entity that is required to prepare an annual report under section 63 of the *Financial Accountability Act 2009* (subclause (1)).

Subclause (2) sets out the following information that the entity must include in each annual report:

- details of any actions taken during the reporting period to further the objects of the HR Act (paragraph (a)); and
- details of any human rights complaints received by the entity, including the number of complaints received, the outcome of the complaints, and any other prescribed information relating to complaints (paragraph (b)); and
- details of any review of policies, programs, procedures, practices or services undertaken in relation to their compatibility with human rights (paragraph (c)).

*Clause 98* provides that the commissioner may, by notice, request a public entity to give the commissioner information in the public entity's possession or control, other than personal information that is not publicly available, that the commissioner considers necessary to prepare an annual report or a report under clause 92 (subclause (1)).

The notice requesting information must state why the request has been made and the period within which the information is to be given (clause (2)).

Clause 98 also creates an offence (maximum penalty 100 penalty units) for a failure to comply with a request for information from the commissioner without a reasonable excuse (subclause (3)).

The commissioner is required to only use the information obtained under this clause for the purpose for which it was requested (subclause (4)).

*Clause 99* applies in circumstances where a person who, acting honestly, gives information under the Bill to the commissioner or another entity in relation to a human rights complaint (subclause (1)). Subclause (2) makes it clear that the person is not liable civilly, criminally or under an administrative process for giving the information. In addition, just because the person gives the information, the person cannot be held to have breached any code of professional ethics (subclause (3)(a)) or departed from accepted standards of professional conduct (subclause (3)(b)).

*Clause 100* allows the commissioner to give a direction prohibiting the disclosure of information that identifies, or is likely to lead to the identification of, a person. The commissioner may give the direction if, at any time while dealing with a human rights complaint, the commissioner considers that the preservation of anonymity for a person involved in the complaint is necessary to protect the work security, privacy or any human right of the person.

Subclause (2) creates an offence (35 penalty units for an individual; 170 penalty units for a corporation) for a person to fail to comply with a direction under this provision, unless the person has a reasonable excuse.

Subclause (3) provides that a reference to involvement in a complaint includes:

- making a complaint under the HR Act and continuing with the complaint (paragraph (a)); and
- being a respondent to a complaint (paragraph (b)); and
- giving information to a person who is performing a function under the HR Act (paragraph (c)).

*Clause 101* provides for how offences under the Bill are to be prosecuted and applies section 226 of the *Anti-Discrimination Act 1991*.

*Clause 102* provides that the address for service for a complainant or respondent for a human rights complaint must be a residential or business address, a post office box address, or an email address.

*Clause 103* applies if an address for service is not known because:

- of the party's failure to comply with a requirement for advising an address for service; or
- the party is a respondent and has not yet been notified of the acceptance of a human rights complaint under clause 76.

Subclause (2) provides that the address for service is taken to be:

- for an individual – the individual's last known place of residence or business (paragraph (a)); or
- for a public entity – the entity's principal office (paragraph (b)).

*Clause 104* provides that the chief executive may approve forms under the HR Act.

*Clause 105* provides for the Governor in Council to make regulations under the HR Act.

## **Part 6 Savings and transitional provisions**

*Clause 106* provides that the Bill does not affect any law applicable to the termination of pregnancy or the killing of an unborn child, whether before or after the commencement of Part 2 (Human rights in Queensland) to ensure that human rights contained in the Bill will not impact the operation of laws applicable to the termination of pregnancy or the killing of an unborn child.

*Clause 107* ensures that the Bill does not affect native title rights and interests otherwise than in accordance with the *Native Title Act 1993* (Cwlth) (subclause (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 (subclause (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) (subclause (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).

*Clause 108* provides that the Bill does not affect proceedings commenced or concluded before the commencement of the Bill or apply to any act or decision of a public entity prior to the commencement. This will prevent a question of law in a proceeding from being referred to the

Supreme Court under the Bill and will not require courts to interpret a law in a way that is compatible with human rights, where the proceeding commenced or concluded before commencement of the Bill.

## **Part 7      Amendment of legislation**

### **Division 1      Amendment of this Act**

*Clause 109* states that the division amends the HR Act.

*Clause 110* amends the long title of the HR Act.

### **Division 2      Amendment of *Anti-Discrimination Act 1991***

*Clause 111* provides that this division makes consequential amendments to the *Anti-Discrimination Act 1991*.

*Clause 112* amends Chapter 7, part 1, heading, to replace the reference to the ‘Anti-Discrimination Commission’ with the ‘Queensland Human Rights Commission’. Re-naming the commission is consistent with the new functions of the commission under the Bill.

*Clause 113* inserts a new section 140A to provide for dealing with a complaint under the 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 section 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)).

*Clause 114* amends section 221 to extend the offence in relation to providing false or misleading information under the *Anti-Discrimination Act 1991* to providing false or misleading information under the HR Act.

*Clause 115* amends section 222 to extend the offence in relation to consciously hindering or using insulting language towards a person performing a function under the *Anti-Discrimination Act 1991* to a person performing a function under the HR Act.

*Clause 116* amends section 226 to apply the provisions about how offences under the *Anti-Discrimination Act 1991* are to be prosecuted to offences under the HR Act.



*Clause 117* amends Chapter 9, part 1, heading, by replacing the reference to the ‘Anti-Discrimination Commission’ with the ‘Queensland Human Rights Commission’.

*Clause 118* amends section 234 to replace the reference to the ‘the Anti-Discrimination Commission’ with the ‘Queensland Human Rights Commission’ and the ‘Anti-Discrimination Commissioner’ with the ‘Human Rights Commissioner’.

*Clause 119* amends section 243 to replace the reference to the ‘Anti-Discrimination Commissioner’ with the ‘commissioner’.

*Clause 120* amends section 244 to replace the references to ‘power’ with ‘power or function’.

*Clause 121* amends section 263C to replace with reference to ‘post office box address’ with ‘post office box address or an email address’.

*Clause 122* amends section 265(1)(g) and (h) to extend the existing protection against civil liability for an honest act or omission in the performance or purported performance of functions, or the exercise or purported exercise of powers, under the *Anti-Discrimination Act 1991*, to the HR Act. The protection is afforded to certain persons, including a person who is or has been the commissioner or a member of the former Anti-Discrimination Tribunal, and staff of the commission or the former Tribunal.

*Clause 123* inserts a new chapter 11, part 6 in (sections 277 and 278) to insert new provisions that provide continuity for the commission and commissioner in the transition from the Anti-Discrimination Commission to the Queensland Human Rights Commission.

New section 277 is inserted to provide that the Anti-Discrimination Commissioner immediately before the commencement of the Bill continues in office as the Human Rights Commissioner until the end of his or her term of appointment, and that references in a document to the Anti-Discrimination Commissioner, unless the context otherwise permits, are taken to be a reference to the Human Rights Commissioner.

New section 278 is inserted to provide that the Anti-Discrimination Commission (ADCQ) continues as the Queensland Human Rights Commission (QHRC) and provides that references in a document to the ADCQ is taken to be a reference to the QHRC.

*Clause 124* amends the Schedule Dictionary so that *commission* means the Queensland Human Rights Commission and that *commissioner* means the Human Rights Commissioner.

### **Division 3           Amendment of *Corrective Services Act 2006***

*Clause 125* provides that this division amends the *Corrective Services Act 2006*.

*Clause 126* inserts a new section 5A in the *Corrective Services Act 2006*.

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 Act 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.

*Clause 127* amends section 319D to replace the reference to the 'anti-discrimination commissioner' with the 'human rights commissioner'.

*Clause 128* amends section 319E to replace the reference to the 'anti-discrimination commissioner' with the 'human rights commissioner'.

*Clause 129* amends section 319F(2) to replace the reference to the 'anti-discrimination commissioner' with the 'human rights commissioner'.

#### **Division 4           Amendment of *Corrective Services Regulation 2017***

*Clause 130* provides that this division amends the *Corrective Services Regulation 2017*.

*Clause 131* amends section 17(1)(j) to replace the reference to the 'Anti-Discrimination Commissioner' with the 'human rights commissioner'.

#### **Division 5           Amendment of *Disability Services Act 2006***

*Clause 132* provides that this division amends the *Disability Services Act 2006*.

*Clause 133* amends schedule 8, definition of *complaints agency* to replace the reference to the 'Anti-Discrimination Commissioner under the *Anti-Discrimination Act 1991*' with 'the human rights commissioner under the *Anti-Discrimination Act 1991*'.

#### **Division 6           Amendment of *Family and Child Commission Act 2014***

*Clause 134* provides that this division amends the *Family and Child Commission Act 2014*.

*Clause 135* amends schedule 1, definition of *complaints entity* to replace the reference to the 'anti-discrimination commissioner under the *Anti-Discrimination Act 1991*' with 'the human rights commissioner under the *Anti-Discrimination Act 1991*'.

#### **Division 7           Amendment of *Financial Accountability Act 2009***

*Clause 136* provides that this division amends the *Financial Accountability Act 2009*.

*Clause 137* amends section 63(1) to insert a note to the provision referring to section 97 of the HR Act for particular information relating to human rights that must be included in an annual report.

## **Division 8           Amendment of *Health Ombudsman Act 2013***

*Clause 138* provides that this division amends the *Health Ombudsman Act 2013*.

*Clause 139* amends section 30(a) to replace the reference to the ‘Anti-Discrimination Commission’ with ‘the Queensland Human Rights Commission established under the *Anti-Discrimination Act 1991*’.

## **Division 9           Amendment of *Industrial Relations Act 2016***

*Clause 140* provides that this division amends the *Industrial Relations Act 2016*.

*Clause 141* amends section 157 to replace the references to the ‘Anti-Discrimination Commission’ with the ‘Queensland Human Rights Commission’.

*Clause 142* amends section 253 to replace the reference to the ‘anti-discrimination commissioner’ with ‘the human rights commissioner under the *Anti-Discrimination Act 1991*’.

*Clause 143* amends section 531 to replace the references to the ‘Anti-Discrimination Commission’ with the ‘Queensland Human Rights Commission’.

*Clause 144* amends schedule 5, dictionary, to provide a definition of *Queensland Human Rights Commission* to clarify that the *Queensland Human Rights Commission* means the Queensland Human Rights Commission established under the *Anti-Discrimination Act 1991*.

## **Division 10       Amendment of *Industrial Relations (Tribunals) Rules 2011***

*Clause 145* provides that this division amends the *Industrial Relations (Tribunals) Rules 2011*.

*Clause 146* amends rule 80B(3) to replace the reference to ‘anti-discrimination commissioner’ with ‘human rights commissioner’.

*Clause 147* amends rule 80C(1)(b) to replace the reference to ‘anti-discrimination commissioner’ with ‘human rights commissioner’.

*Clause 148* amends rule 80D to replace the reference to ‘anti-discrimination commissioner’s’ with ‘human rights commissioner’s’.

*Clause 149* amends rule 80E to replace the reference to ‘anti-discrimination commissioner’ with ‘human rights commissioner’.

*Clause 150* amends rule 88B to replace the reference to ‘anti-discrimination commissioner’ with ‘human rights commissioner’.

*Clause 151* amends schedule 2, dictionary to provide a definition of *human rights commissioner* to clarify that the *human rights commissioner* means the human rights commissioner established under the *Anti-Discrimination Act 1991*.

### **Division 11      Amendment of *Information Privacy Act 2009***

*Clause 152* provides that this division amends the *Information Privacy Act 2009*.

*Clause 153* amends section 165 to insert a reference to the ‘human rights commissioner under the *Anti-Discrimination Act 1991*’, and renumbers paragraphs in subsection 165(2).

### **Division 12      Amendment of *Integrity Act 2009***

*Clause 154* provides that this division amends the *Integrity Act 2009*.

*Clause 155* amends schedule 1 to replace the reference to the ‘anti-discrimination commissioner’ with ‘the human rights commissioner’ for the purposes of that Act.

### **Division 13      Amendment of the *Ombudsman Act 2001***

*Clause 156* provides that this division amends the *Ombudsman Act 2001*.

*Clause 157* amends schedule 3, dictionary, to replace the reference to the ‘Anti-Discrimination Commissioner’ with ‘the human rights commissioner’.

### **Division 14      Amendment of *Parliament of Queensland Act 2001***

*Clause 158* provides that this division amends the *Parliament of Queensland Act 2001*.

*Clause 159* amends section 67 to replace the reference to the ‘anti-discrimination commissioner’ with ‘the human rights commissioner under the *Anti-Discrimination Act 1991*’.

*Clause 160* inserts a new subsection in section 93 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 and statements of compatibility), 40 (Scrutiny of non-Queensland laws), and 57 (Action by portfolio committee on declaration of incompatibility).

### **Division 15      Amendment of *Prostitution Regulation 2014***

*Clause 161* provides that this division amends the *Prostitution Regulation 2014*.

*Clause 162* amends the section 24(4)(a), definition of *complaints agency* to replace the reference to the ‘Anti-Discrimination Commissioner’ with ‘the human rights commissioner’.

### **Division 16      Amendment of *Public Guardian Act 2014***

*Clause 163* provides that this division amends the *Public Guardian Act 2014*.

*Clause 164* amends the section 144(5)(a), definition of *complaints agency* to replace the reference to the ‘Anti-Discrimination Commissioner’ with ‘the human rights commissioner’.

## **Division 17      Amendment of *Public Sector Ethics Regulation 2010***

*Clause 165* provides that this division amends the *Public Sector Ethics Regulation 2010*.

*Clause 166* amends the schedule of entities prescribed as public service agencies under the *Public Sector Ethics Regulation 2010* to replace the entry for the Anti-Discrimination Commission established under the *Anti-Discrimination Act 1991* with the Queensland Human Rights Commission established under the *Anti-Discrimination Act 1991*.

## **Division 18      Amendment of *Public Service Act 2008***

*Clause 167* provides that this division amends the *Public Service Act 2008*.

*Clause 168* amends section 219A(3) to insert a note to the provision which provides that details of customer complaints that are human rights complaints must, under section 97 of the HR Act, be included in the department’s annual report.

*Clause 169* amends schedule 1 to replace the references to the ‘Anti-Discrimination Commission under the *Anti-Discrimination Act 1991*’ with ‘the Queensland Human Rights Commission established under the *Anti-Discrimination Act 1991*’ and the ‘anti-discrimination commissioner’ with the ‘human rights commissioner’

## **Division 19      Amendment of *Public Service Regulation 2018***

*Clause 170* provides that this division amends the *Public Service Regulation 2018*.

*Clause 171* amends schedule 14, item 1 to replace the reference to the ‘Anti-Discrimination Commissioner’ with the ‘human rights commissioner’.

## **Division 20      Amendment of the *Queensland Civil and Administrative Tribunal Rules 2009***

*Clause 172* provides that this division amends the *Queensland Civil and Administrative Tribunal Rules 2009*.

*Clause 173* amends rule 102 to replace the reference to ‘anti-discrimination commissioner’s’ with ‘human rights commissioner’s’.

*Clause 174* amends rule 104 to replace the reference to ‘anti-discrimination commissioner’ with ‘human rights commissioner’.

*Clause 175* amends rule 105 to replace the reference to ‘anti-discrimination commissioner’ with ‘human rights commissioner’.

Clause 176 amends rule 106 to replace the reference to ‘anti-discrimination commissioner’ with ‘human rights commissioner’.

Clause 177 amends rule 107 to replace the reference to ‘anti-discrimination commissioner’ with ‘human rights commissioner’.

### **Division 21 Amendment of *Statutory Bodies Financial Arrangements Regulation 2007***

Clause 178 provides that this division amends the *Statutory Bodies Financial Arrangements Regulation 2007*.

Clause 179 amends schedule 3 to replace the reference to the ‘Anti-Discrimination Commission’ with the ‘Queensland Human Rights Commission’.

### **Division 22 Amendment of *Statutory Instruments Act 1992***

Clause 180 provides that this division amends the *Statutory Instruments Act 1992*.

Clause 181 amends the note in section 49(1) which notes the requirement for explanatory notes to be tabled with subordinate legislation, to also reflect the requirement to table a human rights certificate with subordinate legislation in accordance with clause 41 of the Bill.

### **Division 23 Amendments to the *Youth Justice Act 1992***

Clause 182 provides that this division amends the *Youth Justice Act 1992*.

Clause 183 inserts new subsections (7) and (8) in section 263 of the *Youth Justice Act 1992*.

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 clause 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.

## **Schedule 1      Dictionary**

Schedule 1 is the dictionary and sets out the definition for words used in the Bill

© The State of Queensland 2018