

Queensland Human Rights Bill 2018

Submission to Queensland Parliament Legal Affairs and
Community Safety Committee

22 November 2018

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Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.¹

¹ www.lawyersalliance.com.au.

Introduction

1. The ALA welcomes the opportunity to have input into the review of the *Human Rights Bill 2018* ('the Bill') (Queensland) being conducted by the Legal Affairs and Community Safety Committee.
2. This submission will consider the following provisions of the Bill:
 - Section 9 – the meaning of public entity;
 - Section 10 – When function is of a public nature;
 - Section 23 – Taking part in public life;
 - Section 43 – Override declarations;
 - Section 49 – Referral to Supreme Court;
 - Section 58 – Conduct of public entities;
 - Section 59 – Legal proceedings;
 - Section 60 – Entity may choose to be subject to obligations;
 - Part 4, Division 2 – Human rights complaints;
 - Section 95 – First review of Act;
 - Section 126 – Insertion of new s5A in *Corrective Services Act 2006*; and
 - Section 183 – Insertion of s263 (Management of detention centres) in *Youth Justice Act 1992*.

General Comments

3. The ALA is generally supportive of the Queensland Government's tabled draft of the *Human Rights Bill 2018*. The ALA notes that the Bill is modelled on similar statutory human rights legislative instruments enacted in Australia, namely the Victorian *Charter of Human Rights and Responsibilities Act 2006* ('the Charter') and the ACT *Human Rights Act 2004* ('the

ACTHRA'). However, the ALA notes that the Bill as tabled provides additional protections for human rights and is a significant improvement on both the Victorian and ACT Acts.

4. The ALA particularly welcomes the inclusion of economic, social and cultural rights in the Bill, namely:
 - Section 27 – cultural rights – generally;
 - Section 28 – cultural rights – Aboriginal peoples and Torres Strait Islander peoples;
 - Section 36 – the right to education; and
 - Section 37 – the right to health services.
5. The ALA also welcomes the inclusion of an accessible complaints mechanism for alleged contraventions by a public entity (Part 4, Division 2). The ALA notes that the statutory eight-year review of the Victorian Charter recommended that the Charter be amended to include such a complaints mechanism.² The Review accepted the statement from the Victorian Equal Opportunity and Human Rights Commission's submission that the confusing and limited availability of remedies under the Charter has held back the development of a human rights culture, and creates a disincentive for compliance as there are no obvious consequences of a breach.³ The provision in the Bill for a complaint to be made to the Human Rights Commissioner (the Commissioner) is a significant advancement on the Charter and the ACTHRA, and will encourage the development of a human rights culture across government and the community in Queensland.
6. Without detracting from the ALA's strong support for the Bill and particularly the abovementioned provision, the ALA makes some comments below in relation to specific provisions in the Bill which could be improved. In particular, the ALA notes that given that many provisions in the Bill are closely modelled on similar provisions in the Charter and the ACTHRA, some provisions have replicated parts of these Acts which will undermine the stated objects of the Bill, namely:

² Brett Young, Michael (2015), *From Commitment to Culture – The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006*, 105.

³ *Ibid*, 124.

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

Section 9 – Meaning of public entity

7. Section 9 of the Bill provides a detailed definition of a ‘public entity’ to which human rights obligations will apply under the Bill. The definition is similar to the definition of a ‘public authority’ in s4 of the Charter and s40 of the ACTHRA.
8. Under s9(1)(h) of the Bill, a public entity includes 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). Immediately following this clause the Bill includes a statutory example to assist in clarifying the term ‘performing the functions for the State or a public entity’:

Example of an entity not performing functions of a public nature for the State –

A non-State school is not a public entity merely because it performs functions of a public nature in educating students because it is not doing so for the State.

9. The Bill does not contain any other provision to assist in clarifying the term ‘performing the functions for the State or a public entity’. Nor is there any clarification of the term in the Explanatory Memorandum or the Explanatory Speech by the Attorney-General.
10. A similar phrase appears in s40(1)(g) of the ACTHRA and also s4(1)(c) of the Victorian Charter. The Victorian Charter also includes a statutory example using the same wording as that which appears in the Queensland Bill, albeit with a different heading (only the word ‘Example’ appears in the Victorian Charter). The ACTHRA does not include a statutory example. In addition, there is nothing in the Explanatory Memorandum or the Second Reading Speech to further clarify this phrase in the ACTHRA.
11. Unlike the Queensland Bill, the Victorian Charter provides further clarification of the phrase ‘*on behalf of the State or a public authority*’ in sub-sections (4) and (5) :

- (4) For the purposes of subsection (1)(c), an entity may be acting on behalf of the State or a public authority even if there is no agency relationship between the entity and the State or public authority.
 - (5) For the purposes of subsection (1)(c), the fact that an entity is publicly funded to perform a function does not necessarily mean that it is exercising that function on behalf of the State or a public authority.
12. In the second reading speech for the Charter the Victorian Attorney-General Rob Hulls stated that the phrase was not intended to be confined to situations of agency in the ‘strict legal sense’. He said that the degree of government regulation and control of the functions being performed would be just one factor to consider in determining whether the entity was performing the function on behalf of the State (the Explanatory Memorandum makes the same point). He then reiterated the point made in the statutory note in s4 that non-government schools delivering education services that are subject to government regulation are not acting on behalf of the State for the purposes of the Charter.⁴
13. In the Victorian Civil and Administrative Tribunal (VCAT) decision of *Metro West v Sudi* the President of VCAT Justice Bell stated that the effect of s4(4) is that an organisation can be acting on behalf of the State or a public authority even though the relationship is looser than one in a recognised legal category such as contract or agency, and that such relationships need not be characterised in formal legal terms. He stated that the nature of the functions themselves is relevant, not just for determining whether they are of a public nature, but also in assessing whether it carries out the purposes of the State or a public authority in a practical sense. He emphasised that functions exercised in respect of vulnerable and disadvantaged people, ‘whose human rights protection is an important purpose of the Charter, is a relevant factor to consider whether a function is being exercised on behalf of the State’.⁵ In considering what the phrase encompasses, he referred to the fact that modern governments use various strategies and mechanisms to engage with non-government entities to provide for the

⁴ Hulls, Rob (Attorney-General) (2006), *Second Reading Speech Charter of Human Rights and Responsibilities Bill 2006, Parliament of Victoria, Parliamentary Debates (Hansard)*, Legislative Assembly, Fifty-fifth Parliament, First Session, 4 May 2006, (Extract from book 5), 1294.; Legislative Assembly of Victoria, *Charter of Human Rights and Responsibilities Bill 2006*, Explanatory Memorandum As Sent Print 16/6/2006, 6.

⁵ *Metro West v Sudi (Residential Tenancies)* [2009] VCAT 2025, per Bell J, paragraph 141.

delivery of services, and that the entity could acquire the functions by statute, contract, informal arrangement, voluntary acceptance, lawful imposition or, as s4(1)(c) itself says, ‘otherwise’.⁶

14. The ALA is concerned that, while the Bill provides the statutory example of non-state schools referred to above to clarify the phrase ‘performing the functions for the State or a public entity’, there is no additional clarifying material such as what appears in s4(4) and (5) of the Charter, the Charter Explanatory Memorandum and the Victorian Attorney-General’s Second Reading Speech. The ALA is concerned that, in the absence of this additional clarifying material, the interpretation of the application of the statutory example may be considerably broader than the equivalent Victorian example, resulting in a narrower interpretation of the phrase ‘on behalf of the State’. This gives rise to the potential to exempt the activities of other entities that perform functions of a public nature, including those that perform the functions listed in s10(3) of the Bill.
15. The ALA submits that in the absence of this supportive clarifying material in the legislation, the Explanatory Memorandum and the Explanatory Speech, the provision in s40(1)((g) of the ACTHRA is to be preferred. Accordingly the ALA recommends removing the statutory example included in the Bill at the end of s9(1)(h).
16. Alternatively, if the statutory example at the end of s9(1)(h) remains, the ALA submits that the Bill should be amended to include two additional sub-sections in s9 in terms that are identical to s4(4) and (5) of the Victorian Charter. In addition, statements clarifying the intended meaning of the phrase *‘on behalf of the State or a public authority’* should be included in the Explanatory Memorandum for the legislation and the Explanatory speech.

Section 10 – When function is of a public nature

17. The clarification of the phrase ‘function of a public nature’ in s10 of the Bill assists in providing greater certainty to non-government organisations that perform public functions as to their obligations under the legislation. The section is similar to s40A of the ACTHRA, which builds on the original legislative clarification of the term that was included in s4(2) of the Charter.

⁶ *Ibid*, per Bell J, paragraph 128.

18. The ALA welcomes the inclusion of s10(3) which lists particular functions that are defined as being of a public nature. This is similar to s40A(3) of the ACTHRA. The ALA notes that the statutory eight-year review of the Victorian Charter recommended that the Charter be amended to include a similar provision.⁷ The review noted that such a provision was necessary given that several non-government organisations, particularly those that deliver regulated community housing services, had continuing uncertainty about whether they are functional public authorities. The review noted that this was a barrier to the incorporation of the Charter in the day-to-day work of community housing providers and inhibited the development of a human rights culture.⁸
19. The ALA submits that s10(3) should also include the provision of gas, electricity and water supply as functions which are to be taken to be of a public nature. This is consistent with what is included in the ACTHRA (s40A(3)(b)(i)), and acknowledges that services which were once provided by government authorities, but are now being provided by non-government or private entities, are still essential public services being provided on behalf of the State.

Section 23 – Taking part in public life

20. The ALA strongly supports s23 of the Bill, which recognises that every person in Queensland has the right to take part in public life. This section closely mirrors s18 of the Victorian Charter, which despite its shortcomings in relation to Aboriginal Victorians,⁹ has been successfully referred to by those seeking redress for improper decision-making by government.¹⁰
21. The ALA submits that the Bill would be strengthened by an explicit acknowledgment in the Explanatory Notes for s23 of the Bill that the right to take part in public life includes the following procedural rights:
- the right to public access to information; and
 - the right to transparency and accountability in governance and decision-making.

⁷ See n 2 above, 62.

⁸ *Ibid*, 58.

⁹ *Ibid*, 217.

¹⁰ For example, see *Slattery v Manningham City Council* [2013] VCAT 1869.

22. Next year will mark 30 years since the report highlighting corruption and wrongdoing by government officials was submitted to the Queensland Government by Tony Fitzgerald QC, Chairman of the Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct (the Fitzgerald Report). It was acknowledged in the Fitzgerald Report that the free flow of accurate information shapes public opinion, which ‘is the only means by which the powerful can be controlled’.¹¹ Further, access to justice is inhibited by controls on access to information held by government.¹² This serves as a timely reminder that public participation and transparency in government decision-making is essential for a functioning democracy and for ensuring natural justice.

Section 43 – Override declarations

23. The ALA does not support the inclusion of the provision to allow Parliament to make an override declaration in exceptional circumstances, under s43. The ALA considers that such a provision serves to undermine the institutional dialogue that legislative human rights charters such as this (and the Charter and ACTHRA) were designed to create.

24. Under s43(1) of the Bill, Parliament may expressly declare in an Act that the Act or another Act, or a provision in the Act or another Act, has effect despite being incompatible with one or more of the protected human rights. Under sub-section (4), it is the intention of Parliament that such an override declaration will be made only in exceptional circumstances. A statutory example is then provided as to what this includes:

Examples of exceptional circumstances –

war, a state of emergency, an exceptional crisis situation constituting a threat to public safety, health or order.

25. Further clarification of when the Parliament can make an override declaration is included in the Explanatory Memorandum. This is in the same terms as the statutory example.

26. The provision for an override declaration is similar to that which is included in the Victorian Charter in s31. While s31(4) similarly states that it is the intention of Parliament that an

¹¹ Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct, *Report of a Commission of Inquiry* (1989), 6.

¹² *Ibid*, 128.

override declaration will be made only in exceptional circumstances, there is no statutory example. However, according to the Charter's Explanatory Memorandum, 'exceptional circumstances' includes threats to national security or a state of emergency which threatens the safety, security and welfare of the people of Victoria.¹³

27. The clear intent of the override declaration provision in the Charter is that it will be used only in the most exceptional circumstances in which there is clear evidence of a threat to national security, public safety, health or order. In situations where there is a public interest in enacting legislation that is not compatible with the Charter, the Override declaration is not necessary as the legislation could still be introduced accompanied by a Statement in accordance with s28 of the Charter that indicates that the legislation is incompatible with human rights, and the nature and extent of the incompatibility. Under s36(1) of the Charter, such legislation could not be struck down or invalidated by the Supreme Court of Victoria. In this way, the principles of parliamentary sovereignty, community safety and public interest are all preserved without the need of an override provision.
28. The ALA therefore submits that an override provision in the Queensland Bill, for which there is a similar intent, is not required. The Queensland Parliament can still enact legislation that it acknowledges is incompatible with the human rights contained in the Bill, pursuant s38(1) and (2). This preserves the principle of parliamentary sovereignty and enables the Parliament to enact laws that it considers to be in the public interest and to ensure community safety.
29. In addition, the ALA submits that the proposed override provision undermines the dialogue model of human rights protection that is afforded by legislative human rights instruments such as the Queensland Bill. Division 3 of the Bill provides for a process of interpretation and dialogue in which the courts are required to interpret legislation in a manner that is compatible with human rights, in accordance with a formula detailed in s13, which states that a human right may be subject to reasonable limitations. If such an interpretation is not possible then the Supreme Court may issue a Declaration of Incompatibility under s53 to which the relevant Minister must respond (s56). This process of dialogue is central to the operation of a statutory bill of rights.
30. An important feature of the dialogue model is that the courts are unable to invalidate or strike down a statutory provision. This is stated in s54 of the Bill. Accordingly, the ALA submits that

¹³ Explanatory Memorandum, *Charter of Human Rights and Responsibilities Bill 2006 (Vic)*, 21.

an override provision is not necessary within a statutory bill of rights that adopts the dialogue model of human rights protection. The ALA notes that, apart from the Victorian Charter, such an override declaration does not appear in other statutory bills of rights that implement a dialogue model of human rights protection, namely the ACTHRA, the United Kingdom's *Human Rights Act 1998* and the New Zealand *Bill of Rights Act 1990*.

31. The override provision in the Victorian Charter was imported from s33 of the *Canadian Charter of Rights and Freedoms*, a constitutionally entrenched bill of rights that empowered the courts in Canada to invalidate legislation which was considered to unjustifiably limit a right. The inclusion of an override declaration was considered necessary in order to preserve parliamentary sovereignty.¹⁴ However, in a statutory bill of rights that incorporates a dialogue model of human rights protection, and which by its nature preserves parliamentary sovereignty, the provision for an override declaration is not necessary.
32. Accordingly, the ALA strongly opposes inclusion of the provision for override by Parliament and recommends that Division 2 of Part 3 be removed from the Bill.

Section 49 – Referral to Supreme Court

33. Section 49 of the Bill limits a referral to the Supreme Court where there is a current proceeding before a court or tribunal. This section is almost identical to s33 of the Charter, which also has no freestanding cause of action. As part of the implementation of the Charter in 2007 the Victorian Department of Justice initiated an audit of existing legislation and policies to assess compatibility with the Charter,¹⁵ which resulted in legislative amendments.¹⁶
34. The ALA submits that all existing legislation and policies in Queensland should be reviewed and amended upon commencement of the legislation. This would serve as a proactive measure in reducing the need for an independent right of referral to the Supreme Court for declarations of incompatibility.

¹⁴ See Weinrib, Lorraine Eisenstat (1990), 'Learning to Live with the Override' (1990) 35 *McGill Law Journal* 541.

¹⁵ Victorian Government, *Victorian Government submission to the Scrutiny of Acts and Regulations Committee's review of the Charter of Human Rights and Responsibilities Act 2006* (2011), 5.

¹⁶ See, for example, *Statute Law Amendment (Charter of Human Rights and Responsibilities) Act 2009* (Vic).

Section 58 – Conduct of public entities

35. The ALA submits that s58(6) of the Bill should be removed. In practice, this provision would result in the absurd situation whereby certain decisions and actions of public entities are declared unlawful, but are not necessarily invalidated on this basis. The current limitations on the relief and remedies available, as discussed below, further weaken the application of this provision. The ALA submits that this is an unacceptable result, as human rights without accessible effective remedies are essentially meaningless. This is supported by Article 2 of the *International Covenant on Civil and Political Rights*, which recognises the need for an effective remedy for human rights violations by those acting in an official capacity.¹⁷

Section 59 – Legal Proceedings

36. The ALA submits that s59 of the Bill should be replaced with a clear provision establishing that a breach of s58 is an independent cause of action, that the Queensland Civil and Administrative Tribunal ('QCAT') has jurisdiction to hear applications for relief or remedy in relation to alleged unlawful conduct under s58, and that there are no limitations on a party seeking damages.
37. Section 59(1) of the Bill limits legal proceedings to instances where there is a separate claim of unlawfulness to a claim under s58 of the Bill, which is therefore not a stand-alone cause of action.
38. Sections 58 and 59 of the Bill closely mirror the wording of ss38 and 39 of the Charter. In the 2015 review of the Charter, the Law Institute of Victoria highlighted many issues with the operation of the equivalent provisions in Victoria:
- the requirement for a piggy-back cause of action can mean that significant resources are spent on 'resolving preliminary jurisdictional issues',¹⁸ 'bringing judicial review

¹⁷ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, (entered into force 23 March 1976) Article 2 Section 3.

¹⁸ Law Institute of Victoria, *2015 Review of the Charter of Human Rights Submission* (2015) 19, available online at: <https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.vic-engage.files/2914/8609/7801/Submission_78_Law_Institute_of_Victoria.pdf>

proceedings in the Supreme Court’,¹⁹ and ‘arguing potentially “weaker” claims, when the “stronger” claim arises from a breach of the Charter’,²⁰ and

- numerous examples evidencing that ‘[the] absence of a direct cause of action for a breach of human rights under the Charter is a barrier to accessible, just and timely remedies for infringements of people’s basic human rights’.²¹

39. The Victorian Bar Council also highlighted that the equivalent provisions in the Charter have been the subject of judicial and academic criticism and advocated for a stand-alone cause of action.²² However, it stopped short of recommending that damages be available as a remedy.²³

40. Section 59(3) of the Bill makes it explicit that a person is not entitled to be awarded damages on the ground of unlawfulness mentioned in s58. The policy underpinning this provision in the Charter at the time was that remedies should focus on practical outcomes rather than monetary compensation.²⁴ The Law Institute of Victoria highlighted that, while practical outcomes are important, damages are sometimes the only way to fairly compensate a person for a breach of their human rights.²⁵ The ALA strongly supports this position.

41. The ALA submits that jurisdiction should be conferred on QCAT to hear applications for relief or remedy in relation to alleged unlawful conduct under s58 of the Bill. In contrast to formal, complex and costly judicial review proceedings in the Supreme Court, QCAT is an accessible tribunal that provides a quick and inexpensive avenue to make decisions.²⁶ It is the ALA’s

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ *Ibid.*, 20.

²² Victorian Bar Council, *Victorian Bar Submission to the Charter Review 2015* (2015) 12-15, available online at: <https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.vic-engage.files/7414/8609/7790/Submission_54_Victorian_Bar.pdf>.

²³ *Ibid.*, 15.

²⁴ See n 4 above, 1294.

²⁵ Law Institute of Victoria, *2015 Review of the Charter of Human Rights Submission* (2015) 21, available online at: https://s3.ap-southeast-2.amazonaws.com/hdp.au.prod.app.vic-engage.files/2914/8609/7801/Submission_78_Law_Institute_of_Victoria.pdf.

²⁶ <https://www.qcat.qld.gov.au/about-qcat>.

position that all Queenslanders, irrespective of their financial or social status, should have access to justice in applying the provisions of the Bill.

42. The equivalent sections of the Charter were the subject of litigation in *Director of Housing v Warfa Shire Sudi* [2011] VSCA 666 ('Sudi'). In Sudi, the Victorian Supreme Court of Appeal held, among other things, that while the Victorian Civil and Administrative Tribunal (VCAT) does have jurisdiction to consider Charter issues in other ways, it does not have jurisdiction under s39 of the Charter to conduct a collateral review of a decision of a public authority.²⁷ The Court found that these matters should be referred to the Supreme Court through judicial review proceedings.²⁸ The Victorian Equal Opportunity and Human Rights commission said that the 'chilling effect of Sudi'²⁹ may have:

- 'created a mistaken belief in some advocates and public authorities that VCAT had no jurisdiction at all to consider human rights';³⁰ and
- 'deferred people from relying on the Charter in legal proceedings'.³¹

Section 60 – Entity may choose to be subject to obligations

43. The ALA strongly supports the provision for an entity to request the Minister to declare that the entity is subject to the obligations of a public entity under the Bill (s60) ('the opt-in provision'). The ALA notes that a similar opt-in provision is in the ACTHRA (s40D) and that the statutory eight-year review of the Charter recommended that the Charter be amended to include an opt-in provision.³² The ALA submits that the opt-in provision can assist in promoting cultural change by developing a 'rights consciousness' across Queensland, encouraging

²⁷ *Director of Housing v Warfa Shire Sudi* [2011] VSCA 666, [34]-[45].

²⁸ *Ibid* [281].

²⁹ Victorian Equal Opportunity & Human Rights Commission, *Submission to the Eight-Year Review of the Charter of Human Rights and Responsibilities Act 2006* (2015) 67, available online at:<https://www.humanrightscommission.vic.gov.au/home/submissions/item/download/7814_1d1e6210214903849020b077750f0fc4>.

³⁰ *Ibid*, 12.

³¹ *Ibid*, 66.

³² See n 2 above, 64-5.

broader, voluntary compliance with human rights standards, promoting a meaningful human rights dialogue within the community and cultural change by developing human rights consciousness within Queensland.

44. The original intention for the s40D opt-in provision in the ACTHRA was to encourage voluntary compliance with human rights standards across the private sector. However, none of the seven organisations that have voluntarily agreed to be subject to the ACTHRA under s40D could be regarded as a private sector organisation. Each organisation is a non-government, not-for-profit organisation that has a long-standing commitment to human rights values. According to Schetzer, based on detailed field research involving each of these organisations, the organisations exhibited exceptional practice in terms of operationalising human rights standards throughout their policies and activities. Human rights practices were considered to be embedded in the culture and service practices of these organisations.³³
45. While s40D has not as yet attracted private sector organisations to opt-in to the human rights obligations as originally intended, the opt-in provision has had an important influence in the development of a human rights culture within the ACT, given the example provided by the opt-in organisations to other organisations in terms of practical incorporation of human rights practice into their operations. Each organisation was able to audit and review its policies, operations and procedures within a limited budget, to ensure that the organisation fulfilled its human rights obligations under the ACTHRA. The organisations considered that by embedding human rights standards into their policies and operations, the quality of their service delivery to service users was improved. Moreover, the organisations noted that by opting-in to the ACTHRA, they secured greater certainty regarding their human rights obligations under the ACTHRA.³⁴ The example provided by these not-for-profit opt-in organisations in the ACT indicates that the process of implementing a human rights-compliant business model for service delivery does not involve a significant or overly burdensome financial cost, and can result in significant benefits for the organisations concerned.

³³ Schetzer, Louis (2018), 'The ACT Human Rights Act – How it has been applied by non-government organisations', Chapter 11 in Schetzer, Louis (2018), *Human rights and the hollowed-out state: How human rights charters apply to contracted-out public services*, 288, available online at: <https://www.unswworks.unsw.edu.au/primo-explore/fulldisplay?vid=UNSWORKS&docid=unswworks_49235&fromSitemap=1> (last accessed 12 November 2018).

³⁴ *Ibid*, 289.

46. The ALA strongly supports the inclusion of a similar opt-in provision in the Bill at s60. However, in order to strengthen the influence of the provision the ALA notes that there are a range of initiatives that should be undertaken by the Executive following the provision coming into operation. These include:

- Comprehensive promotion and encouragement of the opportunity to voluntarily elect to be subject to the *Human Rights Act* under s60, in order to enhance corporate social responsibility within the operations of private and corporate bodies;
- Developing a government tender pre-qualification process in which prospective tenderers for government contracts have to satisfy, among other things, their capacity to adhere to the *Human Rights Act*, with an exemption to this requirement provided for organisations that voluntarily elect to be subject to the Act under s60.

Part 4, Division 2 – Human Rights Complaints

47. The ALA welcomes the provision in s64(1) for an individual who has been the subject of an alleged contravention of protected human rights to make a complaint to the Queensland Human Rights Commission (the Commission). The ALA also welcomes the provision for a human rights complaint that is accepted by the Commissioner to be referred to a conciliation conference (s79). As noted above, this is a significant advancement on the Charter and the ACTHRA.

48. The ALA notes that under s80, the purpose of conciliation of a human rights complaint is to promote the resolution of the complaint in an informal, quick and efficient manner. However, the ALA is concerned that the process of conciliation is deficient as there is no binding or clear outcome from a complaint being brought to the Commission. Even if the outcome of the conciliation is an acknowledgment by the respondent public entity that it has acted unlawfully under s58(1), there is no provision in the Bill that obliges the public entity, or gives powers to the Commission to compel the entity, to remedy the breach or provide some redress to the complainant.

49. The ALA notes that if the conciliation fails to resolve the complaint, the Bill states that the Commissioner must prepare a report about the complaint for the complainant and the respondent, which sets out the substance of the complaint and the actions taken to try and resolve the complaint (s88). The ALA submits that the Commissioner should have the power

to direct a public entity to address the issues raised in the complaint that have been acknowledged by the respondent or which the Commissioner considers to have been substantiated.

50. The ALA is concerned that a complaints and conciliation process that does not provide for a clear or binding outcome, or provide for enforcement of the rights that are protected in the legislation, will result in individuals who allege human rights abuses losing confidence in the complaints and conciliation process and ultimately the Commission itself. This will undermine the role of the Commission and the ability of the Act to fulfil its main object as outlined in s3.

Section 95 – First review of Act

51. The ALA submits that, in addition to the rights mentioned in s95(4) of the Bill, the review of the operation of the Act should include consideration of whether the right to a safe, clean, healthy and sustainable environment should be included.

52. A number of international instruments have acknowledged the right to a healthy environment. Principle 1 of the Stockholm Declaration recognises that '[m]an has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations'.³⁵ Principle 1 of the Rio *Declaration on Environment and Development* states that '[h]uman beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.'³⁶ Many national constitutions and laws recognise the right to a clean environment, including the constitutions of Turkey³⁷ and Brazil.³⁸

³⁵ *Declaration on the United Nations Conference on the Human Environment*, UN Doc A/CONF.48/14/Rev.1 (1972) Principle 1.

³⁶ *United Nations Declaration on Environment and Development*, UN Doc A/CONF.151/5/Rev.1 (1992) Principle 1.

³⁷ *Constitution of the Republic of Turkey*, Article 56, available online at: https://global.tbmm.gov.tr/docs/constitution_en.pdf.

³⁸ *Constitution of the Federative Republic of Brazil*, Article 225, available online at: <http://english.tse.jus.br/arquivos/federal-constitution>.

53. The ALA submits that environmental protections should form part of the first review of the operation of the Act, for the purposes of considering inclusion of environmental rights in the future. The latest in Queensland's State of the Environment Report series reveals poor outcomes, with Queensland being ranked as the highest state emitter of greenhouse gases in Australia, responsible for producing 29 per cent of national emissions.³⁹ In the inquiry into a possible Human Rights Act for Queensland, a number of submitters raised the need for a right to a healthy environment in Queensland.⁴⁰ For example, the Environmental Defenders Office Qld (Inc) identified multiple benefits of recognising the right to a healthy environment necessary to ensure robust decision-making by government and access to justice for Queenslanders in rural areas.⁴¹

Section 126 – Insertion of new s5A in *Corrective Services Act 2006*

54. The ALA is deeply concerned about the wording of s126 of the Bill, which is a consequential amendment to the *Corrective Services Act 2006*, including a new s5A. The ALA is concerned that as it currently reads, the new s5A will have the effect of diminishing the rights of prisoners who come within the circumstances detailed in s5A(1)(a) and (b).

55. According to the Attorney-General in her Explanatory Speech:

The bill also amends the *Youth Justice Act 1992* and the *Corrective Services Act 2006* so that other factors relevant to determining how to act or make a decision under these acts will apply in addition to the human rights considerations under the bill. The effect of these amendments is that an act or decision made under those acts, taking into consideration these additional factors, will not be unlawful under the bill only because these additional factors were considered... In relation to the *Corrective Services Act*, this will be limited to decisions relating to the segregation of convicted

³⁹ Department of Environment and Science, *Queensland State of the Environment 2017 Summary and Management Responses* (2018) 18, available online at: https://www.stateoftheenvironment.des.qld.gov.au/_media/documents/SOE2017-Summary-and-Management-Responses-Oct-2018.pdf.

⁴⁰Legal Affairs and Community Safety Committee, *Inquiry into a possible Human Rights Act for Queensland* (2016) xxxvii, available online at: <http://www.parliament.qld.gov.au/documents/tableoffice/tabledpapers/2016/5516t1030.pdf>.

⁴¹ *Ibid.*

and non-convicted prisoners and the management of prisoners where it is not practicable for a prisoner to be provided with his or her own room.⁴²

56. The ALA is concerned that the wording of the s5A(2) does not achieve the outcome envisaged by the Attorney-General in her Explanatory Speech. The effect of the word ‘only’ in line three of sub-section (2) could give rise to an interpretation that if the chief executive or a corrective services officer only gives consideration to the matters addressed in (2)(a) or (b), then that will be sufficient so as not to be acting in contravention of s58(1) of the *Human Rights Act 2018*. This does not reflect the intention of the amendment to the *Corrective Services Act* as expressed in the Attorney-General’s speech, which was that because the matters in (2)(a) or (b) were taken into consideration ***in addition to*** the human rights considerations under the Bill, then the chief executive or a corrective services officer would not be acting in contravention of s58(1) of the *Human Rights Act 2018*.
57. The ALA is concerned that under the current wording, the new s5A(2) of the *Corrective Services Act 2006* may be interpreted in a fashion that will mean that prisoners that come within the circumstances of s5A(1)(a) and (b) will have their rights diminished, as decisions affecting their circumstances will not specifically be subject to human rights considerations in the same way as will be the case for other Queensland citizens.
58. The ALA recommends that the wording of the new s5A(2) be amended as follows to properly reflect the intentions of the section as articulated by the Attorney-General in her Explanatory Speech:
 - That the word ‘**or**’ at the end of s5A(2)(a) be replaced with the word ‘**and**’ – so that the chief executive is compelled to consider the safe custody and the welfare of all prisoners when making decisions;
 - That the word ‘**also**’ be inserted into s5A(2) after the word ‘consideration’- so that the chief executive or officer does not contravene s58(1) ‘only because the chief executive’s or officer’s consideration also takes into account’ the factors listed in (2)(a) and (b), together with the factors in s13 of the Bill.

⁴² D’Ath, YM, Queensland Attorney-General (2018), *Explanatory Speech, Human Rights Bill 2018*, 31 October 2018, available online at:

<<http://www.parliament.qld.gov.au/documents/tableOffice/BillMaterial/181031/Human.pdf>> (last accessed 20 November 2018).

Section 183 – Insertion of s263 (Management of detention centres) in *Youth Justice Act 1992*

59. For similar reasons the ALA is deeply concerned about the wording of the consequential amendment to the *Youth Justice Act 1992* (the YJA), in which s183 of the Bill amends s263 of the YJA. The ALA is concerned that as the new s263 currently reads, the effect will be to diminish the rights of child detainees who come within the circumstances detailed in s263(7)(a) and (b).
60. The Attorney-General indicated in her Explanatory Speech that the effect of these amendments is that a decision made under the *Youth Justice Act* about whether to segregate accused from convicted children in youth detention centres as required by the right to humane treatment in detention, will not be unlawful under the bill only because these additional factors were considered.⁴³
61. As with the example above involving the new s5A of the *Corrective Services Act*, the ALA is concerned that the wording of the new s263(8) of the *Youth Justice Act 1992* does not achieve the outcome envisaged by the Attorney-General in her Explanatory Speech. The effect of the word ‘only’ in line three of sub-section (8) could give rise to an interpretation that if the chief executive only gives consideration to the matters addressed in (8)(a) or (b), then that will be sufficient and she/he will not be acting in contravention of s58(1) of the *Human Rights Act 2018*. This does not reflect the intention of the amendment to the *Youth Justice Act 1992* as expressed in the Attorney-General’s speech, which was that because the matters in (8)(a) or (b) were taken into consideration ***in addition to*** the human rights considerations under the Bill, then the chief executive would not be acting in contravention of s58(1) of the *Human Rights Act 2018*.
62. The ALA is concerned that under the current wording, the new s263(8) of the *Youth Justice Act 1992* may be interpreted in a fashion that will mean that child detainees who come within the circumstances of s263(7)(a) and (b) will have their rights diminished, as decisions affecting their circumstances will not specifically be subject to human rights considerations in the same way as will be the case for other Queensland citizens.

⁴³ *Ibid.*

63. The ALA recommends that the wording of the new s263(8) be amended as follows to properly reflect the intentions of the section as articulated by the Attorney-General in her Explanatory Speech:

- That the word '**also**' be inserted into s263(8) after the word 'consideration'- so that the chief executive does not contravene s58(1) 'only because the chief executive's consideration also takes into account' the factors listed in (8)(a) and (b), together with the factors in s13 of the Bill.

Conclusion

64. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input into the review of the *Human Rights Bill 2018* being conducted by the Legal Affairs and Community Safety Committee. The ALA is available to appear before the Committee in its consideration of the Bill to provide further explanation for the matters raised in this submission.

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