



# A HUMAN RIGHTS ACT FOR QUEENSLAND

Submission to the Legal Affairs and Community Safety Committee of the Queensland Parliament

April 2016

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## Queensland Mental Health Commission

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## **ACKNOWLEDGEMENT**

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We pay respect to Aboriginal and Torres Strait Islander Elders, past and present, and acknowledge the important role of Aboriginal and Torres Strait Islander people, their culture and customs across Queensland.

We also acknowledge the people living with mental health and drug and alcohol problems, their families and carers. We can all contribute to a society that is inclusive and respectful, where everyone is treated with dignity and able to focus on wellness and recovery and have fulfilling lives.

## COMMISSIONER'S MESSAGE

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The Queensland Mental Health Commission strongly supports the introduction of a Human Rights Act because it will offer extra safeguards and broader protections for people affected by mental illness. There are a number of lessons to learn from other jurisdictions about the design of the legislation to ensure it achieves its potential in protecting the rights of Queenslanders.

In preparing this submission, we sought input from stakeholders and also reviewed research in relation to the effectiveness of current laws in other states and mechanisms for protecting human rights in Queensland specifically for people with mental illness. We are also mindful that involuntary treatment in mental health facilities has a historical context of actions that breach human rights and are not sanctioned today.

This submission outlines our rationale for supporting the proposal and recommendations on how to ensure it achieves its full potential. If the Committee decides that a Human Rights Act is warranted, we look forward to continued involvement in discussions on the model and shape of the legislation, and we urge the Government to ensure people with lived experience are also involved in the design phase.



**Dr Lesley van Schoubroeck**  
Queensland Mental Health Commissioner

# INTRODUCTION

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The Queensland Mental Health Commission's role is to drive on-going reform towards a more integrated, evidence-based, recovery-oriented mental health and substance misuse system.

Respect for human rights is fundamental to supporting recovery of people living with mental illness, mental health problems and problematic alcohol and other drug use. It enables individuals to be socially included, have lives with purpose through participation in education, employment and access to services such as health and housing services.

Legislation plays a very significant role in setting the groundwork for respecting human rights. The recent passage of the *Mental Health Act 2016* is a good example of legislation which seeks to protect the human rights of people who are receiving or who are being assessed for involuntary treatment. The Commission is pleased that many of the recommendations we put to Government have been adopted.

But this law is not enough. People who experience mental illness are vulnerable to a range of practices and processes that infringe their rights within the health system, when accessing other services and in the broader community. Human rights legislation is required as a safeguard for all Queenslanders particularly those who are vulnerable including those living with mental illness and problematic alcohol and other drug use, not just those who are being treated as patients. It is also an important basis for fostering dignity, respect and choices for a group of people whose common experience is being stigmatised, discriminated against and controlled.

These laws serve as a foundation for action. Legislation must be supported by actions that translate good intent to reality in the lives of ordinary people. Actions that support cultural change are essential to enhance the mental health and wellbeing of Queenslanders and the recovery of those living with mental illness and problematic alcohol and other drug use.

This submission draws on the views of our stakeholders who contributed to a consultation process on the proposal, particularly Suicide Prevention Australia, as well as research and analysis into the potential implications of a Human Rights Act for people who experience mental illness. Treatment for mental illness and oversight of that treatment has made significant progress in the last 50 years, but there are many people living today who have stories of forced treatment that is now outlawed, or can be used only in prescribed circumstances. These stories provide the backdrop to this submission.

# WHY HUMAN RIGHTS MATTER

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Human rights protections have particular relevance for people who are vulnerable, marginalised or disadvantaged because these groups are more likely to encounter violations of human rights than others, and they may have more difficulty enforcing their rights without assistance. Our submission focuses on the human rights of people living with mental illness including those receiving involuntary treatment, and people living with problematic alcohol and other drug use. It acknowledges that human rights are an essential part of maintaining good mental health and wellbeing for all Queenslanders.

## Impact on mental health and wellbeing of all Queenslanders

Mental health is different from mental illness. The World Health Organisation defines mental health as ‘a state ... in which the individual realises his or her own abilities, can cope with the normal stresses of life, can work productively, and is able to make a contribution to his or her community’.<sup>1</sup>

All Queenslanders, regardless of whether they are living with a mental illness or not, experience different levels of mental health. Good mental health and wellbeing is influenced by a wide range of factors including: whether they have been subject to discrimination; their social inclusion; and social and economic factors such as employment and access to services such as housing and health services. These factors play a significant role in the social and emotional wellbeing of Aboriginal and Torres Strait Islander Queenslanders.

Human rights will protect Queenslanders when, for whatever reason, they experience compromised mental health and wellbeing.

## Impact on those living with mental illness

People experiencing mental illness are more likely to:

- **Be subject to involuntary treatments and restrictive practices** – human rights legislation can protect against inhuman and degrading treatment.
- **Have shorter life expectancies and experience poor physical health** – human rights include the right to enjoyment of the highest attainable standard of physical and mental health and right to life.
- **Come into contact with the criminal justice system** – human rights include the right to a fair hearing, the right to legal advice and representation, the right to procedural fairness, the right to an expeditious hearing and the right to equality before the law.
- **Have difficulty accessing services** – human rights can include the right of all people to access services including housing, education and training.
- **Have difficulty obtaining and retaining employment** – human rights include the right of all people to equal opportunity.

It is important to note that during episodes of acute illness, a person with mental illness may be unable to assert their rights at the very time when those rights may be most vulnerable to being breached. Further, there are occasions when a person’s mental illness becomes severe and they are unable to consent to treatment, and if subject to criminal proceedings may be found to be of unsound mind or unfit for trial. On these occasions involuntary treatment including involuntary detention in hospital may be the best option our society can offer. For

these people, protections provided in the soon to be implemented *Mental Health Act 2016* provide an important safeguard to human rights violations. The use of seclusion and restraint and some forms of treatment are heavily regulated as they are recognised as being contrary to human rights and should be used only in the rarest of occasions.

Stigma about mental illness is a significant barrier to help seeking and accessing support. For example, the Leadership Group of the National Lived Experience Network has found that stigmatising behaviour of health professionals is a significant barrier to help seeking for those who are vulnerable to suicide<sup>2</sup>. The stigma related to mental illness also impacts people who do not have a mental illness but who, for whatever reason, may have been diagnosed with or treated for a mental illness at some time. This impacts perceptions of employers and others in the community and can limit the individual's capacity to gain an education or position commensurate with their abilities. The Queensland Government for instance issued an apology in February 2010 to 'those who as children in the care of the State of Queensland suffered in any way while resident in an adult mental health facility ... (acknowledging) that for some, such placements led to an incorrect diagnosis of mental illness, which has had a significant impact on their lives'. This and other apologies including to the Stolen Generation, to those harmed in institutions during their childhood, and to those affected by forced adoption all point to an acknowledgment that our recent history has far too many examples of the violation of the rights of vulnerable people.

The vast majority of people who experience mental illness do not need involuntary treatment or come in contact with the judicial system and thus are not covered by the human rights protections within the Mental Health Act. It is estimated, for example, that 20 per cent of all suicides are people who have already exited the health system<sup>3</sup> and twice as many Queenslanders living with a mental health condition experience discrimination or unfair treatment as a personal stressor compared to all Queenslanders.<sup>4</sup> Human rights protections are needed because they apply to everyone; people who experience mental illness would be covered by protections whether or not they have a diagnosed condition, whether or not they have ever been treated and whether or not they are currently unwell.

## **Impact of those living with problematic alcohol and other drug use**

The World Health Organisation indicates that people living with problematic alcohol and other drug use can be subject to stigma and discrimination at very high levels. For example, illicit drug use is considered to be the most stigmatised condition in the world.<sup>5</sup>

Discrimination relating to problematic alcohol and other drug use can lead to and compound existing social disadvantage having a detrimental impact on recovery.

We advocate that all people who experience problematic alcohol and other drug use have a right to services that support their recovery. Human rights are central to modern, recovery-oriented mental health practices that foster dignity, respect and choices and empower individuals to be at the centre of the care they receive. A Human Rights Act would provide a safety net for all people who do, or may, experience problematic alcohol and other drug use during their lives and thus become vulnerable to discrimination and other human rights abuses.



## WHY HAVE A HUMAN RIGHTS ACT

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The Commission supports the implementation of a Human Rights Act in Queensland, particularly to protect the human rights of the most vulnerable in our community for a number of reasons including:

- Providing an overarching human rights framework for Queensland
- Improving oversight of human rights when making laws and regulations
- Improving access to and effectiveness of government delivered and funded services.

### An overarching human rights framework

There is no overarching framework that articulates how Queensland is meeting its human rights obligations including for those living with mental illness and problematic alcohol and drug use. Responsibility rests with a number of agencies, operating without formal linkages or structures, many of which are not covered explicitly by other legislation such as the Mental Health Act. With no centralised reporting or oversight, there is little capacity to distinguish between failures at an individual service level and those that are indicative of systemic weaknesses.

A Human Rights Act and associated reporting arrangements could provide a common basis for decision-making and service provision for all public authorities as well as feedback on how rights are being protected and where further action might be required.

The lack, or inadequacy, of independent oversight is compounded by an inability of all patients to be represented by skilled advocates during reviews of their involuntary treatment.

### Oversight when making laws and regulations

Queensland is more vulnerable than other jurisdictions to abuses of process because it has only one house of parliament. There is no upper house to review the laws passed by the Legislative Assembly as in other states, where this mechanism acts as a fetter on government power and also a forum of considerable debate. While the Committee process exists to consider legislation in Queensland, the full and frank debate that occurs in the tradition Upper House is not public and cannot therefore provide the community with detailed argument of the pros and cons of aspects of legislation.

A Human Rights Act would protect Queenslanders by explicitly requiring law-makers to consider the human rights implications of legislation, compensating to some extent for having fewer checks on government power.

### Considerations in program and service delivery

Government program and service delivery is critical to the mental health and wellbeing of Queenslanders as well as the recovery of people living with mental illness or problematic alcohol and other drug use. The Commission notes and supports the model adopted by Victorian *Charter of Human Rights and Responsibilities Act 2006* which requires public authorities to act in ways that are compatible with human rights including when delivering programs and services.

Two out of five Queenslanders with a mental health condition have difficulty accessing services,<sup>6</sup> and some groups are missing out more than others due to a range of barriers such as people living in rural and remote Queensland, Aboriginal peoples and Torres Strait Islanders and asylum seekers.

- **Rural and remote residents:** Proper access to well-resourced mental health services in rural and remote areas has been an ongoing problem in Australia and Queensland.<sup>7</sup> Timely diagnosis, treatment and ongoing management of a mental health condition in rural and remote areas is likely to occur later or not at all, sometimes leading to tragic of outcomes.<sup>8</sup>
- **Aboriginal and Torres Strait Islander Queenslanders:** Aboriginal and Torres Strait Islander Queenslanders experience poorer life outcomes against all measures. For example, the rate of suicide among Aboriginal and Torres Strait Islander Queenslanders is seven per cent higher than the rest of Australia and more than twice that of the non-Indigenous population.<sup>9</sup> At least one mental health condition was recently found to be present in 73 per cent of male and 86 per cent of female Indigenous prisoners in Queensland.<sup>10</sup> While Indigenous Australians use mental health services at higher rates than other Australians, it is hard to assess whether this use is as high as the underlying need.<sup>11</sup> There are also concerns about the way services, not only health services, are delivered which impacts access and therefore life outcomes.
- **Asylum seekers:** There is a high prevalence of mental health concerns experienced by asylum seekers as a result of social isolation due to language difficulties; the experiences that people are fleeing from; and the process of detention itself. Up to 1,300 new asylum seekers a month are being accommodated just in the greater Brisbane area.<sup>12</sup> Asylum seekers currently struggle to access sub-acute mental health care services for a range of reasons, including inappropriate service models, limited resourcing and lack of capacity and cultural understanding.<sup>13</sup> The recent conviction for 'attempted suicide' of an asylum seeker in the Nauru detention centre brings a stark reality to the rights of people seeking asylum in Australia.<sup>14</sup>

Consideration of human rights in the design and delivery of services has the potential not only to increase access but also to provide more cost-effective services.

# DESIGNING THE RIGHT LEGISLATION AND PROVIDING SUPPORT FOR IMPLEMENTATION

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The model for a Human Rights Act in the Commission's view should:

- Require the State Government and Parliament to consider human rights when developing laws and regulations
- Cover all programs and services funded by the State Government
- Protect economic, social and cultural rights
- Be supported by accessible and effective remedies.

## Human rights considerations when developing laws

A Human Rights Act may well lead to ongoing changes to laws, particularly those such as the Mental Health Act that deal with the rights of vulnerable individuals. While the process of assessing bills for compatibility with the Act adds complexity to the law-making process, it also means that legislation can be transparently judged against agreed human rights criteria, which are embedded in a Human Rights Act.

The Commission would welcome this extra scrutiny of legislation including mental health legislation. It would allow governments and individuals to make more informed, transparent assessments about, for example, the balance between the human rights of mental health patients and the interests of public or individual safety.

## Services funded by the government

The Commission submits that a Human Rights Act should apply to public authorities and to those organisations funded by the State Government to deliver services.

Government service delivery as discussed earlier is critical to mental health and wellbeing of all Queenslanders and is particularly important for vulnerable people such as those living with mental illness and problematic alcohol and other drug use. Requiring that programs and services are designed and implemented in a way which considers human rights could represent a significant step towards more effective service delivery and better access.

The Commission submits that the need to consider human rights in program and service delivery should be extended to all services funded directly and indirectly by the State including those delivered by private and non-government organisations. This is particularly important given the trend towards outsourcing service delivery to organisations outside of government, for example through the National Disability Insurance Scheme (NDIS).

The review of the Victorian Charter highlighted that while currently disability service providers that operate under contract to the Victorian Department of Health and Human Services have obligations under the Charter as public authorities, under the NDIS, they will no longer have these obligations. The department itself will continue to be bound by the Charter but private providers will no longer be performing public functions on behalf of the Victorian Government, so will no longer have human rights obligations under the Charter after the full transition to the NDIS.<sup>15</sup>

To ensure people are protected under the new arrangements, the Commission recommends that a Human Rights Act in Queensland defines public authorities broadly enough to include all private and not-for-profit organisations providing government funded services.

## **Inclusion of economic, social and cultural rights**

Legislation in both the ACT and Victoria is focused on civil and political rights, rather than economic, social and cultural rights. In 2013, the ACT included one economic, social and cultural right in its legislation and has committed to incrementally including more. The 2015 review of the Victorian Charter acknowledged concerns that economic, social and cultural rights are a gap and has recommended they be considered in the next review.

The official position within the United Nations is that economic, social and cultural rights and civil and political rights are interdependent and indivisible. The right to freedom from inhuman and degrading treatment, for example will be compromised by a lack of adequate housing and access to health care.<sup>16</sup> The Commission supports this position. Lack of access to mental health care and other supports such as affordable housing are key factors contributing to disadvantage amongst people who experience mental illness and problematic alcohol and other drug use.

People with mental illness and problematic alcohol and other drug use would benefit from increased access to social services, particularly around health and housing, to the status of rights worthy of inclusion in a Human Rights Act. This underscores in the strongest possible terms that everyone in our community is entitled to the best possible mental healthcare, accommodation and other services and would create a system of accountability in which public authorities would be formally directed to pursue the realisation of these rights.

While there is undoubtedly a cost to government in including economic, social and cultural rights in a Human Rights Act, this does not need to be excessive. There is provision under the International Convention on Economic, Social and Cultural Rights, which requires states to move as expeditiously as possible towards the full realisation of each economic, social and cultural right, *in light of available resources*.<sup>17</sup> Furthermore, many studies show that the longer term economic impact of providing access to health, education and housing services as soon as the need is identified results in significant savings in the longer term. It is an investment in the future.

## **Accessible and effective remedies**

The right to an effective remedy is an essential component of human rights under the International Covenant of Civil and Political Rights and other human rights instruments because even when appropriate legal and other measures to protect and promote human rights are in place, breaches can occur. These measures must be simple and easy to access for even the most disadvantaged in our community.

A key recommendation of the Victorian 2015 review was that providing for rights without remedies sends mixed messages about the importance of human rights. Currently, the Charter can only be enforced in a complicated way, typically through legal action in the Supreme Court.

The review recommends sensible changes to make it simpler, easier and cheaper to protect human rights by giving community members access to dispute resolution at the Victorian Equal Opportunity and Human Rights Commission, and an avenue to have the Victorian Civil and Administrative Tribunal decide whether their rights have been breached. The review found that if this change did not happen the system would continue to be flawed as the focus would be on government administration, rather than remedies for individuals and the Charter's use would be limited because many people would not have the resources to pursue their human rights breaches in the Supreme Court.

A 2014 review of the ACT Human Rights Act found that a lack of clarity regarding the extent to which civil and administrative tribunal and lower courts may assess and remedy breaches of public authority obligations was limiting success of the Act and that the availability of damages may assist claimants who otherwise may be deterred by the cost and time involved in pursuing litigation.<sup>18</sup>

Queensland should learn from these experiences and ensure that legislation provides for a direct cause of action to the Queensland Civil and Administrative Tribunal for breaches of the Act. This would allow people to raise breaches easily in a low cost way that is accessible and allows just and appropriate remedies to be available.

The Commission recognises that some in our community may require assistance to raise breaches of their human rights and this should be provided by the State where appropriate. There are many lessons to be learnt from mental health rights based mechanisms. Studies have shown for instance that people are far less likely to complain about a mental health service than a general health service<sup>19</sup>. It might be expected that the most vulnerable will be less likely to assert their human rights without empathetic supports.

## CULTURE CHANGE

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Legislation is recognised as a significant measure in reducing stigma and discrimination.<sup>20</sup> However legislation alone cannot bring about a culture change necessary to reduce discrimination and stigma in our community.

The 2015 review of the Victorian Charter concluded that having the law was not enough and that Victoria also needs a culture that makes human rights real in people’s everyday interaction with public authorities. It found that improving people’s understanding of human rights, how they are protected and what they mean for individual and collective responsibilities is vital to developing a good human rights culture and recommended building knowledge and capacity amongst ministers, senior public servants, supervisors and staff and the legal sector as well as better educating the community and the private sector about rights.<sup>21</sup>

A 2010 review of the ACT Human Rights Act found a lack of understanding by the legal profession of the provisions of the Act and that until “the courts fully grasp their part in the human rights conversation, there will remain some question as to the Human Rights Act’s ability to generate dialogue between the courts and legislature, and to provide accountability for the Government’s implementation of human rights”.<sup>22</sup>

Given the critical importance of achieving a broad understanding of human rights to combat stigma against people who experience mental illness and achieve the intended purpose of human rights legislation, the Commission recommends appropriate investment be made early on in building knowledge and capacity to support understanding of rights amongst individuals, parliamentarians, the legal sector and public authorities.

## CONCLUSION

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The Queensland Mental Health Commission believes that a Human Rights Act will help address gaps and weaknesses in current protections; provide a basis for strengthening and harmonising legislation that impacts on vulnerable people including those living with mental illness and problematic alcohol and other drug use; and if supported, encourage a culture of human rights within organisations performing public functions. This will undoubtedly bring improved outcomes over time for Queenslanders who experience mental illness.

The Commission strongly supports the introduction of a Human Rights Act in Queensland that draws on lessons from the reviews of the ACT and Victorian Acts, including:

- providing accessible remedies for breaches of human rights
- including economic, social and cultural rights, such as adequate healthcare, education and housing
- investing in educational resources to support understanding of rights amongst individuals, parliamentarians, the legal sector and public authorities and to promote a human rights culture in Queensland
- using a broad definition of the public authorities to ensure organisations funded by the State Government to deliver services for example under the NDIS are within scope.

The Commission further recommends that people with lived experience are involved in the design of the legislation and that safe language guidelines and patient care protocols are applied in the drafting of this legislation and associated policy documentation to ensure appropriate terminology and safe, non-stigmatising wording is used.

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