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Making Rights Real: The Promise and Potential Pitfalls of the Human Rights Act 2019 (Qld)

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Queensland Human Rights Commission

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# Making Rights Real: The Promise and Potential Pitfalls of the *Human Rights Act 2019* (Qld)

SCOTT MCDUGALL\*

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Thank you everyone, and thank you Bond University for the invitation to deliver this speech tonight at such an exciting time, as we embark on a human rights journey in Queensland.

I'd like to acknowledge the traditional owners and custodians of the country on which we are gathered today, the Kombumerri People, and pay my respects to their Elders past, present, and emerging. I would also like to acknowledge that the horrific circumstances in which the Kombumerri People were dispossessed of their lands have not yet been addressed in law.

Well, here we are. It's already February and many of us are just getting back into the swing of things after a summer that, I think, may have changed Australia forever.

For those Australians who thought the jury was still out (on whether human-induced atmospheric carbon levels were causing the planet to heat) well, that jury came roaring in this summer in the form of devastating bushfires that started in Queensland in August, and sadly are still continuing to wreak havoc in communities, including at the doorstep of our national parliament.

I reckon I was born an optimist, and no doubt an idealist — you don't spend so much time working in community legal centres unless you are at least one or the other — but there are so many deeply-entrenched challenges confronting Queensland and Australia that you could be forgiven for tipping over into pessimism and apathy.

My purpose is not to depress you — in fact it is the opposite — but we do need to acknowledge that Queensland and Australia must confront a range of significant structural challenges if we are going to create a society where all of us, regardless of our backgrounds, are able to meaningfully enjoy the rights that are now protected in legislation.

As I mentioned, climate change is one challenge, and I will spend some time tonight briefly discussing the human rights implications of

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\* Commissioner, Queensland Human Rights Commission. I would like to express my gratitude to Jane Andrews for her research assistance in preparing the written form of this paper.

global heating. But now I will turn to some of the other challenges we face.

### Pressing Human Rights Challenges

Aboriginal and Torres Strait Islander people are grossly over-represented in all major indexes of socio-economic disadvantage.<sup>1</sup> Our eyes often glaze over and we can become inured to the statistics, but let me give you just one stark example of this disadvantage. Today, of three Aboriginal boys who commenced prep last week, we know that one of them will spend time in prison before he reaches the age of 25.

Presently we have two royal commissions: one exploring violence, abuse, neglect, and exploitation of people with disability (the Disability Royal Commission);<sup>2</sup> and one inquiring into the treatment of people in aged care (the Aged Care Royal Commission).<sup>3</sup>

The horrendous stories emerging from these inquiries highlight the enormity of the challenge faced to ensure that older people and people experiencing vulnerability due to disability are able to enjoy fundamental rights and freedoms on an equal basis with others. How will the *Human Rights Act* bring about a material difference in their quality of life?

While new technology is improving the lives of many people, with and without disability, it is also making a mockery of our attempts to safeguard rights to privacy. The coercive use of technology envisaged by George Orwell in his novel *1984* has now become a reality in some countries, and just this week the University of Newcastle revealed that it is using location data to monitor student attendance — heaven help me if that technology existed in 1987!<sup>4</sup>

When I was a young criminal lawyer in the early 1990s, it was a very big deal for a prisoner to be placed in solitary confinement. This was in the post-Fitzgerald era in which there was a heightened focus on the criminal justice system, particularly following the closure of the Boggo Road jail and its infamous ‘Black Hole’.<sup>5</sup> Today, solitary confinement

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<sup>1</sup> United Nations Human Rights Council, *Report of the Special Rapporteur on the Rights of Indigenous Peoples on Her Visit to Australia*, 36<sup>th</sup> sess, Agenda Item 3, A/HRC/36/46/Add.2 (8 August 2017) [11].

<sup>2</sup> Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *First Progress Report* (2019).

<sup>3</sup> Royal Commission into Aged Care Quality and Safety, *Interim Report* (2019).

<sup>4</sup> Alison Xiao, ‘Outrage as University of Newcastle to Track Student Attendance Using Mobile Phones’, *ABC News* (4 Feb 2020) <<https://www.abc.net.au/news/2020-02-04/newcastle-university-tracking-student-attendance-through-mobile/11915502>>.

<sup>5</sup> Christopher Dawson, ‘The “Black Holes” Inside Boggo Road’ <<https://www.boggoroadgaol.com.au/2015/10/the-holes.html>>.

has become a regular feature of the management options deployed by prison managers.<sup>6</sup>

However, it is not only *prisoners* who are vulnerable to human rights violations occurring in dark places that are out of sight and out of mind. Older people in Queensland's sixteen state-run aged care facilities will fall within the Act's purview.<sup>7</sup>

Likewise, the use of restrictive practices (including physical and chemical restraint) remains a serious issue in nursing homes, and for that matter in private homes, throughout Australia.<sup>8</sup> People in mental health institutions and children in care are also highly vulnerable to abuse.<sup>9</sup>

### Opportunities Available Through the Act

Tonight, I want to get you thinking about the opportunity presented to us through the introduction of the *Human Rights Act* for tackling some of these issues, and to improve the lives of *all* people in Queensland.

I emphasise the word 'opportunity', because whether the Act reaches its full potential will depend not just on how well it is implemented by the government, but also how it is taken up by the legal profession and the broader community.

As Eleanor Roosevelt said in her final work, *Tomorrow is Now*, 'Government is people. The ultimate triumph of the democratic system depends on the *individual use* of democratic principles.'<sup>10</sup>

The good news is that the *Human Rights Act* now makes it so much easier for individuals in Queensland to access and use those democratic principles.

This important piece of democratic infrastructure is not just the plaything of lawyers; it is something I hope everyone in this room tonight can assume a role in — to develop a society that values freedom, respect, equality, and dignity — and ensure that human rights are not just some abstract, international concept, but rather a practical day-to-day reality.

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<sup>6</sup> Monique Ross and Damien Carrick, "'Animals Get Treated Better': Life in Solitary Confinement", *ABC News* (The Law Report, 11 September 2018) <<https://www.abc.net.au/news/2018-09-11/life-in-solitary-confinement/10203686>>.

<sup>7</sup> Felicity Caldwell, '15-year Master Plan Proposed for Queensland's Public Aged-Care Homes' *Brisbane Times* (13 September 2019) <<https://www.brisbanetimes.com.au/politics/queensland/15-year-master-plan-proposed-for-queensland-s-public-aged-care-homes-20190909-p52pgp.html>>.

<sup>8</sup> Royal Commission into Aged Care Quality and Safety, *Background Paper 4: Restrictive Practices in Residential Aged Care in Australia* (May 2019) 2–3.

<sup>9</sup> Victorian State Government, 'Children and Families at Risk Due to Living Circumstances', *Better Health Channel* (September 2015) <<https://www.betterhealth.vic.gov.au/health/ServicesAndSupport/Children-and-families-at-risk-due-to-living-circumstances>>.

<sup>10</sup> Eleanor Roosevelt, *Tomorrow is Now* (Harper & Row, 1963) 119 (emphasis added).

I will give you a brief overview of the four ways in which the Act works to protect human rights in Queensland, and identify some of the potential benefits and pitfalls. Then I will return to some of the major challenges that confront modern Queensland society, and canvass how the Commission intends to ‘make rights real’.

So how does the *Human Rights Act* work? Before I jump into the four ways the Act protects human rights, it is important to make clear what the *Human Rights Act* doesn’t do.

In Queensland (as in the other Australian human rights jurisdictions of the ACT and Victoria) the human rights model is not constitutionally entrenched. This means that, necessarily, parliamentary sovereignty is retained, and unlike the United States and Canada, the higher courts do not have the final word on important issues, such as abortion or marriage equality.

Our model is described as a *dialogue model*.<sup>11</sup> The ‘dialogue’ is said to occur between the parliament and the judiciary, principally through a process of Ministers addressing human rights in statements of compatibility when making new laws, and courts issuing declarations of incompatibility when they find that a law is incapable of being interpreted consistently with human rights.

### Role of Parliament

The first way the Act protects human rights is by requiring parliament to consider human rights when making new laws.<sup>12</sup> In the parliamentary history of Queensland, it has not been uncommon for governments on both sides of politics to introduce draconian legislation in urgent circumstances, with only superficial consideration afforded to ‘fundamental legislative principles’.

This lack of scrutiny was, and still is, exacerbated by the unicameral parliamentary system with only one house to consider Bills. The Scrutiny of Legislation Committee was permitted to consider impacts of Bills on fundamental legislative principles,<sup>13</sup> however these did not articulate rights and freedoms in the way that is now comprehensively covered by the twenty-three rights protected by the *Human Rights Act*.

The Act now requires Ministers introducing new laws to table statements of compatibility setting out how the laws engage human rights and, to the extent to which human rights are limited by the laws, an explanation of how such limitations can be justified as reasonable and proportionate.<sup>14</sup>

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<sup>11</sup> Explanatory Notes, Human Rights Bill 2018 (Qld) 10.

<sup>12</sup> *Ibid* 12.

<sup>13</sup> *Legislative Standards Act 1992* (Qld) s 4(3).

<sup>14</sup> *Human Rights Act 2019* (Qld) s 38 (‘*Human Rights Act*’).

In ‘exceptional circumstances’, a Bill may include an override declaration, the effect of which is to exclude the Supreme Court from making a declaration of incompatibility. In order to do so, the Minister must make a statement to the House explaining why the circumstances are exceptional.<sup>15</sup>

In Victoria, this has happened on just two occasions, including on one occasion to prevent parole being granted to Julian Knight, who was sentenced by the Victorian Supreme Court to life imprisonment of each of seven counts of murder, known as the ‘Hoddle Street massacre’.<sup>16</sup>

The Queensland Act provides the following examples of exceptional circumstances: a war, a state of emergency or an exceptional crisis situation constituting a threat to public safety, health or order.<sup>17</sup>

When trying to think of examples of what previous governments in Queensland would regard as exceptional circumstances, a colourful one came to mind — the infamous ‘Broadbeach bikie brawl’ incident, which was relied upon to justify the *Vicious Lawless Association Disestablishment Act 2013* (Qld).

While people may look back and laugh at the hot pink jumpsuits that hardened criminals were forced to wear, it is still little understood just how damaging these poorly-drafted laws were on human rights — not just of members and associates of outlawed motorcycle gangs, but on the rights of all Queenslanders. In fact, a 2016 review found that only 17.8% of people charged under the laws were actually members of outlaw gangs.<sup>18</sup>

Yet it would not have been surprising if the government of the day characterised that Broadbeach café incident as an ‘exceptional circumstance’ or crisis that threatened public safety.

Herein lies a potential pitfall. There is a danger that override statements will be included too frequently in Bills. Moreover, there is a greater risk that statements of compatibility will be prepared that provide merely a superficial analysis of the potential impact on the rights of those affected by proposed laws.

In Queensland and elsewhere, the parliamentary committee system is at risk of being criticised as being merely a rubberstamping process. This is because there are very few examples of where submissions made to parliamentary committees in Queensland have been taken on board by the committee as recommendations, and fewer still examples of the government amending legislation to reflect those submissions.<sup>19</sup>

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<sup>15</sup> *Human Rights Act* s 44.

<sup>16</sup> Explanatory Memorandum, Corrections Amendment (Parole) Bill 2014 (Vic) cl 3.

<sup>17</sup> *Human Rights Act* s 43.

<sup>18</sup> Department of Justice and Attorney-General, Queensland Government, *Report of the Taskforce on Organised Crime Legislation* (2016) 82.

<sup>19</sup> Australian Law Reform Commission, *Traditional Rights and Freedoms — Encroachments by Commonwealth Laws* (Report 129, 2015) 72 [3.83].

Aside from the potential for mere lip-service being provided to human rights, there is also the difficulty of unrealistic timeframes for committees to consider Bills, and for members of the public to make submissions. Prior to the passage of Queensland's Human Rights Bill, constitutional lawyer, Professor George Williams, recommended to parliament that minimum consultation and reporting periods should be included to enable proper consideration of human rights.<sup>20</sup>

This suggestion unfortunately was not taken up. However, a review of the Act is required as soon as possible after 1 July 2023, and it could be that this aspect of the operation of the Act will come under close scrutiny in that review.

### Obligations on Public Entities

The second way in which the *Human Rights Act* protects rights is by placing obligations on public entities to give proper consideration of human rights when making decisions, and to act compatibly with human rights.<sup>21</sup>

'Public entity' includes Ministers, public servants, and government agencies, but also non-government organisations to the extent that they are providing services for the State. Most universities in Queensland are caught by the definition, with a notable exception being Bond University. However, I'd like to think that Bond might (at some point in the future) decide to opt in, by asking the Attorney-General to gazette the university as a public entity.

So what does 'act compatibly with human rights' mean? To act compatibly with human rights, a public entity must not limit a human right, or limit a right only to the extent that can be demonstrably justified in a free and democratic society based on human dignity, equality, and freedom. Arguably, this is the most important component of the Act, and the provision that drives the engine of the human rights machine is s 13.<sup>22</sup>

### *Proportionality Test*

Section 13 sets out the test for determining whether a limit on a human right can be justified. In doing so, it establishes what amounts to a structured, ethical decision-making process to guide public entities. Known as the 'proportionality test', it requires decision-makers to consider four questions:

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<sup>20</sup> Daniel Reynolds and George Williams, *Submission No 6 to Queensland Parliament Human Rights Inquiry* (11 March 2016) 5–6.

<sup>21</sup> *Human Rights Act* s 58.

<sup>22</sup> *Ibid* s 13.

- Is the aim of the proposed limitation legitimate (i.e., for a proper purpose)?<sup>23</sup>
- Is there a rational connection between the limitation and the proper purpose (i.e., does it actually help to achieve that purpose, or is it really directed at achieving another purpose that may not be legitimate)?<sup>24</sup>
- Is the limitation necessary (i.e., are there any less restrictive ways of achieving the purpose)?<sup>25</sup>
- Is this limitation fairly balanced against the importance of protecting the human right?<sup>26</sup>

The necessity test is essentially the biggest benefit of the Act, and we will know we have successfully built a human rights culture when public servants routinely ask themselves, ‘Can I do this in a less restrictive way?’ There is no escaping that the final balancing question will often involve a value judgment, but the judgment is made in a structured way that incorporates internationally accepted standards.

The proportionality test is a profound and significant development in Queensland’s administration, and the benefit of this obligation is already being realised. For example, many departments and agencies spent considerable time last year conducting audits of their legislation, policies, and procedures to test for compatibility with human rights. I have no doubt that improvements have already been made that may not be readily apparent to outsiders.

### ***Children in Watch Houses***

One clear example of a benefit already delivered by the Act can be seen in the response of the Queensland Government following the public outcry triggered by the ABC *Four Corners* program in May last year about the prolonged detention of children in adult watch houses.<sup>27</sup>

For those of you who may not have followed the story of what I described at the time as probably the worst human rights violation I would expect to encounter during the course of my term, let me provide you with some details.

Essentially, what occurred from late 2018 was as a direct result of overcrowding in youth detention centres. Anywhere from six to 80 children, most of whom were Aboriginal (some as young as ten years of age) were detained in small watch house cells, often in close

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<sup>23</sup> Ibid s 13(2)(b).

<sup>24</sup> Ibid s 13(2)(c).

<sup>25</sup> Ibid s 13(2)(d).

<sup>26</sup> Ibid s 13(2)(g).

<sup>27</sup> ‘Inside the Watch House’, *Four Corners* (Australian Broadcasting Corporation, 13 May 2019) <<https://www.abc.net.au/4corners/inside-the-watch-house/11108448>>.



proximity to adults, for extended periods, some of them for up to five or six weeks.

Having personally inspected the Brisbane watch house, I can tell you it is a haunting experience to look into the sunken eyes of a 17-year-old boy who has lived in a holding pen the size of a small bedroom for three weeks, with barely any access to sunlight, fresh air, or any of the services and support that a child with high needs requires.

This terrible situation doesn't just have an impact on these children, it clearly takes a toll on the police officers required to supervise them — a task for which they have no training — and I commend the officers who were responsible for bringing this issue out into the open.

While reserving any judgment about how the situation arose, I also commend the government for taking action that has now greatly reduced the numbers of children in detention centres across Queensland from about 210 in May last year to 162 as of last Friday. Nonetheless, last week one child spent six days in a remote watch house because of logistical difficulties. This unacceptable situation shows there is still more work to do here.

Without being cynical, I have no doubt that the commencement of the Act's operative provisions on 1 January had a large bearing on the motivation of the government to fix the problem of children in watch houses, and it does demonstrate the benefit of the Act.

### ***Proper Consideration***

Returning to s 13, a potential pitfall of this element of the *Human Rights Act* is if the proportionality test is not rigorously implemented, or it becomes just a perfunctory 'tick and flick' exercise that focuses attention on justification, rather than fully considering the nature and scope of the rights, and importantly, the values that underpin them. In Victoria, this phenomena has been described as learning the 'dance steps to derogation'.

On the other hand, the requirement that decision-makers give proper consideration to human rights is also potentially problematic. What does 'proper consideration' mean? We want decision-making that upholds human rights, not human rights holding up decision-making. Right?

There is a risk that an overly legalistic and risk-adverse approach to human rights decision-making will lead to bureaucratic delays. Can I tell you, as someone who has spent large parts of my career battling bureaucracies, that is the last thing I would like the *Human Rights Act* to do.

Thankfully, the Victorian courts have provided some guidance on the extent of what is required in giving 'proper consideration', and I think we can confidently expect Queensland courts to follow their lead. Victoria has adopted a common sense approach that requires decision-

makers to ‘seriously turn their mind’ to impacts on human rights and ‘do more than merely invoke’ the *Human Rights Act* ‘like a mantra’.<sup>28</sup>

### Obligations on Courts and Tribunals

The third way human rights are protected under the Act is through the obligations and powers bestowed on courts and tribunals.<sup>29</sup> These obligations take two forms. Firstly, when courts are acting in an administrative capacity, they are deemed to be public entities and have to comply with the requirement to give proper consideration to human rights and act compatibly with human rights.<sup>30</sup>

It isn’t always crystal clear when courts are exercising their functions in a judicial or administrative manner. So this is likely to be an area in which the courts themselves may need to provide some guidance.<sup>31</sup>

The second obligation arises from the statutory command in s 48 of the Act that all statutory provisions must, to the extent possible that is consistent with their purpose, be interpreted in a way that is compatible with human rights.

No doubt the Queensland Supreme Court will be called on to consider how s 48 should be applied, and in particular, whether, by virtue of the *Acts Interpretation Act 1954* (Qld), there is a need for some ambiguity in the law to be established before any interpretation can be tested for compatibility with human rights.<sup>32</sup>

As mentioned earlier, another role for the Supreme Court comes in the form of a discretionary power to make a ‘declaration of incompatibility’ when it is of the opinion that a law cannot be interpreted in a way that is compatible with human rights.

This power is intended to be the principal means by which the courts enter into a dialogue with parliament about human rights. However, in other jurisdictions (including Victoria, the Australian Capital Territory and the United Kingdom) courts have been very reluctant to take up this avenue of communication.

In fact, in Australia, in sixteen years of human rights jurisprudence, there have only been two such declarations, and one of those was set aside by the High Court.<sup>33</sup>

To my mind, it is understandable that courts may be reticent about weighing into the political fray by entering into a ‘dialogue’ which triggers an essentially political process. Similarly, given the importance of maintaining their independence through the separation of powers,

<sup>28</sup> See *Castles v Secretary to the Department of Justice* [2010] VSC 310 [186].

<sup>29</sup> *Human Rights Act* pt 3 div 3.

<sup>30</sup> *Ibid* s 9(4)(b).

<sup>31</sup> *Cemino v Cannan* [2018] VSC 535.

<sup>32</sup> *Human Rights Act* s 48.

<sup>33</sup> *Momcilovic v The Queen* (2011) 245 CLR 1.

courts are also reluctant to stray into areas they see as being the preserve of the executive arm, such as resource allocation.

This was demonstrated to me quite clearly in a discrimination case in which I was involved in the mid-2000s. In that case, two hearing-impaired school children complained about the failure of Education Queensland to provide adequate levels of Auslan instruction.<sup>34</sup> The court was obviously troubled by the suggestion that the case could be characterised as a test case, even though, as a direct result of the court's decision, the Queensland Government had to rewrite its policy and allocated an additional \$30 million to Auslan provision.

This reticence on the part of the judiciary stands as another possible pitfall when it comes to potential litigation, particularly in cases involving recognition and enjoyment of the two economic, social and cultural rights, namely the 'right to education' and the 'right to access health services'.

This is where the proportionality analysis will become critical in a court's consideration of whether 'reasonably available alternatives' were open to the government. In particular, determining the reasonableness of their availability may require courts to venture into the uncomfortable territory of considering fiscal capacity.

However, our courts do routinely make decisions in commercial matters, and matters that have significant cost implications for government. There is no reason therefore why courts should not be prepared to make decisions about human rights matters that will also have cost implications for government.<sup>35</sup>

### Remedies for Human Rights Breaches

The fourth and final way in which the Act protects human rights is by providing remedies to people who consider that their human rights have been unjustifiably limited in breach of the obligations on public entities under s 58 of the Act. There are two remedies created.

In an Australian first for state human rights jurisdictions, a person is entitled to make a complaint to the Queensland Human Rights Commission.<sup>36</sup> The Commission is able to bring the parties together for a conciliation conference to help resolve the complaint, and has certain powers including the power to publish information about unresolved complaints.<sup>37</sup>

The other remedy involves an indirect right to raise human rights arguments in any stand-alone cause of action that a person may have.

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<sup>34</sup> *Hurst and Devlin v Education Queensland* [2005] FCA 405.

<sup>35</sup> See, for example, *Scott & Anor v Telstra Corporation Limited* (1995) EOC ¶92-717, 78,402 (in which Sir Ronald Wilson rejected Telstra's unjustifiable hardship argument in relation to providing TTY machines to their customers with profound hearing loss).

<sup>36</sup> *Human Rights Act* pt 4 div 2.

<sup>37</sup> *Ibid* s 90.

The most likely causes of action that human rights will be ‘piggybacked’ onto are discrimination matters and judicial review proceedings, although, it is possible that other areas such as torts (with an element of unlawfulness) and some WorkCover proceedings may also give rise to human rights arguments.

So what are the areas in which the *Human Rights Act* promises to deliver meaningful outcomes to everyday Queenslanders, and what role can the Human Rights Commission play in helping to ‘make rights real’ for those people?

### **Commission’s Plan to Deliver Meaningful Outcomes**

The Commission recently spent some days considering those exact questions and has developed a strategic plan with a focus on four key areas, the first being to support Indigenous justice, and in particular the establishment of a structural mechanism for dialogue between Aboriginal and Torres Strait Islander peoples and the government.

#### ***Engagement with Aboriginal and Torres Strait Islander Peoples***

The continued lack of formal engagement continues to diminish Australia in many ways, some of which many Australians may never have contemplated. One example is the lost opportunity to receive the benefit of Aboriginal land management practices honed over tens of thousands of years.

In a parallel universe, with a mature and genuine relationship between Australia’s First Nations and the Commonwealth, all Australians could have received the benefit of this ancient knowledge. In fact, it might be that we wouldn’t have suffered such catastrophic fires this summer if we had implemented Aboriginal fire management strategies, even as recently as a decade ago.

As the Queensland Human Rights Commissioner, I am committed to ensuring that Aboriginal and Torres Strait Islander people throughout Queensland are aware of their rights and able to pursue remedies. In order to do this, Aboriginal and Torres Strait Islander people must have trust and confidence in the Commission’s complaint process.

To this end, we have commenced a project to ensure we provide a culturally appropriate ‘whole of Commission’ experience to all Aboriginal and Torres Strait Islander people. As part of this commitment, we have established an Indigenous Advisory Group co-chaired by Mick Gooda and the Mayor of the Torres Strait Council, Vonda Malone.

#### ***Safer Communities***

The second focus area is working towards safer communities. Our work here will focus on effective responses to hate speech and online

vilification, working with police and other agencies about balancing the rights of people who are using public spaces, protecting human rights of children in care, and educating the public about the human rights implications of climate change.

### *Climate Change*

In her opening statement to the Human Rights Council in September 2019, the United Nations High Commissioner for Human Rights, Michelle Bachelet, described climate change as ‘a rapidly growing and global threat to human rights.’<sup>38</sup> In scientific studies, Brisbane has been identified as one of the capital cities with a consistent and significant increase in mortality during heatwave events.<sup>39</sup>

Justine Bell-James and Briana Collins have noted in a paper just published in the *University of New South Wales Law Journal* that Queensland residents will be affected by climate change in serious and measurable ways, including:

- heat-related illness and effects;
- increased incidents of disease;
- impacts on food and water security;
- impacts on mental health; and
- threats to their livelihoods and homes.<sup>40</sup>

Late last year, in a case brought by the Urgenda Foundation and a large number of concerned Dutch citizens, the Supreme Court of the Netherlands ruled that the Dutch Government must reduce its carbon emissions by at least 25% compared to 1990 levels by the end of 2020.<sup>41</sup> In doing so, the Court relied on the positive duty of the government to take steps to protect the right to life.

While Queensland courts are not bound by international precedent,<sup>42</sup> the *Human Rights Act* explicitly permits consideration of foreign decisions in the interpretation of provisions.<sup>43</sup>

So there is significant potential for the *Human Rights Act* to encourage Queensland’s state and local governments to take necessary actions to respond to the threat of climate change, including actions to reduce emissions and ameliorate the effects of global heating. Examples of such actions might include transitioning to low carbon transport

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<sup>38</sup> Michelle Bachelet, *Opening Statement by United Nations High Commissioner for Human Rights*, 42<sup>nd</sup> sess, Human Rights Council (9 September 2019).

<sup>39</sup> Shilu Tong et al, ‘The Impact of Heatwaves on Mortality in Australia: A Multicity Study’ (2014) *BMJ Open* 1, 4.

<sup>40</sup> Justine Bell-James and Briana Collins, ‘Queensland’s *Human Rights Act*: A New Frontier for Australian Climate Change Litigation?’ (2020) 43(1) *University of New South Wales Law Journal* 3.

<sup>41</sup> *Urgenda Foundation v The Netherlands* ECLI:NL:HR:2019:2007.

<sup>42</sup> *Cook v Cook* (1986) 162 CLR 376, 22.

<sup>43</sup> *Human Rights Act* s 48.

systems, introducing urban cooling schemes, and providing air-conditioners in public housing and schools.

### ***Access and Inclusion***

The Commission's third focus area is improving access and inclusion. It is important to remember that the Human Rights Commission maintains all its functions under the *Anti-Discrimination Act 1991* (Qld) and discrimination will continue to be a major focus of our work, and particularly the challenges faced by people with disability.

In promoting access and inclusion, the Commission will address access to health services and education for all people in Queensland, and the advancement of equal access for people in regional and remote areas. The *Human Rights Act* specifically includes discrimination as a component of five rights,<sup>44</sup> and will allow a broader meaning of discrimination, which is defined as including discrimination as defined in the *Anti-Discrimination Act*.

The implication of this is that the definition is not limited to the definition in the *Anti-Discrimination Act*.<sup>45</sup> Therefore, a definition of discrimination that takes on board international jurisprudence may lead to other attributes effectively being protected. This could have significant implications for people living in remote and regional areas where access to services is limited, or for protection of other statuses, such as homelessness.

### ***Institutional Transparency***

The last focus area for the Commission is increasing institutional transparency. Here we will target closed environments to ensure that people understand their rights and are able to access our services. We may also use our reporting and review functions for this purpose. Closed environments in this context includes not just prisons, but youth detention centres, watch houses, forensic disability services, authorised mental services, and locked dementia wards in state-run aged care facilities.

To sum up, it has never been more apt to say that here in Queensland we do live in exciting times. The *Human Rights Act* has the potential to improve lives for all Queenslanders through better government decision-making, but particularly for those people experiencing vulnerability.

The success of the Act does not rest solely on its implementation by government agencies and the courts, it is up to all of us to make rights

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<sup>44</sup> The rights are: equality before the law (s 15); taking part in public life (s 23); protection of families and children (s 26); rights in criminal proceedings (s 32); and the right to health services (s 37).

<sup>45</sup> *Human Rights Act* sch 1 (definition of 'discrimination').

real, and as Eleanor Roosevelt would say, the ‘triumph’ of the *Human Rights Act* will depend on how we, as individuals, make use of its democratic principles.<sup>46</sup>

Thank you.

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<sup>46</sup> Roosevelt (n 10) 119.