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FCC Act review team

Strategic Policy and Legal Services

Department of Justice and Attorney-General

50 Ann St

Brisbane Qld 4000

***By email to:*** fccactreview@justice.qld.gov.au

Dear Review Team

**Review of the *Family and Child Commission Act 2014***

Thank you for the opportunity to make submissions on the review of the *Family and Child Commission Act 2014* (**FCC Act**) and consultation paper dated March 2023.

The Queensland Family and Child Commission (**QFCC**) provides an essential component of the government framework to protect and support vulnerable children, recommended by the Carmody Inquiry to be an oversight body of the child protection system, promote support for families, and to advocate systemically for the rights, interests and wellbeing of children and young people.[[1]](#footnote-1)

The Queensland Human Rights Commission (**QHRC**) is a statutory body established under the *Anti-Discrimination Act 1991.* The QHRC has functions under that Act andthe *Human Rights Act 2019* (**HR Act**) to conduct systemic reviews and other activities to promote an understanding and discussion of human rights, and to build a human rights culture in the Queensland public sector. The QHRC draws upon this experience in making submissions on this review.

# Summary of recommendations

The QHRC recommends, organised in accordance with the review’s terms of reference (**TOR**) :

1. The object of the FCC Act include express reference to the human rights of children and young people.
2. The QFCC have a function to promote participation by children and young people in the making of decisions that affect their lives.
3. Systems of advocacy, investigation and oversight for protecting the rights of children and young people at risk should be mapped and gaps identified to assist in determining whether the QFCC’s powers are appropriate and fit for purpose.
4. Section 9(2) of the FCC Act, which provides that it is not a function of the QFCC ‘to investigate the circumstances of a particular child, young person or family or advocate on their behalf’, is amended so that it clearly means that the QFCC does not investigate individual complaints or allegations, or advocate on behalf of individuals.
5. The powers of the QFCC to receive and compel information from public entities is strengthened, subject to individual rights to privacy.
6. Appropriate relevant agencies should be required to report annually on their achievement of FCC Act objects, including collaboration with other agencies.
7. The QFCC have a function to prepare and monitor a whole of government strategic plan to protect the rights and improve the lives of children at risk.
8. Consideration be given to whether the FCC Act sufficiently encompasses NDIS funded services, for example, whether they fall within the definition of ‘relevant agency’.
9. Ensuring all QFCC reports are tabled by the Minister in the Legislative Assembly, subject prior consideration of privacy rights of individuals identified in the report and procedural fairness.
10. QFCC should not be generally subject to ministerial direction.

# TOR 1: Amendments to the objects of the Act

## Include reference to human rights in the objects of the FCC Act

The object of the FCC Act is to establish the QFCC:

(a) to promote the safety, wellbeing and best interests of children and young people; and

(b) to promote and advocate the responsibility of families and communities to protect and care for children and young people; and

(c) to improve the child protection system.[[2]](#footnote-2)

The FCC Act came into force before the commencement of the HR Act on 1 January 2020. The HR Act, and the rights it protects, provides a comprehensive framework against which service systems can be consistently assessed and shortfalls identified. While ‘safety, wellbeing and best interests’ is broad, it arguably risks overlooking matters protected under the HR Act, such as child’s right to equality and self determination, freedom of expression and the right to receive information, the right to privacy and individual identity, and the special importance of cultural rights of Aboriginal peoples and Torres Strait Islander peoples.[[3]](#footnote-3)

The ‘relevant agencies’ which make up the child protection system (as defined under Schedule 1 of the FCC Act), as well as the QFCC itself, are all ‘public entities’ under the HR Act, and have responsibilities to act compatibly with human rights, and give proper consideration to human rights when making decisions.[[4]](#footnote-4) It is therefore not an additional burden on these agencies to incorporate human rights into the objects and responsibilities of the FCC Act.

In the QHRC’s view, it would be appropriate and preferable for the FCC Act to include express reference to the human rights of children and young people in the objects of the FCC Act, with any necessary cascading amendments to the QFCC’s functions set out in section 9.

# TOR 5a: whether the QFCC’s powers in the Act are appropriate and fit for purpose

## Participation by children and young people in the making of decisions that affect their lives

The Carmody Inquiry highlighted the importance of child participation in decisions that affect them, for their growth and development, to have a sense of personal power and control, and ultimately to achieve better outcomes.[[5]](#footnote-5) This right to increasing levels of autonomy and self determination receives protection from a number of different rights under the HR Act, including the right to recognition and equality before the law, the right to privacy, the rights of the child, and freedom of expression.

As a result of the Carmody Inquiry, the Public Guardian was established providing both child advocacy services for individuals and supporting children through the community visitors program.

Under the FCC Act, in performing their functions, the commissioner must engage with, and take account of, the views of children, young people and their families.[[6]](#footnote-6) The ACIL Allen review noted QFCC’s strong connection with young people and that their voices are influential in shaping QFCC’s work and priorities.[[7]](#footnote-7)

The QHRC considers that the Public Guardian’s individual advocacy role would be complemented by an express function under section 9(1) of the FCC Act of the QFCC to promote the participation by children and young people in the making of decisions that affect their lives. This function is consistent with the functions of childrens commissions in New South Wales, South Australia, Western Australia and Tasmania.

## Map current gaps in individual and systems advocacy for children at risk

In establishing the QFCC to replace the Commission for Children and Young People and Public Guardian, individual advocacy functions were moved to the newly established Office of the Public Guardian, while investigation and complaints were to sit with line agencies with oversight by the Queensland Ombudsman.[[8]](#footnote-8)

However, while the QFCC has a mandate to promote the safety, wellbeing and best interests of children and young people, and to provide oversight of the child protection system, which is given a broad meaning[[9]](#footnote-9):

* the Public Guardian’s child advocacy functions are limited to ‘relevant children’, which essentially refers to children currently or recently subject to child protection orders[[10]](#footnote-10); and
* the ombudsman’s investigative functions necessarily focus on children and young people willing and able to make a complaint, or who have a legal guardian in place willing and able to make a complaint.

There are clearly gaps in advocacy, investigation and oversight systems for the protection of children’s rights, particularly for children and young people who do not fit the definition of ‘a child in need of protection’, are disinterested in processes and decisions affecting them, or do not have parents or guardians with the resources or capacity to advocate on their behalf. Further, there are limited protections for issues generally not seen by themselves as a child safety issue, such as education, discrimination, or cultural connection.

The QHRC recommends that systems of advocacy, investigation, and oversight for protecting the rights of children and young people at risk are mapped and gaps identified as a necessary step to determine whether the QFCC’s powers are appropriate and fit for purpose.

## Amend provision relating to investigating particular circumstances

Section 9(1) of the FCC Act sets out the functions of the QFCC, and goes to provide:

(2) However, it is not a function of the commission to investigate the circumstances of a particular child, young person or family or to advocate on their behalf.

It is understood that the intention of this provision is to reduce duplication and improve efficiency, with the roles of advocacy and investigation sitting with other entities.

However, the current wording of the provision arguably limits the QFCC’s ability or willingness to identify issues or form an evidence base arising from individual cases to carry out other functions under section 9(1) of the FCC Act such as:

1. to provide oversight of the child protection system;

…

(b)(ii) to promote and advocate – the safety and wellbeing of children and young people…

…

(f) to assist relevant agencies evaluate the efficacy of their programs and identify the most effective service models;

…

(h) to increase collaboration and build capacity across different sectors to improve the delivery of services to children, young people and families;

(i) to analyse and evaluate, at a systemic level, policies and practices relevant to the child protection system and the performance of relevant agencies in delivering services;)

The functions of the Public Advocate, which holds a similar systemic role to the QFCC in relation to adults with impaired capacity, stipulate:

…it is not the function of the public advocate to investigate a complaint or allegation that concerns a particular adult with impaired capacity for a matter.[[11]](#footnote-11)

This appears to better encapsulate the intent of the legislation that the Public Advocate does not investigate or act on individual complaints and allegations made to it, without impeding its systemic advocacy functions. It is recommended that section 9(2) of the FCC Act should be similarly drafted to avoid confusion.

## Strengthen QFCC powers to receive and compel information

QFCC’s functions must be underpinned by strong powers to access relevant information.

Under section 35 of the FCC Act, the principal Commissioner may request a public entity for (non-confidential) information necessary for the performance of the QFCC’s functions. A public entity must comply with that request subject to a broad range of exceptions, including where disclosure of the information ‘is impracticable’. If the public entity refuses to comply with the request, the entity must give written notice to the principal Commissioner of its reasons for the refusal.

Section 27 of the FCC Act gives powers to the principal Commissioner to request a public entity for information necessary for its functions in relation to the Child Death Register, with fewer exceptions, and allows requests for confidential information.

In contrast, the QHRC’s powers to request information to prepare an annual report or other report under section 98 of the HR Act:

* makes it an offence not to comply with a request ‘unless the entity has reasonable excuse’;
* cannot include a request personal information that is not publicly available;[[12]](#footnote-12)
* protects the public entity from civil or criminal liability in providing the information.[[13]](#footnote-13)

The QHRC recommends that the powers of the QFCC to receive and compel information from relevant agencies be aligned with the powers of the QHRC under the HR Act to better support its functions.

# TOR 5c. whether any amendments to the Act are required to support more effective coordination between the QFCC, statutory bodies and other agencies/institutions;

## Require relevant agencies to report annually on achievement of FCC Act objects

The role of the QFCC to increase collaboration is critical to supporting children facing multiple disadvantages who require a coordinated multi-service system response.

Under the HR Act, public entities required under the *Financial Accountability Act 2009* to prepare an annual report must include in their report details of any actions taken to further the objects of the HR Act, and details of any review of policies, programs, procedures, practices or services undertaken in relation to their compatibility with human rights.[[14]](#footnote-14) This can then be analysed and incorporated into the HR Act annual report, prepared by the QHRC about the operation of the HR Act during the year.[[15]](#footnote-15)

The FCC Act could impose a similar requirement on relevant agencies to report on actions taken to further the objects of the FCC Act, including protection of children’s rights and collaboration with other agencies.

## Prepare a whole of government strategic plan

The purpose of the establishment of the Queensland Mental Health Commission was:

to drive ongoing reform towards a more integrated, evidence-based, recovery-oriented mental health and substance misuse system. It will be responsible for leading a cultural change in the way mental health, substance misuse (including misuse of alcohol and other drugs) and other human services provided to people with, vulnerable to, or at significant risk of, mental health or substance misuse issues are planned and delivered in Queensland.[[16]](#footnote-16)

The Queensland Mental Health Commission has a legislative obligation to prepare a whole of government strategic plan for the improvement of mental health and substance misuse, and to monitor and report to the Minister on the implementation of the plan.[[17]](#footnote-17)

The QFCC could be similarly charged with a statutory duty or authority to prepare and monitor a whole of government strategy to protect the rights and improve the lives of children at risk.

## Ensure NDIS funded services are included

Many children are in receipt of NDIS funding and services. Consideration should be given to whether the FCC Act sufficiently captures NDIS funded services in looking at systems of support for children with disability, for example, whether they fall within the definition of ‘relevant agency’.

## Strengthen QFCC powers to receive and compel information

As above.

# TOR 5d. whether the tabling/reporting requirements set out in the Act are appropriate to demonstrate outcomes and independence of the QFCC;

## Ensure all QFCC reports must be tabled with the Legislative Assembly

Under section 9(1)(j) of the FCC Act, the QFCC’s functions include ‘to report to the Minister about matters relating to a function …’. The FCC Act also provides for annual reports to be given to the Minister, which the Minister must table in the Legislative Assembly[[18]](#footnote-18), and Child Death Review Board reports, over which the Minister has discretion of whether to table.[[19]](#footnote-19)

For reasons of transparency and independence, the QHRC recommends that all QFCC reports to be given to the Minister should be required to be tabled, subject to privacy rights of individuals identified in the report and procedural fairness being considered prior to their publication.

# TOR 5h: whether any amendments should be made to the Act to provide for the enhanced independence of the QFCC in the performance of its current functions under the Act.

## QFCC should not be generally subject to ministerial direction

Under section 22 of the FCC Act,

(1) A commissioner is subject to the directions of the Minister in performing the commissioner’s functions under this Act.

(2) The commissioner must comply with a direction given by the Minister.

Directions of the Minister under this provision must be recorded in QFCC’s annual report.[[20]](#footnote-20)

The Child Death Review Board must act independently and in the public interest, and is not subject to Minister direction about how to perform its functions under s 22 of the FCC Act.[[21]](#footnote-21)

While it may be appropriate in some instances for the Minister to direct a particular review or report be undertaken, a general obligation to be subject to the direction of the Minister is inconsistent with the independence and impartiality an entity like the QFCC is expected to have in order to properly carry out its oversight functions.

At the least, it would be appropriate to make clear in the FCC Act that in performing its functions, the Commissioner is to act independently and impartially, as suggested in the consultation paper.[[22]](#footnote-22)

Questions regarding this submission can be directed to Rebekah Leong on 3021 9127 or rebekah.leong@qhrc.qld.gov.au.

Yours sincerely



**SCOTT MCDOUGALL**

**Queensland Human Rights Commissioner**

1. Queensland Child Protection Commission of Inquiry, *Taking Responsibility: A Roadmap for Queensland Child Protection* (Report, June 2013) 407. [↑](#footnote-ref-1)
2. *Family and Child Commission Act 2014* (Qld) s 4. [↑](#footnote-ref-2)
3. *Human Rights Act 2019* (Qld) ss 15, 21, 25, 28. [↑](#footnote-ref-3)
4. For definition of ‘public entity’, see *Human Rights Act 2019* (Qld) s 9. For obligations imposed on public entities, see *Human Rights Act 2019* (Qld) s 58. [↑](#footnote-ref-4)
5. Queensland Child Protection Commission of Inquiry, *Taking Responsibility: A Roadmap for Queensland Child Protection* (Report, June 2013) 416. [↑](#footnote-ref-5)
6. *Family and Child Commission Act 2014* (Qld) s 23(1)(a). [↑](#footnote-ref-6)
7. ACIL Allen, *Independent Review of the performance of the Queensland Family and Child Commission of its functions* (Final Report, 2021) 10. [↑](#footnote-ref-7)
8. Ibid 5. [↑](#footnote-ref-8)
9. *Family and Child Commission Act 2014* (Qld) ss 4(a), 9(1)(a). The ‘child protection system’ is defined as systems of services provided to children ‘in need of protection’ or ‘at risk of harm’, and includes preventative and support services to strengthen and support families and prevent harm to children and young people: *Family and Child Commission Act 2014* (Qld) sch 1 (definition of ‘child protection system’). [↑](#footnote-ref-9)
10. *Public Guardian Act 2014* (Qld) s 52. [↑](#footnote-ref-10)
11. *Guardianship and Administration Act 2000* (Qld) s 209(2). [↑](#footnote-ref-11)
12. However, under its function to deal with human rights complaints, the QHRC has power to compel information, including personal information, and can publish information about a human rights complaint provided it does not include personal information unless consent has been given: *Human Rights Act 2019* (Qld) s 78. [↑](#footnote-ref-12)
13. *Human Rights Act 2019* (Qld) s 99. [↑](#footnote-ref-13)
14. *Human Rights Act 2019* (Qld) s 97. [↑](#footnote-ref-14)
15. *Human Rights Act 2019* (Qld) s 91. [↑](#footnote-ref-15)
16. Explanatory Notes to the Queensland Mental Health Commission Bill 2012 (Qld) 1. [↑](#footnote-ref-16)
17. *Queensland Mental Health Commission Act 2013* (Qld) ss 4, 7 and 11. [↑](#footnote-ref-17)
18. *Family and Child Commission Act 2014* (Qld) ss 29, 29J. [↑](#footnote-ref-18)
19. *Family and Child Commission Act 2014* (Qld) s 29K. [↑](#footnote-ref-19)
20. *Family and Child Commission Act 2014* (Qld) s 40(1)(b). [↑](#footnote-ref-20)
21. *Family and Child Commission Act 2014* (Qld) s 29F. [↑](#footnote-ref-21)
22. Department of Justice and Attorney-General, *Review of the Family and Child Commission Act 2014* (Consultation paper, March 2023) 15. [↑](#footnote-ref-22)