Queensland Human Rights Commission

FACT SHEET:

Queensland's *Human Rights Act 2019*

Queensland's *Human Rights Act 2019* protects 23 human rights in law.

The Act primarily protects civil and political rights drawn from the International Covenant on Civil and Political Rights. It also protects two rights drawn from the International Covenant on Economic, Social and Cultural Rights (right to education and health services) and one right drawn from the Universal Declaration of Human Rights (property rights). The Act also explicitly protects the cultural rights of Aboriginal and Torres Strait Islander peoples.

Although the Act does not make international law part of our law in Queensland, it does make it clear that, when interpreting human rights, courts can consider international law.

The Act requires each arm of government to act compatibly with these human rights. This means that:

- parliament must consider human rights when proposing and scrutinising new laws;
- courts and tribunals, so far as is possible to do so, must interpret legislation in a way that is compatible with human rights; and
- public entities – such as state government departments, local councils, state schools, the police and non-government organisations and businesses performing a public function must act compatibly with human rights.

The Act makes it clear that rights can be limited, but only where it is reasonable and justifiable.

Timeline

Queensland's Human Rights Act was passed by State Parliament in February 2019.

From 1 July 2019 the Act changed our name, from the Anti-Discrimination Commission Queensland to the Queensland Human Rights Commission. It also expanded our work protecting and promoting the rights of Queenslanders.

From 1 January 2020 the Act will require public entities to act compatibly with human rights.

Making a complaint

From 1 January 2020, if your human rights have been limited by a public entity, you may be able to make a complaint with us at the Commission.

Complaints will only be able to be made for breaches that occur after 1 January 2020.

The Human Rights Act protects:

YOUR RIGHT TO RECOGNITION AND EQUALITY BEFORE THE LAW (SECTION 15)

Everyone is entitled to equal and effective protection against discrimination, and to enjoy their human rights without discrimination.

YOUR RIGHT TO LIFE (SECTION 16)

Every person has the right to life and to not have their life taken. The right to life includes a duty on government to take appropriate steps to protect the right to life.

YOUR RIGHT TO PROTECTION FROM TORTURE AND CRUEL, INHUMAN OR DEGRADING TREATMENT (SECTION 17)

People must not be tortured. People must also not be treated or punished in a cruel, inhuman or degrading way. This includes protection from treatment that humiliates a person. This right also protects people from having medical treatment or experiments performed on them without their full and informed consent.

YOUR RIGHT TO FREEDOM FROM FORCED WORK (SECTION 18)

A person must not be forced to work or be made a slave. A person is a slave when someone else has complete control over them.

YOUR RIGHT TO FREEDOM OF MOVEMENT (SECTION 19)

People can stay in or leave Queensland whenever they want to as long as they are here lawfully. They can move around freely within Queensland and choose where they live.

YOUR RIGHT TO FREEDOM OF THOUGHT, CONSCIENCE, RELIGION AND BELIEF (SECTION 20)

People have the freedom to think and believe what they want – for example, religion. They can do this in public or private, as part of a group or alone.

YOUR RIGHT TO FREEDOM OF EXPRESSION (SECTION 21)

People are free to say what they think and want to say. They have the right to find, receive and share information and ideas. In general, this right might be limited to respect the rights and reputation of other people, or for the protection of public safety and order.

YOUR RIGHT TO PEACEFUL ASSEMBLY AND FREEDOM OF ASSOCIATION (SECTION 22)

People have the right to join groups and to meet peacefully.

YOUR RIGHT TO TAKING PART IN PUBLIC LIFE (SECTION 23)

Every person has the right to take part in public life, such as the right to vote or run for public office.

PROPERTY RIGHTS (SECTION 24)

People are protected from having their property taken, unless the law says it can be taken.

YOUR RIGHT TO PRIVACY AND REPUTATION (SECTION 25)

Everyone has the right to keep their lives private. Your family, home or personal information cannot be interfered with, unless the law allows it.

YOUR RIGHT TO PROTECTION OF FAMILIES AND CHILDREN (SECTION 26)

Families are entitled to protection. Children have the same rights as adults with added protection according to their best interests.

CULTURAL RIGHTS – GENERALLY (SECTION 27)

People can have different family, religious or cultural backgrounds. They can enjoy their culture, declare and practice their religion and use their languages.

CULTURAL RIGHTS – ABORIGINAL PEOPLES AND TORRES STRAIT ISLANDER PEOPLES (SECTION 28)

Aboriginal and Torres Strait Islander peoples in Queensland hold distinct cultural rights. They include the rights to practice their beliefs and teachings, use their languages, protect and develop their kinship ties, and maintain their relationship with the lands, seas and waterways.

YOUR RIGHT TO LIBERTY AND SECURITY OF PERSON (SECTION 29)

Everyone has the right to freedom and safety. The right to liberty includes the right to not be arrested or detained except in accordance with the law. The right to security means that reasonable steps must be taken to ensure the physical safety of people who are in danger of physical harm.

YOUR RIGHT TO HUMANE TREATMENT WHEN DEPRIVED OF LIBERTY (SECTION 30)

People have the right to be treated with humanity if they are accused of breaking the law and are detained.

YOUR RIGHT TO A FAIR HEARING (SECTION 31)

A person has a right to a fair hearing. This means the right to have criminal charges or civil proceedings decided by a competent, independent and impartial court or tribunal after a fair and public hearing.

RIGHTS IN CRIMINAL PROCEEDINGS (SECTION 32)

There are a number of minimum guarantees that you have when you have been charged with a criminal offence. These include the right to be told the charges against you in a language you understand; the right to an interpreter if you need one; the right to have time and the facilities (such as a computer) to prepare your own case or to talk to your lawyer; the right to have your trial heard without too much delay; the right to be told about Legal Aid if you don't already have a lawyer; you are presumed innocent until proven guilty; and you don't have to testify against yourself or confess your guilt unless you choose to do so.

RIGHTS OF CHILDREN IN THE CRIMINAL PROCESS (SECTION 33)

A child charged with committing a crime or who has been detained without charge must not be held with adults. They must also be brought to trial as quickly as possible and treated in a way that is appropriate for their age. Children are entitled to opportunities for education and rehabilitation in detention.

RIGHT NOT TO BE TRIED OR PUNISHED MORE THAN ONCE (SECTION 34)

A person will only go to court and be tried once for a crime. This means if the person is found guilty they will only be punished once. If they are found to be innocent they will not be punished.

RETROSPECTIVE CRIMINAL LAWS (SECTION 35)

A person has the right not to be prosecuted or punished for things that were not criminal offences at the time they were committed.

RIGHT TO EDUCATION (SECTION 36)

Every child has the right to primary and secondary schooling. Every person has the right to have access to further vocational education, based on their ability.

RIGHT TO HEALTH SERVICES (SECTION 37)

Everyone has the right to access health services without discrimination. This right also states that nobody can be refused emergency medical treatment.

Queensland Human Rights Commission

FACT SHEET:

Right to recognition and equality before the law

Section 15 of the *Human Rights Act 2019*

Section 15 of the *Human Rights Act 2019* says that:

1. Every person has the right to recognition as a person before the law.

2. Every person has the right to enjoy the person's human rights without discrimination.

3. Every person is equal before the law and is entitled to the equal protection of the law without discrimination.

4. Every person has the right to equal and effective protection against discrimination.

5. Measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination.

This right is based on Articles 2, 16 and 26 of the International Covenant on Civil and Political Rights. Australia became a party to this treaty in 1980.

Note: Under the Act, all rights may be subject to reasonable limits (section 13). The nature of the right is relevant when considering what is reasonable.

Scope of the right

The right to recognition as a person before the law is absolute, and under international law, cannot be limited under any circumstances.

Essentially, it ensures legal rights - for example, the equal right to enter into contracts or access government services. In some countries, certain groups (such as women or particular ethnic groups) are denied this.

The right to enjoy other human rights free from discrimination provides for all people to have the same rights and to deserve the same level of respect. This means that laws, policies and programs should not be discriminatory. It also means that public entities should not apply or enforce laws, policies and programs in a discriminatory way.

Discrimination is defined by the *Anti-Discrimination Act 1991 (Qld)*, and is unlawful when based on:

- age;
- breastfeeding;
- family responsibilities;
- gender identity;
- impairment;
- lawful sexual activity;
- parental status;
- political belief or activity;
- pregnancy;
- race relationship status;
- religious belief or activity;
- sex;
- sexuality;
- trade union activity;
- association with, or relation to, a person identified on the basis of any of the above attributes.

Subsection 3 refers to the enforcement and administration of the law. It provides the right of legal personality, meaning every person is equal before the law and entitled to equal protection of the law. It is closely linked to the principle of non-discrimination.

Subsection 4 reflects the essence of human rights: that every person holds the same human rights simply because they are human. People do not need to have a particular characteristic or belong to a special group to hold human rights.

Special measures

Section 15(5) of the Act states that measures taken to assist or advance people disadvantaged because of discrimination, cannot themselves be considered discrimination. This allows for what are sometimes called 'special measures'. Some examples of special measures could include, for example:

- programs addressing the disadvantage experienced by many Aboriginal and Torres Strait Islander Queenslanders;
- employment programs for people with disabilities, a group which has been traditionally under-employed.

Examples

There are no case examples involving this right in Queensland. The following examples are from Victoria, where the same right is included as Section 8 in the Charter of Human Rights and Responsibilities Act 2006.

INTERSECTION OF THE RIGHT TO EQUALITY AND ANTI-DISCRIMINATION LAW

(Lifestyle Communities Ltd (No 3) (Anti-Discrimination) [2009] VCAT 1869 (22 September 2009))

Lifestyle Communities Ltd runs aged care facilities. It sought an exemption from the Equal Opportunity Act 1995 (Vic) to enable it to provide places only to people aged over 50. The Victorian Civil and Administrative Tribunal (VCAT) ruled that the exemption was not justified as a reasonable limitation on the right to equality before the law. VCAT's ruling found there was no reason to exclude all applicants under 50, and that the company's proposal was based on stereotypes.

MEASURES TO ADVANCE PEOPLE EXPERIENCING DISCRIMINATION NOT A BREACH OF RIGHT TO EQUALITY FOR OTHERS

(Parks Victoria (Anti-Discrimination Exemption) [2011] VCAT 2238 (28 November 2011))

In another case, Parks Victoria wanted to advertise for and employ Indigenous people to care for Wurundjeri country. VCAT found that the purpose of the activity was to provide employment opportunities to Indigenous people, to increase the number of Indigenous people employed by Parks Victoria, to provide opportunities for connection and care for the Wurundjeri country by its traditional owners, and also for the maintenance of the culture associated with the country. The Tribunal was satisfied that the measure was proportionate because at the time the application was made only 7.6 per cent of Parks Victoria's workforce was Indigenous. Limiting the employment opportunity to Aboriginal people was found to be a reasonable limitation on the right to equality of other groups.

Examples of when this right could be relevant in practice

The actions of public entities can both promote and limit rights.

Section 15 could be relevant to activities that:

- provide for the delivery of an entitlement or service to some groups but not others;
- assist or recognise the interests of Aboriginal and Torres Strait Islander persons or members of other ethnic groups;
- have a disproportionate impact on people who have one or more protected attributes under the Anti-Discrimination Act 1991 (for example, sex, race, age or disability);
- deal with any of the human rights set out in the Act in a discriminatory way (for example, limits to freedom of expression if people have engaged in trade union activity);
- set age brackets that are expressed as protective measures, graduated entitlements (for example, driver licensing), or statements of legal capacity (for example, voting);
- establish eligibility requirements for access to services or support (such as legal aid);
- contain measures which aim to assist people who have been socially, culturally or economically disadvantaged;
- take steps to lessen or remove conditions that have disadvantaged specific groups within society (sometimes called positive discrimination);
- regulate access to building, roads, transport, schools, housing and hospitals;
- affect information and communications services including electronic services;
- regulate access to education, healthcare, the justice system, courts, or voting;
- provide for mobility aids, assistive devices and technologies designed for people with disabilities;
- set standards or guidelines for access to facilities and services to ensure access for people with disabilities.

Queensland Human Rights Commission

FACT SHEET:

Right to life

Section 16 of the *Human Rights Act 2019*

Section 16 of the *Human Rights Act 2019* says that:

Every person has the right to life and has the right not to be arbitrarily deprived of life.

The Human Rights Act protects the right to life. The right not to be deprived of life is limited to arbitrary deprivation of life. It follows that not every action that results in death will be a breach of the Human Rights Act.

This right includes an obligation on states to take steps to protect the lives of individuals. Examples include positive measures to address threats to life like malnutrition and infant mortality.

This right is modelled on Article 6(1) of the International Covenant on Civil and Political Rights. Australia ratified this treaty in 1980.

This section is to be read together with clause 106 of the Human Rights Act. It states that nothing in the Act affects any law relating to termination of pregnancy or the killing of an unborn child.

Scope of the right

Because the right to life is concerned with preventing the arbitrary deprivation of life it can be relevant in situations such as:

- the use of force by public authorities;
- the delivery of medical treatment; and
- the investigation of the conduct of public entities, particularly when a person dies while in their care.

The right to life imposes both positive and negative duties on public entities. This means public entities need to refrain from taking someone's life (a negative duty). They also need to act to protect people from real and immediate risks to life (a positive duty).

Under international law, the right to life is one of the rights that cannot be suspended, even in emergency situations. The unlawful and arbitrary deprivation of life is never allowed.

Like all rights in the Act, the right to life can be limited where it is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

However, because of the nature of this right and because it cannot be limited under international law, it is difficult to see circumstances where this right would be limited in Queensland.

Negative duties

The negative duties imposed by this right mean that public entities must not arbitrarily or intentionally deprive someone of life.

The use of force by government officials that has resulted in a deprivation of life must have been 'absolutely necessary' and 'strictly proportionate' to the achievement of the permitted purpose. For example, this might occur when the police have to use lethal force to protect the lives of other people in imminent danger.

The European Court of Human Rights has found violations of the right to life because of deficient operational planning and control. For example, in *Gulec v Turkey (Application No 54/1997/838/1044, 27 July 1998)*, the Court found that the right to life had been violated when police fired guns to disperse demonstrators, killing a 15 year old boy, where less lethal means of crowd control should have been used.

Positive duties

The right to life also requires public entities to take positive steps to protect the right to life. Because the Act requires public entities to give proper consideration to relevant human rights when making a decision, government agencies, such as the Queensland Police Service, should have regard to the right to life in their actions and decision-making. This may also imply a positive obligation to safeguard the lives of Queenslanders.

When this right could be relevant

Section 16 could be relevant to laws, policies, acts or decisions that:

- impact on the way that essential services (such as medical or welfare services) are provided, or how and whether these services can be accessed in a way that impacts on people's welfare or safety;
- impact on the delivery of medical resources for patients;
- impact on procedures for the management of those held in care;
- permit law enforcement officers to use force, including the use of weapons in the course of their duties;
- create or amend the law withholding or requiring medical treatment, or coronial inquests;
- relate to investigation into the conduct of public entities, especially when people die while in the care of public entities, for example, deaths in custody or of children in the child protection system.

Examples

There are no case examples from Queensland yet which involve this right. The following examples are from Victoria and the United Kingdom, where the right to life is included in their human rights laws.

CORONIAL INVESTIGATION INTO LEVEL CROSSING DEATHS

The Victorian Coroners Court was investigating 29 deaths that occurred on level crossings in Victoria. The Coroner held that there was an obligation on the Coroners Court to interpret all legislation compatibly with human rights. The Court found that the right to life 'requires the Coroner to conduct an inquest that investigates not only the immediate circumstances of the death but also the possibility of systemic failure on the part of the authorities to protect life'.

RESPONSIBILITY TO PROTECT LIFE

(Rabone and Anor v Pennine Care NHS Foundation Trust (2012))

A woman with a recurring depressive disorder had attempted suicide on several occasions. She was initially assessed by the hospital as being at high risk of deliberate self harm and suicide. Following treatment, she was reassessed as moderate to high risk of self harm. Her father was concerned about her condition and urged the hospital not to allow her home on leave or to discharge her too soon. However, the woman asked for home leave and was granted it for two days and nights against her parents' wishes. During her home leave she committed suicide. The Supreme Court held that the hospital had a duty to take reasonable steps to protect her from the real and immediate risk of suicide and that article 2 of the European Convention, which protects the right to life, had been breached.

Queensland Human Rights Commission

FACT SHEET:

Right to protection from torture and cruel, inhuman or degrading treatment

Section 17 of the *Human Rights Act 2019*

Section 17 of the *Human Rights Act 2019* says that:

A person must not be –

(a) subjected to torture; or

(b) treated or punished in a cruel, inhuman or degrading way; or

(c) subjected to medical or scientific experimentation or treatment without the person's full, free and informed consent.

The Human Rights Act states that a person must not be tortured or treated in a way that is cruel, inhuman or degrading. This includes not being subjected to medical or scientific treatment unless the person has given their full, free and informed consent.

Torture is a crime in Australia under the Commonwealth Criminal Code Act 1995 (Division 274). Some instances of torture and cruel or inhuman treatment may also be crimes under the Queensland Criminal Code.

Section 17 is based on Article 7 of the International Covenant on Civil and Political Rights. Australia ratified treaty in 1980.

Scope of the right

Like all rights in the Act, the right to protection from torture and cruel, inhuman or degrading can be limited where it is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

However, the right to protection against torture cannot be limited under international law. Torture is also prohibited under Queensland law. It is therefore very unlikely that any limitation to the right to protection against torture would be justifiable.

Torture

Torture is an act that intentionally inflicts severe physical or mental pain or suffering.

In Victoria, where the same right is protected in the Victorian Charter of Rights and Responsibilities Act 2006, it has been clarified that this right may also give rise to positive obligations, including, for example, obligating public authorities to take steps to prevent deliberate acts of torture.

Cruel, inhuman or degrading treatment or punishment

Cruel, inhuman or degrading treatment or punishment is a broader concept than torture. It often refers to treatment that is less severe than torture or that does not meet the definition of torture. It still involves abuse or humiliation. It does not necessarily have to be intentionally inflicted or physical pain. It can include acts that cause mental suffering, debases a person, causes fear, anguish or a sense of inferiority.

Medical or scientific experimentation or treatment

This right protected in the Human Rights Act expands on Article 7 of the International Covenant on Civil and Political Rights by providing that informed consent must be given for medical treatment.

When this right could be relevant

Section 17 could be relevant to laws, policies, acts or decisions that:

- cause a person serious physical or mental pain or suffering, or humiliate them;
- create new powers, or change or increase existing powers of police, inspectors or authorised officers;
- affect the operation of detention facilities and conditions attached to all forms of state care and detention (including access to goods and services, such as medical treatment, while in detention);
- create new types of penalties (including mandatory minimum sentences, and limits to or denial of a service);
- authorise changes to rules of evidence or procedure that would allow for evidence obtained as a result of torture, inhuman or degrading treatment, to be used in courts or tribunals;
- introduce or permit corporal punishment by a public entity;
- involve procedures relating to conducting searches;
- regulate the treatment of people at any site for which a public entity is responsible, including: a public hospital, an approved mental health service, a prison, a government school, a disability or aged care service, or a supported residential service;
- allow for prolonged periods of segregation or other particularly harsh prison regimes;
- involve crisis intervention strategies or behavioural management plans that include the use of seclusion, chemical restraint or physical restraint;
- define and regulate procedures for obtaining consent to medical treatment and experiments;
- regulate medical treatment of people without their consent; or
- regulate the conduct of medical or scientific research.

Examples

There are no case examples from Queensland yet which involve this right. There are some from other jurisdictions below.

CRUEL AND DEGRADING TREATMENT OF PEOPLE WITH DISABILITY A BREACH OF HUMAN RIGHTS

(Davies v State of Victoria [2012] VSC 343 (15 August 2012))

This case involved the treatment of a person with disabilities. While living at a Community Residential Unit, the person was dragged naked along a hallway. This caused bruising and grazing. The Supreme Court of Victoria found that the treatment of the resident constituted cruel, inhumane and degrading treatment.

ENSURING CHILDREN IN DETENTION ARE KEPT SAFELY AND HUMANELY

(Certain Children (No 1) [2016] VSC 796 [169]; contra Certain Children (No 2) [2017] VSC 251 [241], [256] – [258]).

This case related to the detention of children at the Barwon Prison. It was found that the treatment children were being subjected to collectively amounted to cruel, inhuman and degrading treatment. The treatment included:

- very long periods of solitary confinements;
- uncertainty as to the length of lockdowns;
- fear and threats by staff;
- the use of control dogs;
- the use of handcuffs when moving children to an outdoor area;
- the noise of loud banging or screaming;
- the failure to advise children of their rights or the centre's rules;
- lack of space and amenities;
- limited opportunity for education; and
- the absence of family or religious visits.

COMPULSORY MEDICAL TREATMENT NOT SEVERE ENOUGH TO BE CRUEL, INHUMAN OR DEGRADING TREATMENT

(Kracke v Mental Health Review Board [2009] VCAT 646 (23 April 2009))

In this case, Mr Kracke was subject to compulsory medical treatment prescribed by a psychiatrist. The Medical Health Review Board was required to review the psychiatrist's orders within a certain time period, but failed to do so. Mr Kracke argued that the orders therefore became invalid, and his treatment amounted to a breach of the Human Rights Charter, which prohibits medical treatment without consent. The Tribunal held that, since Mr Kracke was in medical need, the law allowing involuntary treatment was a reasonable limit on his rights. It also held that, in this case, the right to be free from torture and ill-treatment was not engaged because the treatment was not severe enough.

Queensland Human Rights Commission

FACT SHEET:

Right to freedom from forced work

Section 18 of the *Human Rights Act 2019*

Section 18 of the *Human Rights Act 2019* says that:

1. A person must not be held in slavery or servitude.

2. A person must not be made to perform forced or compulsory labour.

3. In this section –

   court order includes an order made by a court of another jurisdiction.

   forced or compulsory labour does not include

   (a) work or service normally required of a person who is under detention because of a lawful court order or who, under a lawful court order, has been conditionally released from detention or ordered to perform work in the community; or

   (b) work or service performed under a work and development order under the State Penalties Enforcement Act 1999; or

   (c) work or service required because of an emergency threatening the Queensland community or a part of the Queensland community; or

   (d) work or service that forms part of normal civil obligations.

The Human Rights Act says that a person must not be made a slave or forced to work. This right does not include certain forms of work or service, such as work or service required of a person who is detained.

This section is based on Article 8 of the International Covenant on Civil and Political Rights. Australia ratified this treaty in 1980.

Scope of the right

Although slavery and servitude have been against the law across the world for many decades, contemporary forms of slavery and servitude still happen every day. Under international law, the protection from slavery is an absolute right. It may not be limited in any circumstances.

Contemporary forms of slavery and servitude include child soldiers, debt bondage, forced labour and forced marriage. There are many people in Queensland who either experience these things or live with the consequences of them every day.

Queensland Human Rights Commission

FACT SHEET:

Freedom of movement

Section 19 of the *Human Rights Act 2019*

Section 19 of the *Human Rights Act 2019* says that:

Every person lawfully within Queensland has the right to move freely within Queensland and to enter and leave it, and has the freedom to choose where to live.

The Human Rights Act protects the right of every person within Queensland to move freely within Queensland, enter or leave Queensland and choose where they will live.

This section is based on Article 12 of the International Covenant on Civil and Political Rights. Australia ratified this treaty in 1980.

Scope of the right

This right means that public entities cannot act in a way that would unduly restrict freedom of movement. It does not force governments to do things to promote the freedom of movement. It does not, for example, mean public transport should be free.

The right to freedom of movement only applies to people who are 'lawfully within Queensland.' People who have overstayed their visitor's visa are not in Queensland lawfully. Neither are those who have entered Queensland despite legal restrictions in another state (for example, a court order not to leave NSW).

Like all rights in the Act, the right to freedom of movement can be limited where it is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

Right to move freely within Queensland

The right to move freely within Queensland means that a person cannot be arbitrarily forced to remain in, or move to or from, a particular place. The right includes freedom from physical and procedural barriers, like requiring permission before entering a public park or participating in a public demonstration in a public place. The right may be engaged where a public entity actively curtails a person's freedom of movement. This could be done through police 'move on' powers, for example. It could also occur through orders excluding adolescents from a licensed premises, orders made under the *Mental Health Act 2016 (Qld)* or orders that subject a person to strict surveillance or reporting obligations before or when moving.

Right to enter and leave Queensland

The right to be free to enter and leave the state is also protected by section 92 of the Australian Constitution. This guarantees freedom of movement between states, of both goods and people. Restrictions on the right to enter and leave Queensland must be proportionate to a legitimate and sufficiently important government aim under both the Act and the Constitution.

Right to choose where to live

The right to choose where to live may be engaged by laws relating to trespass or protected areas such as national parks. Orders under the *Mental Health Act 2016 (Qld)* or court orders to direct where people on bail or under supervision may live could also engage this right.

When can freedom of movement be limited?

Examples of reasonable restrictions on freedom of movement can be found in case law from Victoria and overseas. They include:

- lawful detention;
- guardianship orders;
- involuntary treatment orders;
- Parole Board orders;
- family violence intervention orders;
- residence conditions on people suspected of terrorist activities; and
- restrictions on leaving the country where judicial proceedings are pending.

When this right could be relevant

Section 19 could be relevant to laws, policies, acts or decisions that:

- regulate the ability of people to be in public spaces;
- involve the laws of trespass;
- restrict the movement of people as part of the criminal process, for example, the imposition of bail conditions;
- allow for an intervention order against a person, or enables their detention;
- limit the ability of a person to choose where to live in Queensland;
- propose surveillance of an individual;
- empower public authorities to restrict people's movement based on national security considerations or in emergencies;
- compel someone to provide information (for example, a subpoena);
- regulate access to land based on quarantine considerations, or on eligibility requirements permit people to be excluded from public land; or
- affect the conduct of public protests.

Examples

There are no case examples from Queensland yet which involve this right. In Victoria, the right to freedom of movement has typically been raised in cases about court orders restricting movement.

SUPERVISION ORDER AFTER PRISON RELEASE NOT UNREASONABLE LIMIT ON RIGHT TO FREEDOM OF MOVEMENT

Secretary, Department of Justice v AB [2009] VCC 1132 (28 August 2009)

A supervision order was placed on a convicted person who had already served his term of imprisonment. This was found to be a reasonable limitation on his freedom of movement because of the risk of him committing another offence.

FREEDOM OF MOVEMENT CAN BE LIMITED IN ORDER TO PROTECT THE RIGHTS OF OTHERS

AC (Guardianship) [2009] VCAT 1186 (8 July 2009)

A young man with a mild intellectual disability was subject to an order which only allowed him to leave his psychiatric facility if accompanied by staff members. It was found that the only less restrictive option – voluntary treatment – was not appropriate given his history of violent outbursts. The order was upheld.

Queensland Human Rights Commission

FACT SHEET:

Right to freedom of thought, conscience, religion and belief

Section 20 of the *Human Rights Act 2019*

Section 20 of the *Human Rights Act 2019* says that:

1. Every person has the right to freedom of thought, conscience, religion and belief, including-

(a) the freedom to have or to adopt a religion or belief of the person's choice; and

(b) the freedom to demonstrate the person's religion or belief in worship, observance, practice and teaching, either individually or as part of a community, in public or in private.

2. A person must not be coerced or restrained in a way that limits the person's freedom to have or adopt a religion or belief.

The Human Rights Act protects the rights of every person to think and believe what they want, and to have or adopt a religion without being influenced to do so. This right includes being able to publically and privately practice their religion as an individual or in a group.

This right is based on Article 18 of the International Covenant on Civil and Political Rights. Australia ratified to this treaty in 1980.

Scope of the right

This right means everybody can think and believe what they want. They can develop their own conscience. They can have or adopt a religion, free from external influence.

This right protects both religious and non-religious belief, so it includes freedom of religion and freedom from religion. It requires the state not to interfere with an individual's spiritual or moral existence.

This right has two parts: a freedom to think and believe whatever you choose, and a freedom to demonstrate your thoughts or beliefs publicly.

This right protects things like:

- organised religious rituals and ceremonies;
- building places of worship or religious teaching;
- publishing and dissemination of religious tracts and texts;
- displaying symbols or wearing particular kinds of clothing;

- observing holidays and days of rest; and
- observing a particular diet or avoiding certain food products.

Like all rights in the Act, the right to freedom of thought, conscience and belief can be limited where it is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

However, under international law, the right to have or adopt a religion is considered to be absolute, while the right to demonstrate that religion can be subject to reasonable limits. On that basis, it is very unlikely that the right to have or adopt a religion would be limited in Queensland.

When this right could be relevant

Section 20 could be relevant to laws, policies, acts or decisions that:

- promote, restrict or interfere with a particular religion or set of beliefs;
- require a person to disclose his or her religion or belief;
- affect an individual's ability to adhere to his or her religion or belief;
- disadvantage a person because of their opinions, thoughts or beliefs;
- attempt to regulate conduct that will affect some aspect of a person's worship, observance, practice or teaching of his or her religion or belief;
- criminalise behaviour that is required or encouraged by a person's religion or beliefs;
- restrict the ability of people under state control (for example, prisoners) to comply with the requirements of their religion;
- restrict the ability of people in the care or control of a public entity to comply with the requirements of their religion;
- compel certain acts that may be inconsistent with a religion or set of beliefs;
- set dress codes (possibly for safety or hygiene reasons) that do not accommodate religious dress;
- impose requirements as a condition of receiving a benefit that prevents a person from adhering to his or her religion or belief;
- require students to learn about particular religions or beliefs, or to be taught materials that might have the effect of undermining their religious beliefs; or
- regulate planning or land use that may make it difficult to use or establish places of religious worship.

Examples

FREEDOM OF RELIGION CONSIDERED IN APPLICATION TO BUILD NEW MOSQUE

(Rutherford & Ors v Hume CC [2014] VCAT 786)

This case involved an application to establish a Shi-ite Islamic mosque in a Melbourne suburb, on land adjacent to a church whose congregation was mostly comprised of people of Assyrian background, many of whom had fled Iraq because of extremist Islamic violence. Hume City Council approved the application to build the mosque. Ten local residents objected on the grounds that the mosque would have a significant detrimental impact on the church community and would diminish the safety of the area. In their review of the Council decision to grant the application, the Victorian Civil and Administrative Tribunal considered the right to freedom of thought, conscience and belief protected in the Charter of Human Rights and Responsibilities.

The Tribunal upheld the Council's permit approval, stating:

> *"Whilst the followers of one religion may have fled war or persecution overseas, at the hands of extremists from another religion, it would be a poor outcome for planning in Victoria if town planning decisions were made to achieve an outcome that effectively replicates in Australia those same divisions, fear and distrust. Town planning decisions should not set out to separate people, or the use of land, based on ethnicity or religion.*
>
> *Town planning decisions should reflect Australia's rich and proud history of welcoming all religions, and provide a society where people of different faiths can live, work and worship side-by-side, without fear of threats, intimidation or violence.*
>
> *There are no adverse amenity considerations or other planning considerations that justify a refusal of the permit."*

WOMEN-ONLY SWIMMING SESSIONS HELP UPHOLD FREEDOM OF RELIGION

Hobsons Bay City Council & Anor (Anti-Discrimination Exemption) [2009] VCAT 1198 (17 July 2009)

In this case, the Victorian Civil and Administrative Tribunal considered whether to grant an exemption to the *Equal Opportunity Act 1995* to allow women-only swimming sessions. The Centre had undertaken extensive community consultations that indicated that many women in the area were not participating in sport and recreation because of cultural constraints. The Tribunal noted that the rights of women to practice their culture and religion were relevant to this decision. It found that 'it is the exercise of those rights to practice aspects of their culture and religion which makes them unable to swim at the Centre while men are present and so means that use of the pool area is currently barred to them'. The Tribunal granted the exemption.

Queensland Human Rights Commission

FACT SHEET:

Right to freedom of expression

Section 21 of the *Human Rights Act 2019*

Section 21 of the *Human Rights Act 2019* says that:

1. Every person has the right to hold an opinion without interference.

2. Every person has the right to freedom of expression which includes the freedom to seek, receive and impart information and ideas of all kinds, whether within or outside Queensland and whether-

   (a) orally; or

   (b) in writing; or

   (c) in print; or

   (d) by way of art; or

   (e) in another medium chosen by the person.

The Human Rights Act protects the right to freedom of expression. This includes the right to hold and express and opinion and to seek out and receive the expression of others' opinions. Ideas and opinions can be expressed orally, in writing, in print, by way of art or in another way chosen by the person.

This right is based on Article 19 of the International Covenant on Civil and Political Rights. Australia ratified this treaty in 1980.

This right is connected to and complementary to cultural rights (sections 27 and 28) and freedom of thought, conscience and religion (section 20).

Scope of the right

The right to freedom of expression protects the right of people to hold and express an opinion. This applies even if those opinions are unpopular, or disturbing. It covers opinions expressed through speech, art, writing, broadcasting, online, and more. It also allows people to seek and receive other people's opinion, so you have rights both as a speaker and as a member of an audience.

Like all rights in the Act, the right to freedom of expression can be limited, but only where it is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom. Hate speech and pornography may qualify as expression. Even expression which is unpleasant can still be expression. However, this form of expression can be lawfully limited if it is justifiable in accordance with section 13.

Right to hold an opinion

Section 21 of the Act says that every person has a right to hold an opinion without interference. The UN Human Rights Committee has clarified that this means that no person should be subject to discrimination or victimisation because of any actual or perceived opinions that they hold.

In addition, no one should be coerced into holding or abandoning an opinion.

Under international law, the right to hold an opinion is an absolute right. This means it cannot be limited in any circumstance.

Right to freedom of expression

This is the freedom to seek, receive and impart information and ideas of all kinds, whether within or outside Queensland.

The right to freedom of expression protects almost all types of expression, as long as it conveys or attempts to convey a meaning. This is judged by its impact on reasonable members of the public who are exposed to it, without knowing the purpose of the person who expressed it.

However, not all forms of expression are protected. Expressions which involve violence, for example, or criminal damage to someone else's property, are not protected by this right, regardless of whether they convey meaning or not. While the concept of freedom of expression is very broad, the way people can exercise it can be limited.

Commercial communication might qualify as expression, although the right to freedom of expression is given to human beings and not corporations. Commercial expression has been found to be less important than social or political expression. Limitations on it have therefore been more easily justified.

The right to seek and receive information

The right to freedom of expression also incorporates a right to freedom of information. In particular, it includes a right to access government-held information.

When this right could be relevant

Section 21 could be relevant to laws, policies, acts or decisions that:

- regulate the manner, content and format of any public expression (for example, the contents of a speech, publication, broadcast, display or promotion). Examples could include requiring prior approval for public protest or restricting where protest activity can take place;
- censor materials or require that they be reviewed or approved before being published;
- compel someone to provide information (for example, a subpoena);
- impose a dress code;
- regulate or restrict an individual's access to information (including access to material on the internet); or
- attach criminal or civil liability to publications of opinions or information.

Examples

No examples yet exist in Queensland, but this right has been tested in Victoria and in the ACT.

EXPRESSION THAT DAMAGES THIRD PARTY PROPERTY NOT PROTECTED

(Magee v Delaney [2012] VSC 407)

In this case, Mr Magee had painted over an advertisement in a bus shelter. He intended this to be a protest against the global advertising industry. He was charged and convicted of property damage. Mr Magee appealed this decision. He asked the Supreme Court to consider how the criminal charges intersected with his right to freedom of expression under the Victorian Human Rights Charter. The Supreme Court found that the painting over of the advertisement was an expression, as it was capable of conveying a meaning. However it also found that damage to a third party's property (or a threat of such damage) is not protected. It found the right to freedom of expression is subject to lawful restrictions reasonably necessary to respect the property rights of other persons (irrespective of whether those persons are human beings, companies, government bodies or other types of legal entities). The Court also found that the criminal offence of intentionally causing property damage was a lawful restriction on the right to freedom of expression, for the protection of public order.

PROTESTING IN PUBLIC SPACES

(Victoria Police v Anderson & Ors (Magistrates Court, 23 July 2012))

In this case, people had gathered outside Max Brenner's Chocolate Bar in a Melbourne shopping complex, to protest the political and social interests of the store. They were charged with trespassing after QV management and Victoria Police asked them to leave and they refused. The Magistrates' Court dismissed the trespass charges. It found that the protestors had gone to the complex to hold a political demonstration, which they had a right to do. The Court said that to find the protestors guilty of trespass would not be compatible with their right to freedom of expression.

Queensland Human Rights Commission

FACT SHEET:

Right to peaceful assembly and freedom of association

Section 22 of the *Human Rights Act 2019*

Section 22 of the *Human Rights Act 2019* says that:

1. Every person has the right of peaceful assembly.

2. Every person has the right to freedom of association with others, including the right to form and join trade unions.

The Human Rights Act protects the right of peaceful assembly and freedom of association. This right protects not only the right to meet but to join or form a group with like-minded people.

This right is based on Articles 21 and 22 of the International Covenant on Civil and Political Rights. Australia ratified this treaty in 1980.

Scope of the right

Peaceful assembly

The right to peaceful assembly is the right of individuals to gather for a common purpose or to pursue common goals. Meetings and protests are examples of assemblies. Only peaceful assemblies are protected, not those which involve violence.

This right covers preparing for and conducting of the assembly and protects the organisers and the participants.

The freedom of association

This right extends to all forms of association with others, including but not only for political purposes. The freedom to join trade unions is simply an example of freedom of association.

Like all rights in the Act, the right to peaceful assembly and freedom of association can be limited where it is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

When this right could be relevant

Section 22 could be relevant to laws, policies, acts or decisions that:

- regulate membership of groups or associations;
- limit the ability of a person or group of people to exercise their right to peacefully protest;
- treat people differently on the basis of their membership of a group or association, for example, trade unions;
- prohibit membership in a group or association, for example a motorcycle gang.

Queensland Human Rights Commission

FACT SHEET:

Taking part in public life

Section 23 of the *Human Rights Act 2019*

Section 23 of the *Human Rights Act 2019* says that:

1. Every person in Queensland has the right, and is to have the opportunity, without discrimination, to participate in the conduct of public affairs, directly or through freely chosen representatives.

2. Every eligible person has the right, and is to have the opportunity, without discrimination

   (a) to vote and be elected at periodic State and local government elections that guarantee the free expression of the will of the electors; and

   (b) to have access, on general terms of equality, to the public service and public office.

Scope of the right

While every person in Queensland has the right to take part in public life, the Act makes it clear that this does not provide a right to specific outcome from their participation.

The Act limits the right to vote, be elected and have access to the public service and public service to 'eligible people'. This reflects the limitations attached to the right to vote and hold office, such as residence, age and imprisonment.

Like all rights in the Act, the right to participate in public life can be limited where it is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

What is participating in the 'conduct of public affairs'?

The Act does not define 'conduct of public affairs'. In reference to the International Covenant on Civil and Political Rights, the UN Human Rights Committee has given this concept a broad meaning saying:

"The conduct of public affairs…covers all aspects of public administration, and the formulation and implication of policy at international, national, regional and local levels." (UN Human Rights Committee, General Comment No. 25, [5]).

Examples of participating in the conduct of public life include:

- being a member of parliament;
- taking part in referendum or other electoral processes;
- being part of a community consultation with government;
- being able to attend and ask questions at a local council meeting;
- participating in public debate and dialogue with representatives (either as an individual or as part of an organisation).

Participation in 'public life' means participation in the political affairs and public administration of the State. The word 'public' life in this context does not mean 'community' life or 'social' life. The right to take part in public life does not mean the right to access public space through the use of public transport.

When this right could be relevant

Section 23 could be relevant to laws, policies, acts or decisions that:

- limit people's ability to take part in elections of local and state governments;
- require people to meet certain conditions in order to be eligible to participate in local and state elections;
- regulate how people vote in elections (for example, the method of voting);
- regulate eligibility and access to employment in the public service or appointment to public office;
- establish requirements for membership of public bodies;
- regulate the conduct of elections and the electoral process;
- regulate the suspension and conduct of local government;
- regulate the suspension and removal of statutory office holders;
- regulate electoral processes including funding of and expenditure by political parties and the drawing of electoral boundaries; or
- affect communication of information and ideas about public and political issues.

Example

ACCESS TO COUNCIL-OWNED SPACES A PART OF THE RIGHT TO PARTICIPATE IN PUBLIC LIFE

(Slattery v Manningham CC (Human Rights) [2013] VCAT 1869)

Mr Slattery was a resident and ratepayer of the City of Manningham. He had lived in the City of Manningham for many years, and had been an active and contributing member of the community. Mr Slattery was diagnosed with bipolar disorder, attention deficit hyperactive disorder and post-traumatic stress disorder. He also had an acquired brain injury and a hearing impairment. Mr Slattery made thousands of complaints to Manningham City Council. Eventually the Council decided to prohibit Mr Slattery from attending any building that is owned, occupied or managed. This meant that Mr Slattery was prohibited from going to council pools with his grandchildren, attending the library and using public toilets. Mr Slattery successfully claimed that the Council's actions breached the Victorian Charter, including engaging the right to participate in public life.

Queensland Human Rights Commission

FACT SHEET:

Property rights

Section 24 of the *Human Rights Act 2019*

Section 24 of the *Human Rights Act 2019* says that:

1. All persons have the right to own property alone or in association with others.

2. A person must not be arbitrarily deprived of the person's property.

The Human Rights Act protects people from having their property unlawfully removed.

This right is based on Article 17 of the Universal Declaration of Human Rights.

Scope of the right

This right protects the right of all people to own property alone or with others. It provides that a person must not be arbitrarily deprived of their property. This right does not include a right to compensation if a person is deprived of their property.

Like all rights in the Act, property rights can be limited where it is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

When this right could be relevant

Section 24 could be relevant to laws, policies, acts or decisions that:

- provide for acquisition, seizure or forfeiture of a person's property under civil or criminal law;
- confer on a public authority a right of access to private property;
- limit or terminate property rights;
- restrict the use of private property (for example, under planning laws);
- restrict or regulate established patterns of access (especially for commercial or business purposes) to public property;
- implement government control over its own property (for example, resumption of land);
- impound or suspend registration of a motor vehicle.

Example

No examples exist yet in Queensland, but this right has been tested interstate.

PLANNING DECISIONS IN ACCORDANCE WITH THE LAW

(Swancom Pty Ltd v Yarra CC [2009] VCAT 923)

Swancom (operators of an hotel) applied for an existing planning permit to be changed. They wanted to extend trading hours in the hotel beer garden from 11:30pm until 3am, and to increase patron numbers from 750 to 1300.

The Victorian Civil and Administrative Tribunal heard the case. VCAT held that the application to extend hours and patron numbers should fail. The Tribunal held that while refusing the application might arguably interfere with Swancom's broader property rights, section 20 of the Charter only provides that a person must not be deprived of property 'other than in accordance with law'. The Tribunal was of the opinion that the imposition of reasonable restrictions on the use or development of the land under the regulatory framework is in accordance with the law, and therefore is not unlawful or arbitrary.

Queensland
Human Rights
Commission

More information is available from the Queensland Human Rights Commission website at www.qhrc.qld.gov.au.

This fact sheet last updated: July 2019.

Queensland Human Rights Commission

FACT SHEET:

Right to privacy and reputation

Section 25 of the *Human Rights Act 2019*

Section 25 of the *Human Rights Act 2019* says that:

A person has the right –

(a) not to have the person's privacy, family, home or correspondence unlawfully or arbitrarily interfered with; and

(b) not to have the person's reputation unlawfully attacked.

The Human Rights Act protects rights to privacy and reputation.

This right is based on Article 17 of the International Covenant on Civil and Political Rights. Australia ratified this treaty in 1980.

Scope of the right

The scope of the right to privacy is very broad. It protects personal information and data collection, for example. It also extends to a person's private life more generally, so protects the individual against interference with their physical and mental integrity, including appearance, clothing and gender; sexuality and home.

This right protects the privacy of people in Queensland from 'unlawful' or 'arbitrary' interference. Arbitrary interference includes when something is lawful, but also unreasonable, unnecessary or disproportionate.

The protection against an attack on someone's reputation is limited to unlawful attacks. This means attacks that are intentional and based on untrue allegations.

While the right to privacy is very broad, it must be balanced against other rights and competing interests. Like all rights in the Act, the right to privacy and reputation can be limited where it is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

When this right could be relevant

Section 25 could be relevant to laws, policies, acts or decisions that:

- involve surveillance of people for any purpose (such as closed-circuit television, CCTV);
- involve collection, storage, use or publication of personal information and how that information is accessed, used or disclosed;
- regulate information held on a public register;
- restrict access by people to their own personal information;

- provide for sharing of personal information across or within agencies;
- involve powers of entry, search, seizure, confiscation or forfeiture;
- allow personal information to be published - for example, results of surveillance, medical tests, electoral roll;
- provide for a compulsory physical intervention on a person such as a DNA, blood, breath or urine test; forced medical examination; or corporal punishment;
- provide for treatment or testing of a patient without his or her consent;
- involve a professional duty of confidentiality;
- change or create any confidentiality provisions or secrecy provisions relating to personal information;
- provide for mandatory reporting of information (including disclosure of convictions, injury or illness), or by professionals reporting abuse, for example, doctors about patients or teachers about students;
- regulate a person's name, private sexual behaviour, sexual orientation or gender identification;
- involve the interception, censorship, monitoring or other regulation of mail or other communications;
- relate to handling personal information for research or statistics;
- recognise or fail to give legal recognition to close or enduring personal relationships;
- provide for the removal of children from a family unit or a family intervention order;
- regulate tenancy or eviction;
- regulate a state-run care facility or mental health service;
- regulate standards, consultation and procedures operating in respect of public housing;
- authorise compulsory acquisition of a home or regulate planning or environmental matters that may affect a person's home.

Example

There are no examples from Queensland yet, but this right has been tested interstate and internationally.

COURT-ORDERED URINE TESTING NOT A BREACH OF RIGHT TO PRIVACY

(R v Wayne Michael Connors [2012] ACTSC 80 (28 May 2012))

This case in the ACT questioned whether bail conditions were a breach of a person's right to privacy. Mr Wayne Connors was awaiting trial in the ACT for aggravated robbery. He was released on bail with the condition that he submit to urine testing to check for illicit drug use. Mr Connors argued that the requirement was a breach of his right to privacy under the ACT's Human Rights Act 2004. The Chief Justice of the ACT Supreme Court found it was not a breach. His ruling recognised that bail conditions like this did limit people's right to privacy, and that there was a danger of them being enforced in a way that was unfairly oppressive. However, in this particular case he ruled the limitation was reasonable, lawful, and 'demonstrably justifiable'.

Queensland Human Rights Commission

FACT SHEET:

Right to protection of families and children

Section 26 of the *Human Rights Act 2019*

Section 26 of the *Human Rights Act 2019* says that:

1. Families are the fundamental group unit of society and are entitled to be protected by society and the State.

2. Every child has the right, without discrimination, to the protection that is needed by the child, and is in the child's best interests, because of being a child.

3. Every person born in Queensland has the right to a name and to be registered, as having been born, under a law of the State as soon as practicable after being born.

The Human Rights Act includes rights to the protection of both families and children. Families are recognised as the fundamental unit of society and are entitled to protection. Every child has the right, without discrimination, to the protection that is in their best interests as a child. Every person born in Queensland has the right to a name and to registration of birth.

These rights are based on Articles 23(1) and 24(1) of the International Covenant on Civil and Political Rights. Australia ratified this treaty in 1980.

Scope of the right

These rights extend to more than non-interference; they are a guarantee of institutional protection of the family and positive measures for the protection of children by society and the state.

Like all rights in the Act, the rights to the protection of families and children can be limited where it is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

Protection of families

This right is also supported by the right to privacy in section 25 of the Act. This prohibits a public entity from unlawfully or arbitrarily interfering with a person's family.

If the term 'family' is interpreted consistently with international law it should be interpreted broadly, extending to different cultural understandings of family and small family units with or without children. The term 'family' has been interpreted broadly in Victoria, where the same protection exists in the Charter of Rights and Responsibilities Act 2006.

Laws or policies that allow for the removal of a child from a family unit or the incarceration of a parent need to be considered in light of sections 25 and 26 of the Act.

Protection of children

The Act recognises that children are entitled to special protection. It recognises that children are more vulnerable because of their age. 'Child' is not specifically defined in the Act, but is broadly understood to be someone under 18 years of age.

Children are entitled to all of the rights in the Human Rights Act 2019 (except in certain cases, for example the right to vote under section 23(2a)).

The right to protection of families and children means that the government should adopt special measures to protect children. It also means the best interests of the child should be taken into account in all actions affecting a child. What will be in each child's 'best interests' will depend on their personal circumstances.

Right to a name and registration of birth

This right obligates the State to ensure registration services are available. It is intended to operate alongside the Births, Deaths and Marriages Registration Act 2003. It doesn't require the state to take active steps to register a birth or name a child if the parent does not lodge a registration.

When this right could be relevant

Section 26 could be relevant to laws, policies, acts or decisions that:

- affect the law regarding close or enduring personal relationships or fail to give legal recognition to these relationships;
- affect any aspect of care of children, including children cared for by parents, guardians, informal carers, children in out-of-home care, children with a disability, parents or carers with a disability;
- relate to treatment of children in the criminal process;
- relate to family violence;
- affect adoption or surrogacy;
- provide for the separation and removal of children from parents or guardians or other adults responsible for their care;
- regulate family contact for those in the care of public authorities or enables intervention orders to be granted between family members;
- affect the welfare of children within the family or state care;
- regulate family contact of prisoners or others in involuntary state care;
- create a regime for giving children access to information about biological parents when the child has been adopted or born using assisted reproductive technology.

Examples

YOUNG GIRL PROTECTED FROM GIVING EVIDENCE AGAINST HER ABUSERS

A young Victorian girl had been abused. Her advocates used the Victorian Charter of Human Rights and Responsibilities Act, and in particular the right to the protection of family and children, to argue that she shouldn't be required to give evidence against the alleged perpetrators. They said that this right should be given proper consideration when determining whether a young person should be required to provide testimony. As a result the girl was not required to give evidence.

Source: Fitzroy Legal Service, cited by Human Rights Law Centre.

MOTHER FREE TO CARE FOR HER DAUGHTER

A Victorian woman with cerebral palsy was at risk of having her child taken from her by Child Protection because of concerns about her ability to care for her daughter. The woman relied on the right to protection of families and children as well as the right to equality before the law. The woman was then given the opportunity to demonstrate her ability to care for her daughter and her daughter remained in her care.

Source: Leadership Plus: Submission for Review of the Victorian Charter of Human Rights and Responsibilities Act 2006.

Queensland Human Rights Commission

FACT SHEET:

Cultural rights

Section 27 of the *Human Rights Act 2019*

Section 27 of the *Human Rights Act 2019* says that:

All persons with a particular cultural, religious, racial or linguistic background must not be denied the right, in community with other persons of that background, to enjoy their culture, to declare and practise their religion and to use their language.

The Human Rights Act states that all people with particular cultural, religion, racial and linguistic backgrounds have a right to enjoy their culture, declare and practice their religion, and use their language in community with other people of that background.

This section is based on Article 27 of the International Covenant on Civil and Political Rights. Australia ratified this treaty in 1980.

The Human Rights Act also protects the distinct cultural rights of Aboriginal and Torres Strait Islander peoples at section 28 of the Act.

These rights are complemented by freedom of religion and expression, which are protected in sections 20 and 21 of the Act.

Scope of the right

This section promotes the right to practise and maintain shared traditions and activities. It is also aimed at the survival and continued development of cultural heritage.

It allows for people of particular backgrounds to:

- enjoy their own culture;
- profess and practise their own religion;
- use their own language (in private and in public); and
- participate effectively in cultural life.

The cultural rights of all people with a particular cultural, religious, racial or linguistic background are protected. Such people may or may not be a member of a minority group, in the sense of being in a group with numerically fewer members or members who are in a subordinate position compared with those in the rest of the community.

The protection of being able to enjoy rights to culture 'in community with other persons of that background' is an important part of section 27. This is because enjoying one's culture is intertwined with the capacity to do so in connection with others from the same cultural background.

Like all rights in the Act, cultural rights can be limited, but only where it is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

When this right could be relevant

Section 27 could be relevant to laws, policies, acts or decisions that:

- limit the observance of any religious practices;
- address discrimination based on attributes including race or religion;
- restrict people's ability to declare or make public that they belong to a particular racial, religious or cultural group;
- limit or prohibit communication in languages other than English, including through the provision of information;
- prevent people using their language in community with others;
- limit the ability of members of an ethnic group to take part in a cultural practice, or otherwise interferes with their distinct cultural practices;
- restrict the provision of services or trade on religious holidays;
- regulate access to public spaces including libraries, museums, sports facilities;
- regulate cultural or religious practices around the provision of secular public education;
- impose or coerce people to do something that interferes with their distinct cultural practices, for example, wear clothes that differ from their traditional cultural attire;
- regulate traditional medical practices; or
- license or provide a restriction on the preparation and serving of food.

Examples

There are no Queensland examples yet, but some from Victoria are below.

CULTURAL RIGHTS PROTECTED BY REVOCATION OF GUARDIANSHIP ORDER

A woman had been moved by her guardian into a residential facility. The facility had no workers who spoke her language, understood her cultural and religious beliefs or would prepare food in a way which was required by her religion. The woman and her family wished for her to stay primarily with them in her family home. The woman's advocates argued that the decision was in breach of the Victorian Charter of Human Rights and Responsibilities Act, namely protection of families and children, cultural rights and the right to freedom of religion. The resulting decision of the tribunal was that the guardianship be revoked.

Source: Public Interest Law Clearing House: Submission for Review of the Victorian Charter of Human Rights and Responsibilities Act 2006 (Case Study 77).

RECOGNITION OF CULTURAL RIGHTS LED TO SUPPORT INSTEAD OF EVICTION

An Aboriginal woman lived in housing owned and leased by a non-Aboriginal community organisation. A condition of her tenancy was that she was required to engage with community services. After her nephew died she went back to her country for a couple of weeks of 'sorry business'. When she returned she started receiving warnings to engage with services, however she wasn't able to do so because she was overwhelmed with family responsibilities, trauma and grief.

A possession order was made and the police came to her door with a warrant. Her advocates made an application for an urgent review and stay. They argued that the community organisation had failed to engage with the woman's cultural rights and the rights of her grandchild and family members in their eviction process. These rights are protected in the Victorian Charter of Rights and Responsibilities. As a result the community organisation withdrew their possession application and engaged an Aboriginal support service.

Queensland Human Rights Commission

FACT SHEET:

Cultural rights of Aboriginal and Torres Strait Islander peoples

Section 28 of the *Human Rights Act 2019*

Section 28 of the *Human Rights Act 2019* says that:

1. Aboriginal people and Torres Strait Islander peoples hold distinct cultural rights.

2. Aboriginal peoples and Torres Strait Islander peoples must not be denied the right, with other members of their community-

   (a) to enjoy, maintain, control, protect and develop their identity and cultural heritage, including their traditional knowledge, distinctive spiritual practices, observances, beliefs and teachings; and

   (b) to enjoy, maintain, control, protect and develop and use their language, including traditional cultural expression; and

   (c) to enjoy, maintain, control, protect and develop their kinship ties; and

   (d) to maintain and strengthen their distinctive spiritual, material and economic relationship with the land, territories, waters, coastal seas and other resources with which they have a connection under Aboriginal tradition or Island custom; and

   (e) to conserve and protect the environment and productive capacity of their land, territories, waters, coastal seas and other resources.

3. Aboriginal peoples and Torres Strait Islander peoples have the right not to be subjected to forced assimilation or destruction of their culture.

The Human Rights Act specifies that Aboriginal peoples and Torres Strait Islander peoples hold distinct cultural rights as Australia's first people. The Act says that Aboriginal and Torres Strait Islander peoples must not be denied this right, with other members of their community, to live life as an Aboriginal or Torres Strait Islander person who is free to practice their culture.

This section is based on two international instruments. One is article 27 of the International Covenant on Civil and Political Rights, which Australia ratified in 1980. The other is articles 8, 25, 29 and 31 of the United Nations Declaration on the Rights of Indigenous Peoples. Australia announced support for this declaration in 2009.

The Human Rights Act also protects cultural rights generally at section 27 of the Act.

Cultural rights are complemented by the rights to freedom of religion and of expression, which are protected in sections 20 and 21 of the Act.

Scope of the right

This section recognises that Indigenous peoples and individuals have distinct cultural rights. They have the right not to be subjected to forced assimilation or destruction of their culture (reflecting article 8 of the UNDRIP). They have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal sears (article 25 of UNDRIP). They have the right to conserve and protect the environment and the productive capacity of their lands, territories and waters (article 29 of the UNDRIP). They have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expression (article 31 of UNDRIP).

The Act protects the right of Aboriginal and Torres Strait Islander peoples to live life as an Aboriginal or Torres Strait Islander person and to practice their culture. Examples of practicing culture include:

- to maintain and use Indigenous languages;
- to maintain kinship ties;
- freedom to teach cultural practices and educations to children; and
- the right to maintain distinctive spiritual, material and economic relationships with land, water and other resources that there is a connection with under traditional laws and customs.

Like all rights in the Act, the cultural rights of Aboriginal and Torres Strait Islander peoples can be limited, but only where it is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

When this right could be relevant

Section 28 could be relevant to laws, policies, acts or decisions that:

- limit the ability of Aboriginal persons to take part in cultural practice, or otherwise interferes with their distinct cultural practices;
- restrict access to a place of spiritual significance for Aboriginal people, or prevent or limit traditional practices on that land;
- regulate the conduct of commercial activities on the traditional lands of Aboriginal persons;
- interfere with the relationship between Aboriginal and Torres Strait Islander peoples and land, water and resources;
- regulate the conduct of commercial activities on the traditional lands of Aboriginal and Torres Strait Islander peoples; or
- limit the ability of Aboriginal and Torres Strait Islander peoples to maintain a connection to their community, including because of the child protection, criminal law and mental health systems.

Example

RECOGNITION OF CULTURAL RIGHTS LED TO SUPPORT INSTEAD OF EVICTION

An Aboriginal woman lived in housing owned and leased by a non-Aboriginal community organisation. A condition of her tenancy was that she was required to engage with community services. After her nephew died she went back to her country for a couple of weeks of 'sorry business'. When she returned she started receiving warnings to engage with services, however she wasn't able to do so because she was overwhelmed with family responsibilities, trauma and grief.

A possession order was made and the police came to her door with a warrant. Her advocates made an application for an urgent review and stay. They argued that the community organisation had failed to engage with the woman's cultural rights and the rights of her grandchild and family members in their eviction process. These rights are protected in the Victorian Charter of Rights and Responsibilities. As a result the community organisation withdrew their possession application and engaged an Aboriginal support service.

Source: Victorian Aboriginal Legal Service

Queensland Human Rights Commission

FACT SHEET:

Right to liberty and security of person

Section 29 of the *Human Rights Act 2019*

Section 29 of the *Human Rights Act 2019* says that:

1. Every person has the right to liberty and security.

2. A person must not be subjected to arbitrary arrest or detention.

3. A person must not be deprived of the person's liberty except on grounds, and in accordance with procedures, established by law.

4. A person who is arrested or detained must be informed at the time of arrest or detention of the reason for the arrest or detention and must be promptly informed about any proceedings to be brought against the person.

5. A person who is arrested or detained on a criminal charge:

   (a) must be promptly brought before a court; and

   (b) has the right to be brought to trial without unreasonable delay; and

   (c) must be released if paragraph (a) or (b) is not complied with.

6. A person awaiting trial must not be automatically detained in custody, but the person's release may be subject to guarantees to appear:

   (a) for trial; and

   (b) at any other stage of the judicial proceeding; and

   (c) if appropriate, for execution of judgment.

7. Any person deprived of liberty by arrest or detention is entitled to apply to a court for a declaration or order regarding the lawfulness of the person's detention, and the court must:

   (a) make a decision without delay; and

   (b) order the release of the person if it finds the detention is unlawful.

8. A person must not be imprisoned only because of the person's inability to perform a contractual obligation.

The Human Rights Act states that every person has the right to liberty and security. This right protects against the unlawful or arbitrary deprivation of liberty. A person who is arrested or detained is entitled to certain minimum rights. They also have a right to a brought to a trial without unreasonable delay.

This right is based on Articles 9 and 11 of the International Covenant on Civil and Political Rights. Australia ratified this treaty in 1980.

The rights protected in section 29 are complementary to:

- the right to freedom of movement, protected in section 19;
- the right to humane treatment when deprived of liberty, protected in section 30; and
- protection from medical or scientific experimentation or treatment without consent, protected in section 17.

Scope of the right

Like all rights in the Act, the right liberty and security of person can be limited where it is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

Liberty and security of person

The right to liberty means that people must not be arrested and detained, unless provided for by law. Their arrest and the detention must also not be arbitrary.

This right applies to all forms of detention where people are deprived of their liberty, not just criminal justice processes. This can be relevant any time a person is not free to leave a place by their own choice.

This right differs from the freedom of movement in section 12 of the Charter, because a person must be 'detained' to suffer a deprivation of liberty.

The right to security requires the State to take reasonable measures to protect a person's physical security. The government does this through the work of the police and emergency services, for example.

Subsection 2 states that a person must not be subject to arbitrary arrest or detention. 'Arbitrary' might involve injustice, inappropriateness, unpredictability, or a lack of due legal process.

Subsection 3 means that someone can only be detained or have their liberty denied in accordance with the law.

Rights of arrested or detained people

The rights in subsections 29(4)–(7) are relevant after a person has been arrested or detained. Some of these rights are also reflected in the criminal law of Queensland.

Subsection 4 states that when someone is arrested or detained, they must be told why and informed about any proceeding against them.

Subsection 5 is about the rights a person has when arrested or detained on a criminal charge. It means they must be promptly brought before a court, and that they have the right to be brought to trial without unreasonable delay.

Subsection 6 relates to the rights of people awaiting trial. It says that anyone awaiting trial should not be automatically detained in custody, but can be released on certain conditions or guarantees.

Subsection 7 means that if a person who has been arrested applies to a court, that court can make a decision about whether the person's detention was lawful. If the court finds it is not, they must be released.

Subsection 8 means that people cannot be imprisoned if they cannot pay a debt.

When this right could be relevant

Section 29 could be relevant to laws, policies, acts or decisions that:

- authorise a person with a mental illness to be detained for treatment in a mental health facility, and/or review their detention;
- allow for the interim detention of a person whether or not they are suspected of committing an offence (for example, to prevent the spread of a contagious disease, or enable a person to 'sober up');
- provide for special powers of detention of people for purposes including national security;
- make provision for granting of bail;
- relate to holding people in remand or in watch houses;
- relate to the management of security of anyone in the care of public authorities, particularly those in involuntary care;
- allow a public entity to cordon an area and control movement within that area.

Examples

No examples exist yet in Queensland.

INVOLUNTARY TREATMENT ORDER NOT A BREACH OF RIGHT TO LIBERTY

(MH6 v Mental Health Review Board (General) [2008] VCAT 84)

In this case an involuntary treatment order under the *Mental Health Act 1986* was upheld. Evidence indicated that the patient would be a risk to himself and others if released. His behaviour only stabilised in the structured high security psychiatric treatment facility to which he was confined. The order was necessary to fulfil the patient's treatment needs, and was therefore in his interests and a reasonable limitation of his right to liberty and security of person.

RIGHT TO LIBERTY REQUIRES A SPEEDY HEARING

(KB and others v Metal Health Review Tribunal and Secretary of State for Health (2002))

KB and others were patients detained under the Mental Health Act 1983 (UK). Each of them applied to a Mental Health Review Tribunal for a review of their detention. In each case, the hearing arranged by the Tribunal was repeatedly adjourned, leading to delays of up to 22 weeks. KB and others argued that on the specific facts of their cases, the delays they suffered could not be justified. The court found in each case that the delay in hearing each application was not justified, and that the claimants had not received a speedy hearing as required by Article 5 of the UK's Human Rights Act, the right to liberty and security.

Queensland Human Rights Commission

FACT SHEET:

Right to humane treatment when deprived of liberty

Section 30 of the *Human Rights Act 2019*

Section 30 of the *Human Rights Act 2019* says that:

1. All persons deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person.

2. An accused person who is detained or a person detained without charge must be segregated from persons who have been convicted of offences, except where reasonably necessary.

3. An accused person who is detained or a person detained without charge must be treated in a way that is appropriate for a person who has not been convicted.

The Human Rights Act states that everyone must be treated with respect when deprived of liberty. It also says that people who have been charged but not convicted of an offence should be held separately to people who have been convicted, unless it is necessary.

This right is based on Articles 10(1) and 10(2) of the International Covenant on Civil and Political Rights. Australia ratified this treaty in 1980. It expands on Article 10 by requiring specific treatment of an accused person or a person who is detained without charge.

This right is complementary to the right to be free from torture and cruel, inhumane and degrading treatment (section 17 of the Act). However, it has a lower threshold - that is, it is engaged by less serious mistreatment than under section 17.

Scope of the right

Section 30 ensures that minimum standards of treatment apply for people who are deprived of their liberty. The underlying principle is that a person's rights should only be limited by the confinement itself, not additional factors.

People are deprived of liberty when they are held, for example, in prisons, psychiatric hospitals or correctional institutions. Facilities of this kind which are run by private commercial organisations may fall within the definition of public entity.

Section 30 grants extra rights to 'an accused person who is detained' and a 'person detained without charge'. These rights follow from the principle of the presumption of innocence in criminal law. They mean that a detainee who has not yet been tried is entitled to different treatment than convicted detainees.

The UN Standard Minimum Rules for the Treatment of Prisoners establishes minimum standards on a range of matters. They include accommodation conditions, adequate food, personal hygiene, clothing and bedding standards, exercise, medical services, and disciplinary procedures.

These rules are now complemented by the Optional Protocol to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Australia ratified this treaty in 2017. This obliges States to set up preventive monitoring mechanisms to maintain detention standards.

The right to humane treatment means that people in detention should not be subject to hardship or constraint in addition to the deprivation of liberty. However, some rights are unavoidably restricted in a closed environment, for example:

- freedom of movement;
- elements of freedom of expression and some elements of privacy; and
- family life.

In particular, accused people are entitled to be segregated from those serving their sentences. The Act states that this right applies 'except where reasonably necessary' – for example where separate facilities are unavailable.

The Human Rights Act amends the Youth Justice Act 1992 and the Corrective Services Act 2006 to clarify that other factors in addition to human rights obligations can be considered when decisions are made under these acts in relation to:

- the segregation of convicted and non-convicted prisoners; and
- the management of prisoners when it is not practicable for the prisoner to be provided with their own room.

Like all rights in the Act, the right to humane treatment when deprived of liberty can be limited where it is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

When this right could be relevant

Section 30 could be relevant to laws, policies, acts or decisions that:

- enable a public entity to detain individuals, or relates to the conditions under which someone may be detained (for example, in prisons, mental health services, or prison transportation facilities);
- concern standards and procedures for treatment of those who are detained (for example, use of force, dietary choice, access to hygiene products, private shower and toilet facilities);
- authorise a person to be held in a place with limited facilities or services for the care and safety of detainees;
- enable enforcement officers to undertake personal searches of people detained in custody or visiting detainees.

Examples

IVF TREATMENTS GRANTED TO WOMAN IN PRISON

Castles v Secretary to the Department of Justice (2010) 28 VR 141; [2010] VSC 310 [113]

Kimberley Castles was convicted of social security fraud in 2009 and sentenced to three years imprisonment. She was imprisoned in a minimum-security women's prison. Before being incarcerated, Ms Castles had been receiving IVF treatment. She wanted to be able to continue to access IVF at her own cost while in prison, because by the time she was released she would be ineligible for the treatment due to her age. Her requests to access this treatment were denied by the Department of Justice. Ultimately, the Supreme Court of Victoria found that Ms Castles was entitled under s 47(1)(f) of the *Corrections Act 1986* to undergo IVF treatment. The judgement in this case gave significant consideration to the application of the right to humane treatment when deprived of liberty, which is protected in the Victorian Charter of Rights and Responsibilities Act 2006. The Court found that the right to humane treatment in detention:

> *"[r]equires the Secretary and other prison authorities to treat Ms Castles humanely, with respect for her dignity and with due consideration for her particular human needs."*

RIGHTS OF CHILDREN IN DETENTION TO BE HELD SAFELY AND HUMANELY

(Certain Children (No 1) [2016] VSC 796 [169]; contra Certain Children (No 2) [2017] VSC 251 [241], [256] – [258]).

This case related to the detention of children at the Barwon Prison. A youth justice and remand centre had been established within a high security adult prison. It was found this engaged the children's rights to humane treatment when deprived of liberty.

Queensland Human Rights Commission

FACT SHEET:

Right to a fair hearing

Section 31 of the *Human Rights Act 2019*

Section 31 of the *Human Rights Act 2019* says that:

1. A person charged with a criminal offence or a party to a civil proceeding has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing.

2. However, a court or tribunal may exclude members of media organisations, other persons or the general public from all or part of a hearing in the public interest or the interests of justice.

3. All judgments or decisions made by a court or tribunal in a criminal or civil proceeding must be publicly available.

The Human Rights Act states that a person has the right to have criminal charges or civil proceedings decided by a competent, independent and impartial court or tribunal following a fair, public hearing.

The right to a fair hearing is based on Article 14 of the International Covenant on Civil and Political Rights. Australia ratified this treaty in 1980.

The right to a fair hearing is complementary to rights in criminal proceedings, protected in section 32 of the Act.

Scope of the right

Competent, independent and impartial court

The right to a fair hearing under section 31 of the Act extends to criminal and civil cases. It applies to all stages in proceedings in any Queensland court or tribunal.

In Victoria, the right to a fair hearing is protected under the Charter of Human Rights and Responsibilities Act 2006. There, the following factors have been identified as relevant to determining whether a court or tribunal is 'competent, independent and impartial:

- it is established by law;
- it is independent of the executive and legislative branches of government, or has, in specific cases, judicial independence in deciding legal matters in judicial proceedings;
- it is free to decide the factual and legal issues in a matter without interference;
- it has the function of deciding matters within its competence on the basis of rules of law, following prescribed proceedings;
- it presents the appearance of independence; and
- its officers have security of tenure.

Fair and public hearing

This right applies to procedural fairness, not the fairness of a decision or judgement of a court or tribunal. It provides a right for parties to be heard and to respond to allegations made against them, and requires courts be unbiased and independent. What constitutes a 'fair' hearing will depend on the facts of the case, and will require a number of public interest factors to be weighed. These factors might include the rights of the accused and the victim in criminal proceedings, for example.

Subsection 2 allows for courts and tribunals to exclude media or other people from a hearing if it is in the public interest or the interest of justice.

Subsection 3 states that judgments and decisions must be public. However, international law (and the Explanatory Notes to the Bill when it was introduced) acknowledge that some circumstances will justify a court suppressing all or part of a judgement.

Like all rights in the Act, the right to a fair trial can be limited but only where it is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

In addition to this, the Act states that the right to a fair trial can be lawfully limited by a court or tribunal excluding certain people from a hearing in the public interest or in the interests of justice.

When this right could be relevant

Section 31 could be relevant to laws, policies, acts or decisions that:

- create or limit the review of administrative decision-making and appeals processes;
- reverse the onus of proof;
- regulate the rules of evidence in courts and tribunals;
- regulate the procedures for challenging the impartiality and independence of courts and tribunals;
- impact on the way witnesses give evidence; or
- regulate media reporting on proceedings.

Examples

No examples exist yet in Queensland, but this right has been tested in Victoria.

OPEN JUSTICE AND LIMITING PUBLICATION OF POLICE DOCUMENTS

(Inquest into the Death of Tyler Cassidy, Ruling on suppression application by the Chief Commissioner of Police pursuant to section 73(2)(b) of the Coroners Act 2008 (Vic))

During the inquest into the fatal shooting of Tyler Cassidy by police, the Coroner had to consider evidence relating to the internal workings and procedures, training methods and protocols of the police. The Chief Commissioner applied to have these documents kept secret due to their sensitive nature. Among other things, the Coroner considered the principle of open justice set out in section 24(3) of the Victorian Human Rights Charter [equivalent to section 31(3) of the Queensland Act]. She noted that this is not an absolute principle and could be limited in certain circumstances. She found that allowing most of the documents to be published might place police and others at risk, and ordered that they be kept secret. However, to ensure the integrity of the coronial process and the effectiveness of the investigation, she allowed police officers to be questioned about some of the matters in the documents where it was appropriate.

Queensland Human Rights Commission

FACT SHEET:

Rights in criminal proceedings

Section 32 of the *Human Rights Act 2019*

Section 32 of the *Human Rights Act 2019* says that:

1. A person charged with a criminal offence has the right to be presumed innocent until proved guilty according to law.

2. A person charged with a criminal offence is entitled without discrimination to the following minimum guarantees—

   (a) to be informed promptly and in detail of the nature and reason for the charge in a language or, if necessary, a type of communication the person speaks or understands;

   (b) to have adequate time and facilities to prepare the person's defence and to communicate with a lawyer or advisor chosen the person;

   (c) to be tried without unreasonable delay;

   (d) to be tried in person, and to defend themselves personally or through legal assistance chosen the person or, if eligible, through legal aid;

   (e) to be told, if the person does not have legal assistance, about the right, if eligible, to legal aid;

   (f) to have legal aid provided if the interests of justice require it, without any costs payable by the person if the person is eligible for free legal aid under the Legal Aid Queensland Act 1997;

   (g) to examine, or have examined, witnesses against the person;

   (h) to obtain the attendance and examination of witnesses on the person's behalf under the same conditions as witnesses for the prosecution;

   (i) to have the free assistance of an interpreter if the person cannot understand or speak English;

   (j) to have the free assistance of specialised communication tools and technology, and assistants, if the person has communication or speech difficulties that require the assistance;

   (k) not to be compelled to testify against themselves or to confess guilt.

3. A child charged with a criminal offence has the right to a procedure that takes account of the child's age and the desirability of promoting the child's rehabilitation.

4. Any person convicted of a criminal offence has the right to have the conviction and any sentence imposed in relation to it reviewed by a higher court in accordance with law.

5. In this section –

   legal aid means legal assistance given under the *Legal Aid Queensland Act 1997*.

In section 32, the Human Rights Act protects the right to certain minimum procedural guarantees in criminal trials.

This section is modelled on Article 14 of the International Covenant on Civil and Political Rights. Australia became a party to this treaty in 1980.

The rights contained in section 32 are complementary to the rights contained in section 31 of the Act, which protects the right to a fair hearing.

Scope of the rights

The rights contained in this section relate to people who are charged and/or convicted of a criminal offence.

In Victoria, where a similar protection is found in the Victorian Charter of Human Rights and Responsibilities Act 2006, this has been interpreted to mean that it applies from the time the police first indicate that charges will be laid.

Like all rights in the Act, rights in criminal proceedings can be limited where it is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

The right to be presumed innocent until proven guilty according to law

This right should inform the way criminal proceedings are conducted. It may include requiring that the accused is not presented in court in a manner that implies they are a dangerous prisoner.

This right has significance for bail applications. Bail should only be refused where there is a genuine reason, rather than as punishment.

In Victoria, the Supreme Court has found that the right appears to apply only to criminal proceedings and that it would not apply in disciplinary proceedings.

Minimum guarantees

A person who is charged with an offence has a right to minimum guarantees about how they will be treated and how the criminal proceedings will be conducted. These rights are available without discrimination.

The right to minimum guarantees when convicted of a crime can be limited. For example, the right to defend oneself may be limited for the purpose of examining vulnerable witnesses, preventing an accused from cross-examining a witness without representation.

A person has the right to choose a lawyer under s 32(2)(d), but this is not an absolute right. It must be balanced against considerations such as potential delays and availability of reasonable alternatives if the person's first choice of lawyer is unavailable. Additionally, it will not give someone the right to Legal Aid funding when they do not satisfy Legal Aid's eligibility criteria.

A child charged with a criminal offence

This right should include the requirement that detained children are treated in a manner that is consistent with the promotion of their dignity and worth. It should ensure that children can participate equally and without exclusion in the legal process. This may mean that special measures are required.

Internationally, the UN Human Rights Committee has explained that article 14 of the International Covenant on Civil and Political Rights requires that alternatives to criminal proceedings be considered for children changed with criminal offences. These alternatives include mediation, conferences, counselling, community services or educational programs (UN Human Rights Committee, *General Comment No. 32* [44]).

Right to review of a conviction

Section 32(4) of the Act is modelled on article 14(5) of the International Covenant on Civil and Political Rights.

The UN Human Rights Committee has explained that article 14(5) gives a convicted person the right to access the written judgment of the trial court and other relevant documents, such as trial transcripts (General Comment No. 32 [49]).

When these rights could be relevant

Section 32 could be relevant to laws, policies, acts or decisions that:

- impact on the right to be presumed innocent (including changes to the law relating to self-incrimination);
- regulate aspects of criminal trial procedure, such as time limits on complaints or access to witnesses;
- establish guidelines or procedures for the provision of assistants, translators and interpreters;
- change whether the accused can represent themselves personally;
- regulate how an accused person may appear in court, for example, security measures associated with their appearance;
- limit requirements on courts or tribunals to accord fair hearing rights;
- deal with the admissibility of evidence;
- restrict access to information and material to be used as evidence;
- affect the law of evidence governing examination of witnesses;
- allow special procedures for examination of witnesses, for example, the manner in which they give evidence;
- create or amend an offence that contains a presumption of fact or law and puts the legal or evidential burden on the accused to rebut the presumption;
- alter the criteria or conditions under which a person may apply for or be released on bail;
- amend or alter procedures under which a person is able to appeal against or review a decision;
- amend the eligibility criteria for legal aid;
- relate to remedies available to people whose criminal convictions have been overturned or who have been pardoned in situations involving a miscarriage of justice;
- affect the law regarding double jeopardy;
- affect the capacity of investigators and prosecutors to prepare for trial and of courts to conduct trials through allocation of resources.

Example

DELAY IN HEARING NOT JUSTIFIED

Gray v DPP [2008] VSC 4

In this matter, the Court was asked to consider a trial delay. The delay meant the accused could spend longer on remand than any sentence that might be imposed if he were convicted. The Court considered the Charter and the rights contained in sections 21(3) and (5) [equivalent of section 29(3) and (5) under the Queensland Act] and 25(2)(c) [32(2)(c) in Queensland]. The Court found that Gray's continued incarceration was not justified because of the delay. He was released on bail (with strict conditions).

Queensland Human Rights Commission

FACT SHEET:

Rights of children in the criminal process

Section 33 of the *Human Rights Act 2019*

Section 33 of the *Human Rights Act 2019* says that:

1. An accused child who is detained, or a child that is detained without charge, must be segregated from all detained adults.

2. An accused child must be brought to trial as quickly as possible.

3. A child who has been convicted of an offence must be treated in a way that is appropriate for the child's age.

The Human Rights Act details special protections for children involved in criminal processes. It provides that an accused child must not be detained with adults and must be brought to trial as quickly as possible. It also says that a convicted child must be treated in a way that is appropriate for their age.

These rights are based on articles 10(2)(b) and 10(3) of the International Covenant on Civil and Political Rights. Australia ratified this treaty in 1980. They are also based on articles 37 and 40 of the Convention on the Rights of Child, which Australia ratified in 1990.

Section 33 applies only to children in the criminal process. As human beings, children are entitled to all the rights in the Act (unless those rights have an eligibility condition they don't meet, like the right to vote under section 23). Other rights protected in the Human Rights Act that apply more generally to people involved in the criminal process include:

- protection from torture and cruel, inhuman or degrading treatment or punishment (section 17);
- right to liberty and security of person (section 29);
- humane treatment when deprived of liberty (section 30);
- right to a fair hearing (section 31);
- rights in criminal proceedings (section 32);
- right not to be tried or punished more than once (section 34);
- retrospective criminal laws (section 35).

Scope of the right

Section 33 recognises that children are entitled to special protections because of their age. It only applies to criminal process, unlike section 30 which applies to someone detained regardless of the purpose of the detention.

Like all rights in the Act, the rights of children in the criminal process can be limited, but only where it is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

The Human Rights Act amends the *Youth Justice Act 1992* to clarify that when decisions are made under that Act in relation to the segregation of convicted and non-convicted children, the following additional factors can be considered in addition to human rights obligations:

- the safety and wellbeing of a child on remand and other detainees; and
- the chief executive's responsibilities and obligations under section 263 of that Act, which relates to the management of detention centres.

Right to be segregated from all detained adults

Any child who is detained as part of a criminal process must be held separately to any detained adults, preferably in a separate juvenile facility. As with adults, accused children on remand must also be segregated from convicted prisoners serving their sentences (section 32(2) of the Act).

The law recognises that children, because of their age, are more vulnerable. When housed in adult prisons, or other adult facilities, children's basic safety and well-being may be compromised. So might their ability to reintegrate into society, or avoid becoming involved in further criminal activity. That is why there must be separate facilities for children, with different policies and practices, to cater for their developmental needs.

The only permitted exception to the separation of children from adults is where it is not in the child's best interests. This would only be in exceptional circumstances. For example, the child's best interest may require greater priority for family contact than for separation from detained adults. This might lead to the child being detained with a parent or close to home, even if detention is in a facility shared with adults.

Right to be brought to trial as quickly as possible

Every child arrested and charged must be brought before a court as quickly as possible. This requirement is similar to the one which applies to everyone (sections 29(5) and 32(2)(c) of the Act), but is more onerous. This reinforces that timing can be critical when a child is kept in detention. It recognises that a child should be detained for the shortest appropriate time.

It is not sufficient to cite the absence of proper resources as reason for any delay. A prosecuting authority has a responsibility to ensure that all agencies are adequately supported, and that proper consideration is given to the speed of criminal cases involving children.

Right to be treated in a way that is appropriate to the child's age

This right must be applied, observed and respected throughout the entire process. This means from the first contact with the child by law enforcement agencies through to the implementation of any sentence.

When this right could be relevant

Section 33 could be relevant to laws, policies, acts or decisions that:

- enable children to be detained for any length of time;
- authorise the holding of children in amenities that have limited facilities or services for the care and safety of children;
- enable people to undertake personal searches of a detained child;
- impacts on the environmental design of detention centres or conditions under which children are detained;
- establish or alter programs in prisons, youth training centres or residential centres;

- affects the speed at which a child may be brought to trial;
- create or amend procedures and the law of evidence applicable to children charged with criminal offences, including the investigation and prosecution of offences; or
- amend the law relating to children in criminal proceedings, including bail, adjournments and sentencing.

Examples

No examples exist yet in Queensland, but this right has been tested in Victoria.

OMBUDSMAN'S REPORT ON THE MELBOURNE YOUTH JUSTICE PRECINCT

In 2010, Ombudsman Victoria conducted an investigation into the conditions at the Melbourne Youth Justice Precinct. This precinct consists of the Melbourne Youth Justice Centre, Melbourne Youth Residential Centre and Malmsbury Youth Justice Centre. Ombudsman Victoria found the precinct was did not comply with the human rights principles in the Charter. It found:

- there was undesirable mixing of detainees of widely varying ages and different legal situations;
- remanded detainees were being placed in units with sentenced offenders;
- 39 per cent of former and current staff legally required to have a Working with Children Check (WWCC) to work at the precinct did not have a WWCC on their personal file;
- the precinct was struggling to meet the needs of children who were seriously mentally ill, including detainees who were suicidal or displaying self-harming behaviour;
- in some instances, remanded detainees were placed in sentenced units during the day, which in one case resulted in a remanded detainee being severely assaulted by four sentenced detainees.

Ombudsman Victoria found that these were human rights violations. It recommended that the precinct be replaced with a new facility, a review be carried out of all policies and practices relating to conditions to ensure they comply with human rights principles and that the performance of all current staff be reviewed.

DELAY IN TRIAL TOO LONG

(Perovic v CW, ACT Children's Court, Unreported (1 June 2006))

In this case, the court decided that under the ACT equivalent of section 33(2), a delay of 16 months between the alleged offence and trial for a child was too long, especially for a case that was not very complex. Lack of investigative resources was held to be no excuse.

Queensland Human Rights Commission

FACT SHEET:

Right not to be tried or punished more than once

Section 34 of the *Human Rights Act 2019*

Section 34 of the *Human Rights Act 2019* says that:

A person must not be tried or punished more than once for an offence in relation to which the person has already been finally convicted or acquitted in accordance with law.

The Human Rights Act protects the right not to be tried or punished more than one for an offence.

This right is based on Article 14(7) of the International Covenant on Civil and Political Rights. Australia ratified this treaty in 1980.

Scope of the right

This right will generally apply where a person is charged with the same offence for which they have been previously convicted or acquitted.

This principle, also known as 'double jeopardy', applies to criminal offences. It does not apply to civil trials which may result in civil liability. Sanctions and penalties imposed by professional disciplinary bodies are not usually considered a breach of this right.

This right only applies where a person has been 'finally' acquitted or convicted. This means all appeals have been exhausted.

This right does not prevent cases from being reopened if an appeal court finds a conviction has been the result of a miscarriage of justice.

Like all rights in the Act, the right to not to be tried or punished more than once can be limited, but only where it is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

When this right could be relevant

Section 34 could be relevant to laws, policies, acts or decisions that:

- allow a person to be punished a second time for the same offence;
- amend any criminal procedure rules relating to previous convictions and acquittals;
- create an overlap between an offence in regulations and an offence in the authorising legislation;
- allow continued incarceration of people (for example, convicted sex offenders) following completion of sentence.

Example

No examples exist yet in Queensland, but this right has been tested in Victoria.

PROFESSIONAL DISCIPLINARY PROCEEDINGS AND THE QUESTION OF DOUBLE PUNISHMENT

(Psychology Board of Australia v Ildiri (Occupational and Business Regulation) [2011] VCAT 1036)

In this case, Ms Ildiri had been found guilty of numerous fraud offences under the Crimes Act 1958 (Vic). The Psychology Board of Australia knew of the findings. As a result, they ruled that Ms Ildiri had also engaged in unprofessional conduct under the Health Professions Registration Act 2005 (Vic). The Tribunal found this did not violate the right not to be tried more than once under section 26 of the Charter [equivalent of section 34 under the Queensland Act]. This was because the aim of the disciplinary proceedings was 'primarily to protect the public, and not to punish the practitioner'.

Queensland Human Rights Commission

FACT SHEET:

Right to protection against retrospective criminal laws

Section 35 of the *Human Rights Act 2019*

Section 35 of the *Human Rights Act 2019* says that:

1. A person must not be found guilty of a criminal offence because of conduct that was not a criminal offence when it was engaged in.

2. A penalty must not be imposed on any person for a criminal offence that is greater than the penalty that applied to the offence when it was committed.

3. If a penalty for an offence is reduced after a person committed the offence but before the person is sentenced for that offence, that person is eligible for the reduced penalty.

4. Nothing in this section affects the trial or punishment of any person for any act or omission which was a criminal offence under international law at the time it was done or omitted to be done.

The Human Rights Act protects against retrospective criminal laws. It reflects the long recognised criminal law principle that there can be no crime and no punishment, other than as established by the law.

This right is modelled on Article 15 of the International Covenant on Civil and Political Rights. Australia ratified to this treaty in 1980.

Scope of the right

Subsection (1) states that a person must not be found guilty of an offence for conduct that was not an offence at the time it was engaged in. This prohibits retrospective criminal laws and also reflects the duty of states to ensure all criminal offences are defined precisely by law.

Subsection (4) clarifies that international criminal law offences, such as war crimes or crimes against humanity, which were not crimes under domestic law but were crimes against customary international law at the time they were committed, are still considered to be international criminal law offences. It also allows for new Queensland offences to be created that authorise prosecution of these people.

Section 35(2) and 35(3) of the Act are concerned with penalties that may be imposed for criminal offences. These sections only apply where the 'penalty' imposed is intended to be punitive (as opposed to a community safety objective).

Under the International Covenant on Civil and Political Rights, the right to protection against retrospective criminal laws does not prohibit retrospective changes to criminal procedures which do not form part of the penalty for an offender, such as changes in the law of evidence.

Like all rights in the Act, the right to protection against retrospective criminal laws can be limited where it is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

The nature of the right is one factor that must be considered when determining if a limitation is justified. The right to protection against retrospective criminal laws cannot be limited under international law. This suggests that it would be unlikely that the right could be reasonably limited under the Act in Queensland.

Section 35(4) of the Charter contains an exception to the protection against retrospective criminal laws. It explicitly allows for the trial or punishment of an act which was not criminal in Queensland at the time, but was an offence under international law (such as war crimes, genocide or a crime against humanity.

When this right could be relevant

Section 35 could be relevant to laws, policies, acts or decisions that:

- seek to sanction a person for conduct that was not contrary to law at the time the conduct was undertaken;
- apply more severe penalties for conduct by a person than those that existed at the time the conduct was undertaken;
- fail to apply less severe penalties for conduct by a person if penalties have decreased since the conduct was undertaken;
- expand the range of activities that are covered by an existing criminal offence;
- amend criminal law procedure that applies to trials for acts done before the legislation commences;
- introduces new sentencing options to apply to acts done before the legislation was operative; or
- change parole conditions that apply to sentences of imprisonment imposed before the legislation commences.

Queensland Human Rights Commission

FACT SHEET:

Right to education

Section 36 of the *Human Rights Act 2019*

Section 36 of the *Human Rights Act 2019* says that:

1. Every child has the right to have access to primary and secondary education appropriate to the child's needs.

2. Every person has the right to have access, based on the person's abilities, to further vocational education and training that is equally accessible to all.

The Human Rights Act protects the right of every child to access primary and secondary education appropriate to their needs. It also says that every person has the right to have access, based on their abilities, to equally accessible further vocational education and training.

This right is based on Article 13 of the International Covenant on Economic, Social and Cultural Rights. However, the rights protected in section 36 are narrower than the rights protected in Article 13. Australia became ratified this treaty in 1975.

Scope of the right

Section 36 is intented to be consistent with *Education (General Provisions) Act 2006* and to provide rights in relation to public education service delivery. Private and non-government schools are not required to comply with the Act.

Like all rights in the Act, the right to education can be limited, but only where it is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

Internationally this right has been interpreted as requiring that education be accessible to all people without discrimination. Section 15 of the Act states that all rights included in the Act are intended to be enjoyed by all people 'without discrimination'.

The wording 'appropriate to the child's needs' concerned advocates in the debate over the Bill. They argued that this phrase could be used to justify different standards for children with a disability. The Department of Justice and Attorney-General responded to these concerns. They stated that, in addition to s15 of the Act specifying that all rights are intended to be enjoyed by all people without discrimination:

> *"Clause 12 of the Bill clarifies that the human rights included in the Bill are in addition to other rights and freedoms included in other laws. This means that provisions in the Anti-Discrimination Act 1991 will continue to operate to protect vulnerable Queenslanders from unfair discrimination."*

Subsection 2 relates to 'further vocational education and training'. The Act does not specify what type of tertiary education or training this may extend to. The phrase 'based on the person's abilities' implies that this right does not guarantee access to education where a person does not already satisfy eligibility requirements – for example, prior study or a certain level of academic achievement.

When this right could be relevant

This right could be relevant to laws, policies, acts or decisions that:

- limit access to schools by children or young people with disabilities, such as failure to provide wheelchair access;
- introduce fees for education that, while applying to everyone, discriminate against people on low incomes;
- favour sharp disparities in spending policies resulting in differing qualities of education for persons residing in different geographic locations, including for example school closures;
- provide inferior educative materials to children of diverse cultural backgrounds;
- fail to tailor education and its mode of delivery for students such as migrants, refugees, working students, students with children, students in detention, homeless students and students with disabilities.

Examples

No examples exist yet in Queensland.

Head of Department, Department of Education, Free State Province v Welkom High School and Another Case (CCT 103/12) [2013] ZACC 25 (10 July 2013)

In this case, the Constitutional Court of South Africa ruled that the exclusion of pregnant students from schools violeated their right to education and equality.

Ali v United Kingdom – 40385/06 [2011] ECHR 17 (11 January 2011)

The European Court of Human Rights found that excluding a student from school during the investigation of a serious criminal offence was a reasonable limitation to their right to education.

Queensland Human Rights Commission

FACT SHEET:

Right to health services

Section 37 of the *Human Rights Act 2019*

Section 37 of the *Human Rights Act 2019* says that:

1. Every person has the right to access health services without discrimination.

2. A person must not be refused emergency medical treatment that is immediately necessary to save the person's life or to prevent serious impairment to the person.

Although this right is modelled on Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), the rights protected in section 37 are much narrower than the rights protected in article 12. Australia ratified this treaty in 1975.

The right to health services is not protected in any other human rights legislation in Australia.

Scope of the right

As this right is not protected elsewhere in Australia, and the wording in the Act is narrower than that contained in the ICESCR, the scope of this right is difficult to ascertain. Similarly, limited guidance can be gained from looking to international cases on the right to health, given the difference in wording in the Queensland Act.

It is clear from the Explanatory Notes to the Bill when it was introduced to Parliament that this section is not intended to encompass rights relating to underlying determinants of health, such as food and water, social secuirty, housing and environmental factors.

Like all rights in the Act, the right to health services can be limited, but only where it is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

When this right could be relevant

This right could be relevant to laws, policies, acts or decisions that:

- relate to access to information on the health and well-being of families, including information and advice on family planning;
- relate to access to health facilities, goods, including essential medications and services, especially for vulnerable or marginalised groups;
- relate to health services for particular groups, including Indigenous Australians, people with disability, women and children;
- provide for reproductive, maternal (pre-natal and post-natal) and child health care;
- provide immunisation against infectious diseases; or
- relate to the prevention, treatment and control of epidemic and endemic diseases, including HIV/AIDS.

Queensland Human Rights Commission

FACT SHEET:

The role of Parliament under the *Human Rights Act 2019*

The Human Rights Act requires the parliament, the courts and the executive to act compatibly with the Act.

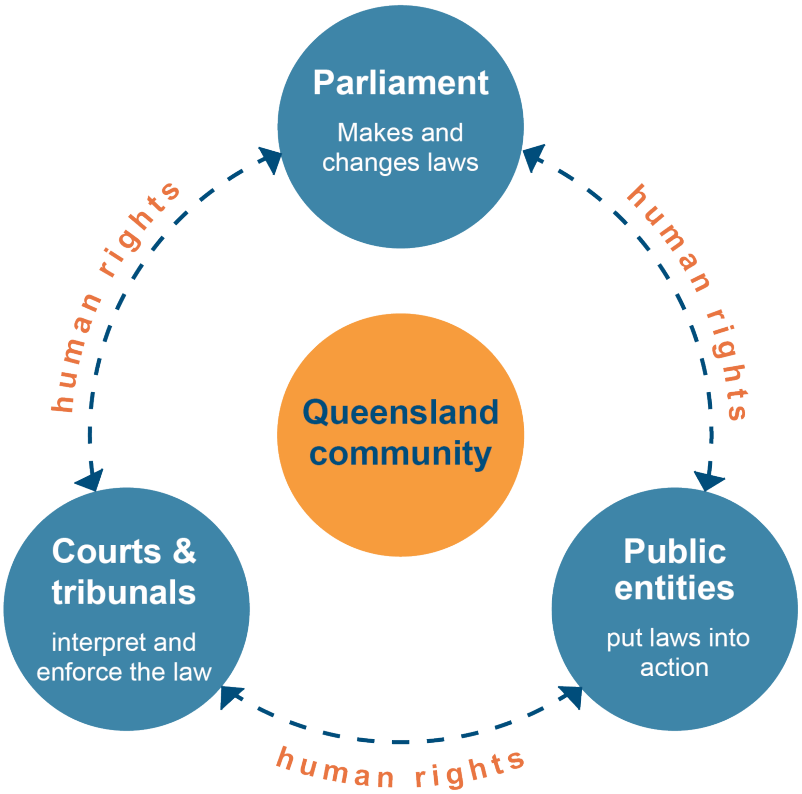
In order to act compatibly with the Human Rights Act, the parliament must scrutinise all proposed laws for compatibility with human rights. This includes through accompanying all new bills introduced into Parliament with a statement of compatibility and requiring portfolio committees to examine bills and report to the legislative assembly about any incompatibility with human rights.

The parliament's obligation is to consider the impact of new laws on human rights. It continues to be able to pass laws that are not consistent with human rights.

The 'dialogue model'

The Act is based on a 'dialogue' model of human rights. It aims to promote a discussion between the different arms of government – the legislature, the judiciary, and the executive.

In a dialogue model of human rights, parliament is still responsible for making and passing laws. Courts cannot overrule legislation because it is not compatible with human rights.



Statements of compatibility

All legislation introduced into parliament must be accompanied by a statement of compatibility. The statement has to be written by the Member of Parliament introducing the bill. It has to state clearly whether or not, in the Member's opinion, the bill is compatible with human rights and the nature and extent of any incompatibility.

The parliament can still choose to pass a law even if it is accompanied by a statement that says it is incompatible with human rights.

Portfolio committees

Committees play an important role in Queensland's parliament. Unlike every other state and territory, and the federal parliament, Queensland does not have an upper house. Parliamentary committees take on some of the work an upper house would usually do. This includes monitoring or investigating particular issues and scrutinising proposed laws.

There are seven portfolio committees in Queensland Parliament. They are made up of members of parliament and it is their job enquire into proposed laws before they are debated by parliament. You can find information about the committees and their functions on the parliament website.

Under the Human Rights Act, a committee examining a piece of proposed legislation will need to report to the parliament about any incompatibility with human rights.

Override declarations

In exceptional circumstances the Human Rights Act allows parliament to make an 'override declaration' about a law, or part of a law. If an override declaration is made, the Human Rights Act does not apply to the law or part of a law the declaration has been made about. It is only for use in exceptional circumstances.

Queensland Human Rights Commission

FACT SHEET:

The role of courts and tribunals under the *Human Rights Act 2019*

Although Queensland courts and tribunals are independent of government, they have important duties under the *Human Rights Act 2019*.

Direct application

The Act applies to courts and tribunals when they are performing functions that are relevant to the rights protected under the Act. This includes both the judicial and administrative functions of courts and tribunals.

Judicial functions include the work courts and tribunals do in hearing cases and handing down judgements. Examples of the human rights that will apply to judicial functions include:

- equality before the law;
- fair hearing; and
- rights in criminal proceedings.

Acting in an administrative capacity

Under the Act, public entities are obligated:

- to act and make decisions in a way that is compatible with human rights; and
- when making a decision, to give proper consideration to human rights relevant to the decision.

The obligations on public entities apply to courts and tribunals when they are acting in an administrative capacity. Examples of when courts and tribunals may be acting in an administrative capacity include:

- staffing matters;
- registry functions (including managing records, receiving and processing appeals, and listing cases); and
- developing and applying policies and procedures.

Much of the work of some tribunals involve acting in an administrative capacity, for example:

- reviewing administrative decisions of government agencies;
- disciplinary proceedings;
- appointing guardians and administrators; and
- reviewing involuntary treatment orders.

Some of the work of courts involve acting in an administrative capacity, for example committal proceedings.

Interpreting legislation

The Act requires that all legislation is to be interpreted in a way that is compatible with human rights, to the extent that is consistent with the purpose of the legislation.

If a legislation cannot be interpreted that way, it is to be interpreted in a way that is *most* compatible with human rights, to the extent that is consistent with purpose of the legislation.

'Compatible with human rights' means the provision does not limit a human right, or limits a human right only to the extent that it is reasonable and demonstrably justifiable in a free and democratic society based on human dignity, equality, and freedom. The Act sets out factors that may be relevant in deciding whether a limit on a human right is reasonable and justifiable.

Referral to Supreme Court

In court or tribunal proceedings, there may be a question of law about the application of the Act, or a question about the interpretation of a statutory provision in the way the Act requires. These questions may be referred to the Supreme Court to decide.

Declaration of incompatibility

The Supreme Court or the Court of Appeal may make a declaration of incompatibility, if the Court considers that a legislation cannot be interpreted in a way that is compatible with human rights.

There is a process for a declaration of incompatibility to be brought to the attention of Parliament. If a declaration is made, it is up to Parliament to decide what to do about it. A declaration does not make the legislation invalid.

Intervention

The Attorney-General and the Queensland Human Rights Commission have the right to intervene in proceedings in courts and tribunals where there is a question of law about the application of the Act or the interpretation of a legislation in the way the Act requires.

Queensland Human Rights Commission

FACT SHEET:

What is a public entity?

The *Human Rights Act 2019* requires public entities to act compatibly with human rights.

A public entity is an organisation or body performing a public function in and for Queensland.

There are two types of public entities.

Core public entities are considered public entities at all times, and are usually government entities.

Functional public entities are only considered public entities when they are performing a function of a public nature on behalf of the state. Organisations funded by government to provide public services would fall under this category. Functional public entities could be non-government organisations, private companies or government owned corporations. A private company funded to run a prison, or an NGO providing a public housing service, would be considered a functional public entity.

Organisations may also choose to be declared a public entity by regulation under the Act.

Some examples of public entities include:

- government agencies and departments;
- public service employees;
- the Queensland Police Service and other emergency services;
- State Government Ministers;
- public schools;
- public health services, including hospitals; and
- local government, councillors and council employees.

What is not a public entity?

The Act defines a public entity as being 'in and for Queensland'. This means that federal public services and entities are not included.

Private schools are not public entities because they are not performing their services on behalf of the state. They do not have to comply with the obligations for public entities under the Act.

Many private hospitals and private healthcare providers will also be exempt, unless they are treating public patients.

When is a function of a public nature?

A function is of a public nature when it is carried out in connection with a government responsibility. Indications that an organisation is performing a public function include when it is:

- connected to or identified with functions of government;
- carried out because of a requirement under law;
- is regulatory in nature; or
- is carried out by a government owned corporation.

Functions that are of a public nature would include:

- the operation of a corrective services facility or another place of detention;
- the provision of emergency services;
- public health services;
- public disability services;
- public education;
- public transport; and
- public and funded housing services.

The role and obligations of public entities

The Human Rights Act makes it unlawful for public entities to act or make a decision in a way that is not compatible with human rights. Failing to give proper consideration to a relevant human right is also considered to be not acting compatibly under the Act.

A public entity can act or make a decision that limits human rights, but only if it is reasonable and justifiable, or if the entity could not have acted differently or made a different decision because of another law.

For example, although the actions of a police officer executing a search warrant may limit human rights, they are lawful and permitted by the Human Rights Act because the officers are required by law to undertake these activities.

Complaints about public entities

From 1 January 2020, people are able to make a complaint when a public entity acts or makes decisions inconsistently with the Human Rights Act.

The Act requires that complaints are made directly to the relevant public entity in the first instance. If the complaint is not responded to, or not adequately responded to, after 45 business days have passed the person may make a complaint to the Human Rights Commission. The Commission may refuse to deal with the complaint if it is not made within 1 year of the public entity's decision or action. Complaints may also be accepted by the Commission within the 45 business day period of the Commissioner considers there are exceptional circumstances.

Complaints will only be able to be made regarding acts or decisions which occur on or after 1 January 2020.