



**Community
Legal Centres
Queensland**

Queensland Human Rights Act

A Guide for Community Lawyers

March 2019

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Acknowledgement:

The case studies used in this Guide have been adapted from materials produced by the British Institute of Human Rights (www.bih.org.uk) and the Human Rights Law Centre (www.hrlc.org.au).

Table of Contents:

1. Introduction.....	3
2. An Overview of the Human Rights Act	4
3. Benefits of the Human Rights Act.....	5
4. Key Mechanisms of the Human Rights Act	6
5. Remedies.....	8
6. Protected Human Rights	9
7. Role of the Queensland Human Rights Commission	11
8. Using the Human Rights Act in Practice – Case Studies	13
9. Further Information and Resources	30

1. Introduction

The *Human Rights Act 2019* (Qld) is landmark legislation that, for the first time in Queensland, enshrines a comprehensive range of human rights into law. This presents important opportunities for community lawyers to advocate for their clients and undertake law and policy reform activities in a new and different light.

This Guide is intended to be a resource for community lawyers and advocates. It provides:

- a brief overview of the Human Rights Act and its key operative provisions;
- an outline of the human rights enshrined in the Act;
- guidance on using the Human Rights Act in practice; and
- details on whether to find further information and resources.

2. An Overview of the Human Rights Act

The Human Rights Act is an ordinary Act of the Queensland Parliament that enshrines twenty-three fundamental human rights in law. It will take effect from 1 January 2020.

The Human Rights Act establishes a “dialogue model” of human rights protection that seeks to ensure that human rights are taken into account across the three arms of government – the legislature, the executive and the judiciary.

This dialogue is facilitated through a number of key mechanisms:

- First, all legislative proposals (Bills and subordinate legislation) must be assessed for their compatibility with the human rights contained in the Human Rights Act through the tabling of a Statement of Compatibility when the Bill is introduced to Parliament. In exceptional circumstances, the Parliament may make an Override Declaration that the Human Rights Act does not apply to an Act or a provision in Act.
- Second, all legislative proposals must be considered by the responsible portfolio committee for its compatibility with human rights.
- Third, public entities must act compatibly with human rights and also give proper consideration to human rights in any decision-making process. The consequence of a failure to do so is unlawfulness.
- Fourth, so far as possible, courts and tribunals must interpret and apply legislation consistently with human rights and should consider relevant international, regional and comparative domestic jurisprudence in so doing.
- Fifth, the Supreme Court has the power to declare that a law cannot be interpreted and applied compatibly with human rights and to issue a Declaration of Incompatibility. The relevant Minister must respond to such a Declaration within six months.
- Finally, affected individuals may make a human rights complaint for an alleged violation of human rights, or a claim of unlawfulness under the Human Rights Act may be added to another cause of action.

Each of these mechanisms is explored in further detail throughout this Guide.

3. Benefits of the Human Rights Act

The Human Rights Act in Queensland is modelled on similar human rights laws that operate in the Australian Capital Territory and Victoria.

Lessons from these jurisdictions identify that human rights laws lead to the following key benefits:

1. Increased consideration of human rights in the development of laws and policies, through parliamentary scrutiny mechanisms that promote transparency and accountability;
2. The greatest practical impact has been on executive decision-making and actions, through improvements in public service delivery and decision making that embeds human rights principles;
3. The dialogical model of human rights protection has enabled community organisations and advocates to articulate the language and ideas of human rights more effectively, without the need for litigation;
4. There has been little discernible impact on the number (or length or complexity) of legal cases. While courts have largely taken a cautious approach, human rights laws have provided remedies for a range of individual and systemic injustices; and
5. Human rights laws have been used to remedy a wide range of issues, but have been most relevant to issues of access to justice, housing and homelessness, equality and non-discrimination, and mental health.

4. Key Mechanisms of the Human Rights Act

4.1 Parliamentary Scrutiny

Under the Human Rights Act, the Parliament plays a key role in scrutinising all new legislative proposals – both Bills and subordinate legislation – for compatibility with the human rights contained in the Human Rights Act.

Several key mechanisms are established to do this.

First, all Bills introduced into the Legislative Assembly must be accompanied by a **Statement of Compatibility** prepared by the Member of Parliament who introduces the Bill that states whether, and if so how, the Bill is compatible with human rights (section 38). For subordinate legislation, the member responsible is to prepare a human rights certificate when it is tabled in the Legislative Assembly (sections 41-42).

Second, the portfolio committee responsible for examining a Bill must **report to the Legislative Assembly** on any incompatibility with human rights raised by the Bill (section 39).

Finally, in exceptional circumstances, Parliament may make an **Override Declaration** that the Human Rights Act does not apply in relation to an Act or a provision in an Act (section 43). An override declaration means that the Human Rights Act does not apply to the Act or provision for a period of 5 years or while the declaration remains in force (section 45).

The purposes of these mechanisms is to promote scrutiny, transparency and accountability about the compatibility of all proposed new legislative measures with human rights.

4.2 Obligations of Public Entities

The Human Rights Act creates a specific legal obligation for “public entities” to act and make decisions in a way that is compatible with human rights.

(a) *What is a public entity?*

Section 9 of the Human Rights Act provides a detailed definition of what is a “public entity”. Essentially, for the purposes of the Human Rights Act, a public entity includes the Queensland Government and other entities that undertake functions on behalf of the Government. Courts and tribunals, except when acting in an administrative capacity, are not considered to be public entities.

Importantly, the definition of a “public entity” extends to entities that exercise functions of a public nature on behalf of the Queensland Government or a public entity (whether under contract or otherwise). Under section 10 of the Human Rights Act, the factors that may be taken into account in determining if a function is of a public nature include whether the function is conferred by statute, is connected to or identified with government, is of a regulatory nature, as well as whether the entity is publicly owned or publicly funded to perform the function.

In other jurisdictions with similar human rights legislation a host of different bodies have been held to be public entities, including hospitals, private broadcasters, housing associations, a statutory water and sewerage undertaker and an insurance corporation.

The following bodies are, or are likely considered to be, public entities for the purposes of the Human Rights Act:

- Ministers

- Government departments and public officials
- Queensland Police Service
- Local councils, including councillors and employees
- Agencies and entities when performing functions of a public nature, including emergency services, public health services, public transport and publicly-funded housing providers.

(b) Obligations of Public Entities

Public entities have specific legal obligations under section 58(1) of the Human Rights Act to:

- act compatibly with human rights; and
- when making a decision, give proper consideration to relevant human rights.

The definition of “act” includes both a proposal to act and a failure to act.

The term “proper consideration” requires that public entities give real and genuine consideration to human rights, where relevant, and also involves a notion of weight and proportionality, rather than merely requiring a ‘tick the box’ exercise.

4.3 Role of Courts

Section 48 of the Human Rights Act directs courts and tribunals to interpret all statutory provisions in a way that is compatible with human rights, to the extent possible that is consistent with the statutory purpose. Where a court or tribunal cannot interpret a statutory provision in a way that is compatible with human rights, the provision must, to the extent possible that is consistent with its purpose, be interpreted in a way that is most compatible with human rights.

In undertaking this statutory interpretation role, courts and tribunals are empowered to consider international law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right.

Where the Supreme Court is of the opinion that a statutory provision cannot be interpreted in a way that is compatible with human rights, the court may make a **Declaration of Incompatibility** (section 53). Such a declaration does not affect the validity of the Act or statutory provision.

Within 6 months after receiving a Declaration of Incompatibility, the Minister responsible for administering the statutory provision must prepare and table in parliament a written response to the declaration.

5. Remedies

There is no stand-alone legal remedy for a contravention of the Human Rights Act. Instead, the Act establishes two limited enforcement mechanisms to review the conduct of public entities:

- a model of dispute resolution through making a human rights complaint; or
- 'piggy-backing' a claim of unlawfulness on a separate cause of action.

5.1 Human rights complaints

The Human Rights Act creates a process of human rights complaints, with the re-badged Queensland Human Rights Commission (QHRC) undertaking a dispute resolution process function through complaints handling and conciliation.

As the first step, individuals who are the subject of a public entity's alleged failure to act or make a decision in a way that is compatible with human rights may make a complaint directly to the relevant public entity.

If the complaint cannot be resolved with the public entity, a person may make a human rights complaint to the QHRC. The QHRC can seek to resolve the complaint through discussions with the complainant and the public entity or, if appropriate, through a conciliation process.

5.2 Unlawfulness

Where individuals have a separate cause of action against a public entity, a claim of unlawfulness under section 58 of the Human Rights Act can be "piggy-backed" onto that existing cause of action. An example of a separate cause of action is the right to seek judicial review of a decision of a public entity.

6. Protected Human Rights

This section provides a brief overview of the 23 human rights enshrined in the Human Rights Act.

6.1 Recognition and equality before the law (s 15)

Every person has the right to equal recognition and protection before the law. This means that the law must recognise that all people have legal rights and are entitled to the equal protection of the law without discrimination. The Human Rights Act also provides that people have the right to effective protection from discrimination and allows for special measures to be taken to assist groups who are disadvantaged because of discrimination.

6.2 Right to life (s 16)

This right is concerned with the protection and preservation of life. The right imposes on public entities both a negative obligation to refrain from arbitrarily depriving a person of life and certain positive obligations. This includes obligations to protect the life of persons in their care.

6.3 Protection from torture and cruel, inhuman or degrading treatment (s 17)

This right protects people from torture and from other treatment that is inhuman or degrading. This means treatment that humiliates or debases a person. Section 17 also prohibits medical or scientific experimentation or treatment without free and informed consent. Consent must be voluntary and the person must be given sufficient information for an informed decision to be made.

6.4 Freedom from forced work (s 18)

This right prohibits slavery, servitude and forced or compulsory labour. Forced or compulsory labour means work that a person has not voluntarily offered to do but is done under threat of penalty. It does not include work that is undertaken as part of normal civil obligations (such as jury duty), or as part of a court order, or during emergencies.

6.5 Freedom of movement (s 19)

People who are in Queensland lawfully have the right to enter and leave Queensland, to move around freely within Queensland and to choose where to live.

6.6 Freedom of thought, conscience, religion and belief (s 20)

People have the freedom to have or choose a religion or belief, and the freedom to demonstrate their religion or belief. They can do this privately or publicly – at home, at work or in a place of worship – as part of a group or alone. A person must not be coerced into or restrained from having or adopting a religion or belief.

6.7 Freedom of expression (s 21)

People have the right to hold opinions without interference. People have the right to seek out, receive and impart information and ideas of all kinds. This can be orally, in writing, in print, through art or in another medium (eg sign language).

6.8 Peaceful assembly and freedom of association (s 22)

The right to peaceful assembly protects the rights of individuals and groups to meet together to exchange ideas and information, to publicly express their views and to hold a peaceful protest. The right to freedom of association protects the rights of persons to voluntarily group together for a common goal and to form and join an association, including a trade union. It also includes the right not to join a union or association.

6.9 Taking part in public life (s 23)

Every person has the right to participate in public affairs without discrimination. Every eligible person has the right to vote, be elected at periodic elections and have access to public service and public office.

6.10 Property rights (s 24)

A person must not have their property taken away from them except in accordance with law.

6.11 Privacy and reputation (s 25)

A person has the right not to have their privacy, family, home or correspondence unlawfully or arbitrarily interfered with and not to have their reputation unlawfully attacked. Privacy includes bodily privacy, territorial privacy, communication privacy as well as information privacy.

6.12 Protection of families and children (s 26)

This section states that families are the fundamental group unit of society and are entitled to be protected by society and the State. The term 'families' has been interpreted broadly. A child has the right, without discrimination, to protection that is in their best interests and that may be required because they are a child.

6.13 Cultural rights (s 27-28)

People of all cultural, religious, racial or linguistic backgrounds have the right to enjoy their culture, declare and practise their religion or use their languages.

In section 28, Aboriginal and Torres Strait Islander people have the right to enjoy their culture, use their language, and maintain their kinship ties and their relationship with the land and water with which they have a connection under traditional laws and customs.

6.14 Liberty and security of person (s 29)

Everyone has the right to liberty and security of person. This means a person must not be arrested or detained arbitrarily. A person may only be deprived of liberty in accordance with procedures established by law. This right also sets out protections for people who have been arrested or detained including the right to be told the reasons for the arrest or detention and be promptly brought before a court.

6.15 Humane treatment when deprived of liberty (s 30)

All people deprived of their liberty must be treated with humanity and dignity. Persons who have been accused of offences or detained without charge must be segregated from persons who have been convicted of offences, except where reasonably necessary. They must also be treated in a way that is appropriate for someone who has not been convicted.

6.16 Fair hearing (s 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 in a fair and public hearing. All judgments or decisions made by a court or tribunal must be made public except where it is otherwise permitted by law or it would not be in the best interests of a child.

6.17 Rights in criminal proceedings (s 32)

This section sets out the rights and minimum guarantees of people charged with criminal offences. It includes the right to be presumed innocent until proven guilty, to be informed of the charges and tried without unreasonable delay, the right not to be compelled to testify or confess guilt, and the right to have any conviction and sentence reviewed by a higher court. A child who is charged with a crime has the right to a process that takes into account their age and the desirability of promoting their rehabilitation.

6.18 Children in the criminal process (s 33)

This right specifies additional requirements that apply for children who are detained in the criminal process, including the right to be segregated from detained adults and brought to trial as quickly as possible. A child convicted of an offence must be treated in a way that is appropriate to their age.

6.19 Right not to be tried or punished more than once (s 34)

A person must not be tried or punished more than once for the same offence if he or she has already been convicted or acquitted of that offence in a court.

6.20 Retrospective criminal laws (s 35)

A person has the right not to be prosecuted or punished for acts or omissions that were not criminal offences at the time they were committed. If a penalty is imposed for an offence, it must not be greater than the penalty that existed at the time the offence was committed. If a penalty is reduced after a person committed the offence but before the person is sentenced, the person should have the benefit of the reduced penalty.

6.21 Right to education (s 36)

Every child has the right to access primary and secondary education that is appropriate to the child's needs. This right is also extended to include equal access to further vocational education and training.

6.22 Right to health services (s 36)

Every person has the right to access health services without discrimination. This includes the right not to be refused emergency medical treatment immediately necessary to save the person's life or prevent serious impairment.

7. Role of the Queensland Human Rights Commission

The Anti-Discrimination Commission Queensland has been renamed as the Queensland Human Rights Commission (QHRC). The QHRC is provided with important additional functions under the Human Rights Act, including:

- dealing with human rights complaints;
- if asked by the Attorney-General, to review the effect of legislation and the common law on human rights;
- reviewing public entities' policies, programs, procedures, practices and services in relation to their compatibility with human rights;
- public awareness and education on human rights in Queensland and the Human Rights Act;
- preparing annual reports on the operation of the Human Rights Act; and
- undertaking a 4-year and 8-year review of the Human Rights Act.

8. Using the Human Rights Act in Practice – Case Studies

This section outlines a number of case studies, together with some guidance notes on how the Human Rights Act might apply to each situation.

Case Study 1: Molly’s residential care

Molly has been a resident in a state-run service for people with a disability for three years. She is 57. She is a refugee from Sierra Leone and has been in Australia for 10 years. She has significant communication difficulties. Molly needs assistance with meals and drinks as well as personal hygiene.

Molly’s sister Sally came to visit her one morning. Sally found that her sister was suffering from dehydration and had lost a significant amount of weight. Her room smelt and her bedding has not been changed nearly as regularly as it should be.

Distressed by her sister’s suffering, Sally immediately spoke to the Manager. She believed her sister’s human rights are being breached. The Manager did not seem surprised by the allegations, but said she was limited in what she could do. She attributed the problems to insufficient resources to recruit and train suitably qualified personnel. The difficulty, she said, for existing staff was understaffing, lack of training and the pressure to get their job done and move on to the next resident.

Who has rights in this scenario?

What HRA rights may be relevant?

How are the rights being limited?

Are the limitations reasonable?

Opportunities for redress?

Case Study 2: Protestors and police

At a recent political protest staged in Southbank there were numerous incidents of violence between police and protestors. During the protest police took many photos of protestors. In the weeks following the protest the police released some photos to a newspaper, so that it could publish them. The persons were labelled as ‘persons of interest’ wanted for committing acts of violence whilst protesting. Under the photos was a hotline requesting readers to phone in with information regarding the identity of those individuals appearing in the photos.

Jenny was protesting peacefully at the rally, and committed no offence. Her photo featured in the newspaper as a person of interest. Her employer saw her photo in the newspaper and dismissed her from her job at a childcare centre.

Who has rights in this scenario?

What HRA rights may be relevant?

How are the rights being limited?

Are the limitations reasonable?

Opportunities for redress?

Case Study 3: Young people at Fortitude Valley Station

A group of young people often meet and hang out at Fortitude Valley train station. They are commonly in high-spirits and can be quite noisy, prompting occasional complaints from commuters. Guards at the station instruct them that they are banned from entering the station unless they are proceeding directly to catch a train.

The group replies that they have a right to enjoy freedom of peaceful assembly under the Human Rights Act, which they learnt about in school. They also say they have a right to freedom of expression, including noisy expression.

The guards reply that they are private contractors who don't care about human rights. The group is caught defying the ban, and the guards physically escort them from the station.

Who has rights in this scenario?

What HRA rights may be relevant?

How are the rights being limited?

Case Study 4: Bullying in schools

Queensland public schools have been experiencing an unprecedented surge in schoolyard bullying. In recent months, a trend has been developing in Queensland whereby 'gangs' have formed, denoted by either a specialised cap with a gang logo on the front, or a patterned bandana worn on the head. These gangs have targeted other students and the Queensland community has been shocked by stories of students being physically and verbally assaulted and robbed in the schoolyard.

In response, the Queensland Government has decided to ban all headwear in schools except for approved sun hats. It hopes this will help stop the formation of gangs in schools. It is also hoped that the new ban will draw attention away from students who wear religious headwear, and who have been significant victims of such attacks.

The government is also proposing to pass laws to restrict meetings of four or more young people (defined as persons under 25) in designated areas, in order to combat the gang activity.

Who has rights in this scenario?

What HRA rights may be relevant?

How are the rights being limited?

Are the limitations reasonable?

Opportunities for redress?

Case Study 5: Public housing tenancy

Matthew was a sole tenant of a public housing property. His tenancy commenced in June 2013. In 2015, Matthew's partner, Alice, moved into the property and 6 months later they had a daughter, Rose. Alice is a stay at home Mum and primary carer for Rose.

Last month, Matthew tragically died in an accident. Alice notifies the local housing office of Matthew's death. She is told that they have no record of her and that she shouldn't be living at the property. Alice is distraught and states that Matthew took care of these things and she had shared her life with him for over 3 years.

Alice has letters from her GP showing her address as the public housing property dating back to May 2016 and letters indicating that her obstetrician is also close to the property. She does not know why her residency wasn't formally reported and doesn't understand why there is a problem.

Alice's parents are nearby living in a one bedroom aged care unit. They at times help out with caring for Rose since Matthews' death. Alice and Rose attend a Mum's and Bub's group two mornings a week and Rose was placed on the local school and child care waiting lists in the area when Alice became pregnant. Due to her being the primary carer for Rose, she is relying solely on Centrelink benefits now that Matthew has passed away.

Who has rights in this scenario?

What HRA rights may be relevant?

How are the rights being limited?

Are the limitations reasonable?

Opportunities for redress?

Case Study 6: Planning permission for mosque

A planning body rejects an application to build a mosque in a suburb which is predominantly comprised of two-storey Queenslanders, many of which are heritage-listed. The planning body states that a mosque would not be in keeping with the surrounding aesthetic environment, particularly the minarets, which would puncture the low-rise horizon. It also claims that traffic chaos would ensue. In the same month, the planning body approves the construction of a five-storey high waterslide complex, a large modern shopping mall, along with a new church (with a tall bell-tower). The applicants appeal the decision, which is decided by a member of the same planning body without any further hearing.

Who has rights in this scenario?

What HRA rights may be relevant?

How are the rights being limited?

Are the limitations reasonable?

Opportunities for redress?

Case Study 7: Tracey and the police

Tracey, a 15-year-old Aboriginal person, is stopped and questioned by police regarding a criminal incident that has recently occurred. She comes from a family with a significant history of police involvement, and is part of a peer group that has frequent contact with police. Tracey is also a known 'chromer'. When stopped by police, Tracey tries to keep walking. She is deemed to be uncooperative and is taken into custody for further questioning. The police have no evidence about Tracey's involvement in the incident and she is released four hours later.

Who has rights in this scenario?

Are the limitations reasonable?

Opportunities for redress?

Case Study 8: D's parole conditions

D is a convicted paedophile who has just completed a 10 year prison term. During his prison sentence, D underwent extensive counselling and feels confident that his time in prison has rehabilitated him. Reports from both his case manager and prison counsellor also suggest that he is no longer a threat to the community.

Since being released D has moved into a residential neighbourhood. D is very positive about the new chapter ahead and is committed to continuing his rehabilitation. He has voluntarily agreed to continue weekly sessions with his psychiatrist as well as to attend weekly support group meetings. D is also subject to certain conditions. In particular, he is not allowed to be within 500 metres of any school.

D's new dwellings happen to be located within 2 km of a local primary school. His case manager, aware of the proximity between the school and D, is debating whether to approach the school principal to inform him of D's release and living arrangements. Although his case manager is confident of D's rehabilitation he wants to take every precaution to ensure that D does not cause any harm to the community or do further harm to himself. His case manager is considering giving the school principal a photo of D, which could be circulated amongst the teachers in order to alert them if they see D on or near the school premises.

Who has rights in this scenario?

What HRA rights may be relevant?

How are the rights being limited?

Are the limitations reasonable?

Opportunities for redress?

Additional Notes

9. Further Information and Resources

Human Rights Law Centre: www.hrlc.org.au

Victoria

Victorian Equal Opportunity and Human Rights Commission
www.humanrightscommission.vic.gov.au

ACT

<http://acthra.anu.edu.au/>
<http://www.hro.act.gov.au/index.html>

International Jurisprudence

UN Treaty Body Database
<http://www.unhchr.ch/tbs/doc.nsf>

Regional Jurisprudence

European Court of Human Rights
<http://www.echr.coe.int/echr>

Inter-American Commission on Human Rights
<http://www.cidh.org/DefaultE.htm>

Inter-American Court on Human Rights
<http://www.corteidh.or.cr/>

African Commission on Human and Peoples' Rights
<http://www.achpr.org>

Comparative Domestic Jurisprudence

Commonwealth
<http://www.interights.org>

UK – Human Rights Act 1998
<http://www.dca.gov.uk/peoplesrights.htm> <http://www.yourrights.org.uk/>
<http://www.humanrights.org.uk/5/>

New Zealand – Bill of Rights Act 1990
<http://www.humanrights.net.nz/>
<http://www.hrc.co.nz/home/default.php>

Canada – Charter of Rights and Freedoms 1982
<http://www.canlii.org/ca/com/chart/index.html>