



**Community  
Legal Centres  
Queensland**

# Human Rights Act 2019

**Workshop for CLCs and Advocates**

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Presented by:

Ben Schokman

Schokman Consulting

[www.schokmanconsulting.com.au](http://www.schokmanconsulting.com.au)



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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](http://www.bih.org.uk)) and the Human Rights Law Centre ([www.hrlc.org.au](http://www.hrlc.org.au)).

# Overview of today's workshop

- General introduction to human rights
- Key lessons from other jurisdictions
- Overview of the Human Rights Act – key operative provisions
- Content of rights protected in the HRA
- Case studies: Identifying relevant human rights
- Reviewing conduct of public entities
- Case studies: Using the Human Rights Act in practice
- Next steps

# Purpose of today's workshop

- Survey feedback
- In pairs, identify one question you would like answered today?



# Key messages

- You are already familiar and work with many human rights laws and concepts
- HRA enshrines basic principles of good policy, decision making and service delivery
- However, HRA is a relatively weak form of statutory protection – ‘dialogue’ model aimed at prevention, not litigation
- Need to rely on more than the ‘allure’ of human rights – evidence and sophisticated legal analysis required
- Know the opportunities and know your audience (and the limitations of human rights)
- Seek further guidance and assistance where needed

# Key lessons from other jurisdictions

- Human rights laws lead to:
  - increased consideration of human rights in the development of laws and policies
  - improvements in public service design, delivery and outcomes
  - remedies for a range of individual and systemic injustices
- Maintained parliamentary sovereignty
- Greatest practical impact has been on executive decision-making and actions
- Courts have largely taken a cautious approach
- Little discernible impact on the number (or length or complexity) of legal cases

# Key lessons (cont)

- HRA cases arise across a wide range of civil litigation, but have arisen most often in relation to cases dealing with:
  - access to justice
  - housing and homelessness
  - equality and non-discrimination
  - mental health
  - other areas include: prison/conditions in detention, children/young people, disability
- Rights that are most engaged:
  - right to privacy
  - right to a fair hearing
  - recognition and equality before the law
  - freedom of expression

# Key lessons (cont)

- Some challenges that lead to limited effectiveness:
  - low levels of engagement and understanding within some public entities
  - lack of awareness of human rights laws within the community and especially for particularly vulnerable groups
  - legal complexity of some key operative provisions
  - perceived lack of “teeth” of legislative models



# Thinking about rights

What would you want if:

- your partner was rejected for a job on the grounds of his or her ethnicity and accent?
- your friend was arrested and charged for alleged criminal activity?
- your parent was placed in a nursing home?

# What are human rights?

- Human rights are those rights everyone needs to live a dignified life
- Human rights are:
  - derived from human dignity
  - universal, core minimum standards
  - common sense and common values
- Source of human rights
- Civil and political rights / economic, social and cultural rights

# Who has human rights?

- Citizens?
- Non-citizens?
- Minority groups?
- Criminals?
- Companies?

Human rights belong to ***all*** human beings by virtue of them being human (HRA section 11)

# Nature of rights

- Duty bearers and rights holders
- State obligation to protect, respect and fulfil
  - Prevent others from violating rights
  - Do not do anything that violates rights
  - Take positive action to ensure that the right is enjoyed by all people
- Positive and negative duties
- Often involves ‘balancing’ rights against each other
- Rights can be particularly relevant to some groups who require distinct protection

# Purpose of the Human Rights Act

## Preamble –

- Recognises the “inherent dignity and worth of all human beings”
- Founded on principle that “human rights are essential in a democratic and inclusive society that respects the rule of law”
- Recognises the special importance of Aboriginal and Torres Strait Islander peoples of Queensland

## Main objects (section 4) –

- to protect and promote human rights
- to help build a human rights culture in the Queensland public sector
- to promote a dialogue about the nature, meaning and scope of human rights

# Context for introduction

- 2015/2016 public inquiry – majority of submissions supported a HRA in Queensland
- Legal Affairs and Community Safety Committee report in 2016
- Sustained support and advocacy from a diverse range of legal and community organisations
- Support for a ‘dialogue’ model based on the ACT and Victorian laws
- Protection of right to health and education in addition to ICCPR rights
- Absence of comprehensive human rights protection at the federal level
- Opposition from some groups

# Overview of the Human Rights Act

- Legislation → establishes legal obligations
- Protects 23 human rights (Part 2, Divisions 2 and 3)
- Aims to “protect and promote human rights” through a “dialogue” model
- Establishes a number of mechanisms that require all arms of government to consider human rights as part of decision-making processes

# Key operative provisions

- Parliament –
  - Passes laws after assessing them for compliance with human rights
  - In exceptional circumstances, can override the HRA in passing legislation
  - Responds to declarations made by Supreme Court
- Executive –
  - Human rights standards built into laws and policies
  - Obligation to make decisions and act compatibility with human rights
- Courts –
  - Where possible, interpret law to be compatible with the HRA
  - Supreme Court can make a declaration that a law is not consistent with the HRA



# Parliamentary scrutiny

- Statements of compatibility (s 38)  
(Human rights certificate for subordinate legislation – s 41)
- Portfolio committee also reviews compatibility and reports to Parliament (s 39)
- Applies to all new legislation, but has no effect on the application of laws if not complied with
- Purpose is to build human rights standards into all legislation, policy and practices

# Override declaration

## Section 43:

- In exceptional circumstances, Parliament may expressly declare that an Act or provision is incompatible with human rights
- Expires after 5 years

# Courts – Interpretation of laws

## Section 48:

- All statutory provisions must, to the extent possible that is consistent with their purpose, be ***interpreted in a way that is compatible with human rights.***
- If a statutory provision can not be interpreted 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.
- International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision.
- Does not affect the validity of an Act or provision

# Interpretation of laws (cont)

- Momcilovic: HCA said equivalent Victorian provision is an ordinary principle of statutory interpretation (6:1)
- VCA has said equivalent to the ‘principle of legality’ with a wider field of operation, cited by French CJ as representative of the HCA’s views: Slaveski (2012)
- Principle of legality is a common law presumption that Parliament does not intend to abrogate fundamental rights except by clear and unambiguous language

# Declaration of incompatibility

## Section 53:

- Where the Supreme Court is of the opinion that a statutory provision can not be interpreted in a way that is compatible with human rights
- Does not affect the validity of the statutory provision or give rise to any right or cause of action (s 54)
- Response by Minister (s 56)
  - must table the Declaration in parliament within 6 days
  - prepare a written response within 6 months
- Response by portfolio committee within 3 months (s 57)

# Referral to Supreme Court

## Section 49:

- Where a question of law arises relating to the application of the HRA
- A party may make an application for the matter to be referred to the Supreme Court

# Procedural matters

- Right to intervene in proceedings – applies to both the Attorney-General (s 50) and Commission (s 51)
- Notice must be given to Attorney-General and Commission if a question of law arises that relates to the application of the HRA

# Executive – Role of “public entities”

What is a “public entity”? (sections 9 and 10)

- ‘Core’ public entities enumerated in section 9, including Ministers, government departments, public officials and servants, Queensland Police, local governments, statutory bodies
- ‘Functional’ public entities: Entities discharging “functions of a public nature when it is performing the functions for the State or a public entity”: section 9(1)(h)



# Public entities (cont)

- Factors to consider (s 10):
  - Function conferred by statute
  - Connected to or identified with government
  - Degree of state regulation
  - Public funding
  - Structure of entity
- Focus on ‘function’ not ‘institution’
  - “[t]he definition of ‘public entity’ must be given a wide and generous interpretation which is consistent with the central purpose of the Charter to protect and promote human rights”
  - should be “approached as a matter of substance and not form and legal technicality”
  - obligation cannot be avoided by outsourcing: “The state cannot shirk its human rights responsibilities by implementing its programs and policies through private entities acting on its behalf”

Source: *Metro West v Sudi* [2009] VCAT 2025



# Public entities (cont)

- 'Opt-in' provision (s 60)
- A public entity does not include:
  - Legislative Assembly (except when acting in an administrative capacity)
  - Courts and tribunals

# Obligations of public entities (section 58)

- Obligations – public entities must:
  - act and make decisions compatibly with human rights (*substantive* obligation)
  - give “proper consideration” to relevant human rights when making decisions (*procedural* obligation)
- Requires public entities to:
  - **CONSIDER** human rights in decision-making
    - No blanket or inflexible rules – requires real, genuine and proportionate consideration
  - **ACT** compatibly with human rights
    - Treat people as individuals and according to their particular needs
  - **INTERPRET** and apply laws compatibly with human rights
    - Requires active consideration and a genuine attempt to comply with human rights

# Reviewing conduct of public entities

Consider:

- Is the entity a ‘public entity’? (ss 9/10)
- Did the decision-maker: (s 58)
  - give ‘proper consideration’ to relevant human rights?
  - act compatibly with relevant human rights?
  - was the limitation on relevant human rights reasonable, necessary and proportionate? (s 13)
- If not, consequence = action or decision is “unlawful”

# Exceptions

- Acts or decisions required by law: s 58(2)
  - Obligation under s 58(1) does not apply if the public entity “could not reasonably have acted differently or made a different decision” as a result of a Qld or Cth statutory provision
- Acts of religious bodies: s 58(3)
  - Where act or decision is in accordance with the doctrine of the religion and necessary to avoid offending religious sensitivities
- Private acts: s 58(4)

# Protected human rights

Civil and political rights	Economic, social and cultural rights
Non-discrimination and equality before the law	Right to health
Right to life	Right to an adequate standard of living
Right to privacy	Right to adequate shelter
Freedom of expression	Right to work and to just conditions of work
Freedom of thought, conscience and religion	Right to education
Freedom of association, assembly and movement	Right to form and join a trade union
Freedom from torture, cruel, inhuman and degrading treatment	Cultural rights
Right to liberty and security	Protection of families and children
Freedom from slavery	Right to social security
Right to a fair hearing; rights in criminal proceedings	

# Touchstone – “FRED”

- Freedom*** movement, assembly & association, forced work, expression, thought & religion, liberty & security, fair hearing
- Respect*** life, protection of families and children, health, education, cultural rights, property
- Equality*** non-discrimination, equal recognition, participation
- Dignity*** torture & cruel treatment, privacy & reputation, humane treatment in detention

# Limitations on rights (section 13)

- A human right may be subject under law only to reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom: section 13(1)
- ***Reasonable and justified***: relevant factors outlined in section 13(2)
  - Nature of the right
  - Nature (and importance) of the purpose of the limitation
  - Relationship between purpose and limitation
  - Availability of any less restrictive means



# Thinking about limitations

- Not all rights are ‘absolute’
- Rights may be subject to limitations that:
  - Have a legitimate and compelling aim;
  - Are proportionate to that aim; and
  - Impair the right as little as reasonably possible
- Many rights require positive, facilitative obligations (eg voting)
- Onus is on the state to demonstrably justify any limitation
- Standard of proof is high and commensurate to gravity of limitation
- Evidence should be clear, cogent and persuasive
- Financial considerations alone are not a sufficient reason to limit rights

Sources: *Momcilovic*; *Wesley College*; *Travel Sisters*

# Equality and non-discrimination (s 15)

- Right to recognition as a person before the law (absolute right)
  - all people have legal rights in a general sense
- Enjoyment of human rights without discrimination
  - every person should be able to enjoy the human rights set out in the HRA without discrimination
- Equality before the law, equal protection of the law
- Equal and effective protection against discrimination
  - **Direct Discrimination:** treating a person less favorably because he or she has one or more of the listed attributes.
    - Example: refusing to provide a service to a person because the person is homosexual.
  - **Indirect Discrimination:** means imposing a condition
- “Special measures” do not constitute discrimination

# Right to life (s 16)

- Every person has the right to life and the right not to be arbitrarily deprived of life
- State has a positive obligation to protect life, as well as a negative obligation not to take life
- Relevant to a broad range of contexts, including health care, aged care, people in detention, domestic violence, police action
- Also a procedural obligation to investigate deaths

# Freedom from torture, cruel, inhuman & degrading treatment (s 17)

- **Torture** is severe pain and suffering (physical or mental), intentionally inflicted, for a prohibited purpose
- **Cruel and inhuman treatment** involves less severe physical or mental ill-treatment than torture. It need not be intentional and the purpose for inflicting is not relevant
- **Degrading** treatment is treatment that humiliates or debases a person
- Also includes medical or scientific experimentation without consent
- Absolute right
- Relevant to people in detention, including hospitals, mental health services, guardianship orders
- Also a procedural obligation to investigate allegations

# Freedom from forced work (s 18)

- Prohibition against slavery or servitude (absolute right)
  - Slavery means ‘the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised’
  - Servitude means being forced to perform labour for another person under coercion
- Forced or compulsory work
  - Means labour a person is forced to do under threat of a punishment or penalty
  - Does not include
    - under legitimate detention or on conditional release by court order (such as prison work or community service)
    - work that forms part of a normal civic obligation, such as jury duty or maintaining a building if you are a landlord

# Freedom of movement (s 19)

- Right to enter and leave Queensland
- Right to move freely within Queensland
- Right to choose where to live
- Relevant to matters such as parole, mental health orders, homelessness, use of public space

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

- Freedom to have or adopt a religion (absolute)
- Includes freedom of manifestation of religion (subject to limitation)
- Does not protect incitement to discrimination, hatred, hostility or violence
- Manifestation encompasses a broad range of acts, including ritual and ceremonial acts, wearing particular garments, religious holidays, special dietary needs
- Must be some recognised philosophical basis for a belief

# Freedom of expression (s 21)

- Right to hold an opinion – broader than the implied constitutional “freedom of political communication”
- Includes the right to seek, receive and impart information and ideas
- Protects expression in any form such as speaking aloud, publishing articles, books or leaflets, television or radio broadcasts, producing works of art, communication through the internet, commercial advertising, dress and images
- May be subject to limitations set out in the law and where the aim of the restriction is to respect the rights and reputation of other persons or for the protection of national security, public order, public health or public morality
- May be relevant to protest, publications, broadcasts, displays, busking, people in detention, FOI laws



# Peaceful assembly and freedom of association (s 22)

- Peaceful assembly:
  - Freely meet and receive and impart ideas, express views, protest peacefully
  - Subject to limitation
  - May impose positive facilitative obligations
- Free association, including trade unions
  - Join together to pursue common interests
- May be relevant to public protests, demonstrations or marches, or in industrial relations

# Taking part in public life (s 23)

- Right to participate in public affairs, directly or through representatives – a broad concept relevant to the exercise of government power across all arms of government
- Right to vote and to be elected – for eligible persons
- Equal access to public service
- Extends to participation in public debate and formulation of government policy
- May be relevant to particular groups, including people in detention, people with disability or people with English as a second language

# Property rights (s 24)

- Right to own property
- No arbitrary deprivation of property – must be a lawful basis
- Broadly applies to both real and personal property, and possibly also intellectual property
- May be relevant to issues such as property seizure, car clamping

# Privacy and reputation (s 25)

- Privacy – broad term which covers all aspects of a person’s physical, psychological and social identity and relationships
- Family – broad interpretation to include all those comprising the family as understood in society and is not confined by marriage
- Home – includes ‘where a person resides or carries out their ordinary occupation’
- Correspondence – includes communications and information privacy
- Unlawful or arbitrary interference – must be both authorised by law and reasonable, necessary and proportionate in the circumstances
- Reputation unlawfully attacked

# Protection of families and children (s 26)

- Includes the right to have family relationships recognised by the law, and the right of a family to live together and to enjoy each other's company
- Broad definition of family meant to protect the family unit, including same-sex couples, single parents, de facto couples, foster parents and children
- Includes the right of every child, without discrimination, to protection and in the child's best interests
- Right to a name and birth registration
- May be relevant to removal of children, family violence, people in detention or state care, people charged with a criminal offence

# Cultural rights (s 27 and 28)

- Right to enjoy culture, religion and language in community with others (s 27)
- Includes a broad range of beliefs and practices
- Specific Aboriginal and Torres Strait Islander cultural rights (s 28)
  - Recognises distinct cultural rights, including identity, cultural heritage, language, kinship ties, relationship with the land, protection of land, territories and waters

# Liberty and security of person (s 29)

- Applies to all forms of detention
- Detention must be lawful and not arbitrary
- Rights relating to arrest and detention powers
- Essence of the right is personal freedom
- Two key components –
  - Not to be arrested or detained except in accordance with the law
  - Obligations when a person is detained, including
    - being told the reasons for detention
    - the right to challenge detention
- Relevant to the criminal process and mental health and aged care services

# Humane treatment in detention (s 30)

- Respect for inherent dignity
- Special protection for unconvicted prisoners
- Special measures in relation to vulnerable detainees
- Must not be subject to any hardship or restraint other than resulting from deprivation of liberty
- Applies to all forms of detention by the state, not just in the context of law enforcement
- Examples of breaches include
  - denial of adequate bedding, food or medical attention
  - physical, psychological and verbal abuse
  - extended periods of isolation
  - overcrowding
  - lack of educational opportunities, work or reading materials



# Fair hearing (s 31)

- Everyone has the right to have a charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing
- Minimum requirements include:
  - Equal access to, and equality before, the courts
  - Right to legal advice and representation
  - Right to procedural fairness
  - Discretion as to costs
  - Right to expeditious hearing / trial without undue delay
  - Right to interpreter where necessary
- May be relevant to tenancy issues or child protection matters

# Rights in criminal proceedings (s 32)

- Presumption of innocence
- Range of minimum guarantees
- Also –
  - Right not to be tried or punished more than once (s 34)
  - Retrospective criminal laws (s 35) (absolute right)

# Children in the criminal process (s 33)

- Children must be segregated from adults
- Brought to trial 'as quickly as possible'
- Treatment appropriate to age

# Right to education (s 36)

- Right to access primary and secondary education
- Appropriate to the child's needs
- Further vocational education and training that is equally accessible to all

# Right to health services (s 37)

- Right to access health services without discrimination
- Must not be refused emergency medical treatment necessary to save life or prevent serious impairment

# Activity: Identifying relevant human rights

- Questions for discussion:
  - Who has rights in this scenario?
  - What HRA rights are relevant?
  - Are any relevant rights being limited?
  - Are the limitations reasonable?



# Reviewing conduct of public entities

- Legal proceedings (s 59)
  - No independent cause of action available
  - Must “piggy-back” onto another cause of action for unlawfulness (eg judicial review)
  - No entitlement to damages
- Human rights complaints – model of dispute resolution

EM: “The regulatory model for the Bill favours discussion, awareness raising and education about human rights”

# Queensland Human Rights Commission (Part 4)

- Functions (s 61)
  - Empowered to deal with human rights complaints
  - Referral by A-G to review the effect of laws on human rights
  - Review policies, procedures and services of public entities
  - Human rights education role
- Prepare annual reports on the operation of the HRA (s 91) – to be tabled in parliament within 6 sitting days



# Human rights complaints

- Complaint about an alleged violation of section 58(1) by a public entity
  - May be made by an affected individual or an agent of the individual
  - At least 45 days after a complaint has been made to the public entity where there has been no/inadequate response (s 65) (unless “exceptional circumstances” apply)
  - Must be written (s 67)
  - Interaction with other complaints processes –
    - Ombudsman
    - Health Ombudsman
    - Crime and Corruption Commission
    - Information Commissioner
- May deal with the complaint or refer complaint to the QHRC

# Responding to human rights complaints

- QHRC has a wide range of options –
  - Make preliminary inquiries
  - Refuse complaint, or defer
  - Refer to other entities, including NDIS Commissioner
  - Deal with the complaint as an anti-discrimination complaint with the consent of the complainant (s 75)
  - Accept the complaint

# Dealing with human rights complaints

- Commissioner may:
  - take “reasonable action”
  - ask for submissions or further information
  - discuss the complaint with the complainant and respondent
  - conduct a conciliation conference under subdivision 4
- Commissioner must prepare a report about the complaint with details of action the respondent should take (s 88)

# Activity: Using the HRA in practice

- Questions for discussion:
  - Is there a public entity involved?
  - What obligations does the public entity have?  
Have they complied with their obligations?
  - If not, what action could you take?



# Other provisions

- Reviews –
  - 4 years – consider whether other human rights should be included, legal proceedings, Corrections Act and Youth Justice Act
  - 8 years
- Reporting requirements for public entities reporting under Financial Accountability Act – actions taken to further the objects of the HRA
- HRA does not affect:
  - Abortion laws
  - Native title rights and interests
- Consequential amendments, including to Corrective Services Act and Youth Justice Act

# Further information and resources

- Human Rights Law Centre: [www.hrlc.org.au](http://www.hrlc.org.au)
- Victoria
  - Victorian Equal Opportunity and Human Rights Commission  
[www.humanrightscommission.vic.gov.au](http://www.humanrightscommission.vic.gov.au)
- ACT
  - <http://acthra.anu.edu.au/>
  - <http://www.hro.act.gov.au/index.html>
- UK – Human Rights Act 1998
  - <http://www.dca.gov.uk/peoplesrights.htm>
  - <http://www.yourrights.org.uk/>
- International Jurisprudence
  - Bayefsky <http://www.bayefsky.com/docs.php/area/jurisprudence>
  - UN Treaty Body Database <http://www.unhchr.ch/tbs/doc.nsf>



# Further information and resources (cont)

- 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>
  - New Zealand – Bill of Rights Act 1990 <http://www.humanrights.net.nz/> and <http://www.hrc.co.nz/home/default.php>
  - Canada – Charter of Rights and Freedoms 1982 <http://www.canlii.org/ca/com/chart/index.html>

# Recap: Key messages

- You are already familiar and work with many human rights laws and concepts
- HRA enshrines basic principles of good policy, decision making and service delivery
- However, HRA is a relatively weak form of statutory protection – ‘dialogue’ model aimed at prevention, not litigation
- Need to rely on more than the ‘allure’ of human rights – evidence and sophisticated legal analysis required
- Know the opportunities and know your audience (and the limitations of human rights)
- Seek further guidance and assistance where needed





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Legal Centres  
Queensland**

**Thank you.**

**Community Legal Centres Queensland Inc.**

PO Box 12102 George St, Brisbane QLD 4003

Tel: 07 3392 0092 ABN: 71 907 449 543

admin@communitylegalqld.org.au

**www.communitylegalqld.org.au**

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