



TOWNSVILLE
COMMUNITY
LAW

Identifying Human Rights Act 2019 Cases

Acknowledgement of Country

TCLS acknowledges the traditional custodians of the land on which we meet today and pays respects to elders past, present and emerging for they hold the memories, the tradition, the culture and hopes of Aboriginal and Torres Strait Islander peoples across the nation.

We extend our respect to the Aboriginal and Torres Strait Islander people who are present today.



Disclaimer

- The information provided in this presentation is for information only.
- It must not be relied on as legal advice.
- You should seek legal advice about your own particular circumstances.
- Law is current at March 2020

Why are we here?

- The *Human Rights Act 2019* (Qld) commenced on **1 January 2020**
- All individuals in **Queensland** have human rights (s.11)
- Those human rights are in **addition** to our existing rights (s.12)
- Lawyers and advocates have an **obligation** to advise their clients
- Recognising when and how human rights are **engaged** is critical
- **Taking steps to protect human rights (a topic for later)**



Professional Context

Australian Solicitors Conduct Rules:

4. *OTHER FUNDAMENTAL ETHICAL DUTIES*

4.1 A solicitor must also:

*4.1.1 act in the **best interests of a client** in any matter in which the solicitor represents the client;*

4.1.2 be honest and courteous in all dealings in the course of legal practice;

*4.1.3 deliver legal services **competently, diligently** and as promptly as reasonably possible;*

4.1.4 avoid any compromise to their integrity and professional independence; and

4.1.5 comply with these Rules and the law.



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Two sides of the same coin

- Our obligation to act in a client's best interests, to be competent and diligent is the flipside of being negligent or unprofessional



Achieving the HRA's objects

1. Requiring public entities to act and make decisions in a way compatible with human rights: [sec 4\(b\) HRA](#)
2. Requiring courts and tribunals to interpret statutory provisions, to the extent possible that is consistent with their purpose, in a way compatible with human rights: [sec 4\(f\) HRA](#)
3. Through human rights complaints: [sec 4\(i\) HRA](#)

* You need to recognise the Act's engagement to achieve the objects



Achieving the HRA's objects

- Recognising when human rights are involved
 - 23 human rights in the Act (ss.15-37)
- Recognising a public entity
 - various definitions (ss.9-10, 60)
- Recognising public entity conduct
 - act, make a decision or fail to consider (s.58)
- Recognising relevant Court proceedings (s.59)
- Understanding compatibility (s.8) and proportionality (s.13)



Identifying Cases

- It involves some 'detective work'
- Concentrate on the facts and details
- Note what the client says at intake
- Ensure accurate lead-in information
- Consider the client's documents
- The client's instructions in interview
- Use screening questions



Identifying Cases

- Sometimes we can't see the forest for the trees
- Look for the human rights angle first, be **methodical** each time
- Be **proactive**, and over time it becomes **intuitive**



The Facts & Details

Basic in information-gathering, rhetoric, argumentation or problem-solving, since classical antiquity: Aristotle, Hermagoras, St Thomas Aquinas, Cicero

The Elements of Circumstance

*I keep six honest serving-men
(They taught me all I knew);
Their names are What and Why and When
And How and Where and Who.*

Just So Stories - The Elephant's Child



Who: Public Entity

Queensland as a prefix or suffix as in Queensland Ambulance Service, Legal Aid Queensland

Public as in public agency, public service, public servant, public employee, public authority

Government as local government, state government, government owned corporation

Officer as in environmental officer, local government officer, public officer

Be Familiar with the operative provisions: ss. 9-10



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Public Entities (s.9)

- **Core public entities** are entities that fall within the definition of public entity in s.9
- **Functional public entities** are entities that fall within the definition of 'public entity' in section 9 only when they are performing certain functions.
- Includes Courts and Tribunals acting an an **administrative capacity**
 - ▶ The relevant distinction is between acting in an administrative capacity and acting in a judicial or legislative capacity in the public law sense, that is, by considering the legal character of the function in question: *PJB v Melbourne Health*; *Patrick's case* (2011) 39 VR 373
 - ▶ For Tribunals: see *Sabet v Medical Practitioners Board* (2008) 20 VR 414 and *Re Kracke and Mental Health Review Board* (2009) 29 VAR 1 and *Carwoode Pty Ltd v Cardinia SC (Red Dot)* [2008] VCAT 1334

Public Entities (s.9)

- The inclusion of functional public entities reflects the modern operation of the government, where non-government entities, including non-government organisations, private companies and government owned corporations, are engaged, in various ways, to deliver services to the public on behalf of the government or another public entity.
- An example of a functional public entity is a private company managing a prison, or a non-government organisation providing a public housing service.



Public Functions (s.10)

- Matters to be considered:
 - ▶ Conferred by statute
 - ▶ Connected to or identified with Government
 - ▶ Regulatory nature
 - ▶ Publicly funded
 - ▶ Government owned corporation
- The factors are not exhaustive and the existence of one or more of the listed factors, in respect of a particular entity, is not determinative



Public Functions (s.10)

- Functions of public nature:
 - Public **Education** (Tertiary and Vocational)
 - **Emergency** services
 - Public **health** services
 - Public **disability** services
 - Public **transport**
 - **Housing** services
 - **Corrective** services facility or place of **detention**



Government Entities (s.9(1)(a))

- A **government entity** under the *Public Service Act 2008* (Qld)

24 What is a government entity

(1) An entity is a "**government entity**" if it is—

- (a) a department or part of a department; or
- (b) a public service office or part of a public service office; or
- (c) an agency, authority, commission, corporation, instrumentality, office, or other entity, established under an Act or under State authorisation for a public or State purpose; or
- (d) a part of an entity mentioned in paragraph (c) ; or
- (e) another entity, or part of another entity, declared under a regulation to be a government entity; or
- (f) a registry or other administrative office of a court of the State of any jurisdiction.



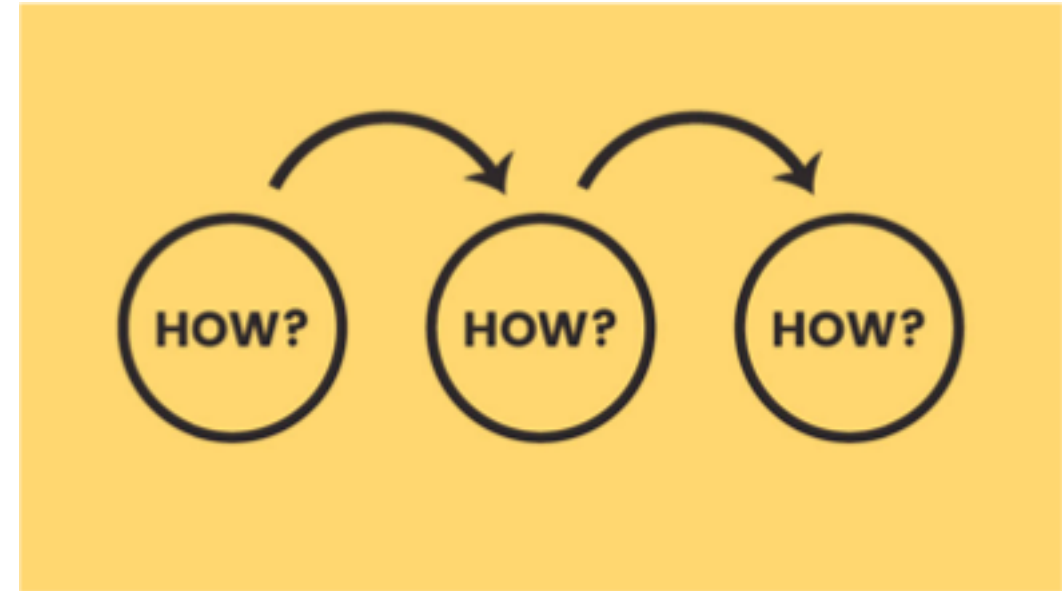
The Conduct

- **What** is the decision is being made or was made
- **When** date was it made or effective
 - S.65(1)(b) – 45 days time limit for complaints to QHRC
 - S.70(1)(d) – 1 year limitation from alleged contravention
 - S.75 Dealt with as discrimination complaint
- **Where** (jurisdictional issues)



How: Proper Consideration

- **How** is to act and make decisions compatible, give consideration to relevant human rights (s.58)
- Exceptions:
 - Application of statutory provisions
 - Accordance with religious doctrine
 - Was of a private nature
- Consideration:
 - identify relevant rights and
 - consider compatibility



Why: Compatibility s.8

- Compatible with human rights is a unifying concept which is central to many provisions (Expl. Notes)
- Compatible means it does not limit a human right or that any limitation is reasonable and justifiable (s.8)
- The test is set out in section 13



Why: Proportionality s.13

- Justification requires a proportionality test:
 - Factors: s.13(2)
 - The balance between matters in s.13(2)(e)-(f)
- see *Momcilovic v The Queen* (2011) 245 CLR 1; [2011] HCA 34 [22] (French CJ); *R v Oakes* [1986] 1 SCR 103 [67].



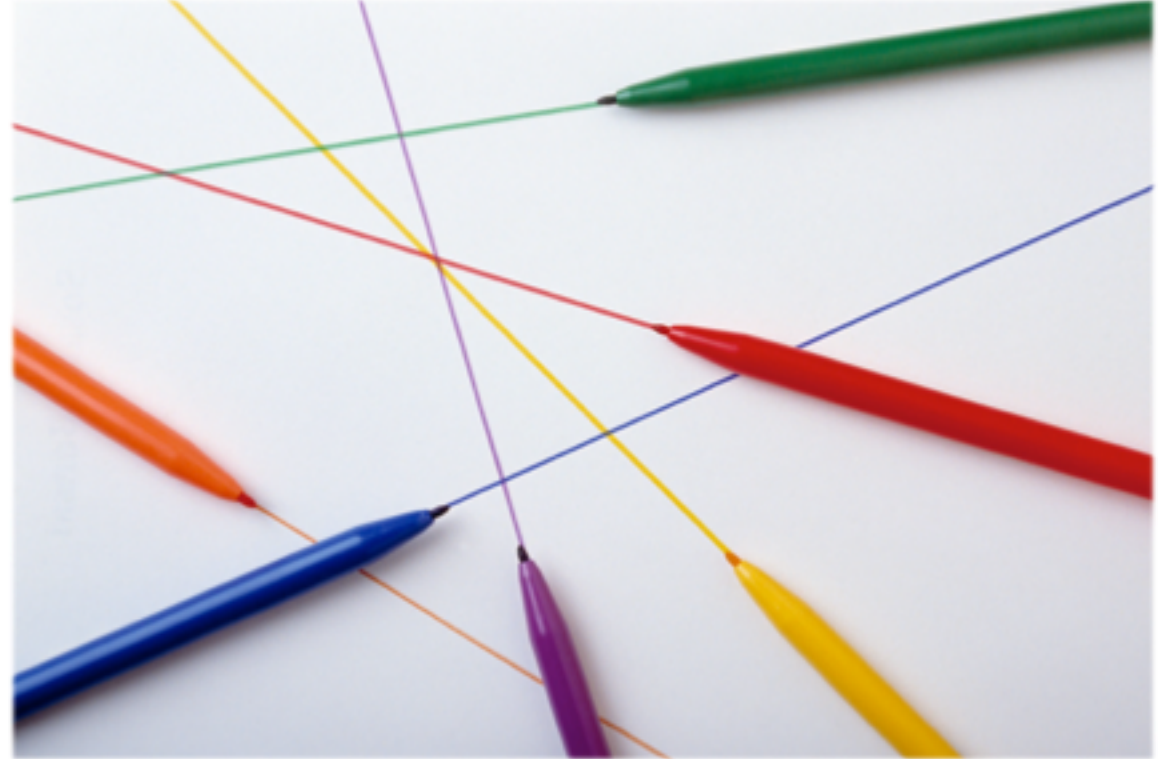
R v Oakes on Proportionality

- This involves a form of proportionality test involving three important components.
- To begin, the measures must be fair and not arbitrary, carefully designed to achieve the objective in question and rationally connected to that objective.
- In addition, the means should impair the right in question as little as possible.
- Lastly, there must be a proportionality between the effects of the limiting measure and the objective -- the more severe the deleterious effects of a measure, the more important the objective must be.

Per Dickson C.J. and Chouinard, Lamer, Wilson and Le Dain JJ

Intersectionality

- Human rights are indivisible, interrelated and interdependent
- The improvement of one right facilitates advancement of the others
- Some human rights are enablers or multipliers
 - education
 - health
 - access to justice



Example: Equality (Sec 15)

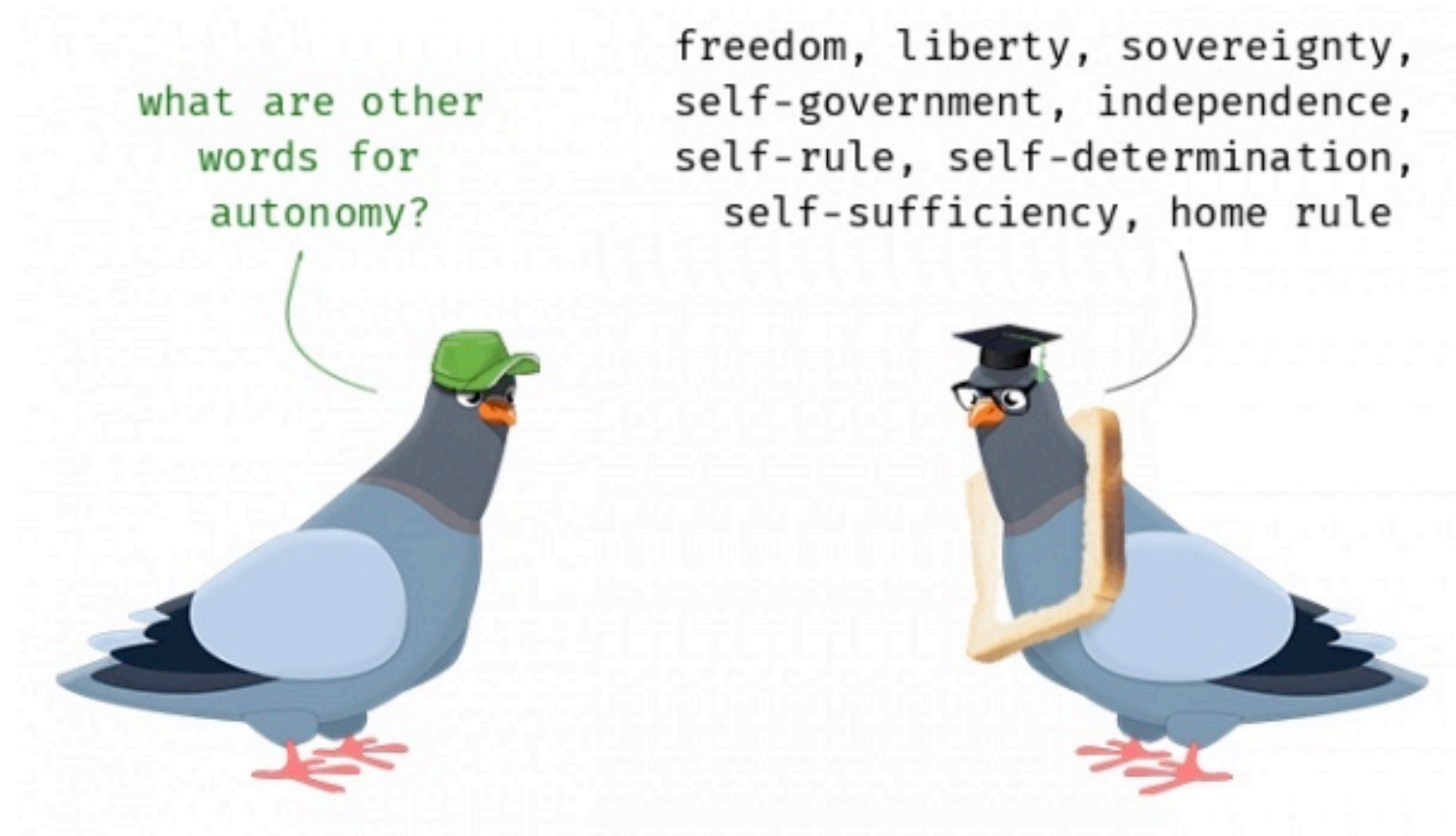
Recognition and equality before the law (sec.15)

- recognition as a person
- enjoy human rights without discrimination
- equal before the law and equal protection of the law
- equal and effective protection against discrimination
- See for example *Ghaidan v Godin-Mendoza* [2004] UKHL 30



Rights (Section 15)

- autonomy ...



Horizon Housing Company v Ross

[13] In coming to a decision in this case, I have considered the provisions of the Human Rights Act 2019 and, insofar as human rights of the tenant are engaged on the facts of this case, having considered them, I find that they are lawfully limited by the valid and effective provisions of the Residential Tenancies and Rooming Accommodation Act 2008 in circumstances where the tenant is in ongoing breach of the lease in ever increasing amounts rental-wise in the respects to which I have referred.

- Adjudicator Alan Walsh

ADI v EGI [2020] QDC 13

- District Court was considering staying a decision of a Magistrate after an appeal against a dismissal of an application to vary a protection order. Human rights engaged included:
 - S.17 – Protection from torture and cruel, inhuman or degrading treatment
 - S.26 – Protection of families and children
 - S.31 – Fair Hearing
- Section 48 (interpretation) was also considered
- Stay was refused

Hobsons Bay City Council & Anor

Hobsons Bay City Council and Leisure Management Services ('LMS') applied for an exemption from the EO Act to conduct women-only swimming sessions and related programmes at the Bayfit Leisure Centre in North Altona (a facility managed by LMS on behalf of the Council).

- Deputy President McKenzie accepted that, for the purposes of the proposal, the Council and LMS were public authorities. She also held that VCAT is a public authority when determining exemption applications and must therefore make a human rights compatible determination.

COVID-19

Boris Johnson took the extraordinary step of ordering pubs, clubs and restaurants across the UK to close on Friday.

Announcing the decision in the fight against the coronavirus, the prime minister said that he realised it went against what he called “the inalienable free-born right of people born in England to go to the pub”.



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COVID-19

“For someone like myself, for whom freedom of travel and movement were hard-won rights,” she said, “such restrictions can only be justified when they are absolutely necessary.”

19. Freedom of movement

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.



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COVID-19

- Each has different but related human rights implications ...
 - ▶ Social distancing means minimising social contact and may include self-quarantine measures.
 - ▶ Self-quarantine is for people who are well but at risk of having the coronavirus (COVID-19).
- HRA engaged include ss.15, 16, 17, 19, 20, 22, 23, 25, 26, 27, 28, 29, 30, 36, 37!

What's the difference?

Social Distancing

Isolation and

Quarantine



#StopTheSpread
Source: www.npr.org



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COVID-19

Some excellent work is already being done by the community legal centre sector:

<https://caxton.org.au/new-covid-19-legal-information/>



New COVID-19 legal information

Posted on March 23, 2020



Caxton Legal Centre has produced two new legal information factsheets related to COVID-19:

- [COVID-19 and the legal consequences of failing to self-quarantine](#)
- [COVID-19 and family law issues.](#)

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COVID-19

Impact on imprisoned people:

- Prison welfare and advocacy groups say suspension of family visits will cause immense distress to prisoners and their families and will worsen the impact of the COVID-19 pandemic.
- People who don't need to be imprisoned should be released
- Elderly and immunocompromised prisoners should be given medical leave
- Health and welfare services must be urgently improved

Coalition for the Human Rights of Imprisoned People in Australia

Sisters Inside Inc
Flat Out Inc
Fitzroy Legal Service Inc
Prisoners Legal Service (QLD) Inc

Suspending family visits will not prevent COVID-19

Prison welfare and advocacy groups say suspension of family visits will cause immense distress to prisoners and their families and will worsen the impact of the COVID-19 pandemic.

A coalition of groups including Sisters Inside in QLD, Flat Out in Victoria and legal services including Fitzroy Legal Service and Prisoners Legal Service QLD are calling on Australian State and Territory governments to release prisoners who can be safely released and urgently improve prison health, medical and welfare services to prevent outbreaks.

Amanda George from Flat Out Inc, an advocacy and housing service for women leaving prison in Victoria says It is not a matter of if, but when, there will be an outbreak of COVID-19 in an Australian prison. But, she says, locking out visitors will not prevent it.

"Thousands of correctional staff, health care workers, contractors and others go in and out of prisons every day," she points out. "Family visitors are essential to the mental and physical health of prisoners."

Screenshot



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Social security and welfare measures:

- Gaps in coverage
- Impact of mutual obligation and program of support requirements on personal health and safety
- Need for increased advocacy funding
- Impact on service system

ECONOMIC JUSTICE AUSTRALIA'S RESPONSE TO THE GOVERNMENT'S CORONAVIRUS ECONOMIC MEASURES

MARCH 23, 2020 / [LATEST NEWS](#), [MEDIA RELEASE](#), [NEWS & MEDIA](#)

Economic Justice Australia welcomes the entire range of social security and income support measures introduced by the Government yesterday (22 March 2020) in particularly the effective doubling of the rate of Newstart (now called JobSeeker Payment).

We make a number of recommendations for improving the effectiveness of the response, drawing on the expertise of our member community legal centres.

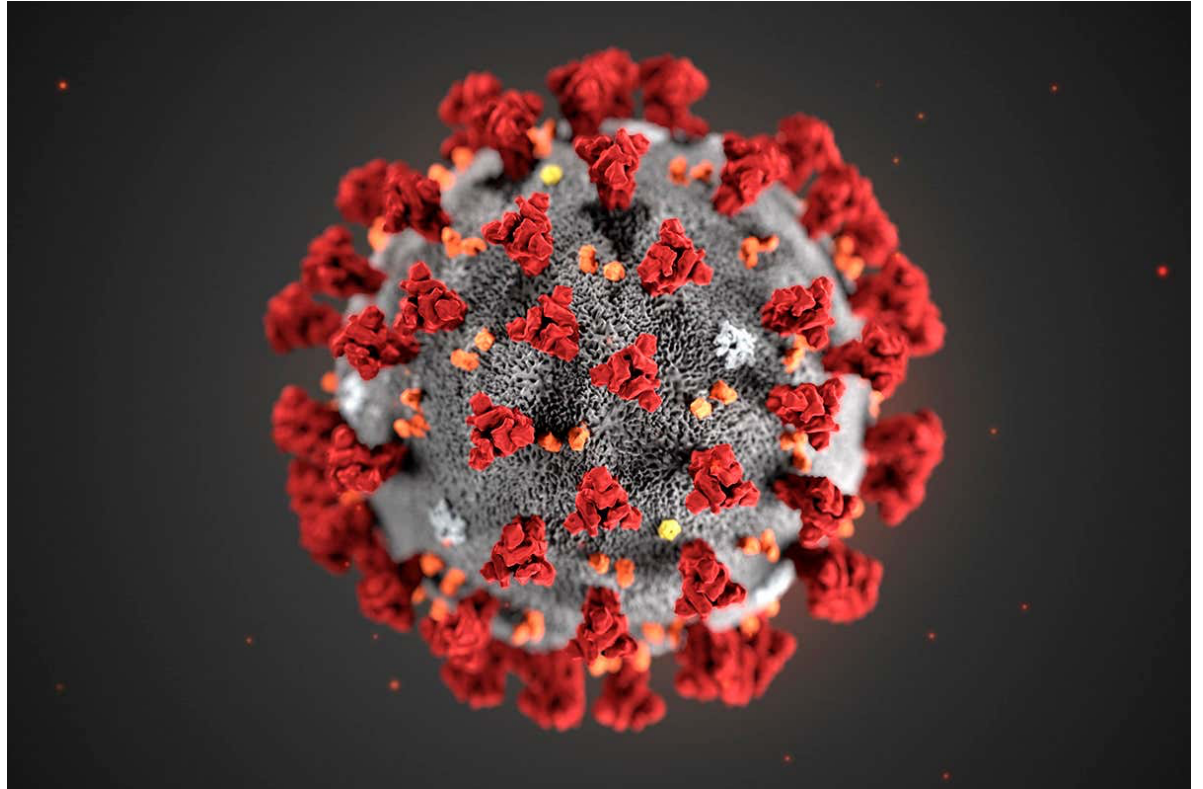
They are:

1. Extend the Coronavirus supplement to vulnerable groups not covered
2. Suspend all mutual obligations
3. Give community legal centres enough funding to effectively respond to the increase in demand for legal advice on Centrelink payments



COVID-19

- Equality before the law
- Right to life (viral mortality)
- Freedom of movement (quarantine)
- Freedom of thought conscience, religion and belief
- Peaceful assembly and freedom of association (social distancing)
- Taking part in public life (closures)
- Protection of families and children (police protection)



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COVID-19

- Right to liberty and security of person (quarantine)
- Humane treatment when deprived of liberty (MH hearings)
- Fair hearing (criminal process)
- Rights in criminal proceedings (expedition)
- Children in criminal process (expedition)
- Right to education (limitations)
- Right to health services (testing, treatment)



COVID-19

- Protect free expression and ensure access to critical information
- Ensure quarantines, lockdowns and travel bans comply with human rights norms
- Protect people in custody and institutions
- Ensure protection of healthy workers
- Ensure marginalised populations can access health care without discrimination
- Promote access to water and sanitation
- Target economic relief to low-wage workers

HUMAN
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Questions?

Feedback please