

Human Rights at the MHRT:

advising and assisting people under involuntary orders

28 October 2020

Rachel Sloper



LawRight

Access | Justice

Acknowledgement of country

I acknowledge the Turrbal and Yugara peoples as the First Nations owners of the land we are recording on today. I pay my respects to their elders past, present and emerging.



Topics we will cover

- MHRT in its administrative function: a public entity with human rights obligations
- Key rights in Treatment Authority and Forensic Order hearings
- Interpreting the MHA in light of HRA – does it change anything?
- Confidentiality Orders and Examination Authorities: held without a person's knowledge
- Key rights in discussions with treating teams and other stakeholders
- First Nations clients



Topics we will not cover

- Basic structure of the MHA, the HRA, and how a person becomes an involuntary patient
- Mental health law issues outside the MHA
- MHA issues outside the hearings process (eg EEAs, treatment complaints, second opinions, MHC appeals, having minor criminal charges dismissed by a Magistrate on mental health grounds)
- Complying with the HRA for yourself as a public entity



Basic help for MHA and MHRT

- [Basic structure of the MHA](#)
- [How a person becomes an involuntary patient](#) (TA)
- Client/patient focused [treatment authorities explainer](#)
- Free statutory representation– [when](#)? What a client can expect from their appointed lawyer in these cases: [lawyer focused info](#); [client focused info](#)
- Tips for MHRT hearings advocacy for people representing themselves: [QAI](#); [LawRight](#) – NB: currently being updated
- Tips for [lawyers new to representing clients with mental health law issues](#)



Basic help for HRA and MHA

- Explainer of [public entity HRA 2019 compliance requirements](#)
- HRA 2019 case notes: by [QHRC](#); by [UQ & Caxton Legal Centre](#)
- [Victorian Charter case notes](#) by Judicial College Victoria
- Other Australian and international HR case notes: [Human Rights Legal Centre](#)
- [Mental health law issues outside the MHA](#)



Human rights: built into the MHA

Section 3: Main objectives of the Act

(2) The main objects are to be achieved in a way that—

(a) **safeguards the rights of persons; and**

(b) **is the least restrictive of the rights and liberties of a person who has a mental illness; and**

(c) **promotes the recovery of a person who has a mental illness, and the person's ability to live in the community, without the need for involuntary treatment and care.**



Human rights: built into the MHA

Section 3: Main objectives of the Act

(3) For subsection (2)(b), **a way is the least restrictive** of the rights and liberties of a person who has a mental illness if the way **adversely affects the person's rights and liberties only to the extent required** to protect the person's safety and welfare or the safety of others.



Human rights: built into the MHA

Section 5: Principles for persons with mental illness

The following principles apply to the administration of this Act in relation to a person who has, or may have, a mental illness—

(a) Same human rights

- the **right of all persons to the same basic human rights must be recognised and taken into account**
- a person's right to respect for his or her human worth and dignity as an individual must be recognised and taken into account



Human rights: built into the MHA

Section 7: Regard to principles

In performing a function or **exercising a power under this Act**, a **person is to have regard to the principles** mentioned in sections 5 and 6.

- Wider than HRA 2019: binds ‘all persons’ (s 4) given powers and responsibilities under the MHA 2016
- In practice: very difficult to get traction on submissions made on this basis



Human rights: built into the MHA

- Modifiers of rights of persons under involuntary treatment also built in:
 - Eg Section 3 (3) ‘least restrictive’ = ‘the way **adversely affects the person’s rights and liberties only to the extent required to protect the person’s safety and welfare or the safety of others.**’
 - Three objects of the Act – wellbeing of a person with mental illness explicitly given equal weighting with community safety and diversion from criminal justice



What difference does the HRA make to the MHA?

- Clarity for public entity decision makers about how and when they must consider human rights, including rights already included in the MHA
 - Some evidence MHRT has taken this on board
- Greater transparency – more obvious if this process isn't followed
- Clarifying existing rights/adding new explicit rights
- New avenue (easier?) for complaints: Queensland Human Rights Commission



MHRT: a ‘public entity’

- Courts and tribunals not a ‘public entity’ unless exercising administrative power: s 9(4)(b)
- MHRT is obviously exercising administrative powers in administrative pre-hearing and post-hearing processes, eg
 - Day, time and location allocated for a hearing
 - Whether it makes interpreters available for a hearing
 - How a person is notified of the decision after a hearing
- ‘Public entity’ for these decisions



MHRT: a ‘public entity’

- MHRT acknowledges it and its ‘staff’ are a public entity: [1.0], [7.0], *Policy - Human Rights*
- ...but views MHRT Members when acting as a panel as a ‘court or tribunal’ under HRA 2019 s 2(a) interpreting statute, as distinct from ‘staff’ who are a public entity: [4.0], [6.0] *Policy - Human Rights*
- Our view: MHRT is exercising administrative powers when it hears reviews and applications



MHRT: a ‘public entity’

- Queensland Court of Appeal: MHRT is acting administratively when it makes an Examination Authority, because it reduces the person’s legal rights and confers legal rights on others (doctors): *MDF v Central Queensland NAMHS* [2020] QCA 108

“In short, upon the issue of an examination authority, a doctor or authorised mental health practitioner is empowered by the Act to engage in conduct which otherwise would amount to common law wrongs actionable by the person the subject of the authority and in some circumstances criminal offences.”

[40]



MHRT: a ‘public entity’

- Same reasoning can be applied to decisions on reviews of TAs, FOs, etc, and making of a TSO/TA/CO by Tribunal; authorisation to give ECT
- Victoria:
 - *Patrick's Case* (*PJB v Melbourne Health* (2011) 39 VR 373) – VCAT acts administratively both in making and reviewing guardianship/administration orders
 - *Kracke v Mental Health Review Board* [2009] VCAT 646 – merits reviews of a treatment order are administrative; periodic reviews are administrative



MHRT: a ‘public entity’

- Same reasoning can be applied to MHRT hearing ‘appeals’ from the Office of the Chief Psychiatrist or hospital administrator
- QCAT has directly adopted the *Patrick’s Case* test in deciding whether it is making administrative or judicial decisions for HRA 2019: *Storch v Director-General, Department of Justice and Attorney-General* [2020] QCAT 152.



MHRT: a ‘public entity’

- This means decisions before, after and during a hearing, as well as the decision in a hearing itself, must be compatible with the HRA.
- *Innes v Electoral Commission of Queensland & Anor (No 2) [2020] QSC 293 at [266]* – cited *PJB v Melbourne Health* regarding what is ‘proper consideration’ of human rights by a public entity



A word on COVID-19

- Used by public agencies over last 6+ months as reason why limitations on all kinds of rights were/are ‘reasonable’ and ‘proportionate’, but often as a blanket limitation rather than considering individual circumstances
- *COVID-19 Emergency Response Act 2020* (Qld) s 15: MHRT can decide certain statutory time limits won’t apply.



A word on COVID-19

- Overrides all other legislation **other than HRA 2019**: s 4. In other words, not sufficient of itself under s 58(2) of HRA to excuse acts, decisions or decision making that is not compatible with human rights.
- Expires Dec 31 2020: s 25.
- MHRT has published guidance on how it plans to use this:
[Policy - Modifying Timeframes in the COVID-19 Emergency Period.](#)



Key rights: before a TA/FO hearing

- President's decision to grant or refuse applicant review
- Setting down for hearing: eg
 - Location (Qld Health locations only; controls number of support persons)
 - Date eg known to Tribunal that the person has a court hearing
 - Time of day eg known to Tribunal that person's medication sedates until 12pm
- Notices and self report forms
- Requirement to submit evidence
- Application forms, website



Key rights: during a TA/FO hearing

- Admission of evidence; quality of evidence
- Facilitation of participation by person subject to the hearing
- Who is required to attend
- Who has the right to speak, and when
 - The patient goes first: right of reply after treating team speaks?
 - NSPs and support persons



Key rights: during a TA/FO hearing

- S 31 – right to have proceeding decided by a ‘competent, independent and impartial’ tribunal after a ‘fair and public’ hearing; persons can be excluded ‘in the public interest or the interests of justice’. ‘All judgements or decisions’ to be made ‘publicly available’
 - SOR 28: No limitation because the patient attended, had a lawyer and NSP attend, received all the written evidence, and the Tribunal was legally constituted
 - SOR 35: Limited because the hearing is not public; but complying would limit s 25. Not limited because given a lawyer and given the right to participate, though did not attend.



Key rights: decisions resolving the TA/FO hearing

- Adjournments
- Whether to order a Tribunal ordered review or independent examination
- Evidentiary decisions:
 - requiring a CFOS review where a person's risk has decreased
 - weight given to cultural needs in a treatment plan/appropriate order
 - requiring ARMC approval
 - length of time on an order
- Conditions:
 - High standard of 'proof'
 - Maintaining double restriction on illegal acts
 - Maintaining restriction on legal behaviour
 - Limited range of customisation



Key rights: decisions resolving the TA/FO hearing

- S 15 - right to enjoy human rights, and to the protection of the law, without discrimination
 - SOR: Not limited: no evidence of discrimination or lack of recognition as a person before the law
 - Note *Patrick's Case*: Acts designed to deal with persons with disability or mental illness are often inherently discriminatory, but this does not relieve a decision maker of the obligation to still consider the issue of discrimination in a particular person's case.
- S 17(c) – not 'subjected to medical or scientific experimentation or treatment without the person's full, free and informed consent'



Key rights: decisions resolving the TA/FO hearing

- S 19 – freedom of movement within, and into and out of Qld; ‘freedom to choose where to live’
 - TA SOR stating community category TA not limiting this right because it ‘does not restrict his movement unduly’
 - Cf an FO SOR, accepting that a approved residence condition ‘does limit the s 19 right, but it was a reasonable and proportionate limitation’ in the individual’s circumstances
- S 21 – right to ‘hold an opinion without interference’; to ‘freedom of expression which includes the freedom to seek, receive and impart information and ideas’



Key rights: decisions resolving the TA/FO hearing

- S 25 – (a) right ‘not to have the person’s privacy, family, home or correspondence unlawfully or arbitrarily interfered with’; (b) ‘not to have the person’s reputation unlawfully attacked’
 - SOR: Not applicable because no evidence that this had actually happened
 - SOR: Potentially limited – but no explanation as to why
- S 26 – families ‘entitled to be protected by society and the State’; right of children to ‘the protection that is needed’ that is ‘in the child’s best interests’



Key rights: decisions resolving the TA/FO hearing

- S 28 – ‘Aboriginal peoples and Torres Strait Islander peoples must not be denied the right, with other members of their community’, to exercise cultural rights, not be ‘subjected to forced assimilation or destruction of their culture’
 - SOR: Refusal to change conditions for Aboriginal woman’s contact with her children in line with her request; limitation justified due to risk to children and their right to protection under s 26
- S 30 – when deprived of liberty a person ‘must be treated with humanity’
 - SOR: Interpretation of deprivation of liberty extending only to when an involuntary inpatient



The law that the panel is applying

- HRA impacts statutory interpretation of MHA: s 48
- Qld has (so far) adopted the established Commonwealth position from *Momcilovic v The Queen* (2011) 245 CLR 1 echoed in Victorian cases: *Innes v Electoral Commission of Queensland & Anor (No 2)* [2020] QSC 293



The law that the panel is applying

- No cases directly addressing any impacts of HRA on ambiguities in MHA - yet
- Directions from other Qld HRA 2019 caselaw
- Directions from Victorian Charter caselaw



What areas of the MHA could be up for re-interpretation?

- Possible areas for argument about how the HRA should modify interpretation of the MHA
 - ‘necessary to protect the community’
 - ‘best interests’
 - ‘least restrictive’



How this can be raised at MHRT

- Legal submissions – submit in writing at least 3 clear days before the hearing
- MHA re: question of law can be referred by MHRT to MHC
- MHC appeals
- Notifying the A-G and QHRC



Key rights: after the TA/FO hearing

- Reserving decisions – time limits
- Appeal rights; asking for a stay
- Statements of Reasons
 - written in legal/formal/complex language
 - written in English
 - so far, often show ‘tick box’ approach to HRA



Key rights: gathering evidence

- NDIS providers
- Family (what do you mean you can't talk to me?)
- Treating teams, caseworkers, Forensic Liaison Officers, Indigenous Mental Health Workers (and exclusions of IMHWs), general health practitioners, private psychologists



Secret hearings and secret information: COs and EAs

- Examination authorities
- Confidentiality orders
- Commonalities: no notice to the person, cannot attend, restricted right to reasons
- High risk for improper rights restrictions



Secret hearings and secret information: COs and EAs

- Role of advocates and lawyers in protecting rights in these contexts
- Key rights to consider in advocacy
- What can I do if there is nobody to give instructions and I am concerned about a rights breach?



Application: rights for First Nations people

- Communication: with lawyers, with the Tribunal
- Access to family and appropriate cultural support, especially inpatients
- Inpatient vs community: perceived adequacy of small town health services blocking leave, community living
- Children on Treatment Authorities
- Applications of cultural understanding to medical evidence for MHA criteria



Practical tips

- [MHRT complaints policy](#) – note timeframe for applying for internal review. Timeframes for response to complainant decided by staff based on their perception of complaint ‘complexity’
 - may refuse to investigate a complaint if the complainant is considered ‘abusive, vexatious or unreasonable’
 - No Human Rights Act complaints to MHRT in 2019-20
- Hearings usually set down 4 weeks in advance (other than ECT/emergency ECT) and difficult to move – contact MHRT registry **early** if a procedural listing issue needs raising



Practical tips

- Asking for information and records:
 - Difficulties with IP/RTI Acts and MHA 2016: exemptions for ‘not in public interest’, especially where ‘detrimental to mental health of wellbeing of a person’
 - *MDF v Central Queensland Network AMHS* may help you here
- Victorian experience – Charter most useful in getting the public entity to change behaviour at early stage or before decisions actually get made
- May be better off working on the evidence from Queensland Health and/or private health professionals to achieve stronger evidence at next hearing



I have a case and I need help!

- Niche area, small number of lawyers, 14,600+ MHRT hearings in 2019/20: practitioners are almost always at capacity. **Please have realistic expectations for referrals and guidance**
- Web based referral: <https://mhlawqld.com.au/find-help/>
- Fee paying: very limited private lawyers and barristers. Try [Disability Law Qld](#) or approaching a large criminal firm
- HRA: Caxton Legal Centre and Townsville CLC: special interest (don't have specialty in MHA, but depending on the issue this may not matter)



I have a case and I need help!

- CLCs and others with lawyers who specialise in MHA and do small amounts of casework:
 - LAQ and QAI: largest, state wide
 - LawRight
 - Cairns
 - Mackay
 - Hub Legal
 - Gold Coast
 - ATSILS offices – Brisbane



Questions

