THE UNIVERSITY OF QUEENSLAND
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CREATE CHANGE

Access to health services in the COVID-19 era: a review of the key right to health challenges (& enablers) in Queensland

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Community Legal Centres Queensland (CLCQ) Thursday 26 November 2020

Assumed Knowledge

- **1 January 2020: *Human Rights Act 2019 (QLD)* entered into force**
- **29 January 2020**: Qld's Minister for Health & Minister for Ambulance Services made an order declaring a Public Health Emergency due to COVID-19 under the ***Public Health Act 2005 (QLD)***
- **Qld's Public Health Emergency has been extended to respond to COVID-19 and ends on 31 December 2020**. Further Public Health Emergency declarations may be made for further periods of 90 days if the public health risk continues
- A Public Health Emergency declaration gives the Qld Chief Health Officer broad (& new) powers to assist in combatting the COVID-19 outbreak in the community by:
  - restricting people's movement;
  - preventing people from entering certain premises;
  - requiring people to stay at certain premises;
  - requiring certain premises to open, close or limit access;
  - restricting contact between people; and
  - providing any other directions the Queensland Chief Health Officer thinks are necessary to protect public health.

Caveats

- The views expressed in this presentation are my own & should not be viewed as legal advice
- Focus = Queensland
  - Intersection with Federal law
  - Intersection with international law
- Mental health
  - *"right to the enjoyment of the highest attainable standard of physical and **mental** health"* (right to health)

Presentation Content

1. Significance of section 37 *Human Rights Act 2019 (Qld)* in the COVID-19 era
2. Parliamentary Inquiry into Qld Government response to COVID-19 (Interim report, Sep 2020)
3. Section 37(1) "right to access health services **without discrimination**" - *Non-discriminatory access to health care & other socio-economic services during PH emergencies and/or on account of a COVID-19 diagnosis (real or imputed)*

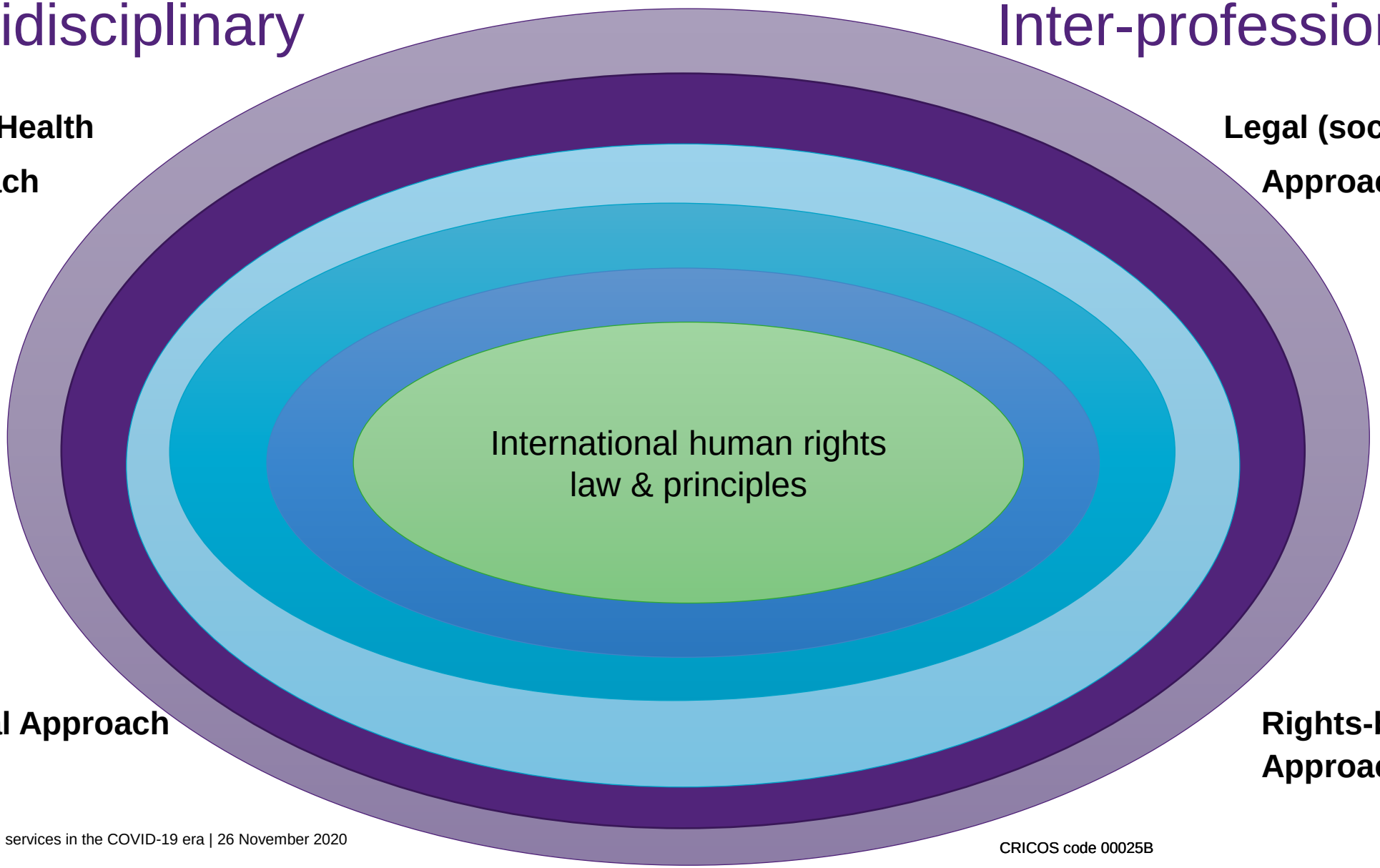
CRICOS code 00025B

Multidisciplinary

Inter-professional

Public Health Approach

Legal (socio-legal) Approach



Cultural Approach

Rights-based Approach

1. *Section 37 Human Rights Act (2019) (Qld)*

Key points

section 37 *Human Rights Act 2019 (Qld)* [HRAQ]

Division 3 Economic, social and cultural rights

36 Right to education

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

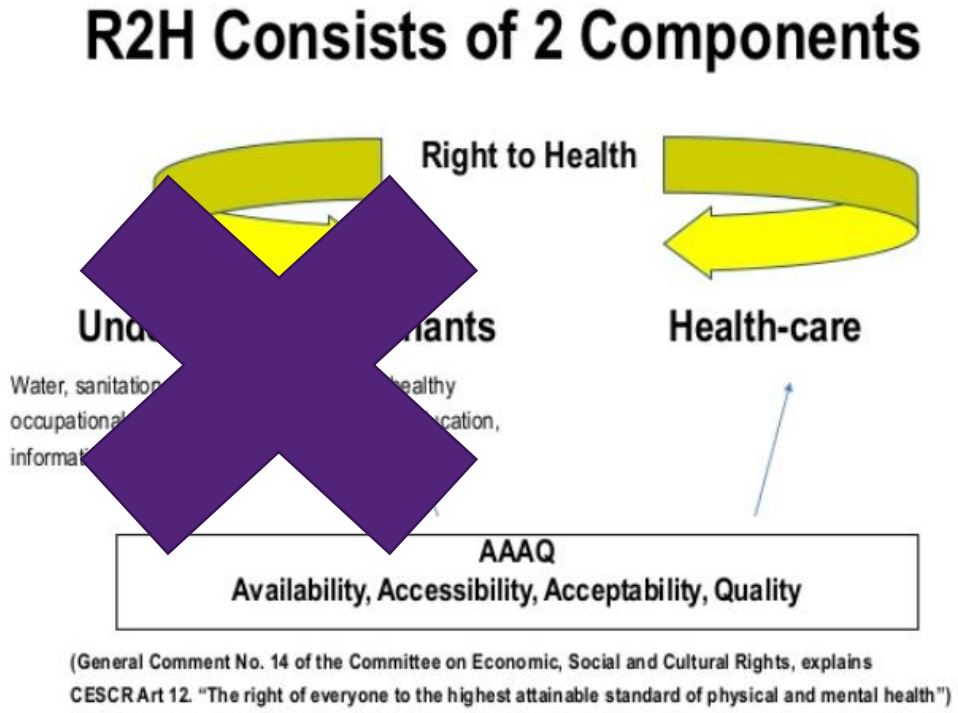
(2) Every person has the right to have access, based on the person's abilities, to further vocational education and training that is equally accessible to all.

37 Right to health services

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

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

Interpreting Section 37 - Right to access health services



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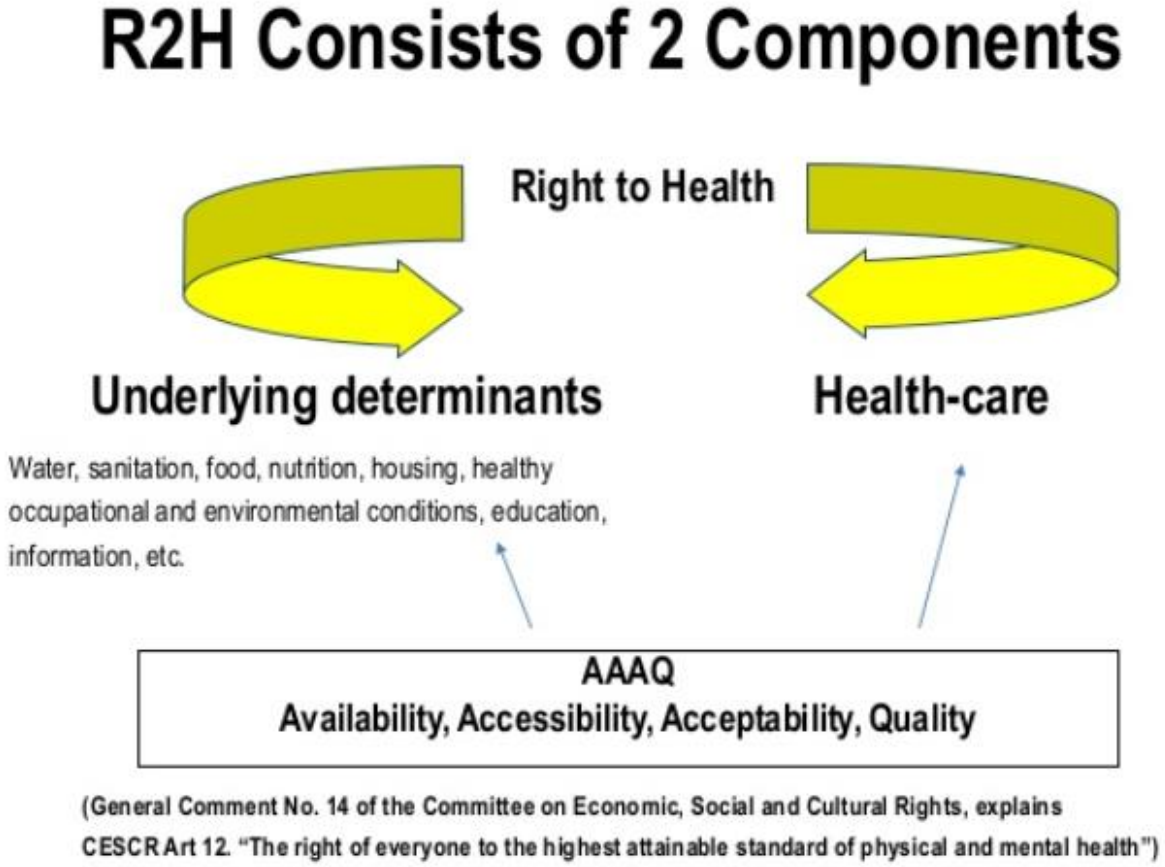
Human Rights Bill 2018 – Explanatory Notes (EN)

Explanatory Note (page 28)

"This clause [Clause 37] is modelled on article 12 of the ICESCR. This clause provides certain rights in relation to health services and is **not intended to encompass rights in relation to underlying determinants of health**, **such as food and water, social security, housing and environmental factors**"

- Right to Education (section 36)
- Cultural Rights (sections 27 & 28)
- Property Rights (section 24)
- Right to Life (section 16)

A “limited” right? A public health reading of the Act suggests not…



PERSPECTIVES VOLUME 213

Queensland's new Human Rights Act and the right to access health services

Claire E Brolan

Med J Aust 2020; 213 (4): . || doi: 10.5694/mja2.50558
Published online: 30 March 2020

HHR Health and Human Rights Journal

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FEBRUARY 3, 2020

Celebrating 25 years: From Aspiration to Reality, An Australian Postscript

Claire E Brolan

Congratulations to *Health and Human Rights* on its 25th anniversary from Queensland, Australia. In 2010 I read Jonathan Mann's article, "Health and Human Rights: If Not Now, When?", published in *Health and Human Rights* in 1997, and republished in the *American Journal of Public Health* in 2006.[1] Therein, Mann identified that in the public health and human rights fields, "we are creating,

Human rights *law* vs human rights *policy & principles*

Examples of Australian healthcare service charters that promote human rights

Charter of Children's and Young People's Rights in Healthcare Services in Australia.

CHILDREN'S HOSPITALS AUSTRALASIA

association for the wellbeing of children in healthcare

Forman et al (2019) Global health, human rights, and the law. *The Lancet* 394:1987

Global health, human rights, and the law

As educators in health and human rights, we were thrilled to see the recommendation in the *Lancet* Commission on the legal determinants of health[1] that "Both health graduates and law graduates should be introduced to the basics of international human rights law." Similar calls have been made by several health professional associations[2] and the truth and reconciliation commissions of various governments (eg, in the Truth and Reconciliation Commission of Canada[3]). Health practitioners are often closely connected to populations that are stigmatised or discriminated against, including sex workers, people who inject drugs, people with disabilities, and refugees. As a result

courses, practical training, and programmes into their curricula to ensure that health professionals graduate with basic skills in human rights law related to health.

LF receives funding for health and human rights research from the Canada Research Chair Program, the Canadian Institutes of Health Research, and through her employment as an Associate Professor at the Dalla Lana School of Public Health, University of Toronto. KHK receives funding that supports research related to health and human rights from the Canadian Institute for Advanced Research, the Canadian Foundation for Legal Research, and through her employment as Assistant Professor within the Human Rights Program at Global College, University of Winnipeg. CEB receives funding for health and human rights research from the Canadian Foundation for Legal Research and as part of her University of Queensland Research Development Fellowship Award, and has run paid workshops on the right to health that were open to Queensland policy makers, civil society, lawyers, and the private sector.

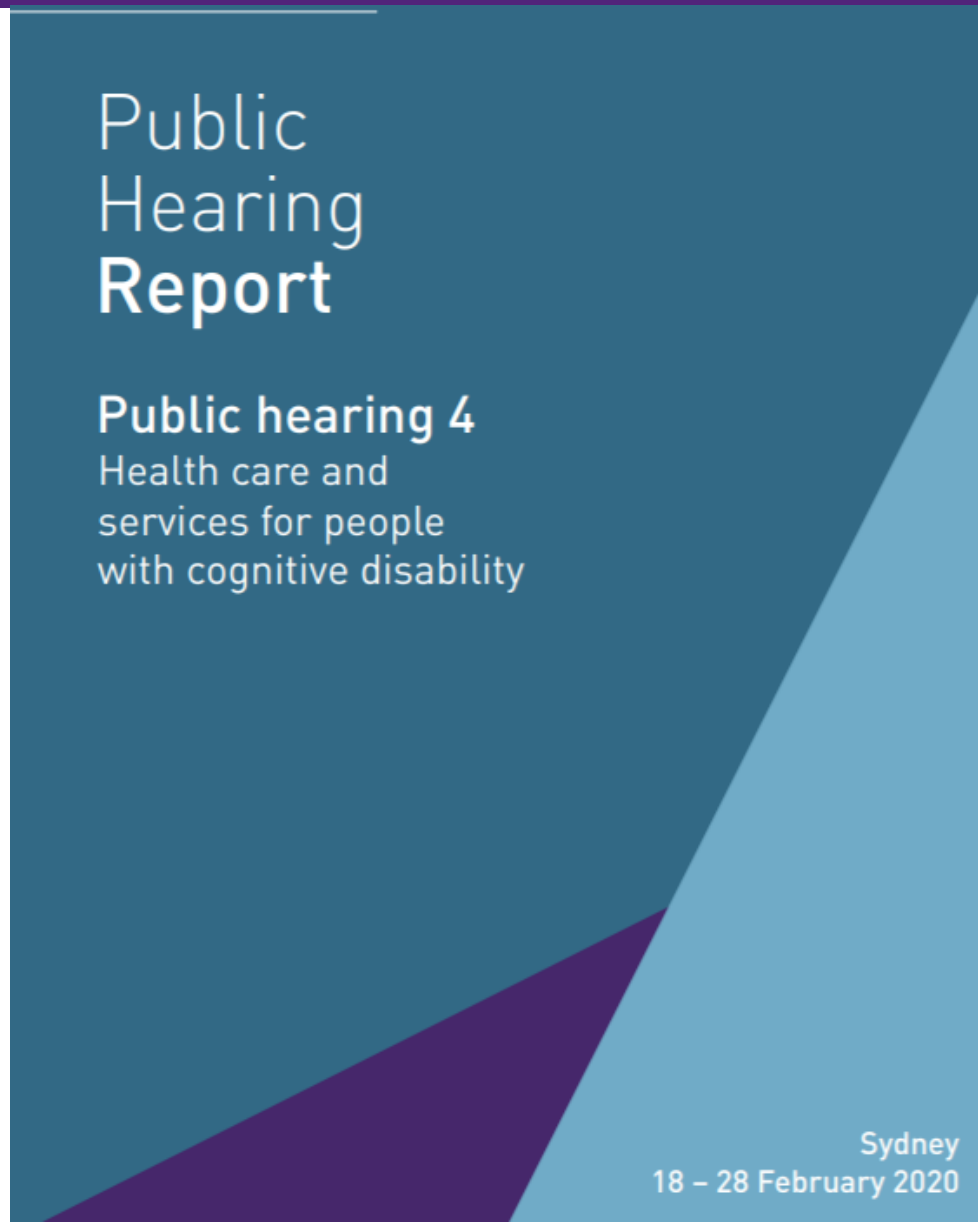
*Lisa Forman, Claire E Brolan, Kristi Heather Kenyon

Necessity of truth-telling

Royal Commission into Violence, Abuse, Neglect & Exploitation of People with Disability

Report publication date: 20 October 2020

https://disability.royalcommission.gov.au



Necessity of truth-telling

Chelsea J Bond, Lisa J Whop, David Singh & Helena Kajlich (2020)

Medical Journal of Australia 213 (6):248-250

Published online: 17 August 2020

Perspectives

"Now we say Black Lives Matter but ... the fact of the matter is, we just Black matter to them"[1]

If Black lives matter we need to be prepared to examine and address racial violence within the Australian health system

My name is Kevin Yow Yeh and today I march for every Black death in custody but I especially march for my grandfather Kevin Yow Yeh Sr. At the age of 34 this man apparently had a heart attack at a Mackay watch house ... This last month we've seen plenty of stats, 430 plus Black deaths in custody ... and that's only since the Royal Commission, but what about all those deaths that led to that. My grandfather was one of them. Let's humanise these stories. When this man had a heart attack, he left his wife and he left five young children. My grandmother was still having his children when she had to put this man in the ground. That's why we march! Of course we stand in solidarity with our brothers in America. And, of course we stand in solidarity with our sisters in West Papua ... but today we stand for our lives here, on stolen land.[2]

Chelsea J Bond[1]
Lisa J Whop[2]
David Singh[1]
Helena Kajlich[1]

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doi: 10.5694/mja2.50723

The statistical story of Indigenous health and death, despite how stark, fails to do justice to the violence of racialised health inequities that Aboriginal and Torres Strait Islander peoples continue to experience. This story has been reported on unremarkably in federal parliament for over a decade, as an annual account-keeping exercise of policy failure and statistical targets not met.[3] This story of failure and failing health has been told countless times in health and medical journal publications, and despite growing more frequent in number, these contributions to new knowledge never seem to translate to improved health outcomes. This story of failure does not do justice to the trauma and loss that Aboriginal and Torres Strait Islander communities experience. This story of failure does not do justice to the pain of never meeting the grandfather that you are named after. Tragically, despite the parlous state of Indigenous health, we have not been met here with the kind of urgency that the global Black Lives Matter movement has spurred elsewhere.

What we have been presented with, aside from the Health Minister admonishing Black Lives Matter protestors for putting the health of the public at risk,[4] has been the triumphal announcement of "research projects",[5] the release of a "landmark report",[6] and a drafting of "refreshed" and "historic targets".[7] All of these supposedly fresh responses were on track before the Black Lives Matter movement hit our shore. Rather than the "new normal" which the threat of coronavirus disease 2019 (COVID-19) inspired, the Australian health system's Black Lives Matter moment is best characterised as indifferent; a "business as usual" approach that we know from experience betokens failure.

When the threat of COVID-19 loomed, action was

sector, instituting special border control measures for remote Indigenous communities, and the development of emergency response plans to protect their communities.[8,9] The effective response to the COVID-19 pandemic sits in sharp contrast to the ongoing pandemic of racism that Indigenous peoples have been fighting since 1788 and which has taken far more Black lives in Australia.

Sweet points out: "To date, there is very little sign that senior health policy makers, from the Chief Medical Officer to Health Minister Greg Hunt, will use their authority to name and address the system racism that contributes to poorer healthcare, as it does to overincarceration".[10] While broad attention is often focused on Black deaths in custody, the premature deaths of Indigenous peoples from supposed natural causes inside and outside of custody tell a consistent story of failure and violence that marks the Australian health system and society more broadly.

Against the quietude of the Australian health system on racism are the powerful voices of Aboriginal and Torres Strait Islander peoples, on television screens, on public streets and in our spreadsheets, speaking the truth about how little Black lives seem to matter. Both Indigenous clients and clinicians have stories to tell of the violence of racism in the health system, of being cast in the category of less capable, less compliant, less deserving of care and less worthy of the category of human. This then brings us to the coronial inquiry, the endgame of not caring; of neglect. Here, never let us forget the mothers, the children, the cousins and the spouses weeping outside coroner's courts, bearing photos of their loved ones in their hands and on their clothing, simultaneously appealing for care and for justice.[11] Moreover, let us not for a second dismiss the anguish of having to fight for the release of recorded footage of your loved one's final moments, to be replayed over and over, in which they too plead vainly,

CRICOS code 00025B

Necessity of truth-telling

Report of the Chief Health Officer (Qld Health), 2020

https://www.health.qld.gov.au

Qld Ombudsman Report, August 2020

https://www.oho.qld.gov.au

Necessity of truth-telling & rights-based approaches

QUEENSLAND COURTS

CORONERS COURT OF QUEENSLAND

FINDINGS OF INQUEST

CITATION:	**Inquest into the death of Barry Haynes**
TITLE OF COURT:	Coroners Court
JURISDICTION:	Brisbane
FILE NO(s):	COR 2017/1416
DELIVERED ON:	16 November 2020
DELIVERED AT:	Brisbane
HEARING DATE(s):	6 December 2019 (written submissions January to May 2020)
FINDINGS OF:	Terry Ryan, State Coroner
CATCHWORDS:	CORONERS: Death in custody, natural causes, terminally ill prisoner, capacity issues, substituted decision maker, palliative care, *Human Rights Act 2019*.
REPRESENTATION:	
Counsel Assisting:	Sarah Lio-Willie
Queensland Corrective Services:	Taylor Mobbs
GEO Group (Arthur Gorrie Correctional Centre):	James Hall, Ashurst
Princess Alexandra Hospital:	Fiona Banwell
Family:	Klaire Coles, Caxton Legal Service
Public Advocate:	Joanna Sampford, Office of the Public Advocate

97. On 1 January 2020 the *Human Rights Act 2019* became operational in Queensland. While this legislation was not in force at the time of Mr Haynes' death it is relevant to consider in relation to any comment or recommendation under s 46 of the *Coroners Act*. The *Human Rights Act* requires that all persons deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person. The Act also provides a right to health services.

CRICOS code 00025B

Necessity of truth-telling & rights-based approaches

Brolan CE, Durham J (2013) Building Queensland's human capital: the case for health advocacy. ***Medical Journal of Australia*** 199(9): 574

Perspectives

Building Queensland's human capital: the case for health advocacy

Effective evidence-based government health policy and legislative reform cannot occur without input from non-government actors

Claire E Brolan
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In March 2012, Queenslanders overwhelmingly voted in the Liberal National Party. With a popular mandate, Premier Campbell Newman undertook a series of reform and cost-saving measures in the public sector. Public health activities fared badly. Units promoting mental health, exercise and dietary change, and reduced substance use were scaled back, and aspects of communicable disease control programs

with other state-based or national agencies able to raise public health concerns without fear of financial penalty.

Improvements in health outcomes occur through a whole-of-agency approach that builds alliances, gathers evidence and undertakes determined and effective advocacy.[2] Robust policy requires that non-government actors have an opportunity to understand and question government action (or inaction). Good health advocacy is not founded on hearsay — it is based on scientific evidence and the meritorious, well documented concerns of health system users. The Health Minister's argument that health funding should not be used for political advocacy is

Searching for the Elusive? Examining the Right to Health's Status in the Pacific

In: Asia-Pacific Journal on Human Rights and the Law

Authors: Jennifer Y Kallie [1], Claire E Brolan [2], and Nicola C Richards [3]

View Less —

[1] The University of Queensland [2] The University of Queensland, University of Toronto [3] The University of Queensland

Online Publication Date: 21 Dec 2016

In: Volume 17: Issue 2

Article Type: Research Article

Pages: 257–277

DOI: https://doi.org/10.1163/15718158-01702007

Australian and New Zealand Journal of Public Health

Open Access

The Journal of the Public Health Association of Australia Inc.

Community Empowerment | Open Access

A potential Human Rights Act in Queensland and inclusion of the right to health

Claire E. Brolan, Lisa Herron, Anna Carney, Eva M. Fritz, Judy James, Miranda Margetts

First published: 27 December 2017 | https://doi.org/10.1111/1753-6405.12734 | Citations: 1

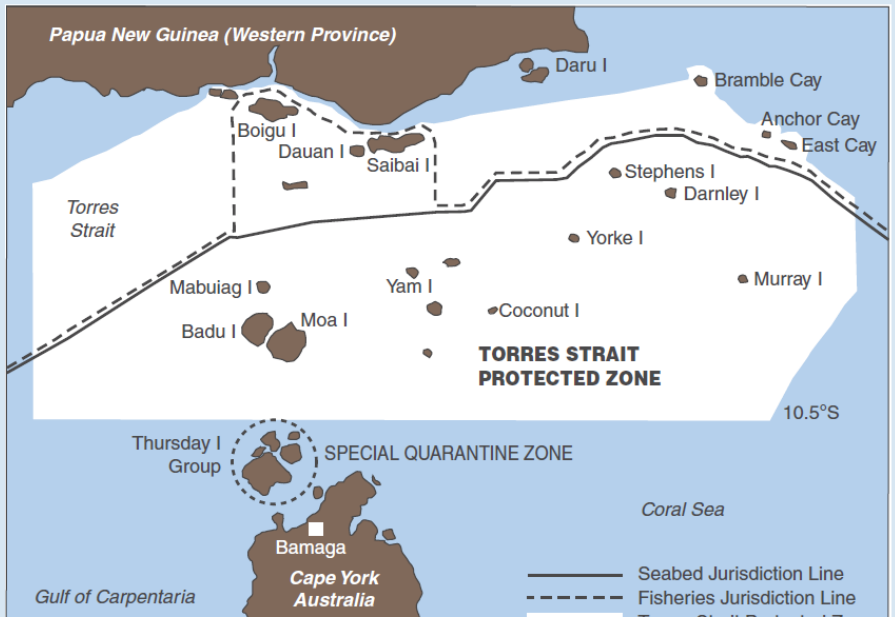
A one off event?

Equal Rights Trust

Brolan CE et al (2011) Borderline health: Complexities of the Torres Strait Treaty. ***Medical Journal of Australia*** 195(9):503-505.

Borderline health: complexities of the Torres Strait treaty

1 Map of the Torres Strait region, showing the boundaries between Australian and Papua New Guinean territory



Self-interest and global responsibility create a public health balancing act

The treaty between Australia and Papua New Guinea (PNG) referred to as the "Torres Strait treaty" entered into force in February 1985.[1] The treaty's purpose is to provide certainty of the sovereignty and maritime boundaries between the two countries, including in the Torres Strait, where there are over 200 islands. The three major inhabited Australian islands of Boigu, Dauan and Saibai are situated several kilometres off the coast of the South Fly District of PNG's Western Province (Box 1).[2]

In September 2009, the Australian Senate requested that

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Graham Simpson
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Stephen D Vincent
MB BS(Hons), FRACP,

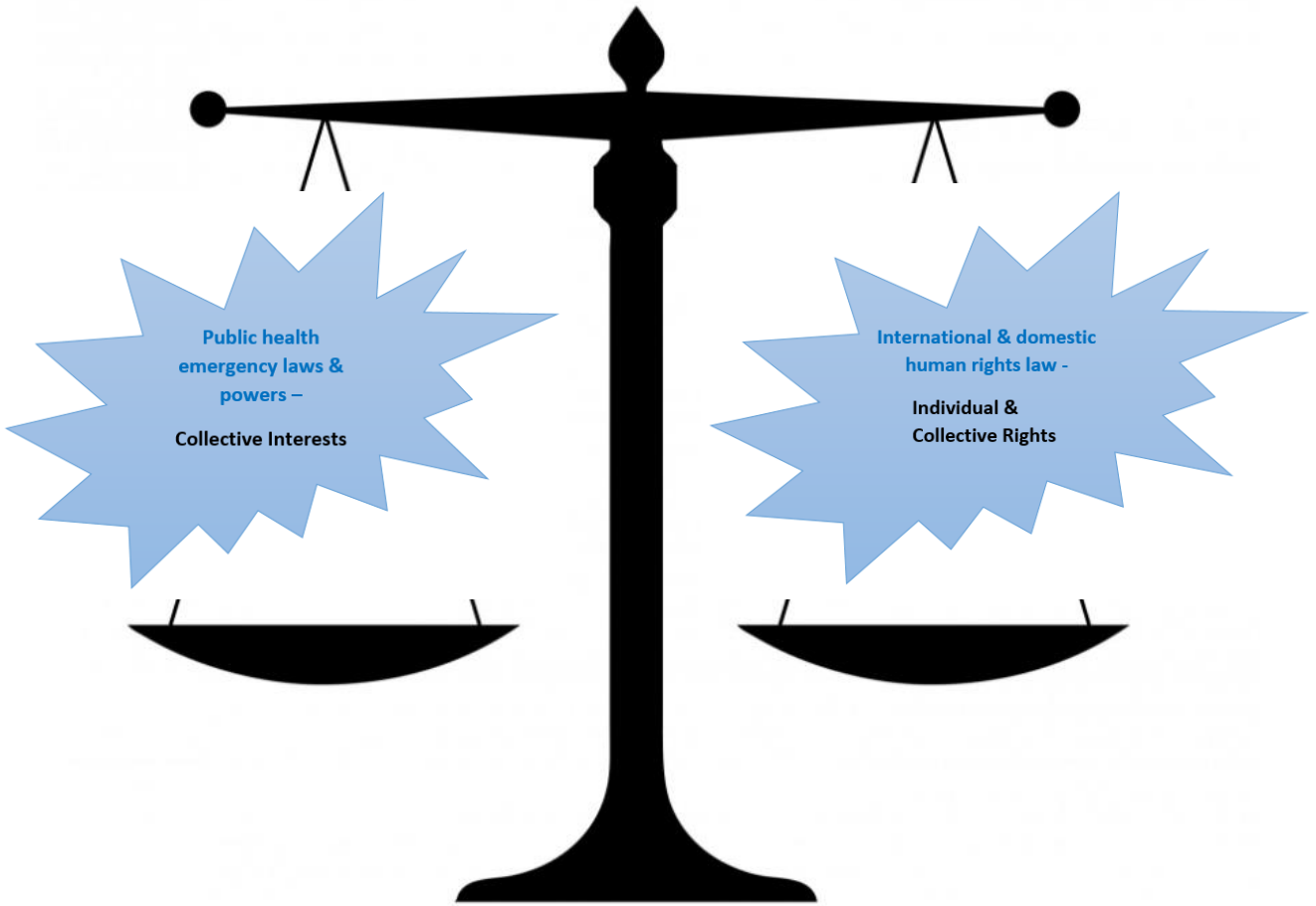
governments from both sides of the border in formulating policy and providing resources.

The Torres Strait treaty

The Torres Strait treaty established a Torres Strait Protected Zone. Within the protected zone, people who live in the coastal areas of PNG and Australians who are Torres Strait Islanders are permitted to travel across the border in accordance with their way of life as the traditional inhabitants of the region.

Australia and PNG are divergent in wealth and development, and this divide has grown in the past 20 years. PNG has one of the poorest health records in the Pacific region and is unlikely to meet any of its health-

Scales of Justice



2. *Parliamentary Inquiry in Qld Government response to COVID-19*

Key points

What do we know about COVID-19 rights concerns? Parliamentary Inquiry

What do we know about COVID-19 rights concerns from the Parliamentary Inquiry interim report? (*applying RTH lens)

- ❑ 6 recommendations (rights-based?)
- ❑ Acknowledgement - Balancing rights and interests
- ❑ **Impacts of COVID-19 & impacts of Public Health Directions and human rights**
  - Mental health
  - Domestic & family violence
  - Queensland Health Ombudsman
  - People with disability
  - People living in closed environments i.e. prisons, youth detention centres
  - Aboriginal and Torres Strait Islander peoples
    - QAIHC raised concerns about the transparency of Aboriginal & Torres Strait Islander testing & screening data, need for disaggregated data
  - Older Queenslanders
  - Individuals in mandatory quarantine

What do we know about COVID-19 rights concerns from the Parliamentary Inquiry interim report? (*applying RTH lens)

- **Impacts of COVID-19 & impacts of Public Health Directions and human rights**
  - Preventative healthcare, palliative care
  - Equitable access to testing
    - PHAA - ‘Government should ensure that everyone in Australia, including asylum seekers, refugees, those on bridging visas, & temporary visa holders including migrant workers & international students, has access to testing and related treatment through the provision of access to Medicare’
  - Public health messaging
  - Access to telehealth services
  - Access to medicines

Stigma and discrimination

RURAL DOCTORS ASSOCIATION OF AUSTRALIA

MEDIA RELEASE

30 April 2020

COVID discrimination must stop

Cases of people being denied health care or work opportunities because of unfounded COVID-19 fears must stop.

Dr John Hall, President of the Rural Doctors Association of Australia (RDAA), said there had been disturbing reports of patients being turned away from essential health care because of perceived COVID risk.

"Patients, whether they are COVID positive or not, still need to be able to access medical appointments, pathology tests or x-rays," Dr Hall said.

"We have heard some very worrying cases of patients being denied access to services due to their potential risk of having coronavirus.

"In most cases these were unfounded, but regardless of whether they have the virus or not, medical professionals, whatever their field, need to provide these services and have the equipment and procedures in place to minimise the risk of infection.

"This is particularly a problem in rural areas where in many cases there is only one provider and no option to look for an alternative that is willing to see them," Dr Hall said.

"Rural patients cannot be disadvantaged because of their lack of choice."

Dr Hall also said that Australia had been very successful in reducing the spread and containing outbreaks of coronavirus, and that people should be taking this now low risk of infection into account when people are generally unwell.

"While we appreciate that there needs to be a healthy level of concern in the community regarding minimising risk, as restrictions are relaxed we need people to be able to function in society with their regular ailments, as normal.

"If someone has a cough, and they've been to the doctor and know that it's a pre-existing condition, allergies, or asthma for example, they should be able to return to work without discrimination.

"We need to continue to practice social distancing and good hand hygiene, and allow people to take a responsible attitude to their health issues.

"A person with tonsillitis may have a temperature and a sore throat, but if they have been to the doctor, had it diagnosed and coronavirus eliminated, then they should be able to function as they would under normal circumstances.

Stigma and discrimination, pp.84-85

The Human Rights Commission were asked about the COVID-19 document at the hearing on the 19th of August 2020. They made the following statement;

> ***" There is a very real danger that the unconscious bias and indirect discrimination would lead to older people , people with disabilities, or people with cognitive impairment actually having their life ended earlier than otherwise would"***

It appears the Queensland Health document was not seen by the Human Rights Commission before it was released.

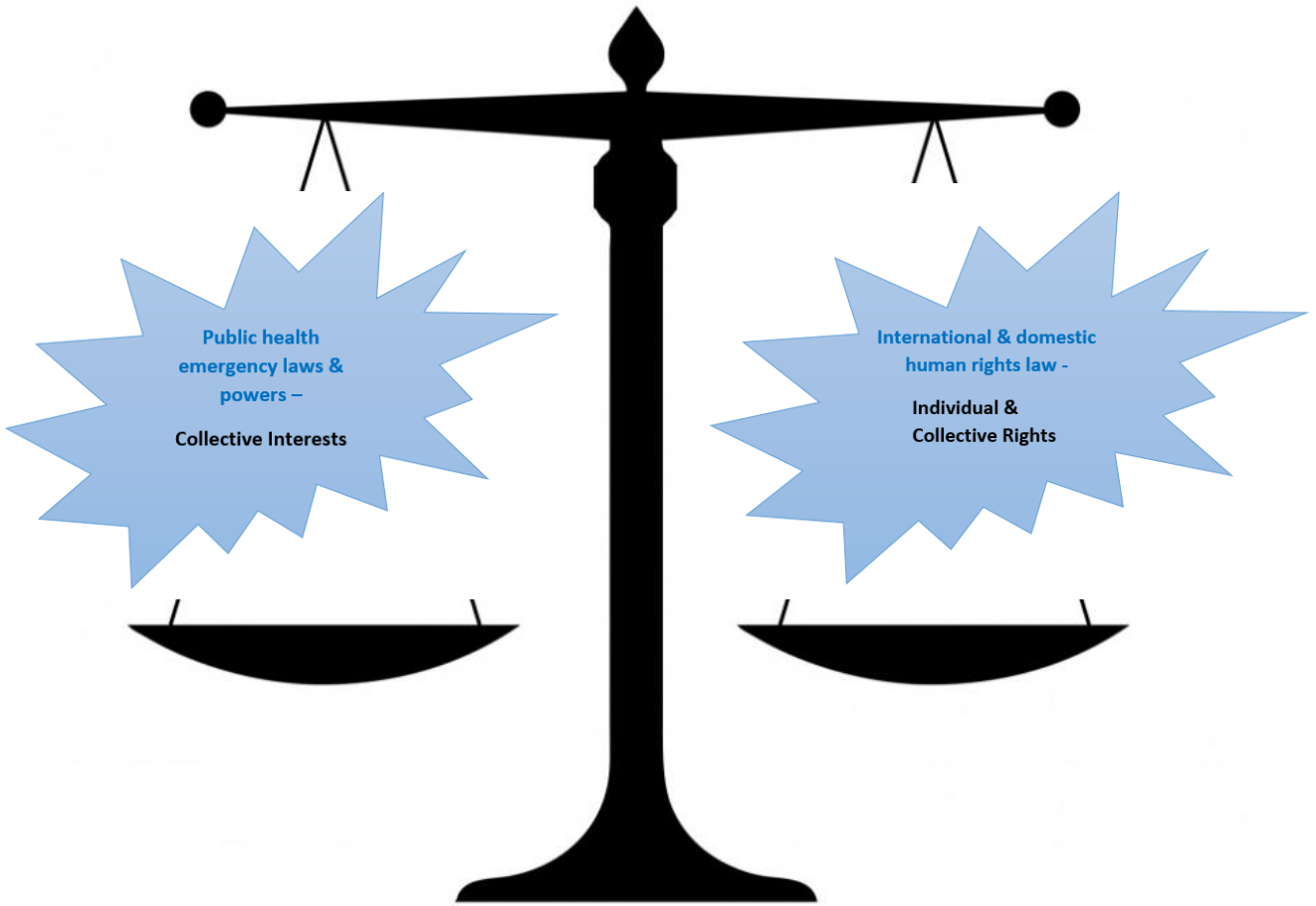
Whilst we have a copy of the COVID-19 document it appears no longer accessible on Queensland Health's website.

If the document was taken down it is of concern and questions touching on human rights may have been ignored.

3. *Non-discriminatory access to health care & other socio-economic services during PH emergencies and/or on account of a COVID-19 diagnosis*

Key points

"Health care rationing"



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  - Human rights

Discrimination

Download the Queensland Anti-Discrimination Act 1991 fact sheet (PDF File, 782.7 KB)

Provisions of relevance in the Anti-Discrimination Act 1991 (Qld)

Section 7 – Discrimination on the basis of certain attributes prohibited

The Act prohibits discrimination on the basis of the following attributes—

(a) sex;

(b) relationship status;

(c) pregnancy;

(d) parental status;

(e) breastfeeding;

(f) age;

(g) race;

(h) impairment;

(i) religious belief or religious activity;

(j) political belief or activity;

(k) trade union activity;

(l) lawful sexual activity;

(m) gender identity;

(n) sexuality;

(o) family responsibilities;

(p) association with, or relation to, a person identified on the basis of any of the above attributes.

Provisions of relevance in the Anti-Discrimination Act 1991

According to the Dictionary (Schedule 1), "impairment", in relation to a person, can mean one of eight things:

(a) the **total or partial loss of the person's bodily functions**, including the loss of a part of the person's body; or

(b) **the malfunction, malformation or disfigurement** of a part of the person's body; or

(c) **a condition or malfunction that results in the person learning more slowly than a person without the condition or malfunction**; or

(d) **a condition, illness or disease that impairs** a person's thought processes, perception of reality, emotions or judgment or that **results in disturbed behaviour**; or

(e) **the presence in the body of organisms** capable of causing illness or disease; [e.g. HIV] or

(f) **reliance on** a guide, hearing or assistance dog, wheelchair or other remedial device; whether or not arising from an illness, disease or injury or from a condition subsisting at birth, and includes an impairment that—

(g) presently exists; or

(h) previously existed but no longer exists.

Brolan et al (2011) Australian Journal Human Rights:

The right to health of Australians with intellectual disability

Claire E Brolan, Robert S Ware, Miriam Taylor Gomez and Nicholas G Lennox*

laws

Opinion

A Word of Caution: Human Rights, Disability, and Implementation of the Post-2015 Sustainable Development Goals

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Academic Editor: Anna Arstein-Kerslake
Received: 30 March 2016; Accepted: 6 May 2016; Published: 14 May 2016

Racism directed at women charged with coronavirus border fraud ostracises African Australians

ABC NEWS

ABC Radio Brisbane / By Edwina Seselja

Posted Fri 31 Jul 2020 at 4:48pm, updated Fri 31 Jul 2020 at 10:33pm

https://www.abc.net.au/news/2020-07-31/racism-directed-at-women-charged-with-coronavirus-border-fraud/12510910

THE CONVERSATION

Academic rigour, journalistic flair

Queensland's coronavirus controversy: past pandemics show us public shaming could harm public health

July 31, 2020 3.45pm AEST

Author

Clare Southerton

Postdoctoral Fellow, UNSW

https://theconversation.com/queensland-coronavirus-controversy-past-

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Thank you

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