



## **An introduction to the *Human Rights Act 2019* for criminal lawyers in Queensland**

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**Scott McDougall**  
**Commissioner**  
**4 November 2019**  
**College of Law**

## Acknowledgment of Country

The Queensland Human Rights Commission acknowledges Aboriginal and Torres Strait Islander peoples as the First Australians and recognises their culture, history, diversity and their deep connection to the land, waters and seas of Queensland and the Torres Strait.

We acknowledge that the Commission's offices are on lands of the traditional owners of the Brisbane, Rockhampton, Townsville and Cairns areas and pay our respects to Elders past, present, and emerging.

# Overview

- Modern human rights
- Compatibility with human rights
- The 3 ways the Act may apply to your case
- Remedies
- Role of the Commission
- Key points and resources for criminal lawyers

# Modern human rights law

**Universal Declaration  
of Human Rights  
(1948)**

**International Covenant on  
Civil & Political Rights  
(1966)**

**International Covenant on  
Economic, Social & Cultural Rights  
(1966)**

**Race  
(1969)**

**Women  
(1981)**

**Torture  
(1987)**

**Children  
(1990)**

**Indigenous  
Peoples  
(2007)**

**Disability  
(2008)**

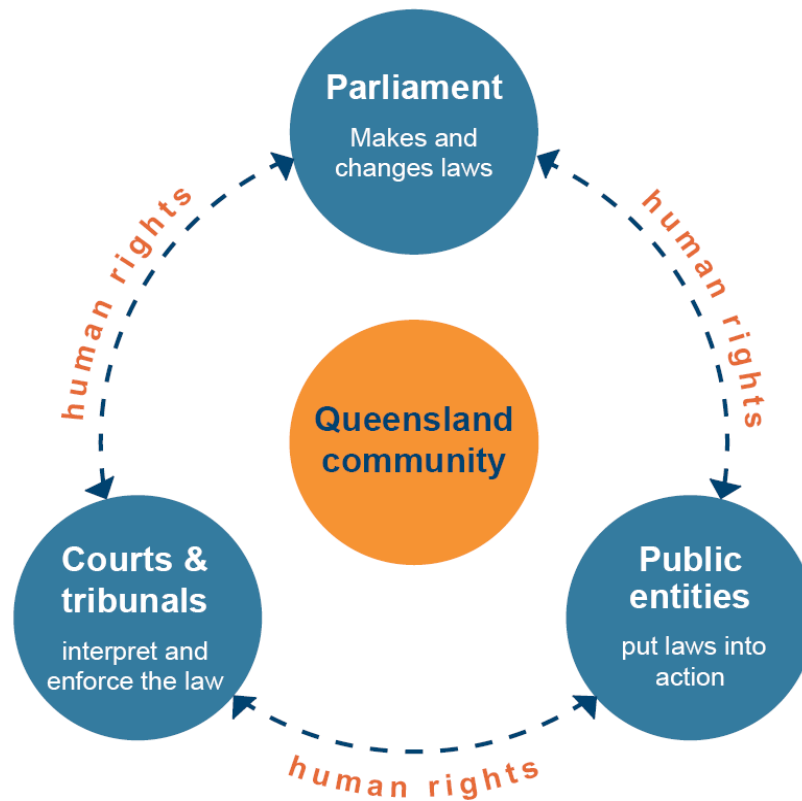


## 23 Categories of Human Rights

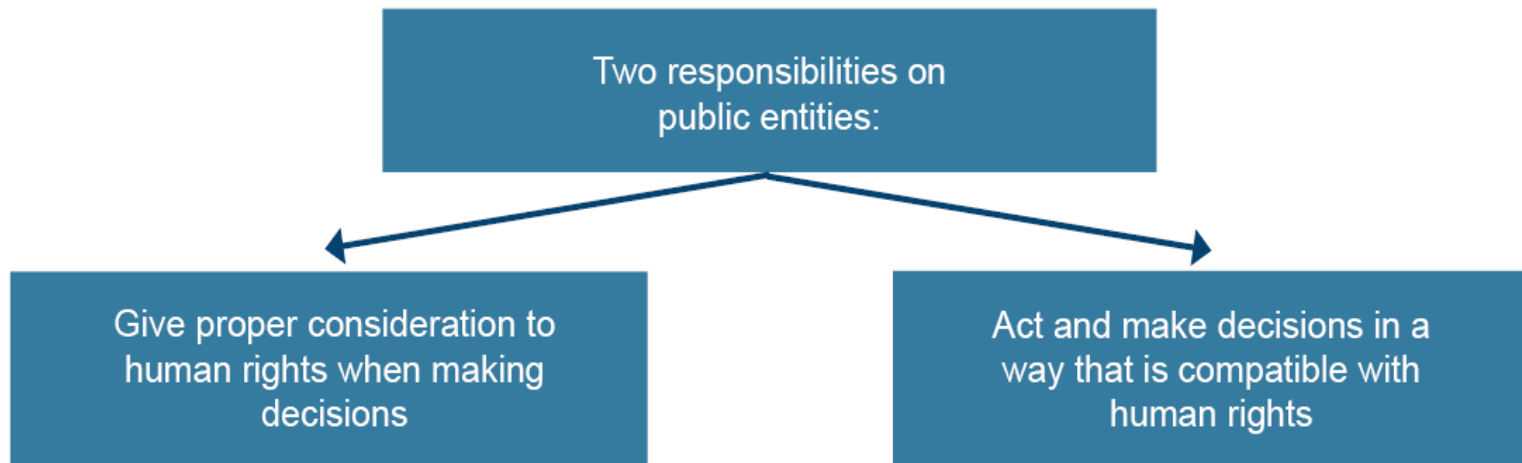
- s 15** Right to recognition and equality before the law
- s 16** Right to life
- s 17** Protection from torture and cruel, inhuman or degrading treatment
- s 18** Freedom from forced work
- s 19** Freedom of movement
- s 20** Freedom of thought, conscience, religion and belief
- s 21** Freedom of expression
- s 22** Peaceful assembly and freedom of association
- s 23** Taking part in public life
- s 24** Property rights
- s 25** Privacy and reputation

- s 26** Protection of families and children
- s 27** Cultural rights – generally
- s 28** Cultural rights – Aboriginal peoples and Torres Strait Islander peoples
- s 29** Right to liberty and security of person
- s 30** Humane treatment when deprived of liberty
- s 31** Fair hearing
- s 32** Rights in criminal proceedings
- s 33** Children in the criminal process
- s 34** Right not to be tried or punished more than once
- s 35** Retrospective criminal laws
- s 36** Right to Education
- s 37** Right to health services

# The Dialogue (Parliamentary) Model



## Responsibilities of public entities (s.58)



## Meaning of *compatible with human rights* (s.8)

An act, decision or statutory provision is ***compatible with human rights*** if the act, decision or provision:

- (a) does not limit a human right; or
- (b) limits a human right only to the extent that is reasonable and demonstrably justifiable in accordance with section 13.



## Human rights may be limited (s.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.

Proportionality test – s.13.

***R v Oakes***, [1986] 1 SCR 103

# Proportionality Analysis (s.13(2))

## s13 Human rights may be limited

- (2) In deciding whether a limit on a human right is reasonable and justifiable... the following factors may be relevant:
- (a) the nature of the human right;
  - (b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom;
  - (c) **the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose;**
  - (d) whether there are **any less restrictive and reasonably available ways to achieve the purpose;**
  - (e) the importance of the purpose of the limitation;
  - (f) **the importance of preserving the human right,** taking into account the nature and extent of the limitation on the human right;
  - (g) the balance between the matters mentioned in paragraphs (e) and (f).

## ‘Proper Consideration’ – Victorian Cases

- decision-maker ‘must seriously turn mind’ to:
  1. Which rights are relevant?
  2. What is the impact?
  3. What are the countervailing interests or obligations?
  4. Balance competing private and public interests as part of exercise of justification  
*Castles v Secretary of the Department of Justice* (2010) 28 VR 141
- more stringent than duty to “take into account relevant considerations” *Bare v IBAC* (2015) 48 VR 129
- “practical and common-sense manner” – Bell J in *PJB v Melbourne Health (Patrick’s Case)* [2011] VSC 327
- *De Bruyn v Victorian Institute of Forensic Mental Health* [2016] VSC 111– a textbook example of proper consideration

# 'Proper Consideration' – Queensland Approach

s.58(5)

For subsection (1) (b) , giving proper consideration to a human right in making a decision includes, but is not limited to—

- (a) identifying the human rights that may be affected by the decision; and
- (b) considering whether the decision would be compatible with human rights.

# Exemptions

- s.58(2) -where decision maker has no discretion (“inevitable infringement”):

*Subsection (1) does not apply to a public entity if the entity could not reasonably have acted differently or made a different decision because of a statutory provision, a law of the Commonwealth or another State or otherwise under law*

E.g. in *Kaba* found that s 59(1) of the Road Safety Act authorised police to randomly stop vehicles and request the driver’s name, address and licence curtailing the driver’s rights to freedom of movement, privacy and liberty. However, they were authorised by the legislation and the police could not reasonably have acted differently in performing them, so the exception applied (***DPP v Kaba (2014) 44 VR 526***)

- s.58(3) body established for a religious purpose
- s.58(4) acts or decisions of a private nature

## Summary – Obligations under s.58

- Step 1: Identify human rights engaged
- Step 2: Consider whether human rights have been limited by the decision or action
- Step 3: Consider if the limit on a human right:
  - ✓ is authorised ('under law')
  - ✓ is justified and reasonable (after applying the proportionality analysis in s13(2))

## The 3 ways the HRA may apply to your case

Under the HRA, Queensland courts and tribunals have a role when:

1. acting in an administrative capacity, as a public entity (s.9(4) and s.58)
2. interpreting legislation (s.48)
3. performing functions relevant to human rights, i.e. direct application (s.5(2)(a))

## The first way: administrative capacity

- Committal proceedings
- Adjournments?

(*Slaveski v R* (2012) 40 VR 1; [2012] VSCA 48 [107]–[108])



## The second way: Interpreting statutory provisions (s.48)

- (1) 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.
- (2) 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.

## The third way: Direct application s.5(2)(a)

- recognition and equality before the law (s.15)
- fair hearing (s.31)
- criminal proceedings (s.32)
- children in the criminal process (s.33)
- not to be tried or punished more than once (s.34)
- retrospective criminal laws (s.35)

## ***Cemino v Cannan and Ors* [2018] VSC 535**

Ginnane J held a Magistrate in Echuca acted unlawfully by refusing an Aboriginal man's request to be sentenced before the Koori Court in Shepparton.

Judicial review on grounds including failure to properly consider:

- Cultural rights; and
- Right to equality before the law

Magistrates decision set aside and ordered that a different Magistrate consider transfer request.

## How did the Victorian Charter apply in *Cemino*?

- Acting in administrative capacity?
- Direct application?
- Interpretative provision?

# Equality before the law “without discrimination”

Sch 1 to HRA defines the term:

***discrimination***, in relation to a person, **includes** direct discrimination or indirect discrimination, within the meaning of the Anti-Discrimination Act 1991, on the basis of an attribute stated in section 7 of that Act.

Contrast with Victorian Charter:

***discrimination***, in relation to a person, **means** discrimination (within the meaning of the **Equal Opportunity Act 2010**) on the basis of an attribute set out in section 6 of that Act.

Implies a wider meaning of discrimination from international law when interpreting s 15 HRA.

# International definition of discrimination

- The ICCPR itself does not provide a definition of discrimination. General Comment 18 on Non-Discrimination has advised as follows:
- ... *the Committee believes that the term "discrimination" as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national **or social origin, property, birth or other status**, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.*

In summary:-

- 1) Distinction, exclusion, restriction, preference [like differential treatment]
- 2) Based on a status [similar to causal nexus in ADA]
- 3) Purpose or effect of nullifying/impairing recognition, enjoyment or exercise of rights [note focused on the purpose/effect the treatment has, as opposed to focus on a comparator]

Does not require intention or malice – *Simunek v Czech Republic* (516/92)

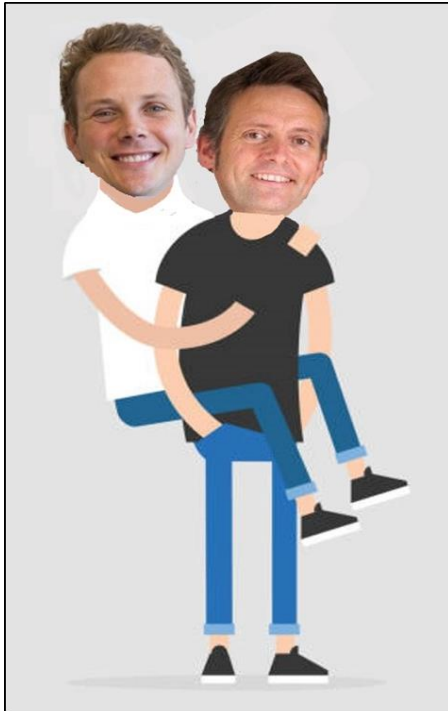
Can also be indirect – neutral rule, no intent to discriminate, with disproportionate affect on particular statuses – *Althammer v Austria* (998/01)

## Courts and tribunals

- Referral to Supreme Court (s.49)
  - question of law about the application of the Act
  - question about the interpretation of a statutory provision
- A-G and QHRC may intervene
  - question arises (Supreme or District Court) or question referred to Supreme Court
  - notice to be given (s.52)
- Declarations of incompatibility

There has been only one declaration made in each of the Victorian and ACT jurisdictions.

# Remedies



- No direct cause of action
- Piggy Back - where relief or remedy available on the ground that act or decision was unlawful – “may seek the relief or remedy” on ground of unlawfulness under HR Act (s.59)
- Primary ground doesn’t need to succeed
- No damages (query impact on costs)
- Complaint to QHRC



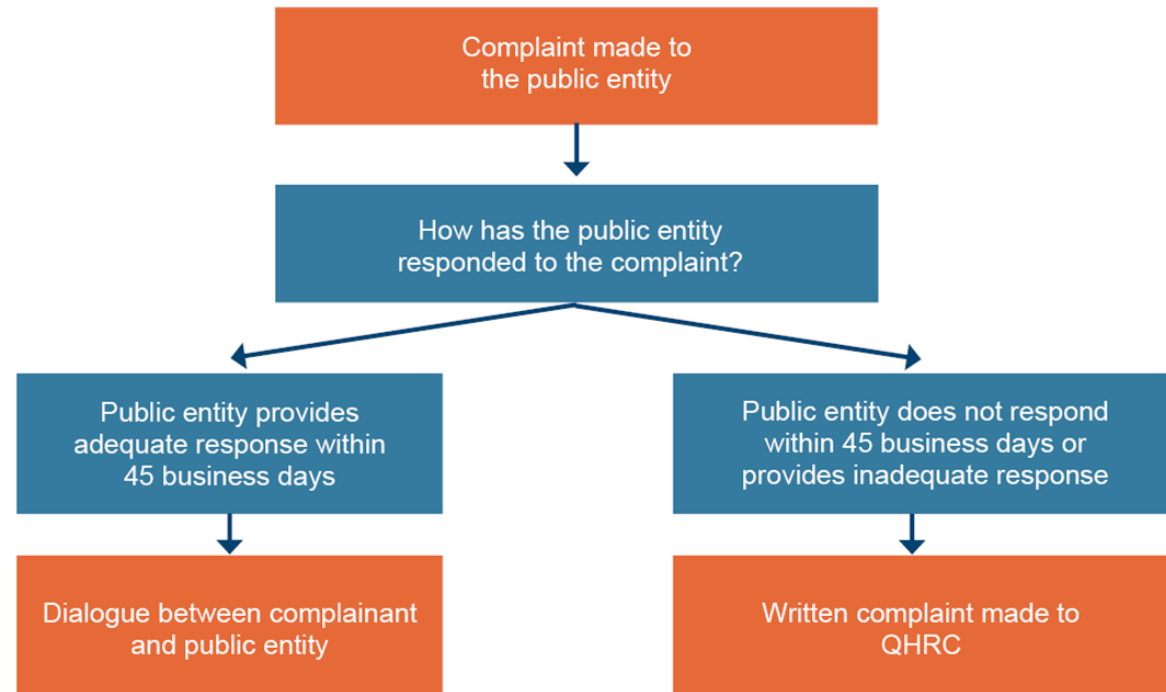
# Remedies

s.59

- (1) Subsection (2) applies if a person may seek any relief or remedy in relation to an act or decision of a public entity on the ground that the act or decision was, other than because of section 58, unlawful.
- (2) The person may seek the relief or remedy mentioned in subsection (1) on the ground of unlawfulness arising under section 58, even if the person may not be successful in obtaining the relief or remedy on the ground mentioned in subsection (1).
- (3) However, the person is not entitled to be awarded damages on the ground of unlawfulness arising under section 58.

# QHRC Complaint Process

Function starts 1<sup>st</sup>  
January 2020 for  
alleged breaches that  
happen after this date.



## QHRC Complaint Process – A Toothless Tiger?

- s.90 - Commissioner may publish information about a complaint including:
  - details of action the commissioner considers the respondent for the complaint should take to ensure its acts and decisions are compatible with human rights
- s.92 - Own motion reports (including about review of public entities' policies and procedures – see s.61)

## Summary of key points to think about...

- Your role as a criminal lawyer in making human rights accessible and real for your clients.
- Giving notice to AG and Commission (s51).
- Explore and understand the scope of the rights.
- On what basis can you raise human rights arguments?
- What might be less restrictive and reasonably available limitations?
- Look to International law but heed the High Court warning about context.
- Be discerning in choosing cases for litigation or the Commission's complaint process.

## Resources

- Explanatory Notes, Human Rights Bill 2018
- Judicial College of Victoria, Charter of Human Rights Bench Book (<https://www.judicialcollege.vic.edu.au/node/1207>)
- Judicial College of Victoria, Victorian Human Rights Charter Case Collection (<https://www.judicialcollege.vic.edu.au/publications/charter-case-collection>)
- Alistair Pound and Kylie Evans, Annotated Victorian Charter of Rights (Lawbook Co., 2<sup>nd</sup> ed, 2019)
- Sarah Joseph and Melissa Castan, The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary (Oxford University Press, 3<sup>rd</sup> ed, 2013)
- Guide: Nature and Scope of the Rights [www.forgov.qld.gov.au/humanrights](http://www.forgov.qld.gov.au/humanrights)



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# Using the Human Rights Act in Criminal Cases

Saul Holt QC  
November 2019

# Introduction

Potential use of the HRA in criminal cases is broad

What has happened elsewhere is helpful but should not be limiting

It is just a statute – that means it must be applied

Today:

- Bail applications

- Trial without unreasonable delay

- Admissibility of evidence



# The ways the HRA can be used

To interpret statutes

To challenge acts and decisions of public authorities

As a basis for a collateral finding of unlawfulness

# Applying for Bail

Section 29(6) – Must not be automatically detained but release may be subject to guarantees to appear

Section 29(5) – Must be promptly brought before a court and brought to trial without unreasonable delay

If not **must** be released

# Applying for Bail

Section 19 – Freedom of movement

Section 20 – Freedom of assembly and association

Section 22 – Privacy and reputation

Section 30 – Humane treatment when deprived of liberty

Section 36 – Right to education

# Three impacts on Bail Proceeding

1. Interpreting the Bail Act
2. Direct obligation on the deciding court
3. Unlawful actions of public authorities

# Direct application to the courts

Section 58 (conduct of public entities) only applies to court's in an administrative capacity

But section 5 says that the Act "binds all persons" and "applies to a court or tribunal to the extent that [it] has functions under Part 2 and Part 3, Division 3

Part 2 contains all of the rights

???

# Direct application to the courts

Victorian Court of Appeal has held that the application provision “reads down” the limitation to “administrative functions”

*De Simone v Bevnol Constructions* (2009) 25 VR 237; [2009] VSCA 199 [50], [52]

But what are a court’s “functions” under Part 2?

Three possible approaches – broad, intermediate and narrow

# Direct application to the cou

## *Application for Bail by HL [2016] VSC 750 [68]–[79]*

70 In light of the position adopted by the parties, it is unnecessary to address this question in order to determine the outcome of this application. Both the parties before the court and the Attorney-General accepted, subject to 1 exception I will come to, the applicability and relevance of the consideration of the applicant’s rights under the Charter in determining whether cause had been shown or whether he presented an unacceptable risk.

71 The exception was with respect to the right identified in [s 25\(3\)](#) of the Charter. The Attorney-General contended that right was not applicable to an application for bail because that provision “relates to rights in criminal proceedings”. It was suggested that a bail application was a different point in the process. I do not accept this submission.

72 I refer to paragraph 56 above and the statement made upon the 1st reading of the Bail Amendment Bill 2015 (Vic). That statement suggests that s 25 is relevant to decisions about bail. Further, by reference to the language in s 25(3), the applicant is “charged with a criminal offence” and the reference to “right to a procedure” is not confined to the specific criminal proceeding in question. I can see no good reason for limiting these words to exclude a bail application.[\[29\]](#)

# Trial without unreasonable delay – section 32(c)

The *Morin* factors:

Length of delay

Waiver of time periods

Reasons for delay, including:

- Inherent time requirements of the case

- Actions of the accused

- Actions of the Crown

- Limits on institutional resources

- Other reasons for delay

Prejudice to the accused



# Trial without unreasonable delay – section 32(c)

In *Morin*, Justice Sopinka noted that “prejudice may be inferred from the length of delay. The longer the delay the more likely that such an inference would be drawn”.

As Justice McHugh stated in, “prejudice may exist without the parties or anybody else realising that it exists”

*Brisbane South Regional Health Authority v Taylor* (1996)  
186 CLR 541 at 551

# Trial without unreasonable delay – section 32(c)

## Remedy

Canada – a stay as the presumptive remedy

UK and NZ – a stay as an exceptional remedy

Likely position – a stay where (a) cannot be a fair trial, (b) it would otherwise be unfair to try the accused, (c) no lesser remedy would vindicate the breach

# Trial without unreasonable delay – section 32(c)

Example – *R v Mills* [2011] ACTSC 109

Lesser available remedies:

1. Bail or relaxation of conditions
2. Expediting proceedings
3. Reduction in sentence
4. Declaration of breach
5. Exclusion of evidence

Practical tips

# Admissibility of evidence

The HRA can provide the foundational “unlawfulness”

*Bunning v Cross*

Statutory interpretation of relevant legislation

Example - *Director of Public Prosecutions v Kaba* [2014]  
VSC 52

# Admissibility of evidence

“What dignity and freedom does a person possess if he or she cannot (without fear of negative consequences) chose not to divulge his or her name to someone (including uniformed police) who has no authority to make the demand? Anyone could be in that position. Because it is a value which we cherish in democratic society, should not all of us be free to choose, subject to law, not to enter into that personal relation with another which involves (against our will) divulging who we are? After all, that is the right which enables every person to fend off, with legal impunity, an entreaty that is not only unwelcome (on whatever grounds) but, as contended in this case, may be unlawful. Is not persistent official insistence (especially despite repeated refusals) upon the revelation of one’s name an interference with the personal living space of an individual and an affront to his or her dignity and autonomy? In my view, it is and the right to privacy in s 13(a) of the Charter was therefore engaged as regards Mr Kaba.”