



## Communications in child protection

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Unresolved complaint report under  
section 88 *Human Rights Act 2019*

7 July 2023

**For public release**

## About this report

This is an unresolved complaint report for a complaint made to the Queensland Human Rights Commission (Commission) under the *Human Rights Act 2019* (HR Act). Under section 88 of the HR Act, the report may include details of actions the Commissioner considers the respondent should take to ensure its acts and decisions are compatible with human rights.

The approach to human rights under the HR Act favours discussion, awareness raising and education about human rights. The Commission has a dispute resolution function which aims to provide the community with an accessible and independent avenue to raise human rights concerns with public entities.

The goal of conciliation is to reach meaningful resolution of complaints in a way that is relatively informal. The Commission cannot settle or determine disputes of fact.

Complaints that cannot be resolved do not get referred for determination by a tribunal, although nothing prevents a complainant from commencing other legal proceedings against the public entity respondent in another court or tribunal and attaching human rights allegations to that claim.

The Commissioner must prepare a report about all unresolved complaints. The report must include the substance of the complaint and actions taken to try and resolve the complaint.

At the discretion of the Commissioner, the report may also include details of actions the Commissioner considers the respondent to the complaint should take to ensure its acts and decisions are compatible with human rights.

A recommendation does not necessarily mean that rights have been unlawfully limited. Unresolved complaint reports aim to assist public entities to comply with their obligations, build a culture in the Queensland public sector that respects and promotes human rights, and to promote a dialogue about the nature, meaning and scope of human rights. The report is not admissible in a proceeding unless the parties otherwise agree.

## Introduction

1. The Commission received a complaint made by a mother whose children had been removed from her care by the Department of Children, Youth Justice and Multicultural Affairs (**the Department**). The complaint included allegations of failures in communication between the complainant and the Department. The complaint was accepted as alleging limitation on the right to freedom of expression, right to privacy, and right to protection of families and children under the *Human Rights Act 2019*.
2. Following an unsuccessful conciliation process, the Commissioner has exercised his discretion to make recommendations to the Department to ensure their acts and decisions are compatible with human rights in this report. The Department was given an opportunity to make submissions in response to the recommendations and their submissions have been incorporated into this final report.
3. A copy of this report has been provided to all the parties, who must agree before it can be used in any proceeding in relation to a contravention of the HR Act.

## Summary of recommendations

4. The Commissioner recommends that the Department consider whether its policies, practices and training:
  - a. Facilitate the provision of temporary assessment orders to occupiers and parents as soon as possible. For example, this could include the flexibility to immediately provide electronic copies of orders with additional information to follow, and the use of Department staff other than staff on the ground to provide copies of orders and additional information. Consideration of these options protect the rights of parents without risking the safety of the child.
  - b. Ensure that information regarding the reasons for taking protective action and options towards reunification is clearly communicated to parents, in a way that parents will understand, and taking into account the parents' communication needs and preferences.

## Substance of the complaint

5. The substance of the complaint is contained in the complaint material lodged with the Commission by the complainant (**C**) on 15 October 2021 and in July 2022.
6. The substance of the complaint is summarised as follows:
  - a. On or around 10 September 2021, C was asked by Child Safety Officers to leave the family home with her young children due to a domestic violence

order issued against C's partner. C agreed to temporarily move in with her child's grandparents.

- b. On the morning of 5 October 2021, C decided to return to the family home with her children, on the understanding that her former partner had abandoned the home. The Department later removed the children pursuant to court order. C says that she was not presented with a court order or any official documentation before the children were removed. A child protection order was later made.
  - c. C states that in an effort to comply with the Department's directions and be reunified with her children, C moved to a domestic violence refuge in around October 2021. However, C's children were not returned to her.
  - d. C alleges the Department's frequent visits and interactions made her feel 'frightened inadequate and powerless', that she felt she had no choice but to sign the safety plans put to her, and that she was 'continuously threaten[ed]' with her children's removal if she did not abide by the Department's every direction, which despite her requests were not put into writing.
7. In summary, the Department's position is that:
- a. The Department advised C multiple times of their concerns if C was to return to the family home, and tried to discuss alternative options before removal of the children.
  - b. The children were removed pursuant to temporary assessment orders under the *Child Protection Act 1999*. Copies of the order were provided to C as soon as possible, and on the same day the orders were granted. In the hours prior to the orders being made, a Child Safety Officer stayed with C at the property for the safety of C and the children, kept C up to date and informed of the process, and encouraged C to obtain independent legal advice. Once the orders were granted, the Child Safety Officer showed C a copy on the orders on her phone, advised that she would provide an electronic copy as soon as possible, and proceeded to transport the children to an alternative address. Once steps had been taken to ensure the children were settled, the Child Safety Officer sent C an email (at 9.54pm) enclosing the orders she had shown earlier as well as a covering letter and additional information.
  - c. The Department is unaware of any representations being made to C that she would regain custody of the children if she moved into a domestic violence refuge. The Department says that there were discussions between C, the Department and the refuge regarding options for reunification, however, it was determined at that time that it was not suitable for C's children to be returned to her custody. This decision was explained to C by a Child Safety Officer and other Departmental staff, and C was advised that the Department would continue to assess the option of her children being returned to her in consultation with the ongoing intervention team.

- d. At all times communications with C were undertaken in accordance with policies and procedures and relevant legislation.
8. Further details of C's allegations and the Department's full response have been included at the parties' request at Annexures A and B to this report. The annexures will be deleted from the report published pursuant to section 90 of the *Human Rights Act 2019*.

## Actions taken to resolve complaint

9. The complaint was accepted by the Commission under the *Human Rights Act 2019* on 20 July 2022.<sup>1</sup> The Department provided further information on 18 August and 1 September 2022.
10. A conciliation conference was held on 13 October 2022. The Department says that it participated in the conference in good faith, but that C did not advise what she sought to resolve her complaint and the Department was therefore not given a reasonable opportunity to resolve the complaint. The Commissioner considers that the complaint has not been resolved.
11. In the course of considering whether to make recommendations under section 88(4) of the *Human Rights Act 2019*, the Commission asked for further information from the Department which was received on 12 December 2022.

## Human rights obligations

12. The Department and its officers are public entities under the *Human Rights Act 2019* with obligations to:
  - a. act and make decisions in a way that is compatible with human rights; and
  - b. give proper consideration to human rights when making the decision.<sup>2</sup>
13. A decision or action is compatible with human rights if it does not limit any human rights, or limits a human right only to the extent that is reasonably and demonstrably justifiable.<sup>3</sup> The factors relevant to this assessment, also known as 'proportionality', is set out in section 13 of the *Human Rights Act 2019*.
14. The right to **freedom of expression**, includes the freedom to seek, receive and impart information.<sup>4</sup> This has been interpreted to include a positive right to access

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<sup>1</sup> The delay in dealing with the complaint by the Commission was due to the high volume of complaints received by the Commission during this time.

<sup>2</sup> *Human Rights Act 2019* s 58(1).

<sup>3</sup> *Human Rights Act 2019* s 8.

<sup>4</sup> *Human Rights Act 2019* s 21.

information held by public entities, at least to the extent that the information is requested by an individual on an issue of public interest or in which the individual has a legitimate interest.<sup>5</sup> Otherwise,

the purposes of the right to seek, receive and impart information will be frustrated if the government, without justification, can simply refuse the information sought.<sup>6</sup>

15. For similar reasons, the right to freedom of expression would also impose an obligation on public entities to disclose information where the disclosure is required by law.
16. A person's **right to privacy** also incorporates a right to access personal information held about them<sup>7</sup>, but goes further. The right to privacy protects an individual against unlawful or arbitrary interference with their privacy, family or home. The broad scope of the right is often referred to in the following terms:

The purpose of the right to privacy is to protect people from unjustified interference with their personal and social individuality and identity. It protects the individual's interest in the freedom of their personal and social sphere in the broad sense. This encompasses their right to individual identity (including sexual identity) and personal development, to establish and develop meaningful social relations and to physical and psychological integrity, including personal security and mental stability.<sup>8</sup>

17. It follows that the right to privacy will be limited in circumstances where a person is not provided with, or is refused access to, information that unlawfully or arbitrarily interferes with their private life, family or relationships.
18. Article 8 of the *European Convention on Human Rights* is comparable to the right to privacy under the *Human Rights Act 2019*. Pursuant to Article 8, parents must be involved in the State authority's decision making process concerning the care of their child to a degree sufficient to provide the requisite protection of the parents' interests.<sup>9</sup> This includes the provision of information that is relied upon by the authority in taking measures of protective care:

This is relevant not only to the parent's ability to put forward those matters militating in favour of his or her capability in providing the child with proper care

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<sup>5</sup> *XYZ v Victoria Police* [2010] VCAT 255 [558]-[559]; Human Rights Committee, *General Comment No 34: Article 19: Freedoms of opinion and expression*, UN Doc CCPR/C/GC/34 (12 September 2011) [18].

<sup>6</sup> *XYZ v Victoria Police* [2010] VCAT 255 [533].

<sup>7</sup> *Human Rights Act 2019* s 25(a); *XYZ v Victoria Police* (2010) 33 VAR 1 [2010] VCAT 255 at [454]-[474]; Human Rights Committee, *CCPR General Comment No 16: Article 17 (Right to Privacy) The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation*, 32nd sess, (8 April 1988) [10].

<sup>8</sup> *Kracke v Mental Health Review Board* [2009] VCAT 646; [2009] 29 VAR 1 [619].

<sup>9</sup> *TP and KM v The United Kingdom* (European Court of Human Rights, Grand Chamber, Application No 28945/95, 10 May 2001) [72]-[73]; *Petrov and X v Russia* (European Court of Human Rights, Chamber, 23 October 2018) [101].

and protection but also to enable the parent to understand and come to terms with traumatic events effecting the family as a whole.<sup>10</sup>

19. In addition, Article 8 has been held to require the authority to take measures to reunite children with their parents as soon as reasonably feasible.<sup>11</sup> It is reasonable that this would include providing information to parents that would enable them to effectively work towards reunification.
20. The right to the **protection of families and children**<sup>12</sup>, in contrast to the right to privacy, has been described as:

stronger than non-interference and extend to the guarantee of institutional protection of the family and positive measures for protection of children by the society and the State.<sup>13</sup>
21. The examples of limitations to the right to privacy given above are also likely to engage the right to protection of families and children.
22. Relevant to this complaint, it is the Commission's view that the rights to freedom of expression, privacy, and the protection of families and children in the *Human Rights Act 2019* necessitate that:
  - a. C has the right to receive information from the Department that she has requested or that the Department is required under law to provide to her; and
  - b. C has the right to be provided with information by the Department, in a way that she is able to understand, that is necessary for her to be able to understand and challenge the removal of, and seek reunification with, her children.
23. C's rights are not absolute and can be limited by actions and decisions of the Department that are reasonable and justified, for example, if the limitation is necessary and proportionate to protect the best interests of the child.

### Department response:

The Department does not contest the human rights which are said to be relevant to the complaint or the Commissioners' application of them to the complaint. The Department acknowledges that the right to freedom of expression includes the right to seek and receive information.

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<sup>10</sup> *TP and KM v The United Kingdom* (European Court of Human Rights, Grand Chamber, Application No 28945/95, 10 May 2001) [80].

<sup>11</sup> See for example: *KA v Finland* (European Court of Human Rights, Chamber, Application No 27751/95, 14 January 2003) [138]-[139]; *Strand Lobben and Others v Norway* (European Court of Human Rights, Grand Chamber, Application No 37283/13, 10 September 2019) [205], [208].

<sup>12</sup> *Human Rights Act 2019* s 26.

<sup>13</sup> Explanatory Notes, Human Rights Bill 2018 22.

## Discussion and recommendations

### Provide a copy of written authority before removal of children

24. C alleges that she was not 'presented with' copies of the temporary assessment orders prior to her children being removed on 5 October 2022, despite C's request that they be provided.
25. Section 31 of the *Child Protection Act 1999* requires that an authorised officer, before entering a place under a temporary assessment order, at least make a reasonable attempt to provide a copy of the order to the occupier of the place. There is an exception to this requirement if the officer reasonably believes immediate entry to the place is required to ensure effective exercise of the powers under the order is not frustrated.
26. Separately, under section 32 of the *Child Protection Act 1999*, the applicant for the temporary assessment order must immediately after the order is made provide a copy of the order to the parent, explain its terms and effect, and inform the parent of their appeal rights.
27. Based on the allegation that C requested but was not presented with a copy of the temporary assessment orders prior to the Department entering the property and removing the children, the Commission considers that C's rights to freedom of expression and privacy have been limited. Having limited rights, the onus is on the Department to demonstrably justify their actions.
28. A limitation may not be justified if there was a less restrictive and reasonably available way to achieve the purpose of the limitation. In this case, it appears that there may have been an opportunity for the Department to provide copies of the temporary assessment orders before entering the place and removing the children by forwarding an electronic copy to C's email.

#### Department response:

The Department submits that it was reasonably and demonstrably justifiable to remove C's children from immediate risk and a potentially harmful situation prior to C receiving a copy of the temporary assessment orders and additional information. It was not the case that C was not provided with the temporary assessment orders or there was an unreasonable delay in her receiving the orders.

The Department says that in consideration of C's human rights, the Child Safety Officer sought to provide C with the information that they were able at the relevant time, whilst also maintaining the Department's fundamental duty to ensure the safety of C's children pursuant to section 5A of the *Children Protection Act 1999*, and in turn, the right to protection of families and children, and the right to privacy under the *Human Rights Act 2019*.



The paramount principle in section 5A of the *Child Protection Act 1999* provides:

The main principle for administering this Act is that the safety, wellbeing and best interests of a child, both through childhood and for the rest of the child's life, are paramount.

*Example—*

If the chief executive is making a decision under this Act about a child where there is a conflict between the child's safety, wellbeing and best interests (whether immediate or long-term in nature), and the interests of an adult caring for the child, the conflict must be resolved in favour of the child's safety, wellbeing and best interests.

The Department says that C was aware of imminent temporary assessment orders, after several hours with the Child Safety Officer and C failing to agree to alternative action, and was shown a copy on the Child Safety Officer's mobile phone once granted. However, the Child Safety Officer did not have access to a printer, or to her computer, which she needed to finalise the covering letter and additional information to be provided to C with sealed copies of the temporary assessment orders.

In the circumstances, it was necessary to prioritise the removal of the children from immediate risk and possible harm, and in the best in interests of the children.

Once the children's safety was ensured, a copy of the temporary assessment orders with a covering letter and additional information was provided to C by email, at most a couple of hours later. It was not the case that C was not provided with the orders or that there was an unreasonable delay in her receiving the orders, but rather she was provided the orders at a time that was appropriate having regard to the urgent need to ensure the safety, wellbeing and best interests of C's children.

The Department considers there have been no limit on C's human rights by their conduct.

29. The Commission acknowledges that in all actions concerning children, the best interests of the child shall be the primary consideration<sup>14</sup> and is not critical of the Department's actions taken to secure the children's safety. The Commission further acknowledges that in assessing proportionality, the nature and extent of the limitation on an individual's human rights is relevant. However, in this case, it appears possible that copies of the temporary assessment orders could have been immediately emailed to C, for example, by another officer at the Department, without risking the safety of the children. Additional information, as required by section 32 of the *Child Protection Act 1999*, could have been provided by that other officer, or provided in later correspondence, as well as being verbally provided by the Child Safety Officer on the ground in the hours leading up to the order being made.

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<sup>14</sup> United Nations Convention on the Rights of the Child, Article 3.

30. The Commissioner makes the following recommendation to ensure the Department's future actions and decisions are compatible with human rights.

**Recommendation 1:** The Department should consider whether its policies, practices and training facilitate the provision of temporary assessment orders to occupiers and parents as soon as possible. For example, this could include the flexibility to immediately provide electronic copies of orders with additional information to follow, and the use of Department staff other than staff on the ground to provide copies of orders and additional information. Consideration of these options protect the rights of parents without risking the safety of the child.

#### Department response:

The Department does not consider that it is appropriate or necessary for them to review and/or amend its policies and procedures. Doing so would arguably diminish the paramount principle of the *Child Protection Act 1999* and the rights of the child in section 26 of the *Human Rights Act 2019*.

Where it is possible and safe to do so, copies of temporary assessment orders are provided to individuals prior to removal of children from properties. Otherwise, the orders are provided to individuals as soon as reasonably practicable after they are granted, which may at times be after the relevant children are removed from a property.

### Improved communication with parents

31. C's allegations indicate that she did not feel heard by the Department and that communications to her were unclear. C did not seem to understand the safety concerns that remained even when she was not in the family home. C believed that her children would be returned if she moved to a domestic violence refuge, which from the Department's perspective was not the case. C says that requests for directions to her by the Department to be in writing were ignored.
32. Under the rights to privacy and to families and children, C was entitled to information that would allow her involvement in the Department's decision making process, including reasons for taking protective action and options towards reunification. If C was given information, it appears that it was not well understood by her. Provision of the information in writing, as requested by C, may have avoided misunderstandings and promoted better relationships between C and the Department.
33. The court processes undertaken to obtain child protection orders, which can be complex and overwhelming for parents, do not necessarily fulfil this obligation of the Department to provide information to parents.

## Department response:

The Department states that they communicated often and effectively with C, including advising of the reasons for taking protective action and the options towards reunification. The Department considers they took all reasonable steps to ensure C understood what she was being advised, having regard to the manner in which the Department had communicated with C over an extended period of time, in respect of which she had not raised issues previously.

The Department notes specifically the information provided in writing to the complainant accompanying the temporary assessment orders sent by email on 5 October 2021. This included information about the orders and what they mean, the next steps, and C's appeal rights and access to legal assistance.

The Department says they have extensive records of contact and case notes of their discussions and other communications with C in respect of matters involving the custody of her children. Where C requested information to be put in writing, the Department says they acknowledged this and ensured they corresponded with C in writing where appropriate.

The Department notes that despite C being given information on access to legal assistance, C elected not to contest the temporary assessment orders.

Further, when arranging meetings and communicating with C regarding reunification, the Department says C elected not to participate in those meetings and take steps towards reunification.

In those circumstances, the Department does not agree that C's rights have been limited by the conduct of the Department.

34. The Commission makes the following recommendation to assist the Department to ensure their future action and decisions are compatible with human rights.

**Recommendation 2:** The Department review its policies, practices and training to ensure that information regarding the reasons for taking protective action and options towards reunification is clearly communicated to parents, in a way that parents will understand, and taking into account the parents' communication needs and preferences.

## Department response:

The Department is open to receiving feedback and is constantly looking at ways to improve the service that it provides to those who work with it. This includes frequently reviewing the matter in which it communicates with all stakeholders, and ensuring that appropriate training is provided to its officers.

35. The Commission recognises the experiences of the complainant, as well as the complex and difficult work undertaken by the Department and its officers for the protection of children and, by extension, their families. The Commission is grateful for the assistance of all parties in seeking to resolve this complaint and preparing this report.