Human rights in courts and tribunals

The role of courts and tribunals

The Westminster system of government, as it operates in Queensland, requires separation of the three arms of government: the legislature (parliament), the executive, and the judiciary. However, each of these arms is required to consider the *Human Rights Act 2019* when acting or making decisions. Courts and tribunals are required to consider the Human Rights Act when:

- interpreting legislation
- acting in an administrative capacity
- carrying out functions where human rights have direct application, and
- dealing with matters in which human rights grounds have been 'piggy-backed' onto an existing cause of action.

Interpreting legislation

Section 48 of the Human Rights Act requires all legislation to be interpreted in a way that is compatible with human rights, to the extent possible that is consistent with the purpose of the legislation.

If legislation cannot be interpreted in a way that is compatible with human rights, it is to be interpreted in a way that is most compatible with human rights, to the extent possible that is consistent with the purpose of the legislation.

A statutory provision is 'compatible with human rights' if it does not limit a human right, or limits a human right only to the extent that is reasonable and demonstrably justifiable in a free and democratic society based on human dignity, equality, and freedom. Section 13 of the Human Rights Act sets out factors that may be relevant in deciding whether a limit on a human right is reasonable and justifiable.

In *BA, DC, FE v State of Queensland* [2022] QCAT 332*,* one of the issues before the Tribunal was whether proceedings under the *Anti-Discrimination Act 1991* had been properly made and referred to the tribunal in circumstances where complaints were made by a lawyer for three young people under 18 years of age, some of whom identified that they have a disability, and no person had been authorised to act on behalf of them. The Tribunal held that the statutory regime contemplated that a person under the age of 18 may bring a complaint and have it referred, and the tribunal would then assist the young person without the need for a litigation guardian. This interpretation was said to be 'most compatible' with the young person's human rights and took into consideration the fact that the young people were legally represented and that lawyers have obligations to the tribunal and their clients. However, in the interests of a fair hearing, the tribunal ordered that a litigation guardian be appointed for one of the young people whose lawyer was taking instructions from the mother rather than the young person themself. Specific human rights were not identified in the tribunal's reasons for decision, but the Commission raised the rights of the child and recognition and equality before the law in its submissions to the tribunal.

In *SBN v Department of Children, Youth Justice and Multicultural Affairs* [2022] QCAT 321 an application was made by a mother to review the Department's decision designed to facilitate contact between her children. As the decision did not involve the mother, the department sought to have the application dismissed

on the basis the mother was not 'a person affected by the decision' as required by the *Child Protection Act 1999*. While not expressly referring to section 48 of the Human Rights Act, the tribunal considered the right to protection of families and children in section 26 of that Act in concluding that the mother was a person affected by a decision concerning contact between her children.

The Human Rights Act requires that 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. Section 48 of the Human Rights Act forms part of the body of interpretative rules to be applied in ascertaining the meaning of a statutory provision.

Declarations of Incompatibility

The Supreme Court or the Court of Appeal may make a declaration of incompatibility if the court considers that a statutory provision cannot be interpreted in a way that is compatible with human rights. The experience of other jurisdictions is that this power is rarely used, and Queensland's Supreme Court did not exercise the power in the 2022–23 year.

Acting in an administrative capacity

When courts and tribunals are acting in an administrative capacity, they are public entities under the Human Rights Act and are required to:

- act and make decisions in a way that is compatible with human rights, and
- give proper consideration to human rights relevant to decisions they make.

In 2022–23, the following Queensland courts and tribunals acknowledged that they were acting in an administrative capacity and are therefore a public entity with obligations under the Human Rights Act, in the circumstances outlined in Table 2a.

Table 2a: Cases confirming where courts and tribunals were acting in an administrative capacity in 2022-23

Subject matter	Case
Land Court in deciding whether to recommend the approval of a mining lease and environmental authority for a coal mine	*Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 6)* [2022] QLC 21
QCAT in deciding an exemption application under section 113 of the *Anti-Discrimination Act 1991*	*Burleigh Town Village Pty Ltd (3) [2022] QCAT 285*
QCAT in a review of a decision to cancel a blue card	*LM v Director-General, Department of Justice and Attorney-General* [2022] QCAT 333

Coroners Court in holding an inquest and making findings and recommendations to prevent deaths in the future	*Inquest into the deaths of Yvette Michelle Wilma Booth, Adele Estelle Sandy, Shakaya George (Findings of inquest, Coroners Court of Queensland, Coroner Wilson, 30 June 2023)*

The following Queensland courts and tribunals confirmed they were acting in a judicial capacity, and are therefore not public entities under the Human Rights Act, in the circumstances outlined.

Table 2b: Cases where tribunals have stated they are not acting in an administrative capacity in 2022-23

Subject matter	Case
QCAT in deciding a complaint about a contravention of the *Anti-Discrimination Act 1991*	*Gorgievski v Gold Coast City Council & Anor* [2022] QCAT 365

Direct application

Section 5(2)(a) of the Human Rights Act imposes direct obligations on courts and tribunals to act compatibly with human rights to the extent that the court or tribunal has the function of applying or enforcing those rights. The obligation applies whether or not the court or tribunal is acting in a judicial or administrative capacity.

The Supreme Court in *Attorney-General for the State of Queensland v Grant* (No 2) [2022] QSC 252 confirmed that a court is required to consider the human rights relevant to the subject matter in the particular proceedings. This has been referred to in other jurisdictions as the 'intermediate construction' of section 5(2)(a) of the Human Rights Act, and a 'functional approach' to identifying rights. Whether this required the Court to 'act compatibly' with the identified right or to merely consider the right depended on the specific function being performed, the relevant right, and the circumstances of the case, although the Court regarded the difference as 'more apparent than real'.

In this case, the Court applied the right to liberty (section 29) and the right to humane treatment when deprived of liberty (section 30) in determining whether a sexual offender who had completed his sentence should be released under supervision or be subject to continuing detention under the *Dangerous Prisoners (Sexual Offenders) Act 2003.*

In *Queensland Police Service v Ahmed* [2023] QMC 2, the defendant was charged with contravening an order by refusing to provide the passcode to his phone to police. The defendant claimed he had a 'reasonable excuse' defence because it would offend his faith to expose photographs of his wife to male police officers. This engaged the rights to freedom of thought, conscience, religion and belief (section 20), and cultural rights (section 27). The Court held that when police fail to

comply with their obligations under the Human Rights Act, this may give rise to, or bolster, the reasonable excuse to withhold information in compliance with the order.

Even where a human right relates directly to a court's proceedings, it does not provide an independent remedy or cause of action. In *Wood v The King & Anor* [2022] QSC 216, the applicant applied for a declaration under the section 29(7) of the Human Rights Act that his detention on remand was unlawful. He argued this would oblige the District Court to order his release. The District Court referred a question of law to the Supreme Court, which determined that section 29(7) did not vest jurisdiction in the District Court to grant a declaration that a prisoner was being held in custody unlawfully. To make such a challenge, a prisoner ought to seek *habeus corpus*, which accommodates the right provided under section 29(7) of the Human Rights Act. However, the real remedy was a bail application, which the Court found is not concerned with the lawfulness of the detention and is therefore not relevant to section 29(7) of the Human Rights Act.

Piggy-back matters

There is no standalone legal remedy available through the courts for an alleged limitation of human rights. However, human rights arguments can be added to, or 'piggy-backed' onto, a separate and independent cause of action against the public entity. For example, an application for judicial review of a decision made by a public entity might also include a claim that the public entity breached its section 58 obligations under the *Human Rights Act 2019* to act or make a decision in a way that is compatible with human rights and to give proper consideration to a human right relevant to the decision.

In these actions, a person may obtain (non-financial) relief if they successfully demonstrate a breach of section 58 of the *Human Rights Act 2019*, even if they are not successful in their primary claim for relief.

Austin BMI Pty Ltd v Deputy Premier [2023] QSC 95 and *Wallace v Tannock & Anor* [2023] QSC 122 are examples of judicial review proceedings to which claims of unlawfulness under the Human Rights Act were piggy-backed.

Wallace v Tannock concerned a review of directions issued by Queensland Corrective Services to a person subject to a supervision order made under the *Dangerous Prisoners (Sexual Offenders) Act 2003*. The Court concluded that the man was not provided with procedural fairness in the making of the directions and also found an invalid limitation had been placed on the applicant's right to freedom of association.

Referrals to Supreme Court

If a question of law arises in a court or tribunal proceeding about the application of the *Human Rights Act 2019*, or statutory interpretation in accordance with the Act, it may be referred to the Supreme Court of Queensland.

In 2022-23, there was one referral from the District Court on the question of whether an application purportedly made pursuant to section 29(7) of the Human Rights Act (liberty and security) was appropriately brought to the District Court. The decision in *Wood v The King & Anor* [2022] QSC 216 was that the application was not appropriately brought because the Human Rights Act does not provide an independent remedy or cause of action.

Queensland cases that have considered or mentioned the Human Rights Act

In the financial year ending 30 June 2023, courts and tribunals considered or mentioned the Act in 202 matters. Of these, 136 involved detailed consideration. On 66 occasions the Human Rights Act only received a minor mention by the decision-maker. For the first time this year we have reported on 2 overseas courts that considered or mentioned the Queensland Act.

The number of times that courts or tribunals considered or mentioned the Human Rights Act more than doubled in number from the previous year.

Table 3: Number of matters where courts and tribunals considered or mentioned the Human Rights Act.

Court	2021-22	2022-23
Federal Court of Australia, Full Court	0	2
Federal Court of Australia	1	1
Federal Circuit and Family Court of Australia	0	1
Fair Work Commission	2	1
Court of Appeal Queensland	1	3
Supreme Court of Queensland	3	14
Industrial Court Queensland	0	1
District Court of Queensland	4	3
Land Court of Queensland	2	4
Mental Health Court Queensland	1	1
Coroners Court Queensland	1	2
Magistrates Court of Queensland	0	2
Queensland Civil and Administrative Tribunal, Appeals	4	4

Queensland Civil and Administrative Tribunal	44	77
Queensland Industrial Relations Commission	23	50
Office of Information Commissioner	0	34
New Zealand Supreme Court	0	1
United Kingdom Supreme Court	0	1
Total	**86**	**202**

Key cases

Queensland courts from a range of jurisdictions considered the Human Rights Act, and a selection of key cases from the reporting period are summarised below.

Property and development

Austin BMI Pty Ltd v Deputy Premier [2023] QSC 95

Three groups applied for judicial review of a decision made by Queensland's Deputy Premier to 'call-in' a development application made by Wanless Recycling Park to establish a new resource recovery and landfill facility west of Ipswich. The call-in meant the decision on whether to approve the application would be made by the Deputy Premier, rather than through the usual development application process. The Deputy Premier had not yet decided whether to approve or reject the application.

A group of local residents alleged that the call-in decision was incompatible with their human rights under the Human Rights Act. The Court considered their right to take part in public life, property rights, and right to a fair hearing. The Court concluded that the Deputy Premier's decision did not limit human rights, and even if it did, any limitation was reasonable and proportionate.

In considering the rights of the local residents to take part in public life,[54] the Court concluded that they had the opportunity, without discrimination, to participate in the conduct of the call-in process. Even if opposing lobbyists had better prospects of persuading the Deputy Premier, the right to take part in public life does not guarantee an equal voice or equality of bargaining power.

The Court also considered the meaning of the term 'without discrimination' as it forms part of the right to take part in public life. The word 'discrimination' is defined in the Human Rights Act as *including* direct or indirect discrimination within the meaning of the *Anti-Discrimination Act 1991*. The Court found that this definition allows for analogous grounds of discrimination beyond what is protected by the

[54] *Human Rights Act 2019* (Qld) s 23.

Anti-Discrimination Act, by applying the ordinary use of the word 'discrimination'. This involves 'making a distinction, as in to discriminate against a minority', and not merely differential treatment.

The applicants had also argued that the call-in deprived them of their rights to property[55] in the form of a statutory right to elect to be a co-respondent and participate as a party to a planning appeal. Even at its most liberal interpretation, the Court disagreed this amounted to property, which goes to a person's dignity and ability to enjoy other human rights. The Court further found that the applicants had not demonstrated how they had been 'arbitrarily' deprived of the right to property and that the Deputy Premier's actions in accordance with the statutory regime could not be described as arbitrary.

The call-in decision meant the planning appeal, to which the applicants were a party, was discontinued. However, the Court followed case law from the United Kingdom to conclude that the applicants' right to a fair hearing[56] would not be limited, provided the call-in decision was subject to independent review which looked at 'the legality of the decisions and of the procedures followed' – in this case, judicial review.

The Court also found the Deputy Premier had given proper consideration to human rights. The Deputy Premier expressly referred to a human rights assessment prepared by the department to assist with his consideration, which he was entitled to do. The human rights assessment primarily discussed freedom of expression and did not refer to the rights to take part in public life, property, or fair hearing under the Human Rights Act. The Court nevertheless held that proper consideration had been given by the Deputy Premier because those rights had not been affected by the call-in decision. Further, the Deputy Premier had identified and considered the potential impact of the call-in decision on the right to property, although the human rights assessment did not refer to that right expressly.

The Court confirmed that section 58(6) of the Human Rights Act makes clear that breach of section 58(1) by a public entity amounts to 'non-jurisdictional error'. That means that even if a decision is 'unlawful' under section 58(1), it does not make the decision 'invalid'.

Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 6) [2022] QLC 21

Waratah Coal applied for a mining lease and an environmental authority to allow it to mine thermal coal in the Galilee Basin. Youth Verdict and others objected to the grant of a mining lease and environmental authority and the matter was referred to the Land Court to make recommendations. The Land Court recommended that the mining lease and environmental authority be refused on several grounds,

[55] *Human Rights Act 2019* (Qld) s 24.
[56] *Human Rights Act 2019* (Qld) s 31.

including that the resulting limitation on human rights caused by climate change could not be justified.

The Land Court was acting in an administrative capacity and therefore required to properly consider human rights that might be limited by the mining project, and to make a decision that is compatible with human rights. The Court accepted the connection between the act of authorising the grant of the lease and the harm that would be caused by the emission of greenhouse gas when the mined coal was burnt. This meant that authorising the project had the capacity to limit human rights.

The Court held it was not necessary for the claimant to have suffered harm to establish a limit on the right to life.[57] The increased risks of climate change, even if the risks did not materialise, were sufficient to demonstrate a limitation because of the life-threatening consequences of climate change caused by burning the mined coal.

Climate change impacts would also have a profound impact on the cultural rights of Aboriginal peoples and Torres Strait Islander peoples[58] and, for people who would be displaced from their country, the survival of their culture was at risk. The impacts of climate change and displacement also limit the right to privacy and home,[59] and the right to enjoy human rights equally.[60]

The rights of children[61] were limited due to their vulnerability to climate change impacts and the disproportionate burden of those impacts on children today and in the future.

The Court also accepted that 'climate change impacts will include destruction of property or a sufficient restriction on the ability to use and enjoy property to amount to a de facto expropriation'. This deprivation of property[62] was arbitrary in the sense of not being proportionate to the legitimate aim. The Court considered the importance of preserving the right, both as a fundamental common law right, and the human and cultural loss for First Nations peoples.

The Court was not persuaded that the limits on human rights identified were demonstrably justified, even taking into account the economic benefit and supply of thermal coal in South-East Asia.

Additionally, the court found that limits on the rights to property and privacy of landholders as a result of nuisance and environmental damage caused by the project were not justified.

[57] *Human Rights Act 2019* (Qld) s 16.
[58] *Human Rights Act 2019* (Qld) s 26.
[59] *Human Rights Act 2019* (Qld) s 25.
[60] *Human Rights Act 2019* (Qld)s 15.
[61] *Human Rights Act 2019* (Qld) s 26.
[62] *Human Rights Act 2019* (Qld) s 24.

Burleigh Town Village Pty Ltd (3) [2022] QCAT 285

The applicant sought renewal of an exemption from the operation of the *Anti-Discrimination Act 1991* in order to operate a manufactured home park reserved for persons over 50 years.

The tribunal held that the right to own property is not limited to the taking of a person's title to their property, but included preventing a person from exercising their property rights[63] in a way that is 'practical and effective'. The exemption, if granted, would limit property rights by preventing a person from owning a home in the park if they are under age 50, and restricting homeowners to selling their homes only to persons over age 50, which in turn significantly affected market value.

The tribunal also considered the right to recognition and equality before the law.[64] If the measure proposed is a 'special measure' to achieve equality for groups of disadvantaged persons, then it is not discrimination. That was not the case here. It followed that the discrimination that would occur by excluding persons under 50 years from ownership and occupation limited the right to recognition and equality before the law and had to be justified.

QCAT was not persuaded that the limitation of either right was reasonable and demonstrably justified 'to the objective of providing affordable housing in a community environment for older people'.

Coronial inquest

Inquest into the deaths of Yvette Michelle Wilma Booth, Adele Estelle Sandy, Shakaya George (Findings of inquest, Coroners Court of Queensland, 30 June 2023)

This inquest investigated the deaths of three young Aboriginal women from the remote community of Doomadgee who died as a result of rheumatic heart disease. The issues for the Coroner included the adequacy of health services and prevention strategies in the community for rheumatic heart disease.

The Coroner found that holding an inquest and making findings and recommendations to prevent deaths in the future is an administrative function of the Court and is therefore subject to the obligations on a public entity under section 58 of the *Human Rights Act 2019.* This means that the Coroner must:

- conduct the inquest in a manner that is compatible with human rights
- undertake a thorough and effective investigation that takes into account all surrounding circumstances, in accordance with the right to life. This may include making findings on failures by public entities to comply with the Human Rights Act that may have caused or contributed to the deaths

[63] *Human Rights Act 2019* (Qld) s 26.
[64] *Human Rights Act 2019* (Qld) s 15.

- give proper consideration to human rights, and to make decisions, findings, and comments that are compatible with human rights
- in making recommendations, take into account the protection of human rights, including a consideration that recommendations should be designed to protect human rights and should not disproportionately limit human rights.

The Coroner found that failures in information sharing between the separate health services as well as between health services, patients, and their families, had an impact on the patients' right to life[65] and their right to access health services without discrimination.[66] The Coroner also made findings that the cultural rights of Aboriginal Peoples and Torres Strait Islander peoples,[67] the right to equality,[68] and children's rights[69] had been affected.

The Coroner acknowledged concerns regarding cultural safety at the health services in the community and made recommendations to address this. The findings outline how cultural rights are preserved by the existence of an Aboriginal Community Controlled Health Organisation in the community, including because it supports community identity by employing locals, ensures observance of language and cultural expression, recognises kinship ties and how those relationships may be impacted, and is governed by a predominantly First Nations Board of Directors and CEO, some of whom have close cultural connections to the community.

Cases relating to the *Dangerous Prisoners (Sexual Offender) Act 2003*

Attorney-General for the State of Queensland v Grant (No 2) [2022] QSC 252

A 78-year-old man's sentence for sexual offences had expired. The decision for the Court was whether to make a supervision order, which would allow the prisoner to be released under supervision, or a continuing detention order under the *Dangerous Prisoners (Sexual Offenders) Act 2003.* While the prisoner's risk to the community could be appropriately managed if released, his health and disability needs would not be met by the placement chosen by Queensland Corrective Services (QCS).

Applying section 5(2)(a) of the Human Rights Act, the Court concluded that the function of making a continuing detention order would involve consideration of at least the right to liberty[70] and the right to protection against arbitrary detention.[71] If a continuing detention order was only made because of QCS's decision to not provide suitable and humane conditions for placement of the, then the prisoner's detention would arguably be arbitrary.

[65] *Human Rights Act 2019* (Qld) s 16.
[66] *Human Rights Act 2019* (Qld) s 37.
[67] *Human Rights Act 2019* (Qld) s 29.
[68] *Human Rights Act 2019* (Qld) s 15.
[69] *Human Rights Act 2019* (Qld) s 26(2).
[70] *Human Rights Act 2019* (Qld) s 29(1).
[71] *Human Rights Act 2019* (Qld) s 29(2).

In contrast, the making of a supervision order in preference to a continuing detention order would involve, at a minimum, consideration of the right to humane treatment when deprived of liberty.[72] The prisoner required a high level of support which made his proposed placement unsafe for his health.

Ultimately, the Court applied the principle that supervised release should generally be preferred to a continuing detention order. This principle rests on the basis that intrusions on the right to liberty are exceptional and that liberty should be constrained to no greater extent than is warranted by the law. This was reinforced in this case by the prisoner's preference for a supervision order. The Court ordered the prisoner be released under a supervision order.

Wallace v Tannock & Anor [2023] QSC 122

A man had a history of sexual offending against women. Following the expiry of his prison sentence, he was released from prison on a supervision order which required that he comply with every reasonable direction of a Queensland Corrective Services (QCS) officer.

QCS became concerned about the man's behaviour with respect to female NDIS workers and in 2022 issued a direction requiring that the man have only male NDIS support workers and that he obtain approval to have any person in his home, including family members. The man's risk had not been assessed since 2015.

The man sought judicial review of the QCS direction.

The Court concluded that the man had not been provided with procedural fairness in the making of the directions and ordered the QCS direction to be set aside and remitted for reconsideration according to law.

The Court also considered the man's human right to freedom of association.[73] The Court found that the direction regarding male NDIS support workers was justified and calculated to mitigate the damage to society that may arise from the man's offending against a female support worker. However, the limitation on visitors, including male visitors from the man's own family, was not justified. There was no rational basis for concern that the man would offend against a male, or any evidence that QCS needed to be aware of all male visitors to ensure community safety. The Court indicated that it would have set aside the QCS direction on the basis that it was an invalid limitation on the man's freedom of association.

Legal capacity

BA, DC, FE v State of Queensland [2022] QCAT 332

The tribunal considered whether complaints made by persons all under 18 years of age had been properly made and referred under the *Anti-Discrimination Act 1991*. The concern arose because of the position in the civil courts that a litigation

[72] *Human Rights Act 2019* (Qld) s 30.
[73] *Human Rights Act 2019* (Qld) s 22.

guardian is required for a person under 18 to bring a proceeding. The tribunal asked the Commission to make submissions.

The tribunal accepted that a complainant did not have to be over 18 years of age to make a valid complaint and, as the complainants were persons subjected to an alleged contravention within section 134(1)(a) of the Anti-Discrimination Act, the complaints had been properly made. This interpretation of the legislation was most compatible with human rights. Although specific rights were not identified in the tribunal's decision, rights raised in the Commission's submissions were the rights of the child[74] and recognition and equality before the law.[75]

Further, the tribunal found that provided a person under 18 years was 'Gillick competent', they may pursue the matter without a litigation guardian. The tribunal assessed the competency of each of the complainants and made directions that one of the complainants be appointed a litigation guardian. QCAT considered that by requiring a litigation guardian, the complainant's rights to equality,[76] protection of families and children[77] and fair hearing[78] were limited. However, that limitation was justified because of its purpose to ensure a fair hearing for all parties based on reliable and informed instructions from a party competent to give instructions and the fair administration of justice.

In the matter of ICO [2023] QMHC 1

The Mental Health Court was asked to consider an application for the approval of involuntary treatment of a woman with electroconvulsive therapy (ECT) under the *Mental Health Act 2016*. Before treatment with ECT can be approved, the Court must be satisfied that the person is not able to give informed consent to ECT.

The Court identified several of human rights engaged by the decision, including the right to equality,[79] privacy,[80] liberty and security,[81] humane treatment when deprived of liberty,[82] the right to access health services without discrimination,[83] and the right not to be subjected to medical treatment without the person's full, free and informed consent.[84] The Court noted that these rights were consistent with the Mental Health Act's objects and principles that must be applied when performing a function or power under the Mental Health Act.

In setting out what was required to determine whether a person can understand the nature and effect of a decision relating to ECT, the Court drew upon aspects of the Victorian case of *PBU and NJE v Mental Health Tribunal* (2018) 56 VR 141. This included that to have capacity, it is not necessary for a person to give careful consideration to the advantages or disadvantages of treatment, or that the person makes a rational or balanced decision. It is enough, like most people, to be able to make and communicate a decision in broad terms as to the general nature and effect of treatment. A person's insight into their illness is relevant to considering

[74] *Human Rights Act 2019* (Qld) s 26(2).
[75] *Human Rights Act 2019* (Qld) s 15.
[76] *Human Rights Act 2019* (Qld) s 15.
[77] *Human Rights Act 2019* (Qld) s 26.
[78] *Human Rights Act 2019* (Qld) s 31.
[79] *Human Rights Act 2019* (Qld) s 15.
[80] *Human Rights Act 2019* (Qld) s 25.
[81] *Human Rights Act 2019* (Qld) s 37.
[82] *Human Rights Act 2019* (Qld) s 29.
[83] *Human Rights Act 2019* (Qld) s 15.
[84] *Human Rights Act 2019* (Qld) s 17(1)(c).

whether a person has the ability to understand the nature and effect of a decision relating to ECT treatment but is not determinative. The question of capacity under the Mental Health Act will be fact and context specific.

In this case, the Court determined the woman did not have capacity to consent to ECT. However, ECT was refused on the basis the Court was not satisfied that it was appropriate in the circumstances, given there remained alternatives to ECT to be explored.

Interventions

The Attorney-General and the Queensland Human Rights Commission may intervene in proceedings before a court or tribunal in which a question of law about the application of the Human Rights Act arises, or a question about how legislation is to be interpreted in accordance with the Human Rights Act.

Commission notifications

For proceedings in the Supreme Court or District Court in which a question of law arises that relates to the application of the Human Rights Act or the interpretation of a statutory provision, parties must give notice in the approved form under section 52 of the *Human Rights Act 2019* to the Attorney-General and the Queensland Human Rights Commission. The Commission also receives notifications of proceedings that are not required under section 52 of the Human Rights Act.

In 2022–23, the Commission received 26 notifications or requests to intervene under the Human Rights Act. Of those, 16 were notices under section 52 of the Human Rights Act.

Commission interventions

In the reporting period, the Commission intervened in 5 matters before the Supreme Court and one matter in the District Court. A decision was also made in a coronial inquest in which the Commission had previously intervened.

One Supreme Court matter was an application by the Attorney-General under the *Dangerous Prisoners (Sexual Offences) Act 2003* about a person who had been convicted of sexual offences and served their time, but remained a risk if released from prison without a supervision order. The Commission made submissions about the direct application of the Human Rights Act when a court is performing functions relevant to human rights, including judicial functions The Court's decision was published on 16 November 2022 as *Attorney-General for the State of Queensland v Grant (No 2)* [2022] QSC 253.

Four Supreme Court matters related to applications seeking review of a magistrate's decision not to release children on bail. The Commission made written submissions about the extent to which limitation of human rights is relevant to the consideration of risk when deciding whether to release a person on bail. However, the applications were withdrawn before being heard.

The District Court matter concerned an application to exclude certain evidence in a criminal proceeding. The Commission made submissions about the right to privacy and how it applied to questioning and seizure of property by police, and the obligations on police to give proper consideration to human rights when deciding to seize property. At the hearing of the application the prosecution entered a *nolle prosequi* (no wish to prosecute) which had the effect of discharging the accused person. As a result, there were no findings on human rights issues.

On 30 June 2023, the Coroners Court made a decision in the *Inquest into the deaths of Yvette Michelle Wilma Booth, Adele Estelle Sandy, Shakaya George* ('RHD Doomadgee cluster'). The Commission's submissions as intervener included the application of the Human Rights Act to the Coroners Court and the scope of rights relevant to the investigation.

The Commission has also commenced or continued to intervene as follows:

- seven applications awaiting decision before the Supreme Court seeking judicial review of mandatory requirements for vaccination against COVID-19. While some of the matters have been heard, at the time of writing no decisions about the human rights compatibility of these requirements have been delivered.
- a coronial investigation into a death in custody which was not heard in the reporting period. At the time of writing, the hearing into this matter has now commenced.

Attorney-General interventions

During 2022–23, the Attorney-General intervened under section 50 of the Human Rights Act in 12 proceedings and provided, or will provide, submissions on the operation of the Human Rights Act in 3 proceedings to which the Attorney-General was already a party:

- One of those was the case of *Wood v The King* [2022] QSC 216, which concerned a referral to the Supreme Court under section 49 of the *Human Rights Act*. The Supreme Court accepted submissions made on behalf of the Attorney-General that the *habeas corpus* right (requiring a person under arrest to be brought before a court and released unless lawful grounds for detention are shown) in section 29(7) is not a standalone cause of action.
- In *Attorney-General (Qld) v Grant (No 2)* [2022] QSC 252, the Supreme Court held that it is required to consider some human rights directly when exercising its discretion to make a supervision order under the *Dangerous Prisoner (Sexual Offenders) Act 2003*.
- In *Morant v Ryan (The State Coroner)* [2023] QCA 109, submissions were made on behalf of the Attorney-General in relation to the relevance of the *Human Rights Act* to the appeal to the District Court.
- In *Wallace v Tannock & Anor* [2023] QSC 122, the Supreme Court determined that a direction made by Queensland Corrective Services in relation to a man subject to a supervision order under the *Dangerous Prisoner (Sexual Offenders) Act 2003* was not compatible with human rights.
- The Attorney-General intervened in the judicial review application of *Waratah Coal Pty Ltd v President Kingham* (Supreme Court No 16196/22), however the application was later discontinued.
- Four matters concerned appeals in the Supreme Court against a grant of bail for young people and are subject to publication restrictions.
- One matter concerned an application in the District Court to exclude evidence on the basis that it was obtained in breach of s 58 of the

Human Rights Act, however the matter resolved without the issue being determined.
- Five other matters are ongoing.

Summary of the role of courts and tribunals in 2022-23

Judgments delivered this year provided guidance to courts and tribunals on direct application of the Human Rights Act under section 5(2)(a) when acting in a judicial capacity. In *Attorney-General for the State of Queensland v Grant (No 2)* [2022] QSC 253, the Supreme Court clarified that the court is required to consider the human rights that relate to the functions the court is performing, rather than limiting its consideration to those rights explicitly addressed to courts (for example, the right to a fair hearing and rights in criminal proceedings). However, rights protected by the Human Rights Act do not give rise to an independent remedy or cause of action.[85]

Further judicial consideration was given to the obligation on public entities to give proper consideration to human rights. The Supreme Court in Austin BMI Pty Ltd v Deputy Premier [2023] QSC 95 reinforced comments made in *Owen-D'Arcy v Chief Executive, Queensland Corrective Services* [2021] QSC 273 that the identification of affected human rights required for proper consideration must be approached in a 'common sense and practical manner'. In *Austin BMI Pty Ltd v Deputy Premier* [2023] QSC 95, the Court held that the decision-maker was entitled to rely on briefings from the department to demonstrate proper consideration, and that the briefing did not have to identify and consider rights that were 'not affected' by the decision. The Court also confirmed section 58(6) of the Human Rights Act makes clear that a contravention of section 58(1) obligations by a public entity when making a decision amounts to non-jurisdictional error and does not make the decision invalid.

In 2022-23, there was limited commentary on the application of the interpretative provision under section 48 of the Human Rights Act.

Significant decisions were made by the Land Court of Queensland and the Coroners Court of Queensland acting in an administrative capacity and therefore with public entity obligations.[86] The Mental Health Court also took a human rights approach in a decision regarding approval of electroconvulsive therapy by applying the principles of the *Mental Health Act 2016,* which the Court found were consistent with the Human Rights Act.[87]

Courts and tribunals provided guidance on particular rights in 2022-23, which is reflected in table 4.

[85] *Wood v The King & Anor* (2022) 12 QR 101, [2022] QSC 216.
[86] *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors* (No 6) [2022] QLC 21; *Inquest into the deaths of Yvette Michelle Wilma Booth, Adele Estelle Sandy, Shakaya George* (Findings of inquest, Coroners Court of Queensland, 30 June 2023).
[87] *In the matter of ICO* [2023] QMHC 1.

Table 4: Consideration of specific rights by courts and tribunals, 2022-23

Protected rights	Cases which considered this right
Recognition and equality before the law (section 15)	*Burleigh Town Village Pty Ltd (3)* [2022] QCAT 285; *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 6)* [2022] QLC 21; *Austin BMI Pty Ltd v Deputy Premier* [2023] QSC 95 (considered the meaning of 'without discrimination' in the context of the right to take part in public life)
Right to life (section 16)	*Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 6)* [2022] QLC 21; *Inquest into the deaths of Yvette Michelle Wilma Booth, Adele Estelle Sandy, Shakaya George* (Findings of inquest, Coroners Court of Queensland, 30 June 2023)
Peaceful assembly and freedom of association (section 22)	*Wallace v Tannock & Anor* [2023] QSC 122
Property rights (section 24)	*Austin BMI Pty Ltd v Deputy Premier* [2023] QSC 95; *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 6)* [2022] QLC 21; *Burleigh Town Village Pty Ltd (3)* [2022] QCAT 285
Cultural rights–Aboriginal peoples and Torres Strait Islander peoples (section 28)	*Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 6)* [2022] QLC 21, *Inquest into the deaths of Yvette Michelle Wilma Booth, Adele Estelle Sandy, Shakaya George* (Findings of inquest, Coroners Court of Queensland, 30 June 2023)
Right to liberty and security of person (section 29)	*Attorney-General for the State of Queensland v Grant (No 2)* [2022] QSC 252
Fair hearing (section 31)	*Austin BMI Pty Ltd v Deputy Premier* [2023] QSC 95; *BA, DC, FE v State of Queensland* [2022] QCAT 332

With the growing number of cases addressing human rights issues in Queensland and the increasing depth of analysis within these cases, it is evident that the jurisprudence surrounding human rights in Queensland is evolving. The rise in such cases may signify a heightened willingness and confidence among advocates to incorporate human rights arguments in their litigation efforts, as well as an increasing openness of courts to thoroughly delve into these matters. As this body of case law continues to expand, both public entities and the community at large will gain a clearer understanding of how the Human Rights Act is applicable in a range of contexts. The Commission's ongoing participation as an intervenor in significant cases will continue to be instrumental in emphasising the significance of human rights in Queensland.