



Victims' rights

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

24 August 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 complaint does not require evidence, and the Commission cannot resolve 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 Queensland Human Rights Commission received a complaint from a person who had made numerous reports about her neighbour's actions to the Queensland Police Service (**QPS**). The complaint included allegations that QPS failed to update the complainant on the progress of investigations and ignored her requests for information and assistance. The complaint was accepted as alleging limitation on the rights to freedom of expression, right to privacy, and right to liberty and security under the *Human Rights Act 2019*.
2. Following an unsuccessful conciliation process, the Commissioner has exercised his discretion to make recommendations to QPS to ensure their acts and decisions are compatible with human rights. QPS was given an opportunity to make submissions in response to the recommendations and their submissions provided by letter dated 31 March 2023 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.
4. The Commissioner will publish this report under section 90 of the HR Act.

Summary of recommendations

5. The Commission recommends QPS takes the following actions to ensure their acts and decisions are compatible with human rights.

QPS should review their policies, procedures and training to ensure that:

- (a) Further guidance is provided to QPS officers in the application of the *Charter of Victims' Rights* (victims charter) with respect to the privacy rights of the accused under both information privacy legislation and the *Human Rights Act 2019*.
- (b) Victims making a police report are made aware of their rights in the victims charter.
- (c) QPS officers are made aware of their obligations under the victims charter.
- (d) Victims who raise concerns about their interactions with police are referred to the process to make a complaint about QPS conduct as provided for by the *Victims of Crime Assistance Act 2009*, and the right to make a complaint under the *Human Rights Act 2019* where there has been an alleged contravention of that Act.

Substance of the complaint

6. The substance of the complaint is contained in the complaint material lodged with the Commission by the complainant (C) on 1 December 2021, 22 February 2022 and 13 October 2022.¹
7. The allegations in the complaint are summarised as follows:
 - (a) C alleges that prior to and since 1 January 2020 she has been targeted by her neighbour, including that they have damaged her property, damaged the home she lives in, and threatened and harassed her.
 - (b) C alleges that despite numerous reports made to QPS since 1 January 2020, QPS have failed to investigate the activities of C's neighbours. She also alleges that QPS have not provided her with updates, failed to take proper records, and ignored her requests for information and assistance.
 - (c) The actions of C's neighbours and the inaction of QPS have caused her distress and fear.
8. The *Human Rights Act 2019* commenced substantive operation on 1 January 2020. Complaints to the Commission can only be made about the actions and decisions of public entities occurring after 1 January 2020.²

Actions taken to resolve complaint

9. A conciliation conference was held on 13 December 2022. The matter did not resolve at conciliation.
10. At the conciliation QPS advised and later confirmed that:
 - (a) On 15 January 2021, QPS attended the complainant's address and took a complaint in relation to her neighbour.
 - (b) Following investigation, the neighbour was charged with one count each of public nuisance and wilful damage.
 - (c) The neighbour was convicted in the Magistrates Court in June 2021 and a no contact order was made.
 - (d) The complainant was not notified of the prosecution action and was unaware of the outcome of the Magistrates Court proceedings until informed at the conciliation conference on 13 December 2022.

¹ 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.

² *Human Rights Act 2019* s 108.

11. It was also indicated by QPS at conference that there was an open investigation in which the only outstanding issue was a statement from C.

Victims charter

12. C is a victim under the *Victims of Crime Assistance Act 2009*.³
13. The *Charter of Victims' Rights* (victims charter), set out in the *Victims of Crime Assistance Act 2009* as far as practicable and appropriate, governs the conduct of police in dealing with victims.⁴ The purpose of the victims charter is to advance the interest of victims and to inform victims of the rights victims can expect will underlie the conduct of police and others when dealing with victims.⁵ While the victims charter is not civilly or criminally enforceable, it does not prevent disciplinary action being taken.⁶
14. Relevantly, the victims charter includes:

Division 1 General Rights

- 1 A victim will be treated with courtesy, compassion, respect and dignity, taking into account the victim's needs.

Division 2 Rights relating to the criminal justice system

- 1 A victim will be informed about the progress of the investigation of the crime, unless informing the victim may jeopardise the investigation. If the investigation may be jeopardised, the victim will be informed accordingly.
- 2 A victim will be informed of each major decision (including the reasons for the decision) made about the prosecution of a person accused of committing the crime, including decisions about any of the following matters—
 - (a) the charges brought against the accused;
 - (b) not bringing charges, or substantially changing the charges, against the accused;
 - (c) accepting a plea of guilty to a lesser or different charge.
- 3 A victim will be informed of the following matters—
 - (a) the name of a person charged with an offence in relation to the crime;

³ *Victims of Crime Assistance Act 2009* s 5(1)(a).

⁴ *Victims of Crimes Assistance Act 2009* s 6B, Schedule 1AA. See also meaning of 'prescribed person' under s 6A.

⁵ *Victims of Crimes Assistance Act 2009* s 6C.

⁶ *Victims of Crimes Assistance Act 2009* s 7.

- (b) the issue of a warrant for the arrest of a person accused of committing the crime;
- (c) details of relevant court processes, including when the victim may attend a court proceeding and the date and place of a hearing of a charge against the accused;

Example of a relevant court process—

an application for bail made by the accused

- (d) details of any diversionary programs available to the accused in relation to the crime;
 - (e) the outcome of a criminal proceeding against the accused, including the sentence imposed and the outcome of an appeal.
- 4 A victim will be informed about the outcome of a bail application made by the accused and any arrangements made for the release of the accused, including any special bail conditions imposed that may affect the victim's safety or welfare.

15. Victims have a right to make a complaint about conduct that is inconsistent with the victims charter to the entity they consider has breached their charter rights. Once a complaint is received, the entity must inform the victim of the process and take all reasonable steps to resolve the complaint as soon as reasonably practicable.⁷
16. However, section 7 of the *Victims of Crime Assistance Act 2009* specifically states that the rights contained in the victims charter:
- (a) are not enforceable by criminal or civil redress;
 - (b) do not affect the validity, or give grounds for review, of anything done or not done, or a decision made or not made in contravention of those rights;
 - (c) do not affect the operation of any other law; and
 - (d) do not affect confidentiality obligations applying to a government or non-government entity.
17. QPS also refers to the Operational Procedures Manual which consists of directions given by the Police Commissioner under section 4.9 of the *Police Service Administration Act 1990*. Part 2.12 of the manual relates to victims of crime and states investigating officers are to, as far as practicable, act in accordance with the victims charter, which is then set out with further guidance. This includes informing the victim about 'the outcome of a criminal proceeding against the accused, including the sentence imposed and the outcome of an appeal.'

⁷ *Victims of Crimes Assistance Act 2009* ss 19, 20, Schedule 1AA Division 3.

Human rights obligations

18. Victims of crime have rights protected under the *Human Rights Act 2019*.
19. QPS is a public entity 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 a decision.⁸
20. 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.⁹ An act includes a failure to act.¹⁰
21. The right to **freedom of expression** incorporates the freedom to seek and receive information.¹¹ This has been interpreted to include a positive right to access 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.¹² 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.¹³
22. For similar reasons, the right to freedom of expression also imposes an obligation on public entities to disclose information where the disclosure is required by law. The victims charter sets out information which QPS officers should, as far as practicable and appropriate, share with victims. In this case, C's allegations are that her requests for information and assistance were ignored.

QPS response:

QPS submits that a distinction should be drawn between the failure to provide information, with an act or omission which is directed towards restricting the freedom of a person to receive information. Section 21 is directed towards the latter, rather than the former and the mere failure of a public entity to disclose information in a particular case is not a restriction on a person's freedom to receive information. Accordingly, QPS submits that section 21 is not engaged in this complaint.

⁸ *Human Rights Act 2019* s 58(1).

⁹ *Human Rights Act 2019* ss 8 and 13.

¹⁰ *Human Rights Act 2019* Schedule 1 (definition of 'act').

¹¹ *Human Rights Act 2019* s 21.

¹² *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].

¹³ *XYZ v Victoria Police* [2010] VCAT 255 [533].

23. The **right to privacy** prohibits unlawful or arbitrary interference with a person's privacy, family or home.¹⁴ Privacy has a broad meaning, including a person's physical and psychological integrity and personal security and mental stability.¹⁵ Like freedom of expression, international law indicates the right to privacy encompasses a person's right to ascertain personal information held about them by government authorities.¹⁶ Furthermore, a failure to tell a victim about court processes or outcomes, preventing their participation in that process or their ability to enforce those outcomes, could arguably be considered an interference with their private life.
24. The right to privacy is only limited where interference is 'unlawful or arbitrary'. The requirement to provide prosecutorial information to victims under the victims charter is only 'as far as practicable and appropriate', and is not civilly or criminally enforceable, and does not affect confidentiality obligations held by the QPS.
25. In Victoria, there have been different approaches to the meaning of 'arbitrary': On one hand, arbitrariness is to be ascertained by assessing whether the limitation of privacy is reasonable and justified applying the usual factors for assessing proportionality (that is, under section 13(2) of the *Human Rights Act 2019*).¹⁷ On the other, 'arbitrariness' means 'capricious, or has resulted from conduct which is unpredictable, unjust or unreasonable'.¹⁸ The Commission has to date maintained the position that the complainant does not need to demonstrate arbitrariness in order for the onus to shift to the public entity to demonstrate proportionality. While the approach to the right to privacy has yet to be settled in Queensland, in relation to property rights¹⁹, the Queensland Supreme Court recently held that the onus is on the individual relying on the human right to demonstrate whether they have been deprived of property in an arbitrary way.²⁰

QPS response:

QPS disagrees with any reliance on *Kracke v Mental Health Review Board*²¹ in this matter, being a decision made under the Victorian *Charter of Human Rights and Responsibilities 2006* about a decision of the Mental Health Review Board and the right to fair hearing.

¹⁴ *Human Rights Act 2019* (Qld) s 25.

¹⁵ *Kracke v Mental Health Review Board* [2009] VCAT 646; [2009] 29 VAR 1 [619].

¹⁶ Eg, 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].

¹⁷ *Kracke v Mental Health Review Board* [2009] VCAT 646; [2009] 29 VAR 1 [109]-[110] and *PBU & NJE v Mental Health Tribunal* [2018] VSC 564 [124].

¹⁸ *Thompson v Minogue* [2021] VSCA 358 [55], [56].

¹⁹ 'A person must not be arbitrarily deprived of the person's property': *Human Rights Act 2019* (Qld) s 24(2).

²⁰ *Austin BMI Pty Ltd v Deputy Premier* [2023] QSC 95 [333].

²¹ [2009] VCAT 646; [2009] 29 VAR 1 [619].

QPS notes the internal limitation on the right to privacy, that the right will only be engaged if interference is unlawful or arbitrary.

QPS submits that the *Information Privacy Act 2009* framework must be considered here and that prosecution outcomes contain personal information of the neighbour, disclosure of which without proper authority may be in breach of the neighbour's rights under both the *Information Privacy Act 2009* and the *Human Rights Act 2019*.

As the victims charter does not create legally enforceable rights²², failure to disclose information to the complainant was not unlawful. Nor was it arbitrary, in the sense that it was neither 'capricious, unpredictable, unjust or unreasonable'.²³

26. Under international law, the **right to liberty and security** imposes a positive obligation on public entities to take reasonable and appropriate measures to protect the security of persons under their jurisdiction.²⁴ This arguably supports the existence of an obligation on police to notify victims when a person has been released from custody or the existence of no contact orders, so that victims are able to take steps regarding their own safety and security. For example, awareness of the existence of a no contact order enables a person to alert the police if the no contact order is breached.

QPS response:

QPS disagrees with this construction and submits that the right to security requires the public authority to provide reasonable and appropriate measures, within the scope of those available to public authorities, to protect a person's physical security, whether or not the person is in detention. This obligation arises when public authorities know or ought to know of the existence of a real and imminent risk to the physical security of an identified individual or group of individuals from the criminal acts of another party. In this case, police had taken out a no contact order to reduce the risk of harm to the complainant. As a result of the QPS taking out this order, the risk of a real and imminent threat to the complainant was significantly diminished. It is unclear what additional steps the complainant could have taken if notified of the existence of the order.

27. In summary, the rights to freedom of expression, privacy, and security, and the victims charter, which gives content to these rights specific to victims, imposes obligations on police to inform victims, in a timely way and in response to any inquiries, of:
- the progress of investigations and each major decision regarding prosecution of the accused, including charges brought;
 - relevant court processes;

²² *Victims of Crime Assistance Act 2009* (Qld) s 7.

²³ *Thompson v Minogue* [2021] VSCA 358 [55].

²⁴ *Human Rights Act 2019* (Qld) s 29; Judicial College of Victoria, 'Charter of Human Rights Bench Book', *Judicial College of Victoria* (Web Page, 10 October 2018) 6.15.2 [8] <<https://www.judicialcollege.vic.edu.au/eManuals/CHRBB/index.htm#57496.htm>>.

- outcomes of court processes and the issue of no contact orders.
28. Victims' rights are not absolute and can be limited by QPS actions that are necessary and proportionate, for a legitimate purpose. For example, it may be compatible with human rights to withhold investigation information from the victim where doing so might jeopardise a police investigation.

Discussion and recommendations

29. The complainant's allegations include that she made repeated requests of QPS for information and assistance, however, she was not informed of the prosecution, conviction and no contact order made in relation to her neighbour. - QPS further appear to have an open investigation, the progress of which had not been communicated to C at the time of the conciliation conference. Had QPS provided C with the information she requested, or in accordance with the victims charter, C's issues with the neighbour may have been more effectively addressed and it may have alleviated C's distress and fear.
30. The Commission has taken into account QPS' submissions however disagrees with their interpretation of rights. It is the Commission's view that QPS, through these acts, have limited C's rights to freedom of expression, and liberty and security. The right to privacy may also have been limited, depending on whether the facts demonstrate the interference with C's privacy was 'arbitrary'. The factors considered in the next step, in considering whether QPS is able to demonstrably justify their actions, is also relevant to this assessment.

QPS response:

QPS accepts that any failure to notify the complainant of the outcome of the proceedings against her neighbour was not consistent with the Operational Procedures Manual Part 2.12 and the victims charter, however, does not accept (in this case) that they have breached or limited rights under the *Human Rights Act 2019*.

31. The Commission accepts that proper application of information access schemes, like the *Information Privacy Act 2009*, will in most cases ensure any limitation of rights is reasonable and justified.²⁵ The Commission notes that the Queensland Government has committed to the appointment of a victims' commissioner following recommendations of the Women's Safety and Justice Taskforce.²⁶ The victims' commissioner's role includes reviewing the victims charter and the Commission considers that this may be a key aspect for consideration in that review.

²⁵ *XYZ v Victoria Police (General)* [2010] VCAT 255 (16 March 2010) [573].

²⁶ Women's Safety and Justice Taskforce, *Hear Her Voice* (Report 2, 2022) vol 1, Recommendations 18 and 19.

32. The Commissioner makes the following recommendations to QPS to ensure their acts and decisions are compatible with human rights in the future.

Recommendation: QPS revise their policies, procedures and training to ensure:

- (a) Further guidance is provided to QPS officers in the application of the victims charter with respect to the privacy rights of the accused under both information privacy legislation and the *Human Rights Act 2019*.
- (b) Victims making a police report are made aware of their rights in the victims charter.
- (c) QPS officers are made aware of their obligations under the victims charter.
- (d) Victims who raise concerns about their interactions with police are referred to the process to make a complaint about QPS conduct as provided for by the *Victims of Crime Assistance Act 2009*, and the right to make a complaint under the *Human Rights Act 2019* where there has been an alleged contravention of that Act.