

Derek Fielding Memorial Lecture

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Queensland Human Rights Commissioner

Presented by the Queensland Council for Civil Liberties

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The Human Rights Act 2019 – A review of its first year

I too would like to acknowledge the Traditional Owners and pay my respects to their Elders – past, present, and emerging.

The site on which I am speaking tonight happens to be Queensland's oldest Anglican church, erected in 1861. Just a few years before it was constructed, the Traditional Owners of this country gathered on the hill near the windmill on Wickham Terrace. From that vantage point, they witnessed a decisive moment in the unrecognised war between South-East Queensland's First Nations and the British colony of New South Wales: the execution of tribal warrior and lawman, Dundalli.

As it happens, the gruesome nature of the botched hanging of Dundalli in 1854 – outside the original gaol, which is now the GPO – is reputed to have led to the banning of public executions, when Queensland became a colony in 1859. An incremental improvement in human rights perhaps? Yet we know that in the following decades, many thousands of unofficial executions took place throughout Queensland, during the systematic 'dispersal' of First Nations peoples by Queensland's mounted police.

I do apologise for this rather sombre start to the talk, but since, as a nation and a state, we are yet to reach any formal settlement with our First Nations, I do think it is important to remind ourselves of the circumstances in which we now come to acknowledge the Traditional Owners of this particular country.

Thank you for the true delight of delivering this lecture named in honour of a man who contributed so much to the quality of Queensland's political and cultural discourse, particularly in the period from the mid-1960s to the late 1970s. Derek Fielding made many contributions towards improving civil liberties, including as President of the Queensland Civil Liberties Council from 1975 to 1979, and in fighting censorship in his role as chair of the Library Association of Australia's Freedom to Read Committee. Yet, of all his contributions, it was his interest in supporting the right to protest which grabbed my attention.

I'll have something to say a bit later on about the state of protest laws in Queensland, but in researching Derek Fielding, I found it both interesting and revealing to learn that while he was in charge of the Walter Harrison Law Library, he gave permission to University of Queensland students to



stage an all-night sit-in protest, as long as there was no disorder or detriment to his library.¹

Clearly Mr Fielding was ahead of his time. By imposing what appear to have been reasonable and justifiable limitations on the students' rights to assembly and freedom of expression, he seems to have pre-empted the proportionality test now set out in the Human Rights Act.² The proportionality test requires the balancing of a person's human rights with sometimes competing public interests, such as the need to maintain community order and safety – or indeed a neat and tidy library!

Tonight, I have been asked to review the first 12 months of the Act. I will frame my discussion around the three arms of government, which, in the so-called 'dialogue model' of human rights protection, are encouraged to enter a discourse about human rights.

Although we are still very much in the early days of the Act, with the key operational provisions having been in place for less than 10 months, enough time has passed to take a sneak peek into the petri dish, to see how our little human rights culture is growing, and to offer, at least some early impressions, on the quality of the 'dialogue' that has taken place to date.

The public sector

So let us begin with the obligations on the public sector.

One of the three objects of the Act is to build a culture in the Queensland public sector that respects and promotes human rights. This raises a number of important questions: What is a human rights culture, how can we build it, and how do we know when we've built it?

In her second reading speech on the Human Rights Bill, the Honourable Y'vette D'ath, then Attorney-General and Minister for Justice, provided some insight into what was intended by this object. She said:

*This Human Rights Bill is about changing the culture of the public sector by putting people first in all that we do. This is about a modern Queensland, a fair Queensland and a responsive Queensland.*³

A 'culture' of human rights indicates that much more is required than mere compliance with the Act. The concept of 'building' a culture acknowledges that it will take time. There will be progress and setbacks. The dialogue model, which prioritises discussion, awareness raising and education over enforcement and compliance, supports this goal of building gradually towards a human rights culture. While many public entities will start in

¹ Routh, S 2014, 'Obituaries: Fred Derek Osmond Fielding', *Fryer Folios*, vol. 9, no. 1, pp. 26-27, <https://espace.library.uq.edu.au/view/UQ:341125>.

² *Human Rights Act 2019* (Qld) s 13.

³ Queensland, *Parliamentary Debates*, Legislative Assembly, 31 October 2018, 3184 (Y'vette D'ath, Attorney-General and Minister for Justice), https://www.parliament.qld.gov.au/documents/hansard/2018/2018_10_31_WEEKLY.pdf.



compliance mode, my hope is that the public sector will move towards a culture in which protecting and promoting the human rights of people – its clients, stakeholders and staff – becomes part of the everyday business of the organisation.

But what is the incentive to build this ‘responsive’ culture?

At the very heart of the Human Rights Act are the obligations imposed upon public entities. In my view the ultimate success of the Act depends upon the enforcement of section 58, which provides:

It is unlawful for a public entity –

- (a) to act, or make a decision, in a way that is not compatible with human rights; or*
- (b) in making a decision, to fail to give proper consideration to a human right, relevant to the decision.*

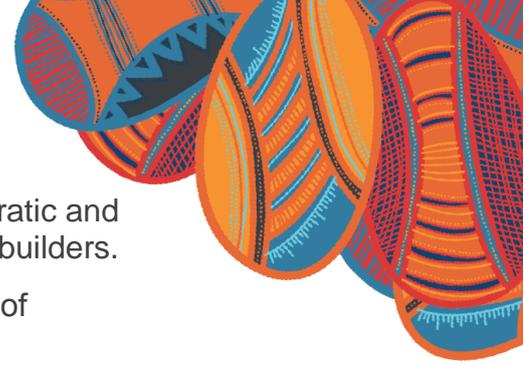
I have tried to put myself into the shoes of a leader of a public entity confronted by these obligations – which incidentally is quite easy since I am a leader of a public entity. It is quite daunting to consider that my actions and decisions require me to both give consideration to the newly protected human rights in order to meet the procedural requirements of the Act, and to ensure that the actions of my organisation are substantively compatible with those human rights.

To manage that risk, as the CEO of a public entity, I would be prompted to identify which human rights are likely to be engaged by my staff’s actions, and ensure any restrictions on those rights are able to be demonstrably justified. To this end, I am pleased to say that many public entities in Queensland – state government departments, councils and functional public entities – have, in fact, undertaken significant reviews of their legislation, policies and procedures to assess their compatibility with human rights, and I am sure that these reviews have already delivered many improvements to decision making and service delivery. For example, one agency reviewed their policies for human rights compliance, and identified it was important to increase their clients’ awareness of the availability of language interpreter services, and so they erected more signage in their building.

However, my concern as a public entity CEO might be alleviated to some extent by considering the potential repercussions for failing to comply with the obligation. Section 58(6) confirms that it is not an offence merely because someone acts or makes a decision in contravention of the obligations, and that any act or decision is not invalid, merely because of such a contravention.⁴

So beyond the personal commitment of public officials, what incentive is there for a public entity to act compatibly with human rights? That is, how are these potentially unlawful breaches of human rights obligations actually enforced? After all, without effective enforcement it would be easy

⁴ *Human Rights Act 2019 (Qld) s 58(6).*



to envisage the obligations becoming little more than bureaucratic and perfunctory tick and flick exercises, rather than robust culture builders.

Queensland's Human Rights Act provides two basic methods of enforcement:

The first is a piggyback action, where a person 'piggybacks' a human rights claim on an independent cause of action, for example, an application for judicial review of an administrative decision.⁵

The second means of enforcement is unique to Queensland's Human Rights Act. This alternative provides for complaints to the Queensland Human Rights Commission. Unless there are exceptional circumstances, a complainant must first complain directly to the public entity and a period of 45 business days must have elapsed before coming to the Commission.⁶ In handling the complaint, the Commission may decide to convene a conciliation conference to attempt to resolve it.⁷ But, unlike discrimination complaints, an unresolved human rights complaint cannot continue to be agitated in a tribunal or court if it is not resolved at the conciliation stage.

However, importantly, the Commission may publish information about unresolved complaints including any recommendations on how the public entity could take steps to ensure that it is acting compatibly with human rights in the future. And in fact, the Commission has just published its first recommendations in an unresolved complaint about the conditions of hotel quarantine.⁸

This is a significant improvement on the Victorian and ACT human rights legislation, as it provides free and direct access to a form of redress that would otherwise only be, at best, potentially available by going to a court or tribunal. Further, although the Commission's recommendations are not enforceable, they may extend to systemic issues and therefore lead to changes in policy and culture that would not necessarily be available in litigation, the outcomes of which are generally confined to the particular legal interests of the parties, and to the powers of the Court.

The big question here, is whether the potential loss of bargaining power of a complainant, who is unable to press their complaint to litigation, is offset by the Commission's ability to make public recommendations about the steps that should be taken by that entity to ensure that it acts compatibly with human rights in the future.

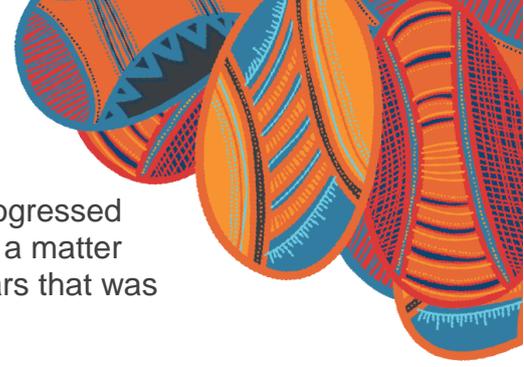
So how effective have these two enforcement provisions been in protecting human rights?

⁵ *Human Rights Act 2019* (Qld) s 59.

⁶ *Human Rights Act 2019* (Qld) s 65.

⁷ *Human Rights Act 2019* (Qld) s 79.

⁸ Queensland Human Rights Commission, 2020, 'Hotel quarantine: unresolved complaint report under section 88 *Human Rights Act 2019*', *Report*, 15 October, online at <https://www.qhrc.qld.gov.au/resources/legal-information/reports-on-unresolved-human-rights-complaints>.



To date, I am not aware of any piggyback claims that have progressed through the Courts, although the Commission did intervene in a matter involving a prisoner held in solitary confinement for over 7 years that was heard yesterday in the Supreme Court.⁹

As at 30th September, the Commission has received 176 complaints against public entities alleging a human rights contravention. The Commission has accepted 98 of those complaints and conciliated 18 of them. Around 43% of the complaints made to the Commission about human rights were combined claims, in which the primary complaint was discrimination with human rights ‘piggybacked’ onto that complaint.

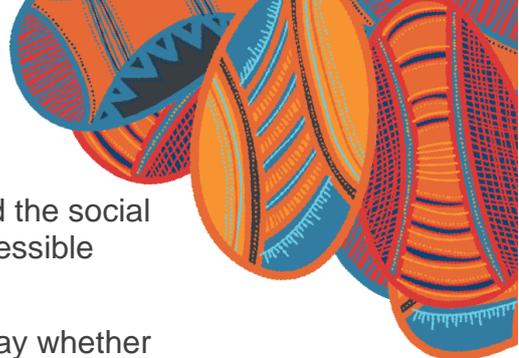
A number of those complaints have been resolved through the conciliation process and I will give you some examples of outcomes that have been achieved in these human rights claims, as well as in the combined or piggyback claims.

One successful matter, which I think clearly demonstrates the potential of the Act, involved an extended family of 5 adults, who had recently returned from overseas with a toddler who has autism, only to find themselves detained in a hotel quarantine environment that was unsuitable for the child’s needs. In what was, I’m sure, a very pleasing result for all concerned, within hours of their complaint being referred to the Commission, they were allowed to home quarantine. I think this outcome definitely meets the Attorney General’s aim of a responsive Queensland.

Other examples of successful conciliation outcomes include:

- A homeless man who had a medical condition that required him to access a public toilet up to 20 times a day, lived in a van. He alleged that local council officers had breached his right to privacy by repeatedly fining him. His ‘illegal camping’ fines of \$3,000 were withdrawn by the local council who also reimbursed him for fines that he had already paid.
- A woman who had experienced domestic violence from the father of her child reached agreement with a hospital so that in future, it would not require the presence of the father by phone at any consultations about the child’s medical condition, and that medical information about the child would be provided to the father separately.
- A teenager held on remand in youth detention during COVID-19 restrictions wanted to see his family on his birthday. The parties agreed to a plan for maintaining family contact that included a one-hour video call for his birthday.
- An Aboriginal woman with a disability together with her children, some of whom also had disabilities, was evicted from social

⁹ *Owen-D’Arcy v Chief Executive, Queensland Corrective Services* BS9472/2020



housing. The complaint settled for a financial sum¹⁰ and the social housing provider agreed to support her to apply for accessible accommodation in her local area.

From our preliminary experiences, I suggest it is too early to say whether the enforcement mechanisms of the Act will be effective in driving a strong human rights culture. I do think though, it is possible to make some observations about the complaint mechanism.

Firstly, public entities have, on the whole, been very responsive to human rights complaints – so far 9 HRA-only complaints have been resolved at conciliation, and 9 combined claims. The conciliation process appears to be providing a safe place for agencies to creatively explore less restrictive alternatives.

Secondly, complainants are much better positioned to achieve successful outcomes when they have access to legal representation to help frame their complaints, if not advocate for them.¹¹

Thirdly, anecdotally, public entities appear to have improved their internal complaints procedures in order to take advantage of the opportunity to resolve complaints early, before they progress to the Commission. We have heard from advocates that some agencies are resolving matters through the internal complaints processes, in particular, in the areas of health, housing and child protection. So it would seem that the Act has already improved the quality of public sector complaints management.

Beyond responsiveness to complaints, have we seen other indicia of a human rights culture growing within the public sector?

There are some positive, as well as negative, examples I can point to.

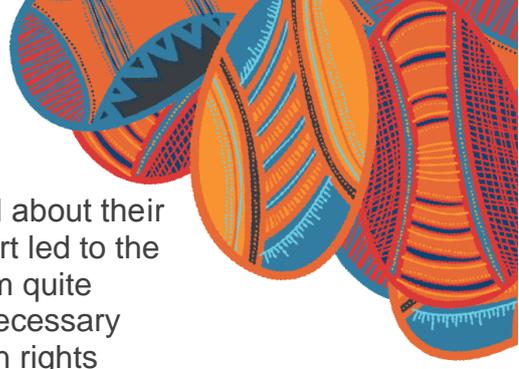
Firstly, when the Black Lives Matter protest was being planned in Brisbane in June this year, at a still very tense time of the pandemic, the Queensland Police Service consulted the Commission about the organisational posture that would be adopted in managing the protest. I have to admit that it was very pleasing to watch the news a few days later and see police handing out masks, instead of handing out fines – and dispensing sanitiser, instead of capsicum spray.

However, this constructive approach to facilitating the rights to freedom of assembly and freedom of expression can be contrasted with the protest laws introduced in late 2019, shortly before the commencement of the Act's operative provisions. These laws criminalise the unreasonable use of 'dangerous attachment devices' and authorise police to stop and search vehicles and to confiscate these items – which, by the way, are not unlawful to possess, only unlawful to use *unreasonably*.

What is 'unreasonable' in the context of protests about government inaction on the existential threat posed by global warming? No doubt the

¹⁰ This was a piggyback discrimination complaint.

¹¹ Many complaints are made that fall outside of the jurisdiction of the Commission suggesting that better screening of complaints may be required.



delays caused to Brisbane’s commuters by citizens concerned about their children’s futures caused much annoyance to many, and in part led to the introduction of the laws. Yet those delays to workers now seem quite trifling compared to the delays and disruption caused by the necessary and decisive response to the COVID-19 pandemic. In a human rights analysis, it is the right to life, and in particular, the positive obligations imposed on governments to protect life, that have justified the various restrictions on our freedoms that Queensland’s Chief Health Officer herself has described as ‘draconian’.

What do we make then of the positive obligations on governments to protect the right to life threatened by climate change? This is a question that several Torres Strait Island communities are asking of the United Nations Human Rights Committee. Given that the World Health Organisation says that between 2030 and 2050, climate change will cause approximately 250,000 additional deaths per year from malnutrition, malaria, diarrhoea and heat stress,¹² it will be very interesting to see the outcome of their complaint.

To sum up the review of the public sector’s implementation of the Act, we will know we have built a strong human rights culture in Queensland when public entities routinely consider the impact of their decisions on the human rights of those people affected, and actively explore less restrictive alternatives to achieve their objectives.

Experience from Victoria and elsewhere suggests that to achieve this, the public sector will require not just strong leadership from chief executives, but also strong encouragement from the Courts and through the Commission’s novel complaints and conciliation process.

In the event that these mechanisms ultimately prove to be ineffective, other potential enforcement options that might be considered at the 4 year review of the Act include creating a direct cause of action and including access to damages. Other options include extending the powers of the Commission to:

- issue compliance notices
- enter into enforceable undertakings, or
- apply to the Court directly for an order requiring compliance.

The Parliament

Now let’s look at the role played by the 56th parliament of Queensland in meeting its obligations under the Act. Remember, it was the 56th parliament of Queensland that passed the Human Rights Act on 27 February 2019, so you would expect to see a high level of commitment to its implementation.

¹² World Health Organization, 2018, ‘Climate change and health’, *Fact sheet*, 1 February, <https://www.who.int/news-room/fact-sheets/detail/climate-change-and-health>.



As you may be aware, under the Act, a member introducing a bill must table a statement of compatibility setting out not just their opinion of whether the bill is compatible with human rights, but also ‘how it is compatible’.

That statement of compatibility is scrutinised by the relevant portfolio committee which must then report to the Legislative Assembly about whether the bill is not compatible.

Since the commencement of this obligation, we have seen 28 bills introduced accompanied by statements of compatibility. While the quality of the statements to date has, on the whole, been satisfactory, I think that the portfolio committees’ scrutiny of the demonstrable justification of limitations requires a level of expertise and rigour that will hopefully develop in coming years.

In this respect, we have welcomed the establishment of a panel of human rights experts to support the various committees. The panel includes Dr Phillip Tahmindjis, formerly the Director of the International Bar Association’s Human Rights Institute based in London, and we certainly hope that the 57th Parliament will draw upon the panel regularly in its term.

Whilst there may be a degree of cynicism about the effectiveness of the committee system in scrutinising new legislation, there can be no doubt that the Human Rights Act has improved the framework in which rights are now identified and considered by our unicameral parliament. To this end, I would encourage all Queenslanders to take advantage of the opportunity to directly participate in the lawmaking process by making submissions about the impact of proposed laws on human rights. Various members of parliament have pointed out to me that public submissions are not just important for placing positions on the record and presenting evidence, they are also helpful to future parliamentarians in developing new laws.

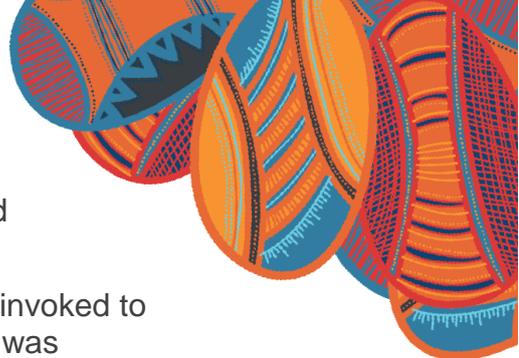
The courts and tribunals

In the time that’s left I will briefly consider how Queensland’s courts and tribunals have applied the Act.

In Victoria, the development of the human rights jurisprudence benefitted greatly from the leadership of now retired Justice the Hon Kevin Bell, firstly in his role as a VCAT Member and later as a justice of the Victorian Supreme Court. Even so it took several years before the Supreme Court’s decisions in the *Re Certain Children* litigation¹³ demonstrated that the Victorian Human Rights Charter was capable of delivering ‘hard law’ – in that case, by issuing a mandatory injunction to remove children from the Barwon adult prison.

In Queensland, we are yet to see whether our judiciary, and the legal profession more generally, views the Act as a superfluous distraction or a

¹³ *Certain Children v Minister for Families and Children & Ors (No 2)* [2017] VSC 251; [2017] VSC 153; [2017] VSC 304.



useful additional tool for ensuring executive power is exercised appropriately and proportionately.

I understand that in the Magistrates Court, the Act is regularly invoked to support applications for bail, and in the early days of the Act it was successfully relied upon to resist an adjournment of a trial on Thursday Island, which ultimately led to the charges being withdrawn.

There have so far only been a handful of cases in which the Supreme Court has had to consider the Act, and the Commission has closely monitored proceedings to assess whether to intervene in matters where questions of law have arisen.

In *Australian Institute for Progress v Electoral Commission Queensland*¹⁴ a politically active think tank sought a declaration that it was permitted to accept donations from property developers to incur political expenditure. Justice Applegarth, ruling against the applicant, found the purpose of preventing corruption and undue influence in government is consistent with a free and democratic society based on human dignity, equality and freedom.

In *State of Queensland v Sri and Ors*¹⁵, Applegarth J applied the proportionality test to issue an urgent injunction restraining a blockade of the Story Bridge, while acknowledging the importance of the right to peaceful assembly.

Clearly, the important test cases determining some key questions of law lie ahead of us, and it will be of great interest to observe the extent to which Queensland Courts are prepared to borrow from international human rights jurisprudence, access to which they are now expressly permitted.

Of course, the extent to which Courts are able to engage with the Act to develop a healthy human rights jurisprudence in Queensland, is largely dependent on the manner in which cases are presented to them by the profession. Clearly, there is a leadership role here for the legal profession and I am pleased that both the Queensland Law Society and the Bar Association of Queensland have established human rights committees that have been active in promoting awareness of the Act's potential application.

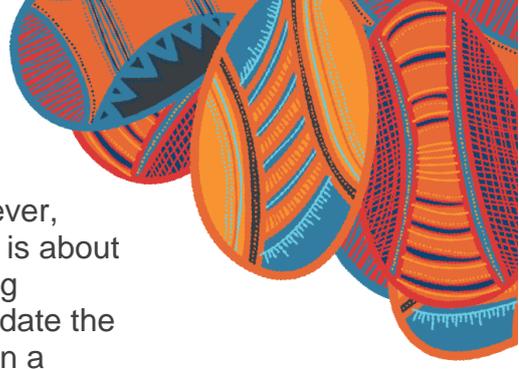
Conclusion

To sum up, I believe that the three arms of government have made a promising start in the pursuit of the Attorney-General's goal of building a modern, fair and responsive public sector in Queensland, through the development of a strong human rights culture.

Whether we achieve that goal rests on the leadership of our public entities, parliamentarians and importantly, on the preparedness of our judiciary to take up the mantle of human rights.

¹⁴ [2020] QSC 54.

¹⁵ [2020] QSC 246.



Yes, there will be a need for some human rights heroes. However, upholding human rights is as much about common sense as it is about common decency. It is about people like Derek Fielding making empathetic, practical and proportionate decisions to accommodate the rights that – to quote from the Act’s preamble – ‘are essential in a democratic and inclusive society’.

So we must not leave the job of building the human rights culture only to the judges, lawyers and bureaucrats. We can all play a role. As Eleanor Roosevelt said:

Government is people. The ultimate triumph of democracy depends on the individual use of democratic principles.

In Queensland, we now have an Act that makes it easier for each of us to use those principles to ensure that our democracy is triumphant.