

# Human rights in courts and tribunals

# The role of courts and tribunals

The separation of powers as outlined in the *Constitution of Queensland 2001* requires the separation of the legal and political processes.

However, courts and tribunals are required to consider the *Human Rights Act 2019* when:

- interpreting legislation
- acting in an administrative capacity
- human rights have ‘direct’ application to its functions, and
- human rights grounds have been ‘piggy-backed’ on to the proceedings.

## Interpreting legislation

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

‘Compatible with human rights’ means the provision does not limit a human right, or limits a human right only to the extent that it is reasonable and demonstrably justifiable in a free and democratic society based on human dignity, equality, and freedom. The Act sets out factors that may be relevant in deciding whether a limit on a human right is reasonable and justifiable.

In *SF v Department of Education* [2021] QCAT 10, Queensland Civil and Administrative Tribunal (QCAT) applied section 48 in interpreting the *Education (General Provisions) Act 2006*. The case concerned whether a person applying to home school their child was required to provide a street address, in circumstances where the person feared for their safety if their location became known.

## Declarations of incompatibility

The Supreme Court or the Court of Appeal may make a declaration of incompatibility, if the court considers that legislation cannot be interpreted in a way that is compatible with human rights. The experience of other jurisdictions is that this power is used rarely. Queensland courts did not exercise this power in the 2020–21 financial year.

## Acting in an administrative capacity

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

1. to act and make decisions in a way that is compatible with human rights, and
2. when making a decision, to give proper consideration to human rights relevant to the decision.

The following Queensland tribunals have acknowledged they are acting in an administrative capacity and therefore a public entity with obligations under the *Human Rights Act 2019*.

**Table 2: Administrative decisions in Queensland tribunals 2020-21**

Subject matter	Case
Queensland Industrial Relations Commission when deciding an exemption application under section 113 of the <i>Anti-Discrimination Act 1991</i>	<i>Re: Ipswich City Council</i> [2020] QIRC 194
QCAT when appointing a guardian or administrator under the <i>Guardianship and Administration Act 2000</i>	<i>JF</i> [2020] QCAT 419; <i>DLD</i> [2020] QCAT 237
QCAT when reviewing a decision of the Department of Child Safety, Youth and Women	<i>RE and RL v Department of Child Safety</i> [2020] QCAT 151
QCAT when reviewing a decision of Blue Card Services.	<i>TRE v Director-General, Department of Justice and Attorney-General</i> [2020] QCAT 306
Land Court when making recommendations under the <i>Mineral Resources Act 1989</i> and making an objections decision under the <i>Environmental Protection Act 1994</i> .	<i>Waratah Coal Pty Ltd v Youth Verdict Ltd &amp; Ors</i> [2020] QLC 33
Mental Health Review Tribunal	See published statements of reasons on the MHRT website. <sup>66</sup>

<sup>66</sup> <https://www.mhrt.qld.gov.au/resources/published-statement-of-reasons>

In 2020-21, Queensland courts have stated the following are judicial decisions.

*Table 3: Judicial decisions in Queensland courts 2020-21*

Subject matter	Case
Bail applications	<i>Dunshea v Director of Public Prosecutions (Qld)</i> [2021] QCA 102
Court of Disputed Returns proceedings	<i>Innes v Electoral Commission of Queensland &amp; Anor (No 2)</i> [2020] QSC 293
Application for trial without jury orders in criminal proceedings	<i>R v NGK</i> [2020] QDCPR 77 and <i>R v Logan</i> [2020] QDCPR 67

## Direct application

The 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 rights engaged when performing judicial functions include:

- equality before the law
- fair hearing, and
- rights in criminal proceedings.

Other rights have been found to apply directly to court functions. For example, in *Innes v Electoral Commission of Queensland (No 2)* [2020] QSC 293, the Court of Disputed Returns held that its function, to hear disputes about the election of a person, included applying or enforcing the right to take part in public life as protected by section 23 of the *Human Rights Act 2019*.

## Piggy-back matters

There is no standalone cause of action for a breach of human rights. Human rights arguments can be ‘piggy-backed’ on legal proceedings against a public entity that, under a different law, allege an act or decision of the public entity was unlawful. For example, an application for judicial review of a decision made by a public entity can include a ground that the public entity breached its section 58 obligations under the *Human Rights Act 2019* – that is, the decision is not compatible with human rights or proper consideration was not given to human rights.

A person can still 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 grounds for relief.

## 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.

The Commission is not aware of any such referrals occurring in the financial year.

## Queensland cases that have considered or mentioned the Act

In the financial year ending 30 June 2021, Queensland courts and tribunals considered or mentioned the Act in 59 matters. A detailed list of cases is available in *Appendix A*.

**Table 4: Number of matters where Queensland courts and tribunals considered or mentioned the Human Rights Act**

Court	Number
Court of Appeal Queensland	3
Supreme Court of Queensland	13
District Court of Queensland & pre-trial rulings	3
Land Court of Queensland	3
Queensland Civil and Administrative Tribunal, Appeals	1
Queensland Civil and Administrative Tribunal	30
Queensland Industrial Relations Commission	6
<b>Total</b>	<b>59</b>

# Key cases

Cases across Queensland courts have considered the *Human Rights Act*. A number of key cases from the reporting period are noted below.

## Interpreting legislation

*SF v Department of Education* [2021] QCAT 10 involved an application of a mother, who had experienced domestic violence, to home school her child. To keep her family safe, she did not disclose her residential address which the Department considered was a mandatory requirement. QCAT first interpreted the relevant provisions of the *Education (General Provisions) Act 2006* in accordance with ordinary rules of statutory interpretation. It then considered the *Human Rights Act 2019*, concluding that an interpretation that allowed for alternative contact details, in circumstances where residential details would risk the health and safety of the family, was consistent with the overarching objects and guiding principles of the governing Act and compatible with human rights.

*Taniela v Australian Christian College Moreton Ltd* [2020] QCAT 249 concerned a complaint of discrimination on the basis of race or sex against a school which required a male student to cut his hair. In concluding that unlawful discrimination had occurred on a plain meaning of the *Anti-Discrimination Act 1991*, QCAT briefly noted that a human rights interpretation encouraged the same outcome. This matter is currently on appeal.

In *Coonan v Registrar of Births, Deaths and Marriages* [2020] QCAT 434, QCAT considered an appeal from a decision of the Registrar of Births, Deaths and Marriages to record a parent as 'mother' on a birth certificate, rather than as 'father', consistent with the parent's gender identity. While the proceedings commenced before 1 January 2020 which meant the *Human Rights Act 2019* did not apply, QCAT still noted a decision involving the application of the UK *Human Rights Act 1998* and the rights of the child in its interpretation of the relevant law.

## Acting in an administrative capacity

The Land Court is currently considering objections to Waratah Coal Pty Ltd's (Waratah) application for a mining lease and environmental authority to develop a coal mine. In *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors* [2020] QLC 33, the Court considered Waratah's application to strike out any objections that relied on the *Human Rights Act 2019* due to the Court's lack of jurisdiction to consider those objections. The parties agreed that the Land Court was a public entity acting in an administrative capacity when making recommendations under the *Mineral Resources Act 1989* and when making an objections decision under the *Environmental Protection Act 1994*. In accordance with the Court's obligations as a public entity, their recommendations and objections had to be compatible with and give proper consideration to human rights. The Court dismissed the strike out application.

A second decision, *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 2)* [2021] QLC 4, related to Waratah's 170 requests for further and better particulars from the objectors, which included objections on human rights grounds. The Department of Environment and Science, a statutory party to the proceeding, suggested there are 5 steps involved in applying human rights obligations placed on public entities under section 48:

1. **Section 58(1)(a) – 'Engagement'**: whether the prospective decision is relevant to a human right (and which right) ....
2. **Section 58(1)(a) – 'Limitation'**: if a right is relevant, is that right limited by the decision...
3. **Section 13 – 'Justification'**: whether such limits as do exist are reasonable and can be demonstrably justified.... There are two overlapping requirements within this step': (i) Legality... [and] (ii) proportionality...
4. **Section 58(1)(b) – 'Proper consideration'**: even if the limits be lawful and proportionate, the decision made must give proper consideration to the rights said to be engaged;
5. **Section 58(2)- 'Inevitable infringement'**: this operates where the public entity could not reasonably act differently or make a different decision because of a statutory provision or under law.<sup>67</sup>

The Court found that the objectors only had to respond to one of Waratah's requests, and that otherwise sufficient detail had been provided for Waratah to choose and brief its expert witnesses.

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<sup>67</sup> *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 2)* [2021] QLC 4 [9].  
*Human Rights Act 2019 Annual Report 2020-2021*



In *Attorney-General for the State of Queensland v GLH* [2021] QMHC 4, the Mental Health Court found the regime established by the *Mental Health Act 2016* to be compatible with the *Human Rights Act 2019*. Accordingly, any condition imposed on a forensic order must be the least restrictive of rights, and only to the extent necessary to address an unacceptable risk to safety. The Court further considered the interaction between human rights and the evaluation of unacceptable risk. The decision also records the reasons of the Mental Health Review Tribunal below, and its deliberation of human rights, which was ultimately confirmed.

## Direct application

The Supreme Court in *Innes v Electoral Commission of Queensland & Anor (No 2)* [2020] QSC 293 considered the direct application of the right to take part in public life to the Court of Disputed Returns, as well as the application of human rights to statutory interpretation where there is no ambiguity. However, the court did not consider the case was ‘an appropriate vehicle for reaching solid conclusions about the operation of the HR Act in Queensland’.

## Discussion of particular rights

In *Attorney-General for the State of Queensland v Sri & Ors* [2020] QSC 246, the Supreme Court considered human rights in an application for a mandatory injunction to prevent a planned protest which involved the blockade of Brisbane’s Storey Bridge. The Commission intervened in these proceedings. The court decided that limiting the rights of freedom of movement of the broader community outweighed the rights of the protestors to peaceful assembly and freedom of expression, and it was therefore appropriate to make the injunction.

*Fernwood Womens Health Clubs (Australia) Pty Ltd* [2021] QCAT 164 and *Re Ipswich City Council* [2020] QIRC 194 concerned applications for exemptions under the *Anti-Discrimination Act 1991*. In both cases, QCAT held that it was acting in an administrative capacity and was therefore a public entity with obligations under the *Human Rights Act 2019*. In making its decisions, QCAT considered the right to equality, and in particular the provision that measures taken for the purpose of assisting or advancing a disadvantaged group does not constitute discrimination.

In *TRE v Director-General, Department of Justice and Attorney-General* [2020] QCAT 306, QCAT reiterated its obligations in reviewing Blue Card decisions to both interpret legislation compatibly with human rights as well as comply with human rights obligations as a public entity. TRE alleged that refusing her a positive notice and Blue Card would contravene her right not to be tried or punished more than once. QCAT noted that the purpose of the review was not to impose additional punishment on TRE, but rather to protect children. In both this case and an earlier case of *HAP v Director-General, Department of Justice and Attorney-General* [2020] QCAT 273, QCAT emphasised the rights of children to protection, and noted that once issued, Blue Cards are unconditional and fully transferable across a range of employment and business.

In *Mohr-Edgar v State of Queensland (Legal Aid Queensland)* [2020] QIRC 136, Legal Aid Queensland applied to suppress the names of employees who had been identified by the complainant in allegations before the Queensland Industrial Relations Commission (QIRC). Legal Aid Queensland's grounds included that the publication of the names would limit the employees' right to privacy and reputation. The QIRC dismissed the application, noting that there was nothing unlawful or arbitrary about the complainant's approach and therefore the right to privacy and reputation did not lead to a conclusion that the orders should be made. The QIRC also considered the fundamental principle of open justice in making the decision.

In *MJP* [2020] QCAT 253, QCAT considered rights to freedom of movement, to privacy, and to not be subjected to medical treatment without his free and informed consent relevant to its decision to appoint a MJP a guardian. In circumstances where MJP was found not to have capacity to make the relevant decisions, any limitation of rights was reasonable and justified, and consistent with MJP's dignity that these fundamental and important life decisions be made.

## Human Rights Case Law Project

The Commission acknowledges the work of the University of Queensland's Human Rights Case Law Project team,<sup>68</sup> overseen by Professor Tamara Walsh that has continued to compile case notes of human rights cases in Queensland for the benefit of legal practitioners, researchers, students, and the public.

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<sup>68</sup> The University of Queensland School of Law, 'Published cases referring to the Human Rights Act 2019 (Qld)', *Human Rights Case Law Project* (Web Page).  
*Human Rights Act 2019 Annual Report 2020-2021*

# Interventions

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

## Commission notifications

For proceedings before the Supreme Court or District Court in which there is a right of intervention, 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 outside the requirements of the Act.

In 2020-21, the Commission received 26 notifications or requests to intervene under the *Human Rights Act 2019*. Of those, 15 were notices under section 52 of the Act.

## Commission interventions

The Commission has published a guideline<sup>69</sup> about when the Commission might intervene in proceedings. Relevant factors include:

- whether human rights form a significant, and not peripheral, issue to the proceedings
- whether the proceedings involve a new or unsettled area of law, or would clarify a disputed interpretation of the law
- whether the Commission can add value to the proceedings, having regard to the parties to the proceedings and whether they are represented
- the court or tribunal in which the proceedings are brought, and whether it is an intermediate or final hearing
- resource constraints.

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<sup>69</sup> Queensland Human Rights Commission, 'Intervention guidelines' Legal information (Webpage, 3 February 2020).

The Commission intervened in 3 matters before the Supreme Court and 2 matters before the Mental Health Court during 2020-21.

The first of the Supreme Court matters was an application for an injunction relating to a proposed 'sit in' protest on the Story Bridge in Brisbane. The Commission made submissions about the right to peaceful assembly, the relevance of the rights of others and of public health and safety, and the onus of establishing that a limitation of a right is reasonable and proportionate. The Supreme Court's decision to grant the injunction has been published: *Attorney-General for the State of Queensland v Sri & Ors* [2020] QSC 246.

Shortly before the publication of this report, a decision was handed down in *Owen-D'Arcy v Chief Executive, Queensland Corrective Services* [2021] QSC 273. A prisoner applied for judicial review of two related decisions to continue his separation from others, after being held in solitary confinement since 2013. The Commission made submissions about the obligations on public entities, including to consider the rights of all relevant people, and on the meaning of relevant rights such as the right to humane treatment when deprived of liberty and the right to life. The court found the right to humane treatment was limited by the decision and the respondents did not discharge the onus of demonstrating that limitation was reasonable. The decision also set out the requirements for a public entity to give 'proper consideration' to human rights when making decisions. As the public entity contravened its obligations under the Human Rights Act, the court concluded the decisions were unlawful. The court will hear the parties on a form of orders.

The Commission is still awaiting the Supreme Court's decision in another proceeding that is subject to reporting and publication restrictions. The Commission's submissions related to statutory interpretation and the obligations imposed on public entities under the HR Act.

Both Mental Health Court matters were appeals from decisions of the Mental Review Tribunal, and are not open to the public. In the first matter, due to the issues ultimately relied upon by the parties, the Commission withdrew from the proceedings.

The second matter considered the impact of human rights on powers under the *Mental Health Act 2016* to impose or remove conditions on a forensic order. We submitted that unless the condition is found to be necessary to mitigate an ‘unacceptable risk’ to safety, the Tribunal’s decision to remove the condition should be confirmed and is compatible with human rights. Our submissions also included human rights jurisprudence in different contexts in the assessment of ‘unacceptable risk’. The court dismissed the appeal: *Attorney-General for the State of Queensland v GLH* [2021] QMHC 4.

## Attorney-General interventions

In 2020-21, the Attorney-General intervened in 9 matters under the Act. Two related to proceedings in which the Commission also intervened and are discussed above. Three are ongoing and/or subject to publication restrictions. The remaining 4 matters concerned:

- A judicial review application of a decision by a public entity to cancel the applicant’s certificate of competency under coal mining safety legislation. The respondent sought to have the judicial review dismissed because there were concurrent civil appeal proceedings available before the Industrial Magistrates Court. The applicant argued the alternative proceedings required him to testify against himself, constituting an unreasonable limitation on his rights in criminal proceedings under section 32 of the *Human Rights Act*. The Supreme Court found the Industrial Magistrates Court proceedings were a ‘much more suitable avenue for resolution of the question of whether or not the applicant ought to have his certificate of competency cancelled’. The court agreed with the Attorney-General that section 48 of the Act was not engaged in interpreting the provisions (*Whiteley v Stone* [2021] QSC 31).
- An application to stay committal proceedings. This matter was discontinued.
- A matter involving whether the Electoral Commission of Queensland should take into account goods and services tax (GST) in assessing expenditure caps under the *Electoral Act 1991*. On a plain reading, the court found the expenditure caps include GST. In the alternative, if there was ambiguity, the court found that that interpretation was compatible with human rights (freedom of expression and right to take part in public life) and better achieved the statutory purpose.

- Extradition proceedings in which a question arose as to whether Magistrates acting under the *Extradition Act 1988* (Cth) are required to act compatibly with human rights. It was held that Magistrates are not public entities under the Act when acting under Commonwealth legislation.

## Summary of the role of courts and tribunals in 2020-21

Overall, the influence of the *Human Rights Act 2019* on courts and tribunals is developing, although it has not been long since the Act commenced. While there have been a number of mentions of human rights in decisions, on most occasions the Act has not been a central focus. The Commission anticipates some key decisions of the Supreme Court (noted above in *Interventions*) that might provide more insight in the next financial year.