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 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 Act requires that all legislation 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.

'Compatible with human rights' means that the statutory provision 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. In section 13, the Act sets out factors that may be relevant in deciding whether a limit on a human right is reasonable and justifiable.

In *BSJ* [2022] QCAT 51, the Queensland Civil and Administrative Tribunal (QCAT) was asked to consider whether a man had legal capacity to transfer property and whether there was a presumption of undue influence regarding the transaction. In relation to section 48 of the Act, QCAT adopted the approach taken by several Justices of the High Court in the decision of *Momcilovic v R* (2011) 245 CLR 1, which concerned the equivalent Victorian legislation, that the section only applies when different interpretations are available based on the language of the provision being interpreted, and having regard to the purpose of the provision. In this case, as there was no ambiguity in the definition of 'capacity' under the *Guardianship and Administration Act*

2000, or the meaning of 'undue influence' under the *Powers of Attorney Act 1998*, application of section 48 did not arise.

The Coroners Court has accepted that section 48 must be applied to the interpretation of section 45 of the *Coroners Act 2003*, which sets out the coroner's obligations in relation to the scope of coronial investigations and findings.[1]

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 this power in the 2021–22 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 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 2021–22, the following Queensland courts and tribunals acknowledged that they are acting in an administrative capacity and are therefore a public entity with obligations under the *Human Rights Act 2019*, in the circumstances outlined in Table 2a.

[1] See: Ruling in relation to the conduct of the Police Coronial Investigation, *Inquest into the death of Selesa Tafaifa* (Coroners Court of Queensland, T Ryan, State Coroner, 20 June 2022).

Table 2a: Cases confirming where courts and tribunals are acting in an administrative capacity in 2021-22

Subject matter	Case
Coroners Court when directing or requesting a particular unit within the Queensland Police Service to be responsible for the investigation of a death in custody	Ruling in the *Inquest into the death of Selesa Tafaifa* (Coroners Court of Queensland, T Ryan, State Coroner, 20 June 2022)
Land Court in relation to the conduct of a hearing of a mining objection	*Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 5)* [2022] QLC 4
QCAT when deciding an exemption application under section 113 of the *Anti-Discrimination Act 1991*	*Sunshine Coast Regional Council (No 2)* [2021] QCAT 439*; Miami Recreational Facilities Pty Ltd* [2021] QCAT 378
QCAT when making an interim order for the appointment of a guardian under the *Guardianship and Administration Act 2000*	*EB* [2021] QCAT 434; *DP* [2021] QCAT 271
Mental Health Court when reviewing a decision of the Mental Health Review Tribunal to remove a condition from a person's forensic order (community category)	*Attorney-General for the State of Queensland v GLH* [2021] QMHC 4

Table 2b: Cases where tribunals have stated they are not acting in an administrative capacity in 2021-22

Subject matter	Case
QCAT when making a declaration of capacity under the *Guardianship and Administration Act 2000* (as opposed to the appointment of a substitute decision maker)	*BSJ* [2022] QCAT 51
QCAT when dealing with a referred privacy complaint under section 176 of the *Information Privacy Act 2009*	*AA v State of Queensland (Office of Industrial Relations)* [2021] QCAT 258

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 most likely to be engaged when performing judicial functions include:

- recognition and equality before the law (section 15)
- fair hearing (section 31)
- rights in criminal proceedings (section 32), and
- liberty and security of person (section 29).

In an application for a declaration of capacity, the QCAT considered that the rights to equality before the law and to a fair hearing applied directly to QCAT (*BSJ* [2022] QCAT 51).

Piggy-back matters

There is no standalone legal remedy available through the courts for an alleged breach of human rights. However, human rights arguments can be added to, or '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 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 can 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.

Owen-D'Arcy v Chief Executive of Queensland Corrective Services [2021] QSC 273 and *SQH v Scott* [2022] QSC 16 are examples of matters in which human rights were piggy-backed, in the case of the first, to a judicial review, and in the second, to a statutory appeal.

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 2021-22.

Queensland cases that have considered or mentioned the Act

In the financial year ending 30 June 2022, courts and tribunals considered or mentioned the Act in 86 matters. Details of the cause of action for each matter are available in Appendix A.

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

Court	Number
Federal Court of Australia	1
Fair Work Commission	2
Court of Appeal Queensland	1
Supreme Court of Queensland	3
District Court of Queensland	4
Land Court of Queensland	2
Mental Health Court Queensland	1
Coroners Court Queensland	1
Queensland Civil and Administrative Tribunal, Appeals	4
Queensland Civil and Administrative Tribunal	44
Queensland Industrial Relations Commission	23
Total	**86**

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.

Owen-D'Arcy v Chief Executive, Queensland Corrective Services [2021] QSC 273

A prisoner applied to the Supreme Court for judicial review of two related decisions to continue his solitary confinement – which had been ongoing for 7 years – for a further 6 months. Alleged breaches of the respondent's obligations under the Human Rights Act were piggy-backed onto the judicial review application, and proved central to the proceedings, as the only successful grounds involved human rights.

Proper consideration

The court clarified what it means to give proper consideration to human rights in making a decision under the Act and dismissed the idea that section 58(5) of the Act, which is unique to Queensland, 'codified' the existing position in Victorian case law.

Instead, section 58(5) sets out two elements necessary to demonstrate that proper consideration has been given to a human right, namely:

- identifying the human rights that may be affected by the decision; and
- considering whether the decision would be compatible with human rights.

Justice Martin stated that identifying the relevant human rights 'is an exercise that must be approached in a common sense and practical manner'.[2]

In this case, the decision-maker only referred to the applicant's right to peaceful assembly and freedom of association. By failing to identify the prisoner's right to humane treatment when deprived of liberty, the respondent had failed to give proper consideration to human rights when making the decision.

[2] *Owen-D'Arcy v Chief Executive, Queensland Corrective Services* [2021] QSC 273 [137].

Compatibility

The court confirmed that the applicant must first demonstrate that a right has been 'engaged' or limited. The onus then shifts to the respondent public entity to demonstrably justify the limitation. The standard of proof on the respondent is high and requires a degree of probability which is commensurate with the occasion.

In this case, the court found there was insufficient evidence to show that the applicant had been subjected to torture, inhuman or degrading treatment. However, the applicant's right to humane treatment when deprived of liberty had been limited, because he had been subject to hardship beyond that experienced by all prisoners by virtue of their detention.

The respondent had not discharged the onus as it had not provided any evidence to support the belief that no less restrictive way of adequately managing the applicant's risk to others was available. As the respondent had not fulfilled its obligations under the Act, the court concluded that the decisions were unlawful. The applicant was also successful on one ground of judicial review: that the respondent failed to take into account a relevant consideration, namely, the effect of the decision on the applicant's human rights.

Attorney-General v GLH [2021] QMHC 4

The respondent had been the subject of a forensic order since 2004. On a review of the forensic order, the Mental Health Review Tribunal removed a condition that prevented the respondent from having unsupervised contact with children. The Attorney-General appealed that decision to the Mental Health Court.

Unacceptable risk

The court recognised the regime established by the *Mental Health Act 2016* is compatible with the *Human Rights Act 2019*, and that it was necessary for the court to consider the compatibility of its decision with human rights. The court also held that conditions on forensic orders that limit human rights should only be imposed to the extent necessary to reduce or maintain the risk posed by the person to a not 'unacceptable' level; any conditions must be proportionate or no more onerous in their limitation of human rights than required.

In the circumstances of this case, and the expert evidence regarding risk, the appeal was dismissed.

Inquest into the death of Selesa Tafaifa

The Coroner was asked to rule on the conduct of a police coronial investigation into the death of a woman in custody.

The Queensland Police Service unit that would normally carry out such an investigation had been investigating and prosecuting the deceased for criminal charges against Queensland Corrective Services employees. The deceased's family opposed the investigation by that unit because of conflict-of-interest issues that arose.

The Coroner, acting as a public entity and interpreting legislation compatibly with human rights, took into account a person's right to life and determined that another unit within the Queensland Police Service should finalise the investigation.[3]

Waratah Coal v Youth Verdict (No 5) [2022] QLC 4

Objectors to a mining lease proposed that the Land Court take 'on country' evidence from four First Nations witnesses.

The court acknowledged that it is unlawful for the court to conduct a hearing in a way that is incompatible with human rights. Refusing the application would limit the witnesses' ability to enjoy and maintain their cultural heritage, specifically the way in which traditional knowledge is imparted, as protected by section 28(2)(a) of the Act. The court granted the application, noting that the inconvenience and cost of an 'on country' hearing did not justify the limitation of rights which would result if the witnesses were confined to witness statements.[4]

SQH v Scott [2022] QSC 16

The Crime and Corruption Commission required a person to answer a question that allegedly touched on charges against them and could have an impact on their receiving a fair trial.

The person sought leave to appeal the decision under the Crime and Corruption Act and piggy-backed a human rights claim. The court found that while the person's right to a fair hearing and right against self-incrimination (that is, the right not to be compelled to testify against themselves or confess guilt) had been engaged, the limit was justified.

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[3] *Inquest into the death of Selesa Tafaifa* (Coroners Court of Queensland, T Ryan, State Coroner, 20 June 2022).
[4] *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 5)* [2022] QLC 4.

This included because of the protections in place under the legislative scheme, such as direct use immunity and confidentiality in respect of the identity of the witness and any evidence given. A further protective order required limited disclosure of the evidence to prevent it from being given to the prosecution.[5]

Miami Recreational Facilities [2021] QCAT 378

The Miami Retirement Village applied for a renewal of an exemption previously granted under section 113 of the *Anti-Discrimination Act 1991* (Anti-Discrimination Act) for it to restrict accommodation and services in a residential complex to people over 50 years old.

When deciding exemption applications, the tribunal is acting in an administrative capacity and is a public entity. The tribunal identified the right to equality before the law as potentially limited by its decision, and that the factors set out in section 13 of the Human Rights Act to assess proportionality should be considered, along with the aims and objects of the Anti-Discrimination Act. On balance, with emphasis on the short-term effect of ending the exemption, renewal of the exemption was found to reasonably and justifiably limit the right to equality.[6]

Sunshine Coast Regional Council (No 2) [2021] QCAT 439

In another exemption application under the Anti-Discrimination Act, the Sunshine Coast Regional Council sought an exemption to allow it to restrict the grant of permits solely to Aboriginal people and Torres Strait Islander people for the commercial activity of Indigenous tourism on Council-controlled land.

The tribunal concluded that it was not necessary to grant an exemption, as the existing 'welfare measures' provision under section 104 of the Anti-Discrimination Act would apply.

Before reaching this conclusion, the tribunal considered if it could interpret section 104 compatibly with the right to equality before the law of non-Indigenous people under the Human Rights Act. The tribunal concluded that the limitation of the human right to equal treatment under the law could be justified. The proposed policy to restrict the grant of permits in the way outlined may also align with section 15(5) of the

[5] *SQH v Scott* [2022] QSC 16.
[6] *Miami Recreational Facilities Pty Ltd* [2021] QCAT 378.

Human Rights Act as a 'special measure'. Section 104 of the Anti-Discrimination Act would also amount to a justification of the Council policy should any complaint made against it under the HR Act.[7]

EB [2021] QCAT 434

The Queensland Civil and Administrative Tribunal granted an interim order for the appointment of a guardian for a woman with severe dementia, but refused an interim order for the appointment of an administrator.

In making its decision, the tribunal acknowledged its obligations as a public entity to interpret legislation compatibly with human rights. The tribunal considered the woman's rights to freedom of movement, privacy and reputation, and fair hearing. The urgent nature of the application, and immediacy of the purpose to protect the woman from the risk of harm justified limiting her right to a fair hearing on a short-term basis, and limits on her rights of free movement and privacy, until the matter is heard.[8]

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 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 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 Act.

[7] *Sunshine Coast Regional Council (No 2)* [2021] QCAT 439.
[8] *EB* [2021] QCAT 434.

In 2021–22, the Commission received 27 notifications or requests to intervene under the Human Rights Act. Of those, 23 were notices under section 52 of the Act.

Commission interventions

The Commission intervened in two matters before the Coroners Court and eight matters in the Supreme Court.

All the matters in the Supreme Court were applications for judicial review of mandatory requirements for vaccination against COVID-19. The Commission (and the Attorney-General) withdrew from one of the matters when the applicant abandoned their human rights grounds, and the other seven matters are in progress, with no decisions handed down at the time of writing.

One Coroners Court matter is an inquiry into a death in custody, and the other is an inquiry into the deaths of three women who died from complications associated with rheumatic heart disease. Only one interim decision has been handed down in relation to these matters.[9]

During the reporting period, three decisions in which the Commission intervened that were mentioned in last year's report were delivered. These were:

- *SQH v Scott* [2022] QSC 16 (4 March 2022)
- *Owen-D'Arcy v Chief Executive, Queensland Corrective Services* [2021] QSC 273 (22 October 2021)
- *Attorney-General for the State of Queensland v GLH* [2021] QMHC 4 (delivered 21 June 2021 *ex tempore*, published October 2021).

Attorney-General interventions

During 2021–22, the Attorney-General intervened in 10 proceedings under the Human Rights Act:

- Eight of those matters are before the Supreme Court and are the same vaccination matters that the Commission has intervened in.
- One matter is subject to publication restrictions.
- One matter is ongoing.

[9] *Inquest into the death of Selesa Tafaifa* (Coroners Court of Queensland, T Ryan, State Coroner, 20 June 2022).

The Attorney-General also intervened in the matters of *SQH v Scott* [2022] QSC 16 and *Owen-D'Arcy v Chief Executive, Queensland Corrective Services* [2021] QSC 273 in which judgments were delivered during the reporting period.

A decision was also handed down in *TRKJ v Director of Public Prosecutions (Qld)* [2021] QSC 297 in which the Supreme Court accepted submissions made on behalf of the Attorney-General. These were to the effect that certain provisions of the *Evidence Act 1977* that do not compel a court to read protected communications before granting leave were compatible with human rights. This includes the right to a fair hearing under section 31 of the Human Rights Act.

Summary of the role of courts and tribunals in 2021-22

The Human Rights Act commenced on 1 January 2020 and case law in the superior courts is continuing to develop.

The Supreme Court provided significant guidance this year with *Owen-D'Arcy v Chief Executive, Queensland Corrective Services* [2021] QSC 273, especially in relation to proper consideration and the onus of proof on each party. Currently, the Supreme Court is considering seven matters subject to interventions by the Commission and Attorney-General that challenge mandatory requirements for vaccination against COVID-19 and raise numerous human rights issues.

Case law has firmly established that Queensland courts and tribunals are subject to the Act when undertaking certain functions. The Land Court, the Mental Health Review Tribunal, and the Coroners Court have all adopted clear positions regarding when they are acting administratively and are therefore public entities with obligations under the Human Rights Act. This has led to positive outcomes, such as the Land Court's decision to allow evidence to be given 'on country' by First Nations witnesses in recognition of their cultural rights.

The Queensland Civil and Administrative Tribunal (QCAT) has also recognised these obligations when deciding exemption applications under the Anti-Discrimination Act for which the Commission provides submissions outlining the key human rights considerations. Other situations in which human rights are regularly considered include appointing guardians under the Guardianship and Administration Act and reviewing decisions to refuse Blue Cards.

In time, the Commission expects that more courts and tribunals will determine when they are acting administratively, and routinely take up their obligations as public entities to act and make decisions compatibly with, and give proper consideration to, human rights.

Courts and tribunals, whether public entities or not, must consider human rights when interpreting legislation and where human rights apply directly to their functions. The Commission noted the absence of specific reference to the Human Rights Act in some cases during the year where human rights generally are discussed. This includes a decision regarding a child's consent to proposed treatment for gender dysphoria[10] and a decision to consent to sterilisation of a child.[11]

The Commission recognises that there may be limits to judicial consideration where Human Rights Act issues are not raised by the parties. This points to the ongoing importance and value of ensuring that legal advocates and self-represented parties have sufficient awareness and understanding of the role of the Human Rights Act in litigation.

[10] *Re A* [2022] QSC 159.

[11] *In an application about matters concerning CM* [2022] QCAT 263