

Brief Overview of the Human Rights Act (Qld) 2019

Introduction

The *Human Rights Act Qld 2019* ('HRA') was passed on the 27 February 2019 and commenced on the 1 January 2020.¹

The HRA defines 'human rights' as the 23 human rights listed in HRA.² These are primarily civil and political rights.³ However, two are economic, social and cultural rights.⁴ The HRA further clarifies that all individuals in Queensland have human rights but only individuals have human rights and not corporations.⁵

There are three main objectives of the HRA.⁶ First, to protect and promote human rights.⁷ Second, to help build a culture in the Queensland public sector that respects and promotes human rights.⁸ Third, to help promote a dialogue about the nature, meaning and scope of human rights.⁹

The HRA essentially aims to achieve these objectives via the three arms of government.¹⁰ The legislature (Parliament) is generally required to consider human rights when proposing and scrutinising new legislation.¹¹ The judiciary (courts and tribunals) are generally required to interpret all Queensland legislation, to the extent possible, in a way that is compatible with human rights.¹² Finally, the executive (public entities) are generally required to act and make decisions in a way that is compatible with human rights.¹³

These obligations, amongst others, are intended to create a 'dialogue model' of human rights protection whereby human rights are considered across the three arms of government, specifically, when the legislature makes the laws, when the executive apply the laws and when the judiciary interpret the laws.¹⁴ By the HRA promoting a discussion or 'dialogue' about the protection of human rights between the three arms of government, it will in turn help build a "human rights" culture across all three arms of government but also within the broader community that interact with all three arms of government.¹⁵

The Executive (public entities)

¹ *Human Rights Act Qld 2019* ('HRA').

² *Ibid* s 7.

³ *Ibid* ss 15 – 37.

⁴ *Ibid* ss 36 – 37.

⁵ *Ibid* s 11.

⁶ *Ibid* s 3.

⁷ *Ibid* s 3(a).

⁸ *Ibid* s 3(b).

⁹ *Ibid* s 3(c).

¹⁰ *Ibid* s 4.

¹¹ *Ibid* s 4(c)-(d).

¹² *Ibid* s 4(f).

¹³ *Ibid* s 4(b).

¹⁴ Queensland Human Rights Commission, *Queensland's Human Rights Act 2019: a guide for public entities* (Guide, 2019) 9.

¹⁵ *Ibid* 4.

The HRA imposes two obligations on public entities.¹⁶ First, to act and make decisions in a way that is compatible with human rights.¹⁷ Second, to take relevant human rights into proper consideration when making decisions.¹⁸

What is a public entity?

In general, a public entity is an organisation or body that performs a public function (i.e. provides services to the public on behalf of the government or another public entity).¹⁹

However, s 9 of the HRA provides a specific definition of the meaning of a 'public entity'. It is said that there are three types of public entities based on this definition: core, functional and opt in.²⁰ All of them, however, must be operating 'in and for Queensland' to amount to a public entity for the purposes of HRA.²¹

Core public entities are public entities at all times, regardless of what functions they are performing.²² The HRA lists several examples of core public entities.²³ These include, but are not limited to, government entities, public service employees, the Queensland Police Service and local governments.²⁴

Functional public entities are entities considered public entities only when they are performing a function of a public nature on behalf of the state.²⁵ These types of public entities reflect the modern operation of government where many public services are provided by non-governmental entities on behalf of the State.²⁶ For example, a private company managing a prison would be a functional public entity only when it is delivering their prison management services.²⁷

The HRA lists a number of matters that may be considered in determining whether an entity's function is of a public nature.²⁸ In addition, the HRA lists a number of functions that are said to be of a public nature such as the provision of public health services, emergency services and public disability services.²⁹

Therefore, employees of public health services, emergency services and public disability services are subject to the public entity obligations under the HRA. However, private health services do not amount to a public entity unless they provide public health services for the state or choose to be subject to the public entity obligations under the HRA.³⁰

Public entity obligations

¹⁶ HRA s 58(1).

¹⁷ Ibid s 58(1)(a).

¹⁸ Ibid s 58(1)(b).

¹⁹ Queensland Human Rights Commission, *Queensland's Human Rights Act 2019: a guide for public entities* (Guide, 2019) 11.

²⁰ Ibid.

²¹ HRA s 9(5).

²² Queensland Human Rights Commission, 'What is a public entity?', *What is a public entity?* (Fact Sheet, July 2019) <<https://www.qhrc.qld.gov.au/your-rights/human-rights-law/what-is-a-public-entity>>.

²³ HRA s 9(1).

²⁴ Ibid.

²⁵ Ibid s 9(1)(h).

²⁶ Queensland, *Parliamentary Debates*, Legislative Assembly, 31 October 2018, 3185 (Yvette D'Ath, Attorney-General).

²⁷ Ibid.

²⁸ HRA s 10(1).

²⁹ Ibid s 10(3).

³⁰ Queensland Human Rights Commission, *Queensland's Human Rights Act 2019: a guide for public entities* (Guide, 2019) 11.

Any organisation or body operating in and for Queensland that falls into one of these categories of a 'public entity' must comply with the two public entity obligations imposed set out by the HRA.³¹

The first obligation to act and make decisions in a way that is compatible with human rights is regarded as a substantive obligation in that it concerns the actual decision or conduct of public entity employees.³² The way the employees act, including by either doing something or failing to do something which they could or should have done, and the decisions they make, have to be compatible with human rights.³³

The second obligation to take human rights into proper consideration when making decisions is a procedural obligation in that it relates to the process public entity employees should follow in making a decision.³⁴ It effectively requires public entity employees to consider how the decision might impact people's human rights before making a given decision.³⁵ This consideration includes considering how the decision will work in practice but also whether there are any effective guidelines, policies or procedures in place that can reduce the impact of the decision on people's human rights.³⁶ Furthermore, the mere fact that an employee cannot identify anyone who will be affected by their act or decision does not mean they don't have to think about human rights in coming to their decision; it is enough that there is a potential impact on human rights for a group of people.³⁷ Importantly, however, the extent to which one is expected to meet this procedural obligation will vary depending on the employee's role, what rights are being affected and the vulnerability of the people affected by the decision.³⁸ For example, the standard required of a person deciding whether to involuntarily detain a person with impaired capacity would be higher than for a person deciding whether to ask people to use a footpath on the other side of the road when work is being completed to fix the other footpath.³⁹

Exceptions to public entity obligations

The HRA outlines three general exceptions to the public entity obligations, that is, three circumstances where a public entity does not need to comply with their substantial or procedural obligations.⁴⁰

First, the obligations do not apply where the public entity could not reasonably have acted differently or made a different decision because of a state or federal law or otherwise under law.⁴¹ The example given in the HRA is that a public entity is acting to give effect to a statutory provision that is not compatible with human rights.⁴² This exception reflects the underlying recognition within the HRA that the public entity obligations do not override other laws and the legal obligations they impose on public entities.⁴³ Employees of public entities should follow laws that tell them how to act or how to make a decision even if it is inconsistent with human rights.⁴⁴

³¹ Ibid s 58(1).

³² Queensland Human Rights Commission, *Guide: Human rights in decision making* (Guide, No 4, January 2020) 3.

³³ Ibid.

³⁴ Ibid 2.

³⁵ Ibid.

³⁶ Ibid.

³⁷ Ibid.

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ HRA s 58(2) – (4).

⁴¹ HRA s 58(2).

⁴² Ibid.

⁴³ Queensland Human Rights Commission, *Guide: Human rights in decision making* (Guide, No 4, January 2020) 9.

⁴⁴ Ibid.

Second, the obligations do not apply where the public entity is a body established for a religious purpose, the act or decision in question is done or made in accordance with the doctrine of the religion concerned and it is necessary to avoid offending the religious sensitivities of the people of the religion.⁴⁵

Finally, the obligations do not apply to any act or decision of a private nature.⁴⁶ That is, the public entity obligations do not extend to employees of public entities making decisions outside of work in their own private life.⁴⁷

Limiting human rights

The first public entity obligation is to act and make decisions in a way that is 'compatible with human rights'.⁴⁸ The HRA states that an act, decision or statutory provision is 'compatible with human rights' if it does not limit a human right or limits a human right only to the extent that is reasonable and demonstrably justifiable in accordance with s 13.⁴⁹

A law may often limit or balance one human right with other human rights to ensure that in protecting this one human right the law does not impinge on these other human rights.⁵⁰ For example, the right to freedom of expression may be limited to ensure national security, public safety or to protect people from vilification.⁵¹

For this reason, the human rights protected under the HRA are not guaranteed for all individual persons in Queensland in the sense that they are not absolute and unqualified rights.⁵²

Section 13(1) of the HRA specifies when a human right may be limited under the law:

A human right may be subject under law only to reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

Section 13(2) provides a list of factors that may be relevant to the determination of whether a limit on a human right is reasonable and justifiable as mentioned in subsection (1). For example, the first factor listed in s 13(2) is the nature of the human right; holding everything else constant, it is likely easier to justify a limitation on the right to freedom of expression than it is to justify a limitation on the right to freedom from torture, cruel and inhuman and degrading treatment.

Accordingly, an employee of a public entity can still comply with their respective substantive and procedural public entity obligations even where they limit a human right. This limitation of a Human Right can occur to the extent it is reasonable and demonstrably justifiable in accordance with s 13(1) having regard to the factors listed in s 13(2). This generally requires a few steps to be followed.⁵³

⁴⁵ HRA s 58(3).

⁴⁶ Ibid s 58(4).

⁴⁷ Queensland Human Rights Commission, *Guide: Human rights in decision making* (Guide, No 4, January 2020) 9.

⁴⁸ HRA s 58(1)(a).

⁴⁹ Ibid s 8.

⁵⁰ Queensland Human Rights Commission, *Queensland's Human Rights Act 2019: a guide for public entities* (Guide, 2019) 8.

⁵¹ Ibid.

⁵² Ibid.

⁵³ Queensland Human Rights Commission, *Guide: Human rights in decision making* (Guide, No 4, January 2020) 5.

First, the employee must consider how any of the human rights protected in the HRA will be limited by their decision or conduct.⁵⁴ Second, the employee must be able to point to a law or regulation that permits them to limit any of these human rights that can be affected.⁵⁵ Finally, the employee must consider whether the limitation that their decision or conduct will have on certain human rights is reasonable and justified in the way mentioned in s 13(1) having regard to the factors listed in s 13(2).⁵⁶

So, if an employee makes a decision or engages in conduct that limits a human right under the HRA, there is a law that enables for this limitation and the limitation is reasonable and justifiable under s 13 then the given decision or conduct by the employee will likely still be in compliance with their public entity obligations.

Notably, documenting a decision-making process along the line of these steps is important for the employee being able to show they acted in accordance with their public entity obligations.⁵⁷

Complaints

The HRA does not create any new offence or a stand-alone statutory cause of action for an alleged breach of a public entity's human right obligations.⁵⁸

However, there are three avenues for a person who believes a public entity has breached their human rights obligations to complain and seek remedies: internal complaints, independent complaints and complaints to the courts and tribunals.⁵⁹ Notably, a person is only able to complain about an alleged breach of public entity obligations under the HRA that occurred on or after 1 January 2020.⁶⁰

The individual must first raise the complaint internally with the public entity.⁶¹

If the person has not received a response within 45 days since the complaint was made or the response received within 45 days is considered inadequate by the individual then the individual can complain to the QHRC.⁶² Notably, either the individual subject to the public entity's alleged contravention of their obligations, an agent of the individual or a person authorised in writing by the QHRC to make a complaint for the individual is permitted to complain to the QHRC.⁶³ Furthermore, the QHRC may accept a complaint made before 45 business days have elapsed since the complaint was made if it considers it appropriate to do so because of exceptional circumstances.⁶⁴ The HRA establishes a whole procedure for the QHRC to follow in dealing with human right complaints submitted to them.⁶⁵ Essentially, the QHRC can try informally resolve the complaint by discussing it

⁵⁴ Ibid 6.

⁵⁵ Ibid 7.

⁵⁶ Ibid 8.

⁵⁷ Queensland Human Rights Commission, *Queensland's Human Rights Act 2019: a guide for public entities* (Guide, 2019) 37.

⁵⁸ Megan Fairweather, 'Building a culture of Human Rights in Queensland: through the lens of the health and aged care sector' (2019) 27(9) *Australian Health Law Bulletin* 149, 151; *HRA* s 58(6).

⁵⁹ Queensland Human Rights Commission, *Queensland's Human Rights Act 2019: a guide for public entities* (Guide, 2019) 41.

⁶⁰ Queensland Human Rights Commission, 'Making a Complaint', *Making a Complaint* (Fact Sheet, May 2021) 3 <<https://www.qhrc.qld.gov.au/complaints/making-a-complaint>>.

⁶¹ *HRA* s 65(1)(a).

⁶² Ibid s 65(1)(b).

⁶³ Ibid s 64(1).

⁶⁴ Ibid s 65(2).

⁶⁵ *HRA* Part 4, Div 2, Subdivision 3 – Subdivision 5

with the parties, attempt to resolve the complaint through a compulsory conciliation conference or refer the complaint to other complaint agencies.⁶⁶

Alternatively, the complaint can be taken to a court or tribunal in limited circumstances.⁶⁷ It cannot be taken directly to the court or tribunal.⁶⁸ However, it is possible to raise the complaint as an additional ground of unlawfulness where the person also has a separate cause of action that the public entity has acted unlawfully.⁶⁹ This has been referred to as a 'piggy-back' action.⁷⁰ Notably, even if the separate cause of action is unsuccessful, the complainant may still obtain the relief or remedy that was available in the separate cause of action if the human rights complaint is upheld unless the relief or remedy consists of damages.⁷¹

⁶⁶ Ibid.

⁶⁷ Ibid s 59.

⁶⁸ Ibid.

⁶⁹ HRA s 59; Queensland Human Rights Commission, *Queensland's Human Rights Act 2019: a guide for public entities* (Guide, 2019) 42; Alistair Pound and Kylie Evans, *Annotated Victorian Charter of Rights* (Thomson Reuters, 2nd ed, 2018) 10.

⁷⁰ Queensland Human Rights Commission, *Queensland's Human Rights Act 2019: a guide for public entities* (Guide, 2019) 42.

⁷¹ HRA s 59.

