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Righting inhuman wrongs – How the new *Human Rights Act 2019* (Qld) can assist clients with disability and mental illness

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Legal disclaimer

This PowerPoint Presentation contains general information about legal matters.

The information is not legal advice and should not be treated as such.

Key things to know about the HRA



- It protects human rights → the basic rights that belong to every person, regardless of age, race, sex, social status or other characteristic
- Protects the human rights of all people in Queensland
- Binds “public entities” → core and functional
- Dialogue model – human rights are taken into account across the three arms of government
- Accessible complaints mechanism
- Protects a range of human rights that Australia has agreed to protect at international law
- Most human rights are individual, some belong to groups (eg cultural rights)

What human rights are protected?

Civil and political rights	
Recognition and equality before the law	Right to life
Protection from torture and cruel, inhuman or degrading treatment	Freedom from forced work
Freedom of movement	Freedom of thought, conscience, religion and belief
Freedom of expression	Peaceful assembly and freedom of association
Taking part in public life	Property rights
Privacy and reputation	Protection of families and children
Cultural rights – generally	Right to liberty and security of person
Humane treatment when deprived of liberty	Fair hearing
Rights in criminal proceedings	Children in the criminal process
Right not to be tried or punished more than once	Retrospective criminal laws
Cultural rights of Aboriginal and Torres Strait Islander peoples	
Economic, social and cultural rights	
Right to education	Right to health services

Human rights that are of particular significance for people with disability

- Recognition and equality before the law
- Right to life
- Protection from torture and cruel, inhuman or degrading treatment
- Privacy and reputation
- Protection of families and children
- Right to liberty and security of person
- Humane treatment when deprived of liberty
- Right to education
- Right to health services
- Freedom from forced work
- Freedom of movement
- Taking part in public life
- Property rights



Obligations of public entities

- ❑ To make decisions compatible with human rights
- ❑ To give proper consideration to relevant human rights in making decisions, which includes:
 - Identifying the human rights that may be affected by the decision; and
 - Considering whether the decision would be compatible with human rights.

Certain Children v Minister for Families and Children & Ors [2016] VSC 796

Minister for Families and Children v Certain Children [2016] VSCA 343

Certain Children v Minister for Families and Children (No 2) [2017] VSC 251

Limits to human rights



The HRA allows for reasonable limits to be placed on human rights, which may be justified in a “free and democratic society based on human dignity, equality and freedom”.

“Proportionality test” used to determine whether limitation is reasonable and justifiable. This test considers:

- nature of human right;
- purpose of limitation;
- relationship between limitation and purpose;
- whether there are less restrictive and reasonably available options;
- importance of purpose of limitation; and
- importance of safeguarding the human right.

HRA permits decisions and actions that are not compatible with human rights if the decision maker ‘could not reasonably have acted differently or made a different decision’ because of that other law (s58(2)).

Complaints mechanisms under the Act

Mechanisms for addressing a human rights issue:

- 1. Raise issue directly with public entity**
- 2. Lodge a complaint with QHRC (after 45 days) – conciliation of complaint if accepted**
- 3. Include human rights complaint as part of court action to protect another legal right**

Human rights legislation has a valuable role in:

- ❖ Addressing power imbalances**
- ❖ Resolving issues while keeping relationships intact**



Right to recognition and equality before the law

Section 15

- (1) Every person has the right to recognition as a person before the law.*
- (2) Every person has the right to enjoy the person's human rights without discrimination.*
- (3) Every person is equal before the law and is entitled to the equal protection of the law without discrimination.*
- (4) Every person has the right to equal and effective protection against discrimination.*
- (5) Measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination.*

Parks Victoria [2011] VCAT 2238

The right to life

Section 16

Every person has the right to life and has the right not to be arbitrarily deprived of life.

Rabone and Anor v Pennine Care NHS Foundation Trust (2012) SC (8 Feb 2012)

Protection from torture and cruel, inhuman or degrading treatment

Section 17

A person must not be—

- (a) subjected to torture; or*
- (b) treated or punished in a cruel, inhuman or degrading way; or*
- (c) subjected to medical or scientific experimentation or treatment without the person's full, free and informed consent.*

Davies v State of Victoria [2012] VSC 343 (15 August 2012)

Certain Children (No 1) [2016] VSC 796 [169]; contra *Certain Children (No 2)* [2017] VSC 251

Privacy and reputation

Section 25

A person has the right—

- (a) not to have the person's privacy, family, home or correspondence unlawfully or arbitrarily interfered with; and*
- (b) not to have the person's reputation unlawfully attacked.*

Non-litigated examples of the application of this right:

- to require provision of a shower curtain, to enable a woman with disability in a group home to shower with privacy and dignity (Vic);
- to challenge the use of CCTV cameras in the bedroom of a couple with disability (UK).

Protection of families and children

Section 26

- (1) Families are the fundamental group unit of society and are entitled to be protected by society and the State.*
- (2) Every child has the right, without discrimination, to the protection that is needed by the child, and is in the child's best interests, because of being a child.*
- (3) Every person born in Queensland has the right to a name and to be registered, as having been born, under a law of the State as soon as practicable after being born.*

This right has been relied upon to help to keep families intact with appropriate support and to prevent the forced removal of children from parents with disabilities.

Right to liberty and security of person

Section 29

- (1) *Every person has the right to liberty and security.*
 - (2) *A person must not be subjected to arbitrary arrest or detention.*
 - (3) *A person must not be deprived of the person's liberty except on grounds, and in accordance with procedures, established by law.*
 - (4) *A person who is arrested or detained must be informed at the time of arrest or detention of the reason for the arrest or detention and must be promptly informed about any proceedings to be brought against the person.*
 - (5) *A person who is arrested or detained on a criminal charge—*
 - (a) *must be promptly brought before a court; and*
 - (b) *has the right to be brought to trial without unreasonable delay; and*
 - (c) *must be released if paragraph (a) or (b) is not complied with.*
 - (6) *A person awaiting trial must not be automatically detained in custody, but the person's release may be subject to guarantees to appear—*
 - (a) *for trial; and*
 - (b) *at any other stage of the judicial proceeding; and*
 - (c) *if appropriate, for execution of judgment.*
 - (7) *A person deprived of liberty by arrest or detention is entitled to apply to a court for a declaration or order regarding the lawfulness of the person's detention, and the court must—*
 - (a) *make a decision without delay; and*
 - (b) *order the release of the person if it finds the detention is unlawful.*
 - (8) *A person must not be imprisoned only because of the person's inability to perform a contractual obligation.*
- MH6 v Mental Health Review Board (General) [2008] VCAT 84*
 - KB and others v Mental Health Review Tribunal and Secretary of State for Health [2002] EWHC 639*

Humane treatment when deprived of liberty

Section 30

- (1) All persons deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person.*
- (2) An accused person who is detained or a person detained without charge must be segregated from persons who have been convicted of offences, unless reasonably necessary.*
- (3) An accused person who is detained or a person detained without charge must be treated in a way that is appropriate for a person who has not been convicted.*

This right may be particularly relevant for persons with disability subject to practices such as lengthy solitary confinement and denied adequate supports and services while incarcerated.

The right to a fair hearing

Section 31

- (1) A person charged with a criminal offence or a party to a civil proceeding has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing.
- (2) However, a court or tribunal may exclude members of media organisations, other persons or the general public from all or part of a hearing in the public interest or the interests of justice.
- (3) All judgments or decisions made by a court or tribunal in a proceeding must be publicly available.

Matsoukatidou v Yarra Ranges Council [2017] VSC 61

C v Chief Psychiatrist and anor [2011] ACTSC 195

The right to education

Section 36

- (1) Every child has the right to have access to primary and secondary education appropriate to the child's needs.*
- (2) Every person has the right to have access, based on the person's abilities, to further vocational education and training that is equally accessible to all.*

Non-litigated example of the application of this right: this right has been relied upon in Victoria to help students with disability to access the supports they need to remain in mainstream schooling.

The right to health services

Section 37

- (1) Every person has the right to access health services without discrimination.*
- (2) A person must not be refused emergency medical treatment that is immediately necessary to save the person's life or to prevent serious impairment to the person.*

Example of the potential application of this right: to challenge the denial of access to basic healthcare for people with disability detained in a forensic disability service or authorised mental health service.

Castles v Secretary of the Department of Justice and Others (2010) 28 VR 141

Other relevant rights to note

Section 18: Freedom from forced work

Section 19: Freedom of movement

Section 23: Taking part in public life

Section 24: Property rights

AC (Guardianship) [2009] VCAT 1186 (8 July 2009)

Secretary, Department of Justice v AB [2009] VCC 1132 (28 August 2009)

Slattery v Manningham CC [2013] VCAT 1869)

Building a human rights culture

Human rights legislation has a valuable role in prompting development of a human rights culture

Specifically:

- ❑ Recognising fundamental rights that can be raised in decision-making processes that engage a person's human rights, as a means of addressing power imbalances
- ❑ Resolving issues while keeping relationships intact
- ❑ Allowing for complaints where necessary
- ❑ Training and education of the public sector

The greatest value of the Act won't be in litigated outcomes, but in changes in the culture of government.

A Federal Human Rights Act remains greatly needed.

Tips for lawyers

- ❑ Raise the HRA at earliest opportunity (eg in initial meetings with Department)
- ❑ Use the HRA in a positive way, not only to protect clients from rights breaches but to call for positive action (eg right to support needed to ensure a properly inclusive education; right to support needed for a person with disability to parent)
- ❑ Raise human rights arguments in relevant forums
- ❑ Use the HRA wisely:
 - Ordinary Act of Parliament (not constitutionally-entrenched), can be amended or repealed
 - A strong collection of stories will help to protect our HRA – to show its use and value
 - Rely on it to compel decision-makers to consider human rights, challenge power imbalance and the unthinking application of bad policy
 - BUT we also need to be careful about which cases we litigate
 - In Victoria, early cases are still authoritative in shaping interpretation

Summary of key points



- ❑ The HRA is a powerful advocacy tool to protect the rights and lives of people with disability in Queensland
- ❑ A number of the new rights can be used to target some of the human rights breaches experienced by people with disability
- ❑ Use it wisely, in a positive, proactive way, as the foundation for rights-based arguments
- ❑ Hopefully, as more jurisdictions gain human rights legislation, we are moving closer to having a Federal Human Rights Act or Charter



Thank You.

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