Australian
Health Law
Bulletin

Building a culture of Human Rights in Queensland: through the lens of the health and aged care sector

Megan Fairweather *MINTERELLISON*

Abstract

The Human Rights Act 2019 (Qld) heralds a significant change to the way in which administrative decisions are to be made in Queensland from 1 January 2020.[1]

Introduction

The Human Rights Act 2019 (Qld) introduces 23 civil, political, economic, social and cultural human rights, drawn from international treaties, with the fundamental objective to build a culture in Queensland where human rights are respected, protected and promoted. The preamble to the Human Rights Act recognises the inherent dignity and worth of all human beings with special recognition to the importance of human rights to Aboriginal peoples and Torres Strait Islander peoples, as Australia's first people, with their distinctive and diverse relationship with lands, waters and coastal seas.

The Human Rights Act will impact public sector decision-makers at all levels, including by:

- making it unlawful for public entities to act or make decisions that are not compatible with human rights, or that fail to take human rights into proper consideration when making decisions[2]
- requiring every statutory provision in Queensland, to the extent possible consistent with their purpose, to be interpreted in way that is compatible, or most compatible, with human rights[3]
- empowering the Supreme Court to make a "declaration of incompatibility" if a statutory provision cannot be interpreted in a way that is compatible with a human right[4]

The human rights created under the legislation are not absolute. It will be permissible to "limit" a human right if it is "reasonable and demonstrably justifiable" to do so by reference to the criteria in s 13 of the Human Rights Act. The application of these criteria is considered below.

This article will examine the operation of the Human Rights Act through the lens of the health sector and the extent to which its application will reach beyond public health and aged care services to include National Disability Insurance Scheme (NDIS) providers and, in certain situations, private sector health and medical research entities. Some high-level insights will be provided into the human rights relevant to health and aged care, including the right to access health services, as well as a summary about what remedies are available for a human rights breach.

A "core public entity" or an entity with a "function of a public nature"

The Human Rights Act will apply to public entities, whether defined as "core" or "functional" public entities. Public sector health and aged care services will be captured as core public entities in one or more of the following defined categories:

- government departments, public service offices and agencies, authorities, commissions and corporations established under an Act for a public or state purpose[5]
- individual public service employees, and staff members or executive officers of public entities[6]
- an entity established by an Act, when the entity is performing "functions of a public nature"[7]
- an entity whose functions are of a public nature, when it is performing those functions *for* the state or *for* another public entity[8]

The functions of a public nature specifically include the provision of public health services.[9]

Private sector health providers will be considered core public entities when they provide public health services *for* the state, for example, under contractual arrangements to relieve public waiting lists. A private health provider can also be deemed a functional public entity if it performs functions of a public nature, assessed by the any of following criteria:[10]

> (a) whether the function is conferred on the [private health] entity under a statutory provision;
> (b) whether the function is connected to or generally identified with functions of government;

(c) whether the function is of a regulatory nature;
(d) whether the [private] entity is publicly funded to perform the function;
(e) whether the entity is a government owned corporation.

These identifiers are not further defined and are not intended to be an exhaustive list. While it seems unlikely that the day-to-day activities of private facilities regulated in Queensland under the Private Health Facilities Act 1999 (Qld) will be considered functional public entities, there is scope for certain conditions to invite the application of the Human Rights Act.[11] Providers registered under the National Disability Insurance Scheme Act 2013 (Cth) are captured as defined core public entities when performing functions of a public nature in Queensland.[12] The activities of health and medical-related research entities, including universities, will also be captured as either core or functional public entities if, by way of example, they are an institute established by statute or if they are in receipt of public funding to conduct research.

The right to access health services

Queensland is the first of the human rights jurisdictions in Australia to include a right to health services and so the extent of its nature and scope is yet to be determined in a local context. The right provides:[13]

(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.

The operation of the right is expected, at minimum, to reflect existing obligations at common law, in anti-discrimination legislation and under the Australian Charter of Health Rights.[14] It is however potentially much broader than this and may bring into the spotlight the provision of health services in rural and remote regions and management of chronic illness. International jurisprudence indicates that access to dialysis, in particular, is a common basis for complaint under similar "health care" rights.[15]

In jurisdictions that have not legislated for a specific human right to access health care, other human rights have been used as a vehicle for complaint. These have included complaints about decisions to access therapeutic drug trials,[16] access to effective home birthing services[17] and access to in vitro fertilisation (IVF) treatment.[18] It is expected that the right to access health services will overlap with other human rights, including the right to life and the right to humane treatment when deprived of liberty as outlined further below.

Other human rights relevant to the provision of health care

There are very few of the other human rights protected by the Human Rights Act that will not be relevant to the provision of health and aged care services.[19] The following table highlights some examples of these, together with an indication of circumstances in which the rights are likely to be subject to limitation.

Protected human rights	Potential limitations
section 15(4): right to equal and effective protection against discrimination[20]	employment decisions; access to services that impact one group more than another
section 16: right to life and the right not to be arbitrarily deprived of life	deaths related to health care; end-of-life decision-making; access to health services and lifesaving treatment[21]
section 17(c): right to not be subjected to medical treatment without full, free and informed consent[22]	involuntary treatment and behavioural and detention orders under mental and public health legislation; use of restraint
section 19: freedom of movement	involuntary treatment, behavioural and detention orders under mental health and public health legislation; use of restraint; removing persons creating a disturbance; traffic control
section 20: freedom of thought, conscience, religion and belief includes the freedom to adopt a religion or belief of the person's choice	immunisation programs, blood transfusions, dietary choices, dress codes, conscientious objections to providing health care services
section 21: freedom of expression, which includes the freedom to seek, receive and impart information and ideas of all kinds	social media restrictions for employees; protection of patient information;[23] information requirement notices
section 22: peaceful assembly and freedom of association	safe access zones for termination services; obstructing authorised investigators and officers
section 23(2): taking part in public life includes a right and opportunity, without discrimination, to access the public service and public office	positions that have age restrictions or irrelevant eligibility criteria or qualifications
section 24: property rights	search, seizure and disposal powers by authorised investigators and officers
section 25: privacy and reputation — a person's *privacy*, *family*, *home* and *correspondence* must not be unlawfully or arbitrarily interfered with; a person has the right not to have their reputation *unlawfully* attacked	disclosure of patient information; involuntary treatment and detention; compulsory medical assessments; search and seizure powers by authorised investigators and officers; management of social media

section 26: protection of families as the fundamental unit of society and protection of children in their best interests	care and custody arrangements, impact of involuntary treatment or detention, consent and capacity issues
section 27: cultural rights — generally: persons with particular cultural, religious, racial and linguistic backgrounds have a right to enjoy their culture, declare and practise their religion, and use their language, in community with other persons of that background	use of interpreters, dietary choices, dress codes, health treatment choices; culturally specific employment needs
section 28: cultural rights — Aboriginal peoples and Torres Strait Islander peoples hold distinct cultural rights as Australia's first people: they must not be denied the right, with other members of their community, to live life as an Aboriginal or Torres Strait Islander person who is free to practise their culture	connection to land in access to health and aged care services; kinship ties and role in decision-making and patient care; culturally specific employment needs
section 30: right to humane treatment when deprived of liberty — a person must be treated with humanity and respect when deprived of liberty	detention for involuntary treatment under mental health and public health legislation; prisoner access to health care; access to visitors and amenities; use of restraint
section 31: right to fair hearing	compliance with mental health treatment authority timeframes[24]
section 36: right to education — every child has the right to have access to primary and secondary education appropriate to their needs	paediatric inpatient admissions; vaccination exclusions

Making decisions in compliance with the Human Rights Act

The Human Rights Act requires decision-makers to identify which of the human rights may be affected by the decision and to then consider whether the decision will be compatible with those rights.[25] If the decision will have the effect of limiting one or more of the protected human rights, the decision-maker must consider whether the limitation is "consistent with a free and democratic society based on human dignity, equality and freedom".[26] The criteria set out in s 13 of the Human Rights Act require the decision-maker to apply a proportionality test to determine whether the proposed limitation is reasonable and demonstrably justifiable. That test includes considerations about the nature of the human right; the nature, purpose and importance of the proposed limitation; and, most importantly perhaps, whether there is any less restrictive and reasonably available way to achieve the purpose.

The prudent use of public resources will often be a legitimate factor when making decisions that may limit human rights, such as when prioritising patients for access to health services. However, without evidence of those impacts, it will not necessarily be a sufficient justification.[27] There remains a place for reasoned policy and guidelines for decision-makers. However, the higher the impact on the human right in question, the higher the onus will be on establishing why it should be limited.

Remedies for a breach of the human rights

The Human Rights Act does not create any new offences at law or any independent statutory cause of action, and does not provide a mechanism for financial compensation. There are two primary avenues for complaint about a human rights breach.

First, a contravention of a human right may be raised in addition to another cause of action that exists against the entity concerned, for example, a judicial review proceeding. This is referred to broadly as a "piggy-back" cause of action.[28] In other words, it is not possible to commence a standalone proceeding for a human rights breach.

Second, the Human Rights Act includes a mechanism for resolving complaints by way of a direct complaint to the Queensland Human Rights Commission.[29] There is however a requirement for an aggrieved person to first raise their complaint with the entity concerned.[30] If the complaint is not resolved locally, it may then be dealt with by the Human Rights Commission. The Human Rights Commission can direct parties to participate in a conciliation.[31] After a matter is finalised, with or without resolution, the Human Rights Commission has broad powers to publish information about the matters raised, including to recommend actions it thinks should be taken by a respondent to ensure it acts compatibly with the Human Rights Act.[32] There is no further appeal right following the finalisation of a complaint by the Human Rights Commission.

The Human Rights Commission can also refer the matter to other agencies if it is appropriate to do so, including the Queensland Ombudsman, the Health Ombudsman, the Crime and Corruption Commission, the Information Commissioner or the NDIS Commissioner.[33] There is no requirement for any consultation to take place before referral but it is intended that arrangements will be made with each organisation about how such referrals will be managed.[34]

Preparing for implementation

The provisions to establish the Human Rights Commission commenced on 1 July 2019. The substantive provisions for protecting the human rights will commence on 1 January 2020. To prepare for the operation

of the new law, public entities should ensure internal policies are reviewed for compatibility with the Human Rights Act and ensure that decision-makers are equipped with training about the nature and scope of the human rights and with tools to make and record their decisions. Internal complaints processes will also need to be reviewed and adapted for managing human rights complaints.

Megan Fairweather
Special Counsel
MinterEllison
Megan.Fairweather@minterellison.com
www.minterellison.com

Footnotes

1. The author would like to acknowledge the following resources in the preparation of this paper: A Pound and K Evans, *Annotated Victorian Charter of Rights*, 2nd ed, Lawbook Co, Australia, 2019; *Charter of Human Rights Bench Book*, Judicial College of Victoria, Australia, 2016, www.judicialcollege.vic.edu.au/node/1207; Victorian Government *Charter of Human Rights and Responsibilities: Guidelines for Legislation and Policy Officers in Victoria* (July 2008) www.justice.vic.gov.au/justice-system/laws-and-regulation/human-rights-legislation/charter-of-human-rights-guidelines-for; and the assistance of Nicholas Davison, MinterEllison research clerk.
2. Human Rights Act, s 58.
3. Above, s 48.
4. Above n 2, s 53.
5. Above n 2, s 9(1)(a), where the definition references s 24 of the Public Service Act 2008 (Qld).
6. Above n 2, s 9(1)(b) and (i).
7. Above n 2, s 9(1)(f).
8. Above n 2, s 9(1)(h).
9. Above n 2, s 10(3)(b)(ii).
10. Above n 2, s 10(1).
11. It has been held internationally that the state remains responsible for the protection of human rights in the private sector through its overarching regulatory role. In *Alyne da Silva Pimentel Teixeira v Brazil* Communication No 17/2008; UN Doc CEDAW/C/49/D/17/2008 www2.ohchr.org/english/law/docs/CEDAW-C-49-D-17-2008.pdf, the Committee on the Elimination of Discrimination against Women found that the:

    > … unsatisfactory medical practices of the private institution were imputable to the State … because the State was directly responsible for exercising due diligence in regulating and monitoring private healthcare institutions. The failure to ensure such due diligence also constituted a violation.

12. Above n 2, s 9(2) and (5).
13. Above n 2, s 37.
14. Australian Commission on Safety and Quality in Health Care *Australian Charter of Healthcare Rights (second edition)* (8 August 2019) www.safetyandquality.gov.au/national-priorities/charter-of-healthcare-rights/review-of-the-charter-of-healthcare-rights-second-edition.
15. *Soobramooney v Minister of Health (Kwazulu-Natal) (CCT32/97)* [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (27 November 1997) www.saflii.org/za/cases/ZACC/1997/17.pdf; *Tribunal Constitucional de Bolivia [Constitutional Tribunal of Bolivia]* Constitutional Judgment 12/94/2004-R, August 12, 2004 (Bol) www.globalhealthrights.org/wp-content/uploads/2013/06/2004-CC-Constitutional-Judgment-1294-2004-R.pdf.
16. The right to life was referenced, without success, by a person excluded from a potentially lifesaving drug trial due to a policy interpretation. The drug trial access policy was not considered acceptable, but the court stopped short of ordering the health service to supply the drug: *R (Rogers) v Swindon NHS Primary Care Trust* [2006] All ER (D) 181 (Apr); [2006] NLJR 720; [2006] 1 WLR 2649; [2006] EWCA Civ 392.
17. The right to privacy was referenced, without success, in a complaint about a public health service refusal to supply a home birthing service when it was considered unsafe: *Wilson v Western Health (Human Rights)* [2014] VC 797.
18. It was accepted that access to health care was an important part of a right to humane treatment when deprived of liberty, but the right to protection of families did not extend to a right to *have* a family: *Castles v Secretary of Dept of Justice* (2010) 28 VR 141; [2010] VSC 310; BC201004776.
19. The rights relating to criminal process are not expected to be relevant to health services.
20. Above n 2, s 15(4), noting there is an exception in s 15(5) when the discrimination is for the purposes of assisting or advancing disadvantage.
21. Note that s 106 provides that nothing in the Human Rights Act is intended to affect termination of pregnancy laws.
22. This section is a subset of the right to protection against torture and cruel or degrading treatment. It is not expected to be materially different to the existing common law and legislative frameworks around patient capacity and consent.
23. It is expected that existing information access and privacy and confidentiality regimes will continue as "reasonable" and "demonstrably justifiable" limitations on competing notions of access to documents on the one hand, and protection of confidentiality and privacy on the other, pursuant to above n 2, s 13.
24. The obligation is likely to be applicable to forums such as the Mental Health Review Tribunal rather than individual clinicians: *Kracke v Mental Health Review Board* (2009) 29 VAR 1; [2009] VCAT 646.
25. Above n 2, s 58(5).
26. Above n 2, s 13(2)(b).

27. See *Certain Children v Minister for Families and Children (No 2)* (2017) 52 VR 441; 266 A Crim R 152; [2017] VSC 251; BC201703410.
28. Above n 2, s 59.
29. Established to replace the Anti-Discrimination Commission Queensland from 1 July 2019; above n 2, s 64.
30. Above n 2, s 65.
31. Above n 2, s 81.
32. Above n 2, s 90.
33. Above n 2, s 66.
34. Above n 2, s 74.