

Human Rights Advocacy Guide

Protecting
human rights
for people in prison
using Queensland's
Human Rights Act



Purpose of this guide:

This guide is designed to help people in prison advocate for their human rights.

This guide provides information about when the *Human Rights Act 2019* (Qld) (the Act) might be able to help and how to get further assistance.

The guide is focused on the main human rights that are impacted for people in prison.

The Act does not apply outside of Queensland.

The information in this guide is for general information purposes only and is not legal advice. If you would like help with a legal problem, you should seek legal advice. The information in this guide is current as of March 2020.

PLS and the Human Rights Law Centre respectfully acknowledge the Aboriginal and Torres Strait Islander peoples as the traditional owners and custodians of this land and acknowledge their Elders, past, present and emerging.

Which human rights are protected in Queensland?

Human rights are the basic rights and freedoms inherent in every person. They apply regardless of where you are from, what you believe or how you choose to live your life. Importantly, human rights are principles about how people should be treated and are based on respect and dignity. Queensland protects some human rights in law through the Act. The rights that are most likely to be impacted in the prison context are:

- the right to recognition, equality and non-discrimination;
- the right to protection from torture and cruel, inhuman or degrading treatment;
- the right not to have privacy, family, home or correspondence arbitrarily interfered with;
- freedom of religion;
- the right of every child to have protection as is in their best interests;
- the right to protection of families;
- the right to take part in public life;
- the right to liberty and security;
- cultural rights – including recognition of the distinct cultural rights of Aboriginal and Torres Strait Islander people;
- the right to humane treatment when deprived of liberty;
- the right to a fair hearing;
- the right to health services; and
- the right to education.

How are rights protected?

The Act is designed to protect and promote the human rights of individuals in Queensland. It also promotes transparency in the ways that the Queensland Government and Parliament deal with human rights. The Act requires Queensland public entities to:

- *properly consider human rights* when making laws, developing policies, delivering services and making decisions; and
- *act compatibly* with human rights.

The Act also requires that:

- new laws be assessed in Parliament against human rights standards; and
- Courts interpret laws consistently with human rights.

If a public entity doesn't act compatibly with or properly consider human rights, the Act gives people the ability to raise human rights issues directly with the relevant Queensland government agency and/or to make a complaint to the Queensland Human Rights Commission if a public entity breaches the Act.

You can't take direct legal action in a court for a breach of the Act, but you can raise the breach of the Act if you have another legal action available. In this way, the Act can help to stop or change the way that a public entity acts.

- You *can't get compensation* for a breach of your human rights under the Act.
- Courts *can't invalidate laws* that breach human rights.
- The Queensland Parliament can expressly choose to override human rights when passing new laws.

How can rights be limited?

The Queensland Government can *lawfully limit or restrict human rights* through policy or its implementation of legislation. However, it can only do this if it has a good reason for restricting a right, and it does so in a reasonable way that is justified in a free and democratic society.

In some cases, the law will allow human rights to be restricted, for example, if it is necessary to manage the prison safely and there is no less restrictive way to do so.

Who does the Act apply to?

The Act applies to public entities in Queensland. Public entities include Queensland Government bodies, public service employees, the Queensland Police Service, Queensland Corrective Services, local councils and other government bodies like the Parole Board Queensland. Courts and tribunals also have to comply with the Act in various ways.

The Act applies to some private and community bodies when they are doing certain things for the government. The Act applies to private companies running prisons on behalf of the Queensland Government. The Act does not apply to the Federal Government (eg, Centrelink or immigration) or other state and territory governments.

Case studies and examples

This guide provides examples of different ways that similar human rights laws in Australia and overseas have been used to protect the rights of people in prison. These examples show how the Act might help to protect the rights of people in prison.

It is important to understand these are only examples of how the Act might be used to make human rights arguments in Queensland. The Act has only recently become law and it is unclear how it will be interpreted to apply in Queensland prisons. Some human rights will be lawfully limited when a person is in prison. Whether a limitation on human rights is lawful will depend on the individual circumstances of the case and a range of legal considerations, including the nature and importance of the human right balanced against the purpose, nature and importance of the limitation.



Humane prison conditions

The Act requires prison authorities to ensure that all persons who are detained in prisons, or other places of detention like police cells, are treated with humanity and respect for their dignity. It requires that prison authorities must not treat or punish people in a cruel, inhuman or degrading way. The Act, through advocacy or legal action, *may help to stop harmful practices and remedy harsh prison conditions* such as prolonged solitary confinement and routine strip searches. The equality rights in the Act and anti-discrimination laws can also help where harsh conditions have a particularly negative impact on certain groups, such as people with a mental illness or intellectual disability.

Prolonged solitary confinement and other harsh prison conditions:

Taunoa v Attorney-General ***(New Zealand Supreme Court)***

A number of prisoners in New Zealand brought legal action arguing that a harsh behavioural management regime imposed by New Zealand prison authorities breached their human rights under New Zealand's Bill of Rights Act. The regime included extended solitary confinement, unlawful routine strip searches, unhygienic cell conditions, failure to monitor mental health, people sometimes being left naked in cells, no rehabilitation programs, and more. The people in prison ultimately succeeded in their case, securing a ruling that their right to humane treatment in detention was violated.

Strip Searches:

Frerot v France (European Court of Human Rights)

Mr Frerot was a prisoner in France who argued that particular strip searches conducted on him violated the prohibition on degrading treatment protected under the European Convention on Human Rights (the Convention). At one prison, he was subjected to strip searches each time he left the visiting room. These searches included a requirement of '*leaning forward and coughing*' which had not been imposed on him in other prisons. His refusal to '*lean forward and cough*' resulted in his placement in a disciplinary cell. The Court held that the search procedure was not generally inhuman or degrading because full body searches might sometimes be necessary in prison to assure security, defend order or prevent crime. The search procedure was lawful only if such searches were conducted where '*absolutely necessary*' and where there were '*serious reasons*' to suspect a prisoner was hiding an object or substance in that part of the anatomy. The Court found that the searches undergone by Mr Frerot each time he left the visits room amounted to degrading treatment under the Convention. In reaching this conclusion, it was relevant that only one prison imposed the '*lean forward and cough*' procedure and that every prisoner was subjected to such a search upon return from the visiting room. This reflected a presumption at the particular prison that all prisoners returning from the visiting room were concealing objects. The feelings of anxiety, inferiority and encroachment on personal dignity during the searches amounted to a degree of humiliation that exceeded reasonable procedures and was considered '*degrading treatment*' within the Convention.

Access to health care

People in prison typically experience more health issues than the general population, with particularly high rates of mental illness, intellectual disability and blood borne viruses such as Hepatitis C. People in prison are also not able to access Medicare and rely on prison and health care authorities to access medical care inside the prison or by granting permission to leave the prison to access external services. The Act provides a right to access health services without discrimination. The Act also protects the right to life which includes the provision of adequate health care where this is needed to preserve life. Lack of access to essential medicines, opioid dependence treatment, oral health and women's health care are examples of concerns the Act may help to address.

Health care services to prevent illness: *Lee v Minister for Correctional Services* (Constitutional Court of South Africa)

Mr Lee contracted tuberculosis while in prison in South Africa. He sued the Minister for damages on the grounds that the poor prison health system caused him to become infected. The Constitutional Court of South Africa found that the prison authorities had a duty to provide adequate health care services as part of the constitutional right of all people in prison to conditions of detention that are consistent with human dignity. The Constitutional Court held that the prison authorities failed to take reasonable steps to prevent the applicant from contracting tuberculosis.

Access to ongoing IVF treatment:

Castles v Secretary to Department of Justice (Victorian Supreme Court)

Ms Castles was receiving in vitro fertilisation (IVF) treatment for a year before she was sentenced to three years in prison. Soon after being sentenced, she was transferred to a minimum security prison which focussed on preparing women for community reintegration. She asked for permission to continue the IVF treatment at her own expense while she was imprisoned but the prison authorities refused. She challenged the refusal under Victoria's Corrections Act and Charter of Human Rights. The Court ruled that she should be permitted to have the IVF treatment at her own expense. It said that IVF treatment was both necessary for the preservation of her reproductive health and was reasonable, consistent with her right as a person deprived of liberty to be treated with humanity and with respect for her human dignity. The Court made the decision based on the right to access reasonable medical care under the Victorian Corrections Act, and also considered human rights. The Court said that the starting point is that people in prison should not be subjected to hardship or constraint other than that which results from the deprivation of liberty. It found that the right to humane treatment in detention required prison authorities to treat Ms Castles humanely, with respect for her dignity, and that access to health care is a fundamental aspect of the right to dignity. However, while people in prison are entitled to care necessary for a high standard of health, the Court said that this does not mean that they are entitled to access any treatment that they may want or that they would have been able to access if they were not in prison.

Protection of families and children

The Act recognises that families are the fundamental group unit of society and are entitled to be protected by society and the State. It also recognises that a person has the right not to have their privacy, family, home or correspondence arbitrarily interfered with.

The circumstances and regime of a prison in which a person is detained should not generally prevent them from maintaining contact with their family, for example, by receiving visits, making telephone calls and sending or receiving mail.

Removal of child from mother in prison:

R (on the application of CD, AD) v Secretary of State for the Home Department
(High Court of England and Wales)

CD gave birth to her child while she was in prison. After giving birth, she was moved to a Mother Baby Unit (MBU). CD was later excluded from the MBU due to concerns about her behaviour. This resulted in CD being separated from her child. A judicial review application of the decision to exclude CD from the MBU was lodged. The Court found that by excluding CD from the MBU, the prison management had failed to give proper consideration for the best interests of her child. The Court held that the decision to exclude CD from the MBU and thus be separate from her child was disproportionate. As such, it was not a justifiable interference with both CD's and her child's right to respect for family life under the European Convention on Human Rights.

Restrictions on family visits:

Nowicka v Poland

(European Court of Human Rights)

Mrs Nowicka was detained by a Polish court to undergo psychiatric medical examination. Her daughter filed an application for multiple visits but the court permitted only one visit per month. The European Court of Human Rights held that the restriction placed on Mrs Nowicka's right to see members of her family to once a month while in detention was in breach of the right to respect for her private and family life under the European Convention of Human Rights. It found that restricting Mrs Nowicka's visiting rights to one visit per month 'did not pursue, and was not proportionate to, any legitimate aim'. The Government failed to show that the interference was justified as a normal restriction on prison life.

Ouinan v France

(European Commission on Human Rights)

Mr Ouinas was detained in a prison for people serving long sentences. He was unable to have visits with his daughter because, among other reasons, the prison was too far away. Mr Ouinas complained that this limited his right to respect for private and family life protected under the European Convention on Human Rights. The European Commission of Human Rights held that an essential element of a prisoner's right to family life is the assistance of prison authorities in maintaining prisoners' contact with their close family. The Commission found that there had been an interference with Mr Ouinas' right to respect for family life in this case.

Access to education

Access to education is vital for increasing employment opportunities and outcomes for people in prison and reducing reoffending rates.

The Act recognises the right of people in prison to education by providing that '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.' Prisons, TAFEs and public universities are all public entities under the Act.

Access to personal laptop for studying: *Pretorius and Others v Minister of Justice and Correctional Services and Others* (High Court of South Africa)

The applicants in this case were in a maximum security prison in South Africa, and were registered students at tertiary institutions. A new prison policy provided that no computers were allowed in any cells. The applicants argued that this new policy deprived them of sufficient time to study for their courses, and constituted unfair discrimination under South African discrimination laws. The High Court of South Africa found in favour of the applicants and said that the policy prohibiting computers in cells for study purposes unfairly discriminated against the applicants on the basis that it imposed disadvantages on them and withheld benefits, opportunities and advantages. This was found to adversely affect the equal enjoyment of their right to further education.

Access to secondary school operating in prison: *Velyo Velev v Bulgaria* (European Court of Human Rights)

Mr Velev was in prison on remand. He was refused entry into a secondary school operating inside the prison. This was because the Prison Governor had decided that Mr Velev fell into the category of a 'recidivist' offender (although he had not yet been convicted) and should therefore be kept separate from 'non-recidivist' offenders in prison who were attending the school. Mr Velev took his case to the European Court of Human Rights and argued that he was being denied his right to education. The European Court of Human Rights stressed that while there is no positive obligation to provide education in prison in all circumstances, where such a possibility is available, it should not be subject to arbitrary and unreasonable restrictions. The Court found that there was no evidence that people on remand would be endangered by attending the school with persons convicted of crimes, that the uncertainty of the length of Mr Velev's pre-trial detention was not a valid basis for the exclusion, and that Mr Velev was not a 'recidivist' because he was entitled to the presumption of innocence.



Section 266 of the *Corrective Services Act 2006* (Qld) provides that Queensland Corrective Services must establish programs or services to help prisoners reintegrate into the community after their release from custody, including by acquiring skills.

Cultural rights of Aboriginal and Torres Strait Islander people

The Act provides a general right for all people to enjoy their cultural rights. It also provides specific protection for the distinct cultural rights of Aboriginal and Torres Strait Islander people; including their right to enjoy, maintain, control, protect and develop their identity, cultural heritage, language, kinship ties and relationship with land or waters.

Addressing the over-representation of Aboriginal and Torres Strait Islander women in prison *Anti-Discrimination Commission Queensland*

Aboriginal and Torres Strait Islander women are the fastest growing group in Queensland prisons, with over one third (35%) of women in prison identifying as Aboriginal and Torres Strait Islander. The Anti-Discrimination Commission in Queensland has undertaken research on how to reduce the rate at which Aboriginal and Torres Strait Islander women are being imprisoned. Drawing upon rights set out in the Act, including the right to equality, Aboriginal and Torres Strait Islander cultural rights and the protection of children, the Commission has made a number of recommendations for better justice system responses to the issue, including improved access to diversion, accommodation support to improve access to bail, and culturally and gender appropriate programs in prison to promote rehabilitation.

Kinship ties for Aboriginal people in prison *Victorian Human Rights Commission*

The Victorian Human Rights Charter has been used a number of times by Aboriginal people in prison to facilitate access to their family on the basis that their Aboriginal cultural rights under the Charter include the right to maintain kinship ties. One example involved an Aboriginal mother in prison trying to see her children, which was extremely difficult due to her incarceration 750km away from them. The Aboriginal Family Violence Prevention and Legal Service Victoria raised arguments about the woman's Aboriginal cultural rights and the right to protection of families under the Charter. A judge directed the Department of Health and Human Services, which had child protection orders over the children, to make all necessary arrangements for the children to visit their mother.



Section 3 of the *Corrective Services Regulation 2017* (Qld) provides that an Aboriginal or Torres Strait Islander prisoner is to be accommodated in a corrective services facility as close as practicable to the prisoner's family unless the chief executive is satisfied the prisoner does not want to be accommodated near the prisoner's family.

Taking Action

The Act can be used to *advocate* for actions to be taken to stop breaches of human rights. In some circumstances, the Act can be used in *legal action* to stop or change government action that breaches human rights. The Act can also be used to *engage* with the Queensland Government and law reform bodies when laws and policies are being developed to push for better laws and policies that comply with human rights.

1

IDENTIFY THE POLICY, ACT OR DECISION

What is being done or not done that you want stopped or changed?
Who is being affected?
Who made the policy, act or decision?
Is it a Queensland public entity?

2

IDENTIFY THE RESTRICTION ON HUMAN RIGHTS

What is/are the human right/s being restricted?
Is the restriction for a good reason?
Is it being done in the least restrictive way?
Did the restriction happen after 1 January 2020?

3

RAISE THE ISSUE WITH THE PUBLIC ENTITY

Gather the information you need to raise the issue
Identify the change you want to achieve
Raise the issue with the public entity (see page 11 for contact details for public entities that commonly make decisions about prisoners)

4

TAKE FURTHER ACTION

Have you made a human rights complaint to the public entity?
Are you unhappy with their response? OR
Have they failed to respond within 45 days?



SEEK EXPERT LEGAL ADVICE

See page 11 for the contact details of agencies who can provide legal advice about human rights in prison



MAKE A COMPLAINT TO THE QLD HUMAN RIGHTS COMMISSION

See page 12 for the contact details for the Commission and important information about making complaints

Public entities

This page lists the contact details for some of the *public entities* that make decisions about people in prison.

QUEENSLAND CORRECTIVE SERVICES

Prisoners can write to Queensland Corrective Services at :

Commissioner
Queensland Corrective Services
GPO Box 1054
Brisbane Qld 4001

Friends and family members of prisoners can email
Queensland Corrective Services at:

Stakeholder.Liaison@corrections.qld.gov.au

PAROLE BOARD QUEENSLAND

Prisoners can write to the Parole Board Queensland at:

President
Parole Board Queensland
GPO Box 1054
Brisbane Qld 4001

Family members can email the Parole Board Queensland at:

ParoleBoardQLD@corrections.qld.gov.au

QUEENSLAND POLICE SERVICE

Prisoners can write to the Queensland Police Service at:

Queensland Police Service
State Coordinator
Complaint Management
GPO Box 1440
Brisbane, QLD 4001

QUEENSLAND HEALTH

Queensland Health deliver prisoner health services through different Hospital and Health Services (HHS). Prisoners can write to the nurse unit manager at their prison or the relevant HHS that oversees health care at their prison:

Arthur Gorrie, Borallon, Brisbane, Brisbane Women's, Palen Creek, Southern Queensland and Wolston:
Consumer Liaison Officer
West Moreton Hospital and Health Service
PO Box 73, Ipswich 4305

Helana Jones, Woodford:
Metro North Hospital and Health Service
Royal Brisbane and Women's Hospital Butterworth Street
Herston Qld 4029

Numinbah:
Gold Coast Hospital and Health Service
PO BOX 318, Nerang 4211

Maryborough:
Wide Bay Hospital and Health Service
PO Box 34, Bundaberg 4670

Capricornia:
Central Queensland Hospital and Health Service
PO Box 871, Rockhampton QLD 4700

Townsville:
Patient Feedback Services
Townsville Hospital and Health Service
PO Box 670, Townsville QLD 4810

Lotus Glen:
Patient Liaison Service
Cairns and Hinterland Hospital and Health Service
PO Box 902, Cairns Qld 4870

Advice & Complaints

This page lists the contact details for where you can get *legal advice* and make *human rights complaints*.

PRISONERS' LEGAL SERVICE INC (PLS)

Prisoners can contact PLS for legal advice by calling them on the free Arunta telephone system available in all Queensland prisons.

People in the community can contact PLS on behalf of friends or family members in prison by calling the PLS Community Advice Line.

PLS Community Advice Line
Every Wednesday between 6:30-7:30pm
(07) 3846 5290

PLS cannot provide legal advice to third parties about prisoners legal matters but may be able to contact a prisoner to provide advice if required.

LEGAL AID QUEENSLAND

Prisoners can contact Legal Aid for legal advice by calling them on the free Arunta telephone system available in all Queensland prisons.

QUEENSLAND HUMAN RIGHTS COMMISSION

The Queensland Human Rights Commission (QHRC) can receive complaints about some prison and human rights issues. The QHRC cannot provide legal advice.

Prisoners can contact the QHRC by calling them on the free Arunta telephone system available in all Queensland prisons.

Prisoners can write to the QHRC at:

Queensland Human Rights Commission
PO Box 15565
City East Q 4002

Letters to and from the QHRC are treated confidentially.

People in the community can call 1300 130 670 or visit www.qhrc.qld.gov.au for more information about the QHRC.



IMPORTANT INFORMATION ABOUT MAKING COMPLAINTS TO THE QHRC

There is a 12 month time limit from the date of the situation being complained about to make a complaint to the QHRC. If it has been more than 12 months, the QHRC may still be able to accept a complaint in some cases, depending on the length of the delay and the reason for it.

Complaints under the Act will only be able to be made about alleged human rights breaches which happen after 1 January 2020.