



Queensland
Human Rights
Commission

Criminal Procedure Review: Magistrates Courts

Submission to Consultation Paper

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Introduction

1. Thank you for the opportunity to make submissions to this Review.
2. The Queensland Human Rights Commission (QHRC) is a statutory authority established under the Queensland *Anti-Discrimination Act 1991* (**AD Act**).
3. The QHRC has functions under the AD Act and the *Human Rights Act 2019* (**HR Act**) to promote an understanding and public discussion of human rights in Queensland, and to provide information and education about human rights. It includes rights drawn from the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*.
4. The QHRC also deals with complaints of discrimination, vilification and other objectionable conduct under the AD Act, reprisal under the *Public Interest Disclosure Act 2009*, and human rights complaints under the HR Act.
5. The QHRC does not regularly appear in the Magistrates Courts and so cannot provide detailed submissions on the operation of the *Justices Act 1886* (Justices Act). The QHRC may be able to provide more detailed submissions in relation to specific changes to the Magistrates Courts, Justices Act or *Criminal Practice Rules 1999*.
6. This submission therefore focusses primarily on the potential application of the HR Act and AD Act to the Magistrates Courts, with reference to the relevant Terms of Reference, and only provides brief responses to some of the consultation questions.

Human Rights in Queensland

7. The substantive provisions of the HR Act commenced on 1 January 2020. The HR Act establishes and consolidates statutory protections for human rights, primarily drawn from the United Nations *International Covenant on Civil and Political Rights*, and two rights from the *International Covenant on Economic, Social and Cultural Rights*.

Compatible with human rights

8. As summarised at paragraph 1.15 of the Consultation Paper, the Terms of Reference for the review include balancing the interests of victims and accused persons, and more generally the need to protect and promote rights.
9. The HR Act provides a framework for assessing whether an act, decision or statutory provision is ‘compatible with human rights’. A decision or action is compatible with human rights if the action or decision either:
 - a. does not limit a human right, or

- b. limits a human right only to the extent that is reasonably and demonstrably justifiable in accordance with section 13.¹
10. An act or decision (or statutory provision) will ‘limit’ a human right if it ‘places limitations or restrictions on, or interferes with’ a human right.²
11. Section 13(1) of the HR Act provides that 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. Factors relevant to deciding whether a limit is reasonable and justifiable are set out in section 13(2) of the HR Act as including:
 - a. the nature of the human right;
 - b. the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom;
 - c. the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose;
 - d. whether there are any less restrictive and reasonably available ways to achieve the purpose;
 - e. the importance of the purpose of the limitation;
 - f. the importance of preserving the human right, taking into account the nature and extent of the limitation on the human right;
 - g. the balance between the matters mentioned in paragraphs (e) and (f).³
12. A ‘pressing and substantial’ public or social concern is more likely to be capable of justifying a limit placed upon human rights. The more important the right, and the greater the incursion, the more important the purpose will need to be.⁴
13. Limitation provisions in very similar terms to s 13 are contained in s 7(2) of the *Charter of Charter of Human Rights and Responsibilities Act 2006* (Vic) (**Charter**), and s 28 of the *Human Rights Act 2004* (ACT). These, in turn, drew upon similar human rights legislation in Canada, New Zealand and the *Constitution of the Republic of South Africa*.

¹ *Human Rights Act 2019* s 8.

² *Innes v Electoral Commission of Queensland (No 2)* [2020] QSC 293; (2020) 5 QR 623 (Ryan J) [291]-[292]; *Owen-D’Arcy v Chief Executive, Queensland Corrective Services* [2021] QSC 273 (Martin J) [130]; *PJB v Melbourne Health (Patrick’s case)* (2011) 39 VR 373 (Bell J) 384 [36].

³ *Human Rights Act 2019* s 13(2).

⁴ Explanatory Notes, Human Rights Bill 2018 (Qld) 16-18.

14. Any practice or legislative change recommended by the review should be compatible with human rights.

Obligations on public entities

15. Section 58 of the HR Act requires public entities to act and make decisions compatibly with human rights, and to give proper consideration to human rights when making decisions.⁵
16. Explicit guidance has been given as to the content of the second or 'procedural' limb of the obligation in relation to decision-making. Section 58(5) provides that proper consideration includes, but is not limited to:
 - a. Identifying the human rights that may be affected by the decision; and
 - b. Considering whether the decision would be compatible with human rights.⁶
17. In *Owen-D'Arcy v Chief Executive, Queensland Corrective Services*, Martin J concluded that the inclusion of section 58(5) in the HR Act, which is absent from the Victorian *Charter*, had the effect of requiring a decision maker to correctly identify all rights that may be affected by a decision.⁷ However, Martin J still considered that the identification of rights must still be approached in a common sense and practical manner, and referred to and applied the test paraphrased by Tate J in *Bare v Independent Broad-Based Anti-Corruption Commission* (2015) 48 VR 129 at 223 [288]

...for a decision-maker to give 'proper' consideration to a relevant human right, he or she must: (1) understand in general terms which of the rights of the person affected by the decision may be relevant and whether, and if so how, those rights will be interfered with by the decision; (2) seriously turn his or her mind to the possible impact of the decision on a person's human rights and the implications thereof for the affected person; (3) identify the countervailing interests or obligations; and (4) balance competing private and public interests as part of the exercise of justification.⁸
18. In relation to assessing the compatibility of an act or decision of a public entity, the following process suggested in *Certain Children v Minister for Families and Children (No 2)* was adopted by the Queensland Supreme Court:

⁵ *Human Rights Act 2019* s 58(1). Although it does not apply where to a public entity if it could not reasonably have acted differently or made a different decision because of a statutory provision, a law of the Commonwealth or another State or otherwise under law: *Human Rights Act 2019* s 58(2).

⁶ *Human Rights Act 2019* s 58(5).

⁷ *Owen-D'Arcy v Chief Executive, Queensland Corrective Services* [2021] QSC 273 [136].

⁸ *Ibid* [135]- [138].

- a. The plaintiff/applicant for human rights relief need only establish prima facie incompatibility, before the burden shifts to the defendant public entity to justify the limitations caused by their action/decision.
- b. The burden on the public entity to justify limitations is high, requiring a degree of probability commensurate with the occasion, and must be strictly imposed in circumstances where the individual concerned is particularly vulnerable.⁹

Application of the HR Act to the Magistrates Courts

The HR Act applies to a Magistrates Court when it is:

- Acting in an administrative capacity, as a public entity with obligations under section 58(1) of the HR Act; and
- Performing functions relevant to human rights, under section 5(2)(a) of the HR Act; and
- Interpreting statutory provisions, under section 48 of the HR Act.

Acting in an administrative capacity

19. Public entities are defined in section 9 of the HR Act, and include entities established under an Act when the entity is performing functions of a public nature.¹⁰ However, section 9(4)(b) of the HR Act provides that a public entity does not include ‘a court or tribunal, except when acting in an administrative capacity.’ The definition of ‘court’ in Schedule 1 of the HR Act includes the Magistrates Court.
20. Case law from Victoria establishes that ‘administrative capacity’ is taken to mean in the exercise of administrative power in the public law sense. The relevant question is what capacity a Magistrates Court is acting in when exercising the particular power.¹¹ That will depend on the specific circumstances, but as way of example, s 4(1)(j) of the *Charter* suggests a court will be operating in an administrative capacity in committal proceedings, issuing of warrants, listing cases and adopting practices and procedures.¹²

Performing functions relevant to human rights

21. Section 5(2)(a) of the HR Act states that the Act applies to ‘a court or tribunal, to the extent the court or tribunal has functions under part 2 and part 3, division 3’. Part 2 of the HR Act sets out who has human rights, how human rights may be limited, and the

⁹ Ibid [131]-[132], citing *Certain Children v Minister for Families and Children (No 2)* (2017) VR 473 [203].

¹⁰ *Human Rights Act 2019* s 9(1)(f).

¹¹ *PJB v Melbourne Health (Patrick’s case)* (2011) 39 VR 373 (Bell J) 384 [124]. Cited in *Re: Ipswich City Council* [2020] QIRC 194 [19]

¹² While the HR Act is based the *Charter* no such examples are given in s 9. See also recent decision of State Coroner in *Inquest into the death of Selesa Tafaifa: Ruling in relation to the conduct of the police coronial investigation*.

human rights that are protected by the Act. Part 3 Division 3 relates to, among other things, the interpretation of statutory provisions.

22. Queensland has favoured the 'intermediate construction' adopted by Victorian Courts, being that the functions under Part 2 referred to in section 5(2)(a) of the HR Act 'are the functions of applying or enforcing those human rights that relate to court and tribunal proceedings.'¹³ Relevant rights are identified by focusing on the function that the court or tribunal is performing and the rights which relate to that function, rather than focusing on the nature of each right to determine whether it conferred a function on the Court (such as the right to fair hearing).
23. Due to the potential uncertainty as to when a Magistrates Court has obligations under the HR Act, the Justices Act could be amended to specify when and how these obligations arise, such as providing examples, which is the approach taken in the Victorian *Charter*.

Statutory interpretation

24. Subject to an override declaration by parliament at the time a bill is passed,¹⁴ section 48(1) HR Act applies to all statutory provisions, whenever enacted. It requires:
 - consistency of interpretation with the statutory provision's intended meaning; and
 - an interpretation which is compatible with human rights.
25. An act or decision will be 'compatible with human rights' if it (s 8 HR Act):
 - a. Does not limit a human right; or
 - b. Limits a human right only to the extent that is reasonable and demonstrably justifiable in accordance with section 13.
26. Section 48 will be relevant to how the Justices Act is interpreted, and how other legislation is applied by the Magistrates Courts.

Relevant human rights

27. The HR Act will be potentially relevant to the human rights of all individuals working in or appearing before the Magistrates Courts including staff, accused and victims.
28. These rights will be particularly relevant to those with vulnerable needs and vulnerabilities as identified in the Consultation Paper. These include people with disability, women, people from culturally and linguistically diverse backgrounds and First Nations people. The QRHC suggests that a proper consideration of human rights will assist in the Review's aim of developing contemporary and effective criminal

¹³ *Re Kracke and Mental Health Review Board* (2009) 29 VAR 1 (Bell J) at 29 [250]; *Innes v Electoral Commission of Queensland (No 2)* [2020] QSC 293; (2020) 5 QR 623 (Ryan J) [214]-[242]; *BSJ* [2022] QCAT 51 [180]-[184].

¹⁴ *Human Rights Act 2019* s 43.

procedure that takes into account the needs and preferences of people who use the Magistrates Courts, including groups of people that have specific needs or vulnerabilities.

29. The QHRC agrees with the rights identified at paragraph 2.45 as being the most relevant to the Review, which include:

- Cultural rights for Aboriginal and Torres Strait Islander people (s 28)
- Right to liberty and security of the person (s 29)
- Right to fair hearing (s 31)
- Rights in criminal proceedings (s 32)
- Right not to be tried or punished more than once (s 34)

30. To that the QHRC would add:

- Right to equality and non-discrimination (s 15)
- Right to life (s 16)
- Rights of children in the criminal process (s 33)

Response to consultation questions

1: Generally, how are criminal procedures in the Magistrates Courts working? What could be changed or improved?

2: What does 'contemporary and effective' mean to you? How should those concepts be applied to criminal procedure laws in the Magistrates Courts?

31. Several reports have highlighted the over representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system.¹⁵ The QHRC recommends this Review consider the recommendations of previous reports, and further engage with First Nations stakeholders to identify how criminal procedures can better address this issue. This includes in relation to better cultural awareness throughout the criminal justice system¹⁶, addressing communication issues,¹⁷ as well as greater investment in diversion and referral pathways.

4: Should the new legislation include guiding principles? If so, what should the main themes of those principles be?

32. The QHRC suggests that if the new legislation does include guiding principles, these should be informed by and reflect relevant rights in the HR Act.

¹⁵ For example Queensland Productivity Commission, *Inquiry into Imprisonment and Recidivism* (Report, August 2019) (*'Inquiry into imprisonment and recidivism'*); Australian Law Reform Commission, *Pathways to Justice – An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander peoples* (Report No 133, December 2017) (*'Pathways to Justice'*)

¹⁶ 'Gratuitous concurrence' was a particular issue identified by the Australian Law Reform Commission in its *Pathways to Justice* report, 325 [10.19].

¹⁷ See for example *Pathways to Justice* report, 321 [10.5].

5: Should the law be changed to create a single Magistrates Court of Queensland?

33. The QHRC suggests there is potential for a single Magistrates Court, however named, to address potential human rights limitations in the current system.
34. For example, in *Cemino v Cannan* [2018] VSC 535, the Victorian Supreme Court found that when considering the transfer of proceedings to the Koori Court Division of the Victorian Magistrates Court, a Magistrate was obliged to consider human rights under the *Charter*. The relevant rights being the right to equality and cultural rights of Aboriginal persons. In that case an Aboriginal man who lived in northern Victoria sought to have charges against him transferred to the closest Koori Court in Shepparton. The Magistrate refused the application deciding that the case should be heard in the locality in which the offences occurred. The Supreme Court found that the exercise of discretion was a judicial, rather than administrative power, and so the Magistrates Court was not a public authority for the purposes of the *Charter*. However, in adopting the intermediate construction of the *Charter*, the Supreme Court found that the *Charter* directly applied to the Magistrates Court proceedings. The Court ordered that a differently constituted Magistrates' Court at Echuca rehear the application.
35. While the QHRC is not familiar with the specifics of the Magistrates Courts' current operating framework, the specific geographic nature of the present courts may unnecessarily complicate the transfers of matters in similar situations (for example those involving specialist courts such as the Murri Court, the Domestic and Family Violence Court and the Drug and Alcohol Court).

8: Should the new Act contain general provisions to allow for electronic processes and procedures? If yes, are any safeguards required?

9: What criminal procedures in the Magistrates Court could be improved by using technological solutions? Are there any criminal procedures for which technology should not be used? Please provide examples.

10: Should summary hearings be conducted remotely? Why or why not? Conclusion

36. The QHRC appreciates that the use of technology may potentially uphold several human rights and offer greater protection from discrimination, particularly for people with disability. For example, the need for greater supports to ensure people with disabilities can participate in legal processes has been the subject of several reviews, often with reference to relevant international human rights law such as the UN Convention on the Rights of Persons with Disabilities (**UN CRPD**).¹⁸
37. Nonetheless, it must be recognised that the use of technology can also potentially limit rights. The Australian Human Rights Commission's *Human Rights and*

¹⁸ United Nations, Committee on the Rights of Persons with Disabilities, *General Comment No. 1 (2014): Article 12: Equal recognition before the law*, UN Doc CRPD/C/GC/1 (19 May 2014). See also: Australian Law Reform Commission, *Equal Before the Law: Towards Disability Justice Strategies*, (Report No 124, August 2014) 36; Victorian Human Rights Commission, *Inclusive Juries – Access for People who are Deaf, Hard of Hearing, Blind or Have Low Vision* (Consultation Paper, December 2020) 2 and 41.

Technology Report discusses how inaccessible technology can limit the right to equality for many, including people with disability.¹⁹ The introduction of technology should ensure that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.²⁰

38. Discrimination is defined inclusively in the HR Act to include direct and indirect discrimination as defined in the AD Act on the basis of one or more of the attributes listed in s 7 of that Act. This inclusive definition may also include additional attributes. Based on the experience of other human rights jurisdictions, any additional protected attributes are likely to be analogous to those already in the AD Act, and based on characteristics that a person cannot change (or cannot change without unacceptable personal cost) in circumstances where the targeted group has suffered historic disadvantage.²¹ In the absence of jurisprudence, the protection under the Queensland HR Act remains unclear.
39. In some circumstances, this criteria might lead to protection for person based on where they live, particularly an Aboriginal or Torres Strait Islander person living on country. With this in mind, the QHRC submits it is important the improvements made to the Magistrates Courts are as consistent and universal as possible, so that those living in regional and remote communities are not unreasonably disadvantaged.

27: If the new legislation does include requirements about case management:

(a) should they be mandatory? Why or why not?

(b) how should they apply when a defendant is self-represented?

40. Victorian Courts have recognised that human rights must be considered by courts when dealing with self-represented litigants. The right to fair hearing in s 31 of the HR Act will be particularly relevant, as courts may need to play a greater role to ensure proceedings are fair for such litigants.²²
41. In *Matsoukatidou v Yarra Ranges Council* (2017) 51 VR 624 the Victorian Supreme Court considered the obligations on the Victorian County Court in conducting criminal proceedings involving self-represented litigants. One such litigant had a learning disability and the applicants sought judicial review of orders made on the basis that the hearing was conducted in away that failed to ensure their right to equality and fair hearing. The Supreme Court applied the ‘intermediate construction’ of direct application of the *Charter*, and held that courts must directly apply the right to equality before the law in considering modifications of processes to accommodate the needs of self-represented litigants or parties with particular needs. A court’s duty under the right to fair hearing is to ensure that a self-represented litigant can effectively

¹⁹ Australian Human Rights Commission, *Human Rights and Technology* (Final Report, March 2021), Part D.

²⁰ Both the AD Act (preamble) and the HR Act (s 15) acknowledge every person’s right to equal recognition and protection before the law. See also UN CRPD, Article 12.

²¹ See for example *Miron v Trudel* [1995] 2 SCR 418; *Corbiere v. Canada (Minister of Indian and Northern Affairs)* [1999] 2 SCR 203; *Quebec (Attorney-General) v A* [2013] 1 SCR 61;

²² See for example *Slaveski v Smith* (2012) 34 VR 206; [2012] VSCA 25 [57];

participate in the proceeding and have ‘equality of arms’ with the opposition, subject to considerations of judicial independence, impartiality and fairness to other parties.

29 – 42: Diversion and related issues

42. The QHRC has some concerns with recent changes to the *Youth Justice Act 1992*, particularly regarding bail, but notes that a review of this legislation is outside the terms of reference.
43. In relation to the questions regarding diversion, the QHRC considers that far greater emphasis should be placed on diversion, particularly for children and young people and people with intellectual disability. In order for such strategies to be effective, the QHRC suggests further investment is needed in diversionary options to support families and prevent children and people with disability unnecessarily being involved in the criminal justice system.²³

49: How can victims’ interests be incorporated into Magistrates Court criminal procedures? This includes decisions to divert a defendant out of the criminal justice system, diversionary processes and outcomes, and court proceedings (for example, in closing the court room or considering adjournment applications).

44. The QHRC agrees that the rights of victims must be considered and relevant rights are likely to include the right to security, right to life, right to equality and right to fair trial.
45. The Victorian Law Reform Commission’s 2016 *Report on the Role of Victims of Crime in the Criminal Trial Process* discussed the principles of a fair trial. It noted that the state’s control of all elements of the criminal process has resulted in a focus on how to address the power imbalance and ‘equality of arms’ with the accused. This focus has eclipsed the recognition of the victim’s inherent interest in the response by the criminal justice to the crime. The report notes that the Victorian *Charter* reinforces several rights of the accused relevant to receiving a fair trial. This however does not prevent the interests of the victim being considered.

The legitimate rights of the accused should be protected and fulfilled. So too the rights of the community. The legitimate rights of victims, properly understood, do not undermine those of the accused or of the community. The true interrelationship of the three is complementary. There is a public interest in ensuring that trials are fair. This interest can be served not only by safeguarding the rights of the accused and the objectivity of the prosecution but also by acknowledging the victim’s interest.²⁴

46. That report recommended that the Victorian *Charter* should be amended to include a right for a victim of a criminal offence to have certain specific minimum guarantees including to be acknowledged as a participant with an interest in the proceedings, to

²³ See also the recommendations of Bob Atkinson, Report on Youth Justice, (Report, 2018) (Atkinson Report), and the *Inquiry into imprisonment and recidivism report*.

²⁴ Victorian Law Reform Commission, Victims’ Rights in the Criminal Trial Process, (Report, August 2016) 29.

be treated with respect at all times and to be protected from unnecessary trauma, intimidation and distress when giving evidence.

47. The right to fair trial under the ACT *Human Rights Act 2004* (ACT) arguably already provides some of these protections, as it refers to everyone holding the right to have criminal charges, decided by a competent, independent and impartial court or tribunal after a fair and public hearing. In contrast, s 31 of the HR Act, based on the same right in the *Charter*, refers only to a person charged with a criminal offence enjoying a similar right. These issues may be outside the scope of this review, but the QHRC is hopeful the recommendations of the Victorian Law Reform Commission are further explored during the 4-year review of the HR Act.

Conclusion

48. Thank you for the opportunity to make a submission to the Review and the QHRC would be happy to further assist the Review as required.