**FIRST NATIONS RIGHTS IN THE QLD HUMAN RIGHTS ACT**

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*This factsheet was last updated in August 2024*

# What is this factsheet about?

This factsheet outlines the rights First Nations peoples and communities have under section 28 of the *Human Rights Act 2019* (Qld) (**Human Rights Act**), and how they can seek to have those rights protected, including the making of complaints against public entities for breaches of the Act and the commencement of an action in court.

# Introduction to the Human Rights Act

The Human Rights Act recognises and seeks to protect 23 human rights in law, including specific cultural rights for Aboriginal and Torres Strait Islander peoples. It requires the Queensland public sector to act and make decisions which are compatible with the rights it protects.

The Act commenced in its entirety on 1 January 2020, which means that only actions or decisions made by public entities after that time can be the subject of a ‘human rights complaint’ under the Act.

Generally, rights are not absolute. This means that rights can be limited, but only in a way that is justifiable and proportionate, and with careful consideration.

The Act requires each branch of government to act compatibly with the human rights. Therefore:

* The Queensland Parliament must consider human rights when proposing new laws;
* Courts and tribunals must, within their power, interpret legislation in a way that is compatible with human rights; and
* Public entities must act and make decisions compatibly with human rights – which means they can only limit human rights if it can be justified.

## What is a public entity?

A public entity is an organisation or body performing a public function in and for Queensland. This means that federal public services and entities are not included. State government departments, ministers, health services, educational institutions and public officers, like police, are public entities. There are three types of public entities: core, functional and ‘opt in’. The table attached to the end of this factsheet outlines the types of public entities that exist in each part and what are not considered public entities.

# Aboriginal and Torres Strait Islander peoples’ rights to protect Country and culture

Section 28 of the Human Rights Act in Queensland recognises that Aboriginal and Torres Strait Islander peoples, as individuals and in community, hold distinct cultural rights.

Section 28 of the Act includes the right of Aboriginal and Torres Strait Islander peoples to:

* enjoy, maintain, control, protect and develop:
	+ their identity and cultural heritage including their traditional knowledge, distinctive spiritual practices, observances, beliefs, and teachings;
	+ use of language including traditional cultural expressions; and
	+ their kinship ties;
* maintain and strengthen their distinctive spiritual, material and economic relationship with the land, territories, waters, coastal seas and other resources with which they have a connection under tradition or custom;
* conserve and protect the environment and productive capacity of land, territories, waters, coastal seas and other resources;
* not be subject to forced assimilation or destruction of their culture.

## How should section 28 be applied?

The Queensland Human Rights Commission considers that section 28 could be relevant to law, policies, acts or decisions that:

* limit the ability of Aboriginal people to take part in cultural practice, or otherwise interferes with their distinct cultural practices;
* restrict access to a place of spiritual significance for Aboriginal people, or prevent or limit traditional practices on that land;
* interfere with the relationship between Aboriginal and Torres Strait Islander peoples and land, water and resources;
* regulate the conduct of commercial activities on the traditional lands of Aboriginal and Torres Strait Islander people: for example, regulation of fishing, land use and other traditionally exercised economic rights are likely to require consideration of cultural rights;
* limit the ability of Aboriginal and Torres Strait Islander peoples to maintain a connection to their community, including because of the child protection, criminal law and mental health systems. this may include rights during bail applications where cultural considerations are relevant.

Cultural rights under this provision are likely to be interpreted with greater breadth and significance than the general cultural rights protected by section 27 of the Act because of the history of colonisation and the unique connection that First Nations peoples have with the lands and seas of Queensland.

In the preamble to the Act, which appears at the start and helps to set the scene, the Parliament of Queensland recognises the particular significance of the right to self-determination for Aboriginal and Torres Strait Islander peoples.

## Section 28 and International law

Section 28 is based on Article 27 of the International Covenant on Civil and Political Rights (‘ICCPR’), which Australia has ratified, and Articles 8, 25, 29 and 31 of the United Nations Declaration on the Rights of Indigenous peoples, which the Australian government has supported as a non-legally binding document.

Article 27 of the ICCPR provides that:

*In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.*

## Recognition of rights in other states

The ACT and Victoria also have Acts which recognise similar human rights. Although the way things are done in Queensland will be different, it can be useful to look at how this state and territory deal with cultural rights to assist in considering how the right should be applied in Queensland.

For example, the ACT Human Rights Commission considered that cultural rights could be engaged by activities that:

* Limit or prohibit communication in an Indigenous language;
* Limit the sharing or teaching of information by Aboriginal and Torres Strait Islander peoples about their language, beliefs or culture;
* Limit the ability of Aboriginal and Torres Strait Islander peoples to take part in a cultural practice, or otherwise interfere with their distinct cultural practices;
* Fail to recognise the rights of Aboriginal and Torres Strait Islander children and young people to learn and be connected to their culture and to maintain kinship ties to the community;
* Fail to consult with Aboriginal or Torres Strait Islander peoples about decisions that affect them;
* Regulate the conduct of commercial activities on the traditional lands of Aboriginal peoples in the ACT.

In Victoria, similar cultural rights have been used or considered in the following ways (these are just some examples):

* to preference members of the Wurundjeri Tribe for field and office positions with Parks Victoria, which involved working on and caring for Wurundjeri country;[[1]](#footnote-2)
* when making decisions in relation to an Aboriginal person’s request to be heard in the Koori Court.[[2]](#footnote-3)

# How First Nations peoples can protect their rights in Queensland

If a public entity makes a decision or acts in a way that limits (without reasonable justification) the rights of First Nations peoples under section 28, or fails to give proper consideration to that right, then that decision is unlawful under section 58(1) of the Human Rights Act.

First Nations peoples, as individuals and/or communities, can protect their rights by two primary ways:

1. Make a stand-alone complaint to the Queensland Human Rights Commission; or
2. When bringing another action to the courts, piggy-backing a human rights claim to it.

## How to make a complaint

If a person thinks their right/s were unjustifiably limited by the actions or decisions of a public entity, the person must first:

* make a complaint to that public entity about the alleged contravention; and
* wait for at least 45 days.

After 45 days, if the person does not receive a response or receives a response that the person considers to be inadequate, then a complaint can be made to the Queensland Human Rights Commission (**QHRC**).

The complaint can be made by the individual, their agent or a person authorised in writing by the QHRC to make a complaint on their behalf.

The QHRC can accept a complaint before the 45 days has passed if there are exceptional circumstances.

After a complaint is received, the QHRC may:

* Refuse to deal with the complaint if it is frivolous, trivial, vexatious, misconceived or lacking in substance;
* Delay or refuse to deal with the complaint if there is a more appropriate way of dealing with the complaint, or if the complainant is not being co-operative;
* Refer the complaint to another entity, such as the Ombudsman, Crime and Corruption Commission, or NDIS commissioner with the complainant’s consent;
* Deal with the complaint under the Anti-Discrimination Act if the commissioner considers this would be more appropriate;
* Accept the complaint for resolution.

## Time limit

A complaint should be made within one year of the act or decision in issue, as the QHRC may refuse to deal with a complaint from one year after the event or series of events.

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| Visit: | The [**QHRC website**](https://www.qhrc.qld.gov.au/complaints/make-a-complaint) to make a complaint online. |

## Tips for making a complaint to the Queensland Human Rights Commission

* Make sure you have first made a complaint with the public entity responsible and have waited 45 days for their response (unless there are exceptional circumstances in which case you should explain this).
* Your complaint must be in writing.
* State your name and the address where you would like to receive information about your complaint.
* Describe what happened, when it happened, who was involved and how the act or decision affected you. It is important to be as detailed as possible and explain why the actions or decision of the public entity affected your cultural rights.
	+ For example, did the public entity prevent you from enjoying, maintaining, controlling or protecting your distinct cultural practices or beliefs.
* Attach any evidence you have as well as the complaint you made to the public entity and any reply you received.
* Explain how you would like to have the complaint resolved. You could seek compensation, request an apology or public statement, or seek policy changes or training for staff within the public entity. The types of things you could ask for are not limited but the QHRC does not have the power to require the public entity do something.
* The QHRC will usually facilitate a conciliation conference. There is more information about what this involves below.
* Remember: a limitation might be caused by a specific event or decision, or it may occur over a series of events – for example because of ongoing discrimination.
* You should make your complaint within one year or the QHRC may not consider it.

## Conciliation conferences

Most human rights complaints made under the Human Rights Act will be dealt with by way of supervised discussion between the complainant and representatives of the public entity, called a conciliation. Often the public entity will bring legal representatives.

An accredited conciliator will be present for the discussion and is intended to assist the parties in reaching an agreement to resolve the complaint. The conciliator will not make a decision about whether a breach of the Human Rights Act has occurred, nor can they tell either party what to offer or take sides during the conference. Their role is to facilitate discussion by asking questions. Additionally, they will explain the law and advise the parties of the outcomes in similar cases

Conferences may be conducted in person, via phone or video, or by a ‘shuttle’ method where the conciliator shifts between talking to each party in separate rooms. Both parties will be required to talk about what happened and how it impacted each party. The parties will then discuss how they could resolve the complaint. If agreement is reached, this will be recorded in writing and signed by the parties. The agreement is then binding. If agreement is not reached, the parties will be informed on what next steps they could take to resolve the complaint

Cultural rights should be considered in the process of conciliation between the parties. This means that an Aboriginal and/or Torres Strait Islander person may be able to request special arrangements that are more respectful of their cultural practices and beliefs, for example having particular persons present or holding the conciliation in a particular place.

Anyone is entitled to have a support person with them during the conciliation, and can also request an interpreter if required. A complainant may also bring their own legal representative.

## How to commence an action in court

Court proceedings relating to a breach of section 58(1) cannot be brought on their own. An action in relation to a breach of section 58(1) of the Act can only be commenced in court through a “piggy-back” action.

This means proceedings can only be brought under section 58(1) by “piggy-backing” onto a different cause of action which a person has grounds to take action in court over. In practice, the cause of action is likely to be seeking judicial review of a decision by a public entity, however any action in a court or tribunal may be used to bring an additional claim under the Human Rights Act.

We strongly recommend you seek legal advice prior to commencing any action in court, as it can be resource and time consuming with possible costs risks.

## Using the Human Rights Act to advocate for culturally appropriate practices

A public entity should be acting and making decisions in a way that is compatible with human rights. This means that a person may be able to use the Act to request that particular practices or decision-making processes be done in a way that is culturally appropriate, and can try and prevent an unjustified limitation of their cultural rights. For example, in a court case, evidence could be taken on Country.[[3]](#footnote-4)

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| Visit: | The [QHRC website](https://www.qhrc.qld.gov.au/resources/case-studies/a-and-tsi-case-studies) for examples of how other First Nations peoples have used the Human Rights Act. |

# Evaluate this resource

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| Core | Functional | Opt in | Not a public entity |
| Queensland Police ServicePublic service employeesLocal governmentCouncillor of a local governmentLocal government employeeA ministerMembers of parliamentary committees when acting in an administrative capacity Courts and tribunals when acting in an administrative capacity (e.g. when hiring staff, listing cases, adopting policies and procedures, undertaking committal proceedings, and issuing warrants) A registered provider that is performing function of a public nature in Queensland | Emergency services Public health services Public disability services NDIS registered providers Public transport state schools Vocational education and training State funded housing providers Private company managing a prison  | An organisation may choose to be subjectto obligations underthe Act by asking the Minister in writing, to declare them an entity. This allows community sector organisations to make public statements of their commitment to human rights.  | The legislative assembly (unless it is an act of administrative capacity)A court and tribunal (unless it is an act of administrative capacity)Grammar school and the board of a grammar schoolFederal public services |

1. *Parks Victoria (Anti-discrimination Exemption)* [2011] VCAT 2238. [↑](#footnote-ref-2)
2. *Cemino v Cannan and Ors* [2018] VSC 535. [↑](#footnote-ref-3)
3. *Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 5)* [2022] QLC 4 [↑](#footnote-ref-4)