

## Older people, hospital discharge and duty of care

# 05| Applying the Human Rights Act 2019 (Qld) to hospital discharge considerations

## Information for health professionals

The *Human Rights Act 2019* (Qld) (HRA) has three main aims:

- (a) protect and promote human rights
- (b) help the Queensland public sector respect and promote human rights
- (c) encourage discussion about what human rights mean and how far they reach.

The HRA works alongside other rights-based reforms in Australia. These include the *Aged Care Act 1997* (Cth), as amended, and the recommendations of the *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*.

Together, these reforms support a rights-based and person-centred approach to caring for older people and people with disability. They also help explain what Queensland public health services must do.

Queensland public health services are public entities under the HRA. Section 9 defines a “public entity” to include government bodies and people who perform public functions for the State.

Section 10(3)(b)(ii) specifically lists public health services as public functions. This means Queensland hospital and health services, and their staff, must act and make decisions in a way that respects human rights.

Section 58 of the HRA makes it unlawful for a public entity to act or decide in a way that is not compatible with human rights.

It also requires public entities to properly consider any relevant human rights before they act or decide.

### RELEVANT HUMAN RIGHTS

Several rights under the HRA are especially relevant when hospitals make discharge decisions about older people:

#### Section 15 — Recognition and equality before the law:

Every person has the right to enjoy their human rights without discrimination and to receive equal protection under the law. Age and impairment are protected attributes under the *Anti-Discrimination Act 1991* (Qld).

A hospital may discriminate if it pushes older people into residential aged care because of age-related risks without properly assessing each person’s situation. Direct discrimination may occur if staff treat an older person less favourably because of their age.

Indirect discrimination may occur if a general policy, such as a falls-risk protocol, affects older people more harshly and is not reasonable in the circumstances.



## **Section 17 - Protection from torture and cruel, inhuman or degrading treatment**

A person must not receive medical or scientific treatment or experimentation without their full, free, and informed consent. Although this section focuses mainly on experimentation, it reinforces the importance of consent in all treatment decisions.

## **Section 19 – Freedom of movement**

Every person who is lawfully in Queensland has the right to move freely and choose where to live. This right is directly affected if a hospital stops an older person from returning home and instead directs them to residential aged care.

## **Section 25 – Privacy and reputation**

A person has the right not to have their privacy, family, or home unlawfully or arbitrarily interfered with. Decisions about where a person lives and what care they receive affect privacy, bodily autonomy, and personal choices about home and living arrangements.

## **Section 29 – Right to liberty and security of person**

Every person has the right to liberty and security. A person can only lose their liberty for lawful reasons and through lawful procedures. If a hospital effectively stops an older person from leaving, either by refusing discharge or by taking practical steps that make leaving impossible, this right may be affected.

## **Section 37 – Right to health services**

Every person has the right to access health services without discrimination. This supports an older person's right to proper discharge planning and access to community-based health services that may allow them to return home safely.

## **LIMIT ON HUMAN RIGHTS**

Section 13 of the HRA allows limits on human rights, but only when the limit is lawful, reasonable, and clearly justified in a free and democratic society based on human dignity, equality, and freedom.

When deciding whether a limit is justified, the following matters are relevant:

- (a) what the right protects
- (b) why the right is being limited;
- (c) whether the limit helps achieve its purpose
- (d) whether a less restrictive and reasonably available option could achieve the same purpose
- (e) how important the purpose is; and
- (f) how important it is to protect the human right.

This means the hospital must weigh the purpose of the limit against the impact on the person's rights.

## **INTERPRETING OTHER LAWS**

Section 48 of the HRA requires courts and decision-makers to interpret Queensland laws, as far as possible and consistently with their purpose, in a way that is compatible with human rights.

This applies to laws that affect hospital discharge decisions, including the *Civil Liability Act*, the *Guardianship and Administration Act 2000* (Qld), and the *Hospital and Health Boards Act 2011* (Qld).

If a law is unclear, the interpretation that best protects human rights should be preferred. In *Momcilovic v The Queen* (2011) 245 CLR 1, the High Court said this type of rule works with ordinary principles of statutory interpretation. It does not let courts rewrite legislation.



Even so, within the proper limits of interpretation, the HRA requires a rights-respecting approach.

## **PRACTICAL IMPLICATIONS FOR DISCHARGE DECISIONS**

When Queensland public hospital staff make discharge decisions about older people, the HRA requires them to:

- (a) properly consider the human rights affected by the decision
- (b) act in a way that respects those rights, or limit them only where the limit is reasonable and clearly justified
- (c) consider whether less restrictive and reasonably available options can keep the patient safe
- (d) avoid blanket policies that treat all older people with falls risks, or other common age-related conditions, in the same way without assessing each person individually
- (e) respect the patient's freedom to choose where to live and their right to liberty, unless the law allows a restriction.

## **EXAMPLES**

### **Example 1 — Falls risk**

An older patient wants to return home after a fall. The hospital is worried the patient may fall again. Staff should not simply say, "You must go to residential aged care."

They should look at the patient's own situation, speak with the patient and family or supporters, and consider safer options at home, such as physiotherapy, home modifications, mobility aids, community nursing, or in-home personal care. If those supports can manage the risk, sending the person home may better respect their rights.

### **Example 2 — Consent and choice**

A patient has capacity and clearly says they want to go home, even though staff think residential aged care would be safer. Staff should explain the risks in plain language, check the patient understands them, and record the discussion.

If the patient understands the risks and still chooses to go home, the hospital should respect that choice unless a law allows a different decision.

### **Example 3 — Blanket policies**

A hospital policy says that any older person who lives alone and has a high falls risk should be referred for residential aged care. Staff should not apply that policy automatically.

They should ask whether the policy fits the patient's circumstances and whether less restrictive supports could keep the patient safe at home.

### **Example 4 — Discharge planning**

A patient cannot safely leave hospital today because home supports are not ready. The hospital may delay discharge for a short time while it arranges those supports.

Staff should keep the delay as short as possible, explain the reason to the patient, and keep looking for the option that affects the patient's rights the least.

If a hospital's practice does not meet these requirements, the person may be able to make a complaint to the Queensland Human Rights Commission under section 64 of the HRA.



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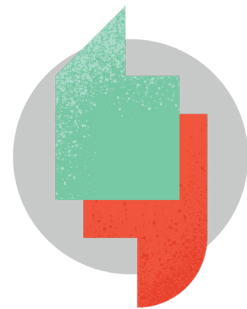
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