

# Human Rights

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## FACTSHEET

### When courts & tribunals act in an administrative capacity

Courts and tribunals can act in one of two capacities: an administrative capacity (which means they are exercising the power of the executive government) or a judicial capacity (which means they are exercising judicial power). Judicial power is usually reserved for judges, but some members of tribunals and commissions can also exercise judicial power when deciding cases.

The *Human Rights Act 2019* applies to courts and tribunals in different ways depending upon whether they are acting in an administrative or judicial capacity. When acting in a judicial capacity, courts and tribunals must **interpret legislation** in a way that is compatible with human rights<sup>1</sup> and apply certain rights directly where they relate to the substance and process of the particular proceeding<sup>2</sup>. When acting in an administrative capacity, courts and tribunals must **act and make decisions** compatibly with human rights.<sup>3</sup>

The question of whether a court or tribunal is acting in an administrative capacity can be complicated. Often, it is necessary to weigh up various factors to ascertain whether an action or decision is being made using administrative power or judicial power. These factors are set out below:

Factors indicating a court/tribunal is acting in an administrative capacity	Factors indicating a court/tribunal is acting in a judicial capacity
<ul style="list-style-type: none"><li>• The task or decision is made by non-judicial court staff (including a Registrar), or could be made by a non-judicial court staff, as well as by a judicial officer.<sup>4</sup></li><li>• The task does not involve determining the legal rights of the parties.<sup>5</sup></li><li>• The task is a review on the merits – that is, it requires the court or tribunal to ‘step into the shoes’ of a public servant and re-make the decision under relevant legislation.<sup>6</sup></li><li>• The task relates to the logistical running of the court in a general sense (for example, issuing practice directions, placing a matter on a particular case list, or hiring staff).<sup>7</sup></li><li>• The task is one that Queensland legislation says is an “administrative responsibility” of a particular judicial officer.<sup>8</sup></li></ul>	<ul style="list-style-type: none"><li>• The task or decision can only be made by a judicial officer.</li><li>• The task involves conclusively deciding a dispute between two or more parties that has an impact on legal rights.<sup>9</sup></li><li>• The task involves a judicial officer providing a conclusive interpretation of the law or application of the law to a set of facts, which can only be overturned by another judicial officer of a higher court or tribunal.<sup>10</sup></li><li>• The task involves a judicial officer making an order which can be enforced as a court order.<sup>11</sup></li></ul>



1



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### Case law examples: court/tribunal is acting in an administrative capacity

- The task has been recognised in Queensland case law as being an example of a court/tribunal acting in an ‘administrative capacity’:
  - ◇ Deciding whether to grant an exemption under the *Anti-Discrimination Act 1991*.<sup>12</sup>
  - ◇ The appointment of Guardians or Administrators under the *Guardianship and Administration Act 2000*.<sup>13</sup>
  - ◇ Holding a coronial inquest and making findings and recommendations.<sup>14</sup>
  - ◇ A Coroner when directing that a particular QPS officer is responsible for conducting an investigation of a death in custody.<sup>15</sup>
  - ◇ Reviewing decisions about foster carers.<sup>16</sup>

- The task has been recognised in other jurisdictions as being an example of a court/tribunal acting in an ‘administrative capacity’.
  - ◇ The Victorian Charter of Human rights designates the following actions of courts/tribunals as administrative:<sup>18</sup>
    - conducting committal proceedings<sup>19</sup>
    - issuing warrants<sup>20</sup>
    - listing cases
    - adopting practices and procedures.
  - ◇ Other examples include:
    - issuing a summons<sup>21</sup>
    - reviewing guardianship orders, planning and environment decisions, decisions about licences, and freedom of information decisions.<sup>22</sup>

### Case law examples: court/tribunal is acting in a judicial capacity

- The task has been recognised in Queensland as being an example of a court/tribunal exercising judicial power:
  - ◇ Making an order for a criminal trial to be held before a judge alone without a jury.<sup>17</sup>
- The task has been recognised in other jurisdictions as being an example of a court/tribunal exercising judicial power:
  - ◇ Application for adjournment of a trial that already has a listed hearing date, or is currently being heard.<sup>23</sup>
  - ◇ Transferring proceedings to another division of the court such as the Koori Court (Victoria’s Murri Court counterpart).<sup>24</sup>
  - ◇ A magistrate hearing and deciding a police application for a Personal Safety Intervention Order (Victoria’s Peace and Good Behaviour Order counterpart).<sup>25</sup>
  - ◇ Reviewing a police decision to refuse a Private Security Individual Officer License.<sup>26</sup>



2



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## REFERENCES

1. *Human Rights Act 2019 (Qld)* s 48.
2. *Human Rights Act 2019 (Qld)* s 5(2)(a). See also *Innes v Electoral Commission of Queensland (No 2)* (2020) 5 QR 623, 670 [219]-[230] (Ryan J).
3. *Human Rights Act 2019 (Qld)* s 58.
4. *Re Kracke and Mental Health Review Board* (2009) 29 VAR 1 at [268]. If a person is employed under the *Public Sector Act 2022*, this is a good indication that they are not a judicial officer. However, people appointed under other legislation are also not judicial officers. For example, a Judge's Associate is also not a judicial officer.
5. *Love v Attorney-General (NSW) and Another* (1990) 169 CLR 307 at [24]-[26] (Mason CJ, Brennan, Dawson, Toohey and Gaudron JJ).
6. *Storch v Director-General, Department of Justice and Attorney-General* [2020] QCAT 152 at [40]-[44] and *PIM v Director-General, Department of Justice and Attorney-General* [2020] QCAT 188 at [26]-[27], both citing *PJB v Melbourne Health and Anor* (Patrick's case) [2011] VSC 327; and *Re Kracke and Mental Health Review Board* (2009) 29 VAR 1 at [279].
7. *Re Kracke and Mental Health Review Board* (2009) 29 VAR 1 at [263]-[271]. Most courts and tribunals have a power to 'control their own procedures' including by issuing practice directions, performing case management through subject-matter specific lists or publishing an Annual Report. See, eg. *Supreme Court of Queensland Act 1991* (Qld) ss 17-19, 58.
8. For example, the *Supreme Court of Queensland Act 1991* (Qld) s 15 states that the Chief Justice is responsible for "the administration of the Supreme Court and its divisions and the orderly and expeditious exercise of the court's jurisdiction and power," and confers the Chief Justice with "power to do all things necessary or convenient to be done to perform [those] responsibilities."
9. *Huddart Parker v Moorehead* (1909) 8 CLR 330.
10. *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 374-375 (Kitto J).
11. *Hilton v Wells* (1985) 157 CLR 57 at [12] (Gibbs CJ, Wilson and Dawson JJ).
12. *Re: Ipswich City Council* [2020] QIRC 194 at [29].
13. *JF* [2020] QCAT 419.
14. *Inquest into RHD Doomadgee Cluster*, Findings of Inquest (2019/4445; 2020/2244; 2020/3951, 30 June 2023) at [125].
15. *Inquest into the death of Selesa Tafaiifa*, Ruling in relation to the conduct of the Police Coronial Investigation (2021/5473; dated 20 June 2022) at [42].
16. *RE & RL v Department of Child Safety, Youth and Women* [2020] QCAT 151 at [22].
17. *R v Logan* [2020] QDCPR 67 at [17].
18. See *Charter of Human Rights and Responsibilities Act 2006* (Vic) s4(1)(j).
19. *Grassby v The Queen* (1989) 168 CLR 1 at [10]-[12] (Deane J).
20. See *Love v Attorney-General (NSW) and Another* (1990) 169 CLR 307 at [28]-[30] (Mason CJ, Brennan, Dawson, Toohey and Gaudron JJ); *Ousley v The Queen* (1997) 192 CLR 69.
21. See *Donohoe v Chew Ying* (1913) 16 CLR 364, 369 (Griffith CJ); *Electronic Rentals Pty Ltd v Anderson* (1971) 124 CLR 27 at [14] (Windeyer J); *Aston v Irvine* (1955) 92 CLR 353, 365.
22. See, respectively: *RB (Guardianship)* [2010] VCAT 532 at [445]; *Smith v Hobsons Bay City Council* [2010] VCAT 668 at [11]; *Director of Transpower v XFJ* (2010) 33 VAR 327 at [55] and fn 56; *Smeaton v Victorian WorkCover Authority* [2009] VCAT 1195 at [21] and *Rogers v Chief Commissioner of Police* [2009] VCAT 2526 at [109]-[110].
23. *R v Williams* (2006) 16 VR 168 at [50]; *Slaveski v the Queen* (2012) 40 VR 1 at [75] (Warren CJ) and [106]-[108] (Nettle and Redlich JJA).
24. *Cemino v Cannan* [2018] VSC 535; 56 VR 480 at [33].
25. *Austin v Dwyer & Anor* [2019] VSC 837 at [33].
26. *WUT v Victoria Police* [2020] VSC 586 at [252].

