

Crown Law
QUEENSLAND

Human Rights Workshop

Shasha Ingbritsen
Senior Principal Lawyer
Constitutional Law

1

Crown Law
QUEENSLAND

Acknowledgement of Traditional Custodians

We acknowledge Aboriginal and Torres Strait Islander peoples as the Traditional Custodians of Queensland and pay our respects to Elders past, present and emerging.

Slide 2

2

Crown Law
QUEENSLAND

Take home message / Road map

- Overview of the Human Rights Act
- Limits on human rights
- How to justify limits on human rights – ss 8 and 13
- Role of legislature – ss 38 and 43
- Role of courts / interpretation – ss 48 and 53
- Role of executive / public entities – ss 58 and 59

3

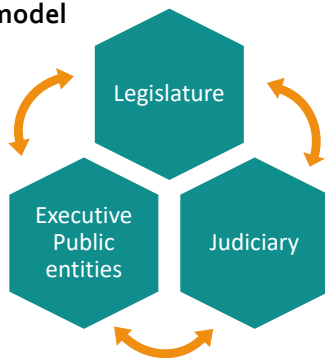
(1) OVERVIEW OF ACT

Human Rights Act 2019

- Passed on 1 March 2019
- Commenced fully on 1 January 2020
- Applies to all legislation whether passed before or after 1 January 2020 – section 108(1)
- But, does not affect
 - proceedings commenced before 1 January; or
 - act or decision of public entity made before 1 January 2020 (section 108(2)).

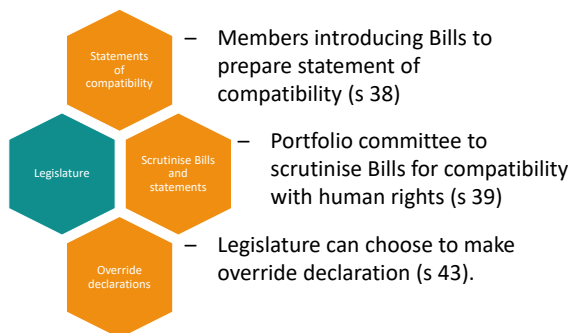
4

Dialogue model



5

Role of the legislature



6

Crown Law
QUEENSLAND

Role of the courts

- Interpretation – Interpret legislation compatibly with human rights, so far as it is possible to do so (s 48)
- Declaration of incompatibility – Discretion to issue declaration of incompatibility (s 53)
- Act compatibly – Act compatibly with human rights which are relevant to the functions of a court (s 5(2)(a)).

Queensland Government

7

Crown Law
QUEENSLAND

Role of the executive/public entities

- Act Compatibly – Public entity must act compatibly with human rights (s 58(1)(a))
- Consider human rights – Public entity must consider human rights when making a decision (s 58(1)(b), (5))
- Respond to declaration – Responsible Minister must respond to declaration of incompatibility issued by courts (s 56).

Queensland Government

8

(2) COMPATIBILITY

Linchpin of the Act – “compatibility”

“Compatible with human rights” defined in s 8:

- Does not limit human rights at all
- Limits a human right to an extent justified under s 13.

Queensland Government

9

Crown Law
QUEENSLAND

Three stage analysis

- 1 • Engagement – Is a human right relevant?
- 2 • Limitation – Is a human right limited?
- 3 • Justification – Is the limit justified?

Austin BMI Pty Ltd v Deputy Premier [2023] QSC 095, [306] (Freeburn J).

10

Crown Law
QUEENSLAND

Human rights

- s 15 – Recognition and equality before the law
- s 16 – Right to life
- s 17 – Protection from torture and cruel, inhuman or degrading treatment
- s 18 – Freedom from forced work
- s 19 – Freedom of movement
- s 20 – Freedom of thought, conscience, religion and belief
- s 21 – Freedom of expression
- s 22 – Peaceful assembly and freedom of association
- s 23 – Taking part in public life
- s 24 – Property rights
- s 25 – Privacy and reputation
- s 26 – Protection of families and children
- s 27 – Cultural rights – generally
- s 28 – Cultural rights – Aboriginal peoples and Torres Strait Islander peoples
- s 29 – Right to liberty and security of person
- s 30 – Humane treatment when deprived of liberty
- s 31 – Fair hearing
- s 32 – Rights in criminal proceedings
- s 33 – Children in the criminal process
- s 34 – Right not to be tried or punished more than once
- s 35 – Retrospective criminal laws
- s 36 – Right to education
- s 37 – Right to health services

11

(2) JUSTIFYING LIMITS ON HUMAN RIGHTS

Section 13 – limitation clause and proportionality

- Section 13 sets out a “structured proportionality” test
- Used worldwide in human rights cases
- Applied in implied freedom of political communication cases since 2015 and freedom of interstate intercourse, trade and commerce cases since 2021.

12

Crown Law
QUEENSLAND

Structured proportionality

- 1 • Legitimate aim/proper purpose
- 2 • Suitability/rational connection
- 3 • Necessary/alternative means
- 4 • Fair balance/strict proportionality

Queensland Government

13

Crown Law
QUEENSLAND

Overall test – s 13(1)

“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”

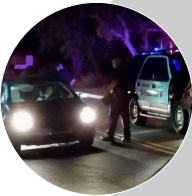
- “under law”
- limit must be authorised by law
- “demonstrably justified”
- onus is on State/public entity to justify burden

Queensland Government

14

Crown Law
QUEENSLAND

Case example – *DPP v Kaba* (2014) 44 VR 526



- Police stopped a car for a random check
- Driver and passenger were two young African men
- Police then conducted search of car
- The passenger – Magnus Kaba – became indignant about being stopped and the delay, and decided to walk the rest of the way to nearby flats
- Police then repeatedly pressed him for his name and address (without any suspicion of wrongdoing)
- Kaba responded offensively and things escalated to assault
- Did the police breach Kaba’s right to privacy and freedom of movement?
- If so, should the evidence be excluded?

Queensland Government

15

Crown Law
QUEENSLAND

Nature of the human right – s 13(2)(a)

“the nature of the human right”

- Quality of the right and the values that underlie it
- Absolute/non-derogable right?

Queensland Government

16

Crown Law
QUEENSLAND

Legitimate aim/proper purpose – s 13(2)(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”

Does the limit have a proper purpose?

Examples of legitimate aims

Examples of illegitimate aims

- Public interest considerations
- Preserve public revenue
- Protect human rights
- Limit a human right
- Discriminate

Queensland Government

17

Crown Law
QUEENSLAND

Examples of “proper purposes” (s 13(2)(b))

- Purpose of prohibited donor provisions in the *Electoral Act 1992* is to “prevent[] corruption and undue influence in the government of the State”
 - *AIP v ECQ* (2020) 4 QR 31, [122]
- “[T]he decision to cancel mobile polling booth voting and visitor elector voting was intended to protect the physical, and perhaps mental, health of voters and ECQ staff during the pandemic”
 - *Innes v ECQ* (2020) 5 QR 623, [296]


Queensland Government

18

Crown Law
QUEENSLAND

Suitability/rational connection – s 13(2)(c)

“the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose”




- Relationship between means and ends
- Are the means chosen to pursue a proper purpose “rationally connected” to that purpose?
- Suitable if “helps to achieve”, “furthers”, goes some way towards “realising” / “advancing” the proper purpose

Queensland Government

19

Crown Law
QUEENSLAND

Case example – *R (T) v Chief Constable, Greater Manchester Police* [2015] AC 49



- When “T” was 11 he received two warnings from police about stolen bikes
- When he was 18 he tried to enrol in a sports degree that required him to get a police check as he would be working with children
- The police warnings were disclosed to the university
- Disclosure engaged T’s right to private life (art 8 of the ECHR)
- Was that limit justified?

Queensland Government


20

Crown Law
QUEENSLAND

Necessity – s 13(2)(d)

“whether there are any less restrictive and reasonably available ways to achieve the purpose”

- Are there other ways of achieving proper purpose?
- Are those other ways “as effective” (i.e. “reasonably available”)?
- Do they limit human rights to a lesser degree (i.e. “less restrictive”)?
- If so, the measure is not “necessary”



Queensland Government

21

Crown Law
QUEENSLAND

Necessity – s 13(2)(d)

Effective at achieving purpose →

Impact on human rights →

Queensland Government

22

Crown Law
QUEENSLAND

Case example – *Multani v Commission scolaire Marguerite-Bourgeoys* [2006] 1 SCR 256

- A school regulation prevented students bringing knives to school.
- Gurbaj Singh Multani was a devout Sikh who carried a kirpan (a religious object resembling a dagger)
- Proper purpose: ensuring safety of students.
- But was the ban necessary? Could safety be achieved without an absolute ban?

Queensland Government

23

Crown Law
QUEENSLAND

Bare statements


- Bare statements that there are no less restrictive alternatives are rarely convincing
- In a vacuum, judges can always come up with their own alternatives
- "A judge would be unimaginative indeed if he could not come up with something a little less 'drastic' or a little less 'restrictive' in almost any situation..."
 - *Illinois State Board of Elections v Socialist Workers Party*, 440 US 173, 188 (1979) (Blackmun J)
- Better to list alternatives considered and reasons why not as effective or reasonably available.

Queensland Government

24

Crown Law
QUEENSLAND

**Owen-D'Arcy v Chief Executive, QCS (2021)
9 QR 250**



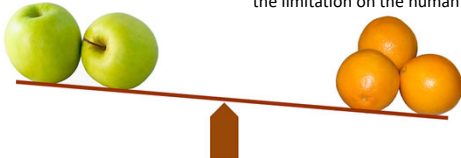
- "In reaching her conclusion, [the decision-maker] does not provide any basis for her belief that no [less restrictive] alternative was available that could adequately manage the risk. The burden on the respondent is a heavy one and cannot be discharged simply by the decisionmaker reciting that he or she held a particular belief without providing any basis for that belief".

Queensland Government

25

Crown Law
QUEENSLAND

Fair balance – s 13(2)(e), (f) and (g)



"(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)"

Queensland Government

26

Crown Law
QUEENSLAND

Fair balance – s 13(2)(e), (f) and (g)


- Does the measure strike a fair balance between "the **benefits** gained by the public and the **harm** caused to the [human] right through the use of the means selected by law to obtain the proper purpose"?
- Involves a value judgment, but it "make[s] value judgments more explicit"
- Deference / margin of appreciation – sometimes appropriate to accord more weight to proper purpose chosen by Parliament.

Queensland Government

27

Crown Law
QUEENSLAND

Case example – the statue example



- A law allows a person to be shot and killed to prevent damage to cultural property such as public statues
- Proper purpose: protect property
- Rational connection: helps to achieve proper purpose
- Necessity: no other alternative measure would be as effective
- Fair balance: does the protection of property outweigh the right to life?

Queensland Government

28

Crown Law
QUEENSLAND

Summary – justification

STRUCTURED PROPORTIONALITY

- Does the measure limit/engage a human right?

- Is the limit authorised by law?

- What is the nature of the human right?

- Does the measure have a proper purpose?

- Is there a rational connection between the means and the proper purpose?

- Is the limit necessary, or are there less drastic ways of achieving the proper purpose?

- Does the measure strike a fair balance between protecting the human right and achieving the proper purpose?

Queensland Government

29

(3) ROLE OF LEGISLATURE

Compatibility statements – s 38

- To accompany any new Bill: s 38
- Also – ‘human rights certificates’ for subordinate legislation: s 41

Queensland Government

30

Crown Law
QUEENSLAND

Some key rights to think about for Bills

- Equal protection of the law without discrimination
• Does your provision treat people differently on basis of attribute?
s 15(3)
- Right to be presumed innocent
• Reverse onus provisions – evidential burden or legal burden?
s 32(1)
- Right not to incriminate oneself
• Any time person compelled to give info – does self-incrim apply?
s 32(2)(k)
- Retrospective criminal laws
• For any transitional provisions, are you backdating penalties?
s 35

Queensland Government

31

Crown Law
QUEENSLAND

R v DA (2016) 263 A Crim R 429, [45]-[46]

- Statement of compatibility can be used as an aid to interpretation

49 Contempt of Chief Examiner

(1) A person attending before the Chief Examiner in answer to a witness summons is guilty of a contempt of the Chief Examiner if the person—

(a) fails without **reasonable excuse** to produce any document or other thing the person is required by the witness summons to produce;

Queensland Government

32

Crown Law
QUEENSLAND

MAJOR CRIME (INVESTIGATIVE POWERS) AND OTHER ACTS AMENDMENT BILL

Introduction and first reading

Received from Assembly.

Read first time for Hon. J. M. MADDEN (Minister for Planning) on motion of Mr Lenders.

Statement of compatibility

For Hon. J. M. MADDEN (Minister for Planning), Mr Lenders tabled following statement in accordance with Charter of Human Rights and Responsibilities Act:

In accordance with section 28 of the Charter of Human Rights and Responsibilities, I make this statement of compatibility with respect to the Major Crime (Investigative Powers) and Other Acts Amendment Bill 2008.

In my opinion, the Major Crime (Investigative Powers) and Other Acts Amendment Bill 2008, as introduced to the Legislative Council, is compatible with human rights

Legal or evidential burden of proof?

Section 49(1) provides that a person is guilty of contempt if the person fails without reasonable excuse to: produce a document or other thing; or refuse or fail to answer certain questions. This provision imposes an **evidential burden only** on an accused to raise the possibility of a reasonable excuse. Ultimately, the burden remains on the prosecution to prove the offence beyond reasonable doubt. Accordingly, I consider that the provision does not limit the **right to be presumed innocent** in s 25(1) of the charter.

Queensland Government

33

Crown Law
QUEENSLAND

Override declaration – s 43

- Express declaration in Act
- Declaration extends to statutory instrument made under Act / provision
- Only to be made in 'exceptional circumstances': s 43(4)
- To be accompanied by statement about exceptional circumstances: s 44
- Effect of override declaration – Human Rights Act does not apply: s 45(1)
- 5 year sunset clause, but may be re-enacted: ss 45(2) and 46.

Queensland Government

34

Crown Law
QUEENSLAND

Corrections Act 1986 (Vic) s 74AB

74AB Conditions for making a parole order for Craig Minogue

- (1) The Board must not make a parole order under section 74 or 78 in respect of the prisoner Craig Minogue unless an application for the order is made to the Board by or on behalf of the prisoner.
- (4) The **Charter of Human Rights and Responsibilities Act 2006** has no application to this section.
- (5) Without limiting subsection (4), section 31(7) of the **Charter of Human Rights and Responsibilities Act 2006** does not apply to this section.


Queensland Government

35

Crown Law
QUEENSLAND

Minogue v Victoria (2019) 268 CLR 1

- Gageler J at [30]:
'I accept that he is ... "treated or punished in a cruel, inhuman or degrading way" and, as a person "deprived of liberty", is not "treated with humanity and with respect for the inherent dignity of the human person" within the meaning of [the Victorian Charter]'
- Despite override declaration.



Queensland Government

36

(4) ROLE OF COURTS / INTERPRETATION

Interpretative clause – s 48

48 Interpretation

- (1) All statutory provisions must, to the extent possible that is consistent with their purpose, be interpreted in a way that is compatible with human rights.
- (2) If a statutory provision can not be interpreted in a way that is compatible with human rights, the provision must, to the extent possible that is consistent with its purpose, be interpreted in a way that is most compatible with human rights.
- (3) ...

37

Approach to s 48

Ambiguity? What are the possible interpretations?

No ambiguity? Section 48 spent

Only one interpretation compatible with human rights? Select that one: s 48(1)

Two (+) interpretations compatible? Select the one that 'best achieve[s]' purpose of Act: s 14A of the AIA

Two (+) interpretations incompatible? Select the one 'most compatible' with human rights: s 48(2)

38

Bell v Queensland (2022) 10 QR 568



- Section 76 of the *Education (General Provisions) Act 2006* allowed any 'minister of a religious denomination or society ... to give to the students in attendance at a State school ... religious instruction'.
- The Noosa Temple of Satan wanted to provide 'Satanic' religious instruction at four schools.
- Application was refused and Temple sought judicial review.
- Did s 48 of the *Human Rights Act* affect meaning of 'religious denomination or society'?

39

Crown Law
QUEENSLAND

Declaration of incompatibility

53 Declaration of incompatibility

(2) The Supreme Court may, in a proceeding, make a declaration (a **declaration of incompatibility**) to the effect that the court is of the opinion that a statutory provision can not be interpreted in a way compatible with human rights.

54 Effect of declaration of incompatibility


A declaration of incompatibility does not—

- affect in any way the validity of the statutory provision for which the declaration was made; or
- create in any person any legal right or give rise to any civil cause of action.

40

Crown Law
QUEENSLAND

Case example – *Re Islam* (2010) 175 ACTR 30



- Isa Islam was charged with attempted murder
- Section 9C of the *Bail Act 1992* (ACT) provided for a presumption against bail where applicant faces charge of attempted murder, unless applicant can show special circumstances
- Is s 9C compatible with right of person awaiting trial not to be detained in custody as a ‘general rule’? (in Qld right not to be ‘automatically detained’: s 29(6))
- If not, should a declaration of incompatibility be issued?

41

Crown Law
QUEENSLAND

Declaration of incompatibility

[403] Accordingly, I make the following declaration:
Under s 32(2) of the Human Rights Act 2004 (ACT), the court is satisfied, for the reasons set out in *Re an Application for Bail by Isa Islam* [2010] ACTSC 147, that s 9C of the *Bail Act 1992* is not consistent with the human right recognised in s 18(5) of the Human Rights Act, being that “Anyone who is awaiting trial must not be detained in custody as a general rule”.

42

Crown Law
QUEENSLAND

ACT Attorney-General's response

The final response proposes amendments to the Bail Act that seek to ensure that the legislation is compatible with the Human Rights Act. The amendments proposed in the response do not eliminate the requirement for an applicant to establish special and exceptional circumstances but will allow the court to consider the normal bail criteria in determining the existence of special and exceptional circumstances. The government considers this would ensure the limitation of section 18(5) of the Human Rights Act is reasonable and justified.

- ACT, Parliamentary debates, 8 May 2012, 2125-7 (Mr Corbell)

Queensland Government

43

Crown Law
QUEENSLAND

Qld learning from dialogue in ACT?

- Youth Justice and Other Legislation Amendment Bill 2021

However, the government has taken on board the dialogue between the courts and the legislature in the ACT arising from the case of *Re application for bail by Islam*, and has decided to adopt the alternative of making the normal bail criteria in s 48AA(4) relevant to whether the child has shown cause. This is the intended effect of s 48AA(1)(d), to be inserted by clause 21 of the Bill. This strikes a fairer balance between the human rights of children and the need to protect the community from the danger presented by serious recidivist youth offenders.

Queensland Government

44

(5) ROLE OF EXECUTIVE / PUBLIC ENTITIES

What are 'public entities'?

- Core public entities
 - s 9(1)(a)-(e), (g)
- Functional public entities
 - s 9(1)(f), (h)
 - s 10 (functions of a public nature)
- Courts/tribunals when exercising an administrative function
 - s 9(4)(b)
- Courts/tribunals when exercising a judicial function where human right is relevant to that function
 - s 5(2)(a).

Queensland Government

45

Crown Law
QUEENSLAND

Example – you

- Any part of a Department – core public entity
 - s 9(1)(a) of HR Act
- Public service employee – core public entity
 - s 9(1)(b) of HR Act

46

Crown Law
QUEENSLAND

Human rights unlawfulness clause – s 58

58 Conduct of public entities

(1) It is unlawful for a public entity—

(a) to act or make a decision in a way that is not compatible with human rights; or

Substantive limb

(b) in making a decision, to fail to give proper consideration to a human right relevant to the decision.

Procedural limb

47

Crown Law
QUEENSLAND

How do you give 'proper consideration'?

(5) For subsection (1)(b), giving proper consideration to a human right in making a decision 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.

For any Victorians, this is intended to bring the *Castles* test to Queensland


48


Crown Law
QUEENSLAND

How rigorous does the analysis need to be?

- '[N]ot expected to approach ... like a judge "with textbooks on human rights at their elbows"'
- But need to 'seriously turn' your mind to impacts on human rights, 'more than merely invoke the [Human Rights Act] like a mantra'
- Evidence – document decision-making
- Variable standard

PJB (2011) 39 VR 373, 442 [311]; *Castles* (2010) 28 VR 141, 184 [185]-[186]; *Minogue v Thompson* [2021] VSC 56, [54]






49


Crown Law
QUEENSLAND

Traps

- Need identify the correct human rights
 - *Owen-D'Arcy v Chief Executive, QCS* (2021) 9 QR 250, [136]
- Consideration needs to come before the decision
 - *Johnston v Carroll* [2024] QSC 2, [104]
- Failure to document consideration



This Photo by Unknown Author is licensed under CC BY 3.0





50

Crown Law
QUEENSLAND

Owen-D'Arcy v Chief Executive, QCS (2021) 9 QR 250

- Michael Owen-D'Arcy found guilty of murder
- Later found guilty of attempted murder of QCS officer
- Maximum Security Order and No Association decisions made every 6 months for 7 years
- Challenged latest decisions under HRA
- For No Association Decision, QCS considered freedom of assembly and association
- Did not consider right to humane treatment





51

Crown Law
QUEENSLAND

Martin J held:

- “Section 58(5)(a) requires that the rights be identified. It is not enough to say: ‘I considered the impact of not permitting contact associations within the MSU on prisoner Owen-D’Arcy’s human rights, particularly, the right to peaceful assembly and freedom of association under the Human Rights Act 2019’. The rights must be identified if they ‘may’ be affected by the decision. This was not done.”
- “[The decision-maker] could not, then, have been able to give proper consideration to a human right relevant to that decision.”
 - [265]-[266]

52

Crown Law
QUEENSLAND

Exceptions to s 58

- Required by law (‘the entity could not reasonably have acted differently or made a different decision because of’ another law): s 58(2)
 - No discretion
- Religious exemption: s 58(3)
- Act or decision of a private nature: s 58(4)
 - Eg Mayor when campaigning as a candidate in an election: *Innes v ECQ [No 2]* (2020) 5 QR 623
- Note: breach of s 58 is a non-jurisdictional error: s 58(6).

53

Crown Law
QUEENSLAND

Remedies for Charter-unlawfulness under s 58

Court

- Aggrieved may bring proceeding in courts if another cause of action is available (s 59(1)) (“piggy back” clause)
- May obtain relief or remedy even if not successful on non-Charter cause of action (s 59(2)) but not damages (s 59(3)).


QHRC

- Aggrieved may make complaint to Human Rights Commissioner (s 64)
- Commissioner can seek to resolve dispute (s 77), including by conciliation (s 79).

54

Crown Law
QUEENSLAND

**Case example – *Re Certain Children [No 2]* (2017)
52 VR 441**




- 17 Nov 2016 – riot at Parkville Youth Justice Precinct
- 21 Nov 2016 – Grevillea Unit (part of Barwon adult maximum security prison) re-gazetted as youth justice centre under s 478 of the *Children, Youth and Families Act 2005* (Vic)
- 2 Dec 2016 – children challenged order in council
- 21 Dec 2016 – Supreme Court held orders in council were invalid (and unlawful under the Charter – breached procedural limb)
- 28 Dec 2016 – Court of Appeal agreed

Queensland Government

55

Crown Law
QUEENSLAND

**Case example – *Re Certain Children [No 2]* (2017)
52 VR 441**



- 29 Dec 2016 – Minister re-made the decision and re-gazetted Grevillea Unit
- Dec 16 to Feb 17 – decisions made to transfer children to Grevillea unit
- 27 Jan 2017 – Governor in Council made Orders in Council under s 8B of the *Control of Weapons Act 1990* allowing use of capsicum spray and extendable batons on children
- Children again challenged all these decisions in the Supreme Court
- Sought: declaration of invalidity, writ of habeas corpus, certiorari and injunctions

Queensland Government

56

Crown Law
QUEENSLAND

Dixon J held:

- Decisions to establish Grevillea Unit, transfer children, and exempt weapons limited the best interests of the child right (s 17(2)) and the right of detainees to be treated with humanity, respect and dignity (s 22(1))
- Decisions to establish Grevillea Unit and transfer children were not justified limits on human rights
 - Unlawful under equivalent of s 58(1)(a)
- Decision to exempt weapons was a justified limit
 - Not unlawful under equivalent of s 58(1)(a)

-continues

Queensland Government

57

Crown Law
QUEENSLAND

- All decisions failed to give proper consideration to human rights
- Higher standard expected because Minister had benefit of Supreme Court and Court of Appeal decisions
 - Unlawful under equivalent of s 58(1)(b)
 - Weapons exemption decision breached procedural limb even though it didn't breach substantive limb
- Children failed to make out any of their administrative law grounds
- Orders made:
 - Declarations of Charter unlawfulness
 - Injunctions restraining defendants from detaining children at Grevillea Unit, and using capsicum spray

58

Crown Law
QUEENSLAND

Questions ?

59

Crown Law
QUEENSLAND

Workshop scenarios

60

Crown Law
QUEENSLAND

Scenario one

Brian Complainsalot

61

Crown Law
QUEENSLAND

Scenario one

- **Question 1:** Is Sunshine City Council a 'public entity'?
 - Yes – s 9(1)(d) of the Human Rights Act
- **Question 2:** Would the motion limit any of Brian's human rights? (s 8) If so, which human rights?
 - Right to enjoy human rights without discrimination – s 15(2)
 - Freedom of movement – s 19
 - Freedom of expression – s 21
 - Right to take part in public life – s 23(1)
 - Other rights?

62

Crown Law
QUEENSLAND

Scenario one

- **Question 3:** Is the motion authorised by law? (s13(1))
 - Yes – Council has the power of an individual to revoke licence to enter
- **Question 4:** What is the purpose of the motion? Is that a proper purpose? (s 13(2)(b))
 - Uphold public safety
 - Protects the human rights of others (security of person – s 29(1)).

63

Crown Law
QUEENSLAND

Scenario one

- **Question 5:** Is the motion suitable or rationally connected? (s 13(2)(c))
 - Yes
- **Question 6:** Is the motion necessary? (s 13(2)(d))
 - Could Council staff receive training / support in how to deal with difficult clients?
 - Could complaints be referred to one specially trained officer?
 - Could the ban exclude public toilets, libraries, swimming pools, other places that have not been an issue?

Queensland Government

64

Crown Law
QUEENSLAND

Scenario one

- **Question 7:** Does the motion strike a fair balance between its purpose and Brian's human rights? (s 13(2)(e), (f), (g))
 - ?
- **Question 8:** Would the motion represent a justified limit on human rights? (s 13)
 - ?

Queensland Government

65

Crown Law
QUEENSLAND

Scenario one

- **Question 9:** Do any exceptions to the obligation to act compatibly with human rights apply? (s 58)
 - s 58(2) – could not have acted otherwise
Duty to provide safe system of work?
 - s 58(4) – act or decision of a private nature
Council acted in its capacity as landlord or employer, rather than provider of services to the public?

Queensland Government

66

Crown Law
QUEENSLAND

Scenario one

- Question 10:** What if Brian Complainsalot belonged to a political organisation that regularly met at the Sunshine City Council Library?
 - Is the real purpose to limit right of peaceful assembly and freedom of association? (s 22)
 - Would that purpose be proper?
 - What if only incidental impact on freedom of association?

67

Crown Law
QUEENSLAND

Slattery v Manningham City Council [2013] VCAT 1869

- Mr Slattery had an acquired brain injury following a stroke
- The Manningham City Council passed a motion banning Mr Slattery from entering any building owned, occupied or managed by the Council
- VCAT found ban discriminated on the basis of a disability (not behaviour unrelated to his acquired brain injury)
- Ban engaged right to enjoy human rights without discrimination, freedom of expression and right to participate in conduct of public affairs

68

Crown Law
QUEENSLAND

Necessity

- “I find that there were less restrictive means reasonably available to the Council to achieve the purpose for which it sought to limit Mr Slattery’s rights” [164]
- Eg “training and supporting staff; offering consistent, calm and structured responses in difficult situations; taking responsibility and apologising for any organisational departures from that consistent, calm approach; de-briefing; structuring contact with the person so that a few comprehensively trained staff members are the main point of contact...” [132]

69

Crown Law
QUEENSLAND

Fair balance

- “It is disproportionately extensive and unspecified. It is blunt, broad and insufficiently tailored. It bars Mr Slattery from venues in the municipality where, on the evidence, he has caused no one any concern whatsoever. It is indefinite, and incorporates no transparent process of review.” [131]

70

Crown Law
QUEENSLAND

Private acts exception

- “[I]t could be argued ... that the acts were of a private nature, in that the Council was acting in its capacity of a landlord or employer, rather than a provider of services to the public” [154]
- “Council provides services to residents such as Mr Slattery ... [T]he provision by Council of access to the local library, swimming pool, toilets in Council parks and other Council buildings and facilities is a service... [T]he provision of access to the customer service counter at the Council offices is a service, as is the assistance offered there to those who attend” [29]
- “I do not accept the submission of the Respondent that the acts are of a private nature” [165]

71

Crown Law
QUEENSLAND

Scenario 2

Shelley

72

Crown Law
QUEENSLAND

Scenario two

- **Question 1:** Does your decision limit any human rights? If so, which human rights?
 - Freedom of expression – s 21
 - Freedom of association – s 22
 - Right to take part in public life – s 23(1)
 - Right to property – s 24(2)
 - Other rights?
- **Question 2:** Is your decision authorised by law? (s 13(1))
 - Yes – you hold a delegation

Queensland Government

73

Crown Law
QUEENSLAND

Scenario two

- **Question 3:** What is the purpose of your decision? Is that a proper purpose? (s 13(2)(b))
 - The purpose is to maintain an apolitical and professional public service.
- **Question 4:** Is your decision suitable or rationally connected? Would making the decision help to achieve the purpose? (s 13(2)(c))
 - Yes

Queensland Government

74

Crown Law
QUEENSLAND

Scenario two

- **Question 5:** Is your decision necessary? Are there any less drastic ways of achieving the purpose? Would those alternatives be as effective? (s 13(2)(d))
 - Could any other management action be taken (i.e.. verbal warning)?
 - Could Shelley be provided with further training and support to help her understand her obligations under the Code of Conduct?

Queensland Government

75

Crown Law
QUEENSLAND

Scenario two

- **Question 6:** Does your decision strike a fair balance between its purpose and Shelley's human rights? (s 13(2)(e), (f), (g))
– ???
- **Question 7:** Does your decision represent a justified limit on human rights? (s 13)
– ???

-continues

Queensland Government

76

Crown Law
QUEENSLAND

Scenario two

- **Question 8:** Would your answer change if Shelley had also made serious allegations of corrupt conduct regarding the appointment of graduate nurses and she felt that she could not seek prior approval?
– ???

-continues

Queensland Government

77

Crown Law
QUEENSLAND

Gilbert v Metro North Hospital Health Service [2021] QIRC 255




- Margaret Gilbert was a nurse at Prince Charles Hospital and Branch of the Nurses' Professional Association of Queensland Inc (NPAQ)
- She was quoted in the Sunday Mail in her capacity as a nurse commenting about the poor quality of nursing graduates
- She was issued a show cause notice as to why she should not be disciplined
- She said the hospital attempted to stop her from expressing views on matters concerned with trade union activity
- Breach of freedoms of expression and association?

Queensland Government

78

Crown Law
QUEENSLAND

Goryaynova v Ukraine (2021) 73 EHRR 4



- After trying to raise corruption issues internally, a prosecutor wrote an open letter accusing Department of corruption and abuse of power.
- Following a discipline process, she was dismissed.
- Limit on freedom of expression.
- Civil servants have a duty of loyalty and discretion to their employer, but this duty can be overridden by strong public interest in information.

Queensland Government

79

Crown Law
QUEENSLAND

Scenario three

Property developers

Queensland Government

80

Crown Law
QUEENSLAND

Scenario three

- **Question 1:** Would the proposed ban on donations from property developers limits any human rights? (s 8) If so, which human rights?
 - Freedom of expression – s 21
 - Right to take part in public life – s 23
 - Other rights?

Queensland Government

81

Crown Law
QUEENSLAND

Scenario three

- **Question 2:** What is the purpose of the ban? Is that a proper purpose? (s 13(2)(b))
 - Prevent corruption and undue influence
 - Prevent perception of corruption and undue influence

Queensland Government

82

Crown Law
QUEENSLAND

Scenario three

- **Question 3:** Is the ban suitable or rationally connected? (s 13(2)(c))
 - Yes. With the ban the risk of corruption is reduced. Without the ban, the risk remains as it is.
- **Question 4:** Is the ban necessary? (s 13(2)(d))
 - Could it be confined to the local government level?
 - Could the ban on donations on behalf of the property developer be removed?
 - Any other alternatives?

Queensland Government

83

Crown Law
QUEENSLAND

Scenario three


- **Question 5:** Does the ban strike a fair balance between its purpose and the human rights of property developers and others? (s 13(2)(e), (f), (g))
 - ?
- **Question 6:** Would the ban represent a justified limit on human rights? (s 13)
 - ?

Queensland Government

84

Crown Law
QUEENSLAND

Australian Institute for Progress Ltd v ECQ (2020) 4 QR 31



- AIP was a think tank. It undertook research and intended to take part in a State election
- AIP received funds from property developers who are “prohibited donors” under *Electoral Act 1992*
- Offence for prohibited donor to make a political donation, or for a person to accept a political donation from a prohibited donor: s 275
- AIP sought declaration it wasn’t caught because “political donation” only captures electoral expenditure for a party / member / candidate

Queensland Government

85

Crown Law
QUEENSLAND


Section 48 – interpretative clause

- Reading ss 274 and 275 of the *Electoral Act* as catching AIP would mean less money available to fund political campaigns
- Therefore limits on freedom of speech (s 21) and right to take part in public life (s 23)
- However, limits were justified by legitimate aim of reducing corruption and undue influence.
- No need to read ss 274 and 275 any differently. Section 48 of the *Human Rights Act* did not change the reading.

Queensland Government

86

Crown Law
QUEENSLAND



Shasha Ingbritsen
Senior principal lawyer
Constitutional Law
3031 5617
Shasha.ingbritsen@crownlaw.qld.gov.au

Slide 87

Queensland Government

87
