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Queensland Corrective Services and the Human Rights Act


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



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Road map

- 1 • Overview of the Human Rights Act
- 2 • Limits on human rights – ss 15, 17, 25, 29, 30, 31
- 3 • How to justify limits on human rights – ss 8 and 13
- 4 • Role of legislature – ss 38 and 43
- 5 • Role of courts / interpretation – ss 48 and 53
- 6 • Role of executive / public entities – ss 58 and 59

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(1) OVERVIEW OF ACT

Dialogue model

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graph TD
    Legislature[Legislature] --> Judiciary[Judiciary]
    Judiciary --> Executive[Executive Public entities]
    Executive --> Legislature
  
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Role of the legislature

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graph TD
    Legislature[Legislature] --- A[Statements of compatibility]
    Legislature --- B[Scrutinise Bills and statements]
    Legislature --- C[Override declarations]
  
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- Members introducing Bills to prepare statement of compatibility (s 38)
- Portfolio committee to scrutinise Bills for compatibility with human rights (s 39)
- Legislature can choose to make override declaration (s 43).

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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)).

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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).

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(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.

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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).

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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

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RIGHTS IN FOCUS

Rights of particular relevance to QCS

- Equality and non-discrimination (s 15)
- Protection from torture (s 17(a))
- Protection from cruel, inhuman or degrading treatment (s 17(b))
- Right to privacy (s 25(a))
- Right to liberty and security of person (s 29)
- Humane treatment when deprived of liberty (s 30)
- Right to a fair hearing (s 31)

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RIGHTS IN FOCUS: EQUALITY

15 Recognition and equality before the law

- (1) ...
- (2) Every person has the right to enjoy the person's human rights without discrimination.
- (3) Every person is equal before the law and is entitled to the equal protection of the law without discrimination.
- (4) Every person has the right to equal and effective protection against discrimination.
- (5) ...



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Underlying values

"To treat somebody differently because of an attribute, such as gender, age or political or religious belief, is to make stereotypical assumptions about them personally and their behaviour. When a difference in treatment is not rationally based on individual worth and merit, but on the basis of such an attribute, the individual is not treated because of who they are ... [I]t corrodes the dignity which is the essence of their humanity..."

- *Re Lifestyle Communities Ltd [No 3]* (2009) 31 VAR 286, 311 [109] (Bell J)



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Inclusive definition of 'discrimination'

- Defined to include direct or indirect discrimination on protected attribute under the *Anti-Discrimination Act 1991*


- | | |
|---|--|
| (a) sex; | (j) political belief or activity; |
| (b) relationship status; | (k) trade union activity; |
| (c) pregnancy; | (l) sex work activity; |
| (d) parental status; | (m) gender identity; |
| (e) breastfeeding; | (n) sexuality; |
| (f) age; | (o) sex characteristics; |
| (g) race; | (p) family responsibilities; |
| (h) impairment; | (q) association with, or relation to, a person identified on the basis of any of the above attributes. |
| (i) religious belief or religious activity; | |



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Shelley v UK (2008) 46 EHRR SE16



- John Shelley was a prisoner.
- The UK had needle exchange programs in the community, but did not have similar programs in prisons.
- Of prisoners who had injected drugs, 30% had done so in prison. 75% of those who injected in prison shared equipment.
- Access to a needle exchange program engages private life
- Is status as a prisoner an “other status”?
- Did prisoners and non-prisoners enjoy private life equally?

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RIGHTS IN FOCUS: TORTURE

17 Protection from torture and cruel, inhuman or degrading treatment

A person must not be—

- subjected to torture; or
- treated or punished in a cruel, inhuman or degrading way; or
- subjected to medical or scientific experimentation or treatment without the person’s full, free and informed consent.


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Spectrum

Torture	Cruel/inhuman/ degrading	not humane
s 17(a)	s 17(b)	s 30(1)



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Torture

Torture is any act that:

- is intentional
- inflicts severe physical or mental pain or suffering
- is for a prohibited purpose (such as obtaining a confession, punishment, intimidation or coercion) and
- is inflicted by or with the consent or acquiescence of a public official or a person acting in an official capacity.

- Art 1 of *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1984)

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Cruel, inhuman or degrading

- Treatment or punishment is cruel, inhuman or degrading if it:
 - falls short of torture
 - still reaches a minimum threshold of severity and
 - is still inflicted by or with the consent or acquiescence of a public official or a person acting in an official capacity
- Art 16(1) of *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (1984)

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Relevant factors


- the scope of the right contained in s 17(b) is conditioned by a minimum standard or threshold of severity or intensity that can manifest in bodily injury or physical or mental suffering,
- the combination of the adjectives — cruel, inhuman or degrading — define the prohibited treatment or punishment,
- the assessment of the minimum threshold is relative, and it depends on all the circumstances of the case, including the duration of the treatment, its physical or mental effects, and the sex, age and state of health of the alleged victim,
- most cases of breach will involve on the part of the decision-maker deliberate imposition of severe suffering or intentional conduct to harm, humiliate or debase a victim, and
- the purpose of the decision-maker's conduct will, at the very least, be a factor to be taken into account, though the absence of such a purpose does not conclusively rule out a violation of the right.

Owen-D'Arcy v Chief Executive, QCS (2021) 10 QR 250, [186]

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Vinter v UK (2013)
63 EHRR 1




- Douglas Vinter was found guilty of a second murder, and sentenced to life without parole ('whole life order')
- Could only be released by Secretary of State on compassionate grounds when terminally ill/seriously incapacitated
- Limit: freedom from inhuman or degrading punishment (art 3 of the ECHR)
- Proper purposes: punishment, deterrence, protection of the community
- Rational connection: whole life order helps to achieve proper purposes
- Necessity: no other alternative measure would be as effective
- Fair balance: does the protection of community outweigh extinguishment of any hope of ever rehabilitating?

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R v Bissonnette, 2022 SCC 23

- Alexandre Bissonnette burst into a mosque and opened fire, killing 6 people
- He was sentenced to life imprisonment without the possibility of parole
- Did this constitute cruel and unusual punishment (similar to s 17(b) of the HR Act)?



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RIGHTS IN FOCUS: DIGNITY RIGHT

30 Humane treatment when deprived of liberty

- (1) All persons deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person.
- (2) An accused person who is detained or a person detained without charge must be segregated from persons who have been convicted of offences, unless reasonably necessary.
- (3) An accused person who is detained or a person detained without charge must be treated in a way that is appropriate for a person who has not been convicted.

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When engaged?

- Section 30(1) relevant whenever a person deprived of their liberty is 'subjected to hardship or constraint other than the hardship or constraint that results from the deprivation of liberty'
 - Castles v Secretary, Department of Justice* (2010) 28 VR 141, 169 [108]
- Section 30(1) protects against 'conduct that lacks humanity but falls short of being cruel'
 - Owen-D'Arcy v Chief Executive, QCS* (2021) 9 QR 250, [235]-[237]
- Section 17(b) prohibits 'bad conduct', whereas s 30(1) mandates 'good conduct' towards people deprived of liberty
 - AG (Qld) v Grant [No 2]* (2022) 12 QR 357, [121]

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Thompson v Minogue (2021) 67 VR 301



- Craig Minogue was prisoner at Barwon
- He was subject to random urine tests and strip searches.
- Random urine tests of 5% of prison population every month to discourage drug use + automatic full strip searches before urine tests.
- Engaged privacy and limited dignity right.
- Were the impacts on human rights justified?

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RIGHTS IN FOCUS: LIBERTY

29 Right to liberty and security of person

- Every person has the right to liberty and security.
- A person must not be subjected to arbitrary arrest or detention.
- A person must not be deprived of the person's liberty except on grounds, and in accordance with procedures, established by law.
- ...

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When is liberty deprived?

- The difference between deprivation of liberty and restriction on liberty is one of degree
 - *Secretary of State for the Home Department v JJ* [2008] AC 385, 411 [17] (Lord Bingham).
- Rule of thumb: containment for up to 16 hours per day will generally not amount to deprivation of liberty
 - *Secretary of State for the Home Department v JJ* [2008] AC 385, 438-9 [108] (Lord Brown).



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RIGHTS IN FOCUS: PRIVACY

25 Privacy and reputation

A person has the right—

- not to have the person's privacy, family, home or correspondence unlawfully or arbitrarily interfered with; and
- not to have the person's reputation unlawfully attacked.

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Values underlying s 25

- 'The rights to privacy, family, home and correspondence in [s 25] are of fundamental importance'
- 'Their purpose is to protect and enhance the liberty of the person – the existence, autonomy, security and well-being of every individual in their own private sphere.'
- 'They protect those attributes which are private to all individuals, that domain which may be called their home, the intimate relations which they have in their family ... each of which is indispensable [sic] for their personal actuation...'
- *Re Director of Housing and Sudi* (2010) 33 VAR 139, [29]

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Privacy covers

- Informational privacy
- Mental and physical integrity
 - *PBU v Mental Health Tribunal* (2018) 56 VR 141, 179 [125]
- Social identity, eg sexuality
 - *Re Kracke and Mental Health Review Board* (2009) 29 VAR 1, 131 [619]
- Aspects of the right to work?
 - *ZZ v Secretary, Department of Justice* [2013] VSC 267, [72]-[95]

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'Unlawful' or 'Arbitrary'

- 'Unlawful' interference is 'one which infringes an applicable law'
 - *Thompson v Minogue* [2021] VSCA 358, [49]
- 'Arbitrary' interference with privacy is 'one which is capricious, or has resulted from conduct which is unpredictable, unjust or unreasonable in the sense of not being proportionate to the legitimate aim sought'
 - *Thompson v Minogue* [2021] VSCA 358, [55]

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RIGHTS IN FOCUS: FAIR HEARING

Section 31


31 Fair hearing

- (1) A person charged with a criminal offence or a party to a civil proceeding has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing.
- (2) However, a court or tribunal may exclude members of media organisations, other persons or the general public from all or part of a hearing in the public interest or the interests of justice.
- (3) All judgments or decisions made by a court or tribunal in a proceeding must be publicly available.

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McKechnie v Victoria (Computer Judgment) [2023] VSC 259



- McKechnie was in solitary confinement
- He had limited access to computers compared to mainstream prisoners (fewer computers, less time and no internet)
- McKechnie said he needed access to a computer to run his litigation
- Limit on right to fair hearing?
- The right does not extend to being provided with an 'in-cell computer' for exclusive use.
- But prison authorities should ensure *reasonable access* to computers.

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(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.

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Structured proportionality

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

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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

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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?

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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?
 - Public interest considerations
 - Preserve public revenue
- Examples of legitimate aims
 - Protect human rights
- Examples of illegitimate aims
 - Limit a human right
 - Discriminate

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Chocholáč v Slovakia (2023) 76 EHRR 19



- Chocholáč was a life prisoner for murder.
- During a routine search he was found to have a magazine with explicit pictures.
- The pictures depicted “classic” heterosexual adult sex, Chocholáč was not a sexual offender and it was for his individual and private use only.
- The magazine was confiscated and he was disciplined for ‘threat to morality’.
- Was sexual life part of private life?
- Was enforcing morality a legitimate end?

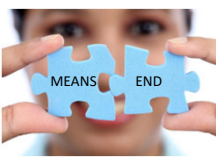
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Suitability/rational connection – s 13(2)(c)

“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

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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?

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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”



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Necessity – s 13(2)(d)




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Case example – *S v Makwanyane* [1995] 3 SA 391



- T Makwanyane and M Mchunu were found guilty of 4 murders
- Sentenced to death
- Death penalty engages right to life (s 9) and freedom from cruel, inhuman or degrading punishment (s 11(2))
- Proper purpose: deterrence, ensure safety of community, retribution
- But is the death penalty necessary? Could the purposes be achieved by life imprisonment?

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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.

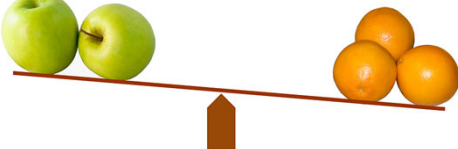
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Fair balance – s 13(2)(e), (f) and (g)

“(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)”

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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?

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Summary – justification

• Does the measure limit/engage a human right?

• Is the limit authorised by law?

• What is the nature of the human right?

STRUCTURED
PROPORTIONALITY

- 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?

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(3) ROLE OF LEGISLATURE

Compatibility statements – s 38

- To accompany any new Bill: s 38
- Also – ‘human rights certificates’ for subordinate legislation: s 41
- May be used as an aid to interpretation: *R v DA* (2016) 263 A Crim R 429, 443-4 [45]-[46]

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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.

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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.


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Minogue v Victoria [No 2] (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.



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(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) ...

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Approach to s 48

Ambiguity? What are the possible interpretations?

- No ambiguity? Section 48 spent
- Ambiguity? Test possible interpretations for compatibility
 - 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)

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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.

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Davidson v DG, Justice and Community Safety Directorate (2021) 18 ACTLR 1



- Nathan Davidson was placed in solitary confinement for 63 days.
- In the Management Unit he had access to a small courtyard connected to his cell, but not the exercise yard.
- Clause 4.3 of the *Corrections Management (Separate Confinement) Operating Procedure 2019* (ACT) provided:
 - "The open rear cell door will count as the minimum one (1) hour of fresh air and exercise."
- Was cl 4.3 compatible with dignity right?
- If not, should a declaration of incompatibility be issued?

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ACT Attorney-General's response

"Following the June 2021 decision that clause 4.3 was inconsistent and invalid with the Corrections Management Act, the use of the rear yards was discontinued.

Detainees in the management unit are now provided with one hour of open air and exercise in the larger common recreational areas, in addition to their access to the external courtyard to their cells throughout the day. Daily logs have also been introduced to support the ongoing review and accountability of these processes. I can also advise that the operating procedure was revoked earlier this year and replaced by an updated procedure which does not include clause 4.3."

- ACT Hansard, 1 Dec 2022, 4142 (Mr Rattenbury)

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(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).

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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


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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]



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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] QSC 293
- Note: breach of s 58 is a non-jurisdictional error: s 58(6).

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ISSUES FOR POLICIES & PROCEDURES

Decision to adopt policy

- Decision to adopt policy is a decision under s 58
- Policies that predate 1 January 2020 may not be caught
 - But decision to implement policy post 1 January 2020 may be caught
 - Transitional provision – s 108 HR Act
- Variable standard of proper consideration
 - The standard of proper consideration for decision to adopt policy may be higher as it will affect more people
 - But may be able to rely on consideration given to human rights for higher policy

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Further issues for policies

- Embedding human rights in the policy
 - Remind decision-makers under policy that they are subject to human rights obligations
 - Provide guidance to decision-makers about how to comply with their human rights obligations
 - Eg “Ordinarily a decision to do X will be considered to be a justified limit on Y human right provided Z.”

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Further issues for policies

- Tension between need for consistency and harsh consequences of blanket rules
 - Bright line rules help to ensure consistent application of policy (which promotes equality before the law)
 - But bright line rules can be harsh for people who fall on the other side of the line
 - ‘bright line’ rules okay provided ‘the particular bright line rule chosen [is] itself ... rationally connected to the aim and a proportionate way of achieving it’: *Tigere’s case* [2015] 1 WLR 3820, 3835 [37]

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Thompson v Minogue (2021) 67 VR 301, [193]

- Mr Thompson gave proper consideration to privacy and dignity rights for random urine test policy.
- “We accept that the consideration that he gave to those rights was at a fairly high level of generality.”
- “[A]s [his] Charter assessment was not entirely self-contained but also relied upon the state-wide assessment conducted by DJCS and Corrections Victoria, his assessment must be viewed in the context of the state-wide assessment rather than in isolation.”

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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).

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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

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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 capicum 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

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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

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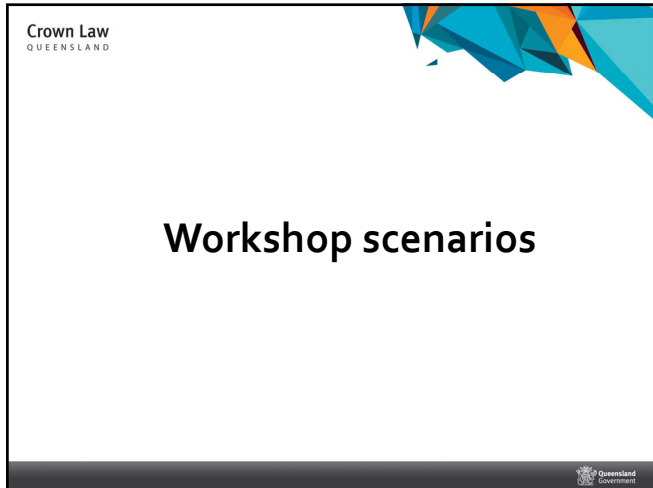
- All decisions failed to give proper consideration to human rights
- Higher standard expected because Minister had benefit of Supreme Court and Court of Appeal decisions
 - Unlawful under equivalent of s 58(1)(b)
 - Weapons exemption decision breached procedural limb even though it didn't breach substantive 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

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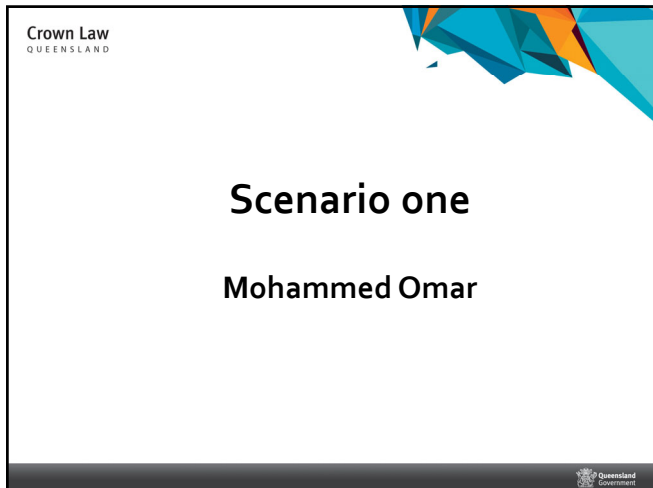
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Questions ?

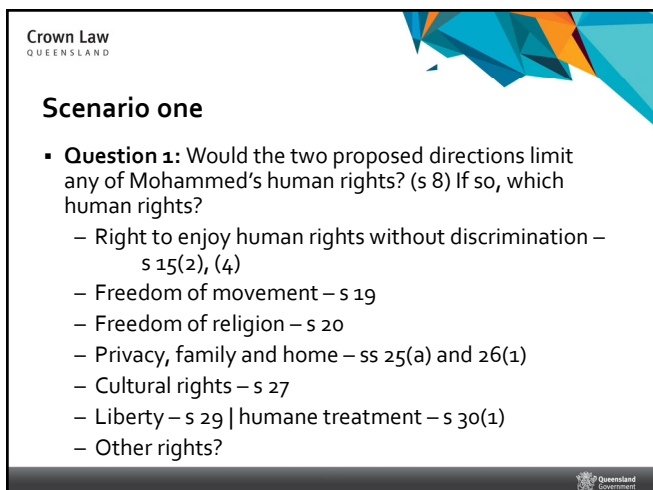
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Scenario one

- **Question 2:** Is the decision authorised by law? (s13(1))
 - Yes – Power to give direction under supervision order
- **Question 3:** What is the purpose of the decision? Is that a proper purpose? (s 13(2)(b))
 - Manage Mohammed's risk, prevent reoffending
 - Protects the human rights of others (security of person and right of children to protection in their best interests – ss 29(1) and 26(2)).

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Scenario one

- **Question 4:** Is the decision suitable or rationally connected? (s 13(2)(c))
 - Yes. With the directions the risk is minimised. Without the directions, the risk is not.
- **Question 5:** Is the decision necessary? (s 13(2)(d))
 - Could there be an exception for visiting the Mosque?
 - Could the requirement for approval from visitors only apply to males or children?
 - Any other alternatives?

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Scenario one

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

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Scenario one

- Question 8:** Do any exceptions to the obligation to act compatibly with human rights apply? (s 58)
 - ?

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Wallace v Tannock [2023] QSC 122

- Leon Wallace was subject to supervision order under DPSOA
- QCS became worried he was showing signs of risk he might offend against female NDIS worker
- QCS officer gave direction that he only have male NDIS workers and that he get prior approval for any visitors
- Limit on freedom of association: [45]
- Held: less restrictive option was to only require approval for female visitors: [49]

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Scenario two

Dom Jones

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Scenario two

- Question 1:** Does your decision limit any human rights? (s 8) If so, which human rights?
 - Right to enjoy human rights without discrimination – s 15(2), (4)
 - Privacy – s 25(a)
 - Right to a name – s 26(3)
- Question 2:** Is your decision authorised by law? (s 13(1))
 - Section 27 of the *Corrective Services Act*.
 - You hold a delegation.

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Scenario two

- Question 3:** What is the purpose of your decision? Is that a proper purpose? (s 13(2)(b))
 - Avoid offending the victim and respect their dignity
 - Protects the human rights of victims

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Scenario two

- Question 4:** Is your decision suitable or rationally connected? Does your decision help to achieve the purpose? (s 13(2)(c))
 - Yes.
- Question 5:** Is your decision necessary? Are there any less drastic ways of achieving the purpose? Would those alternatives be as effective in achieving the purpose? (s 13(2)(d))
 - ???

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Scenario two

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

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Scenario three

Sabrina Mayfair

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Scenario three

- Question 1:** Would the decision to seize the three tarot cards and the book of spells limit any of Sabrina's human rights? (s 8) If so, which human rights?
 - Right to enjoy human rights without discrimination – s 15(2), (4)
 - Freedom of religion – s 20
 - Freedom of expression – s 21
 - Property – s 24
 - Privacy – s 25(a)
 - Humane treatment – s 30(1)
 - Other rights?

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Scenario three

- **Question 2:** Is the decision authorised by law? (s13(1))
 - Yes – Section 48(1) of the CS Act.
- **Question 3:** What is the purpose of the decision? Is that a proper purpose? (s 13(2)(b))
 - Reduce risk to the security and good order of the prison.

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Scenario three

- **Question 4:** Is the decision suitable or rationally connected? (s 13(2)(c))
 - Arguably?
- **Question 5:** Is the decision necessary? (s 13(2)(d))
 - Could the tarot deck be used under supervision?
 - Could the benign parts of the spell book be released?
 - Any other alternatives?

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Scenario three

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

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Scenario three

- Question 8:** Do any exceptions to the obligation to act compatibly with human rights apply? (s 58)
 - ?
 - What if the corrective services officer was a devout Christian and the “The Devil” card offended her religious sensitivities? Would s 58(3) apply?

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Haigh v Ryan [2018] VSC 474

- Paul Haigh was a practising pagan
- He was refused access to four cards in a tarot deck on the basis they contained “objectionable material” – they depicted women with bare breasts
- May have been a proper purpose – Arguably, the cards might be used to influence other prisoners
- However, Governor of prison had not considered human rights, particularly freedom of religion, when making decision.

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