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Human Rights Act 2019 (Qld)
What work will it bring us?

Introduction

1. The *Human Rights Act 2019* (Qld) ("the Act") was passed in February this year. Most of its provisions did not commence then but will commence on 1 January 2020.[2] It is therefore timely to ask, what work will the Act bring to the practising profession and the courts?

2. Our discussion of this question this evening is important, not for the speculative answers it may prompt but for its prompting of you to think about the Act. It is an enigmatic piece of legislation, quite unlike the legislation you commonly apply in practice. If you do not ruminate over this unusual Act you may overlook its potential for application in practice.

What does the Act do?

3. Let me begin by telling you what the Act is not. It is not a Bill of Rights. It does not entrench rights as they might be entrenched constitutionally. Nor does it create a new cause of action for contravening the rights it espouses.

4. So what does the Act does do? Well, that's harder to explain. To the uninformed it does a great deal, because it lists a very large number of rights which we humans have. To the cynic it does nothing, because it does not make a breach of those rights directly actionable. Much of the Act is calculated at increasing awareness of human rights in the public sector and in the drafting and amendment of legislation. The latter aspiration is made more real by conferring upon courts the power to declare legislation incompatible with human rights and more ethereal by the absence of any court-based remedy in consequence of such a declaration. In this feature the Act is said by its advocates to be an example of the dialogue model of rights legislation – promoting a so-called dialogue between the three branches of government about human rights.[3]

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1 Justice of the Supreme Court of Queensland and Far Northern Judge. The presenter gratefully acknowledges the research assistance of his associate Ms Amelia Bell.

2 Per proclamation of 14 November 2019.

3 Explanatory Notes, *Human Rights Bill 2018* (Qld) 6.

5. More tangibly, the Act introduces a principle of statutory interpretation, requiring that statutes are interpreted compatibly, or as compatibly as possible, with human rights. It also provides for referral of interpretation issues and other questions relating to the application of the Act to the Supreme Court. While the Act does not create new causes of action it does allow persons with a ground of conventional relief or remedy against a public entity to also seek relief on the ground the act or decision was unlawful under the Act, though such relief will not include damages. Finally, the Act creates a conciliation and referral role for the Queensland Human Rights Commission in respect of human rights complaints.

Five potential areas of work

6. In that short summary I have identified five potential areas of work for practising lawyers:
   (1) aiding statutory interpretation;
   (2) interpretation referrals to the Supreme Court;
   (3) declarations of incompatibility;
   (4) piggyback relief; and
   (5) conciliation and referral by the Human Rights Commission.

   I do not suggest they are the only areas of work which may arise from the Act but they will be my focus this evening, after I say a little more about the Act's content.

Content of the Act

7. The Act is divided into five parts. The fifth part involves general and miscellaneous matters we need not dwell on.

Part 1 – Preliminary

8. Part 1, "Preliminary", contains the Act's objects and definitions. It is noteworthy that one of the means by which the Act's objects are to be achieved is, per s 4(b), "requiring public entities to act and make decisions in a way compatible with human rights".

9. What is a "public entity"? Its definition at s 9 is lengthy. It targets the executive branch of government, including many forms of government personnel and entities, including so-called "public entities" which exercise functions of a public nature. Section 9(4) provides a "public entity" does not include the legislature or a court or tribunal "except when acting in an administrative capacity".

10. The terms of that exclusion at s 9(4) seem clear, however it is not an exclusion which rests comfortably with s 5. Section 5(1) provides the "Act binds <u>all</u> persons". All jokes aside, judicial officers really are "persons" and thus presumably bound by the Act. However, s 5(2)(a) provides the Act applies to a court or tribunal "to the extent" it "has

functions under" the human rights enumerated in part 2 and also under part 3, division 3, which deals with a principle of statutory construction to which I will return. I will revisit this potential inconsistency between ss 5 and 9.

Part 2 – Human Rights in Queensland

11. Part 2, "Human Rights in Queensland", articulates some matters of principle and then lists our human rights. The most significant matters of principle are contained in s 11 which provides that only individuals, that is to say human beings, have human rights. BHP, Telstra, Google, Microsoft et cetera do not have human rights. The position appears to be different in New Zealand where the *Bill of Rights Act 1990* (NZ) does not contain a provision expressly confining its application to individuals as distinct from other legal persons in the form of companies.[4]

12. Section 13 of the Act articulates a proportionality principle by which a human right may be subject under law to "reasonable limits that can be demonstrably justified in a free and democratic society".[5] Whether a limit on a human right is reasonable and justifiable may, pursuant to s 13(2), involve balancing "the importance of the purpose of the limitation" and "the importance of preserving the human right, taking into account the nature and extent of the limitation on the human right".[6]

13. The human rights listed in part 2 under "Civil and political rights" and "Economic, social and cultural rights" are numerous. They are consistent with the form of rights protected by international conventions.

14. It is sufficient for present purposes to list the headings of those sections:

"15 Recognition and equality before the law
16 Right to life
17 Protection from torture and cruel, inhuman or degrading treatment
18 Freedom from forced work
19 Freedom of movement
20 Freedom of thought, conscience, religion and belief
21 Freedom of expression
22 Peaceful assembly and freedom of association
23 Taking part in public life
24 Property rights

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4 There therefore exist New Zealand authorities in which companies have been permitted to lay claim to certain human rights, see for example *Turners & Growers Ltd v Zespri Group Ltd (No 2)* (2010) 9 HRNZ 365 where Turners and Growers Ltd complained export regulations infringed its right of freedom of association.

5 A principle discussed in *Certain Children v Minister for Families and Children & Ors (No 2)* (2017) 266 A Crim R 152, 209.

6 See s 13(2)(e)-(g).

25 Privacy and reputation
26 Protection of families and children
27 Cultural rights – generally
28 Cultural rights – Aboriginal peoples and Torres Strait Islander peoples
29 Right to liberty and security of person
30 Humane treatment when deprived of liberty
31 Fair hearing
32 Rights in criminal proceedings
33 Children in the criminal process
34 Right not to be tried or punished more than once
35 Retrospective criminal laws
36 Right to education
37 Right to health services"

15. Those rights sound in a number of common areas of legal practice. Despite their apparent breadth and generality, the Act provides only incidental means of enforcing them. Those incidental means may be obscure and it may require some lateral thinking to recognise them. It is therefore important to familiarise yourselves with the rights, lest you overlook an opportunity to deploy them.

16. Note that some of those rights relate to court functions, with the apparent consequence that, pursuant to s 5(2), the Act applies to the courts' exercise of those functions. To use a simple example, s 32(2)(c) confers the human right upon a person charged with a criminal offence "to be tried without unreasonable delay". Trying offenders is a function of the courts. It follows the Act's conferral upon a defendant of a right to be tried "applies to" a court which has the function of trying the defendant. In the past such a court's decision-making about listing a trial for hearing should have been informed by the desirability, well-established at common law, of avoiding delay in the disposition of cases. If the above analysis is correct, such decision-making will now also be informed by the existence of the defendant's right to be tried without unreasonable delay.

Part 3 – Application of human rights in Queensland

17. Part 3 of the Act, "Application of human rights in Queensland", contains four divisions, namely:

"Div 1 Scrutiny of new legislation
Div 2 Override declarations
Div 3 Interpretation of laws
Div 4 Obligations on public entities"

18. Divisions 1 and 2 bear upon the operations of Parliament and allow it to declare an Act has effect despite it being incompatible with one or more human rights, a so-called

"override declaration". Section 45 provides the effect of an override declaration is that the Act will not apply to the relevant legislation for five years. Divisions 3 and 4 relate to some of the areas of work I will come to shortly.

Part 4 – Queensland Human Rights Commission

19. Part 4 of the Act, "Queensland Human Rights Commission", deals, inter alia, with conciliation and referral by the Human Rights Commission, a topic to which I will also return.

20. I turn now to the Act's five earlier-identified areas of potential work for practising lawyers.

Statutory interpretation

21. The Act introduces a new principle of statutory interpretation by which statutes are to be interpreted compatibly, or as compatibly as possible, with human rights. Section 48 provides:

> "**48 Interpretation**
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> (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. …"

22. Section 48(3) permits that interpretation process to be aided by consideration of international law and the judgments of domestic, foreign and international courts and tribunals which are relevant to a human right. Section 48(4) provides s 48 does not affect the validity of an incompatible Act or statutory instrument or provision thereof.

23. It is noteworthy that the principles of interpretation in s 48(1) and (2) are of mandatory effect (save that, pursuant to s 48(5), they do not apply to a provision which is subject to an override declaration). This has the consequence that lawyers need to turn their minds to the potential application of the *Human Rights Act* whenever they are engaged in interpreting statutes.

24. While it will often be the case that the principle of statutory interpretation created by the Act is not relevant to a particular interpretation task, it will be prudent to always double-check its potential relevance. For example, a practitioner involved in a property case ought reflect on whether the interpretation of applicable legislation could be affected by the right, at s 24(2) of the Act, "not to be arbitrarily deprived of the person's property". In a similar vein, a practitioner in a criminal case in which the provisions of

the *Police Powers and Responsibilities Act 2000* (Qld) are in play ought reflect on the potential application of the right at s 29(2) of the Act to "not be subjected to arbitrary arrest or detention".

25. The principle of interpretation enshrined in s 48 of the Act is similarly enshrined in s 6 of New Zealand's *Bill of Rights Act 1990,* s 3 of the United Kingdom's *Human Rights Act 1998,* ss 30 and 31 of the ACT's *Human Rights Act 2004* and s 32 of Victoria's *Charter of Human Rights and Responsibilities Act 2006*. Cases from those jurisdictions illustrate the breadth and variability of the potential application of the interpretative principle contained in s 48 of the Act.

26. In the United Kingdom in *Mendoza v Ghaidan*[7] the Court of Appeal considered an appeal by a defendant to possession proceedings brought on a tenant's death. The defendant had lived in a stable and permanent homosexual relationship with the tenant. The defendant argued he had become entitled to an assured statutory tenancy by succession as a surviving spouse. That entitlement was said to arise from a provision of the *Rent Act 1977* which effectively defined spouse as "a person who was living with the original tenant as his or her wife or husband".

27. In aid of interpreting that provision, the Court pursued an interpretation compatible with the defendant's right, pursuant to the *Human Rights Act 1998,* not to be discriminated against on the ground of sexual orientation. The Court allowed the defendant's appeal, interpreting the provision on the basis it referred to a person who was living with the original tenant "as if" the person was the original tenant's wife or husband.

28. In *Casey v Alcock*[8] the ACT Court of Appeal distinguished *Mendoza v Ghaidan*, concluding the ACT's interpretative provision did not permit such a broad approach. That was a personal injuries case in which there was a limitation of actions issue. The issue centred upon whether, as seemingly provided by s 32 *Limitation Act 1985* (ACT), an acknowledgement of the right or title of the claimant within the limitation period was a confirmation, meaning time preceding it did not count. The alleged confirmation was an admission provided in mandatory response to a notice of claim under s 6 *Civil Law (Wrongs) Act 2002* (ACT). The court declined to interpret s 32 so as to prevent its application to a s 6 admission, concluding recourse to an interpretation allegedly consistent with human rights was unwarranted because the meaning of the language of the section was unambiguous.

29. In the New Zealand case of *Electoral Commission v Watson*[9] the Court of Appeal dealt with a case in which Mr Watson, a musician and songwriter, wrote and released a song titled Planet Key, conveying artistic satirical messages hostile to the National Party and

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7 [2003] 2 WLR 478, upheld by the House of Lords in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557.
8 (2009) 3 ACTLR 1.
9 [2017] 2 NZLR 63.

the then Prime Minister. A radio station, wanting to include the song in a politics-based radio show, sought the confirmation of the Electoral Commission that it could be broadcast. The Commission considered it would be unlawful to broadcast as it was within the meaning of an election programme as defined in s 69(1) of the *Broadcasting Act 1989* (NZ). The Court had regard to Mr Watson's human right to freedom of expression in the context of considering whether the preferred interpretation of the Act limited that right only as much as was reasonably necessary to achieve legislative objectives regarding voters. It found in favour of Mr Watson, taking the view that his freedom of expression did not, within the meaning of "election programme", encourage or persuade voters to vote for a particular person or political party.

30. In Victoria, in *Re Application under the Major Crime (Investigative Powers) Act 2004*,[10] the human rights of a person to a fair hearing and not to be compelled to testify against himself or herself was deployed in aid of the interpretation of the aforenamed Act. That Act conferred coercive powers with some similarity to those exercisable under Queensland's *Crime and Corruption Act 2001*. Warren CJ granted an application to vary coercive orders made by a judge. Her Honour considered the *Major Crime (Investigative Powers) Act* had been interpreted inconsistently with the aforementioned rights as requiring people to testify against themselves and not protecting them from derivative use of their testimony.

31. In *Momcilovic v The Queen*,[11] a drugs case, the High Court considered the Victorian Court of Appeal's approach to interpreting s 5 *Drugs, Poisons and Controlled Substances Act 1981* (Vic). That provision is similar to s 129(1)(c) of Queensland's *Drugs Misuse Act 1986*, deeming the occupier of property to be in possession of drugs found on the property unless the occupier satisfies the court to the contrary. The High Court rejected the argument that, because of the human right to be presumed innocent until proved guilty, s 5 ought be read as not imposing a legal burden of disproving possession on the balance of probabilities.[12] The majority considered s 32 of the Victorian Act, the equivalent of s 48 of Queensland's *Human Rights Act*, did not confer a legislative function on the courts and did not carry the court's task beyond ordinary principles of statutory interpretation. French CJ explained:

> "Section 32(1) … mandates an attempt to interpret statutory provisions compatibly with human rights. There is, however, nothing in its text or context to suggest that the interpretation which it requires departs from established understandings of that process. … It requires statutes to be construed against the background of human rights and freedoms set out in the Charter in the same way as the principle of legality requires the same statutes to be construed against the background of common law rights and freedoms. The human rights and freedoms set out in the Charter in

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10 (2009) 24 VR 415.
11 (2011) 245 CLR 1.
12 See also *R v Hansen* [2007] 3 NZLR 1, where a similar issue arose.

> significant measure incorporate or enhance rights and freedoms at common law. Section 32(1) applies to the interpretation of statutes in the same way as the principle of legality but with a wider field of application."[13]

32. His Honour subsequently observed:

> "The interpretive principle in s 32(1) does not require or authorise the interpretation of s 5 in such a way as to transform the legal burden of proof, which it imposes in clear terms, into an evidential burden. The interpretation mandated under s 32(1) must be consistent with the purpose of the statutory provision being interpreted. The purpose of s 5 is apparent from its text."[14]

33. While on the topic of deeming provisions, it is convenient to allude to the allied topic of mandatory liability provisions. One such provision, relating to a driver's failure to provide a breath sample, was considered in the ACT case of *Hausmann v Shute*.[15] The plurality in the Court of Appeal there observed there was nothing in the ACT's *Human Rights Act* preventing the legislature from enacting offences of strict liability.

Interpretation and referrals to the Supreme Court

34. Section 49 of the Act provides for courts and tribunals to refer certain questions to the Supreme Court or, if the referring court is the Supreme Court, to the Court of Appeal.[16] As to what form of questions may be referred, and in what circumstances, s 49 relevantly provides:

> "**49 Referral to Supreme Court**
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> (1) This section applies if, in a proceeding before a court or tribunal –
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> (a) a question of law arises that relates to the application of this Act; or
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> (b) a question arises in relation to the interpretation of a statutory provision in accordance with this Act.
>
> (2) A question may be referred to the Supreme Court if –
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> (a) a party to the proceeding has made an application for a referral; and
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> (b) the court or tribunal considers the question is appropriate to be decided by the Supreme Court."

35. It is difficult to predict how often s 49 referrals will occur. I anticipate that where a question arises in relation to the interpretation of a statutory provision in accordance with the Act, most courts and tribunals would be inclined to proceed to determine the

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13 Ibid 50.
14 Ibid 55.
15 (2007) 1 ACTLR 23, 30-31.
16 Section 49(2) and (4).

question themselves, statutory interpretation being a core task of any court or tribunal. It may be anticipated that courts and tribunals would consider only questions of particular importance or difficulty are appropriate to be decided by the Supreme Court. It appears more likely that a s 49 referral will occur in cases where a court or tribunal suspects the case is an appropriate vehicle for a declaration of incompatibility. I will deal with declarations of incompatibility shortly.

36. Where a s 49(1) question arises, the Attorney-General and the Human Rights Commission can each intervene and be joined as parties to the relevant proceeding, per ss 50 and 51. It is noteworthy that ss 50 and 51 do not relate solely to referrals to the Supreme Court pursuant to s 49. They confer a right to intervene and be joined as a party in the proceeding before a court or tribunal where the s 49(1) questions first arise.

37. Section 52 requires that whenever a s 49(1) question arises in the Supreme Court or District Court, or whenever a question is referred to the Supreme Court under s 49, a party to the proceeding must give notice in the approved form to the Attorney-General and the Commission, unless of course they are already parties. This has the practical effect that in proceedings before the Magistrates Court and Tribunals where a s 49 question arises it will not be necessary to notify the Attorney-General or Commission unless and until the question is referred to the Supreme Court. However, where a s 49(1) question arises in proceedings in the Supreme Court or the District Court, notification of the Attorney-General and Commission is mandatory. That requirement has the potential to cause delay in such proceedings. Parties to such proceedings should be conscious of that risk of delay, which may readily be avoided by parties giving notice to the Attorney-General and Commission of their intention to raise a s 49(1) question reasonably in advance of the listed proceeding.

38. A curious feature of s 49 is that it does not stipulate what the Supreme Court is empowered to do when presented with a s 49 referral question, save for the making of a declaration of incompatibility per s 53. It seems likely the Supreme Court would regard it as implicit in s 49 that it ought answer the question referred, even if the answer does not result in a declaration of incompatibility. I acknowledge there is room for a contrary view.

Declarations of incompatibility

39. Section 53 provides for the making of declarations of incompatibility by the Supreme Court, relevantly providing:

> "**53 Declaration of incompatibility**
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> ...
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> (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.

> (3) However, the Supreme Court can not make a declaration of incompatibility about a statutory provision if an override declaration is in force in relation to the provision."

40. The proceeding referred to in s 53(2) is identified in s 53(1) as being a proceeding in the Supreme Court where a s 49(1) question arises, or a s 49 referral to the Supreme Court, or an appeal before the Court of Appeal relating to a s 49(1) question. Section 53(4) provides that if the Supreme Court is considering making a declaration of incompatibility, the court must give notice of that fact to the Attorney-General and the Commission. Further s 53(5) precludes the Supreme Court from making such a declaration unless it is satisfied notice has been given and a reasonable opportunity has been given to the Attorney-General and the Commission to intervene or to make submissions.

41. The only consequence triggered by a declaration of incompatibility is that it will be considered and reported on, by a portfolio committee of the legislature, to the Legislative Assembly.[17]

42. The Act makes no specific provision for the awarding of costs in respect of s 49 referrals nor s 53 declarations of incompatibility. It is doubtful that average citizens of ordinary resources will often pursue s 49 referrals or s 53 declarations in the civil jurisdiction. They are more likely to be pursued by or with the assistance of privately or publicly funded entities. That said, even those entities might hesitate to commit the funds necessary given, pursuant to s 54 of the Act, a declaration of incompatibility does not affect "in any way" the validity of the relevant statutory provision nor create any legal right, nor give rise to any civil cause of action. The prospect of such relief being pursued in the criminal jurisdiction by legally aided defendants is perhaps higher.

43. In Victoria there has evidently been only one declaration of incompatibility,[18] or declaration of inconsistent interpretation as it called in s 36 of the Victorian Act. That declaration was set aside by the High Court *Momcilovic v The Queen*,[19] a decision referred to earlier. It will be recalled Momcilovic was charged with a drug offence relying on s 5 *Drugs, Poisons and Controlled Substances Act 1981* (Vic), deeming the occupier to be in possession of drugs. The decision of the Victorian Court of Appeal included a declaration of incompatibility on the basis s 5 imposed an unjustified limit on the human right to be presumed innocent until proved guilty. A majority of the High Court concluded the declaration should not have been made. French CJ and Bell J considered s 36 did not confer judicial power and was not incidental to the exercise of judicial power with the result no right of appeal lay against the declaration. Gummow

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17 Per ss 55, 56 and 57.

18 K Evans, 'The March of Human Rights – The *Human Rights Act 2019* (Qld) and Charter of Human Rights and Responsibilities: Some insights from Victoria' (Paper presented at the Queensland Supreme Court Judges' Conference, 13 August 2019) 9.

19 (2011) 245 CLR 1.

and Hayne JJ concluded s 36 was not an exercise of judicial power because it offended the principle in *Kable v Director of Public Prosecutions*.[20] Crennan and Kiefel JJ concluded s 36 was incidental to the exercise of, and did not confer, judicial power. As to the supposed "dialogue" associated with the declaration, Crennan and Kiefel JJ observed:

> "A "dialogue" is an inappropriate description of the relations between the Parliament and the courts and it is inaccurate to describe the process suggested by s 36(2) as involving a dialogue, just as the reference to the making of a "declaration" in that sub-section is inaccurate."[21]

44. In the Victorian case of *WBM v Chief Commissioner of Police*[22] Warren CJ observed there is no obvious ratio to be drawn from *Momcilovic* as to whether the proportionality principle (articulated in the Victorian Act at s 7 and in the Queensland Act at s 13) should be considered as part of the principle of statutory interpretation introduced by human rights legislation (contained at s 32 of the Victorian Act and s 48 of the Queensland Act). In the Judicial College of Victoria's publication *Human Rights Under the Charter: The Development of Human Rights Law in Victoria*, Professor Bryan Horrigan observed of the so-called "post-*Momcilovic* phase" that it remained unsettled from the twin perspectives of binding precedent and predictable judicial views.[23]

Piggyback relief

45. Section 58 of the Act relevantly provides:

> "**58 Conduct of public entities**
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> (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
>
> (b) in making a decision, to fail to give proper consideration to a human right relevant to the decision.
>
> (2) Subsection (1) does not apply to a public entity if the entity could not reasonably have acted differently or made a different decision because of a statutory provision, a law of the Commonwealth or another State or otherwise under law. …
>
> (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

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20 (1996) 189 CLR 51.

21 Supra at 207.

22 [2012] 43 VR 446, 473.

23 B Horrigan, 'Proportionality in Comparative Analysis' (2014) 2 *Judicial College of Victoria Online Journal* 103, 122.

(b) considering whether the decision would be compatible with human rights."

46. Section 58(6) declares that unlawfulness pursuant to s 58(1) will not invalidate an act or decision or constitute the commission of an offence.

47. However, unlawfulness pursuant to s 58(1) will trigger the opportunity for piggyback relief provided by s 59, which relevantly provides:

"**59 Legal proceedings**

(1) Subsection (2) applies if a person may seek any relief or remedy in relation to an act or decision of a public entity on the ground that the act or decision was, other than because of section 58, unlawful.

(2) The person may seek the relief or remedy mentioned in subsection (1) on the ground of unlawfulness arising under section 58, even if the person may not be successful in obtaining the relief or remedy on the ground mentioned in subsection (1).

(3) However, the person is not entitled to be awarded damages on the ground of unlawfulness arising under section 58."

48. The practical effect of this provision is that unlawfulness may ground relief, not including an award of damages, in a proceeding but only where the proceeding is also seeking relief or remedy in relation to an act or decision of a public entity on some ground other than s 58(1) unlawfulness. This need to piggyback upon other causes of relief is replicated in human rights legislation in Victoria,[24] whereas s 40C of the ACT's *Human Rights Act 2004* permits alleged contraventions by public authorities to be pursued as standalone proceedings started in the Supreme Court against the relevant public authority.[25] Queensland courts and practitioners should bear that difference in mind in drawing upon ACT jurisprudence.

49. I referred earlier to a potential inconsistency between ss 5 and 9, regarding the Act's application to judicial decision-making. Whether it is truly an inconsistency is arguable. Section 5 literally obliges courts to comply with functions they have pursuant to human rights. Section 9(4) supports the view that s 58(1) unlawfulness could only arise in respect of a court when the court is acting in an administrative capacity. However there will be proceedings where relief is not being sought per s 59(2) on the ground of s 58(1) unlawfulness but the court's decision-making nonetheless involves consideration of the relevance and weight to be given to a human right in respect of which a court has functions. This will sometimes include appeals where there are allegations a court erred in that consideration. If the view is taken that such cases do

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24 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 39.

25 For example, in the ACT case of *R v Mills* (2011) 252 FLR 295 a stay application of a criminal trial where there had been an egregious delay was considered and granted solely via reliance on the human right to be tried without unreasonable delay.

not involve the seeking of relief or remedy on the ground of s 58(1) unlawfulness then the potential inconsistency falls away.

50. That is the prevailing view in Victoria, articulated as follows by the Victorian Court of Appeal in *De Simone v Bevnol Constructions & Developments Pty Ltd:*[26]

> "Given that s 6(2)(b) refers to both the interpretative functions of courts and tribunals in Pt 3, Div 3, and to their functions under Pt 2, it appears that s 6(2)(b) implicitly reads down s 4(1)(j), so that Pt 2 applies directly to courts and tribunals. It follows that ss 24 and 25 apply directly to courts and tribunals, when they exercise their functions."

51. Translating the above observation to the Queensland context it would read:

> "Given that s 5(2)(a) refers to both the interpretative functions of courts and tribunals in Pt 3, Div 3, and to their functions under Pt 2, it appears that s 5(2)(a) implicitly reads down s 9(4)(b), so that Pt 2 applies directly to courts and tribunals. It follows that ss 31 (fair hearing rights) and 32 (rights in criminal proceedings) apply directly to courts and tribunals, when they exercise their functions."

52. The Victorian decision of *Cemino v Cannan*[27] is illustrative of the Victorian approach. Ginnane J there considered that a failure to consider a court's human rights function informed the assessment of whether an exercise of discretion in judicial decision-making, under s 4F Magistrates' Court Act 1989 (Vic), had miscarried. His Honour was considering the judicial review of a Magistrate's refusal to transfer proceedings to the Koori Court. He considered the Magistrate was engaged in judicial (not administrative) decision-making but was in any event obliged to comply with human rights functions relevant to the exercise of the discretion involved in the decision.[28]

53. Section 58(1) unlawfulness is premised upon incompatibility with or a failure to properly consider human rights which are enumerated in the Act. In Victoria, where unlawfulness akin to s 58(1) unlawfulness has been relied upon, the Victorian Court of Appeal has resisted the implication of rights beyond those in the Victorian Charter of Rights. For example, in *Bare v IBAC,*[29] an appeal from a judicial review, it was argued there was an implied procedural right to an independent effective investigation of a complaint of a breach of the right not to be treated or punished in a cruel, inhuman or degrading way. That argument was rejected. Warren CJ noted the fact the Charter included procedural protections for some rights but not others precluded the implication of such protections where not provided for in the Charter.[30] Tate JA observed the

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26 (2009) 25 VR 237, 247.

27 (2018) 56 VR 480.

28 See also *Matsoukatidou v Yarra Ranges Council* (2017) 51 VR 624 where an application for judicial review was founded upon common law considerations as well as a failure to hear applications consistently with the applicants' human rights to equality and a fair hearing.

29 (2015) 48 VR 129.

30 Ibid 188.

argument of an implied procedural right was premised upon articles of the relevant international convention that were not replicated in the charter.[31] This detracted from the relevance of jurisprudence elsewhere where such articles had been replicated.

54. The Victorian case of *Baker v DPP & Ors*[32] provides an example of how relief against alleged s 58(1) unlawfulness may be piggybacked on a stay application. In that matter Baker had offended as a child but complained of prosecutorial delay, which had the consequence that he was deprived of the opportunity to be sentenced as a child. His application for a permanent stay was refused and, while granted leave to appeal, his appeal was also refused. However, it was accepted he was entitled in his application for a stay at common law to also rely upon an alleged breach of his human right to be tried without unreasonable delay.[33]

55. That case also highlights that the Director of Public Prosecutions is a public entity, obliged to act compatibly with and give proper consideration to human rights. Legal Aid Queensland also appears to be a public entity subject to the reach of the Act. As much was conceded of the ACT Legal Aid Commission in *Hakimi v Legal Aid Commission (ACT)*[34] where a defendant wanting his own choice of lawyer unsuccessfully alleged a decision to appoint him a lawyer from the Commission breached his human right to legal assistance chosen by him. The breadth of that right in cases where legal assistance is provided was read down by reference to the fact the human right to have legal assistance does not include reference to such a choice. In Queensland the reference to a right to choose has been similarly omitted in expressing the right to have legal aid provided if eligible.

56. Use of judicial review is one of the more obvious vehicles for seeking accompanying relief against s 58(1) unlawfulness. For example, in the Victorian case of *Burgess v Director of Housing*[35] the decision of the Director of Housing in deciding an application for a warrant of possession of public housing was judicially reviewed, successfully, on the basis the Director failed to take account of matters he was bound to consider. Those matters included a failure to consider rights protected by Victoria's Charter of Human Rights, viz the rights of the Burgess family to the protection of their group.

57. The New Zealand case of *Attorney-General v Smith*[36] is another example of the use of judicial review to seek relief against s 58(1) unlawfulness. Smith was serving life imprisonment. He was losing his hair and was granted permission to wear a wig. He later absconded to Rio de Janeiro when on temporary release from prison. Upon his

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31 Ibid 269.
32 [2017] VSCA 58.
33 As to what constitutes unreasonable delay in the right to be tried without unreasonable delay see, for example, *Nona v The Queen* (2013) 8 ACTLR 168.
34 (2009) 3 ACTLR 127.
35 [2104] VSC 648.
36 [2018] 2 NZLR 899.

capture and return to prison, the prison manager revoked permission for him to possess his wig. In Mr Smith's judicial review of that decision he alleged a breach of natural justice arising from a failure to give reasons or consult. He also relied on alleged breaches of his human right to freedom of expression and his human right as a detained prisoner to be treated with humanity and respect for his inherent dignity. The New Zealand High Court concluded his practise of wearing a wig in prison did engage his right of freedom of expression under s 14 of their Act. The New Zealand Court of Appeal took a different view, concluding the right of freedom of expression was not engaged. The court considered Mr Smith's wearing of the wig did not convey meaning so as to engage the right to freedom of expression. In the course of his judgment, Kós P used an example to highlight the reasoning. His Honour observed:

> "In a well-known example, *Pointon v Police*, Heath J held that a naturist running naked through woods (so far as we know, largely silently) engaged s 14, because he wished to draw attention to his alternative lifestyle choice and to make the point that, as he saw it, clothing was "an artificial construct that covers the human form"."[37]

58. Warming to his task, his Honour later continued his recourse to examples:

> "A man grows his hair and a moustache over the summer holidays. His workmates notice this on their return to work. No meaningful idea or information is conveyed by these acts alone; no protected expression is involved. Mr Pointon, the ardent naturist jogger, runs naked through the forest. Protected expression is involved … But if Mr Pointon then puts his clothes on for the run home from the forest, the situation is quite different. In now adopting orthodox attire, he conveys no particular meaning to anyone seeing him.
>
> Therein, we suggest, lies the paradox of Mr Smith's case. … His assumption of a wig is calculated to make him less distinctive and more ordinary in appearance. This makes him feel better, but is the antithesis of protected expression. His actions are the equivalent of Mr Pointon, the naturist jogger, putting his clothes back on. Wearing a wig for that purpose does not convey meaning, does not attempt to convey meaning, and does not engage s 14."[38]

59. As it happens, the appeal was moot because permission to wear the wig had been reinstated. However, the Court of Appeal considered the question of law was of such importance that it should nonetheless determine the appeal.

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37 Ibid 908.
38 Ibid 914.

Conciliation and referral by the Human Rights Commission

60. This final area of potential work for lawyers may arise in the context of lawyers advising clients about their option of complaining to the Human Rights Commissioner. It is sufficient for present purposes to review the statutory framework.

61. Part 4 of the Act provides for complaints about s 58(1) unlawfulness on the part of a public entity, a so-called "human rights complaint", to be made to the Human Rights Commissioner. Such complaints can be made by those affected or their agents.[39]

62. Section 66 provides a referral may also be made by the Ombudsman, the Health Ombudsman or the Crime and Corruption Commission in circumstances where a complaint received by them may also be a human rights complaint. Conversely the Commissioner has the power to refer complaints to the Ombudsman, the Health Ombudsman, the Crime and Corruption Commission, the Information Commissioner or the NDIS Commissioner if the human rights complaint could be the subject of a complaint under the legislation pertinent to the agencies of those persons.[40]

63. Where the Commissioner considers a complaint of s 58(1) unlawfulness would be more appropriately dealt with by the Commissioner as a complaint about an alleged contravention of the *Antidiscrimination Act 1991* (Qld) the Commissioner may, with the complainant's consent, deal with the complaint as an alleged contravention of that Act.[41]

64. Where the Commissioner decides to accept a complaint of s 58(1) unlawfulness for resolution by the Commission, the Commissioner has an array of powers involving the seeking of information from the complainant or respondent or other relevant entity.[42] The Commissioner is empowered to conduct a conciliation conference, to promote the resolution of the complaint, at which persons may only be represented by another with the Commissioner's consent.[43]

65. Where a complaint is not resolved by conciliation or otherwise, the Commissioner is obliged by s 88 to prepare a report, providing it to the parties, and may publish information about complaints it has finished dealing with, including in its annual report.[44]

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39 Section 64.
40 Section 73.
41 Section 75.
42 Sections 77-83.
43 Sections 79-83.
44 Sections 90 and 91.

66. It is thus apparent that complaints of s 58(1) unlawfulness to the Commission will not result in an adjudication. However, participation in a conciliation conference will not affect a person's right to seek other relief or remedy for s 58(1) unlawfulness.[45]

Conclusion

67. My object this evening has been to prompt you to think about this new Act. To that end, beyond reviewing the Act, I have sampled some cases from jurisdictions involving similar legislation. I did so in the hope of demonstrating that, despite the Queensland Act not creating any new cause of action, it has the potential to create work for us in ways and in types of cases that may not be immediately obvious.

68. The lawyers in some of the cases I have alluded to likely engaged in some lateral thinking in enlisting the aid of their jurisdictions' human rights legislation. If you are to act in your client's best interests, it is important that you do not overlook the potential assistance the Act might bring to your client's cause.

69. In closing, I respectfully suggest the best means of safeguarding against such oversight is to make it your standard practice in every case to ask yourself: "Might the *Human Rights Act* be relevant here?"

Further reading

1. Debeljak, J, 'Legislating Statutory Interpretation Under the Victorian *Charter*: An Unusual Tale of Judicial Disengagement with Rights-Compatible Interpretation' in C Hunt, L Neudorf & M Rankin (eds) *Legislating Statutory Interpretation: Perspectives from the Common Law World* (Thomson Reuters, 2018)

2. Evans, K, 'The March of Human Rights – The *Human Rights Act 2019* (Qld) and Charter of Human Rights and Responsibilities: Some insights from Victoria' (Paper presented at the Queensland Supreme Court Judges' Conference, 13 August 2019)

3. Gardbaum, S, 'Reassessing the new Commonwealth model of constitutionalism' (2010) 8(2) *International Journal of Constitutional Law* 167

4. Geddia, A & M B Rodriguez Ferrere, 'Judicial innovation under the New Zealand Bill of Rights Act – Lessons for Queensland?' (2016) 35(1) *University of Queensland Law Journal* 251

[45] Section 87.

5. Kós, S (the Hon Justice), 'The Queensland Human Rights Act 2019: Some Lessons from New Zealand' (Paper presented at the Queensland Supreme Court Judges' Conference, August 2019)

6. Venning, G (the Hon Justice), 'From Toupee to Tooth Decay: Recent Bill of Rights cases in New Zealand' (Speech delivered at the Supreme and Federal Courts Judges' Conference, Hobart, 2019)

7. Warren, M (the Hon Chief Justice) and the Hon Justice P Tate (eds), *Human Rights Under the Charter: The Development of Human Rights Law in Victoria* (2014) 2 JCVOJ