



Human rights are essential

Speech delivered to Caxton Legal Centre Human Rights Day Event at Queensland Law Society

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9 December 2020

Traditional owners, Attorney General, distinguished guests and everyone.

I've always thought that the humble Preamble is an under-rated feature of legislation. The *Human Rights Act* preamble is a great example. Clause 3 says, 'Human rights are essential in a democratic and inclusive society that respects the rule of law'.

Last week, I was reminded of the power of these words. The Prime Minister made a statement on the Chinese WeChat platform, in which he said that Australia was dealing with allegations of war crimes in Afghanistan in an 'honest and transparent way', which was how any 'free, democratic and enlightened nation' would act. The Prime Minister's statement was a reminder of the value Australia places on freedom, the rule of law and democratic principles. Of course, it would strengthen the Prime Minister's position considerably if Australia had a Commonwealth Human Rights Act that imposed enforceable obligations on Commonwealth agencies.

Clause 5 of the Preamble recognises that, 'Human rights should be limited only after careful consideration, and should only be limited in a way that can be justified in a free and democratic society based on human dignity, equality, freedom and the rule of law.'

To answer the question, 'What limitations on human rights can be justified?' we must consider the type of society we want to live in. Those charged with the responsibility of justifying limitations on human rights – which on a day-to-day basis, is mostly workers in public entities and parliamentarians – are therefore playing a critical role in determining:

- the quality of our democracy,
- the extent of our freedoms, and
- the level of dignity afforded to all people in Queensland.

In performing the justification analysis, they are answering the question, on behalf of our society, as to how much we actually do value freedom, equality and human dignity.



However this role is not limited to frontline officers, directors-general, and members of parliament. Under the *Human Rights Act*, courts also have a direct role, and therefore, the legal profession has an indirect influence over how we shape the society in which we will raise our children and grandchildren, and care for marginalised, elderly, and vulnerable people in our community.

Today, I offer encouragement to the legal profession to take up its role in shaping the quality of our democracy and determining the levels of inequality and indignity that we are not prepared to walk past.

But, before I come to how the profession can play its part, let's briefly reflect on the first year of the Act. For those of you who are interested, you can read about it in the first annual report on the operation of the Act, entitled *Putting People First*, which we expect to be tabled in parliament today.

Could you have scripted a better test for the *Human Rights Act* than Queensland amid a global pandemic? I must admit that in the early days I didn't have any inkling of what was coming... Then I was contacted by the Queensland Police Service to discuss potential human rights issues involved in monitoring self-isolation of people newly arrived from China. As we know, the situation rapidly evolved, and almost overnight people were grappling with a host of incursions into their rights – starting with freedom of movement – during lockdown.

People with disabilities were denied recognition and equality before the law, as well as the right to security of the person, when their carers were not designated as essential workers. More of their rights were foregone when residential service providers were authorised to lock the gates, doors and windows where they live.

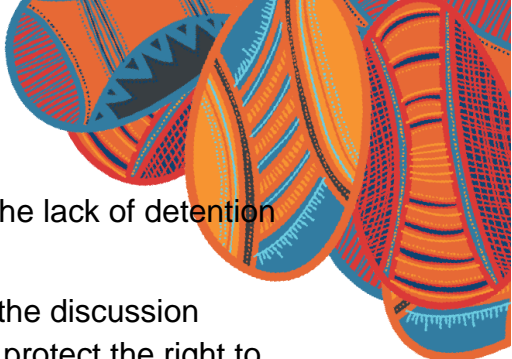
People in aged care and prisons had visiting arrangements curtailed, severely impacting on their right to protection of families and children.

As the pandemic progressed, people who arrived from interstate or overseas were placed in mandatory hotel quarantine for 14 days and many were, and continue to be, denied the right to humane treatment when deprived of liberty, by not having access to fresh air or exercise.

Our courts were forced to abandon jury trials and make other radical changes to procedure that potentially affect the right to a fair hearing and rights in criminal proceedings. Several people complained that their right to vote (which is part of the right to take part in public life) had been unlawfully impeded at the March 2020 local government elections.

But, on the positive side, the June Black Lives Matter rally saw Queensland Police deftly accommodate 30,000 protesters exercising their rights to peaceful assembly and freedom of expression.

One of the impacts that escaped a lot of attention involved children from disadvantaged households, who were unable to attend school remotely and were denied their right to access education. Disturbingly, once again, some children spent



weeks in the Ipswich watch house – this time, not because of the lack of detention centre beds, but because of public health Directions.

When considering the COVID-19 response and human rights, the discussion invariably starts with the positive obligation on governments to protect the right to life. Clearly, the Queensland Premier and her Chief Health Officer take this obligation seriously. In fact, not only has Queensland Health acknowledged its positive obligation to ‘take all steps necessary’ to protect life, it has characterised the right as, and I quote:

*‘an absolute right which must be realised, and outweighs the potential impacts on any one individual’s rights’.*¹

This is an interesting approach to take given other threats to life posed by the pandemic, such as the surge in incidents of domestic violence, which has seen 48 women killed in Australia this year.

As a matter of Queensland law, human rights are not absolute, and may be limited by restrictions that are reasonable and demonstrably justified. Therefore, despite the overarching duty to save lives by preventing contagion, a public health emergency is not a blank cheque to override individual human rights.

Rather, the public health response must:

- be proportionate to the threat posed,
- take account of the other risks posed to public health (such as the mental health impacts of locking people in rooms not designed for detention), and
- employ the least restrictive options.

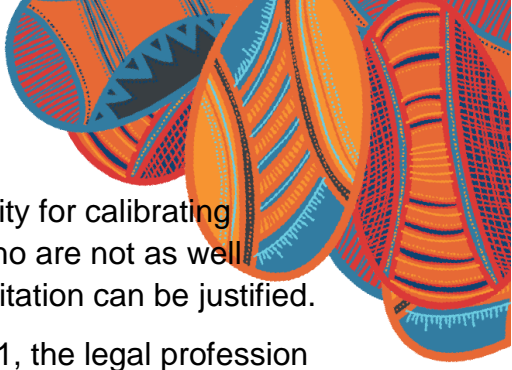
The Queensland public has shown a level of trust in the Chief Health Officer to the extent that they have, mostly, been prepared to ‘accept the science’ in the justifications offered by her. Undoubtedly, this relationship of trust has underpinned compliance with restrictions that have served Queensland so well. Yet, as the pandemic rolls on, public confidence would clearly be improved if the evidence, *demonstrably* justifying restrictions on rights was ventilated more openly.

Role of the courts

This is where the capacity of the courts to robustly test evidence may be required. During Clive Palmer’s constitutional challenge, the High Court handed the Federal Court the job of determining whether border closures were ‘reasonably necessary’ to achieve the legitimate end of public health. Justice Rangiah’s findings and the High Court’s subsequent ruling clearly demonstrate that there is an important role for the law in protecting human rights.

Moreover, the experience of other jurisdictions suggests that developing a strong human rights jurisprudence is a critical ingredient for building an authentic human

¹ *Putting people first: the first annual report on the operation of Queensland’s Human Rights Act 2019 2019-20*, p 94.



rights culture. Without the leadership of the Courts, responsibility for calibrating tolerable impacts upon our human rights will be left to those who are not as well placed to make evidence-based assessments of whether a limitation can be justified.

Following the introduction of the *Anti-Discrimination Act* in 1991, the legal profession took to it with vigour. Legal Aid funded early cases and important decisions were handed down by the then Anti-Discrimination Tribunal, presided over by members featuring the names of some of Queensland's finest jurists: Holmes, Sofronoff, Atkinson, Keim, and indeed Justice Rangiah.

So on the eve of Human Rights Day, I appeal to you to consider the *Human Rights Act* in all the work that you do. Knowing the talent assembled in this room and more broadly within Queensland's legal profession, I have no doubt you will play your part in shaping a 'free, democratic and enlightened society' that truly values human rights.

Thank you.