

SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER:

Applicant: ATTORNEY-GENERAL (QUEENSLAND)

and

First Respondent: ANDREW PAUL MCKINNON

and

Second Respondent: JONATHAN SRI

and

Third Respondent: JARRAH ROBERT KERSHAW

and

Fourth Respondent: LAURA ANN LOUISA HARLAND

OUTLINE OF SUBMISSIONS

FOR THE QUEENSLAND HUMAN RIGHTS COMMISSION (INTERVENING)

Introduction

1. The Attorney-General of Queensland applies under s 7 of the *Attorney-General Act 1999* and at common law for an order to protect public rights. Essentially, the equitable and/or inherent jurisdiction of this Court is sought to be invoked to restrain or prohibit the holding of a public ‘sit-in’ protest, in order to uphold the rights of the public (and essential services) to traverse the Story Bridge and to enforce, in advance of a threatened breach, the *Movement and Gathering Direction (No 2)* issued by the Chief Health Officer under s 362B of the *Public Health Act 2005* (Qld).
2. The Queensland Human Rights Commission (‘QHRC’) intervenes pursuant to s 51 of the *Human Rights Act 2019* (‘the HR Act’).¹ The question of law arising in relation to the operation of the HR Act is the extent to which this Court, in exercising its equitable and/or inherent jurisdiction, will be required by s 5(a) of the HR Act to directly apply human rights. There are also a number of related legal principles and statutory

¹ Under s 51(1)(a) and (2) of the *Human Rights Act 2019* (HR Act), the commission may intervene and be joined as a party where a “question of law arises that relates to the application of” the Act.

expressions which are consistent with, and protective of, the right to peaceful assembly. These rights are also relevant to the discretion called upon.

3. Brief submissions on the implications of the HR Act, in the context of these broader issues follow. The QHRC has prepared these submissions on an urgent basis.

The application

4. This is an unusual application. The effect of the orders sought is to prevent a group of individuals from assembling in order to engage in peaceful protest, a right that has been recognised not only in the HR Act, but also the *Peaceful Assembly Act 1992*. However, the proposed protest is one which will impede traffic on a major road, be an inconvenience to motorists on their Saturday outings, potentially impede cross-river travel between hospitals, and potentially involve a gathering of more than 100 people, in breach of the Public Health directive. The justifications proposed by the Applicant to seek this unusual limitation on fundamental civil and political rights is thus based on both public health grounds and the right to drive on a major road.
5. While it may be within the power of the Attorney-General to seek an order of this kind to prevent the potential commission of criminal acts,² it is for the Court to determine if it has the jurisdiction to grant the application and whether in the exercise of its discretion it should do so. The issuing of an injunction to restrain an actual or threatened breach of criminal law is 'exceptional'.³
6. The public health grounds are more compelling. If the evidence supports an unacceptable increased safety risk, that is, that the increased risk could not be mitigated to an acceptable level through other precautions (as has occurred in respect of, for instance, football games), then public health grounds may provide sufficient reason to make an order.

The *Peaceful Assembly Act*

7. The fact that the organisers have not obtained authorisation under the PA Act deprives the Commissioner of Police of the capacity to oppose a protest being held or obtain a non-authorisation order from the Magistrates Court. However, the absence of authorisation under that Act does not render a gathering unlawful.
8. The PA Act recognises a person's right to assemble peacefully in a public place: ss 2(1)(a) and 5(1). The purpose of the Act is to recognise this (s 2(a)), ensure, as far as appropriate, that persons may exercise that right: s 2(b), and by s 2(c), ensure that such rights are subject only to restriction where necessary and reasonable in a democratic society, in the interests of:

² *Cooney v Ku-ring-gai Corporation* (1963) 114 CLR 582.

³ *Commonwealth v John Fairfax & Sons Ltd* ("*Defence Papers case*") [1980] HCA 44 [19] citing *Gouriet v Union of Post Office Workers* (1978) AC 435; see also *Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* [1998] HCA 49 at [41].

- (a) Public safety;
- (b) Public order; or
- (c) The protection of rights and freedoms of other persons.

These objects are the relevant criteria given for decisions whether or not to authorise a public assembly under the PA Act: s 16.

9. The rights recognised in the PA Act are essentially consistent with the right to peaceful assembly protected by the HR Act (s 22). Although, as set out below, there are additional rights and mechanisms set out in the HR Act designed to ensure human rights are considered, and any limits are scrutinised in the proportionality framework provided by s 13 of the HR Act.
10. The PA Act does not require that any gathering be authorised. Rather, it expresses the right, and provides a procedure where the right may be exercised in a process that is formally authorised, in order to obtain immunity from liability (civil and criminal) for actions engaged in at the gathering: s 6. Clearly, the PA Act appreciates that even for protestors engaging in peaceful protest activity that does not block a road, this can open them up to a number of, usually minor, civil and criminal wrongs; trespass, nuisance etc.
11. Where protests authorised under the PA Act, the police then often provide safety and security assistance, even logistical assistance, to ensure that the protest proceeds in a way that minimises inconvenience (often to motor vehicular traffic) and is safe.
12. The PA Act is a wholly discretionary Act with the stated aim of facilitating the use of the right.
13. Where a protester chooses to avoid the PA Act process, there may or may not be the commission of relatively minor offences (trespass, nuisance etc.) which may be policed.

The Human Rights Act 2019

The relevance of human rights

14. Under s 5(2)(a) of the HR Act, the Act applies to Courts exercising judicial functions ‘to the extent the Court has functions under part 2 and part 3, division 3’.
15. The Victorian Supreme Court, in considering the equivalent provision in the *Charter of Rights and Responsibilities 2006* (‘the Charter’), has held that courts will directly enforce human rights that relate to legal proceedings. A ‘functional’ approach is taken to the question as to whether the provision applies to a court. For example, in *Matsoukatidou v Yarra Rangers Council*, it was held that courts must directly apply the right to equality before the law in considering modifications of processes to accommodate the needs of self-represented litigants or parties with particular needs.⁴

⁴ *Matsoukatidou v Yarra Ranges Council* [2017] VSC 61.

16. In other cases, whether by reference to the Charter equivalent of s 5 (s 6) or not, substantive rights set out in the Charter have been taken into account by courts in bail applications,⁵ sentencing hearings,⁶ conducting child protection proceedings⁷ and in making suppression orders.⁸ The latter category is perhaps of most relevance, as suppression orders are also made at least in part in the exercise of the court's inherent jurisdiction.
17. It is not suggested that this Court must make a decision that is compatible with human rights (c.f. s 58 in its application to administrative acts). However, in considering whether relief should be given, the impact on human rights is a relevant factor.
18. Further, to the extent the human rights in the HR Act make express such rights as have long been accepted, at common law and as an assumption underlying legislation such as the PA Act, the breach of these rights is a weighty factor when the Applicant is seeking a discretionary remedy that is of a rather exceptional kind.

The human rights effected

19. Given the urgency in which these proceedings have been brought, the QHRC provides submissions primarily on the right of peaceful assembly and only briefly deals with other rights engaged.

Right of peaceful assembly – s 22(1) HRA

20. The HR Act consolidates and establishes statutory protections for certain human rights recognised under international law including those drawn from the *International Convention on Civil and Political Rights* (ICCPR).⁹ Section 48(3) of the HR Act states that international law and the judgements of domestic, foreign and international courts and tribunal relevant to a human right may be considered in interpreting a statutory provision.
21. The right of peaceful assembly is drawn from Articles 21 and 22 of the ICCPR and is specifically limited to *peaceful* assembly, which does not involve violence. It upholds individuals' right to gather for a common purpose as a means to exchange information, express opinions and participate in a protest or demonstration. Additionally, it protects the right to 'join or form a group with like-minded people'.¹⁰
22. The UN Human Rights Committee has stated that the scope of the right to peaceful assembly includes ensuring 'independent and transparent oversight of all bodies involved with peaceful assemblies, including through timely access to effective

⁵ *Application for Bail by HL* [2016] VSC 750 at [68]-[79], *DPP v SE* [2017] VSC 13 at [12], [21].

⁶ *DPP v SL* [2016] VSC 714 at [5]-[6].

⁷ *Secretary to the Department of Human Services v Sanding* (2011) 36 VR 221 at [165]-[167].

⁸ *X v General Television Corporation Pty Ltd* (2008) 187 A Crim R 533, [2008] VSC 344 at [34]-[45]; *News Digital Media Pty Ltd v Mokbel* (2010) 30 VR 248 at 259 [38].

⁹ Explanatory Memorandum, Human Rights Bill 2018, p 2.

¹⁰ Explanatory Notes, Human Rights Bill 2018, p 21.

remedies, including judicial remedies or national human rights institutions, with a view to upholding the right, before, during and after an assembly'.¹¹

23. The UN Human Rights Committee has said recognition of the right to peaceful assembly imposes an obligation on the state to accommodate the exercise of the right and its repercussions.¹² This requires refraining from unwarranted interference.¹³ Because political speech enjoys particular protection as a form of expression, assemblies with a political message should enjoy a heightened level of accommodation and enhanced protection.¹⁴ In terms of disruption, the Human Rights Committee observes:

However, peaceful assemblies can sometimes be used to pursue contentious ideas or goals. Their scale or nature can cause disruption, for example of vehicular or pedestrian movement or economic activity. These consequences, whether intended or unintended, do not call into question the protection such assemblies enjoy. To the extent an event may create such disruptions or risks, these have to be managed within the framework of the Covenant.¹⁵

24. The Human Rights Committee suggests that there is a two-step process to engage the right:
- 1) Is the assembly 'peaceful'? If so, the State must respect and ensure the rights of the participants. Violence in the context of article 21 typically entails the use by participants of physical force against others that is likely to result in injury or death, or serious damage to property. Mere pushing and shoving or disruption of vehicular or pedestrian movement or daily activities do not amount to "violence".
 - 2) It must be established whether or not any restrictions applied to the exercise of the right are legitimate in that context.¹⁶
25. The rights to peaceful assembly and freedom of association overlap with the Constitutional implied freedom of political communication. In Victoria, it appears that these rights and freedoms operate consistently, with the same proportionality analysis being used to determine whether the right/freedom has been infringed.

Freedom of association – s 22(2) HRA

26. Section 22, in sub-s (2) also protects the related freedom of association.

¹¹ UN Human Rights Committee, *General Comment No 37*, UN Doc CCPR/C/GC/37 (27 July 2020) 1 [3].

¹² UN Human Rights Committee, *General Comment No 37*, UN Doc CCPR/C/GC/37 (27 July 2020) [47].

¹³ UN Human Rights Committee, *General Comment No 37*, UN Doc CCPR/C/GC/37 (27 July 2020) [8].

¹⁴ UN Human Rights Committee, *General Comment No 37*, UN Doc CCPR/C/GC/37 (27 July 2020) [32].

¹⁵ UN Human Rights Committee, *General Comment No 37*, UN Doc CCPR/C/GC/37 (27 July 2020) [7] (footnotes removed).

¹⁶ UN Human Rights Committee, *General Comment No 37*, UN Doc CCPR/C/GC/37 (27 July 2020) [11].

Freedom of expression – s 21 HRA

27. The second limb of this right – freedom of expression – also has some parallels with the Constitutional implied freedom of political communication, but the Constitutional right is more limited in its application – as a limit upon legislative power, and only for political communications. Section 21 provides for the freedom to include information and ideas of all kinds, and in words, writing, print, art or any other medium.

Right to take part in public life – s 23 HRA

28. This right is modelled on Article 25 ICCPR, conferring a right to participation in the democratic system.¹⁷ It provides the right, and the opportunity, without discrimination, to participate in the conduct of ‘public affairs’ either directly or through freely chosen representatives: s 23.
29. What constitutes public affairs is not defined in the Act, but as the provision is modelled on Article 25 ICCPR, it is likely that public affairs refers to all features of public administration and allows for both direct and indirect participation. Direct participation includes participation in public consultations, debates and assemblies. Indirect participation is exercised through ‘freely chosen representatives’ when governing and policy decision-making.

Limits upon rights

Reasonable and Demonstrably Justifiable Limitations on Rights

30. Section 8 of the HR Act states that an act, decision or statutory provision is compatible with human rights if it does not limit a right, or only limits a right to the extent that is reasonable and demonstrably justifiable under s 13. Section 13 requires a consideration of the purpose of the limitation and whether there are any less restrictive ways to achieve the purpose.¹⁸
31. According to the UN Human Rights Committee, the prohibition of a specific assembly can be considered only as a measure of last resort. Less restrictive measures that may be considered include allowing an assembly to take place and deciding afterwards whether measures should be taken regarding possible transgressions during the event, rather than imposing prior restraints in an attempt to eliminate all risks.¹⁹

Public Health

32. The protection of public health is particularly significant at this time. The UN Human Rights Committee acknowledges that this ground may exceptionally permit restrictions

¹⁷ Ibid.

¹⁸ See, as applied in the context of statutory construction, *AIP v ECQ* [2020] QSC 54.

¹⁹ UN Human Rights Committee, *General Comment No 37*, UN Doc CCPR/C/GC/37 (27 July 2020) [37]

to be imposed, for example where there is an outbreak of an infectious disease and gatherings are dangerous.²⁰

33. The QHRC notes that a public health emergency has been declared in Queensland²¹ and there is a prohibition in place under the *Movement and Gathering Direction (No 2)* against gatherings of more than 100 people. There is the potential for this direction to be infringed by the planned protest.
34. As to the COVID-related safety risks associated with the event, there is no evidence that has been tendered in this regard. That said, the risks posed by large crowds have been widely discussed by experts and commentators in the media. Equally clear, however, those risks can be mitigated (e.g. masks, use of hand sanitizer, adherence to social distancing).
35. The *Movement and Gathering Direction (No 2)* allows for some exemptions to the rule against more than 100 gathering, either on a case by case basis (18(n)) or as expressly listed in (18), for instance (i): a business, facility or service operating in accordance with other direction, or in accordance with the *COVID Safe Framework*. Stated examples include shopping centres; (k) at schools etc; (m) “at an outdoor place where persons may be present for the purposes of transiting through the place. Example Queen Street Mall”. Such exemptions have allowed for crowds in the thousands to gather in stadiums to attend football games.

Public Safety

36. For the protection of public safety to be invoked as a ground for restrictions on the right of peaceful assembly under international law, the assembly must pose a real and significant risk to the safety of persons (to life or security of person) or a similar risk of serious damage to property.²²

Public order

37. For the purposes of Article 21 of the ICCPR, public order refers to the sum of the rules that ensure the proper functioning of society, or the set of fundamental principles on which society is founded, which also entails respect for human rights, including the right of peaceful assembly. Peaceful assemblies can in some cases be inherently or deliberately disruptive and require a significant degree of toleration.²³

Restrictions on the rights and freedoms of others

38. Restrictions imposed for the protection of the rights and freedoms of others may relate to the protection of human rights of people not participating in the assembly.²⁴

²⁰ UN Human Rights Committee, *General Comment No 37*, UN Doc CCPR/C/GC/37 (27 July 2020) [45]

²¹ See *Public Health (Further Extension of Declared Public Health Emergency—COVID-19) Regulation (No. 3) 2020*

²² UN Human Rights Committee, *General Comment No 37*, UN Doc CCPR/C/GC/37 (27 July 2020) [43]

²³ UN Human Rights Committee, *General Comment No 37*, UN Doc CCPR/C/GC/37 (27 July 2020) [37] [44]

²⁴ UN Human Rights Committee, *General Comment No 37*, UN Doc CCPR/C/GC/37 (27 July 2020) [47]

39. In the present context the rights to others beyond extend beyond the inconvenience of the Story Bridge being closed, and extend to their right to life if there were to be a risk of transmission of COVID-19 by the gathering of protesters or by an ambulance not being able to get through. The numbers of people assembling may be limited if there is a clear connection with a legitimate ground, ‘for example where public safety considerations dictate a maximum crowd capacity for a stadium or a bridge, or where public health considerations dictate physical distancing’.²⁵
40. Alternative means for protesters to communicate their message has also been found to be a relevant consideration under the equivalent rights to expression and freedom of peaceful assembly under the European Convention on Human Rights.²⁶

Conclusion

41. As the recognition of the right to peaceful assembly imposes an obligation on the State to accommodate the exercise of the right and its repercussions, the onus lies on the Applicant to demonstrate that the limitation sought by the order is reasonable and proportionate.
42. On the evidence before the Court to date, it is respectfully submitted that this burden has not been satisfied.

P Morreau

Counsel for the QHRC (intervening)
8 August 2020

²⁵ UN Human Rights Committee, *General Comment No 37*, UN Doc CCPR/C/GC/37 (27 July 2020 [59]).

²⁶ See articles 10 and 11 of the European Convention on Human Rights. In *Appleby v United Kingdom* (2003)

³⁷ EHRR 38, the European Court of Human Rights held there was not violation of the equivalent right to peaceful assembly as the protesters had other means available to them to exercise their right to protest including media exposure and doorknocking.