

IN THE SUPREME COURT OF QUEENSLAND

Registry: Brisbane
Number: 9554/23

Applicant YOUTH EMPOWERED TOWARDS INDEPENDENCE INCORPORATED

 and

First Respondent COMMISSIONER OF QUEENSLAND POLICE SERVICE

 and

Second Respondent CHIEF EXECUTIVE, DEPARTMENT OF YOUTH JUSTICE,
 EMPLOYMENT, SMALL BUSINESS AND TRAINING

Submissions on behalf of the Queensland Human Rights Commission, intervening

Introduction

1. The Queensland Human Rights Commission (the **Commission**) intervenes in this proceeding pursuant to s 51 of the *Human Rights Act 2019* (Qld) (**HRA**).
2. The question under the HRA that squarely arises on the Applicant's argument is the interpretation of s 56 of the *Youth Justice Act 1992* (Qld) (**YJA**) in light of s 48 HRA.¹
3. Whilst it is not argued by the Applicant, the Commission further submits that s 5 HRA also applies to the Court's decision whether to order the release of the children into the custody of the Second Respondent, to require the Court to consider and apply the subject children's human rights – to apply their rights liberty and security (s 29), and consider their rights to humane treatment (s 30) and to protection, in their best interests (s 26(2)) when deciding the orders to be made.

The *Youth Justice Act 1992*

4. The YJA exclusively governs the care and control of children in detention: ss 2, 261.
5. Alongside ss 54 and 210, s 56 YJA is designed to ensure the safe custody and wellbeing of children who are held in detention, in particular, by placing them under the care and control of the Second Respondent, who holds particular responsibilities to that end: s 263.
6. Section 54 applies in the short period between arrest and first appearance, permitting a child to be held *either* in the custody of the First Respondent or the Second Respondent: s 54(1). However, even this permission is tightly controlled – it is subject to an obligation on the First Respondent to “*make arrangements*” with the Second Respondent for such a child to, “*wherever practicable*”, be held in a youth detention centre: s 54(2); with a correlative obligation upon the Second Respondent to “*take the action necessary to hold the child in custody*” under the arrangement: s 54(3).

¹ Notice issued to the Commission and to the Attorney-General (Qld) by the Applicant under s 52 HRA. Written submissions filed by the Applicant indicate that only the s 48 interpretation issue is pressed.

7. Section 210 deals with sentenced children. It provides that they “*must serve the period of detention in a detention centre*”: s 210(1). A warrant is to issue directing the First Respondent to take the child into its custody “*and deliver the child to a detention centre decided by the chief executive*”: s 210(2).
8. Section 56 applies to the children the subject of these proceedings. The YJA requires that when a child is denied bail and remanded in custody, that child is to be remanded “*into the custody of*” the Second Respondent: s 56(1). Further, the First Respondent is ordered “*to deliver the child as soon as practicable into the custody of*” the Second Respondent: s 56(4).
9. Section 265(1) then requires the Second Respondent to “*decide*” the detention centre at which a child ordered to be detained “*is to be detained*”.
10. Sections 54, 56 and 210 have been in their current form since the inception of this legislation.² So too, the importance of the Youth Justice principles, which underlie the operation of the Act: s 3.
11. The Second Reading speech indicated that the Act was designed to, relevantly:³
 - (a) emphasise non-custodial options, diversion from the criminal justice system, with detention as a last resort;
 - (b) ensure the general principles of juvenile justice “*underpins each and every provision*”;
 - (c) “*recognise that children may be vulnerable when being dealt with by persons in authority, such as police and court officials*”;
 - (d) ensure decisions affecting children be “*implemented in timeframes that children can understand*”, with “*due consideration*” given to “*age, maturity and cultural background*”;
 - (e) require that children sentenced to detention “*will no longer be able to be detained in prison... consistent with the United Nations standard minimum rules for the administration of juvenile justice, commonly known as the Beijing Rules*”;
 - (f) impose, in an open and transparent way, obligations upon the Second Respondent in relation to children in detention; and
 - (g) specifically as to ss 54 and 56, clarify the custodial responsibilities for children as between the First and Second Respondents.
12. Subsequent amendments to the YJA have expressly referred to human rights in particular instances,⁴ and more recently, specifically overridden the HRA in respect of some decisions under the Act.⁵ The specific reference to human rights elsewhere was to confirm and not exclude their relevance otherwise.⁶

² As the *Juvenile Justice Act 1992* (Qld), which came into force in 1993.

³ Hansard, 18 June 1992, pp 5922-2928.

⁴ Section 52AA and 263(7) and (8).

⁵ Sections 150A, 150B, 246A.

⁶ Explanatory Notes, *Youth Justice and Other Legislation Amendment Bill 2021*, pp19-20.

Interpretation under s 48 of the *Human Rights Act 2019*

13. Subject to an override declaration,⁷ s 48(1) HRA applies to all statutory provisions, whenever enacted.⁸ Its statutory ‘command’ has two aspects:⁹
 - consistency of interpretation with the statutory provision’s intended meaning; and
 - an interpretation which is compatible with human rights.
14. A statutory provision will be ‘compatible with human rights’ if it (s 8):
 - does not limit a human right; or
 - limits a human right only to the extent that is reasonable and demonstrably justified in accordance with section 13. This latter aspect calls for proportionality analysis.
15. The Explanatory Note to the *Human Rights Bill 2018* says:

a court may not depart from the purpose of a provision, but “*may depart from the literal or grammatical meaning of the words used in exceptional circumstances*”.¹⁰
16. As recently indicated by the Court of Appeal in *Athwal v State of Queensland*,¹¹ s 48 does not require departure from established understandings of the interpretative function and is to be applied alongside other statutory rules. Consistent with the ‘modern approach’ to statutory interpretation that is well-established in the courts of this country,¹² human rights are to be kept in mind when a statute is construed, as part of the context, considered at the outset.¹³
17. In this way, French CJ in *Momcilovic v R*¹⁴ indicated, s 32 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**Charter**) would operate like the principle of legality but with a wider field of operation. There is a strong presumption that Parliament did not intend a statute to mean something which would be incompatible with those rights.¹⁵ This approach has been adopted alongside the second principle discussed next in post-*Momcilovic* caselaw in Victoria.¹⁶ As McGrath J said in *R v Hansen*¹⁷ of the interpretation provision in s 6 of the *Bill of Rights Act 1990* (NZ),¹⁸ such provisions can be seen to make the State’s commitment to human rights “*part of the concept of purposive interpretation.*”¹⁹

⁷ Section 48(5) of the *Human Rights Act 2019* (Qld) (**HRA**).

⁸ Section 108(1) HRA.

⁹ *Australian Institute for Progress Ltd v Electoral Commission of Queensland* (2020) 4 QR 31, 72 [114].

¹⁰ Explanatory Note, *Human Rights Bill 2018*, 30-31.

¹¹ *Athwal v State of Queensland* [2023] QCA 156 at [91], [93].

¹² *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309 at [19]; *Mills v Meeking* (1990) 169 CLR 214; *The Queen v A2, The Queen v Magennis, The Queen v Vaziri* (2019) 93 ALJR 1106 at [52]-[53].

¹³ *Momcilovic v R* (2011) 245 CLR 1 at [565].

¹⁴ *Momcilovic* (ibid) at [38]-[40], [50]-[51], [61]-[62] (French CJ).

¹⁵ *R (Wilkinson) v Inland Revenue Commissioners* [2005] 1 WLR 1718 at 1723 [17]; [2006] 1 All ER 529 at 535, cited in *Momcilovic v R* at [47].

¹⁶ *Slaveski v Smith* (2012) 34 VR 206 at [23]-[24]; *Nigro & Ors v Secretary to the Department of Justice* at 382-383 [82]-[85].

¹⁷ *R v Hansen* [2007] 3 NZLR 1.

¹⁸ Section 6 of the *New Zealand Bill of Rights Act 1990* provides: “Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.”

¹⁹ *R v Hansen* (supra) at [252].

18. The inclusion of s 8, in contrast to the prevailing approach in Victoria and the ACT, and consistent with the Explanatory Note to the Queensland HRA “means that it is clear that the court must apply a proportionality analysis when interpreting a statutory provision under cl 13”.²⁰
19. In *R v Momcilovic*,²¹ Justices Gummow (with whom Hayne J agreed on this point²²) and Bell²³ incorporated justified limits into the interpretative task under the Victorian *Charter*, Gummow J quoting the following part of the decision of McGrath J in *Hansen*:²⁴

As between ss 5 and 6 it will usually be appropriate for a Court first to consider whether under s 5 there is scope for a justified limitation of the right in issue. The stage is then set for ascertaining if there is scope to read the right, as modified by a justifiable limitation, as consistent with the other enactment.

20. That is, where the statute limits human rights, the question shifts to whether the legislative limit is proportionate²⁵ and if not, whether consistently with its purpose, it can be interpreted in a way that only limits the relevant human rights to that extent.

Relevant human rights

21. Rights are to be construed in the “*broadest possible way*” by reference to the fundamental values and interests expressed in them and absent any limitation.²⁶ This is consistent with a beneficial approach to construction of the provisions of the HRA that bestow, protect or enforce human rights.²⁷

Section 29 – Right to liberty

22. The right to liberty in s 29(1) and (2) is modelled on Art 9 of the *International Convention on Civil and Political Rights (ICCPR)*. By it, every person has the right to liberty and security (sub-s 1), the right not to be deprived of liberty except on grounds, and in accordance with procedures established by law (sub-s 3) and protection from arbitrary arrest or detention (sub-s 2).
23. As explained by Bell J in *DPP (Vic) v Kaba*,²⁸ at common law, liberty is a foundational value ranging from the protection of the person from restraint, from assault or other non-consensual physical treatment, from restrictions upon movement, from intrusion of privacy etc. Liberty is so highly valued – an individual’s dignity, right to self-determination and freedom – that *any* intrusion by the State must be justified by law. Whilst an individual is free to do as they please except to the

²⁰ Explanatory Note, *Human Rights Bill 2018*, 31.

²¹ *Momcilovic v R* (supra).

²² *Momcilovic v R* at [280] (Hayne J).

²³ *Momcilovic*, at [678], [681]-[684].

²⁴ *R v Hansen* (supra) at 65 [191].

²⁵ *R v Hansen* at [57]-[62] (Blanchard J), [88]-[92] (Tipping J), [191]-[192], [252] (McGrath J); *Momcilovic* at [168] (Gummow J, with whom Hayne J agreed, at [280]); [678], [681]-[684] (Bell J); *Australian Institute for Progress Ltd v Electoral Commission of Queensland* (2020) 4 QR 31 at [114]-[119].

²⁶ *Owen-D’Arcy v Chief Executive, Queensland Corrective Services* (2021) 9 QR 250 (Martin J) (*Owen-D’Arcy*) at [130], citing *DPP (Vic) v Kaba* (2014) 44 VR 526 (Bell J) (*Kaba*) at 556 [105] and *Re Kracke and Mental Health Review Board* (2009) 29 VAR 1 (Bell J) (*Re Kracke*) at 29 [79].

²⁷ *Owen D’Arcy* (ibid) at [118]-[120].

²⁸ *Kaba* (supra).

extent sanctioned by law, there must be lawful authority for all State actions taken to limit this.²⁹ See also to similar affect, Applegarth J's comments in *Attorney-General v Grant (No 2)*.³⁰

Section 19 – Freedom of movement

24. The right to freedom of movement falls alongside the right to liberty. It protects the right to move freely, a right which has long been incorporated within the principle of personal liberty embraced within the law of habeas corpus.³¹
25. The right is also based upon Art 12(1) *ICCPR*, and described in General Comment No. 27 as a “*an indispensable condition for the free development of a person*”. Whilst its exercise is subject to permissible limitations, the importance of the principle must not be nullified.³²

Section 30(1) – Right to treatment with humanity and respect

26. Section 30(1) HR Act requires that all persons deprived of liberty be treated “*with humanity and with respect for the inherent dignity of the human person.*” The right recognises the particular vulnerability of persons in detention.³³
27. Modelled on Article 10(1) *ICCPR*, it places a positive obligation on the State to ensure that persons detained by it do not suffer any hardship or constraint more than that which is a consequence of the imprisonment itself. The Explanatory Notes refer to this right as providing “*certain minimum standards of treatment*” for incarcerated persons.³⁴ It is “*the starting point*” for consideration of detainee rights.³⁵
28. The HRA also specifically provides for the right of a child detained to be segregated from detained adults, as a mandatory minimum condition: s 33(1). It also provides for the right of a child who is convicted of an offence to be ‘treated in a way that is appropriate for the child’s age’: s 33(3). These specific rights may arise for consideration in any particular case, but also serve to give content to the right in s 30(1) in its application to children. The age of the person to whom the treatment is given understandably affects the minimum threshold applicable.³⁶

Section 26(2) – Right of the child to protection

29. The right in s 26, encompassing the protection of families as a fundamental unit, and the protection of children in their best interests, is modelled on Articles 23(1), 24(1) and 24(2) of the *ICCPR*. As

²⁹ *Kaba* at 542-543, citing *Entick v Carrington* (1765) 95 ER 807, 817-818; *Somerset v Stewart* (1772) 98 ER 499, 510; *Attorney-General v Guardian Newspapers (No 2)* [1990] 1 AC 109, 283; *Watson v Marshall and Cade* (supra); LexisNexis, *Halsbury’s Laws of England*, vol 20 (1 March 2014) Constitutional and Administrative Law [31]; Lord Woolf et al, *De Smith’s Judicial Review*, Sweet & Maxwell, 7th ed (2013) 253 [5-025]; *Re Somerset County Council; Ex parte Fewings* [1995] 1 All ER 513, 524; *Hamed v R* [2012] 2 NZLR 305, 323 [24]; *Clough v Leahy* (1904) 2 CLR 139, 157; *Williams v R* (supra) at 292.

³⁰ *Attorney-General v Grant (No. 2)* [2022] QSC 252 (*Grant (No. 2)*) at [163].

³¹ *Woods v DPP (Vic)* (2014) 238 A Crim R 84 at [7].

³² UN Human Rights Committee, *ICCPR General Comment No. 27: Article 12 (Freedom of Movement)*, 67th sess, UN Doc CCPR/C/21/Rev.1/Add 9 (2 November 1999) at [1]-[2].

³³ *Castles v Secretary of the Department of Justice* (2010) 28 VR 141 (*Castles*), [93], [108].

³⁴ *Human Rights Bill 2018*, Explanatory Notes, p25.

³⁵ *Castles* at [108].

³⁶ *Certain Children (No 2)* (2017) 52 VR 441, 519 [250]; *Owen-D’Arcy* at [186].

is emphasised in the Explanatory Notes to the HRA, it involves a positive obligation stronger than non-interference.³⁷

30. The “*fundamental principle*” of the best interests of the child reflected in the HRA is derived from the Convention on the Rights of the Child (CROC), which recognises, relevantly, “*that children are especially vulnerable to physical and emotional harm*” in custodial environments. As noted by Bell J in *Woods v DPP*:³⁸

The detention of young people on remand can have deleterious consequences for them and the community which are out of all proportion to the purpose of ensuring appearance at trial and protecting the community. It separates them from their families and the community, disrupts their education and employment, causes them to associate with other young offenders at a vulnerable time in their lives, often (as in the present case) leads to them being held in a police lock-up rather than a youth detention facility, deprives them of access to therapeutic programs and increases the risk of them being given a sentence of incarceration.

31. The principle also provides the basis for stipulation of appropriate conditions for children in custody. Accordingly, the CROC requires state parties to ensure:³⁹
- (a) there are separate facilities for children deprived of their liberty, with distinct child-centred staff, personnel, policies and practices;
 - (b) the child’s right to maintain contact with family;
 - (c) a physical environment and accommodation in keeping with the rehabilitative aim of residential placement, with due regard to children’s needs for privacy, stimuli, opportunities to associate with peers, and participate in sports, physical exercise, arts and leisure activities;
 - (d) the child’s right to education is met;
 - (e) there is access to adequate medical care; and
 - (f) facilitation of contact with the child’s wider community.
32. The United Nations “*Standard Minimum Rules for the Administration of Juvenile Justice* (‘*the Beijing Rules*’)”⁴⁰ further provide the framework under which legislation like the YJA operates, reflecting the focus, for child defendants, on rehabilitation, protection and diversion from the criminal justice system. The Beijing Rules reflect that treatment of children must be proportionate and cognisant of their best interests. As to detention in particular:
- (a) Rule 13.1 provides that detention should only be used as a measure of last resort and for the shortest possible period of time.

³⁷ Explanatory Notes, p22.

³⁸ *Woods* at [95].

³⁹ See *Re HL (No 2)* [2017] VSC 1 at [122].

⁴⁰ United Nations, *Standard Minimum Rules for the Administration of Juvenile Justice* (the Beijing Rules) GA 40/33, 29 November 1955.

- (b) Rule 13.2 provides that whenever possible detention pending trial shall be replaced by alternative measures such as close supervision, intensive care or placement with a family or educational setting or home.
 - (c) Rule 13.3 requires, relevantly, that children in detention pending trial are entitled to all rights and guarantees of other prisoners.⁴¹
 - (d) Rule 13.4 provides that children in detention pending trial shall be kept separate from adults.
 - (e) Rule 13.5 provides that whilst in custody, children shall receive care, protection and all necessary individual assistance (social, educational, vocational, psychological, medical and physical) that they may require in view of their age, sex and personality.
33. Accordingly, in *DPP v SL*, remarking upon the particular vulnerabilities of children in detention and the criminal justice system, as reflected under international law and within the *Charter*, Bell J indicated that “governments and courts must take and adopt all necessary actions and procedures to protect them from that harm and influence and ensure their effective participation in those processes.”⁴²
34. In a series of bail cases where the children had been housed at an adult facility in Victoria, it was accepted that it was “concerning” and “generally not considered to be in the best interests of a child deprived of liberty to be placed in an adult prison or other facility for adults.”⁴³

Submissions on construction of s 56

35. In *Campbell v NT (No 3)*, the order under consideration was to “be detained in a detention centre” with a warrant of commitment requiring him to be kept at the Don Dale Youth Detention Centre. The Act under consideration in that case did not contain provisions concerning the placement of youths who were sentenced. “However, the implication that the YJ Act requires that the detention which it authorises be detention in accordance with the provisions of the Act itself is very strong. The very fact that the provisions concerning the imposition of sentences of detention and the provisions concerning the management and operation of detention centres are contained in the one enactment is by itself an indication that this is so.”⁴⁴ Justice White of the Federal Court considered that s 150 of the NT YJA (providing for the giving of information to a child upon arrival at a YDC of the child’s rights and responsibilities) was “an explicit recognition that a detainee may have rights ...”.⁴⁵ These findings were made without the benefit of a statutory human rights regime, but merely due to the nature of the youth justice legislation.
36. Accordingly, his Honour concluded the tort of wrongful imprisonment was available to those already in custody but in the incorrect place, or subjected to greater restrictions, and this was consistent with the underlying principle that “the right to personal liberty cannot be impaired or

⁴¹ See in this regard the United Nations *Standard Minimum Rules for the Treatment of Prisoners* (Mandela Rules), GA 70/175, 17 December 2015.

⁴² *DPP v SL* [2016] VSC 714 at [7].

⁴³ *Re HL (No 2)* [2017] VSC 1 at [122].

⁴⁴ *Campbell v NT (No. 3)* [2021] FCA 1089 at [461].

⁴⁵ *Campbell v NT (No. 3)* (ibid) at [465].

taken away without lawful authority and then only to the extent and for the time which the law prescribes."⁴⁶

37. In a variety of contexts, courts have considered a legislative requirement that something be done "*as soon as practicable*" to be imprecise and flexible in its application, with its meaning dependant on the context and circumstances. The words "*as soon as*", nevertheless, set a temporal limit, and the word "*practicable*" identifies that which is *able* to be put into place, or which *can be* effected or accomplished.⁴⁷
38. In *CNK v The Queen*,⁴⁸ the Victorian Court of Appeal held that the phrase "*as far as practicable*", operating in the context of a sentencing provision contained in the Victorian equivalent to the YJA, the *Children Youth and Families Act 2006* (Vic), "*operate as words of emphasis. Since the word 'practicable' means 'feasible' or 'able to be done or accomplished', the phrase 'as far as practicable' means as far as it is possible to go.*"
39. Adopting this approach, in *Davidson v Director-General*, Loukas-Karlsson J of the ACT Supreme Court construed the phrase "*as far as practicable*", contained within a requirement to allow access to open air and exercise in the *Corrections Management Act 2007* (ACT), as involving an inquiry not only into what is or is not practicable, because the preceding words provided an entitlement that is feasible, up to the point at which it becomes impracticable.⁴⁹ The phrase "*made provision for unexpected or non-routine events that make providing the entitlement on any particular day impossible*" but "*cannot operate as a method for the defendant not to provide open air or space to exercise on an ongoing basis.*"⁵⁰ When the provision was construed in light of the equivalent interpretative provision (s 30 of the ACT *Human Rights Act 2004* (ACT)), "*obstacles that can be relatively efficiently and practicably dealt with should not be placed in the way of affording detainees their entitlement... Readily resolved practical matters are not insurmountable obstacles.*" The fact that the built environment needed to be changed to install a door with a hatch, or to enable the entitlement to be regularly attainable required increases in staffing limits did not make it impossible or impracticable.⁵¹
40. The context and purpose of s 56 indicates that it was intended to operate in a fashion that was compatible with children's human rights, relevantly including their rights to liberty and security (s 29 HRA), freedom of movement (s 19), humane and respectful treatment in custody (s 30) and the protection of the child as needed, and as is in the child's best interests (s 26(2) HRA).
41. Of course human rights may be limited, but only in a demonstrably justified way (s 13 HRA). Essentially, subject to the override provisions, the rights of children are only be limited under the YJA to the extent required by the purpose of any operative provision, that is, where necessary to meet important countervailing public interests and to the extent justified in a free and democratic society based on human dignity, equality and freedom.

⁴⁶ *Campbell v NT (No. 3)* at [470], citing *Williams v The Queen* (1986) 161 CLR 278, 292.

⁴⁷ *Al-Kateb v Godwin* (2004) 219 CLR 562 at [121] (Gummow J), *Wright v WA* (2010) 203 A Crim R 339 at [26],[148]; *Sneddon v Minister for Justice (Cth)* (2014) 145 ALD 273 at [116]; *R v HC* (2017) 325 FLR 59 at [67]; *Stubbings v R* [2023] NSWCCA 69 at [48]-[49].

⁴⁸ *CNK v The Queen* (2011) 32 VR 641 at [8].

⁴⁹ *Davidson v Director-General, Justice and Community Safety Directorate* [2022] ACTSC 83 (**Davidson**) at [264].

⁵⁰ *Ibid*, at [268], [274].

⁵¹ *Davidson* at [271]-[273].

42. The clear purpose of s 56, seen in context is to provide for the care and custody of children in detention by the Second Respondent, and only transitionally in the custody of the First Respondent. It:
- (a) requires the First Respondent to deliver children into the custody of the Second Respondent as soon as it takes to physically deliver the child to the youth detention centre, subject only to exceptional circumstances that may occur from time to time but not as a matter of course; and
 - (b) requires the Second Respondent, consistent with its obligation under s 265(1), to take the child who has been remanded into its custody and decide which detention centre the child is to be delivered to, within the same period of time.

Section 5 HRA

43. The HRA also requires the direct application of relevant human rights by the courts, under s 5(2)(a) HRA.
44. In *Attorney-General v Grant (No 2)*⁵² Applegarth J found that s 5(2)(a) of the HR Act ‘*may require consideration of rights that relate to the substance of the function the Court is exercising, not simply the Court’s process*’.⁵³ His Honour adopted a ‘functional’ and ‘intermediate’ approach to consideration of which rights might apply, being those that ‘*relate to court and tribunal proceedings*’. This approach has also been adopted by other single Judges of this Court.⁵⁴
45. Whether a particular right relates to Court and tribunal proceedings may turn on the nature of the right, and whether it expressly or impliedly applies to the judicial process. Further, a right may relate to the proceeding because it is directly relevant to the functions that are being performed by the court or tribunal in the individual matter.⁵⁵ In *Wood v The King*⁵⁶ Davis J accepted the intermediate construction and held ‘*where there are proceedings on foot seeking a remedy such as an application for habeas corpus, human rights must be applied. Those rights would include, for example, those in s 29(5)*’.⁵⁷ When this court is determining an application for habeas corpus it is empowered to grant a declaration that applicants are being held in custody unlawfully. Section 29 of the HR Act pertains specifically to arrest and detention. Further, the application concerns children and they are therefore entitled under the HR Act to special protections.⁵⁸
46. As to the application of the right, in *Grant (No 2)*, Applegarth J considered differences that were apparent from Victorian authorities under the *Charter*,⁵⁹ and concluded:⁶⁰

The application of a particular right depends on the function being performed, the relevant right and the issue in the particular proceedings. In some contexts, an act or omission by a court may simply be incompatible with a right, such as the right to a fair hearing. In the circumstances,

⁵² *Attorney-General v Grant (No 2)* [2022] QSC 252 (***Grant (No. 2)***).

⁵³ *Grant (No. 2)* (ibid) at [75], citing *Nigro v Secretary to the Department of Justice* (2013) 41 VR 359 at [103] and [199].

⁵⁴ *Re Kracke* (supra) at [250], [254], adopted by Ryan J in *Innes v Electoral Commission of Queensland (No 2)* [2020] QSC 293 (***Innes***) at [222]-[224] and Davis J in *Wood v The King* [2022] QSC 216 at [75]-[76] (***Wood***).

⁵⁵ *Matsoukatidou v Yarra Ranges Council* (2017) 51 VR 624, 636 [37]-[39], adopted by Ryan J in *Innes* at [228]-[230].

⁵⁶ *Wood v The King* [2022] QCS 216.

⁵⁷ *Wood* (ibid) at [76].

⁵⁸ HRA, s 26(2).

⁵⁹ *Victoria Police Toll Enforcement v Taha* (2013) 49 VR 1; *Cemino v Cannan* (2018) 56 VR 480.

⁶⁰ *Grant (No 2)* at [103]-[105].

the relevant right may explicitly or implicitly require the Court to enforce the right by acting in a certain way.

In other contexts, like *Cemino*, the function is the exercise of a specific discretionary power. The relevant right is one matter to be taken into account in the exercise of a discretion. Other matters may warrant consideration having regard to the terms and purpose of the power that creates the discretion. To say in that context that the Court must act “compatibly” with the relevant Part 2 right may be awkward or ambiguous. If it is taken to mean apply or enforce the right by considering it along with other matters, then it simply means that the right should be taken into account in performing the Court’s function of exercising the discretion. To say, however, that it means the Court must make a decision so as to give effect to the right to the exclusion of other considerations may be inconsistent with the nature, scope and purpose of the power, and therefore incorrect.

This issue highlights the need, in applying the functional approach, to have regard to the specific function the Court is performing, the relevant right, and the circumstances of the case. The function may be a general one to hear and determine proceedings in which a certain right, like the right to a fair hearing, has a direct application because the right to a fair hearing relates to the core functions courts perform. The function may be the exercise of a specific discretionary power. The specific legal and factual context may require the Court to enforce a right or it may require the Court to apply the relevant Part 2 right, along with other rights and considerations in exercising the discretion. Countervailing rights and considerations may be matters that justify a limitation on the relevant Part 2 right in accordance with s 13 of the *HRA*, or they may be considerations that are not justified by s 13, but still are relevant to the Court’s function in exercising the particular discretion.

47. The Commission therefore submits that separate to the question of construction posed by the Applicant, this Court would apply the children’s rights to liberty and security by requiring that their liberty only be constrained to the extent sanctioned by law; and to take into account the requirements of humane treatment and protection which is in their best interests when determining whether to issue a writ of Habeas Corpus or make a declaration of unlawfulness.

P Morreau

Counsel for the Queensland Human Rights Commission
3 August 2023