

Human Rights Month 2019 Speaker Series: “Understanding the impact of Queensland’s Human Rights Act”

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BRIDGET BURTON: Thank you so much for coming. I am going to stand behind the lectern because there is a lot of action on the stage here. We only have 20 minutes, so I will get right into it. I also would like to acknowledge the traditional owners of the land which we're meeting on – and this is being videoed, so the traditional owners of the land of anyone watching this presentation or at work. I am not covering cultural rights specifically. I am only going to talk about a few specific rights under the Act. But for Aboriginal and Torres Strait Islander people, human rights violations cross across all the rights that exist under the Human Rights Act. It's not just cultural rights. Whenever we're talking about human rights protections, whichever human right we're talking about, it's really important to always reflect upon what might be available now to deliver different outcomes in the future for our Indigenous people in this state, in particular.

So: this year Queensland parliament introduced the Human Rights Act, as you all know. It protects 23 individual rights and freedoms. The Act will take effect in stages, with the final stage – the right to make a complaint – to commence in January 2020. The Queensland Act has been described as the most progressive in Australia. There are also Human Rights Acts in the ACT and Victoria and there are Human Rights Acts or similar in other jurisdictions like the UK, New Zealand, Canada, South Africa and so on.

Human Rights Acts are designed to affect the way the legal system works but they're not constitutional bills of rights, like what you might find in the US, for example. They work with other laws, rather than override them. So five key functions of our Human Rights Act, right across the legal system: I'll mention them briefly, we won't talk in detail about all of these. Five key functions. One is that parliament must consider human rights when it makes laws. It will still be able to make laws which impede human rights but it must be open and transparent about it. It has to tell us, give proper thought and tell us about it.

Courts and tribunals must interpret other laws in line with human rights principles. Thirdly, the Supreme Court can make certain declarations if it identifies that a law cannot be interpreted in a way that respects human rights. This opens the dialogue between the courts and the parliament, alerting parliament to problems in the legal system. Fourth, and this is where we're mostly going to focus today, public entities will need to consider human rights and act and make decisions in a way that's compatible with human rights. Finally, relevant to us, people can make complaints to the Queensland Human Rights Commission and add human rights legal arguments to other sorts of cases that they might be able to bring. We'll focus on the way public entities must now act and the complaint options and I'm going to talk about a few individual rights and, because this is a large group and it's being recorded and interpreted - usually there's an exercise at the end, but what I'll do is give you a demonstration of a human rights decision-making process because I think it's much easier to understand it once it's applied.

So the key - before we go into the detail of the public entities, three overarching principles you need to be aware of. One is that the Human Rights Act only protects individuals. It does not protect corporate entities, just human individuals. Secondly, it doesn't in any way limit rights that might be given by other laws. Thirdly, it doesn't create absolute rights. It allows human rights to be limited and balanced in a way that's consistent – and you'll hear these words a lot – in a free and democratic society based on human dignity, equality and freedom. We'll talk a bit more about limiting human rights a little bit because it's key to understanding the Human Rights Act.

First off, the basic obligation for public entities is found in section 58. I am not going to be a lawyer and go through lots and lots of sections but I do want to give you section 58 because it's very, very important.

It says, 'it is unlawful for a public entity to act or make a decision in a way that is not compatible with human rights or in making a decision, fail to give proper consideration to a human right relevant to the decision'. So what does this mean? First of all, what's a public entity? So a public entity is defined in the Act. It includes: Queensland Government entities and public service employees, which I think is mostly what we have here today; local government; entities created by an enactment performing public functions; an entity with a public function when performing those functions on behalf of the state – so not necessarily a government entity but another entity doing government's work; and courts, tribunals and the legislative assembly when acting in an administrative capacity.

So public entities - public functions which will bring an entity within the scope of being a public entity for the purposes of the Human Rights Act include disability services, including registered NDIS providers, public housing providers – if you think about public housing, it's a great example: Department of Housing is covered, residential services unit is covered, so are housing providers providing social housing on behalf of the state – public transport, private prisons and so on.

So state schools, public hospitals, child safety, police, prisons, community health providers, Legal Aid, TAFE, the Department of Housing, disability service providers and so on. Entities not automatically covered can opt in if they wish to do so. You're probably all covered.

So human rights compatible acts and decisions. This is the substantive portion of section 58. A decision-maker must understand in general terms human rights protections and give serious and proper thought to the impact of the decision before they make it. They need to give - consider and balance competing interests and obligations. I think that's a really important aspect of the Human Rights Act. It is a piece of law that is designed to introduce concepts of proportionality and balance.

So it's then necessary to identify exactly how the proposed action will affect those rights. For me – and I hope that this is the key take away for most people – I think of section 58 as flipping around the usual thinking when determining how to act in any given situation. So currently making a decision, a decision-maker might think, what's *my* responsibility? What is *my* power? What authority do *I* have to do this thing or make this decision? A human rights approach instructs us to instead consider what are *your* rights? How will my proposed decision or action affect *you*? Is there another way that I can do this that would be better for *you*? It sounds very simple but imagine how different policing might look, or healthcare, or education – education for children with disabilities is something I do a fair bit of work in – imagine how different it would be if the primary first step was to think about what *you* need and *your* rights.

So if an action or decision seems to be in breach of section 58 – and I'm sure everyone has things coming to mind that would breach section 58, it's not hard to think of things like that – you then need to think about whether or not that action will be permitted by another part of the Human Rights Act. This is the balancing process that we referred to earlier. So there's going to be a lot of situations where yes, section 58 will have been breached but something else permits that. So the limitations on human rights are usually described as – there are more nuances but these are the main ones – required by another law: so if it's required by another law, a decision-maker who could not have reasonably acted differently or made a different decision because another law required them to act in that way is still going to have their action or decision protected. They'll still be able to do that and it won't breach the Human Rights Act.

The second way human rights can be limited is if it's proportionate and justified. So reasonable limitations can be placed on human rights, justified in a free and democratic society based on human dignity, equality and freedom. Working out whether a limitation is justified requires applying a proportionality test, balancing the human rights and proposed limitation. There is a fair bit of guidance on how to do this, not just within the Act itself but in lots of other things like I just noticed people have been provided with this that takes you through that proportionality test. You are looking at things like: the nature of the human rights; the purpose of the limitation, the actual purpose of the limitation – in detail, drilled into; the relationship between the limitation and its purpose; and, really importantly whether there are less restrictive and reasonably available options to achieve that purpose. And then you look at the importance of the purpose as against the importance of safeguarding the human right. It's a little bit easier to understand once we start to apply it.

The next thing I wanted to make you aware of, and I'll go through it really quickly, is what people can do if they feel their human rights have been breached. So when the Act becomes fully operative in January there will be two ways people can approach breaches of their human rights. The first is part of the dialogue model. You will have potentially heard this discussed. This Human Rights Act is designed to be engaged with in a dialogue format. So it's a right of complaint to the Queensland Human Rights Commission. The Queensland Human Rights Commission will attempt to resolve the complaint relatively informally. Normally we will expect that to be like a conciliation conference, which is like a mediation. They can also investigate. They might seek information or documents from the public entity.

If an agreement can be reached in the Human Rights Commission then that will resolve the matter but if an agreement cannot be reached then for a lot of people that's where their complaint will end. So the Human Rights Commission can write it up, they make recommendations and provide a report to the parties, they can also release that report in some circumstances, deidentified so that everybody else is aware of what they thought of the complaint – but they won't have any binding power. If people want to bring a human rights complaint to a court or tribunal, they need another sort of legal action to piggy back the human rights argument on to. It's complicated and if you have to deal with it, you'll have to figure it out at that point in time I imagine but I did want you to be aware that that's how human rights are being dealt with.

What it means for public entities is if you get a complaint and it's going to the Human Rights Commission, engage with it. Engage with it. Use that opportunity to come to some kind of a resolution. All right. So now that we understand a little bit of the operative functioning of the Act, I just wanted to go through four of the rights so that you could see the scope. You have this in your little publication as well. It's a terrible slide, I accept that, but I wanted to lay them all out there so

you can see. The ones that I've made blue are ones that are primarily related to the justice system, most of the criminal justice system, and the two pink ones at the bottom are the social and cultural rights that we have – the right to education and healthcare in QLD.

The ones I wanted to talk to you about are, first of all, the right to life. I think it's important to talk about this one because we hear that phrase a lot. That's not what this means. So the right to life under the Human Rights Act protects against unlawful killing. It also generally extends to encompass a duty to protect life which might include – and there's going to be a lot of 'might' in this because we don't know how it will work in Queensland – but it might include a duty to enforce laws aimed at protecting life, the protection of lives of people in care, including custody, and possibly effective investigations into death.

The European Court of Human Rights has found that the right to life might be engaged when authorities knew or ought to have known of an immediate risk to the life of a specific individual from the criminal acts of another and failed to take steps within their power that might be reasonably expected to have avoided that risk. This is very different from the current position here in Queensland. We would expect that to have an impact. We would expect it to have a big impact on the policing of domestic violence, for example.

Protection of lives of people in care extends to those in custody, and might include practical measures such as access to healthcare or cultural services to mitigate against the risk of death.

The next one, another big one: protection from torture and cruel, inhuman and degrading treatment. The reason I wanted to talk about this one is because a lot of people read 'protection from torture' and assume the rest is bundled up in that. It's actually quite different.

So this right includes a positive obligation on public entities to both not engage in, but also to take steps to prevent, acts of torture, cruel or inhuman or degrading treatment or punishment, and medical and scientific experimentation without consent. So torture involves a high degree of suffering intentionally inflicted. Cruel and inhuman treatment also involves a high degree of suffering, not necessarily intentionally inflicted. Degrading treatment is focused less on the severity of suffering than on humiliation, and there's a case that gives us a really good example: it's a Victorian case, *Davies v State of Victoria*. Mr Davies was disputing the termination of his employment. So he had been sacked for misconduct and he disputed that, and the court found no, in fact he had engaged in misconduct because he had breached somebody else's human rights. He had dragged CJ, who was a disabled person in his care, naked across a carpeted hallway, causing bruising and grazing on his buttocks. That was found to have inflicted cruel and degrading and inhuman treatment. So medical treatment without consent, I think, everybody jumps straight to that and says, but that's how that happens and it has to happen. It does happen in Queensland, and it will continue to happen in QLD. In some cases that is going to be necessary and proportionate. But the Human Rights Act will require such treatment to be justifiable in every individual case. Applying the proportionality test to involuntary treatment proposals is very likely to lead to different outcomes for some people. I think that is one area that is going to be very significant for a lot of people.

The next one is slightly cheeky. So freedom of expression. It's an issue of the day. You can't really see that but this is my son who is 15. He came home from high school with a badge that says 'mining engineers rock' on it which went down - we live in West End, so it went down well. Freedom of expression is a foundational democratic right on which other rights rely. Of course, it too will be

limited by other human rights protections particularly, including equality, freedom from discrimination, the right to privacy and reputation – particularly where those are clearly protected by other laws – but it has been used in Victoria and it has been used to support the right to protest. There is a case in which protesters were gathered in a shopping mall to protest a particular tenant. In that case it was Max Brenner. In Queensland if a bunch of protesters were gathered in a shopping mall protesting a tenant they would be moved on rapidly. In this case the court considered the fact that the protesters were engaging with the public. People didn't seem intimidated. There was no real threat to public order or peace, and so the removal of the protesters was not a proportionate limitation on their human rights. I think that's an important case for us to think about.

The last one I wanted to talk about, before I give you a demonstration of how to apply all of this, is probably my favourite: the right to privacy. So the right to privacy is highly influential. The key to its impact is its expansive reach. It encompasses privacy, family, home, correspondence and reputation. Each of them with separate protections. You can see in there, if you can read my tiny writing, privacy encompasses physical and psychological integrity, identity, autonomy and the fundamental dignity of the human person. It's similar to (but not identical to) the international right to a private life – quite different from what we think of when we think of privacy law, which generally is information privacy. It is a far more extensive right.

Okay. So what do we do with all of these? What I want to do is take you through one example, I think – yes, one example – of how to apply human rights decision-making process to a scenario. So the first, I'm going to give you this one. I will read it out because it is tiny. A disability service provider has a client slip and injure himself while showering. A Workplace Health and Safety expert recommends removing shower curtains and keeping the door open during showering to improve resident safety and make it possible for staff to respond rapidly in an emergency. This is not a real case. It's quite extreme because I want to be able to process through.

Most of you are probably jumping right to the end at the moment about whether or not this is something that can be done and be compliant with human rights. Let's just stick with the decision-making process, reminding ourselves: firstly identify the human rights engaged. Primarily here we're talking about the right to privacy and also the freedom from cruel and degrading treatment. Secondly: will they be limited by the act or decision proposed? Yes, they will be. Third factor: if yes, is it required by another law? No, it isn't. It might be required by a policy, it might be a good idea under another law, but it's not required by another law. Then we have to look at whether or not the limitation is permitted, proportionate and justified, considering the factors in section 13. It would be permitted by another law but is it proportionate and justified?

What is the nature of the right being protected? The fundamental dignity of the human person. Fairly fundamental. It's a very core human right. What's the purpose of the limitation? When I do this in an open group and let people talk, everyone says, it's safety. But is it? And this is what the Human Rights Act asks you to do. Is it about safety? Is it going to change whether or not somebody falls in the shower? Is it about response time, in fact? And once you get right down to what the real reason is, you can then look at, well, if it's about response time, what's the relationship between the limitation and its purpose? Does taking the doors and shower curtains out really meet that purpose of response times? And then, are there less restrictive and reasonably available options to achieve that purpose? Of course there will be. There will be a number of other options.

The other thing about this particular scenario, it's a blanket rule. It applies to everybody. But in that environment there are probably multiple different people with different needs. Some of them are

not going to have the same risk of falls and some of them, if they do fall, they're going to be fine anyway, so it asks us to really drill into the individual situation and respond to each person's needs in light of their human rights.

And then the relative importance of safeguarding the right as against the importance of the purpose of the limitation, and in this case I think if you got all the way to the end of that decision-making process you would find that you are not removing the doors and shower curtains, because a person's dignity will far outweigh in any fair balancing act the speed of a response in the unlikely event that they may fall. I have another but I don't have time because I want to give you a chance to ask me questions.