DISTRICT COURT OF QUEENSLAND

REGISTRY:
NUMBER:

Applicant **[REDACTED]**

and

Respondent **THE KING**

SUBMISSIONS OF THE QUEENSLAND HUMAN RIGHTS COMMISSION
(Intervening)

Queensland Human Rights Commission
Level 20, 53 Albert St
Brisbane City QLD 4000

A. INTRODUCTION

1. The applicant applies pursuant to section 590AA of the *Criminal Code* (Qld) to exclude evidence from his criminal trial on the basis that it was either obtained unlawfully (in the case of his mobile phone) or given involuntarily (in the case of alleged admissions made by him under police questioning).

2. Pursuant to section 51(1)(a) of the *Human Rights Act 2019* (Qld) (**HRA**), the Queensland Human Rights Commission (**Commission**) intervenes on the basis that the application raises questions of law relating to the application of the HRA.

3. The questions of law which this application raises, and the Commission's short answers to them (depending on the evidence to be adduced at the hearing), are as follows:

   a. Was the questioning by police of the applicant at the roadside unlawful pursuant to section 58(1)(a) of the HRA because it was incompatible with the applicant's right to privacy under section 25 of the HRA?

      Answer: Yes. The right to privacy protects an individual's freedom to speak or stay silent in response to police questions, absent lawful compulsion. No lawful compulsion applied in this case, and the applicant's freedom to speak or stay silent was infringed by the importunacy of police.

   b. Was the decision by police to seize the applicant's mobile phone unlawful pursuant to section 58(1)(b) of the HRA because police failed to give proper consideration of his human rights?

      Answer: Yes. "Proper consideration" of the applicant's human rights required police to turn their minds to the possible impact on his human rights of their decision to seize his mobile phone. There is no evidence they did so.

   c. Was the subsequent search by police of the applicant's mobile phone unlawful pursuant to section 58(1)(a) of the HRA because it was incompatible with the applicant's right to privacy under section 25 of the HRA?

Answer: Yes. The right to privacy protects an individual's freedom to choose whether police may search one's mobile phone, absent lawful compulsion. No lawful compulsion applied in this case, and the applicant denies providing consent to police to search his mobile phone.

d. Was the questioning by police of the applicant at the Bundaberg Watchhouse unlawful pursuant to section 58(1)(a) of the HRA because it was incompatible with the applicant's right to privacy under section 25 of the HRA?

Answer: Yes, for the same reasons given in answer to the first question.

B. FACTUAL BACKGROUND

4. The factual background to this application is set out in the applicant's outline of submissions at [8]-[30]. The key facts are as follows:

a. The applicant is charged with a single count of supplying a dangerous drug. The supply did not eventuate[1]. [Redacted].

b. [Redacted]

c. **Questioning at Roadside**. After attending the scene of the arson, Officer [Redacted] and Officer [Redacted] took up with the applicant at about 8am, [Redacted]. Officer [Redacted] immediately detained the applicant for questioning [Redacted]. Officer [Redacted] cautioned the applicant then informed him of his right to speak with a friend or relative and have them present during questioning. The applicant said he wished to speak with his mother. Officer [Redacted] made no attempt to contact his mother and immediately began questioning him. Officer [Redacted] did not inform the applicant of his right to speak with a lawyer.

[1] The prosecution case is founded on the extended definition of 'supply' in section 4 of the *Drugs Misuse Act 1987* (Qld).

d. Officer [Redacted] body worn camera footage clearly shows the applicant's reticence to answer police questions. Despite this, police questioning continued. Officer [Redacted] said "You're choosing not to [answer our questions]", adding that "at this time it is you that we're looking at, okay, so you need to start talking to us. So, if you haven't had anything to do with it, you need to tell us." [Redacted]. Meanwhile, the applicant asked police "they get to see this don't they?", to which Officer [Redacted] said "no". Officer [Redacted] added "No, this is just between me and you, okay, and my partner here. The more you give us the less it comes back onto you mate." Officer [Redacted] interjected, "You're a party, you're a party to the offence." The applicant shook his head, ran his hands through his hair and breathed heavily. [Redacted]. Officer [Redacted] proceeded to ask the applicant about who else was involved; Officer [Redacted] did likewise. Ultimately, Officer [Redacted] said "Alright, so, we'll leave it for now. You are detained at this stage for further questioning back at the station" and placed the applicant inside a paddy wagon.

e. **Watchhouse Interview**. Police transported the applicant to the [Redacted] Watchhouse at 9.52am. He was placed into a cell. At 10am, he was subjected to a pat down search. [Redacted]. He remained in a cell until 1.37pm, when he was asked to participate in a police interview. At this time, he had been detained by police for almost 6 hours. At the start of the interview, he was cautioned and informed of his right to speak to a support person or a lawyer. He said "Yeah, I want to call my mother"[2]. He reiterated that he would like to speak to "my mum"[3], something which the police interviewer acknowledged[4]. But the interviewer did not make arrangements for the applicant to speak with his mother; instead, he said "So, we've spoken to your mother she's aware of where you are, yeah." The police officer reiterated that the applicant did not need to talk to him, but then proceeded to question him in the absence of his mother.

[2] EROI at page 3, line 12.

[3] EROI at page 3, line 25.

[4] EROI at page 3, line 30.

f. The interview proceeded for about 22 minutes, at which time the police interviewer said, "So I've gone in your phone, and I've had a look for evidence of this offence. Who's involved in it and all that sort of thing. The arson. Um, and I've come across um, some text messages to [redacted] from you."[5] The interviewer repeated the caution he had given earlier and advised the applicant of his right to speak with a support person or lawyer. The applicant declined to exercise that right. [The applicant then allegedly made admissions to the alleged offence].

C. RELEVANT LAW

5. The Commission agrees with the summary of relevant law set out in the submissions of the Attorney-General and supplements those submissions as follows.

6. The HRA commenced substantive operation on 1 January 2020. It applies to acts done or decisions taken after that date: HRA, section 108. It thus applies to this case.

7. The HRA is "An Act to respect, protect and promote human rights": HRA, long title. Its objects are set out in section 3:

> **3 Main objects of Act**
>
> The main objects of this Act are—
>
> (a) to protect and promote human rights; and
>
> (b) to help build a culture in the Queensland public sector that respects and promotes human rights; and
>
> (c) to help promote a dialogue about the nature, meaning and scope of human rights.

[5] EROI at page 22, line 20. Officer [Redacted] states that he "requested the defendant provide access to the mobile phone and in doing so advised him that he was not required to provide access and that if he refused I would be required to seek a warrant for his code. The defendant provided me informed consent to access his mobile phone and also provide his access code to me.": Statement, at [9]-[10]. The applicant denies this.

8. Section 4 deals with how the HRA's main objects are to be achieved:

> **4 How main objects are primarily achieved**
>
> The main objects are to be achieved primarily by—
>
> (a) stating the human rights Parliament specifically seeks to protect and promote
>
> (b) requiring public entities to act and make decisions in a way compatible with human rights; and
>
> …
>
> (j) providing for the Queensland Human Rights Commission to carry out particular functions under this Act, including, for example, to promote an understanding and acceptance of human rights and this Act in Queensland.

9. The requirement in section 4(b) that public entities act and make decisions in a way compatible with human rights is imposed by section 58:

> **58 Conduct of public entities**
>
> (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.
>
> …
>
> (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

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

10. The Queensland Police Service is defined as a public entity in section 9(1)(c). The Queensland Police Service consists of police officers[6], police recruits and staff members[7]. Individual officers fall within the phrase "Queensland Police Service" and thus within the scope of section 58[8].

11. Section 58(1) imposes on public entities two distinct obligations: a substantive obligation pursuant to subparagraph (a) to act compatibly with human rights (**substantive limb**); and a procedural obligation pursuant to subparagraph (b) to give proper consideration to relevant human rights when making decisions (**procedural limb**). It is convenient to deal with these in turn.

12. The substantive limb concerns whether an act of a public entity is "compatible with human rights". That phrase is defined in section 8 as follows:

> **8 Meaning of compatible with human rights**
>
> An act, decision or statutory provision is ***compatible with human rights*** if the act, decision or provision—
>
> (a) does not limit a human right; or
>
> (b) limits a human right only to the extent that is reasonable and demonstrably justifiable in accordance with section 13.

13. Compatibility is to be determined in three stages: engagement, limitation, and justification. The Commission agrees with the Attorney-General's submissions about what these stages require.

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[6] Police officers include "persons holding appointment as a constable": *Police Service Administration Act 1990* (Qld), section 2.2(2)(e).

[7] *Police Service Administration Act 1990* (Qld), section 2.2(1).

[8] An alternative basis on which section 58 applies to police officers is that they are public service employees (see *Public Sector Act 2022* (Qld), section 13) and section 9(1)(b) of the HRA defines a public service employee as a public entity.

14. The procedural limb obliges public entities to identify correctly all rights that may be affected by a decision[9], but this process must be approached in a common sense and practical manner. The correct approach was summarised by Tate J in *Bare v Independent Broad-Based Anti-Corruption Commission*[10]:

> for a decision-maker to give 'proper' consideration to a relevant human right, he or she must: (1) understand in general terms which of the rights of the person affected by the decision may be relevant and whether, and if so how, those rights will be interfered with by the decision; (2) **seriously turn his or her mind to the possible impact of the decision on a person's human rights and the implications thereof for the affected person**; (3) identify the countervailing interests or obligations; and (4) balance competing private and public interests as part of the exercise of justification. (emphasis added)

15. This approach was followed by Martin J in *Owen-D'Arcy* at [135] and by Freeburn J in *Austin BMI Pty Ltd v Deputy Premier* [2023] QSC 95 at [356].

16. In *Castles v Secretary, Department of Justice*[11], Emerton J observed:

> it will be sufficient in most circumstances that there is some evidence that shows the decision-maker seriously turned his or her mind to the possible impact of the decision on a person's human rights and the implications thereof for the affected person, and that the countervailing interests or obligations were identified.

17. Still, there must be at least some evidence to warrant a finding that relevant human rights were "seriously" considered.

(a) The right to privacy

18. The conduct of police in detaining the applicant, taking his mobile phone, and searching its contents, engaged three of his human rights, namely, his:

    a. Freedom of movement, pursuant to section 19 of the HRA;

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[9] *Owen-D'Arcy* (2021) 9 QR 250 (***Owen-D'Arcy***) at [136] per Martin J.

[10] (2015) 48 VR 129 at [288].

[11] (2010) 28 VR 141 at [186].

b. Property, pursuant to section 24 of the HRA;

c. Privacy and reputation, pursuant to section 25 of the HRA[12].

19. Although each of these rights was engaged in this case, the right which assumes most significance is the right to privacy. These submissions focus on that right.

20. The Commission agrees with the Attorney-General's submissions about the scope of this right and notes the following additional matters.

21. The Explanatory Notes to the HRA describe the scope of the right to privacy as "very broad". It:

> protects privacy in the narrower sense including personal information, data collection and correspondence, but also extends to an individual's private life more generally. For example, the right to privacy protects the individual against interference with their physical and mental integrity; freedom of thought and conscience; legal personality; individual identity, including appearance, clothing and gender; sexuality; family and home.

22. As noted in the Attorney-General's submissions, the right to privacy is a right "to be let alone by other people"[13]. In *R v Duarte*[14], La Forest J described it as a right:

> to determine for himself when, how, and to what extent he will release personal information about himself.[15]

[12] The applicant's right pursuant to section 32(2)(k) of the HRA "not to be compelled to testify against themselves or to confess guilt" does not apply because it is limited to cases where a person has been charged: see *SQH v Scott* (2022) 10 QR 215.

[13] *Director of Public Prosecutions (Vic) v Kaba* (2014) 44 VR 526 at [119] per Bell J, citing *Hunter v Southam Inc* [1984] 2 SCR 145 at [24] per Dickson J, citing *Katz v United States* 389 US 347 (1967) at 350 per Stewart J for the Court.

[14] *R v Duarte* [1990] 1 SCR 30.

[15] At 46.

23. The underlying value of the right to privacy "might be said to be the importance of protecting a person's freedom from the unjustified involvement of public authorities in their private sphere."[16]

24. Although what constitutes a breach of privacy is insusceptible of exhaustive definition[17], the collection of information about an individual by State officials without consent—including by searching through an individual's mobile phone—clearly falls within the concept[18].

(i) The right to privacy and mobile phones

25. The right to privacy has special significance in relation to mobile phones. In *Riley v California*[19], the Supreme Court of the United States considered whether a warrantless search of a mobile phone constituted an unreasonable search and seizure, contrary to the Fourth Amendment. The Court's observations about the US Constitution are not directly relevant to this case, but the Court's observations about the relationship between mobile phones and privacy are.

26. It is useful to set out the Court's observations on this point in full, despite their length[20]:

> modern cell phones … are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy. … Cell phones … place vast quantities of personal information literally in the hands of individuals. …
>
> The United States asserts that a search of all data stored on a cell phone is "materially indistinguishable" from searches of … physical items. … That is like saying a ride on horseback is materially indistinguishable from a flight to

[16] Kylie Evans and Nicholas Petrie, *Annotated Queensland Human Rights Act* (2023, Lawbook Co), at [25.20].

[17] *R (Razgar) v Secretary of State for the Home Department* [2004] 2 AC 368 at [9]; *Pretty v United Kingdom* (2002) 35 EHRR 1, at [61]; *Re Kracke and Mental Health Review Board* (2009) 29 VR 1 at [593] and [599] per Bell J. Note,

[18] *Entick v Carrington* (1765) 2 Wils KB 275 [95 ER 807]; *Clough v Leahy* (1904) 2 CLR 139 at 155-156; *George v Rockett* (1990) 170 CLR 104; *Smethurst v Australian Federal Police* (2020) 272 CLR 177; *WBM v Chief Commissioner of Police* (2012) 43 VR 446 at [160] per Bell J. See also *S and Marper v United Kingdom* [2008] ECHR 1581 at [66]; UN Human Rights Committee, General Comment No 16, The right to respect for privacy, family, home and correspondence, and protection of honour and reputation – Art 17 (1988) at [10]; Jacobs, White and Ovey, *The European Convention on Human Rights* (5 th ed, 2010) at 374.

[19] 573 US 373 (2014).

[20] At 385-398.

the moon. Both are ways of getting from point A to point B, but little else justifies lumping them together. Modern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse. A conclusion that inspecting the contents of an arrestee's pockets works no substantial additional intrusion on privacy beyond the arrest itself may make sense as applied to physical items, but any extension of that reasoning to digital data has to rest on its own bottom.

Cell phones differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee's person. The term "cell phone" is itself misleading shorthand; many of these devices are in fact minicomputers that also happen to have the capacity to be used as a telephone. They could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers.

One of the most notable distinguishing features of modern cell phones is their immense storage capacity. Before cell phones, a search of a person was limited by physical realities and tended as a general matter to constitute only a narrow intrusion on privacy. … Most people cannot lug around every piece of mail they have received for the past several months, every picture they have taken, or every book or article they have read—nor would they have any reason to attempt to do so. And if they did, they would have to drag behind them a trunk of the sort held to require a search warrant in *Chadwick*, *supra*, rather than a container the size of the cigarette package in *Robinson*.

But the possible intrusion on privacy is not physically limited in the same way when it comes to cell phones. The current top-selling smart phone has a standard capacity of 16 gigabytes (and is available with up to 64 gigabytes). Sixteen gigabytes translates to millions of pages of text, thousands of pictures, or hundreds of videos. … Cell phones couple that capacity with the ability to store many different types of information: Even the most basic phones that sell for less than $20 might hold photographs, picture messages, text messages, Internet browsing history, a calendar, a thousand-entry phone book, and so on. … We expect that the gulf between physical practicability and digital capacity will only continue to widen in the future.

The storage capacity of cell phones has several interrelated consequences for privacy. First, a cell phone collects in one place many distinct types of information—an address, a note, a prescription, a bank statement, a video—that reveal much more in combination than any isolated record. Second, a cell phone's capacity allows even just one type of information to convey far more than previously possible. The sum of an individual's private life can be reconstructed through a thousand photographs labeled with dates, locations, and descriptions; the same cannot be said of a photograph or two of loved ones tucked into a wallet. Third, the data on a phone can date back to the purchase of the phone, or even earlier. A person might carry in his pocket a slip of paper reminding him to call Mr. Jones; he would not carry a record of all his communications with Mr. Jones for the past several months, as would routinely be kept on a phone.

Finally, there is an element of pervasiveness that characterizes cell phones but not physical records. Prior to the digital age, people did not typically carry a cache of sensitive personal information with them as they went about their day. Now it is the person who is not carrying a cell phone, with all that it contains, who is the exception. According to one poll, nearly three-quarters of smart phone users report being within five feet of their phones most of the time, with 12% admitting that they even use their phones in the shower. … A decade ago police officers searching an arrestee might have occasionally stumbled across a highly personal item such as a diary. … But those discoveries were likely to be few and far between. Today, by contrast, it is no exaggeration to say that many of the more than 90% of American adults who own a cell phone keep on their person a digital record of nearly every aspect of their lives—from the mundane to the intimate. Allowing the police to scrutinize such records on a routine basis is quite different from allowing them to search a personal item or two in the occasional case.

Although the data stored on a cell phone is distinguished from physical records by quantity alone, certain types of data are also qualitatively different. An Internet search and browsing history, for example, can be found on an Internet-enabled phone and could reveal an individual's private interests or concerns—perhaps a search for certain symptoms of disease, coupled with frequent visits to WebMD. Data on a cell phone can also reveal where a person has been. Historic location information is a standard feature on many smart phones and can reconstruct someone's specific movements down to the minute, not only around town but also within a particular building. … ("GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations.").

Mobile application software on a cell phone, or "apps," offer a range of tools for managing detailed information about all aspects of a person's life. There are apps for Democratic Party news and Republican Party news; apps for alcohol, drug, and gambling addictions; apps for sharing prayer requests; apps for tracking pregnancy symptoms; apps for planning your budget; apps for every conceivable hobby or pastime; apps for improving your romantic life. There are popular apps for buying or selling just about anything, and the records of such transactions may be accessible on the phone indefinitely. There are over a million apps available in each of the two major app stores; the phrase "there's an app for that" is now part of the popular lexicon. The average smart phone user has installed 33 apps, which together can form a revealing montage of the user's life.

In 1926, Learned Hand observed (in an opinion later quoted in *Chimel*) that it is "a totally different thing to search a man's pockets and use against him what they contain, from ransacking his house for everything which may incriminate him." *United States v Kirschenblatt*, 16 F. 2d 202, 203 (CA2). If his pockets contain a cell phone, however, that is no longer true. Indeed, a cell phone search would typically expose to the government far more than the most exhaustive search of a house: A phone not only contains in digital form many sensitive

> records previously found in the home; it also contains a broad array of private information never found in a home in any form—unless the phone is.

27. These observations show that, so far as the right to privacy is concerned, mobile phones are in a class of their own. The power to search a person's mobile phone is akin to a power to search through a person's life. The search is apt to destroy any semblance of privacy that the person may wish to maintain.

28. This no doubt explains why Parliament has seen fit to require police officers to obtain a warrant to search a mobile phone that is pass-coded[21]. That requirement accords with the holding in *Riley*, that police officers must first obtain a warrant before searching a person's mobile phone.

(ii) The right to privacy and police questioning

29. The right to privacy also has special significance in relation to police questioning. The right to privacy is what provides the foundation for various discrete rules of law and evidence (commonly grouped under the heading "the right to silence"[22]) that protect an individual from having to divulge information to the State. A breach of these discrete rules thus involves a concomitant breach of the right to privacy[23].

30. This is reflected in High Court authority. In *Pyneboard Pty Ltd v Trade Practices Commission*[24], Murphy J explained:

> The privilege against compulsory self-incrimination is part of the common law of human rights. It is based on the desire to protect personal freedom and human dignity. These social values justify the impediment the privilege presents to judicial or other investigation. It protects the innocent as well as the guilty from the indignity and **invasion of privacy** which occurs in compulsory self-

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[21] *Police Powers and Responsibilities Act 2000* (Qld), sections 154 and 154A. See also *R v Deacon* [2021] QDCPR 8 at [42] per Smith DCJA.

[22] See *Smith v Director of Serious Fraud Office* [1993] AC 1 at 30-31 per Lord Mustill.

[23] The opposite does not follow: a measure may breach the right to privacy without offending any of the rules that comprise the right to silence. An example is an unlawful search of a suspect's person: *R v Ireland* (1970) 126 CLR 321.

[24] (1983) 152 CLR 328.

> incrimination; it is society's acceptance of the inviolability of the human personality.[25] (emphasis added)

31. In *Environmental Protection Authority v Caltex Refining Co Pty Ltd*[26], McHugh J observed:

> the important and independent rationales of the privilege [against self-incrimination] are the desires to protect the human dignity and **the privacy of the accused**.[27] (emphasis added)

32. Mason CJ, Toohey, Brennan, and McHugh JJ all quoted with approval the words of Sopinka J in *R v Amway Corporation*[28] that the dominant rationale underlying the privilege against self-incrimination is:

> the affront to dignity **and privacy** inherent in a practice which enables the prosecution to force the person charged to supply the evidence out of his or her own mouth. (emphasis added)

33. More recently, in *Director of Public Prosecutions (Vic) v Kaba*[29], in which Bell J observed:

> When police assert a compulsive power to demand the name and address of a person, say someone like Mr Kaba who is walking along a public street, they intrude upon his or her common law **right to privacy**.

34. It thus can be seen that the right to privacy underlies those doctrines which constrain authorities from collecting information about people by forcing them to answer questions, as well as those doctrines which constrain authorities from collecting information about people by searching and seizing their papers[30]. This makes sense,

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[25] Mason CJ, Wilson and Dawson J described the privilege as a "fundamental bulwark of liberty" at 340.

[26] (1993) 178 CLR 477 at 551.

[27] Mason CJ and Toohey J observed at 508 that "the privilege [against self-incrimination] in its modern form is in the nature of a human right, designed to protect individuals from oppressive methods of obtaining evidence of their guilt for use against them".

[28] [1989] 1 SCR 21 at 41.

[29] (2014) 44 VR 526 at [90].

[30] *Entick v Carrington* (1765) 2 Wils KB 275 [95 ER 807]; *George v Rockett* (1990) 170 CLR 104; *Smethurst v Australian Federal Police* (2020) 272 CLR 177.

since it is as much an invasion of privacy to compel someone to provide information via documents as it is to compel someone to provide information via spoken words.

(iii) Confessions – admissibility vs unlawfulness

35. A confession is not admissible if it is not voluntary[31]. Voluntary does not mean volunteered, "it means 'made in the exercise of a free choice to speak or stay silent'"[32]. A confession will not be voluntary if it was procured by a threat or inducement from a person in authority[33]. An 'inducement' "may take the form of some fear or prejudice or hope of advantage exercised or held out by the person in authority"[34]. If the confession:

> is the result of duress, intimidation, persistent importunity or sustained or undue insistence or pressure, it cannot be voluntary.[35]

36. A confession that is involuntary because of these factors will necessarily involve an invasion of privacy because it will have been procured absent a "free choice to speak or stay silent"—that is to say, it will have been procured in breach of the right to be let alone[36]. Accordingly, where a person's right to speak or stay silent is vitiated by "duress, intimidation, persistent importunity or sustained or undue insistence or pressure, it cannot be voluntary", his or her right to privacy will be infringed, and, owing to section 58(1)(a) of the HRA, that infringement will be unlawful. Accordingly, forced confessions are not merely inadmissible—they are an unlawful invasion of privacy.

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[31] *R v Lee* (1950) 82 CLR 133.

[32] Ibid at 144.

[33] *Criminal Law Amendment Act 1984* (Qld), section 10.

[34] *McDermott v The King* (1948) 76 CLR 501 at 512 per Dixon J.

[35] Ibid at 511 per Dixon J.

[36] It is to be remembered that there is no general obligation to assist police by answering their questions: *Rice v Connolly* [1966] 2 QB 414 per Lord Parker CJ at 419:

> It seems to me quite clear that though every citizen has a moral duty or, if you like, a social duty to assist the police, there is no legal duty to that effect, and indeed the whole basis of the common law is the right of the individual to refuse to answer questions put to him by persons in authority, and to refuse to accompany those in authority to any particular place; short, of course, of arrest.

37. A confession may be attended by unlawfulness on other grounds. For instance, a person may confess a crime voluntarily, having first been denied the right to speak with a lawyer or support person. *R v Adamic*[37] and *R v Benton*[38] are examples[39]. Given their similarity to this case, it is useful to refer to them in detail.

38. In *Adamic*:

> Mr Adamic was cautioned and advised of his rights to speak to a friend, relative or lawyer and that if he wished to do so "questioning will be delayed for a reasonable time for that purpose" [but] he was not asked what his wishes were, and the questioning was not delayed. Having told him what his rights were, including the right to telephone a solicitor, Constable Ottaway effectively negated that advice by making it clear that the option of contacting a solicitor was not presently available [because that option would be given at a later time]. Constable Ottaway then proceeded to ask him a number of questions during the search of the car and the ride back to the Surfers Paradise police station.[40]

39. Holmes J (as her Honour then was) found that this conduct involved a contravention of the equivalent provision of section 416 of the *Police Powers and Responsibilities Act 2000* (Qld) (***PPRA***) (section 95) and excluded Mr Adamic's admissions, concluding:

> I am however, satisfied that the advice provided to Mr Adamic by Constable Ottaway was such as to create the impression in him that he had no right at that time to seek the advice of a solicitor While there is nothing to suggest that the police officers on this occasion were engaged in any deliberate attempt to circumscribe Mr Adamic's rights, the manner in which the right to call a solicitor was put to him, so as effectively to create the impression that it could not be exercised until the party arrived at the police station manifested at best a careless disregard of the section 95 requirements. It is fairly described as a "cutting of corners"; there was no reason that Constable Ottaway could not have contacted a solicitor nominated by Mr Adamic at the scene; and questioning could, in any case, have waited until they arrived at the police station and he had had the opportunities contemplated by s 95(1).
>
> While, having regard to other factors identified as relevant in Bunning v Cross (1978) 141 CLR 54 at 79 the evidence is cogent and the charge a serious one, it seems to me that this is a proper case for exclusion of the conversations which

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[37] (2000) 117 A Crim R 332.

[38] [2011] QSC 14.

[39] See also *R v Ajax* [2010] QSC 338.

[40] At [11].

took place at the scene of Mr Adamic's apprehension and during the journey back to Southport.[41]

40. In *Benton*:

> Six police officers arrived at [the applicant's] unit in the early evening, at a time when the applicant was there alone. One of them produced a search warrant, alleging the commission of serious offences by the applicant. The police officers immediately took control of the unit, and of the person of the applicant. The applicant was not advised of his right to legal advice, prior to the commencement of questioning. When he himself raised the question of speaking to a lawyer, and he indicated that he wished to do so, although he was told that he might contact a friend or relative or solicitor, and he was given a telephone directory, he appears not to have been able to make use of it; nevertheless, the questioning continued. When he subsequently indicated that he wished to telephone a friend, so that the friend might recommend a solicitor, he was not permitted to do so. He was then told that he would not be asked questions relating to the investigation. Nevertheless, Sergeant Ward later clearly made a decision to continue with the questioning. The applicant indicated that he would not answer questions until he had spoken to a lawyer and that he found his situation to be "overwhelming". Although Sergeant Ward at that point ceased questioning the applicant in relation to the investigation, in the course of general conversation, police officers returned to matters related to the investigation. Notwithstanding what had been said earlier, when the co-accused returned to the unit, the applicant was not at that time offered the opportunity of telephoning his friend. When, at the conclusion of the interview with the co-accused, the applicant was asked if he was prepared to come to the station, he was not told that he was not under arrest, or that he was free to stay at the unit or go elsewhere. He was asked if he wanted to make "any of those phone calls"; but when shortly afterwards he thought he should inform his employer that he might not be at work the following day, he felt it necessary to ask permission; and Sergeant Ward asked for some explanation for the phone call. By this time, the applicant had been under the control of police officers at the unit for a period of approximately four hours.
>
> In this period, the applicant had obviously been experiencing some physical discomfort associated with his allergies. Notwithstanding the period of the evening, he had not been given the opportunity to have a meal. When the applicant later indicated that he was hungry, he was not given the opportunity to eat; rather, on one occasion, Sergeant Ward indicated that he himself did not need to eat at that time. At the police station, he was not told that he was not under arrest, or that he was free to leave. The time for which the applicant was in the company of police officers, after leaving the unit, until the completion of the record of interview, most of which was taken up with that interview, was approximately three hours.

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[41] At [13]-[14].

> On the other hand, it should be pointed out that on a number of occasions the applicant was informed of at least some of his rights. At the unit, a telephone directory had been made available to him, which, no doubt, contained numerous names and telephone numbers of solicitors. On one occasion, he chose not to answer further questions. He later stated that he "had had a chance to think about it" (although what this meant was not explained, except by reference to the applicant's evidence of his state of mind, discussed below). He then agreed to go to the Morningside Police Station. There were periods of time at the unit, some of them substantial, when he was not questioned in relation to the offences.[42]

41. In these circumstances, Peter Lyons J held that the applicant's admissions at the Morningside Police Station were involuntary:

> Having regard to all of the circumstances, I am not satisfied that the statements made by the applicant at the police station were not the result of persistent importunity, or sustained or undue insistence or pressure. By the time he was taken to the police station, the applicant had been detained by police for several hours, in circumstances of some physical discomfort; his attempts to obtain legal advice had been unsuccessful, with some action taken by Sergeant Ward which impeded or was likely to have impeded the applicant's attempts to obtain legal advice; and it was not made plain to him that he was not under arrest, and had no obligation to attend at the police station. There was a deliberate decision by Sergeant Ward to continue questioning the applicant about the offences, notwithstanding the applicant's clear indications that he wanted to obtain legal advice, and despite an earlier assurance by Sergeant Ward that he would not ask the applicant further questions relating to the investigation. Although the applicant declined to answer at this stage, this conduct of Sergeant Ward may have contributed to a belief by the applicant that, in reality, he would not be able to get the assistance of a lawyer, and would be detained, until he answered questions relating to the investigation.[43]

42. But his Honour held that the applicant's admissions at his unit were voluntary. Thus, the question arose whether those admissions were unlawfully obtained and thus apt for discretionary exclusion. His Honour concluded that they were unlawfully obtained and excluded them accordingly.

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[42] At [58]-[60].

[43] At [63].

43. In reaching this conclusion, his Honour adverted to observations made by Toohey, Gaudron and Gummow JJ in *R v Swaffield*[44]. In that case, their Honours observed that one touchstone for the unfairness discretion may be that:

> no confession might have been made at all, had the police investigation been properly conducted[45].

44. This observation was made with reference to *Van der Meer v The Queen*[46], in which Mason CJ observed:

> Had the police observed the principles governing the interrogation of suspects, it might well have transpired that the statements would not have been made or not have been made in the form in which they were made.[47]

45. With those observations in mind, Peter Lyons J held (footnotes omitted):

> There can be no doubt that the offences with which the applicant has been charged are serious offences. The statements made by the applicant to police officers, both at the unit and later at the Morningside Police Station, bear upon the charges. The statements made at the police station provide cogent evidence of the applicant's guilt. However, there are a number of factors which would favour the exercise of the discretion to exclude the evidence.
>
> By itself, the initial failure by Detective Sergeant Ward to advise the applicant of his right to contact a solicitor might be regarded as technical, and perhaps not particularly significant. However, in my view, Sergeant Ward's subsequent conduct was designed to prevent the applicant from exercising that right. At the very least, it had the effect of substantially interfering with attempts by the applicant to obtain legal advice.
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> …
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> In *R v Stafford* Bray CJ said:
>
> > "… the police should not persist in questioning a man who has signified his unwillingness to answer them and a fortiori when he has asked to

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[44] (1998) 192 CLR 159.

[45] *R v Swaffield* (1998) 192 CLR 159 at 189.

[46] (1988) 62 ALJR 656.

[47] *Van der Meer v The Queen* (1988) 62 ALJR 656 at 662.

> see a solicitor before answering. If they do so the evidence should be rejected."
>
> It is apparent that a substantial interference with the right of a person the subject of a police investigation to obtain legal advice is a matter of considerable significance in relation to the discretion to exclude confessional evidence.
>
> It also seems to me that, whether or not the applicant was detained lawfully at the unit, the circumstances (including the number of police officers present, the length of time that they remained in control of the unit, and the applicant, and his condition), all have the effect that to some extent, his freedom to speak or not speak was impugned.
>
> …
>
> This is a case where the considerations relevant to the public policy ground and those relevant to the unfairness ground overlap. In terms of the public policy ground, there have been some breaches of statutory requirements, and the underlying "spirit" which informs those requirements. It is a case where the impropriety has led the applicant to the view that he would not in fact be able to obtain legal advice before answering Sergeant Ward's questions; and where he was likely to be detained for a substantial period unless he did so. It would be unfair to the applicant to permit the evidence to be given, where it was obtained as a result of pressure, at a time when the applicant's freedom to speak or not speak had been impugned, and he was not, in the real sense, given the opportunity to speak to a solicitor.
>
> Accordingly, even if it could be said that the applicant had voluntarily made the statements to the police which are recorded in the exhibits, it seems to me that a proper exercise of the discretion requires their exclusion.[48]

46. *Benton* shows that even if a confession is made voluntarily (and thus involves no interference with the confessionalist's right to privacy) it may nonetheless be attended by unlawfulness warranting its exclusion.

[48] At [99]-[107].

(b) Human rights and discretionary exclusion

47. The Commission agrees with the Attorney-General's submissions[49] about the relationship between human rights and discretionary exclusion but adds the following two points.

48. First, to the extent that "a human rights breach may not carry as much weight as a breach of other laws", the Commission submits that, as a starting point, violation of a human right should be treated as a serious matter.

49. Second, to the extent that there is a debate in Queensland about what human rights this Court must apply when exercising its discretion to exclude evidence, the Commission submits that the approach taken in *Attorney-General v Grant (No 2)*[50] (ie, that section 5(2)(a) of the HRA "may require consideration of rights that relate to the substance of the function the Court is exercising, not simply the Court's process"[51]) is correct and should be followed. If so, this Court ought to consider the right to privacy when determining whether to exclude evidence obtained in breach of that right.

D. SUBMISSIONS

(a) The questioning of the applicant at the roadside was unlawful because it breached his right to privacy

50. Police had no lawful power to compel the applicant to answer their questions. He was entitled to speak or stay silent. By the right to privacy, he was entitled to be let alone. But that choice was impinged—and his right to privacy was thus limited—by the way the police dealt with him.

51. [Redacted]

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[49] Attorney-General's submissions, at [32]-[44].

[50] [2022] QSC 252.

[51] At [75] per Applegarth J, citing *Nigro v Secretary to the Department of Justice* (2013) 41 VR 359; [2013] VSCA 213 at [103] and [199].

52. Police ought not to have questioned the applicant at all after he had exercised his right to speak with his mother. Police had no lawful power to extract information from him in the coercive way that they did. Their conduct was incompatible with the applicant's right to privacy because it interfered with his free choice to speak or stay silent—his right to be let alone. Their conduct was thus unlawful pursuant to section 58(1)(a) of the HRA.

(b) The decision to seize the applicant's mobile phone was unlawful because police failed to give "proper consideration" to his human rights

53. There is no evidence that the police gave any consideration, let alone "proper consideration"[52], to the human rights of the applicant that were relevant to their decision to seize his mobile phone and examine its contents. In the absence of such evidence, a finding that the police failed to comply with procedural limb of section 58(1)(b) is inevitable.

(c) The search of the applicant's mobile phone was unlawful because it breached his right to privacy

54. Police had no lawful power to compel the applicant to provide access to his mobile phone. Police were entitled to search it only if he let them do so. The applicant has denied that he gave any such consent. If the Court is not satisfied that such consent was given[53], it will follow that their search of his mobile phone will have breached his right to privacy. It will be unlawful pursuant to section 58(1)(a) of the HRA for that reason.

(d) The questioning of the applicant at the Bundaberg Watchhouse was unlawful because it breached his right to privacy

55. Despite being under arrest, police had no lawful power to compel the applicant to answer their questions; he remained free to speak or stay silent and entitled to be let

[52] *Austin BMI Pty Ltd v Deputy Premier* [2023] QSC 95 at [356] per Freeburn J; *Owen-D'Arcy* at [137] per Martin J.

[53] A matter on which the prosecution bears the onus of proof: *R v Keen* (2015) 2 Qd R 1 at [18]-[21] per Jackson J.

alone. But, again, that choice was impinged—and his right to privacy limited—by the way police dealt with him.

56. [Redacted]

57. Even this Court accepted that his admissions were made voluntarily (and thus without any interference with his right to privacy), it is respectfully submitted that this Court would accept that his admissions were made in circumstances where the police unlawfully denied him the right to speak with his mother. This is a case where:

> no confession might have been made at all, had the police investigation been properly conducted[54].

58. Having regard to the seriousness of the impropriety in this case, relative to the seriousness of the alleged offence, it is respectfully submitted that this is a case where the discretionary exclusion of the applicant's admissions is appropriate.

E. CONCLUSION

59. The application should be allowed. The Court should answer each question raised by this application in the affirmative.

31 May 2023

J J Underwood
Counsel for Queensland Human Rights Commission

[54] *R v Swaffield* (1998) 192 CLR 159 at 189, citing *Van der Meer v The Queen* (1988) 62 ALJR 656 at 662.