

Human Rights Act 2019 (Qld): Not just another 'Magna Carta argument'

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The purpose of this paper is not to argue the merits or otherwise of human rights legislation. That debate is over. Queensland has enacted the *Human Rights Act 2019 (Qld)* (hereafter "HRA"). All participants in the justice system need to understand the impact that this may have on the administration of justice in Queensland. Queensland Magistrates are well placed to develop Queensland's own human rights jurisprudence for the future.

Queensland's HRA draws on the pre-existing human rights legislation from Victoria² and the Australian Capital Territory.³ The case law and academic analysis from these jurisdictions provide the best insight into how the HRA will operate in Queensland. Also, the largely analogous legislation and jurisprudence from New Zealand⁴ is a useful reference for Queensland.

The Magistrates Court is the engine room of our justice system.⁵ This paper and the attachments intend to be helpful for a busy Magistrate. It is impossible, and indeed unhelpful, to attempt to exhaustively cover all of the situations in which a party to a proceeding may raise the HRA. The creativity (or perhaps misjudgment) of some self-represented applicants or lawyers is impossible to predict! This paper will focus on some representative examples of where interstate experience shows the HRA is likely have practical impacts on litigation especially in the criminal law jurisdiction of the Court.⁶

Statutory interpretation

Statutory interpretation is a well-known process to any judicial officer but under a HRA, there will sometimes be a twist. In the Victorian *Charter of Human Rights and Responsibilities Act 2006* (hereafter "Victorian Charter"), s 32(1) outlines statutory interpretation in a manner largely similar to s 48 of the HRA. Both can be viewed as reflecting the principle of legality, but with a 'wider field of application'.⁷ The respective provisions are summarised below:-

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² *Charter of Human Rights and Responsibilities Act 2006 (Vic)*.

³ *Human Rights Act 2004 (ACT)*.

⁴ *New Zealand Bill of Rights Act 1990*.

⁵ Approximately 98% of offenders are dealt with in the Magistrates Court – see QGSO, Queensland Treasury — Courts Database, extracted September 2018.

⁶ "Criminal courts are likely to bear the brunt of Convention arguments and the right to a fair trial will probably be relied upon more than other rights." A Ashworth, 'The Human Rights Act 1998: (2) Article 6 and the Fairness of Trials' (1999) *Crim LR* 261.

⁷ *Momcilovic v The Queen* (2011) 245 CLR 1, [54] per French CJ.

Charter of Human Rights and Responsibilities Act 2006 (Vic) s 32	Human Rights Act 2019 (Qld) s 48
(1) So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.	(1) All statutory provisions must, to the extent possible that is consistent with their purpose, be interpreted in a way that is compatible with human rights. (2) If a statutory provision cannot be interpreted in a way that is compatible with human rights, the provision must, to the extent possible that is consistent with its purpose, be interpreted in a way that is most compatible with human rights.
(2) International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision.	(3) International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision.
(3) This section does not affect the validity of— (a) an Act or provision of an Act that is incompatible with a human right; or (b) a subordinate instrument or provision of a subordinate instrument that is incompatible with a human right and is empowered to be so by the Act under which it is made.	(4) This section does not affect the validity of— (a) an Act or provision of an Act that is not compatible with human rights; or (b) a statutory instrument or provision of a statutory instrument that is not compatible with human rights and is empowered to be so by the Act under which it is made.
	(5) This section does not apply to a statutory provision the subject of an override declaration that is in force

The Victorian Bench Book⁸ is a useful guide to Queensland judicial officers who are required to interpret specific statutory provisions or where an interpretation of a provision is an issue in any hearing. The Victorian Bench Book provides for the following steps in relation to the operation of s 31(1) of the Victorian Charter:-⁹

1. Determine the provision's potential meaning/s using ordinary grammatical meanings of the words in the provision (insofar as it does not contradict the purpose of the enactment).¹⁰
2. Where the provision has a single clear and unambiguous meaning consistent with the purpose of the enactment, give the provision that meaning *regardless* of whether it limits Charter/HRA rights.
3. If more than one potential meaning is evident, determine if the potential meanings limit one or more Charter/HRA rights:
 - a. If only one potential meaning places no limits on any Charter/HRA rights, than that meaning should be given to the provision;
 - b. If more than one potential meaning places no limits on any Charter/HRA rights, choose the meaning that better enhances or protects the Charter/HRA;
 - c. If all potential meanings limit one or more Charter/HRA rights, the meaning that least limits the rights should be given.

⁸ Charter of Human Rights Bench Book (Vic).

⁹ See 2.1 of the Charter of Human Rights Bench Book (Vic).

¹⁰ *Momcilovic v The Queen* (2011) 245 CLR 1; *WK v R* (2011) 33 VR 516; *Slaveski v Smith* (2012) 34 VR 206; *Nigro v Secretary to the Department of Justice* (2013) 41 VR 359.

Supreme Court Referral

If, in a proceeding before a court or tribunal, a question of law arises that relates to the application of the HRA, or a question arises in relation to the interpretation of a statutory provision in accordance with the HRA, it may be referred to the Supreme Court.¹¹ Given the importance of Queensland developing its own human rights case law and jurisprudence, Magistrates should not be reluctant to make this referral if a genuine point of law ought to be resolved. The Supreme Court may make a declaration of incompatibility to the effect that the statutory provision cannot be interpreted in a way compatible with human rights.¹² This will then be referred to the relevant Minister for consideration and tabling in Parliament.¹³ However, this declaration does not affect the validity of the statutory provision.¹⁴

Momcilovic v R (2011) 245 CLR 1

Momcilovic is the leading High Court decision on the operation of s 32(1) of the Victorian Charter.¹⁵ In particular, it is the authority for the proposition that a provision's meaning must be discerned according to ordinary techniques of construction and that s 32(1) does not allow courts to modify the meaning of a provision beyond the limits of these techniques.¹⁶

The six separate judgments of the High Court and the differently composed majorities on a number of Charter issues means that the application of the Charter in practice has not been fully determined. Further, the High Court allowed the appeal on grounds other than the Charter. Notwithstanding this, the six judgments include detailed discussions of the interpretative process s 32(1) prescribes.¹⁷

First, by a six-to-one majority, the High Court held that s 32 of the Charter is valid.¹⁸ Section 32 refers to no more than the ordinary principles of statutory interpretation – that is, consideration of a provision's terms, context and purpose.¹⁹ Section 32(1) does not extend to reading in words not explicit or implicit in a provision, or reading down of words to change the true meaning of the provision,²⁰ nor does it allow the courts to modify the meaning of the legislative provision beyond the limits of ordinary techniques of construction.

French CJ stated that s 32(1) requires “statutes to be construed against the background of human rights and freedoms set out in the Charter in the same way as the principle of legality requires the same statutes to be construed against the

¹¹ HRA s 49.

¹² HRA s 53.

¹³ HRA s 56(1).

¹⁴ HRA s 48(4).

¹⁵ to s 5 of the *Drugs, Poisons and Controlled Substances Act 1981* (Vic). For a detailed discussion of how key provisions of the Victorian Charter were construed, see: Stephen Tully, 'Momcilovic v The Queen: Case note' (2012) 19 *Australian International Law Journal* 280.

¹⁶ *Momcilovic v The Queen* (2011) 245 CLR 1 at [38]-[40], [50]-[51], [61]-[62] (French CJ); [146], [148]-[160] (Gummow J); [280] (Hayne J); [546], [565], [574] (Creenan and Kiefel JJ); [684]-[685] (Bell J).

¹⁷ 2.2 of the Charter of Human Rights Bench Book (Vic).

¹⁸ *Momcilovic v The Queen* (2011) 245 CLR 1 at [46], [50]-[51] (French CJ); [146](vi), [171] (Gummow J); [280] (Hayne J); [565]-[566], [600] (Creenan and Kiefel JJ); [684] (Bell J); [439], [454]-[456] (Heydon J, dissenting).

¹⁹ *Ibid* at [170]-[171] (Gummow J); [280] (Hayne J); [565]-[566] (Creenan and Kiefel JJ).

²⁰ See also *Slaveski v Smith* (2012) 34 VR 206.

background of common law rights and freedoms” but with a “wider field of application”.²¹

This approach has since been adopted in various cases,²² however, Gummow and Hayne JJ suggested that s 32(1) could have a stronger interpretive rule than the principle of legality – requiring a more stringent textual reading.²³

Further, by a majority of four-to-three, the High Court ruled that the power for the Supreme Court to make a declaration of inconsistent interpretation pursuant to s 36 of the Charter is a valid power. French CJ and Bell J held that making a s 36 declaration was not an exercise of judicial power, nor was it incidental to that.²⁴ However, Creenan and Kiefel JJ did consider it to be incidental or ancillary.²⁵

Relevance of s 13 HRA – human rights may be limited

Section 13 HRA, modelled off s 7(2) of the Victorian Charter, allows for human rights to be limited in certain circumstances. It is clear that s 7(2) of the Victorian Charter (and therefore s 13 HRA) is only enlivened when a right is limited.

<i>Charter of Human Rights and Responsibilities Act 2006 (Vic) s 7(2)</i>	<i>Human Rights Act 2019 (Qld) s 13</i>
<p>(2) A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including—</p> <ul style="list-style-type: none"> (a) the nature of the right; and (b) the importance of the purpose of the limitation; and (c) the nature and extent of the limitation; and (d) the relationship between the limitation and its purpose; and (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve. 	<p>(1) A human right may be subject under law only to reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.</p> <p>(2) In deciding whether a limit on a human right is reasonable and justifiable as mentioned in subsection (1), the following factors may be relevant—</p> <ul style="list-style-type: none"> (a) the nature of the human right; (b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom; (c) the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose; (d) whether there are any less restrictive and reasonably available ways to achieve the purpose; (e) the importance of the purpose of the limitation; (f) the importance of preserving the human right, taking into account the nature and extent of the limitation on the human right; (g) the balance between the matters mentioned in paragraphs (e) and (f).

²¹ *Momcilovic v The Queen* (2011) 245 CLR 1 at [51].

²² *Slaveski v Smith* (2012) 34 VR 206, [23]; *Nigro v Secretary to the Department of Justice* (2013) 41 VR 359, [85].

²³ *Momcilovic v The Queen* (2011) 245 CLR 1 at [170] (Gummow J); [280] (Hayne J).

²⁴ *Ibid* at [95]–[97], [101] (French CJ); [661] (Bell J).

²⁵ *Ibid* at [603]–[605] (Creenan and Kiefel JJ).

The sections are largely the same, however a few key differences should be highlighted:

- Section 13(2)(b) states that it may be relevant to consider “the nature of the purpose of the limitation”, much like s 7(2)(c). Purpose is not referred to in the Victorian equivalent, and the HRA also expressly mentions “whether it is consistent with a free and democratic society based on human dignity, equality and freedom”. This is a reiteration of s 13(1).
- Section 13(2)(c) states that it may be relevant to consider “the relationship between the limitation and its purpose”, much like s 7(2)(d). However, s 13(2)(c) specifies that “whether the limitation helps to achieve the purpose” is also relevant.
- Section 13(2)(f) states that it may be relevant to consider “the importance of preserving the human right, taking into account the nature and extent of the limitation on the human right”. This section is not present in the Victorian Charter; though s 7(2)(c) does require consideration of the nature and extent of the limitation, it does not specify the relevant factor of the importance of preserving a human right
- Section 13(2)(g) states that the matters of subsections (e) and (f) are to be balanced. This section is also not present in the Victorian Charter.

Aside from these differences, we can look to analysis of the Victorian counterparts regarding whether this section entails a separate statutory analysis to the above.

In *Momcilovic*, the court was split 4:3 as to the interaction between s 32(1) and 7(2). French CJ, Kiefel and Crennan JJ held that any s 7(2) proportionality assessment occurs after the interpretation exercise under s 32(1) regarding how the provision ought to be interpreted is complete. Gummow, Hayne, Heydon and Bell JJ held that s 32(1) requires that interpretations be compatible with the Charter rights ‘as identified and described in Part 2’ (including s 7(2)). However, because Heydon J was in dissent overall, there was no binding authority and the role of s 7(2) in interpretation remains open.²⁶

Section 48(3) HRA – international, foreign and local jurisprudence

Section 48(3) HRA is the same as its Victorian Charter counterpart (at s 32(2)). While the courts may consider international, domestic and foreign jurisprudence, they are not required to do so. This is not a novel exercise of judicial power, as courts are already permitted to have regard to international law and relevant domestic, foreign and international jurisprudence when interpreting statute.²⁷

The Explanatory Notes of the *Human Rights Bill 2018* states that the intention is that Queensland courts and tribunals will be able to draw upon an existing body of human rights jurisprudence. However, not all international law and jurisprudence will necessarily be relevant to the human rights framework as prescribed in Queensland.²⁸

²⁶ *WBM v Chief Commissioner of Police* (2012) 43 VR 446.

²⁷ *Momcilovic v The Queen* (2011) 245 CLR 1, [18] (French CJ)

²⁸ Explanatory Notes, *Human Rights Bill 2018* (Qld), 31.

Specifically named as potentially relevant jurisdictions are:

- United Nations Human Rights Committee;
- European Court of Human Rights;
- Inter-American Court of Human Rights; and
- Decisions in domestic courts of Canada, South Africa, UK, New Zealand, ACT and Victoria.

In Victoria, the Supreme Court has held that it is necessary to take into account clear indications of departure from rights as construed in other jurisdictions.²⁹

Right to Fair Hearing

In Australia, the common law right to a fair trial is firmly established by the High Court in *Jago*³⁰ and *Dietrich*.³¹ The common law remedies rest on the abuse of process doctrine and the inherent power of the court to stay proceedings to prevent a trial that is unfair or otherwise improper.

Importantly for our purposes, the common law confines the right to a fair trial narrowly³² (ie *Dietrich* has no application to committals). The HRA will allow for broader protections as it establishes and consolidates statutory protections.

The right to a fair hearing is enshrined in the HRA. This right serves as a useful focus in examining how the HRA can be used in litigation as a supplement to existing common law and statutory law frameworks. The statutory provisions in Queensland and Victoria are as follows:-

²⁹ *Castles v Secretary of the Department of Justice* (2010) 28 VR 141, [70]-[71]; *Bare v ICAC* (2015) 48 VR 129, [211]-[213] (Warren CJ), [457] (Tate JA), [646]-[648] (Santamaria JA). Therefore, courts are to use such jurisprudence with 'discrimination and care' (FN: *Momcilovic v The Queen* (2011) 245 CLR 1, [18] – [19] (French CJ), [155] – [161] (Gummow J); *Bare v IBAC* (2015) 48 VR 129, [182] – [183] (Warren CJ), [631] (Santamaria JA)

³⁰ (1989) 168 CLR 23.

³¹ (1992) 177 CLR 292.

³² Cf: the approach of the European Court of Human Rights which has taken an expansive view, suggesting that Article 6 (Right to Fair Trial) *ECHR* extends into the evidence-gathering process. The House of Lords has also been prepared to accept an expanded view of the fair trial principle, extending the abuse of process doctrine to cover police incitement: *Teixeira v Portugal* [1998] 28 EHRR 101; *Latif* (1996) 1 All ER 353; *R v Looseley* [2001] 4 All ER 897.

Charter of Human Rights and Responsibilities Act 2006 (Vic) s 24	Human Rights Act 2019 (Qld) s 31
(1) A person charged with a criminal offence or a party to a civil proceeding has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing.	(1) A person charged with a criminal offence or a party to a civil proceeding has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing.
(2) Despite sub-section (1), a court or tribunal may exclude members of media organisations or other persons or the general public from all or part of a hearing if permitted to do so by a law other than this Charter.	(2) However, a court or tribunal may exclude members of media organisations, other persons or the general public from all or part of a hearing in the public interest or the interests of justice.
(3) All judgments or decisions made by a court or tribunal in a criminal or civil proceeding must be made public unless the best interests of a child otherwise requires or a law other than this Charter otherwise permits.	(3) All judgments or decisions made by a court or tribunal in a proceeding must be publicly available.

There are a number of accepted factors relevant to criminal proceedings such as:-

- court must be competent, independent and impartial;
- fair and public hearing;
- presumption of innocence;
- adequate time and resources to prepare for trial;
- undue delay;
- right to engage a lawyer unless elected to self-represent;
- right to an interpreter; and
- right not to self-incriminate.

Example: Unreasonable Delay – R v Mills [2011] ACTSC 109

This is a specific right articulated in the HRA.

Human Rights Act 2004 (ACT) s 22(2)(c)	Human Rights Act 2019 (Qld) s 32(2)(c)
(2) Anyone charged with a criminal offence is entitled to the following minimum guarantees, equally with everyone else: ... (c) to be tried without unreasonable delay	(2) A person charged with a criminal offence is entitled without discrimination to the following minimum guarantees— ... (c) to be tried without unreasonable delay

In *Mills* the ACT Supreme Court, in granting a permanent stay, considered what amounts to 'unreasonable delay' and the options available to the court to provide a suitable remedy in the context of section 22(2)(c) of the *Human Rights Act 2004 (ACT)* (equivalent to s 32(2)(c) of the HRA).³³

For various reasons, the trial was delayed for four years since the decision to prosecute. *Mills*' sole argument was unreasonable delay relying on s 22(2)(c) of the *Human Rights Act 2004 (ACT)*. The delay was duly acknowledged by the prosecution,

³³ Section 22(2)(c) of the *Human Rights Act 2004 (ACT)* (Act) states "Anyone charged with a criminal offence is entitled to the following minimum guarantees, equally with everyone else: (c) to be tried without unreasonable delay".

but argued that it would not be unfair to try Mills and that the appropriate response was not a permanent stay.

The decision of the court was to grant a permanent stay. Higgins CJ held that for a matter to take four years to come to trial after the decision to prosecute was unreasonable. His Honour found that “[t]he delay of two and a half years from the first trial, in a relatively simple case is...egregiously unreasonable, for whatever reason it might happen.”

In relation to Mills’ particular circumstances, she had raised the issue of unreasonable delay at an early stage and had been subject to the anxiety and expense of two trials without positive reasons being advanced by the Prosecution for the delay and their failure to promptly test the drug bags (which caused further delay). Higgins CJ further commented that though the lack of resources available to the courts may also have contributed to the delay, “the failure to provide adequate resources will, if unreasonable delay results, be a breach of human rights entitlements”.³⁴

Mills provides the following factors to consider in determining whether delay is unreasonable:³⁵

- (1) The factual and legal complexity of the case.
- (2) The conduct of the judicial and administrative authorities – in relation to the right to a fair trial as governed in Article 6(1) of the *European Convention on Human Rights*,³⁶ the European Court of Human Rights has found that States have a duty to organise their legal systems to allow the courts to comply with Article 6(1), and that a long backlog of work in the system could contribute to unreasonable delay.³⁷
- (3) The test is one of proportionality and the court must consider the length of the delay, reasons for the delay and the risk of prejudice.

Bail – *Gray v DPP* [2008] VSC 4

The HRA, and equivalent Bills of Rights elsewhere, do not expressly contain a right to bail. The right to bail is not included in s 32 HRA (rights in criminal proceedings). Rather, the issue of bail is raised through the provisions dealing with the right to liberty.

³⁴ *Mills* [44].

³⁵ Higgins CJ, relying on *R v Upton* [2005] ACTSC 52. On this point, see also: *R v PJ* [2008] ACTSC 100; *Nona v R* [2013] ACTCA 39; *The Queen v Thomson (No 3)* [2015] ACTSC 379; *Footo v Somes* [2012] ACTSC 63.

³⁶ Article 6(1) *European Convention on Human Rights* provides: “[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”

³⁷ *Hadjidjanis v Greece* judgment of 28 April 2005, as cited in Françoise Calvez and Nicolas Regis, ‘Length of court proceedings in the member states of the Council of Europe based on the case law of the European Court of Human Rights’ (2018) *European Commission for the Efficiency of Justice* 21-22.

Section 29 of the HRA is the relevant provision (equivalent to s 21 of the Victorian Charter):

Human Rights Act 2019 (Qld) s 29

- (1) Every person has the right to liberty and security.
- (2) A person must not be subjected to arbitrary arrest or detention.
- (3) A person must not be deprived of the person's liberty except on grounds, and in accordance with procedures, established by law.
- (4) A person who is arrested or detained must be informed at the time of arrest or detention of the reason for the arrest or detention and must be promptly informed about any proceedings to be brought against the person.
- (5) A person who is arrested or detained on a criminal charge—
 - (a) must be promptly brought before a court; and
 - (b) has the right to be brought to trial without unreasonable delay; and
 - (c) must be released if paragraph (a) or (b) is not complied with.
- (6) A person awaiting trial must not be automatically detained in custody, but the person's release may be subject to guarantees to appear—
 - (a) for trial; and
 - (b) at any other stage of the judicial proceeding; and
 - (c) if appropriate, for execution of judgment.
- (7) A person deprived of liberty by arrest or detention is entitled to apply to a court for a declaration or order regarding the lawfulness of the person's detention, and the court must—
 - (a) make a decision without delay; and
 - (b) order the release of the person if it finds the detention is unlawful.
- (8) A person must not be imprisoned only because of the person's inability to perform a contractual obligation.

The time that a person will spend in custody awaiting the determination of a matter is an important consideration.³⁸ In a case in which it is demonstrated that the time in custody on remand will likely exceed any custodial sentence which might be imposed after conviction, the relative importance of time may very well be regarded by the judge as outweighing the other relevant factors.³⁹ Human rights legislation is likely to take this argument further.

Gray v DPP [2008] VSC 4⁴⁰

In this case, because Gray was likely to spend more time on remand awaiting his trial than what he would receive as punishment for the alleged crime, Bongiorno J found that Gray's Charter rights had been breached,⁴¹ and that this breach of rights must have a remedy:

"If the Charter in fact guarantees a timely trial, the inability of the Crown to provide that trial as required by the Charter must have an effect on the question of bail... The only remedy the Court can provide an accused for a failure by the

³⁸ *Williamson v DPP* [2001] 1 Qd R 99 at 104 per Thomas JA.

³⁹ *Lacey v DPP* [2007] QCA 413 at [13].

⁴⁰ For discussion, see Jeremy Gans, 'The Charter's Irremediable Remedies Provision', (2009) 33 *Melbourne University Law Review* 105, 124.

⁴¹ *Gray v DPP* [2008] VSC 4 per Bongiorno J at [10].

Crown to meet its Charter obligations in this regard (or to ensure that it does not breach those obligations so as to prejudice the applicant), is to release him on bail – at least the only remedy short of a permanent stay of proceedings.”⁴²

It is arguable that, under a HRA, time on remand will be considered an even more important consideration than is presently the case under existing common law.

Police powers and exclusion of evidence – DPP v Kaba [2014] VSC 52

The common law position is that a court has a discretion to exclude evidence that is unlawfully or improperly obtained.⁴³ The Victorian approach is that a breach of human rights will not necessarily or automatically lead to the exclusion of evidence obtained as a consequence of the breach, however it will supply the element of unlawfulness that may in turn enliven the discretion.⁴⁴

DPP v Kaba [2014] VSC 52

The Supreme Court in this case found that police had acted incompatibly with the human rights of freedom of movement and privacy when they coercively questioned a person during a vehicle stop.

The rights as expressed in the Victorian Charter and the HRA are in essence the same:-

Charter of Human Rights and Responsibilities Act 2006 (Vic) s 12	Human Rights Act 2019 (Qld) s 19
Every person lawfully within Victoria has the right to move freely within Victoria and to enter and leave it and has the freedom to choose where to live.	Every person lawfully within Queensland has the right to move freely within Queensland and to enter and leave it, and has the freedom to choose where to live.

Charter of Human Rights and Responsibilities Act 2006 (Vic) s 13(a)	Human Rights Act 2019 (Qld) s 25
A person has the right— (a) not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with.	A person has the right— (a) not to have the person's privacy, family, home or correspondence unlawfully or arbitrarily interfered with.

The Magistrate found that the police had no power under the relevant legislation⁴⁵ to carry out the random stop and licence and registration check, and had breached Mr Kaba’s Charter rights by subjecting him to coercive questioning for his name and

⁴² Ibid per Bongiorno J at [12].

⁴³ *Bunning v Cross* (1978) 141 CLR 54; *R v Swaffield* (1998) 192 CLR 159; *R v Thomas* (2006) 14 VR 475

⁴⁴ Alistair Pound and Kylie Evans, *An Annotated Guide to the Victorian Charter of Human Rights and Responsibilities* (Thomson Lawbook Co, 2008), 525-53 citing Simon Evans and Carolyn Evans, 'Legal Redress under the Victorian Charter of Human Rights and Responsibilities' (2006) 17 *Public Law Review* 264, 272.

⁴⁵ *Road Safety Act 1986* s 59 (1).

address. The Magistrate exercised his discretion not to admit evidence on the grounds that it was the result of unlawful and improper police conduct.

On appeal, Bell J found that the Magistrate was correct to find that police breached Mr Kaba's rights to privacy and freedom of movement. While there was no physical interference with Mr Kaba and the interference with his human rights was of short duration, it was not simply "a brief and innocuous request for Mr Kaba's name and address"⁴⁶:-

"He was not suspected of wrongdoing. He was free to go and he sought to go. He was then coercively asked for his name and details. Police could see that he was angry. They were trained to deal with such situations and made professional choices. Police could easily have let Mr Kaba go on his way and they should have done so. Whether he would give them his name and details was his private business but they pressed him well over the line of permissible questioning."⁴⁷

However, Bell J found that police do have a power of random stop and check under the relevant provision.⁴⁸ Given that the Magistrate's decision not to admit the evidence was based on both findings, the decision was quashed and the matter was returned to the Magistrates Court.

This decision makes it clear that where police breach their obligation under s 38(1) of the Charter to act compatibly with and give proper consideration to human rights, this will be an important consideration when deciding whether to exclude evidence.

Further, it confirms that police conduct that breaches a person's Charter rights is conduct that is both improper, for being 'inconsistent with the standards expected in our society of law enforcement officers', and unlawful.⁴⁹ The gravity of the human rights violation will be relevant in assessing whether to admit the evidence.⁵⁰

R v Shaheed [2002] NZLR 377

Consider the New Zealand jurisdiction, for example. Until the case of *R v Shaheed* [2002] NZLR 377 evidence obtained in breach of the *New Zealand Bill of Rights Act* was prima facie inadmissible. The test now, however, is one of balancing the seriousness of the breach of the right against securing convictions.⁵¹

Mr Shaheed was charged with offensive behaviour and was requested to provide a blood sample for the police database. He was told that if he refused to do so a court-ordered sample would be obtained authorising such to be taken by compulsion, despite no power existing to require such a sample under the relevant Act.⁵² Without being given an opportunity to consult a lawyer, Mr Shaheed provided a sample which linked him to a rape of which he was not previously a suspect. He was then identified by the rape complainant from a photoboard.

⁴⁶ *DPP v Kaba* [2014] VSC 52 at [478].

⁴⁷ *Ibid* at [477].

⁴⁸ *Ibid* at [456].

⁴⁹ *Ibid* at [333].

⁵⁰ *Ibid* at [348], [479].

⁵¹ See generally: Simon Consedine, 'R v Shaheed: the first twenty months' (2004) 10 *Canterbury Law Review* 77.

⁵² *Criminal Investigations (Blood Samples) Act 1995* (NZ).

The New Zealand Court of Appeal overruled previous decisions that applied a prima facie exclusion for evidence obtained in breach of the *Bill of Rights Act 1990* (NZ).⁵³ The Court of Appeal instead replaced the exclusionary rule with a new “balancing test”, summarised by Blanchard J as:

“[w]here there has been a breach of a right guaranteed to a suspect by the Bill of Rights, a Judge who is asked to exclude resulting evidence must determine whether that is a response which is proportionate to the character of such breach. The Judge must make that determination by means of a balancing process in which the starting point is to give appropriate and significant weight to that breach but which also takes proper account of the need for an effective and credible justice system.”⁵⁴

The majority of the Court of Appeal identified six key factors to be considered in applying the balancing test:-

1. the nature of the right and the nature of the breach;
2. whether the right was breached in bad faith, recklessly, negligently or due to a genuine misunderstanding of the law by the police;
3. whether other investigatory techniques were available but not used by the police;
4. the reliability, cogency and probative value of the evidence obtained in violation of the Bill of Rights;
5. the seriousness of the crime; and
6. the importance and centrality of the evidence to the Crown's case.

The result, though with reasons differing considerably between the seven-member bench, was that the blood sample was inadmissible, while the photomontage identification evidence was admissible.⁵⁵

Conclusion

The uptake of human rights litigation in Victoria was quite slow. It is likely that there will be a similar apprehensiveness in Queensland. However, when arguments are properly made before Magistrates there is an important opportunity to embrace the HRA and deliver judgments which will aid and guide the legal profession who are tasked to litigate these issues. The importance of the early decisions of the Magistrates Court on applications to cross examine witnesses post-Moynihan is a good analogy. This paper and the list of cases is designed to assist in that task.

Before the HRA was enacted, Queensland lacked any blanket legislative protection of basic human rights.⁵⁶ However, there are many common law and statutory protections

⁵³ See, for example, *R v Butcher* [1992] 2 NZLR 257.

⁵⁴ *R v Shaheed* [2002] 2 NZLR 377 at [156].

⁵⁵ Elias C held all evidence should be admissible (at 383). Richardson P, Tipping and Blanchard JJ excluded all evidence (at 423-4). Gault and Anderson JJ admitted all evidence (at 428 and 431). McGrath J excluded sample 3 but admitted the photomontage identification evidence (at 430).

⁵⁶ The *Queensland Anti-Discrimination Act 1991* provides protection against discrimination, sexual harassment, vilification, victimisation and other objectionable conduct. However, this protection is limited to individuals with certain characteristics or attributes, and only applies in certain areas of public life. It is also framed as prohibitions (a person must not discriminate...) rather than creating positive obligations on public bodies.

which Courts regularly engage with. As such, the requirement to consider the rights enunciated in the *Human Rights Act 2019* (Qld) will not be a novel exercise for a judicial officer. However, in a busy Court, it will initially take some time and patience. The experience in jurisdictions like New Zealand, who have had legislative protections of human rights for many years, is that it will eventually become a part of the fabric in the administration of justice.

Useful Resources

1. Alistair Pound and Kylie Evans, *An Annotated Guide to the Victorian Charter of Human Rights and Responsibilities* (Thomson Lawbook Co, 2008)
2. Carolyn Evans and Simon Evans, *Australian Bills of Rights: The Law of the Victorian Charter and ACT Human Rights Act* (LexisNexis Butterworths Australia, 2008)
3. Charter of Human Rights Bench Book (Vic).