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Human Rights Act 2019 (Qld) and Bail Decisions

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About the Authors

This research paper was researched and written by University of Queensland (UQ) law students **Jane Beilby, Kristy Do and Jacinta Wild** for and on behalf of **Caxton Legal Centre**, an independent, not-for-profit Community Legal Centre.

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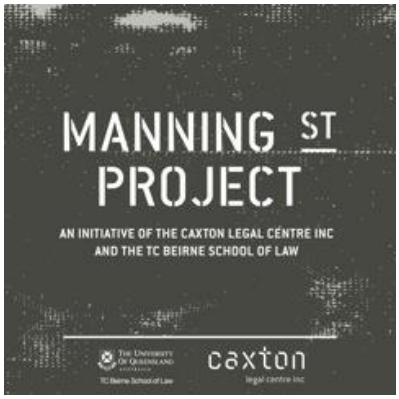

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Introduction

Outline

The *Human Rights Act 2019* (Qld) ('the Act') commenced on 1 January 2020.[1] The aim of this report is to determine how human rights legislation has affected bail decision-making in other jurisdictions and consider the potential for the Act to improve outcomes for people seeking bail in Queensland. Four jurisdictions were the subject of review: Victoria, the Australian Capital Territory (ACT), the United Kingdom, and the European Union.

Context

A significant human rights concern in Queensland and across Australia at the moment is the high number of people being held on remand for long periods of time prior to being sentenced. In Queensland in 2018, un-sentenced prisoners comprised 30% (2,652 prisoners) of the adult prisoner population.[2] This is slightly less than the national figure of 32% (13,856 prisoners).[3] Shockingly, this number has grown from 24% ten years prior.[4] In the experience of Caxton Legal Centre, a large number of people are being held in custody for periods equal to or longer than they would have received on a sentence.[5] The causes for this are complex and many, including the underfunding of legal aid services and a lack of mental health services and resources for prisoners in correctional centres. One of the simpler causes is bail being refused by the Magistrates or Supreme Court. Frequently, bail is refused as a consequence of the applicant being homeless or having a lack of adult supervision and thus being perceived as representing a high risk of reoffending or absconding.[6] Another potential cause for this increase is the significant expansion of offences creating a 'show cause' situation, requiring an accused to demonstrate why bail should be granted, under bail legislation both in Queensland and nationally.[7]

Introduction to the *Human Rights Act 2019* (Qld)

The Act is based on a model of human rights legislation consistent with the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('the *Charter*') and the *Human Rights Act 2004* (ACT) ('*ACT Human Rights Act*').[8] All Australian jurisdictions follow the 'dialogue model' of human rights legislation, which aims to promote a discussion about human rights between the three arms of government (the judiciary, the legislature and the executive).[9] The Act contains three central parts. Part 1 deals with preliminary matters and interpretation of key terms. Part 2 is the most substantive and sets out the rights protected by the Act and how they may be

[1] *Human Rights Act 2019* (Qld) ('Human Rights Act').
[2] Australian Bureau of Statistics, *Prisoners in Australia 2018* (Catalogue number 4517.0, 6 December 2018).
[3] Ibid.
[4] Australian Bureau of Statistics, *Corrective Services, Australia, September Quarter 2008* (Catalogue number 4512.0, 18 September 2008).
[5] This is supported by research from other jurisdictions, see Lorana Bartels et al, 'Bail, Risk and Law Reform: A Review of Bail Legislation across Australia' (2018) 42 *Criminal Law Journal* 91, 93 citing Matthew Ericson and Tony Vinson, Young People on Remand in Victoria: Balancing Individual and Community Interests (Jesuit Social Services, 2010) 20 and NSW Law Reform Commission (NSWLRC), Bail (Report No 133, 2012) 51.
[6] Australian Law Reform Commission, *Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Report no 133, December 2017) 72, 177; Senate Standing Committees on Legal and Constitutional Affairs, Parliament of Australia, *Value of a justice reinvestment approach to criminal justice in Australia* (Report, June 2013) 10 [2.39].
[7] Lorana Bartels et al (n 5) 95.
[8] Explanatory Notes, Human Rights Bill 2010 (Qld), 11; *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('*Charter*'); *Human Rights Act 2004* (ACT).
[9] Ibid; Victoria, *Parliamentary Debates*, Legislative Council, 4 May 2006, 1290 (Mr Hulls, Attorney-General).

limited. Part 3 sets out the application of these rights and the obligations imposed on courts and public entities. The Queensland Human Rights Commission is established under Part 4.

There are 23 rights protected under the Act in Part 2.[10] The Explanatory Notes state that the rights primarily derive from the *International Covenant on Civil and Political Rights*.[11] Two rights – the right to health services and the right to education – are derived from the *International Covenant on Economic, Social and Cultural Rights*.[12] The rights with particular relevance to the matter of bail are:

- Section 17: Protection from torture and cruel, inhuman or degrading treatment
- Section 19: Freedom of movement
- Section 29: Right to liberty and security of person
- Section 31: Fair hearing
- Section 32: Rights in criminal proceedings

This is not a complete list. The relevance of certain rights will depend on a bail applicant's specific circumstances, including whether the applicant is a child (ss 17 and 23) or an Indigenous person (s 19).[13]

These rights are not absolute. They are subject to such 'reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom' having regard to a number of factors, including:

- the nature of the right;
- the nature of the purpose of the limitation;
- the relationship between the limitation and its purpose;
- the existence of less restrictive means reasonably available to achieve this purpose; and
- the importance of preserving the human right, taking into account the nature and extent of the limitation on the human right.[14]

Application of the *Human Rights Act 2019* (Qld)

Introduction

Very simply, the Act creates obligations for courts and tribunals, public entities, and Parliament to consider and act compatibly with the 23 human rights when exercising their functions.[15] Evidently, the implications of the Act for courts is most relevant to the discussion of bail decisions. As the Act was modelled on the *Charter* and the ACT's *Human Rights Act*, its anticipated application and effect is best illustrated through an analysis of how human rights legislation has operated in practice in these jurisdictions, with a primary focus on Victoria.

The Victorian Charter of Human Rights

The *Charter* came into operation in January 2007.[16] The *Charter* had the benefit of being drafted based upon a consideration of the human rights legislation operating in the ACT, New Zealand and the United Kingdom.[17]

[10] *Human Rights Act* (n 1) pt 2.
[11] Explanatory Notes, Human Rights Bill 2010 (Qld), 3.
[12] Ibid.
[13] *Woods v Director of Public Prosecutions* (2014) 238 A Crim R 84 [14] – [15] ('Woods').
[14] *Human Rights Act* (n 1) s 13.
[15] *Human Rights Act* (n 1) s 5.
[16] *Charter*, s 2.
[17] Victoria, *Parliamentary Debates*, Legislative Council, 4 May 2006, 1290 (Mr Hulls, Attorney-General).

There are 20 rights protected under part 2 of the *Charter*.[18] Unlike the Act, it does not include the right to health services or the right to education. Otherwise, the *Charter* rights are identical to that under the Act. There are two mechanisms by which the *Charter* applies to courts. The first is through the interpretation and declaration requirements under division 3 of part 3,[19] and the second is through the 'direct application' of *Charter* rights to the exercise of court functions by virtue of s 6(2)(b).[20]

Interpretation and Declaration: Div 3 Pt 3

The most obvious obligation imposed on courts by the *Charter* is the requirement under s 32 to interpret statutory provisions in a way that is compatible with human rights.[21] However, this must be done only to the extent that the interpretation is still consistent with the purpose of the legislation.[22] The validity of Act or provision of an Act is not affected by a finding that it is incompatible with a human right – thus upholding parliamentary sovereignty.[23] The Supreme Court may make a declaration that a statutory provision cannot be interpreted consistently with a *Charter* right and provide this declaration to the Attorney-General.[24] Again, this does not affect the validity of an Act or provision of an Act, it merely means the Minister administering the relevant inconsistent statutory provision must make a written response to the declaration.[25]

The leading case considering the courts 'interpretation' obligations under the *Charter* is the decision of the High Court in *Momcilovic v The Queen* ('*Momcilovic*').[26] The Court delivered six judgements, so there is no clear consensus about the requirements of s 32.[27] However, it was agreed that s 32 did not justify the 'strong or remedial approach' to interpretation allowed under the *Human Rights Act (UK)*.[28] Most judges considered that s 32 did not modify the requirement for courts to find the meaning of the relevant provision using 'ordinary techniques of statutory construction'.[29] In later cases applying *Momcilovic*, it has been held that s 32 does not allow for the 'reading in of words which are not explicit or implicit in a provision, or the reading down of words so far as to change the true meaning of a provision'.[30] Therefore, if a given provision is only capable of one possible meaning, s 32 has no effect.[31] It is only where multiple possible interpretations are available that the court must select the meaning most compatible with human rights.[32]

Direct Application: s 6(2)(b)

Section 38 of the *Charter* states that it is unlawful for 'public authorities' to act in a way that is incompatible with a right or, in making a decision, to fail to give proper consideration to any relevant rights.[33] However, a court or tribunal is excluded from the definition of 'public authority', except when acting in an administrative

[18] *Charter*, pt 2.
[19] Ibid pt 3, div 3.
[20] Ibid s 6(2)(b).
[21] Ibid s 32; *R v Momcilovic* [2010] VSCA 50, [102], [107].
[22] Ibid.
[23] Ibid s 32(3).
[24] Ibid s 36.
[25] Ibid s 37
[26] (2011) 245 CLR 1 ('*Momcilovic*').
[27] Judicial College of Victoria, *Charter of Human Rights Bench Book* (online at 2 October 2019) '2.2 Statutory interpretation (s 32)' [2] ('*The Charter Bench Book*').
[28] Ibid [14], citing *Momcilovic* (n 26) [20], [38] – [40], [61] – [62] (French CJ), [146], [148] – [160] (Gummow J), [545] – [546], [565], [574] (Crennan and Kiefel JJ), [684] – [685] (Bell J)).
[29] *The Charter Bench Book* (n 27) '2.2 Statutory interpretation (s 32)' [7], citing *Momcilovic* (n 26) [20], [38] – [40], [50] – [51], [61] – [62] (French CJ), [146], [148] – [160] (Gummow J), [280] (Hayne J), [546], [565], [574] (Crennan and Kiefel JJ), [684] – [685] (Bell J).
[30] *Slaveski v Smith* (2012) 34 VR 206; [2012] VSCA 25 [45].
[31] *The Charter Bench Book* (n 27), '2.2 Statutory interpretation (s 32)' [22].
[32] Ibid [19], citing *Momcilovic* (n 26) [512], [579] – [580] (Crennan and Kiefel JJ); *WBM v Chief Commissioner of Police* (2012) 43 VR 446; [2012] VSCA 159 [181] (Bell AJA).
[33] *Charter* s 38.

capacity.[34] Committal proceedings, issuing of warrants, and listing of cases are given as examples of a court acting in an 'administrative capacity'.[35] This implies the *Charter* does not impose an obligation upon courts to consider human rights when making decisions.[36]

However, s 6(2)(b) states that the *Charter* applies to 'courts and tribunals, to the extent that they have functions under Part 2…'. Accordingly, many Victorian courts have determined that they are bound to apply, enforce, and act compatibly with the *Charter* rights set out under Part 2, but only to the extent that those rights relate to the court proceedings.[37] It is not a duty to enforce directly any and all of the rights enacted in Part 2.[38] This means human rights may have 'freestanding' force in the context of court proceeding, including in bail applications.[39] The *Charter of Human Rights Bench Book* states that this 'intermediate approach' is the generally adopted position, and it is certainly the approach taken by judges in the bail application cases discussed below.[40] This 'direct application' approach seems to overcome some of the 'weakness' of the courts' interpretation and declaration powers following *Momcilovic*. This interpretation of s 6(2)(b) is not uncontroversial and some suggest this was not the intention of the legislature.[41] The Scrutiny of Acts and Regulations Committee even recommended that the words 'Part 2' be removed from s 6 of the *Charter*.[42] The Government concurred stating it 'may create legal uncertainties and inappropriately politicise the judiciary'.[43]

Comparison to the *Human Rights Act 2019* (Qld)

The 'interpretation' provision under s 48 of the Act is analogous, though worded slightly different to that in the *Charter*.[44] It includes the additional stipulation that where a 'statutory provision can not 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'.[45] This possibly suggests parliament intended to give courts broader power to interpret provisions compatibly with human rights than has been found to exist under the *Charter*. However, the Explanatory Notes state that s 48(2) is applicable where 'a provision can be interpreted in more than one way but none of the options would be compatible with human rights'.[46] This may indicate that there must still be 'ambiguity' and multiple possible interpretations of a provision for s 48 of the Act to have any effect.

The Act applies to 'a court or tribunal, to the extent the court or tribunal has functions under Part 2…'[47] This is an exact mirror of the 'application' provision of the *Charter* discussed above.[48] Given the detailed consultation

[34] Ibid s 4(1)(j).
[35] Ibid.
[36] *The Charter Bench Book*, (n 27) '2.5 Direct application of Charter rights to courts' [4], citing *De Simone v Bevnol Constructions* (2009) 25 VR 237; [2009] VSCA 199 [50], [52].
[37] Alistair Pound and Kylie Evans, *Annotated Victorian Charter of Rights*, (Thomson Reuters (Professional) Australia Pty Limited, 2018), 46 – 47, citing *Matsoukatidou v Yarra Ranges Council* (2017) 51 VR 624; [2017] VSC 61 [37], [39]; *Kracke v Mental Health Review Board* (2009) 29 VAR 1; [2009] VCAT 646 [250].
[38] *The Charter Bench Book*, (n 27) '2.5 Direct application of Charter rights to courts' [5].
[39] Pound and Evans, (n 37) 47.
[40] *The Charter Bench Book*, (n 27) '2.5 Direct application of Charter rights to courts' [4], [11]; also see *Momcilovic* 204, [525] (Crennan and Kiefel JJ) expressing support for this approach.
[41] Timothy Lau, 'Section 6(2)(b) of the Victorian Charter: A problematic provision' 23 *Public Law Review* 181, 191 – 192.
[42] Scrutiny of Acts and Regulations Committee, *Review of the Charter of Human Rights and Responsibilities Act 2006* (Parliament of Victoria, 2011) 120 – 121.
[43] Victorian Government, 'Response to SARC Review' (14 March 2012).
[44] *Human Rights Act* (n 1) s 48.
[45] Ibid s 48(2).
[46] Explanatory Notes, Human Rights Bill 2010 (Qld), 31.
[47] *Human Rights Act* (n 1) s 5(2)(b).
[48] *Charter* s 6(2)(b).

and consideration that preceded the passing of the Act,[49] it seems logical that it was Parliament's intention for the rights relating to courts' exercise of their functions under Part 2 to have a 'freestanding' application in court proceedings. This approach is widely accepted in Victoria.[50] Given the Act and the *Charter* are largely identical, it is unlikely a substantially different approach would be taken in Queensland.

Interaction between the *Bail Act 1980* (Qld) and the *Human Rights Act 2019* (Qld)

Introduction

A review of other jurisdictions with human rights legislation revealed a large number of cases concerning the interaction between human rights and bail application decisions. The applicability of these cases to future decisions in Queensland will obviously depend on the similarity of the relevant human rights legislation. As such, case law out of Victoria will be highly pertinent, due to the fact the *Charter* and the Act appear to apply to courts in much the same manner, as discussed above. The discussion of case law from other jurisdictions is broken up into specific 'topics' or 'issues' under the *Bail Act 1980* (Qld) *('Bail Act')*.[51]

Assessment of 'unacceptable risk'

Bail Act 1980 (Qld)

In most cases, a defendant has the prima facie entitlement to a grant of bail pending trial.[52] The onus is on the prosecution to satisfy the court that bail should be refused on the basis that there is an 'unacceptable risk' that the defendant, if released on bail, would fail to appear and surrender into custody; or while released on bail commit an offence, endanger the safety or welfare of a person, or otherwise obstruct the course of justice.[53] The prosecution may also argue that the defendant should remain in custody for their own protection.[54] The assessment of 'unacceptable risk' is therefore the central consideration in bail applications. The court has a broad discretion to consider all matters appearing to be relevant.[55]

Victorian Case Law

Woods v Director of Public Prosecutions

Woods v Director of Public Prosecutions (DPP)[56] *('Woods')* provided the most significant analysis of the effect of human rights considerations on bail decisions. It was held that 'liberty and human rights under the common law and the *Charter'* are the proper context within which the *Bail Act 1977* (Vic) ('*Victorian Bail Act')*[57] should

[49] For example, the Queensland Anti-Discrimination Commission provided detailed submission in support of a Human Rights Act for Queensland in April 2016 (Anti-Discrimination Commission Queensland, Submission to the Queensland Parliament, Legal Affairs and Community Safety Committee, *The Human Rights Inquiry* (18 April 2016); also see Legal Affairs and Community Safety Committee, Parliament of Queensland, *Human Rights Bill 2018* (Report No. 26, February 2019).

[50] See, eg, *Matsoukatidou v Yarra Ranges Council* (2017) 51 VR 624; *Kracke v Mental Health Review Board* (2009) 29 VAR 1; Victoria Police Toll Enforcement v Taha (2013) 49 VR 1.

[51] *Bail Act 1980 (Qld) ('Bail Act')*.

[52] *Bail Act* (n 43) s 9.

[53] Ibid s 16

[54] Ibid; Heather Douglas and Emma Higgins, *Criminal Process in Queensland* (Thomson Reuters (Professional) Australia Pty Limited, 2nd ed, 2017) 93.

[55] *Bail Act* (n 51) s 16(2).

[56] Woods (n 13).

[57] *Bail Act 1977* (Vic) ('*Victorian Bail Act'*).

be understood.[58] The rights to freedom of movement and liberty and security of the person[59] were specifically stated to be engaged 'when deciding whether or not to grant bail to a person under arrest on criminal charges and impose conditions of bail'. It was clarified that this is not a closed list; further rights may be engaged depending on circumstances.[60] Justice Bell emphasised that the presumption of innocence must be the starting point of all bail applications, being both a fundamental principle of the common law and a human right.[61] The limitation of these rights was noted, Bell J stating that 'they do not prevent the refusal of bail to an accused who, for example, represents an unacceptable risk…'. Justice Bell considered that the legislature clearly intended for the *Victorian Bail Act* to be applied with the 'justifiable limitations' provision of the *Charter* kept in mind.[62]

Referring to decisions of the European Court of Human Rights and the ACT case of *Re Seears,*[63] Bell J found that human rights legislation requires a court to 'carefully consider the individual facts and circumstances of the case before the severe step of depriving the accused of his or her liberty is taken'.[64] Reliance on broad considerations, such as generalised concerns that an accused might abscond or a lack of fixed residence, was expressed to be an unacceptable basis to refuse bail, though these may be relevant considerations.[65] Justice Bell considered that in deciding whether there is an 'unacceptable risk', factors that weigh against the grant of bail, such as a high risk of offending, must be considered in the light of whether there will be, for example, inordinate delay before trial, or whether there is a weak prosecution case, as it may be the case that 'having regard to the presumed innocence, right to liberty and other human rights of the accused' the risk is not unacceptable as a consequence.[66]

Application for Bail By HL

Application for Bail by HL[67] concerned a 16 year-old charged with, amongst other offences, committing an indictable offence whilst on bail. Justice Elliot stated that the *Charter* rights were relevant to determining an application for bail and that 'the court must give full effect to the relevant right or rights, but that must be done within the scheme of the *Bail Act'*.[68] The applicant asked the Court to determine whether it had an obligation under s 32(1) of the *Charter* to interpret the provisions of the Bail Act in a manner that is compatible with the *Charter* rights.[69] Justice Elliot, following the authority of the High Court in *Momcilovic,* found that there was no basis to depart from the legal meaning of the provisions of the *Victorian Bail Act*, as there was no ambiguity or competing interpretation identified in any provision which would allow the Court to give it an interpretation more consistent with the *Charter*.[70]

However, Elliot J did find that s 6(2)(b) of the *Charter* necessitated a consideration of the applicant's rights under the *Charter* in determining whether the applicant had 'shown cause' (discussed below) or presented an unacceptable risk.[71] Consequently, Elliott J took into account the conditions of the remand centres in which the applicant was to be held and the treatment he received there. It was found that detention in the remand centre did impact upon the applicant's rights, including the right to protection in his best interests as a child, and the right whilst deprived of liberty to be treated with dignity and in a manner appropriate for a person who

[58] Woods (n 13) [3].
[59] *Charter* ss 12, 21.
[60] Woods (n 13) [14] – [15].
[61] Ibid [19].
[62] *Charter* s 7(2).
[63] [2013] ACTSC 187.
[64] Woods (n 13) [29].
[65] Ibid [25].
[66] Ibid [47].
[67] *Application for bail by HL* [2016] VSC 750.
[68] Ibid [57] – [60].
[69] Ibid [41].
[70] Ibid [64] – [67].
[71] Ibid [70].

has not been convicted.[72] However, it was found that the level of unacceptability of the risk presented by the applicant made it such that the presumed infringements of the applicant's rights under the *Charter* did not make that risk acceptable.[73] At a secondary hearing it was also held that the applicant's right as a child charged with a criminal offence to a procedure that takes account of his age and the desirability of rehabilitation was also breached by his detention, but the ultimate decision as to the granting of bail remained the same.[74]

ACT Case Law

The *Bail Act 1992* (ACT) ('*ACT Bail Act*') does not adopt the 'unacceptable risk' requirement, rather it just requires the court to consider the 'likelihood' of a number of factors similar to those under s 16 of the *Bail Act*, for example, 'the likelihood of the person appearing in court in relation to the offence'[75] and 'the likelihood of the person, while released on bail, committing an offence'.[76] The ACT courts do, however, still use 'unacceptable risk' in determining whether to refuse bail.[77]

In *Re Application for Bail by Lacey*,[78] Refshauge J considered the impact of the right to liberty under s 18 of the *ACT Human Rights Act* on the circumstances in which bail should be granted. The Court held that the refusal of bail is not inconsistent with the right to liberty, however the *ACT Bail Act* provisions in favour of bail should be interpreted liberally in order to give effect to the right to liberty.[79]

In *R v Rubino*[80] the Supreme Court considered a sixth request for bail by a man charged with aggravated burglary, theft and criminal damage, where the previous five applications for bail were refused due to the unacceptable risk of reoffending. In granting bail, Refshauge J found that previous bail applications were approached in a manner that assumed Mr Rubino would commit further offences and that he had to disprove this.[81] His Honour found this approach was not only inconsistent with the presumption in favour of bail, but also offended against the presumption of liberty in the *ACT Human Rights Act*.[82]

UK and European Case Law

Of relevance to the progression of UK law in relation to exceptions to bail is the 'Bail and The Human Rights Act 1998 Project' by the Law Commission in 2001.[83] Although some of the recommendations have been implemented by the UK legislature, it would be helpful to summarise the findings of this report for reference.

Essentially, the report finds that only two exceptions to the right of bail were acceptable and did not violate the rights protected under the European Convention on Human Rights ('the Convention'). These included first, detention on the grounds of a fear that the defendant will fail to surrender to custody or will interfere with witnesses or otherwise obstruct the course of justice.[84] The second ground related to where a case is adjourned for inquiries or a report, and it appears to the court that it would be impracticable to complete the inquiries or make the report without keeping the defendant in custody.[85] The latter is compatible with the Convention as it would also fall within the legitimate purpose of preventing the defendant from obstructing the

[72] Ibid [73] – [78]; *The Charter* ss 17 (2), 22.
[73] Ibid [95].
[74] *Application for Bail by HL (No 2) [*2017] VSC 1 [131] – [134], [153].
[75] *Bail Act 1992* (ACT), s 22(1)(a).
[76] Ibid s 22(1)(b).
[77] *R v Rubino* [2012] ACTSC 157.
[78] [2010] ACTSC 82.
[79] Ibid.
[80] [2012] ACTSC 157.
[81] *R v Rubino* [2012] ACTSC 157, [41].
[82] Ibid.
[83] The Law Commission, *Bail and the Human Rights Act 1998,* 20 June 2001, available online: https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2015/03/lc269_Bail_and_the_Human_Rights_Act.pdf accessed 8 January 2020.
[84] See now *Bail Act 1976,* Part I para 1(2)(c).
[85] Ibid Part I para 7.

course of justice. Outside of these two grounds, the Commission was sceptical of any other purported restriction on the right to bail.

As the report is extensive in its analysis of the UK's position on bail at that time, the most relevant criticisms which could perhaps be applicable in the Queensland context will be discussed. First, the Commission was sceptical of a refusal of bail where there existed grounds for believing that the defendant would commit an offence whilst on bail.[86] The scepticism can be summarised succinctly as follows: read literally, such refusal of bail would be permitted if the offence that it is feared the defendant might commit is not of a serious nature (and perhaps, not even serious enough to warrant a term of imprisonment). The purported offence may also have no connection to the original offence charged. The Commission suggested that such a refusal on this basis would most likely be a violation of Article 5(3) of the Convention. In the case of *Clooth v Belgium,*[87] the Strasbourg court held that in considering whether a refusal of bail is based on a belief that an accused person might commit a further offence, there is no automatic assumption that there is a risk of alleged re-offending based solely on the accused person's record. Rather, the court should consider whether the previous convictions are comparable either in nature or seriousness, to the original charges against the accused. This principle was again confirmed in the case of *Lyubimenko v Russia.*[88] Yet despite these findings from the European Court (coupled with the recommendations by the Law Commission), it is important to note that the UK legislature has yet to accept these suggestions on this point. To this day, the provision allows a refusal of bail if there are substantial grounds for believing that the defendant, if released on bail, would commit an offence[89] – much like the position in Queensland.

Another relevant ground for refusing bail that the Commission had issue with is if the need to detain the defendant was for his or her own protection.[90] The Commission concluded that a refusal of bail for the defendant's own protection, whether from harm by others or self-harm, would only be compatible with the Convention where detention is necessary to address a 'real risk' that, if granted bail, the defendant would suffer harm by others or self-harm, against which detention could provide protection, and there are exceptional circumstances in the nature of the alleged offence and/or the conditions or context in which it is alleged to have been committed. Of relevance is the case of *IA v France*,[91] where the court dismissed continued detention on the grounds of protecting the defendant from his wife's revenge attacks because there was found to be no 'real' fear. Therefore, the risk must satisfy this threshold requirement. Yet notwithstanding these findings and recommendations, the UK legislature has not altered its terminology on this ground. The current provision in the *Bail Act 1976* reads; 'The defendant need not be granted bail if the court is satisfied that the defendant should be kept in custody for his own protection or, if he is a child or young person, for his own welfare.[92]

Application in Queensland

The Victorian cases of *Woods* and *HL* suggest that human rights legislation necessitates the balancing of an applicant's human rights against the risk posed by their release on bail. *Woods* emphasises that the existence of human rights legislation means an individual's specific circumstances must be taken into consideration by the court in every case, rather than making determinations based on generalised concerns. Obviously, this will not result in a grant of bail in every case just because the applicant's rights will be infringed. This is demonstrated by the fact that bail was still refused to the applicant in *HL* and to one of the applicants in *Woods*. As expressed by Bell J, the justifiable limitation provision is clearly relevant to the court's power to refuse bail.[93]

[86] Ibid Part I para 1(2)(b).
[87] [1998] ECHR 15, [40].
[88] [2009] ECHR, [74].
[89] See now *Bail Act 1976,* Part I para 1(2)(b).
[90] Ibid Part I para (3).
[91] [1998] ECHR.
[92] See now *Bail Act 1976,* Part I para 3.
[93] *Charter*, s 13.

It is arguable that the assessment of 'unacceptable risk' already involves a similar balancing act of competing factors. As stated in *Williamson v Director of Public Prosecutions,* the granting of bail is an acknowledgment that some risks have to be taken in order to protect citizens from the 'right of the executive to imprison a citizen upon mere allegation'.[94] The suggestion in *Woods* that inordinate delay before trial or a weak prosecution case may be factors making it such that risk is not 'unacceptable' was previously considered in the Queensland case of *Lacey v Director of Public Prosecutions.*[95] The Court held that 'the length of delay, the reasons for that delay and the strength of the Crown case will always be matters of degree which must be balanced to arrive at a decision as to whether bail should be granted'.[96] In the case where time on remand will likely exceed any custodial sentence 'the relative importance of time may very well be regarded by the judge as outweighing the other relevant factors.'[97] *Lacey* was applied in *Sica v Director of Public Prosecutions*.[98] In *Sica* the Court expressed that delay, specifically the risk an accused may spend a lengthy time in jail and then be acquitted, is a consideration that should be weighed 'against the strength of the Crown case and the risks that if allowed bail an accused might abscond, re-offend, or interfere with witnesses'.[99] Delay will assume more importance in circumstances where the prosecution case is weak.[100]

It appears the weighing or balancing of factors that point in favour of a grant of bail, such as delay or a weak prosecution case, against negative factors, such as a risk of absconding, is already the approach taken to bail applications in Queensland. Nonetheless, the Act will make the human rights of an applicant a more explicit requirement for courts to consider in performing this balancing act. The Act will emphasise that the infringement of human rights is the fundamental concern underpinning the necessity of the 'unacceptable risk' assessment. The statements made by Bell J in *Woods* may also discourage judges from relying on general considerations, such as an applicant's lack of fixed address, to justify a refusal of bail.

'Show cause' provisions

Bail Act 1980 (Qld)

Under s 16(3) of the *Bail Act*, the presumption is favour of bail shifts in a certain cases, such as matters where only the Supreme Court may grant bail[101] or where the accused is charged with an indictable offence alleged to have involved the use, or threatened use, of a firearm, offensive weapon or explosive substance.[102] In these cases, the accused bears the onus of 'showing cause' as to why their detention in custody is not justified, which in practice requires them to satisfy the court that they are not an 'unacceptable risk'.[103]

Victorian Case Law

Woods v Director of Public Prosecutions

Provisions of the *Victorian Bail Act* at the time of *Woods* made it such that where an accused had allegedly committed an indictable offence while awaiting trial for an indictable offence, or was charged with a range of other specified offences, bail must be refused 'unless the applicant shows cause why his detention in custody is not justified'.[104] Significantly, Bell J stated that 'the presumptive entitlement to bail, which reflects the importance of the presumption of innocence and the prosecutorial onus of proof as well as the right of all

[94] *Williamson v Director of Public Prosecutions (DPP) (Qld)* [2001] 1 Qd R 99 [21].
[95] *Lacey v Director of Public Prosecutions (Qld)* [2007] QCA 413 ('*Lacey'*).
[96] Ibid [13].
[97] Ibid.
[98] *Sica v Director of Public Prosecutions (Qld)* [2011] 2 Qd R 254 ('*Sica'*).
[99] Ibid [43].
[100] Ibid [57].
[101] *Bail Act* (n 51) s 16(3)(b).
[102] Ibid s 16(3)(c).
[103] Heather Douglas and Emma Higgins, (n 54) 94.
[104] *Bail Act 1977* (Vic) s 4(4), as at 20 December 2013.

persons to liberty and freedom of movement' was displaced by the 'show cause' provisions in the *Victorian Bail Act*.[105]

Despite appearing to recognise that the 'show cause' provision is inconsistent with the presumption of innocence and a number of *Charter* rights, neither the 'inconsistent interpretation' or 'justifiable limitation' provisions of the *Charter* were referred to by Bell J.[106] Instead, his Honour performed a detailed review of the case law discussing the 'show cause' provision. Justice Bell reached the conclusion that that 'there is nothing in the nature of the show cause test…which necessarily requires applicants to disprove what would normally be for the prosecution to prove, i.e. that the applicant represents an unacceptable risk…'.[107] This interpretation of the 'show cause' provision was said to give effect to 'the principle that the liberty and freedom of movement of the applicant is to be denied on the ground that he or she represents an unacceptable risk only where the prosecution discharges the onus of establishing that to the satisfaction of the court'.[108] Consequently, while the onus is on the applicant to 'show cause', the prosecution still bears the onus of establishing that there is an unacceptable risk to the satisfaction of the Court. Where 'unacceptable risk' cannot be demonstrated by the prosecution, 'cause' for the grant of bail will be shown in the applicant's favour.[109] It is not a 'one step' process whereby the Court must refuse bail if the applicant has not satisfied the Court that his/her detention in custody is not justified. In Bell J's view this approach would have the 'troubling feature' of reversing the onus of proof.[110]

ACT Case Law

The *ACT Bail Act* differs from the *Bail Act* in that it does not contain a 'show cause' provision, rather, it uses the 'special or exceptional circumstances' test.[111] In that case, however, even if special or exceptional circumstances are established, the court must refuse bail if satisfied that refusal is justified after considering matters referred to in s 22.[112]

In *In the matter of an application for Bail by Isa Islam*[113] the ACT Supreme Court declared a provision of the *ACT Bail Act*, requiring those accused of certain crimes to show 'exceptional circumstances' before having a normal assessment for bail undertaken, as inconsistent with the right to liberty under s 18 of the *ACT Human Rights Act*, that a person awaiting trial must not be detained in custody as a 'general rule'. In reaching this conclusion, her Honour found that the limits of s 9C of the *ACT Bail Act* were not proportional to the importance of its purpose, with this case mainly turning on interpretation. This is distinguished, however, from Queensland's show cause provisions as the captured offences are much less specific.

Whilst this provision was declared invalid, no legislative change has followed. Regardless, in the ACT Parliamentary Counsel's response to the declaration of inconsistency, drafting suggestions to amend the provision in order to make it consistent were in line with Queensland's provisions and therefore unlikely that any such declaration of inconsistency will arise in Queensland with the introduction of the *ACT Human Rights Act*.

UK and European Case Law

The equivalent 'show cause' provision is s 25(1) of the *Criminal Justice and Public Order Act 1994*. This provision stipulates that a person who has been charged or convicted of a qualifying offence (and a previous conviction for another such serious offence) shall be granted bail only if the court or the constable is satisfied

[105] *Woods* (n 13) [34].
[106] *Charter* ss 7(2), 32.
[107] *Woods* (n 13) [57].
[108] Ibid.
[109] Ibid [58].
[110] Ibid [56].
[111] *Bail Act 1992* (ACT).
[112] Ibid s 9C(3).
[113] [2010] ACTSC 147.

that there are exceptional circumstances which justify it. Amongst the offences of which 'show cause' applies are murder, attempted murder, manslaughter, and rape.[114]

Section 25 states that a person to whom it applies can be granted bail only if the court or constable considering the grant of bail is satisfied that there are exceptional circumstances which justify it. The meaning of "exceptional circumstances" is therefore crucial. In the 'Bail and The Human Rights Act 1998 Project', the Law Commission concluded that provided that s 25 is interpreted so that the courts are not prevented from giving genuine consideration to whether the defendant poses a risk to the public, it is highly likely that the courts would find that the provision can be justified. This was taking into consideration the history of the provision, and the fact that s 25 was enacted in response to public concerned about the threat of serious offeces committed by repeat offenders.

In terms of what would constitute "exceptional circumstances", the case of *Offen* provides guidance.[115] Subject to this case, 'exceptional circumstances' encompasses situations where the court believes that the defendant would not pose a significant risk to the public if released on bail. Therefore, Section 25 should be construed as meaning that where the defendant would not, if released on bail, pose a real risk of committing a serious offence. This construction would achieve Parliament's purpose of ensuring that, when making bail decisions about defendants to whom s 25 applies, decision-makers focus on the risk the defendant may pose to the public by re-offending. If the court approached the interpretation of s 25 which left the court with no discretion at all, this would be at odds with the contextual interpretative exercise required as well as Article 5 of the European Convention on Human Rights.

Regina (O) v Crown Court at Harrow[116]

On the question of 'show cause', the leading case in the U.K. context is *Regina (O) v Crown Court at Harrow*.[117] In this case, the defendant was charged with rape, false imprisonment and indecent assault. He was remanded in custody on the ground that the judge was not satisfied there were exceptional circumstances in justifying bail pursuant to s 25(1) of the *Criminal Justice and Public Order Act 1994*. In due time, the defendant's custody limit expired. Although the judge refused the prosecution's application to extend the custody limit because the prosecution had not acted with 'due diligence and expedition',[118] the defendant was nonetheless refused bail. The court held that there were still no exceptional circumstances to justify its grant.

The issue before the court was, inter alia, whether the trial judge's reliance on the 'show cause' provision under s 25(1) after the expiration of his custody time limit violated his right to trial within a reasonable time which was enshrined in Article 5(3) of the *Convention for the Protection of Human Rights and Fundamental Freedoms* (as scheduled for in the *Human Rights Act 1984*). The court answered in the negative. Section 25 was to be read down as placing an evidential burden upon a defendant to whom the section applied to adduce material supporting the existence of exceptional circumstances justifying the grant of bail. Moreover, it was held that s 25 needed to be construed as a guide to the proper operation of the *Bail Act 1976* and operated to disapply the ordinary requirement that bail should be granted automatically to any defendant whose custody time limit had expired. Put simply, the 'show cause' provision applied in this way was compatible with Article 5(3) of the *Convention for the Protection of Human Rights and Fundamental Freedoms.*

Ilijkov v Bulgaria[119]

In this case, the European Court of Human Rights clarified the requirements under Article 5(3) of the *Convention for the Protection of Human Rights and Fundamental Freedoms.* Put simply, two requirements are

[114] *Criminal Justice and Public Order Act 1994*, s 25(2).
[115]
[116] [2006] UKHL 42.
[117] Ibid.
[118] Pursuant to section 22(3) of the Prosecution of Offences Act 1985
[119] (Application No 22977/96) (unreported) 26 July 2001.

imposed by Article 5(3). First, the prosecution must bear the overall burden of justifying a remand in custody; that is, the remand must advance good and sufficient public interest reasons outweighing the presumption of innocence and longstanding presumption in favour of liberty. Second, the judge must be entitled to take into account all relevant considerations pointing for and against the grant of bail so as to exercise effective and meaningful judicial control over pre-trial detention.

Essentially, the court reiterated that continued detention can only be justified in rare instances where there existed specific indications of a genuine requirement of public interest. Even if there exists a putative law which provides for a presumption in respect of factors relevant to the grounds for continued detention, the existence of concrete facts outweighing the rule of respect for individual liberty must nevertheless be established. To shift the burden of proof is tantamount to overturning the requirement in Article 5 of the *Convention for the Protection of Human Rights and Fundamental Freedoms.*

Application in Queensland

The outcome in *Woods* was essentially that Bell J preferred an interpretation of the 'show cause' provisions which meant that (at least in Bell J's view) the onus of proof was not reversed, as it may have been if a different interpretation was accepted.[120] Maintaining the prosecutorial onus of establishing 'unacceptable risk' ensured consistency with the presumption of innocence and the *Charter* rights. This was done without reliance on the 'interpretation' provisions of the *Charter*. The current Queensland *Bail Act* mirrors the 'show cause' provision discussed in *Woods*, albeit with different relevant offences specified.[121] Once the Act has come into effect, it is possible that Queensland courts will follow in path of *Woods* and interpret the 'show cause' provision in a manner which upholds the prosecutorial onus of proof and thus presumption of innocence. However, the extent to which this would make any difference in practice to what currently occurs in the 'show cause' situation in Queensland is unknown.

Bail conditions

Bail Act 1980 (Qld)

Under s 11 *Bail Act*, a court may impose conditions necessary to secure the accused's appearance and to ensure that they do not commit further offences, endanger the public or interfere with witnesses while released on bail. These conditions, however, must not be more onerous than 'are necessary having regard to the nature of the offence, the circumstances of the defendant and the public interest.'[122]

Victorian Case Law

Woods v Director of Public Prosecutions

Justice Bell stated that the imposition of bail conditions is regulated by the *Charter*, meaning the Court must 'impose no greater limitation upon the liberty and human rights of the accused than the circumstances of the case require'.[123] It was observed that the imposition of a condition of bail requiring the accused to obtain medical or other treatment may engage the *Charter* right prohibiting treatment of a person without their full, free and informed consent.[124] Additionally, bail conditions may limit the ability for a person to enjoy the right 'not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with' and right to 'peaceful assembly'.[125]

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[120] *Woods* (n 13) [56]; for the alternative interpretation which Bell J believed had this effect see *Re application for bail by Asmar* [2005] VSC 487 [11] – [13].
[121] *Bail Act* (n 51) s 16(3).
[122] Ibid s 11.
[123] *Woods* (n 13) [65], [82] – [84].
[124] Woods (n 13) [15]; *Charter*, s 10(c).
[125] *Woods* (n 13) [16] – [17]; *Charter* ss 13; 16.

Justice Bell illustrated the effect of *Charter* considerations by refusing to impose a condition requested by the DPP that would have prevented the applicant from using all public transport.[126] The applicant was a young person who could not drive and relied solely on public transport. In these circumstances it was found such a condition 'would impede his freedom of movement to an extent which would not be warranted for any legitimate purpose of bail'.[127] In respect of a different applicant, Bell J imposed a condition that they consume no alcohol, however stated that this 'can be liberalised if it interferes too much with the applicant's daily life and, given progress, becomes unnecessary'.[128] Justice Bell refused to impose a condition sought preventing the applicant from attending a local shopping centre, finding that it would 'impose greater constraints upon his freedom of movement that the circumstances require'.[129]

ACT Case Law

An accused's right to privacy under s 12 of the *ACT Human Rights Act* was considered in the context of bail conditions in *R v Wayne Michael Connors*[130] where the relevant bail condition required testing at random by urinalysis. Chief Justice Higgins recognised the limitation such bail conditions posed on the accused's right to privacy as well as the danger if it was enforced aggressively or in an unfairly oppressive manner.[131] However, it was accepted that in this case the limitation on rights of the accused was reasonable, lawful and justified pursuant to the limitation provision of the *ACT Human Rights Act* given its purpose to facilitate compliance with the law and the primary condition of bail to abstain from the consumption of illicit drugs.[132]

Application in Queensland

Woods provides useful guidance to Queensland courts on the interaction between human rights and the courts power to impose bail conditions under s 11 of the *Bail Act*.[133] The test of 'no greater limitation upon the liberty and human rights of the accused than the circumstances of the case require' is helpful guidance;[134] though, it is arguable that it does not in practice require anything above the existing requirement that conditions of bail 'not be more onerous for the person than those that in the opinion of the court or police officer are necessary having regard to the nature of the offence, the circumstances of the defendant and the public interest'.[135]

It should be kept in mind that prior to the decision in *Woods*, the provision of the *Victorian Bail Act* relating to bail conditions was amended to include a note making explicit reference to certain relevant rights under the *Charter*.[136] This was to 'ensure the *Charter* provisions are considered when bail conditions are imposed…and provide guidance on what may be considered "no more onerous than is required"'.[137] It is probable the principles from *Woods* will still be applicable in Queensland despite our *Bail Act* not featuring an analogous note; however, it may be desirable for Parliament to amend the *Bail Act* comparably in the future to make human rights considerations an explicit requirement.

[126] *Woods* (n 13) [100].
[127] Ibid.
[128] Ibid [131].
[129] Ibid [132].
[130] [2012] ACTSC 80.
[131] *R v Wayne Michael Connors* [2012] ACTSC 80.
[132] Ibid.
[133] *Bail Act* (n 51) s 11.
[134] *Woods* (n 13) [65].
[135] *Bail Act* (n 51) s 11(5).
[136] *Charter* s 5.
[137] Explanatory Memorandum, Bail Amendment Bill 2010 (Vic) 8.

Delay

Victorian Case Law

Since the enactment of the *Charter*, a number of bail application cases have considered the impact of s 21(5), which provides for the right to be brought to trial without unreasonable delay.[138] The earliest of these decisions was *Gray v Director of Public Prosecutions*.[139] Justice Bongiorno made the following significant comments:

> 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. It would be difficult to argue that a trial which may well be not held until after the applicant had spent more time in Custody than he is likely to serve upon a sentence would be a trial held within a reasonable time. The only remedy the Court can provide an accused for a failure by the Crown to meet its Charter obligations in this regard…is to release him on bail...[140]

Having regard to the significant delay which was expected before the finalisation of the case, as well as other factors which pointed towards a low level of risk, Bongiorno J granted bail to the applicant.[141]

In *Re Application for Bail by Dickson*[142] the applicant was in a position where he would be held in custody for over two years by the time of his trial.[143] Justice Lasry seemed to accept that this amounted to 'unreasonable delay'.[144] Nonetheless bail was still refused.[145] Justice Lasry remarked that he could not 'conclude that the *Charter* requires that the *Bail Act* be interpreted to allow for an accused to be released on bail, regardless of an established unacceptable risk'.[146] His Honour noted that *Gray* demonstrates that 'the *Charter* has a significant role to play in emphasising the importance of particular rights, but when it comes to the right to be brought to trial without unreasonable delay, that right remains to be considered within the appropriate or relevant provisions of the *Bail Act*'.[147] The facts in *Gray* were also distinguished from those in *Dickson*, in that there was a much greater chance of re-offending and there was nothing to suggest the applicant would spend more time in pre-sentence custody than he would serve upon sentencing.[148]

Subsequently to *Dickson*, *Re Creamer*[149] and *Director of Public Prosecutions v Barbaro*[150] were decided. These cases had much the same result – bail was denied despite the prospect of significant delay and acknowledgment by the court that s 21(5) of the *Charter* was relevant to their decision. In *Re Creamer*, Whelan J explicitly preferred the approach taken in *Re Dickson* over *Gray*.[151] Whereas in *Barbaro* the Court, in agreement with a submission made by the Attorney-General, found that the '*Charter* did not require any departure from the existing approach to the treatment of delay as an issue in bail applications'.[152] However, it was noted that 'there will be circumstances where the actual or anticipated delay is of such a magnitude that risks which would, in other circumstances, be regarded as unacceptable may properly be viewed as acceptable'.[153]

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[138] *Charter*, s 21(5).
[139] *Gray v Director of Public Prosecutions (DPP)* [2008] VSC 4 ('*Gray*').
[140] Ibid [12].
[141] Ibid [18].
[142] [2008] VSC 516.
[143] Ibid [11].
[144] Ibid [13].
[145] Ibid [22], [34].
[146] Ibid [15].
[147] Ibid [19].
[148] Ibid [20].
[149] *Re Application for Bail by Creamer* [2009] VSC 46 ('*Re Creamer*').
[150] *Director of Public Prosecutions (DPP) (Cth) v Barbaro* (2009) 20 VR 717 ('*Barbaro*').
[151] *Re Creamer* (n 147) [31].
[152] *Barbaro* (n 148) [40] – [41].
[153] Ibid [41].

UK and European Case Law

1985 Act (UK).

Under UK legislation, s 22(3) of the 1985 Act requires that the prosecution prove a 'good and sufficient cause' and that it has acted 'with all due diligence and expedition'.

The UK have deemed it necessary to introduce custody time limits under the 1985 Act and not merely apply the *Bail Act 1976.* This necessity was discussed by Lord Bingham of Cornhill CJ in *R v Manchester Crown Court, Ex p McDonald*:

> If the law ended at that point [simply with the Bail Act] it would manifestly afford inadequate protection to unconvicted defendants, since a person could, if the Bail Act conditions were satisfied, be held in prison awaiting trial indefinitely, and there would be no obligation on the prosecuting authority to bring him to trial as soon as reasonably possible. It was no doubt to rectify that defect that Parliament [introduced the 1985 Act].[154]

As such, the discussion hereafter will highlight the relevant case law in European case law to elucidate how Strasbourg jurisprudence has dealt with the issue of the delay. The relevant provision is Article 5(3) of the Convention, whereby if an individual is arrested or detained, this person shall be brought promptly before a judge or other officer to exercise judicial power and shall be entitled to a trial within a reasonable time or to release pending trial.

Stogmuller v Austria [155]

In considering the scope of Article 5(3), the Strasbourg court in this case elucidated the requirement of 'special diligence'. Although this requirement is not specified in the Article itself, the court held that Article 5(3) implied that there must be special diligence in the conduct of the prosecution of the cases concerning persons charged or detained.[156] In doing so, the court compared and contrasted to the general requirement stipulated in Article 6(1); that is, the general requirement for a hearing of any proceedings, civil or criminal, 'within a reasonable time'. It was observed that Article 6(1) was not as onerous in its requirements as Article 5(3), thereby emphasising the importance of the rights that Article 5(3) upholds.

Punzelt v Czech Republic[157]

Punzelt provides a more recent and development statement of the principle states in *Stogmuller.* Essentially, the court held that the reasonableness of any length of detention must be assessed in each case according to its special features. Continued detention may be justified in a given case only if there are clear indications of a genuine public interest which, notwithstanding the presumption of innocence, outweighs the right to liberty. The court specified that any grounds for continued detention must be 'relevant' and sufficient'. Even where such grounds are 'relevant' and 'sufficient', officials must also demonstrate that their conduct was of 'special diligence' in the proceedings.[158]

These requirements, when taken together, thus demonstrate the high evidentiary burden imposed on officials. However, as will be demonstrated with the following case studies, the European Court is hesitant to find a breach of Article 5(3) of the Convention. More specifically, even where there is identified a lack of due diligence which is causative delay, a violation of Article 5(3) is not necessarily found.

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[154] [1999] 1 WLR 841, 845-846.
[155] (1969) 1 EHRR 155.
[156] Ibid [5].
[157] (2000) 33 EHRR 1159.
[158] Ibid [73].

Contrada v Italy[159]

In this case, the Strasbourg court rejected an application under Article 5(3) of the Convention. In determining this question, the court noted that 'the right of an accused in detention to have his case examined with particular expedition must not hinder the efforts of the courts to carry out their tasks with proper care.'[160] It is peculiar that the court concluded this way given that there was a finding of lack of due diligence. Regardless, the lack of due diligence did not necessarily equate to a breach of the reasonable time guarantee pursuant to Article 5(3) of the Convention.

Grisez v Belgium[161]

In this case, the ultimate question addressed by the court was whether 'the total length of the detention pending trial appear(ed) excessive'. Although the court did eventually hold that medical experts were causative of the delay in the conduct of these proceedings, it rejected the pleading under Article 5(3). Although the delay due to the medical was considered 'improper', it did not itself constitute a sufficient ground for finding that there was a violation of Article 5(3) of the Convention. The court went on further to note that the total length of the detention pending trial in this case, that is, two years three months and 19 days, did not appear to be excessive in view of the seriousness of the charges and the number of matters requiring investigation.[162]

Application in Queensland

The Victorian cases discussing pre-trial delay suggest that the right under s 32(2)(c) of the Act to be tried without unreasonable delay may have some effect on the considerations made by judges in bail applications, particularly where an accused is likely to spend more time in custody than they would serve upon a sentence.[163] However, in only one of the four cases did consideration of this right actually result in the applicants release from custody. The cases following *Gray* indicate that judges are likely to consider that s 32(2)(c) of the Act does not greatly affect the existing common law position of treating delay as simply one of a number of relevant factors to consider in deciding whether risk is unacceptable.[164]

Bail applications by children and Indigenous persons

Victorian Case Law

Several of the cases discussing the interaction between bail application decisions and the *Charter* concern the rights specific to children, including *HL*, which has already been discussed above.[165] *Director of Public Prosecutions v SL*[166] concerned a 15 year-old charged with a range of serious offences, including committing an indictable offence whilst on bail. The hearing was for the purpose of arranging suitable procedures for the child's upcoming sentencing. Justice Bell stated that the *Charter* provides children a 'positive right to age-appropriate and rehabilitation-focussed procedures', which arises because of s 17 and 23 of the *Charter*.[167] The right to equality before the law in s 8(3) of the *Charter* was also relevant 'because failing to follow such procedures can lead to discriminatory exclusion'.[168] Justice Bell found that 'when hearing and determining criminal charges brought against children, this court clearly has functional responsibilities in relation to…their trial and other treatment'.[169] As such, s 6(2)(b) of the *Charter* requires the court, when

[159] Judgments and Decisions 1998 – V, p 2166.
[160] Ibid [67].
[161] (2002) 36 EHRR 854.
[162] Ibid [53].
[163] Gray (n 137) [12].
[164] *Barbaro* (n 148) [40] – [41]; *Lacey* (n 94) [13]; Sica (n 97) [43].
[165] *Application for bail by HL* [2016] VSC 750.
[166] *Director of Public Prosecutions (DPP) v SL* (2016) 263 A Crim R 193.
[167] Ibid [4].
[168] Ibid.
[169] Ibid [5] – [6].

exercising those responsibilities, to apply the human rights specified in the *Charter* in relation to those matters. *SL* demonstrates that in criminal proceedings involving children, including bail applications, the *Charter* requires courts to take reasonable and necessary steps to assist the child to effectively participate in the proceedings, in order to comply with their human rights.[170]

Director of Public Prosecutions v SE[171] was decided subsequently, which concerned an application for bail by an Aboriginal person aged 17 years-old with an intellectual disability. They were charged with theft of a motor vehicle and committing an indictable offence while on bail. Justice Bell affirmed that the principles in *SL* apply equally when the court is determining an application for bail by a child.[172] The court's obligation to consider human rights when exercising their functions was said to be particularly relevant in relation to the procedures to be followed when hearing and determining bail applications.[173] Justice Bell, referring to *SL*, stated that in order to achieve equality before the law, as required by s 8(3) of the *Charter*, the court had to treat a child-defendant differently to how an adult-defendant would have been treated.[174] His Honour explained that Aboriginal cultural issues must likewise be taken into account when determining bail applications by Aboriginal persons in order to achieve equality before the law.[175] Justice Bell stated that in 'making determinations under the *Bail Act* that take account of SE's age, Aboriginality and intellectual disability, I have therefore borne in mind that the different forms of SE's discriminatory disadvantage and vulnerability likely cumulate and interact, making accommodation even more necessary'.[176] Accordingly, bail was granted. It was held that SE's disadvantage as an Aboriginal child with a disability made it such that holding them on remand was highly undesirable due to the high risk of physical and psychological harm.[177] Justice Bell also expressed that whether or not a bail applicant is a child or Aboriginal person will be relevant to the appropriateness of bail conditions.[178]

Application in Queensland

The Victorian decisions suggest that where an applicant has an attribute that exposes them to disadvantage and discrimination, in particular where they are a child or Indigenous, human rights legislation will require the court to expressly take these attributes into account in making a decision about the granting of bail. In Queensland the relevant rights under the Act are ss 15(3), 26(2), 28, 32(3), 33.[179] Again, it is unclear to what extent this will really effect the way in which bail decisions are made in Queensland. The *Bail Act* already expressly includes provisions requiring the court to make additional considerations where an applicant is a child, or an Aboriginal or Torres Strait Islander person.[180] Justice Bell in *SE* expressed that similar provisions relating to Aboriginal or Torres Strait Islander cultural consideration and children under the *Victorian Bail Act,*[181] should be read concurrently with the cultural rights that Indigenous persons possess under the *Charter*.[182]

[170] Pound and Evans (n 37) 82 – 83.
[171] *Director of Public Prosecutions (DPP) v SE* [2017] VSC 13 ('*Re SE*').
[172] Ibid [13].
[173] Ibid [14].
[174] Ibid [22].
[175] Ibid.
[176] Ibid [28].
[177] Ibid [49].
[178] Ibid [20], [33], [37].
[179] Human Rights Act (n 1) ss 15(3), 26(2), 28, 32(3), 33.
[180] *Bail Act* (n 51) ss 15(1)(f), 16(2)(e), s 16(5).
[181] *Victorian Bail Act* (n 57) ss 3AAA(1)(h), 3A; 3B.
[182] Re *SE* (n 168) [21].

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