

Criminal Defences Research – Phase 1

Intersection between criminal
defences and cultural rights

in partnership with Queensland Law
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Background and context

The Queensland Government has asked the QLRC to review and make recommendations about particular defences in the *Criminal Code 1899* (Qld) (“**the Code**”). UQPBC students were recruited to assist the QLRC in their research. This research report explores the scope of sections 27 and 28 of the *Human Rights Act 2019* (Qld) (“**HRA**”) and the intersection with the operation of criminal defences. Specifically, students were directed to:

- a) identify and provide a summary of the case law that has considered sections 27 and 28 of the *HRA*; and
- b) research how the cultural rights of Aboriginal and or Torres Strait Islander peoples have been engaged and interpreted in other Australian and international jurisdictions in the context of criminal matters (and sentencing) and/or decisions about domestic and family violence.
- c) consider the potential implications for the interpretation of sections 27 and 28 of the *HRA*;
- d) for international jurisdictions, please focus on those jurisdictions with a human rights instrument such as an Act or Charter (if time permits, the research focus can be extended beyond this);
- e) where relevant, please include contextual information on the development of jurisprudence in relation to particular rights (for example, the UNDRIP and the concept of FPIC).

Methodology

The students adopted a doctrinal research methodology. This report presents the findings associated items **a)** and **b)** identified above. Preliminary research undertaken in connection with item **c)** has also been included. The students are committed to completing the research in semester two of this year.



9(a) of Research Memorandum - case law on sections 27 and 28 of the *HRA*

Introduction

To date, the *HRA* has had minimal impact on the operation of criminal law in Queensland.¹ The application of sections 27 and 28 of the *HRA* in criminal law is confined to two cases: *Queensland Police Service v Ahmed*² and *Attorney-General for the State of Queensland v GLH*.³ Outside of criminal law, these rights have been extensively considered by QCAT in blue card, child protection and weapons licensing hearings.⁴ These rights have also been considerably influential in mining grant reviews.⁵ This section of the report provides summaries of the case law.

Section 27 and 28 of the *HRA* in criminal law

Case name	<i>Queensland Police Service v Ahmed</i> [2023] QMC 2
URL	https://www.queenslandjudgments.com.au/caselaw/qmc/2023/2
Court/jurisdiction	Magistrates Court of Queensland
Facts	This case involved a Muslim man charged with contravening an order about device information from digital device under s 205A of the Code. The man refused to provide his phone to police officers executing a search warrant at his home. He refused on the basis that his phone contained photographs of his wife not wearing a hijab and other written communication which, if revealed to unrelated males, would be against his religious beliefs [20].
Relevant issue	The question for the Court was whether this was a reasonable excuse to refuse to disclose the password pursuant to s 205A(1) of the Code. The defendant argued that 'reasonable excuse' ought to be interpreted consistently with human rights (per <i>HRA</i> s 48). The defendant further advanced that the QPS were required to act compatibly with human rights. This would have included making appropriate accommodations when executing the search warrant so as to not infringe upon his religious and cultural sensitivities [28].
Decision	The Court found that the meaning of 'reasonable excuse' was unambiguous such that the interpretative provision had no work to do. In <i>obiter dicta</i> , the Court remarked that if the interpretative

¹ Andreas Schloenhardt, Joseph Lelliott and Carl Tessmann, *Criminal Law in Queensland: Principles, Offences, and Defences* (Thomson Reuters (Professional) Australia Limited, Second edition, 2023) 23 ('Schloenhardt, Lelliott and Tessman, *Criminal Law in Queensland*').

² [2023] QMC 2.

³ *Attorney-General v GLH* [2021] QMHC 4.

⁴ See e.g., *LM v Director-General, Department of Justice and Attorney-General* [2022] QCAT 333.

⁵ *Pickering v Pedersen* [2023] QLC 12



	provision did apply, ‘it may perhaps act to bolster the outcome’ [71]. The Court considered that human rights might be relevant ‘to some degree’ to inform the issue of reasonable excuse [71]. The Court further found that human rights obligations owed by the police extend to the execution of search warrants and the decision to charge under the defendant [78]. Finally, the Court considered that if the police failed to comply with their human rights obligations when executing the search warrant, this too could inform the ‘reasonable excuse’ matter [79].
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Case name	<i>Attorney-General for the State of Queensland v GLH</i> [2021] QMHC 4
URL	https://www.queenslandjudgments.com.au/caselaw/qmhc/2021/4
Court/jurisdiction	Queensland Mental Health Court
Facts	The case involved an appeal by the Attorney-General for the imposition of a condition on a forensic order made under the <i>Mental Health Act 2016</i> (“MHA”). The condition prohibited the respondent from unsupervised contact with children.
Relevant issue	The question for the Court was whether the imposition of the condition was reasonable or justifiable under the <i>HRA</i> , particularly concerning 28(2)(c) (see at [46]-[47]). However, the specific application of the section was not necessary because the Court considered that s 5 of the MHA was already compatible with the <i>HRA</i> .
Decision	The Court dismissed the appeal by applying a multifactorial balancing test which assessed the acceptability of the risk in the context of previous offending, psychiatric stability, and the importance of the respondent’s relationship with children in his family.



Section 27 and 28 of the *HRA* in QCAT proceedings

Blue card matters

Case name	<i>JRL v Director General, Department of Justice and Attorney-General</i> [2023] QCAT 499
URL	https://www.queenslandjudgments.com.au/caselaw/qcat/2023/499#_ftnref25
Matter type	Blue card decision review
Facts	This case concerned an application for review of the respondent's decision to issue a negative blue card notice to the applicant due to his criminal history.
Relevant issue	The Tribunal was required to determine whether an exceptional case existed such that it would not be in the best interests of children for the applicant to hold a blue card. It was further required to consider whether the applicant's human rights were unlawfully limited by the decision.
Decision	The Tribunal identified the relevant human rights of the applicant that may have been impacted by its determination. This included the right to privacy and reputation, the right to take part in public life, right to further vocational education and training, and the applicant's cultural rights (section 28) pursuant to the <i>HRA</i> . The Tribunal did not provide a substantive discussion of the applicant's cultural rights. In setting aside the decision of the respondent, the Tribunal held that the applicant's case was not 'exceptional' within the meaning of s 221 of the <i>Working with Children (Risk Management and Screening) Act 2000</i> (Qld). It was acknowledged that none of the applicant's human rights were limited or impacted.



Case name	<i>TD v Director-General, Department of Justice and Attorney-General [2023] QCAT 397</i>
URL	https://www.queenslandjudgments.com.au/caselaw/qcat/2023/397
Matter type	Blue card decision review
Facts	This case concerned an application for review of the respondent's decision to issue a negative blue card notice to the applicant.
Relevant issue	The Tribunal were required to consider whether the decision unlawfully limited the applicant's human rights, including cultural rights.
Decision	The Tribunal identified the relevant human rights of the applicant that may have been impacted by its determination. This included the applicant's right to privacy and reputation, right to take part in public life, right to further vocational education and training, the applicant's cultural rights (ss 27–28), and the human rights of children. However, the Tribunal concluded that any limitations were reasonably justified and the respondent's decision was confirmed. No further substantive discussion of human rights was provided.

Case name	<i>KLW v Director-General Department of justice and Attorney-General [2023] QCAT 446</i>
URL	https://www.queenslandjudgments.com.au/caselaw/qcat/2023/446
Matter type	Blue card decision review
Facts	This decision concerned an application for review of the respondent's decision to issue a negative blue card notice to the applicant.
Relevant issue	The Tribunal were required to consider whether the decision to refuse the blue card was consistent with human rights.
Decision	In ordering that the respondent's decision be set aside, the Tribunal noted that the applicant's right to right to privacy and reputation, right to a fair hearing, and cultural rights as an Aboriginal and Torres Strait Islander peoples pursuant to the <i>HRA</i> were relevant. The Tribunal did not substantively discuss these rights. The applicant had been convicted in the Magistrates Court of a total of fourteen offences relating to stealing and fraud between 1997 and 2015: at [23]. The Tribunal set aside the respondent's decision and concluded that its decision was compatible with human rights.



Case name	<i>LM v Director-General, Department of Justice and Attorney-General</i> [2022] QCAT 333
URL	https://www.queenslandjudgments.com.au/caselaw/qcat/2022/333
Matter type	Blue card decision review
Facts	The case concerned a review of a decision to suspend the applicant's blue card due to a charge of assault occasioning in bodily harm. The applicant submitted that her cultural rights, as an Aboriginal person, were limited by the negative notice. Specifically, the applicant submitted that she had built strong relationships in the rural Aboriginal and Torres Strait Island communities that she worked as a healthcare provider. The applicant submitted that she cultivated those bonds through culture, 'which is inclusive of language, cultural expressions, kinship, spiritual practices, beliefs and teachings in her career' [396].
Relevant issue	The question for the Tribunal was whether the applicant's cultural rights were limited by the negative blue card notice.
Decision	The Tribunal accepted that the applicant's cultural rights were engaged and may be limited by the issuance of a negative blue card notice. The Tribunal recognised that s 28 addresses the distinct cultural rights of Aboriginal and or Torres Strait Islanders peoples and stated that Aboriginal and or Torres Strait Islander peoples must not be denied certain specific rights set out in s 28(2). The Tribunal held that the rights of children to safety were paramount, but the impingement of the applicant's human rights had to be "reasonable and justifiable". Balancing these rights, the Tribunal held that the negative blue card clearance was compatible with human rights [422]-[423]. The Tribunal added that statutory provisions in the <i>Working With Children Act 2000</i> would make it irrelevant if the issuance was not compatible with human rights because the reading provisions in line with the HRA 'does not apply...if the [Tribunal] could not reasonably have acted differently or made a different decision because of a statutory provision'.



Case name	<i>ST v Director-General, Department of Justice and Attorney-General [2022] QCAT 1</i>
URL	https://www.queenslandjudgments.com.au/caselaw/qcat/2021/337/pdf
Matter type	Blue card decision review
Facts	The case concerned a review of a decision to not grant the applicant's blue card due to dismissed historical charges of possessing child exploitation material.
Relevant issue	The Tribunal was required to consider whether the decision to refuse the blue card was consistent with human rights, including cultural rights.
Decision	The Tribunal considered the applicant's human rights. Specifically, the Tribunal considered the following rights to be relevant: cultural rights (under both ss 27 and 28), the right to privacy, the right to take part in public life, the right to further vocational training. The right of every child to protection was described as the most paramount right in the matrix. The Tribunal did not discuss the rights in further depth. The Tribunal set aside the negative issuance.

Case name	<i>NPK v Director General, Department of Justice and Attorney-General [2022] QCAT 395</i>
URL	https://www.queenslandjudgments.com.au/caselaw/qcat/2022/395
Matter type	Blue card decision review
Facts	The case concerned a review of a decision to not grant the applicant's blue card due to a failure to report allegations of indecent treatment of students by teachers at the school at which he was the head of campus.
Relevant issue	The Tribunal was required to consider whether the decision to refuse the blue card was consistent with human rights, including cultural rights.
Decision	The Tribunal considered the cultural rights of the applicant and the applicant's students. The Tribunal found that the negative blue card issuance "greatly impacted the human right of not only the Applicant but his students on the remote island of Boigu in the Torres Strait." The blue card was reissued on other grounds which were based on the assessment that it was in the best interests of the children.



Case name	<i>JZ v Director-General, Department of Justice and Attorney-General</i> [2022] QCAT 183
URL	https://www.queenslandjudgments.com.au/caselaw/qcat/2022/183/pdf
Matter type	Blue card decision review
Facts	This decision related to a review of the respondent's decision to issue a negative notice to the applicant to hold a blue card.
Relevant issue	The Tribunal was required to consider whether the decision to refuse the blue card was consistent with human rights, including cultural rights.
Decision	The Tribunal acknowledged that when conducting a review of a child-related employment decision, it was a 'public entity' and as such, subject to the <i>HRA</i> . The relevant human rights at play of the included her right to privacy; right to take part in public life; right to education and her cultural rights pursuant to s 27-28. The human rights of children pursuant to s 26 were also engaged by the application. Accordingly, the Tribunal was required to consider whether, in view of the applicant's history of domestic violence and totality of evidence before it, the applicant had an exceptional case in which it would not be in the best interests of children for her to have a blue card. The nature of the applicant's conduct over ten years and involving three different complainants suggested that it was a systemic issue and not conduct that she had been able to put behind her. In the context of the applicant's long history of domestic violence, including the use of weapons and threats to kill or maim, the Tribunal was satisfied that the applicant was an 'exceptional case' in which it would not be in the best interests of children for her to be issued with a blue card.



Case name	<i>NPK v Director-General, Department of Justice and Attorney-General [2022] QCAT 395</i>
URL	https://www.queenslandjudgments.com.au/caselaw/qcat/2022/395/pdf
Matter type	Blue card decision review
Facts	This case concerned an application for review of the respondent's decision to issue a negative blue card notice to the applicant.
Relevant issue	The Tribunal was required to consider whether the decision to refuse the blue card was consistent with human rights, including cultural rights.
Decision	In ordering that the respondent's decision be set aside, the Tribunal noted that the limitation of human rights and cultural rights of Aboriginal and Torres Strait Islander peoples (section 28) was relevant.

Case name	<i>ZB v Director-General, Department of Justice and Attorney-General [2021] QCAT 82</i>
URL	https://www.queenslandjudgments.com.au/caselaw/qcat/2021/82/pdf
Matter type	Blue card decision review
Facts	The case concerned a review of a decision to suspend the applicant's blue card due to multiple Protection Orders being filed against him naming his wife and his children as aggrieved
Relevant issue	The Tribunal was required to consider whether the <i>HRA</i> applied and if so, whether the applicant's cultural rights had been limited by the decision to cancel his blue card.
Decision	The Tribunal held that the <i>HRA</i> did not apply because the proceedings commenced before the commencement of the Act. They noted that if the Act <i>did</i> apply, the Tribunal's decision would be compatible with the restriction of the applicant's rights, including cultural rights, with reference to the paramount aim of the <i>WWCA</i> of protecting children.



Case name	<i>LB v Director-General, Department of Justice and Attorney-General [2021] QCAT 140</i>
URL	https://www.queenslandjudgments.com.au/caselaw/qcat/2021/140/pdf
Matter type	Blue card decision review
Facts	The case concerned a review of a decision to refuse to grant the applicant a blue card due to historical charges of threats and domestic violence.
Relevant issue	Whether the decision to refuse the blue card was consistent with human rights.
Decision	The Tribunal, as a public entity acting in an administrative capacity, was required to consider the applicant's human rights. The Tribunal accepted that the applicant's human rights, along with the right of children to protection, could be engaged and potentially limited by the decision. The Tribunal confirmed the negative issuance and held that the restrictions of the applicant's human rights were reasonable and justifiable.

Case name	<i>JB v Director-General, Department of Justice and Attorney-General [2021] QCAT 433</i>
URL	https://www.queenslandjudgments.com.au/caselaw/qcat/2021/433/pdf
Matter type	Blue card decision review
Facts	The case concerned a review of a decision to cancel the applicant's blue card due multiple offences including assault and public nuisance.
Relevant issue	Whether the decision to cancel the blue card was consistent with human rights.
Decision	The Tribunal considered the applicant's human rights. Specifically, the Tribunal considered the following rights to be relevant: cultural rights (under both ss 27 and 28), the right to privacy, the right to take part in public life, the right to further vocational training. The right of every child to protection was described as the most paramount right in the matrix. The Tribunal did not discuss the rights in further depth. The Tribunal set aside the negative issuance.



Case name	<i>TSG v Director-General, Department of Justice and Attorney-General [2021] QCAT 98</i>
URL	https://archive.sclqld.org.au/qjudgment/2021/QCAT21-098.pdf
Matter type	Blue card decision review
Facts	The case concerned a review of a decision to suspend the applicant's blue card due to historical charges of shoplifting, drug, and traffic offences.
Relevant issue	The Tribunal were required to consider whether the <i>HRA</i> applied and if so, whether the applicant's cultural rights had been limited by the decision to refuse her blue card.
Decision	The Tribunal held that the <i>HRA</i> did not apply because the proceedings commenced before the commencement of the Act. The Tribunal considered that if the <i>HRA</i> were to apply, it would be required to make its decision compatible with human rights. The Tribunal accepted that a decision to refuse a blue card would potentially impact the applicant's human rights and the rights of children to protection. The Tribunal noted that it had considered those rights. The Tribunal set aside the negative issuance.

Case name	<i>HDK v Director-General, Department of Justice and Attorney-General [2021] QCAT 97</i>
URL	https://www.queenslandjudgments.com.au/caselaw/qcat/2021/97/pdf
Matter type	Blue card decision review
Facts	The case concerned a review of a decision to suspend the applicant's blue card due to a charge of unlawful stalking.
Relevant issue	The Tribunal was required to consider whether the <i>HRA</i> applied and if so, whether the applicant's cultural rights had been limited by the decision to cancel his blue card.
Decision	The Tribunal held that the <i>HRA</i> did not apply because the proceedings commenced before the commencement of the Act. They noted that if the Act <i>did</i> apply, the Tribunal's decision would be compatible with the restriction of the applicant's rights, including cultural rights, with reference to the paramount aim of the WWCA of protecting children.



Anti-discrimination matters

Case name	<i>Taniela v Australian Christian College Moreton Ltd</i> [2020] QCATA 249
URL	https://archive.sclqld.org.au/qjudgment/2020/QCAT20-249.pdf
Matter type	Anti-discrimination
Facts	The case involved a complaint made under s 144 of the Anti-Discrimination Act 1991. The application was brought on behalf of a boy of Cook Islands descent who was threatened with unenrolment from his school on the grounds that his hair was not compliant with the school's uniform policy. His hair was kept long in anticipation of a Cook Islands coming-of-age ritual. A separate complaint was made regarding the applicant's human rights, including cultural rights.
Relevant issue	The Tribunal were required to consider whether they should grant an interim order to prevent the school from unenrolling the applicant. Further, the question was whether the unenrolment would be consistent with discrimination law and human rights.
Decision	The Tribunal found that the unenrolment was an act of racial discrimination. The Tribunal noted that the <i>HRA</i> "encourages such an outcome, and, while I take note of that, I would have made the same findings based solely upon the proper interpretation of the AD Act alone".



Case name	<i>Angelopoulos v State of Queensland</i> [2023] QCATA 124
URL	https://www.queenslandjudgments.com.au/caselaw/qcata/2023/124
Matter type	Anti-discrimination; dismissal of complaint referred by QHRC
Facts	The applicant sought to appeal a decision of the Tribunal to dismiss a complaint referred from the Queensland Human Rights Commission. The Tribunal was required to consider whether the State of Queensland engaged in indirect discrimination in breach of <i>Anti-Discrimination Act 1991</i> (Qld) by refusing the applicant's full request for burial assistance in respect of his father's funeral. The applicant had been required to bury his father without a church service or private viewing despite being of Greek Orthodox faith.
Relevant issue	Whether indirect discrimination occurred and whether the originating Tribunal member properly applied the <i>HRA</i> .
Decision	In dismissing the complaint, the learned Member found that the respondent's decision had not resulted in the applicant being treated less favourably than a person applying for funeral assistance for their deceased next of kin with religious, cultural, racial or linguistic requirements or a person applying for funeral assistance for their deceased next of kin who requires more than a burial or cremation. The Appeals Tribunal found that <i>'even if the HRA has no application – a submission upon which I have not formed a view, there were no grounds to argue that the applicant was denied natural justice in the process or that an appealable error arose from this particular ground.'</i>



Case name	<i>Fitzgerald v State of Queensland (Queensland Health)</i> [2023] QIRC 87
URL	https://www.queenslandjudgments.com.au/caselaw/qirc/2023/87#_ftn10
Court/jurisdiction	Queensland Industrial Relations Commission
Matter type	Anti-discrimination
Facts	The case concerned an appeal of a decision to deny the appellant an exemption from COVID-19 vaccination requirements. The Exemption Decision stated that it had considered the appellant's right to equality and non-discrimination, but that these were justified and reasonably limited given the need to ensure the readiness of the health system in responding to COVID-19 and the need to protect life.
Relevant issue	Whether the decision to deny an exemption constituted discrimination, whether human rights, including cultural rights, had been breached.
Decision	The Tribunal referred to Vice President O'Connor's discussion of the limitation of human rights in <i>Mocnik & Others v State of Queensland (Queensland Health)</i> including cultural rights. The Tribunal placed reliance on this discussion and as such, did not provide a substantive discussion of these rights in the case at hand. The Tribunal upheld the decision as fair and reasonable as the limits imposed were reasonable and justifiable.



Child protection

Case name	<i>DR and YO v Department of Child Safety, Seniors and Disability Services [2023] QCAT 333</i>
URL	https://www.queenslandjudgments.com.au/caselaw/qcat/2023/333
Matter type	Child protection
Facts	This case concerned an application for a decision that the operation of a previous decision to remove four children from their care be stayed until a review of the decision was finalised.
Relevant issue	The Tribunal were required to consider whether the stay should be granted and whether the stay decision would limit the applicant's or the children's human rights, including cultural rights.
Decision	A stay was ordered with respect to three of the four children. The Tribunal was satisfied that the rights of the parties to a fair hearing, rights to recognition and equality before the law and their right to privacy and reputation had not been limited by this decision. The Tribunal acknowledged that the decision would restrict the children's ability to develop kinship ties with family in Queensland. However, it was concluded that the decision would not impede the children's cultural rights under s 27 of the <i>HRA</i> as it would not restrict their ability to maintain and strengthen their culture or spiritual relationship with the land under Aboriginal tradition or Island custom. The Tribunal accepted that there is a clear public interest to support safety and stability in placement for children, connection with culture for Aboriginal and Torres Strait Islander children and the placement of these children with family, or with Aboriginal and or Torres Strait Islander carers if possible. There was no evidence that a decision to return the children to live interstate would interfere with their rights to enjoy their culture or restrict their ability to maintain and strengthen their culture or spiritual relationship with the land which they have a connection with under Aboriginal tradition or Torres Strait Islander custom.



Case name	<i>EST & ERE v Department of Child Safety, Seniors and Disability Services</i> [2023] QCAT 305
URL	https://www.queenslandjudgments.com.au/caselaw/qcat/2023/305
Matter type	Child protection
Facts	This case concerned the application for a number of parties to be joined in proceedings regarding the review of the decision to remove two children from the care of their current carers.
Relevant issue	Whether the Tribunal should allow the parties to be joined
Decision	The Tribunal dismissed the applications to have the parties joined to the proceedings. In making this decision, the Tribunal gave consideration to relevant human rights under the <i>HRA</i> , including the cultural rights of Aboriginal and or Torres Strait Islander peoples pursuant to s 28. They further considered the right to recognition and equality before the law, the protection of families and children and the right to a fair hearing. The Tribunal accepted that its decision was compatible with human rights.

Case name	<i>Mrs O and Mr O v Department of Child Safety, Seniors and Disability Services</i> [2023] QCAT 339
URL	https://www.queenslandjudgments.com.au/caselaw/qcat/2023/339/pdf-view
Matter type	Child protection
Facts	This case concerned an application to stay a decision made by the respondents to remove a 20-month-old child from the care of the applicants.
Relevant issue	Whether the Tribunal should stay the decision to remove the children, whether the decision to do so was consistent with human rights.
Decision	The Tribunal considered the fitness of the applicants as carers for the child and acknowledged that human rights would be affected by making its decision. The father of the child was identified by the mother as Aboriginal. The Tribunal ordered for the earlier decision of the respondent to remove the child from the care of the applicants to be stayed until the review had been determined. In making its decision, the Tribunal noted that it was required to act consistently with human rights and to give proper consideration to those rights. The Tribunal acknowledged that a decision is compatible with human rights if it does not limit a human right or if it limits a human right in a way provided by the <i>HRA</i> .



	The Tribunal was satisfied that the decision was compatible with human rights as any limitation on human rights was only to the extent reasonable and justifiable. Human rights that were potentially impacted included the right to recognition and equality before the law; the right to privacy and reputation; the right to protection of families and children and the right to a fair hearing. The cultural rights of the parents of the child were not substantively discussed.
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Case name	<i>DM</i> [2023] QCAT 402
URL	https://www.queenslandjudgments.com.au/caselaw/qcat/2023/402
Matter type	Guardianship application for sterilisation procedure
Facts	This case concerned an application filed by a doctor for an interim order for the appointment of a guardian and an application to consent to special health care sterilisation for DM, a 36-year-old Aboriginal woman who was a patient in the intensive care unit of the Gold Coast University Hospital.
Relevant issue	Whether the interim order ought to be granted, whether such order would be consistent with DM's human rights.
Decision	The Tribunal acknowledged that DM did desire to have more children. However, they were satisfied based on the evidence given in the hearing and contained in the applications, that consent should be given because of the urgent or special circumstances. The Tribunal considered the relevant human rights set out in the <i>HRA</i> . DM's rights to recognition as a person before the law entitled to equal protection without discrimination, freedom of movement, privacy, and protection from torture, cruel, inhuman, or degrading treatment, and also a right to a fair hearing, amongst other rights, were engaged and limited by the order. The Tribunal was satisfied that the limits imposed by the orders made are reasonable and justified in accordance with s 13 of the <i>HRA</i> .



Miscellaneous

Case name	<i>Corones v State of Queensland (Department of Regional Development, Manufacturing and Water) [2023] QIRC 299</i>
URL	https://www.queenslandjudgments.com.au/caselaw/qirc/2023/299
Court/jurisdiction	Queensland Industrial Relations Commission
Matter type	Disciplinary hearing appeal
Facts	This case concerned an appeal against a disciplinary finding against the appellant. The respondent had found the allegations capable of being substantiated; the applicant had downloaded confidential government documents from a departmental computer to a personal portable device without authority. In his appeal, the applicant submitted that the decision-maker did not give proper consideration to his rights pursuant to the <i>HRA</i> . Notably, the appellant submitted that his cultural rights (s 27), as a person with a diverse background, religion and standing in the Greek community were not properly considered in terms of the impact of the findings and decision.
Relevant issue	Whether the appellant's cultural rights were properly considered by the respondent when making their disciplinary finding.
Decision	In the absence of any response to the show cause notice from the applicant identifying particular cultural circumstances he wished to have considered, the Tribunal accepted that it was not incumbent upon the decision-maker to consider the applicant's standing in the Greek community when making the decision. There was no information before the Tribunal to suggest the findings of the investigation were not valid or that the applicant was not treated fairly throughout the investigation. The application was dismissed.



Case name	<i>BIL v Queensland Police Service – Weapons Licensing [2022] QCAT 150</i>
URL	https://www.queenslandjudgments.com.au/caselaw/qcat/2022/150/pdf
Matter type	Weapons licence renewal review
Facts	The case concerned a review of a decision to not renew the applicant's weapons licence on the grounds that a temporary protection order had been made against him by his ex-wife.
Relevant issue	Whether the decision to refuse the renewal of the applicant's weapons licence was consistent with human rights.
Decision	The Tribunal considered the applicant's human rights. Specifically, the Tribunal notes that to the extent possible, it interpreted the statute to be consistent with human rights. It acknowledged that the decision was one that potentially impacts human rights but did not list the engaged rights. The Tribunal upheld the decision to not renew the applicant's licence and held that the decision was a reasonable and justifiable restriction of his human rights consistent with the objects of the <i>Weapons Act 1990 (Qld)</i> .



9(b) of Research Memorandum – engagement of Aboriginal and or Torres Strait Islander peoples cultural rights in other Australian and international jurisdictions

Australian Capital Territory

Case name	<i>House v Chief Minister of Australian Capital Territory [2022] ACTSC 317</i>
Court/jurisdiction	Australian Capital Territory Supreme Court
Matter type	Recognition of traditional custodianship
Facts	The plaintiffs were members of the Ngambri people and claimed to be traditional custodians of the land which Canberra was built. The claim was brought about as the ACT government only acknowledged the Ngunnawal people as traditional custodians of the land which Canberra was built. As such, they claimed that their human rights under s 27(2) of the Human Rights Act (ACT) were breached, these rights being to “maintain, control, protect and develop their connection to the land,” and have this connection be recognised. They also claimed that the defendant was “promulgating, maintaining and enforcing the protocol contrary to s 27(2).” Relevant history to the 2002 recognition of the United Ngunnawal Elders Council by the ACT Government was provided, and one of the plaintiffs claimed to identify as an Elder. A point of contention here is that the Ngunnawal people claim to be the sole traditional custodians of the land, while the Ngambri people dispute this.
Decision	The Court decided to consider the application, taking into account the interests of both communities at a later date.



Case name	<i>Brown v Director-General of the Justice and Community Safety Directorate</i> [2021] ACTSC 320
URL	https://jade.io/article/882295
Court/jurisdiction	Australian Capital Territory Supreme Court
Matter type	Prisoner human rights
Facts	The plaintiff was detained in a correctional facility on two separate occasions. On both occasions, no Aboriginal Health Assessment ('AHA') was conducted. At no point during either of these periods of detention did she make a verbal or written request to Justice Health or ACT Corrective Services for an AHA to be conducted. The plaintiff claimed that the <i>Corrections Management Act 2007</i> (ACT) ('CMA') placed obligations on the defendant to offer her an AHA during each period of detention that she served, and thus by failing to do so, the defendant was in breach of the CMA, as well as ss 19(1) and 27 of the <i>Human Rights Act 2004</i> (ACT) ('HRA'). The claims relating to the HRA related to the right to be treated humanely while detained (s 19(1)), and Aboriginal and or Torres Strait Islander peoples being denied the right to enjoy their "culture, heritage, languages, knowledge, and kinship ties" (s 27(2)). Expert Professor O'Mara was consulted as to the link between AHAs and s 27 of the HRA, to which he contended that Aboriginal and or Torres Strait Islander communities consider the annual health assessments to be "a symbol of heal and wellbeing and of cultural and community connection." The defendant argued differently, stating that the CMA did not impose an obligation to offer the plaintiff an AHA during each of her periods of detention. Further, he argued that the plaintiff was never denied access to an AHA; the plaintiff had not at any point in time requested for an AHA to be conducted, and <i>this</i> was the reason that the service was not provided. As such, the defendant contended that he did not breach any relative obligations under ss 19(1) and 27 of the HRA.
Relevant issue	Whether the failure to provide an AHA constituted a breach of the plaintiff's human rights, including cultural rights
Decision	The Court found that the evidence was not substantial enough to support the claim that the defendant's failure to offer the plaintiff an AHA meant that he fell below the appropriate standard of care. They found that, as the plaintiff would have reasonably known of her ability to request an AHA, the defendant had not acted in such a way as to deny her rights to access the specified healthcare. As such, the defendant was found to be compliant with ss 19(1) and 27 of the HRA.



On appeal - <i>Brown v Director-General of the Justice and Community Safety Directorate</i> [2023] ACTCA 15 https://jade.io/article/976184	
Appeal grounds	The appellant had eight grounds of appeal. Grounds five through to eight are relevant to the findings regarding the sections of the HRA. • Ground 5 – the trial judge found that s 19 of the HRA did not oblige the respondent to provide the appellant with the equivalent of an AHA as part of the requirement for humane treatment of detainees. • Ground 6 – the trial judge found that s 27 of the HRA did not oblige the respondent to provide the appellant with health care that would recognise her cultural rights as a First Nations woman. • Grounds 7 and 8– the trial judge found that the failure to provide the appellant with an AHA during her periods of detainment was not incompatible with ss 19 and 27 of the HRA.
Decision	The Court found that the trial judge was correct in his decision. It was found that the appellant had a “high level of access to medical care” within the detention centre. The appeal was dismissed.



Victoria

Case name	<i>Thorpe v Head</i> [2021] VSC 750
URL	https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSC/2021/750.html
Court/jurisdiction	Victorian Supreme Court
Matter type	Heritage Act claim
Facts	The case concerned whether the construction of a particular stretch of highway would breach the cultural rights of Aboriginal and or Torres Strait Islander peoples. The plaintiff claimed that this construction would be in breach of ss 27 and 28 of the <i>Aboriginal Heritage Act 2006</i> (Vic) (<i>'Heritage Act'</i>), on the basis that: <i>'Certain Aboriginal cultural heritage exists but is not identified in the 2013 plan and is not protected from harm by it, even if the plan is otherwise valid (the non-identification issue). It is claimed that six particular trees and certain other places and things are within the definition of Aboriginal cultural heritage but are not identified in the 2013 plan. Second, it is claimed that the Approval Decision was not lawfully made and, as a consequence, the entire 2013 plan is invalid and cannot render lawful harming of any Aboriginal cultural heritage present in the area, whether or not identified in the 2013 plan (the unlawful decision issue).'</i> The plaintiff argued that the construction was unlawful under s 38(1) of the <i>Charter of Human Rights and Responsibilities Act 2006</i> (Vic) (<i>'the Charter'</i>), which states that public authorities legally cannot <i>'act in a way that is incompatible with a human right.'</i> The plaintiff identified the relevant human rights as those under s 19(1) and (2) of the <i>Charter</i>. These discuss how all persons should not be denied the enjoyment of their cultural rights.
Relevant issue	Whether the construction of a highway breached the cultural rights of Aboriginal and or Torres Strait Islander peoples
Decision	The Court ultimately decided that the plaintiff would not be successful in this action as the <i>Heritage Act</i> had been modified in such a way that relieved the defendant from its duty to protect Aboriginal cultural heritage.



Case name	<i>Re GG [2021] VSC 12</i>
URL	https://jade.io/article/782881
Matter type	Bail application
Facts	The proceedings related to an application for bail by the applicant, GG, a 16-year-old Aboriginal and or Torres Strait Islander child who was aged 14-15 at the time of the crime. Applying the <i>Bail Act 1977</i> (Vic) ('the Act'), the Court was "required to refuse bail unless satisfied by the applicant that exceptional circumstances exist which justify the grant of bail." Furthermore, if an exceptional circumstance was found to exist, s 4E(1)(a) set out that the Court must still refuse bail if the respondent can prove that granting bail would pose an unacceptable risk. When considering bail applications for Aboriginal and or Torres Strait Islander peoples, s 3A of the Act applies, which stipulates that courts must take into consideration the applicant's cultural background, as well as any other relevant cultural issues. This section must be read alongside s 19 of the <i>Charter of Human Rights and Responsibilities Act 2006</i> (Vic) ('the Charter') to ensure that the cultural rights of Aboriginal and or Torres Strait Islander peoples are not being denied, should a bail application be denied.
Issue	Whether bail should be granted, whether denial of bail is consistent with cultural rights of the applicant.
Decision	The Court found that exceptional circumstances did exist which would justify the granting of bail, and thus had to consider whether the granting of bail would pose an unacceptable risk. They acknowledged that there was a substantial risk in releasing the applicant back into the community. However, they considered that there were bail conditions that could mitigate this risk. Exploring these possible conditions was a way in which the Court took into consideration the necessity of upholding the applicant's cultural rights, particularly his right to "connect with his Aboriginal cultural identity" under s 19 of the Charter. Thus, the bail was granted.



9(c) of Research Memorandum - consider the potential implications for the interpretation of sections 27 and 28 of the HRA

We have commenced a preliminary literature review of criminal decisions for content relevant to CALD communities and Aboriginal and or Torres Strait Islander peoples. The cases below are criminal cases in which Aboriginal and or Torres Strait Islander defendants have raised one or a combination of the defences subject to the QLRC review.

Case name	<i>R v Ngakyunkwokka</i> [2023] QCA 85
URL	https://www.queenslandjudgments.com.au/caselaw/qca/2023/85
Matter type	Appeal against conviction; provocation defence
Facts	The appellant, an 18-year-old Indigenous man, fatally stabbed the victim (aged 37) during a fight in Aurukun, Queensland on January 1, 2020. There was a history of conflict between the families of the involved individuals. The appellant was convicted of murder by a jury. Originally, the appellant's defence team argued either a lack of intention to kill or do grievous bodily harm or acting in defence of another.
Relevant issue	The key issue on appeal was whether the trial judge erred by leaving the defence of provocation to the jury, even though it wasn't the primary defence strategy.
Decision	It was argued that leaving provocation to the jury undermined the appellant's evidence, and weakened or destroyed the appellant's arguments based on defence of another and based on lack of intention. The argument against the appellant was predicated on two limbs. First, the appellant denied feeling angry at the time of the stabbing, which could contradict a provocation defence. Second, the CCTV footage showed events that could be considered provocation (e.g. throwing a rock). The appeal was dismissed. The Court found that even if provocation wasn't the main defence strategy, established case law requires the judge to bring it to the jury's attention if there's evidence that could be considered provocation. This ensures the jury has all relevant information to reach a fair verdict.



Case name	<i>R v Moore</i> [2022] QSC 35
URL	https://www.queenslandjudgments.com.au/caselaw/qsc/2022/35
Matter type	Judge only trial
Facts	Mr Moore admitted to stabbing the deceased with a knife, causing the wounds identified in the autopsy. The autopsy revealed nine wounds (one incised and eight stab wounds) inflicted by a knife, with the cause of death being blood loss from these injuries. In a judge alone trial, the Court had to determine: - Whether Mr Moore unlawfully assaulted the deceased or provoked an assault. - Whether the deceased's response was so violent as to cause a reasonable apprehension of death or grievous bodily harm. - Whether Mr Moore believed on reasonable grounds that it was necessary to use such force in self-defence. On this point, Mr Moore's counsel specifically asked the judge to consider his Indigeneity. - Whether the force used was reasonably necessary for Mr Moore's preservation from death or grievous bodily harm. Also, Mr Moore raised the partial defence of provocation, claiming that the deceased provoked him by holding a knife to his chest.
Relevant issue	Whether any of the defences (mentioned above) mitigated culpability
Decision	The trial judge found that: a) Mr Moore first attacked the deceased with a knife; the deceased did not first hold a knife to Mr Moore. This precluded Mr Moore from relying on section 271(2) b) Mr Moore stabbed the deceased with intent to kill or do grievous bodily harm. This precluded Mr Moore from relying on section 272. c) Mr Moore was not provoked (as he said he was) by the deceased holding a knife to him as this did not occur. The trial judge found Mr Moore guilty of murder. This was upheld on appeal.



NOTE: While this case raises the defences of self-defence and provocation, the focus of the appeal was how the Courts should direct juries on evidence provided by Aboriginal and or Torres Strait Islander peoples.

Case name	<i>R v Savage</i> [2017] QCA 139
URL	https://www.queenslandjudgments.com.au/caselaw/qca/2017/139
Matter type	Appeal against conviction
Facts	The appellant was convicted of murder. The appellant claimed that he didn't intend to kill the deceased man and acted in self-defence. The deceased was stabbed with the appellant's knife. The key witness was Mr. Baira, an Indigenous man. In cross-examination, Mr Baira gave a version of events where there was a period of separation between the struggle and the stabbing – this would prove crucial to the self-defence argument. The Judge addressed the jury twice about Aboriginal and or Torres Strait Islander witnesses: once at the beginning of the trial and again during the summing up. The Judge explained that Indigenous witnesses may speak softly, take longer to answer questions and struggle to express themselves sequentially. The Judge emphasised that these are cultural traits and not a reflection of intelligence or honesty. During the summing up, the Judge specifically mentioned Mr. Baira, an Indigenous witness, and noted that his evidence might appear inconsistent due to cultural factors. The Judge did not claim that all Indigenous witnesses exhibit these traits. The Judge also instructed the jury to consider Mr. Baira's evidence like any other witness, taking these cultural factors into account. The appellant submitted that the Judge's directions with respect to Mr Baira's evidence contravened section 632 of the Code and was contrary to both <i>Robinson v R</i> and <i>R v Knight & Ors</i>. Appellant argued that judges should focus on the specific witness's behaviour, not give general directions about Indigenous witnesses.
Relevant issue	Whether the Judge suggested that evidence from an Indigenous person as less reliable such that a legal error occurred.
Decision	The Judge's comments did not violate Section 632 or cause unfairness in the trial. Section 632(3) prevents judges from suggesting the law considers a group unreliable. Judges can comment on cultural factors that may influence how they answer questions, as long as they don't imply the witness is unreliable. In this case, the Judge explained these factors to help the jury assess Mr. Baira's (an Indigenous witness) testimony, not to discredit him because of his race. The Judge in this case only commented that witnesses evidence may appear 'inconsistent' not dishonest, and the influence of his cultural factors should not discredit his evidence.



Case name	<i>R v Aplin</i> [2014] QCA 332
URL	https://www.queenslandjudgments.com.au/caselaw/qca/2014/332
Matter type	Appeal against sentence
Facts	The appellant pleaded guilty to unlawful grievous bodily harm. He punched and kicked the complainant (his girlfriend) in the head, leaving her with permanent injuries. The appellant had a significant criminal history, including prior violence against women. The appellant was sentenced to nine years imprisonment with a Serious Violent Offender declaration. The appellant sought to appeal the sentence, submitting that it was manifestly excessive. Specifically, the appellant's counsel submitted that the assault was on the less severe side. Further, they submitted that he did not have an extensive criminal history, was reasonably young at the time of offending and had attracted a sentence greater than that given to others with similar circumstances. Notably, the appellant suggested that there was a degree of provocation (the applicant had been punched) that had not been taken into account.
Issue	Whether an application for leave to appeal against sentence should be granted
Decision	The application was dismissed. The Court acknowledged the severity of the sentence but found it was not manifestly excessive considering: • The consequences for the victim. The victim in the present case suffered far more serious injuries than the victims in the previous cases; • The appellant's extensive criminal history. He had a worse criminal history of violent offending compared to the offenders in most of the previous cases; and • Provocation could not be relied on. Even if there was a punch, the Court considered that the punch would not have occurred prior to the applicant assaulting the complainant with a stick.



Case name	<i>R v Green</i> [2013] QCA 23
URL	https://www.queenslandjudgments.com.au/caselaw/qca/2013/24
Matter type	Appeal against conviction, application for leave to appeal against sentence
Facts	The appellant, an Aboriginal man, was convicted for grievous bodily harm after a jury trial. The appellant and the complainant met at a hotel and were walking together on the street when an argument ensued. A witness saw the appellant deliver a forceful punch to the victim's head, causing him to fall unconscious. The appellant picked the victim up briefly before letting him fall back to the ground. The appellant left the scene, and the victim suffered a serious head injury requiring hospitalisation. The appellant argued that the complainant had initiated the fight such that he was acting in self-defence. The appellant further contended that he did not intend to cause serious injury to the complainant. The appellant was found guilty and sentenced to five years imprisonment with parole eligibility set at halfway through his sentence. He appealed the conviction. He further sought leave to appeal the sentence.
Relevant issue	Whether it was reasonable for the jury to find the appellant guilty (particularly regarding availability of self-defence) and whether the sentence imposed was manifestly excessive.
Decision	The Court considered that it was open for the jury to find that the evidence excluded the defence of self-defence, particularly given the eye-witness account. On the whole, the Court were satisfied that the evidence was sufficient to justify the jury's verdict. While the Court acknowledged the appellant's disadvantaged background and upbringing as a relevant factor, the appellant's extensive criminal history, the permanent consequences for the victim, and the seriousness of the offense outweighed this factor. The Court compared the sentence to similar cases where offenders received similar sentences for causing more severe injuries but had less extensive criminal records or other mitigating factors. The Court rejected the appellant's argument that the sentence was excessive based on prior cases involving less serious injuries or different circumstances.



Case name	<i>R v Sailor</i> [2012] QCA 246
URL	https://www.queenslandjudgments.com.au/caselaw/qca/2012/246
Matter type	Appeal against conviction
Facts	The appellant was a Torres Strait Islander man who was convicted of murder. The appellant had lived in Cairns since he was three and attended high school there with a cross-section of both Indigenous and Caucasian students until year 10. Prior to the trial, a pre-trial hearing was held to determine the admissibility of a record of interview between the appellant and the police. During the interview, the appellant was not informed of his right to legal aid, and some of the questioning was found to be unfair. Police officer Clark considered a year 10 education at this high school was a more comprehensive education than provided in many Indigenous communities. Police officer Clark considered the appellant “was not a disadvantaged person in comparison with the rest of the Australian community”. The appellant argued that the record of interview should have been excluded from evidence because the police failed to comply with the legislative requirements for questioning Indigenous persons (<i>PPRA</i>, section 420), and because the questioning itself was unfair (<i>PPRA</i>, section 36).
Relevant issue	Whether the appeal should be granted on the basis that the police ROI should not have been admitted into evidence (note that this was one of three grounds of appeal).
Decision	The appeal was dismissed. On the first issue, the Court found that the police officer had complied with the legislation by forming a reasonable suspicion that the appellant was not disadvantaged. The Court acknowledged that some aspects of the appellant's background suggested he may have been disadvantaged, but that the police officer also had evidence to the contrary. On the second issue, the Court found that the questioning was unfair in some respects, such as when the appellant was asked to comment on the opinions of others in his community. However, the Court found that the Judge had given the jury careful directions about how to consider these portions of the interview, and that the overall fairness of the trial was not compromised.



Case name	<i>R v Frank</i> [2010] QCA 150
URL	https://www.queenslandjudgments.com.au/caselaw/qca/2010/150
Matter type	Appeal against conviction
Facts	The appellant and her friends were drinking outside a unit. The deceased, who lived next door, complained about the noise. An altercation ensued between the appellant and the deceased. The appellant stabbed the deceased with a steak knife, causing his death. The appellant denied involvement in the incident.
Relevant issue	Whether the evidence supported a manslaughter charge rather than a murder charge such that the jury's verdict was unreasonable. Whether the trial judge's directions on the use of lies was appropriate.
Decision	The appeal was allowed, and a re-trial was ordered. The Court found that the judge failed to provide an appropriate direction to the jury on how to consider the appellant's lies during the police interview. This omission prejudiced the appellant because the jury may have relied on the lies as evidence of guilt without proper guidance. Reasoning: • The prosecution did not explicitly argue that the appellant's lies were evidence of consciousness of guilt. • However, the appellant's lies were a significant part of the case. • The judge should have instructed the jury on how to consider these lies (<i>Zoneff v The Queen</i>) • This direction should have explained that the jury shouldn't assume guilt simply because the appellant lied. There could be other reasons for lying, such as fear or panic. • The absence of this instruction created a risk that the jury misused the evidence of lies and reached the wrong verdict. Since the error could have affected the outcome of the trial, it resulted in a miscarriage of justice.



Case name	<i>R v Denyer</i> [2009] QCA 53
URL	https://www.queenslandjudgments.com.au/caselaw/qca/2009/53
Matter type	Application for leave to appeal against sentence
Facts	The applicant, an Indigenous man, pleaded guilty to unlawful wounding after striking the complainant with a beer bottle in a pub. The complainant suffered facial injuries. The applicant had consumed alcohol prior to the offence. The attack was considered to have occurred long after any provocation had ceased. The applicant submitted that his sentence was manifestly excessive. Specifically, he pointed out that the <i>Penalties and Sentences Act</i> prioritises rehabilitation, and he had taken significant steps to address his alcohol abuse and anger issues. Further, he submitted that the sentence was too harsh considering his remorse, apology, and lack of criminal history beyond one other assault incident. Finally, he submitted the case was excessive compared to other similar cases (e.g., <i>R v Hays</i>).
Relevant issue	Whether the trial judge erred in applying the <i>Penalties and Sentences Act</i> ; whether the sentence was manifestly excessive.
Decision	The Court acknowledged the applicant's rehabilitation efforts but found that the seriousness of the offence warranted a period of actual imprisonment for deterrence and denunciation purposes. Unlike <i>R v Hays</i> , the applicant's attack wasn't spontaneous, and the pub 'glassing' problem had worsened since that case. The attack was considered to be 'relevantly unprovoked.'





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