UQ/Caxton Human Rights Case Law Project

2020/21 Annual Report

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The *Human Rights Act 2019* (Qld) came into force 1 January 2020 with the aim of promoting a human rights culture and dialogue in Queensland. The UQ/Caxton Human Rights Case Law Project was established in April 2020 as a collaboration between the UQ School of Law and Caxton Legal Centre. Since October 2020, we have also been working with the Queensland Human Rights Commission to ensure there is consistent and complete coverage of cases across our two websites.

I. Project Overview

Volunteer law students from the University of Queensland meet once a week to write case notes for all cases that mention the *Human Rights Act 2019* (Qld) ('the Act'). The purpose of the Project is to assess the utility, interpretation, and influence of the Act in Queensland.

Our team members search for cases that mention the Act each week. They then read and summarise the cases, focusing primarily on the human rights analysis and discussion. Once case notes are drafted, they are edited by other team members, and

then checked and finalised by the Project supervisors. All of our case notes are published online and made available to practitioners, academics, and the general public at: **https://law.uq.edu.au/research/human-rights/case-notes**

At the end of 2020, the Project had 52 cases in its database.

Fifty percent of these cases were heard by QCAT. The Supreme Court heard 10 of the cases, and the District Court heard seven. The Court of Appeal and the Queensland Industrial Relations Commission heard two each. The remainder were heard by the Magistrates Court, the Planning and Environment Court, the Queensland Industrial Court, the Land Court and the NSW Supreme Court.

II. Case categories

We divide all of our cases into one of 12 categories. The cases are allocated to the category that best describes the matter in an overall sense, taking into account the facts and the dominant themes in the judgement. The 12 categories were refined during the first year of the project. The categories are: Children and Families; Civil Procedure; Commercial; Criminal Law and Corrective Services; Discrimination; Education, Training and Employment; Health, Mental Health and Guardianship; Planning and Environment; Political Freedoms; Privacy and Confidentiality; Public Law Considerations; and Tenancy and Social Housing.

'Education, Training, and Employment' and 'Criminal Law and Corrective Services' featured the most: 58% of all cases cited in the database fell within these two categories. Five cases fell within 'Children and Families'. Three within both 'Health, Mental Health, and Guardianship' and 'Tenancy and Social Housing'. 'Discrimination', 'Planning and Environment,' 'Public Law Considerations', and 'Commercial' all had two cases each. One

case fell within each of the 'Political Freedoms', 'Privacy and Confidentiality', and 'Civil Procedure' categories. (See Table 1)

Table 1: Cases by matter type (n=52)

CATEGORY	NUMBER OF CASES
Education, Training, and Employment	15
Criminal Law and Corrective Services	15
Children and Families	5
Health, Mental Health, and Guardianship	3
Tenancy and Social Housing	3
Discrimination	2
Planning and Environment	2
Public Law Considerations	2
Commercial	2
Political Freedoms	1
Privacy and Confidentiality	1
Civil Procedure	1
TOTAL	**52**

III. Who is using the *Human Rights Act 2019* (Qld)?

A. *Self-represented litigants*

The *Human Rights Act 2019* (Qld) has been raised in numerous cases involving self-represented litigants. At the end of 2020, 48% of the cases in our database involved self-

represented litigants. The most common matter types involving self-represented litigants were: 'Children and Families' (particularly child protection), 'Criminal Law and Corrective Services', and 'Education, Training, and Employment'.

B. *Individuals not corporations*

In the Supreme Court case *The Australian Institute for Progress Ltd v The Electoral Commission of Queensland & Ors* [2020] QSC 54, Applegarth J confirmed that the *Human Rights Act 2019* (Qld) only applies to individuals' human rights and not the rights of corporations. The Australian Institute for Progress is not an individual, and therefore the protections of the *Human Rights Act 2019* (Qld) did not extend to it.

IV. When is the *Human Rights Act 2019* (Qld) being used (and not used)?

A. *'Blue Card' cases*

Fifteen cases in our database (29%) were applications for review of negative blue card notices. Decisions regarding whether a blue card should be issued or not are governed by the *Working with Children (Risk Management and Screening) Act 2000* (Qld). Individuals will be prevented from engaging in child-related employment or volunteering, or acting as kinship carers, if they are unable to obtain a blue card. If a person receives a negative blue card notice, they may appeal to QCAT for a review.

The case of *Storch v Director-General, Department of Justice and Attorney-General* [2020] QCAT 152 provided important guidance on the application of the *Human Rights Act 2019* (Qld) to blue card cases. The applicant, Mr Storch, was issued with a negative blue card notice on the basis that he was 'an exceptional case' where the issuing of a positive notice would not be in the best interests of children, despite the fact that he was acquitted at trial on a charge of indecent treatment of a child. The Tribunal determined that, in reviewing the decision, its role was to undertake a fresh review on the merits, and

therefore it was acting in an administrative capacity. As a result, it was required 'to act and make decisions in a way that is compatible with human rights' and give proper consideration to a human right relevant to the decision.

The Tribunal held that the applicant's right to not be tried or punished more than once (section 34) had not been breached because the negative blue card notice decision involved an evaluation of the risk posed to children if the applicant was provided with a positive blue card notice, rather than determining whether the applicant was guilty of the offence. The Tribunal held that the applicant's right to be presumed innocent until proven guilty (section 32(1)) had also not been breached, given that no determination was being made on the applicant's guilt or innocence, but rather the question to be decided, on the balance of probabilities, was whether the applicant posed a risk to children. On this basis, the Tribunal considered evidence of complaints that had been made against the applicant which were not the subject of criminal charges.

The Tribunal also held that the applicant's right to a fair hearing (section 31) had not been breached because the applicant: had been provided with all relevant documents; was given the opportunity to respond to and present submissions; was provided with the opportunity to be legally represented (although he opted to represent himself); was accompanied by a support person; and additional steps had been taken by the Tribunal to ensure that the applicant received a fair hearing. The Tribunal also found that the applicant had been advised of his right not to answer any questions or make statements, if to do so 'might tend to incriminate him', so as to uphold his right under section 32(2)(k) of the *Human Rights Act 2019* (Qld).

The Tribunal ultimately found that any limits imposed on the applicant's human rights were 'reasonable and justified' in accordance with section 13 of the *Human Rights Act 2019* (Qld) and confirmed the decision of the respondent to issue the applicant with a negative blue card notice.

B. *Criminal law*

Fifteen cases in our database (29%) concerned criminal matters. These cases involved discussion of the right to be tried without unreasonable delay (sections 32(2)(c) and 29(5)(b)), the right to liberty and security of person (section 29), the right to humane treatment when deprived of liberty (section 30), and the right to a fair hearing (section 31).

For example, in the case of *Volkers v The Queen* [2020] QDC 25, the right to trial without unreasonable delay and the right to a fair trial were discussed. Mr Volkers sought a permanent stay of an indictment charging him with five counts of indecent dealing with two complainants under the age of 16. The alleged offences occurred in the 1980s, and Mr Volkers was originally charged in 2002 but this prosecution failed. The proceedings at hand commenced in November 2017, and in November 2018 Mr Volkers was committed to stand trial for these offences. Counsel for Mr Volkers provided written submissions to the effect that although prosecution began before the enactment of the *Human Rights Act 2019* (Qld), the Office of the Department of Public Prosecutions was involved in the continuation of proceedings against Mr Volkers and was a public entity within the meaning of the *Human Rights Act 2019* (Qld).

Reid DCJ found no breach of the right to a fair trial, but His Honour did hold that the delay in prosecution of Mr Volkers since 2002 amounted to a breach of his right to a trial without unreasonable delay, and that the appropriate remedy was to grant a permanent stay of proceedings to avoid an abuse of process.

C. *Prisoners*

Four cases in our database (8%) concerned the rights of prisoners. In *Tafao v State of Queensland* [2020] QCATA 76, Ms Tafao, a transgender woman, alleged that she had been subject to discrimination whilst she was incarcerated in a male-only, high security prison. Ms Tafao alleged that prison officers repeatedly referred to her using male pronouns and imposed a behaviour plan 'aimed at mitigating her transgendered behavior and which prevented her from "being who [she was]"'. QCAT found that it was not

necessary to consider the *Human Rights Act 2019* (Qld) because the acts took place before its commencement on 1 January 2020. However, the Appeal Tribunal allowed Ms Tafao's appeal, finding that the respondents were jointly and severally liable for unlawful indirect discrimination pursuant to the *Anti-Discrimination Act 1991* (Qld). A private apology was ordered.

Further, in *Attorney-General v Carter* [2020] QSC 217, the Supreme Court considered the human rights implications of the Attorney-General's application for Terance Carter to be subject to either a continuing detention order or a supervision order. Mr Carter was convicted of the offence of using a carriage service to transmit, make available, publish, advertise or promote child pornography material. Jackson J noted that a supervision order of 10 years was appropriate on the basis that the respondent was a serious danger to the community. In doing so, his Honour recognised that such an order limited the respondent's rights to liberty (section 29) and freedom of movement (section 19) under the *Human Rights Act 2019* (Qld).

D. COVID-19

COVID-19 was raised in four cases, all of which involved applications for no jury trials. In *R v Logan* [2020] QDCPR 67, counsel for the applicant argued that the delisting of the applicant's trial contravened their right to be tried without unreasonable delay (section 32(2)(c)). Counsel argued that if the application for a no jury trial was refused, the case would not be listed until an indeterminate date and, thus, could amount to an unreasonable delay. Although Horneman-Wren J held that human rights were a relevant consideration, the applicant's submissions were ultimately rejected.

E. Cultural rights

The *Human Rights Act 2019* (Qld) protects cultural rights generally (section 27) and the cultural rights of Aboriginal and Torres Strait Islanders (section 28), yet cultural rights were only raised in one of our 52 cases.

In *Taniela v Australian Christian College Moreton Ltd* [2020] QCAT 249, a complaint was made on behalf of a five-year-old boy regarding his school's decision to unenroll him unless he cut his hair to satisfy the school's uniform policy. It was argued that this act amounted to discrimination on the basis of race and sex and contravened several human rights, including cultural rights generally under section 27. The Tribunal did not engage in an in-depth discussion regarding the application of the *Human Rights Act 2019* (Qld), but it did comment that a finding of discrimination was consistent with the plain meaning of the *Anti-Discrimination Act 1991* (Qld) and was supported by section 48 of the *Human Rights Act 2019* (Qld). The Tribunal ordered the school to privately apologise and found that the uniform policy was 'void' insofar as it purported to impose an obligation on the boy to cut his hair.