PRACTISING LAW UNDER THE HUMAN RIGHTS ACT 2019

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I INTRODUCTION

I acknowledge the Wulgurukaba and Bindal people. The preamble to the *Human Rights Act 2019* (Qld) ('the Act') provides '*... human rights have a special importance for the Aboriginal peoples and Torres Strait Islander peoples of Queensland...'* and *'of particular significance is the right to self-determination.'*[1] I stress the fundamental importance of self-determination within a human rights framework. It includes collective self-determination such as cultural rights[2] self-sufficiency and independence, as well as individual identity, selfhood, autonomy and agency. Autonomy resides in the right to equality before the law but is intrinsically linked to many rights and freedoms.[3] The very notion of freedom — or freedoms — implies autonomous, unimpeded and independent action.

This year (2019) marks 30 years for JCU's Law School. As one of its first graduates, and the School's first admitted solicitor, it is an honour to give this address. It is refreshing to see the JCU Law Students Society reinvigorate the Social Justice Lecture Series. Social justice 'involves finding the optimum balance between our joint responsibilities as a society and our responsibilities as individuals to contribute to a just society.'[4] Baldry writes, 'social justice, … is essential to ensure people who need to claim human rights but do not have the ability, capacity or position to do so, can'.[5]

Tonight we discuss how practising under the *Human Rights Act 2019* (Qld) can achieve social justice. Our discussion will traverse *ten essential messages*.[6] A central purpose of the JCU Law clinical legal studies program is that law students see clients of the clinic as bearers of rights and not objects of charity. This is my *first essential message*. Human rights lawyers must practise what they preach. Lawyers ought not act out of traditional notions of benevolence, but out of an ethical duty to see justice done.[7] JCU graduates are the future of human rights in Queensland, especially in rural, regional and

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1 *Human Rights Act 2019* (Qld) Preamble.

2 *Human Rights Act 2019* (n 1) ss 27-28.

3 Ibid s 15. Note: Freedoms are also called liberties.

4 National Pro Bono Resource Centre, Occasional Paper #1: What is Social Justice, Sydney, October 2011 2.

5 Eileen Baldry, 'The Revival of Social Justice' (Marg Barry Memorial Lecture, Alexandria Town Hall, 16 September 2010) 7.

6 I am indebted to my colleagues Hugh de Kretser (CEO, Human Rights Law Centre) and Scott McDougall (Commissioner, Queensland Human Rights Commission) for the speeches they gave at the Community Legal Centres Qld conference in 2019, and from which I drew substantial inspiration.

7 *Legal Profession Act 2007* (Qld) s 38(i). See for example *Giannarelli v Wraith* (1988) 165 CLR 543 at 556 and *Shapiro v Kentucky Bar Association* 486 US 466 (1988) per Justice Day O'Connor.

remote areas of our state where you are more likely to practise law than those from metropolitan law schools. Cast aside notions of lawyering out of compassion; dignity is an inalienable and fundamental right.[8]

I recall the foundation meetings of The JCU Law Student Society. The Law School and the Society organised the first student volunteers for the (then) unfunded Townsville Community Legal Service. The legal service used Aitkenvale Special School as a venue for its Thursday night advice clinic. Consequently, my, and my peers', first experience of social justice was as a student volunteering at the legal service. Little did I know that things would come full circle and I would be back here delivering this lecture as Principal Solicitor of that same service. Law students can still volunteer at community legal centres through structured volunteer programs and JCU Law's Work-Integrated-Learning subjects. I commend those opportunities to you. They are an invaluable method of preparing you for legal practice in the real world.

In 1993, I came to work at the legal service. It was involved in serious human rights cases including abuse and deaths in various circumstances of institutional confinement.[9] My role was to establish a welfare rights service — essentially a poverty law practice.[10] I worked closely with homeless persons, prisoners, persons with disability, single parents and disadvantaged groups in North Queensland. For many of these clients, there were, and still are, no easy answers to their legal problems, no textbook remedies. In 1970, Stephen Wexler wrote, 'poor people are not just like rich people without money. Poor people do not have legal problems like those of private plaintiffs and defendants in law school casebooks.'[11] My *second essential message* is that little has changed. Structural and systemic power imbalances still exist within our society. The law still impacts disproportionately on people living in poverty and the law still lacks effective remedies to reduce property.

Throughout the nineties, the Electoral and Administrative Review Commission of Queensland ('EARC') was designing new systems of accountability, and the Goss Labor Government was enacting new laws in areas of electoral accountability, public assembly, freedom of information, anti-discrimination, judicial review, whistleblowers' protections and more. Despite all the reforms of post-Fitzgerald Queensland, the absence of a human rights framework was stark. EARC's 1993 report on preservation and enhancement of individuals' rights and freedoms recommended a draft Queensland Bill of Rights Bill, with thirty-five (35) wide-ranging rights.

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8 The preamble provides for the inherent dignity and worth of all human beings.

9 *Grave Concerns – Institutionalised Death in Queensland* was published by TCLS in 1993. A summary of the publication can be accessed at http://classic.austlii.edu.au/au/journals/AltLawJl/1994/42.pdf.

10 While this is an American term, it does reflect the collective work of community legal centres, such as welfare rights. See for example Anthony V Alfieri, 'Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative' 100 *Yale Law Journal* (1991) 2107. Available at: https://digitalcommons.law.yale.edu/ylj/vol100/iss7/6

11 Stephen Wexler, 'Practicing Law for Poor People' 79 *Yale Law Journal* (1970) 1049. Available at: https://digitalcommons.law.yale.edu/ylj/vol79/iss6/6.

Politically, it was a bridge too far.[12] In 1997, when the report was finally considered by the relevant Parliamentary Committee, it concluded:

> not to recommend the adoption of a bill of rights in any form is not to say that we believe the current system of rights protection in Queensland is perfect. Certainly, there is room for improvement. In particular, the current system is complex. It is difficult for citizens to identify what their rights are, where those rights are sourced, and how they might enforce their rights. What became very clear to us throughout our deliberations was that in many cases rights education is the key to people being able to access their existing rights.[13]

Such was the 1990s, rebirth out of decades of corruption, and tantalising, but ultimately deflating action on protecting human rights. The problem wasn't that existing rights were poorly understood, they were inadequate. Laws framing rights will always be imperfect. This is my *third essential message*. The Act itself isn't perfect. It won't 'fix' existing laws but it will change how laws are administered.

In 1996 I was involved in a disability discrimination case against Education Queensland, around a young boy with Down Syndrome's right to a mainstream education.[14] He had been suspended from school and left no choice but to attend a 'special school'. Ironically the same place where TCLS began evening advice services. What began as an application for interim orders[15] ended up in almost a week of intense litigation against a cast of crown lawyers led by a senior Queensland silk. We argued valiantly but ultimately lost because of the economic defence of unjustifiable hardship.[16] This defence relies on balancing the special services needed, against the cost of those services, considering financial circumstances, and any possible disruption or benefit to others. The costs to the State and the needs of other children were deemed to outweigh the necessary adjustments needed by the boy. In simple terms, it cost too much to properly resource a child with disability in a mainstream class. In more simple terms, dignity was too expensive.

This case was not and is not an isolated example. In 2015 Walsh found, 'The vast majority of special needs discrimination cases that proceed to tribunals or courts go against the complainant.'[17] I will come back to this case later. It taught me that defending human rights is like politics — values and ideals are pitched against compromise and convenience. This is my *fourth essential message*. Compromise is inevitably woven into any rights framework.

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12 Electoral and Administrative Review Commission, Report on Review of Preservation and Enhancement of Individuals' Rights and Freedoms, August 1993.

13 Legal Constitutional and Administrative Review Committee, Parliament Queensland, *The preservation and enhancement of individuals' rights and freedoms in Queensland: Should Queensland adopt a bill of rights?* (Report No 12 November 1998) -v-.

14 *P v Minister for Education* [1996] QADT 5 (23 January 1996).

15 Ibid.

16 *Anti-discrimination Act 1991* (Qld) s 44.

17 Tamara Walsh, 'Negligence and special needs education: The case for recognising a duty to provide special education services in Australian schools' (2015) 18(1) *Education Law Journal* 32-50.

This Act is no different.

On admission you take an oath and sincerely promise and swear that you will truly and honestly conduct yourself, in the practice of a lawyer of the Supreme Court, according to law to the best of your knowledge and ability. This oath contains an inherent promise to uphold the rule of law. Chief Justice Brennan said:

> The legal profession is a profession of service. In maintaining the rule of law, it gives vitality to the peace and order, the freedom and the decency, of the society in which we live. Sometimes that may be an anxious duty, sometimes difficult to perform. But that has long been the experience of a robust and proud profession.[18]

The rule of law and human rights are two sides of the same principle, the freedom to live in dignity. They have an indivisible and intrinsic relationship. That relationship has been recognised since the adoption of the Universal Declaration of Human Rights, which declared human rights must be protected by the rule of law lest we seek recourse in rebellion against tyranny and oppression.[19]

The Preamble to the Act clearly reflects this unison, "Human rights are essential in a democratic and inclusive society that respects the rule of law."[20] This is my *fifth essential message*. To uphold your oath, you must be a 'human rights defender'.[21]

II *THE HUMAN RIGHTS ACT 2018* (QLD)

Queenslanders have been teased with the hope of dedicated human rights laws since Nicklin's Country Party introduced the Constitution (Declaration of Rights) Bill into the 35th Parliament in 1959. It was deferred and never passed. Three Parliamentary inquiries came and went. On 27 February 2019, the 56th Queensland Parliament passed the *Human Rights Act 2019* — 'An Act to respect, protect and promote human rights'.[22] Attorney-General D'Ath said, 'Queensland's Human Rights Act is about a better Queensland — modern, fair and responsive'.[23] The Act is a living document which should be interpreted and applied in the context of contemporary and evolving values and standards.[24] The Preamble notes, 'Human rights should be limited only after careful consideration, and should only be limited in a way that can be justified in a free and democratic society based on human dignity, equality, freedom and the rule of law.' An act, decision or provision is compatible with human rights if it does not limit a human

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[18] The Hon Sir Gerard Brennan AC, 'Role of the Legal Profession in the Rule of Law', (Speech, Supreme Court, Brisbane, 31 August 2007).

[19] Preamble, Universal Declaration on Human Rights, United Nations General Assembly in Paris on 10 December 1948 (General Assembly resolution 217 A).

[20] *Human Rights Act 2019* (n 1) Preamble.

[21] Actually, a term of art: https://www.ohchr.org/en/issues/srhrdefenders/pages/defender.aspx

[22] *Human Rights Act 2019* (n 1) Long title.

[23] http://statements.qld.gov.au/Statement/2019/2/27/historic-day-for-queenslanders-as-human-rights-bill-passes.

[24] See, e.g. *Tyner v United Kingdom* (1978) 2 EHRR 1.

right or limits a human right only to the extent that is reasonable and demonstrably justifiable.[25]

The Act is based on a dialogue model and takes much of its form and content from the Victorian model — the *Charter of Human Rights and Responsibilities*.[26] It is an amalgam of various normative standards and incorporates human rights drawn from four (4) sources:

- Universal Declaration of Human Rights 1948;[27]
- International Covenant on Civil and Political Rights 1966;[28]
- International Covenant on Economic, Social and Cultural Rights 1966;[29] and
- Declaration on the Rights of Indigenous Persons 2007.[30]

The Act aims to promote a discussion or 'dialogue' about human rights between the three arms of government: the judiciary, the legislature and the executive.[31] It preserves Parliamentary sovereignty by virtue of its status as an ordinary Act of Parliament, and by confining the Judiciary's role to interpret and declare, but not invalidate. Some argue the model is more democratic by not allowing unelected judges strike down laws of elected representatives. This point is the very essence of many years of opposition to human rights laws in Australia and continues to be part of a dangerous anti-human rights mythology.

Understanding the model is essential to unlocking its powers and achieving the first main object of the Act, namely to protect and promote human rights.[32] This is my *sixth essential message*. Strive for an intuitive understanding of the Act and its scope and application. The Act guarantees twenty-three (23) rights for Queenslanders.[33] These include civil, political, economic, social and cultural rights. It is not exhaustive and there are significant gaps. The Act promotes human rights in a number of ways:

- Obliging public entities to act and make decisions in a way compatible with human rights;[34]
- Requiring statements of compatibility with human rights to be tabled for all Bills;[35]

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25 *Human Rights Act 2019* (n 1) s 8.
26 *Victorian Charter of Human Rights and Responsibilities Act 2006* (Vic).
27 Article 17.
28 Articles 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 17, 18, 19, 21, 22, 23, 24, 25, 26, 27.
29 Articles 12, 13.
30 Articles 8, 25, 29, 31.
31 *Human Rights Act 2019* (n 1) s 3(c).
32 Ibid s 3(a).
33 Ibid ss 15-37
34 Ibid ss 5(b), 58.
35 Ibid ss 5(c), 38.

- Providing for a portfolio committee responsible for examining whether a Bill is compatible with human rights;[36]
- Providing for Parliament, in exceptional circumstances, to override the application of the Act to a statutory provision;[37]
- Requiring courts and tribunals to interpret statutory provisions, to the extent possible that is consistent with their purpose, in a way compatible with human rights;[38]
- Conferring jurisdiction on the Supreme Court to declare that a statutory provision cannot be interpreted in a way compatible with human rights;[39]
- Providing for a Minister and a portfolio committee to report to the Legislative Assembly about declarations of incompatibility;[40]
- Providing for human rights complaints;[41] and
- Providing for the Queensland Human Rights Commission to carry out particular functions under this Act, including, for example, to promote an understanding and acceptance of human rights and this Act in Queensland.[42]

Lobbying efforts for the inclusion of an independent cause of action and a United Kingdom-style remedy of damages were unsuccessful. These issues will undoubtedly be enlivened again when the Act is reviewed post-July 2023.[43] However, on balance, the Act may provide Queenslanders with a better scheme than other Australian jurisdictions. On a global comparison, it may be a weaker model of human right protection, but it has its strengths. Unlike the Victorian Charter it provides for two (2) economic rights (education[44] and health[45]) and a complaint process through the Queensland Human Rights Commission.[46]

The Act's likely strengths lie in the ability to shape the culture of public entities in their dealings with everyday Queenslanders.[47] Not the highbrow legal cases, rather how essential public services like housing, emergency services, health, education, law enforcement are delivered. It will provide Queenslanders with civil and political rights in many areas. Let's stop and look at the cluster of rights at ss 20-22 which include

[36] Ibid ss 5(d), 40.
[37] Ibid ss 5(e), 43-47.
[38] Ibid ss 5(f), 48.
[39] Ibid ss 5(g), 53.
[40] Ibid ss 5(h), 56-57.
[41] Ibid ss 5(i), 64-78.
[42] Ibid ss 5(j), 61.
[43] Ibid s 95.
[44] Ibid s 36.
[45] Ibid s 37.
[46] Ibid Part 4.
[47] Ibid s 3(b).

freedom of thought, conscience, religion and belief,[48] freedom of expression,[49] and peaceful assembly and freedom of association.[50]

Townsville has a rich history of free speech. The High Court's decision in *Coleman v Power* on the implied right to freedom of political communication arose out of a JCU Law School student's persistent agitation about local government corruption in Townsville.[51] Much further back, the 'Tree of Knowledge' was a 1930s' Townsville landmark. It was a towering Sea Almond tree with seed pods favoured by black cockatoos. It was located on Denham Street across from the Post Office — now the Townsville Brewery. Under its branches people gathered to listen to 'orators', or 'agitators' depending on perspective. It was removed in 1972.

Australia's only ever communist member of Parliament, lawyer Fred Paterson, unsuccessful candidate for Herbert in 1943, then member for Bowen in 1944, often spoke below the tide mark to avoid arrest. A notorious interchange occurred in 1947, while Paterson was addressing a meeting in Townsville. A priest concerned about Paterson's endorsement of the Soviet Union interjected:

> Priest: *'Have you ever been to Russia?'*
>
> Paterson: *'No, Father. Have you ever been to heaven?'*[52]

A wonderful example of free expression and religion in one brief, satirical and courteous interchange. Paterson later appeared in the Communist Party case before the High Court, one of the most important decisions rendered by that Court.[53] Free speech has a complex and poorly understood interplay with other laws[54] and always involves competing rights. Vilification laws exemplify how human rights and social justice intersect in a high-wire balancing act. Look at the prolix debate about section 18C of the *Racial Discrimination Act 1975* (Cth) over the last decade.[55]

In 2006-2007 I acted for the Anti-Violence Committee of Townsville in *GLBTI v Wilks & Anor* — Queensland's first representative vilification matter under state law.[56] It related to a publication of a letter in the Mission Beach Gazette, threatening violent vigilantism against gay men. The Committee was established after a dark period of Townsville's history, culminating in 2000 when Four Corners broadcast a documentary about homophobic violence in Townsville. The documentary was named for one

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[48] Ibid ss 20-22.
[49] Ibid s 21.
[50] Ibid s 22.
[51] *Coleman v Power* (2004) 220 CLR 1.
[52] https:www.greenleft.org.au/content/communist-parliament-story-fred-paterson.
[53] George Winterton, 'The Significance of the Communist Party Case' (1992) 18 *Melbourne University Law Review* 630.
[54] For example, obscenity, censorship, privacy, confidentiality, secrecy and sedition, defamation, blasphemy, vilification, incitement, and passing off.
[55] See *Toben v Jones* (2003) 129 FCR 515; *Eatock v Bolt* [2011] FCA 1103; *Prior v Queensland University of Technology (No.2)* [2016] FCCA 2853.
[56] *Anti-discrimination Act 1991* (n 16)*; GLBTI v Wilks* [2007] QADT 27.

perpetrator's description of gay men in Townsville — he called them: 'hitting material'.[57] Townsville was an epicentre of gay hate crimes. In 1999 the AIDS Council office, where JCU City Campus now stands, was bombed and a staff member was stabbed in the neck with a syringe.

Indeed, a 2004 survey of local LGBTI residents found that 50% lived with fear of homophobic assault, and therefore consciously modified their behaviour in public spaces. After sunset, this figure increased to 81%.[58] For us now this is unimaginable, but it was the lived experience of our community a short time ago. It remains so for some. The homophobia even extended to popular culture. At one stage Townsville cinemas refused to screen the film 'Brokeback Mountain'. Colin Edwards, a fearless gay activist told media: 'We have a strong western influence up this way in our gay community. We have gay property owners, jackaroos, jillaroos. They really do exist and they really do fall in love.'[59]

While the AVT case settled the issues at play, the inclusion of human rights considerations [60] would have led to a more comprehensive consideration of the balancing of rights in cases where free expression rights are limited. The drafting of the vilification provisions[61] would have required a compatibility statement and also faced Parliamentary scrutiny for compatibility at the time of its passage through the Legislature.[62]

While in many ways free expression is the public litmus test for human rights laws, it shows how poor our human rights awareness is in Australia. When the hubris of rights-speak is always about the right to speak. When the greatest clamour is about the right to be critical of another's autonomous choices. The High Court's quintet of cases *Lange-Coleman-McCloy-Brown* and now *Clubb* have consistently reinforced, 'it is no part of the implied freedom to guarantee a speaker an audience, much less a captive audience.'[63] Justice Nettle observed in *Brown*:

> The implied freedom of political communication is a freedom to communicate ideas to those who are willing to listen, not a right to force an unwanted message on those who do not wish to hear it, and still less to do so by preventing, disrupting or obstructing a listener's lawful business activities. Persons lawfully carrying on their businesses are entitled to be left alone to get on with their businesses and a legislative purpose of securing them that entitlement is, for that reason, a legitimate governmental purpose.[64]

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[57] https://trove.nla.gov.au/work/35633559?q&versionId=44351711.

[58] Wyllie, M. (2004) *Anti-Violence Committee Safety Audit*. Townsville: LGBTI Anti- Violence Committee.

[59] https://www.smh.com.au/entertainment/movies/no-brokeback-blackout-20060113-gdmrvw.html

[60] It would likely have included consideration of many rights under the *Human Rights Act 2019* (Qld) including ss 15, 16, 17, 19, 20, 21, 22, 25, 26.

[61] *Anti-discrimination Act 1991* (n 16) s 124A.

[62] *Human Rights Act 2019* (n 1) ss 38-42.

[63] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Coleman v Power* (2004) 220 CLR 1; *McCloy v New South Wales* (2015) 257 CLR 178; *Brown v Tasmania* (2017) 261 CLR 328; *Clubb v Edwards; Preston v Avery* [2019] HCA 11; (2019) 93 ALJR 448.

[64] (2017) 261 CLR 328 [275].

You need only spend a few minutes on social media to see people's view of free speech is severely misaligned with the jurisprudence. Why are we more concerned with people's right to free speech than we are about people's right to protection from torture and cruel, inhuman or degrading treatment?[65] How is it that many seem to value the right to demonise asylum seekers above their right to freedom from torture? The right to speak becomes more important than the human rights implicit within the subject matter. A paradox indeed.

Remember what I said about the importance of the right to autonomy? Each of us is far more likely to suffer human rights abuses because of a loss of legal capacity or refusal of legal agency than some egregious breach of free expression. I daresay Justice Nettle's comments about unwanted messages are essentially about the sanctity of personal autonomy.

The Act will make rights a reality for Queenslanders who have never thought of having human rights before. The Act says, 'All individuals in Queensland have human rights.'[66] This is what Eleanor Rooseveldt meant when she said:

> Where, after all, do universal human rights begin? In small places, close to home — so close and so small that they cannot be seen on any maps of the world. … Unless these rights have meaning there, they have little meaning anywhere. Without concerned citizen action to uphold them close to home, we shall look in vain for progress in the larger world.[67]

Clarity will also bring discomfort for some. My experience is that ordinary Queenslanders are not natural observers of nuance in the interplay of human rights. Limits on rights will challenge the views of those who come from the Patrick Henry school of absolutism — 'give me liberty or give me death!'[68] Free speech proponents often typify this approach. The Act binds all persons but does not apply as between private individuals. How this will be interpreted remains to be seen.[69]

The Act will protect all those in Queensland, not just those with some specific right of residence, domicile or citizenship.[70] It will operate to engage the interconnectedness, indivisibility and interrelationship between human rights. Let me give an example.

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65 *Human Rights Act 2019* (n 1) s 17.

66 Ibid s 11.

67 Excerpt from Speech by Eleanor Roosevelt at the presentation of 'In Your Hands: A Guide for Community Action for the Tenth Anniversary of the Universal Declaration of Human Rights.' (Speech United Nations New York, March 27, 1958).

68 'Give me liberty, or give me death!' is a quotation attributed to Patrick Henry from a speech he made to the Second Virginia Convention on March 23, 1775 at St. John's Church in Richmond, Virginia.

69 See the concept of 'direct effect' in *Van Gend en Loos v Nederlandse Administratie der Belastingen* (1963) Case 26/62, and *Defrenne v Sabena (No 2)* (1976) Case 43/75.

70 For example, Article 2.1 of the ICCPR states that each party must ensure the rights to the Covenant to 'all individuals within its territory and subject to its jurisdiction'. See also discussion of art.2.1 in Human Rights Committee, General Comment 15, The position of aliens under the Covenant HRI/GEN/1/Rev.9 (Vol. I) 11 April 1986.

A young European backpacker in Australia was wrongfully accused of a very serious assault against another tourist. When arrested, he was so overwhelmed by the allegations he hung himself. He survived with significant laryngotracheal trauma. He was transferred from watch-house into hospital care and then promptly discharged into the community. He could not speak, either to give a record of interview to police or proper instructions to a lawyer, and was reduced to scribbling notes on a cheap pad in a language not his own. His mental health was dire, his suicidality untreated — (without Medicare or health insurance), he was destitute and by definition, homeless.[71] His accuser left the country without intention of returning.

He could not access legal aid prior to being charged, nor would the health system correct his self-inflicted trauma and restore his voice or properly treat his declining mental state and restore his psyche. The complexity of the issues around his pending tourist visa expiry, the tenuous allegations, his inability to talk and his poor state of health lead to a decision to not charge, and he left the country. His case was bursting with human rights issues including equal treatment before the law,[72] expression,[73] humane treatment,[74] access to justice,[75] and access to health.[76]

We also see the critical importance of communication as a fundamental human right and from a social justice perspective, how it is central to human interaction and participation. To understand and to be understood enables expression of basic needs and wants.[77] How can we be effectively autonomous without communication? McLeod summarised our young tourist's double disadvantage nicely:

> The primary modes of communication privileged in many societies are speaking, listening, reading and writing, but can include other modes such as sign languages, online audio/video communication or non-verbal modes such as crying and touch. Effective communication may be compromised for those who have reduced capacity to use these four privileged modes of communication, and for those who rely on modes of communication and languages that are not mainstream in their communities.[78]

McCormack makes the collective issue even plainer, 'For people with communication disabilities, their "voice (i.e. what they want to communicate)" may not be heard due to their "lack of voice (i.e. mode of communication)"'.[79]

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71 See https://www.homelessnessaustralia.org.au/about/what-homelessness
72 *Human Rights Act 2019* (n 1) s 15.
73 Ibid s 21.
74 Ibid s 30.
75 Ibid ss 31-32.
76 Ibid s 37.
77 Sharynne McLeod, Communication rights: Fundamental human rights for all, International (2018) 20:1 *Journal of Speech-Language Pathology* 3-11, DOI: 10.1080/17549507.2018.1428687.
78 Ibid.
79 Jane McCormack, Elise Baker and Kathryn Crowe, 'The human right to communicate and our need to listen: Learning from people with a history of childhood communication disorder' (2017) 20(1) *International Journal of Speech-Language Pathology* 142–151. doi:10.1080/17549507.2018.1397747.

III IMPACT ON AND BY THE LEGAL PROFESSION

I want to focus in on some key statutory issues you are likely to encounter as lawyers. It is important for us to foster a positive view of human rights — one that recognises their universality and importance across our community, and doesn't reinforce the negative stereotypes of the villains' charter or the lawyers' picnic.

Our Victorian colleagues warn us from being trapped in the mythologising of human rights.[80] This is my *seventh essential message*. Do not get caught up in the nonsensical battle between the warriors of social justice and the warriors of the status quo.[81] Particular elements of our new human rights system align with your role to uphold the rule of law through your daily work. They include three (3) specific areas of attention:

- Address the way public entities act and make decisions;[82]
- Use strategic complaints and litigation ─ emphasis on strategic;[83] and
- Promote human rights in statutory interpretation and hold Parliament to account in its legislative function.[84]

Lessons from the Victorian Charter experience include that the Act's greatest impact has come from advocating for public entities to act and make decisions in a way compatible with human rights, and the change this has driven across the public sector. This in turn fulfils the objects of the Act "to help build a culture in the Queensland public sector that respects and promotes human rights."[85] The Act facilitates this by three modalities of interaction between citizen and public entity.

Firstly, it is unlawful for a public entity to act or make a decision in a way that is not compatible with human rights; or in making a decision, to fail to give proper consideration to a human right relevant to the decision.[86] Facilitating this as a lawyer might be as simple as writing to a public entity identifying the relevant rights and approach obliged by the Act. Second, a contravention of the Act is justiciable. Legal proceedings for 'unlawfulness' can be brought if they piggyback on another application such as a judicial review application.[87] Thirdly, the Act contains complaint and dispute resolution procedures where certain preconditions are met.

This my *eighth essential message*. The Act may not provide an independent cause of action but it does provide an array of accessible complaint mechanisms where a public

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80 Hugh de Kretser, (Speech, Community Legal Centres Queensland Conference, Brisbane, 21-22 March 2019).
81 See the online Urban Dictionary at www.urbandictionary.com which carries definitions for both SJW and SQW.
82 *Human Rights Act 2019* (n 1) ss 3(b), 4(b), 9-10, 58.
83 Ibid ss 59, 64-67.
84 Ibid Part 3.
85 Ibid s 3(b).
86 Ibid s 58.
87 Ibid s 59.

entity contravenes the Act. We lawyers have a duty to use them ethically, competently, effectively and strategically.

The complaints process requires an individual, first, to contact the entity and raise their concerns.[88] If after this it remains unresolved, the individual can complain to the Commission. A complaint accepted by the Commission can then be the subject of conciliation.[89] Initial drafts of the Bill did not allow lawyers to represent complainants but they now have this right.[90] Exceptional circumstances can short-circuit the internal dispute process, however, most human rights complaints will be dealt with directly between those owed the rights and those contravening the rights. The Act will have a dynamic effect and this dialogue between the citizen-rights-bearer and responsible entity can happen at any time. Hopefully the process will lead to restoration of any human rights previously lost.

The Commissioner can publish information about complaints which he has indicated might be used to highlight recalcitrant entities.[91] One would hope this naming and shaming process ought to be exercised infrequently. The Act aims to ensure human rights are given proper consideration in public sector decision-making and in the development of policy and legislation in Queensland. This is a concept that requires a government to ask itself, as it develops new policy or legislation — What's the goal we're seeking to achieve? Will it restrict rights? If so, is it justified? Are there less restrictive ways to achieve that goal? This applied properly is human rights in action — delivering good, human-focused law and policy making.[92]

Let's go back to children with disability in the education system. The UN Special Rapporteur on the Right to Education has said that, 'Inclusive education is based on the principle that all children should learn together, wherever possible, regardless of difference, and questions 'traditional (patriarchal, utilitarian and segregational) education'.[93] For years, children with disabilities have struggled against an education system that fails to make reasonable adjustments to their particular circumstances. They make up about 5% of all enrolments.[94] Children with disabilities of both genders and

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88 Ibid s 65.

89 Ibid ss 79-87. Conciliation is a private and informal opportunity for all parties to discuss what occurred, listen to each other's side and have input into how the complaint can be resolved. Conciliation usually involves all parties participating in either a face-to-face meeting or a teleconference.

90 Ibid s 83.

91 Ibid s 90.

92 Taken from Hugh de Kretser (n 80).

93 Report of the Special Rapporteur on the Right to Education, Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled 'Human Rights Council', The right to education of persons with disabilities, 19 February 2007, A/HRC/4/29, 6.

94 See Tamara Walsh, 'Negligence and special needs education: The case for recognising a duty to provide special education services in Australian schools' (2015) 18(1) *Education Law Journal* 32-50; Tamara Walsh, 'Children with special needs and the right to education' (2012) 18(1) *Australian Journal of Human Rights* 27-56; Tamara Walsh, 'Adjustments, accommodation and inclusion: Children with disabilities in Australian primary schools' (2012) 17(2) *International Journal of Law and Education* 23-38.

all ages and in most parts of the world, suffer from a pervasive and disproportionate denial of the right to education.[95] Walsh has noted, 'as it stands, the current protections and courses of redress in Australia are ineffective in ensuring the adequate provision of education to children with special needs.'[96]

The right to education in the Act articulates the right to 'access to primary and secondary education appropriate to the child's needs.'[97] This will clearly be an additional imperative for decision-makers. A decision will need to pass the test which requires action by public entities to be judged against whether a limitation is reasonable and justified ─ often known as the principle of proportionality.[98] Section 36 won't negate the economic considerations but it will rebalance the iterative process. The proportionality test will require decision-makers to consider several things before making their decision that a limitation on a human right is reasonable and justifiable:

- The nature of the human right;
- The nature and importance of the limitation and its consistency with a free and democratic society based on human dignity, equality and freedom;
- Does limiting the right actually achieve its purpose (relationship); and
- Are there less restrictive ways reasonably available to the decision-maker.

The leading case on applying the proportionality test is the Canadian Supreme Court decision in *R v Oakes* where the majority lead by Chief Justice Dickson held:

> This involves a form of proportionality test involving three important components. To begin, the measures must be fair and not arbitrary, carefully designed to achieve the objective in question and rationally connected to that objective. In addition, the means should impair the right in question as little as possible. Lastly, there must be a proportionality between the effects of the limiting measure and the objective the more severe the deleterious effects of a measure, the more important the objective must be.[99]

In *Clubb*, Kiefell CJ, Bell J and Keane J gave an interesting example of proportionality:

> Proportionality testing is an assessment of the rationality of the challenged law as a response to a perceived mischief that must also respect the implied freedom. A law which allows a person to be shot and killed in order to prevent damage to property can be seen to have a connection to the purpose of preventing damage to property. It may also be accepted that other means of preventing damage to property would not be as effective. Nevertheless, the law is not a rational response to the mischief at which it is directed because it is manifestly disproportionate in its effect on the peace, order and welfare of the community. In the same way, it is only if the public interest in the benefit sought to be

[95] Report of the Special Rapporteur (n 93) 5.
[96] Ibid.
[97] *Human Rights Act 2019* (n 1) s 36.
[98] Ibid s 13.
[99] *R v Oakes* [1986] 1 SCR 103.

> achieved by the legislation is manifestly outweighed by an adverse effect on the implied freedom that the law will be invalid.[100]

So, what then is the role of the Courts in the dialogue model? In *Momcilovic v R*[101] the High Court tested the Victorian interpretive provision and found it constitutionally valid. The majority held that statutory provisions must be interpreted in a way which is compatible with human rights' and suggested this is no more than the ordinary judicial task of statutory interpretation; that is, consideration of a provision's terms, context and purpose. Some commentators have suggested this finding is flawed.[102] The Court did not embrace the strong or remedial approach of the House of Lords in *Ghaidan v Mendoza*.[103] The rebuttal of the *Ghaidan* approach was particularly vigorous by Justice Heydon for whom 'purpose' was '*an empty vessel into which particular judges can unrestrainedly pour their own wishes.* '[104]

It will of course take time for courts and tribunals to come to grips with the proper construction and application of the Act. In Victoria, Waters suggested that, 'Reference to international and comparative material on human rights may encourage a more expansive reading of the Charter than black letter, common law lawyers would normally contemplate.'[105] His remarks squarely address the conservatism shown by Victorian judges in their application and engagement with the Charter. Their foils: avoiding international jurisprudence and shared wisdom, reading down the powers granted to them under the legislation, and developing the common law when faced with a Charter argument.[106]

Take Justice Heydon's high water mark of indignation, and arguably eccentricity, about human rights[107] when discussing the use of foreign decisions in *Momcilovic*:

> The odour of human rights sanctity is sweet and addictive. It is a comforting drug stronger than poppy or mandragora or all the drowsy syrups of the world. But the effect can only be maintained over time by increasing the strength of the dose.[108]

Far from this approach, the Act encourages that international law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision.[109] We should look to global

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[100] *Clubb v Edwards; Preston v Avery* (n 63) [70].
[101] *Momcilovic v R* (2011) 245 CLR 1; [2011] HCA 34.
[102] Julie Debeljak, 'Proportionality, Rights-Consistent Interpretation and Declarations under the Victorian Charter of Human Rights and Responsibilities: the *Momcilovic* litigation and beyond' (2014) 40(2) *Monash University Law Review* 340.
[103] *Ghaidan v Godin-Mendoza* [2004] 2 AC 557.
[104] *Momcilovic v R* (n 101), 184-185.
[105] Brian Waters, Simon McGregor, The Charter of Human Rights and Responsibilities: A Practitioner's Guide, (Victorian Bar Association CLE Paper, 9 August 2007).
[106] Hugh de Kretser (n 80).
[107] https://www.theguardian.com/commentisfree/2015/aug/14/the-sometimes-enjoyable-mind-of-dyson-heydon
[108] *Momcilovic v R* (n 101) 185.
[109] *Human Rights Act 2019* (n 1) s 48(3).

jurisprudence despite what that other 'great dissenter' says.[110] It is disingenuous to suggest that because the Act only permits consideration of foreign decisions, but does not compel it, the courts are empowered to consider those decisions they favour and decide not to consider those they dislike.[111]

The rights are open-textured, but they must be applied in concrete situations. This is my *ninth essential message*. Lawyers must find the 'right' rights situations. They must ensure rights are interpreted in a manner which renders them 'practical and effective, not theoretical and illusory'.[112] Coming back to *Momcilovic*, the majority found compatibility with human rights is now one of the rules of construction,[113] but left lingering debates about the nature and process of the interpretive role.[114] The link between the proportionality test and compatibility remains unclear, though it seems obvious they are linked.[115] This issue will no doubt play out in a test case about the Queensland parallel provision.[116]

The High Court has criticised the word 'dialogue' as an inappropriate description of the relations between Parliament and the courts, particularly regarding the courts' role in declaring legislation inconsistent with Charter rights, as it could imply that courts have the power to strike down inconsistent legislation. In Victoria and under the Act, the Courts have no power to invalidate Charter incompatible legislation. Instead the Supreme Court may make a statement to the effect that it has found the legislation incompatible, which has no effect on the validity or application of the law in question.[117]

This is the ultimate paradox of these types of laws. Their hortatory statements and normative and aspirational tone present them as more important than or above ordinary statutes.[118] In reality there are arguably no rights above politics.[119] The Act, contains the means within its design and structure to restrict and constrain its own power.[120] Whether this strikes an appropriate balance in promoting and enforcing human rights remains to be seen. Despite this reality, perhaps the most important lever within the Act is that which requires Parliament to consider whether Bills are compatible with human

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[110] Andrew Lynch, Introduction – What Makes A Dissent 'Great'? in Andrew Lynch (ed) *Great Australian Dissents* (Cambridge University Press, 2016), 5.
[111] *Momcilovic v R* (n 101) 185. Heydon J invokes *Roper v Simmons* USSC 2017 [2005]; 543 US 551 at 627 (2005) per Scalia J dissenting.
[112] *Goodwin v United Kingdom* (2002) 35 EHRR 47 [73] – [74].
[113] The Hon Justice Pamela Tate, Statutory Interpretive Techniques under the Charter: Three Stages of the Charter — Has the Original Conception and Early Technique Survived the Twists of the High Court's Reasoning in Momcilovic?, (2014) 2 *Judicial College of Victoria Online Journal* 52.
[114] See Julie Debeljak, (n 102).
[115] The Hon Sir Anthony Mason AC KBE GBM, Statutory Interpretive Techniques Under the Charter — Section 32, (2014) 2 *Judicial College of Victoria Online Journal* 69.
[116] *Human Rights Act 2019* (n 1) ss 13 and 48.
[117] Ibid s 53.
[118] Russell Solomon, 'The Social Construction of Human Rights Legislation: Interpreting Victoria's Statutes through their Limitations' (2017) 22(1) *Deakin Law Review* 27, 51.
[119] See Conor Gearty, Can Human Rights Survive? (Cambridge University Press, 2005).
[120] Russell Solomon (n 118) 51.

rights. Each member introducing a Bill must include a statement of compatibility and each Bill will be scrutinised by the portfolio committee.

Back in 2010 Ed Santow, now Human Rights Commissioner wrote, 'Without an express obligation on the executive to act compatibly with protected rights, there will remain a substantial lacuna in the protection of human rights in Australian law.'[121] This will be overcome in Queensland. Our Act mandates proactive analysis of all new laws, and engenders debate within our democratic institutions. It also allows us as lawyers to make submissions on the issue of compatibility of each Bill before the Parliament. You can access the public Victorian Statements of Compatibility Register to see how this process has operated in that jurisdiction.[122] Compatibility places human rights law within the continuum of measures aimed at ensuring that public power is exercised in a principled manner and without abuse.[123]

Chief Justice Brennan said of the role of lawyers:

> In this country, in the absence of a constitutional Bill of Rights, fundamental human rights are susceptible to extinction by statute. It is surely the function of lawyers to be able to identify laws which have that effect, to seek to have them narrowly applied and to contribute to any public consideration of the necessity for enacting or retaining such laws. There must be an overriding justification of public interest to warrant a denial of any person's fundamental human rights. That proposition presents today's lawyers with a significant challenge to keep the law respectful of human rights so far as is compatible with the national interest.[124]

The same must be said for any actions to limit human rights, through override declarations.[125]

IV CONCLUSIONS

Some concluding thoughts. Or perhaps my *overarching and tenth message* if you will. I never used to think of myself as a human rights lawyer. In fact, I thought such titles were somehow disconnected from the realities of community legal practice. I will go so far as to say I was cynical of those who did adopt that title. But over time I came to realise that most of what I was doing was human rights work. We now have a legitimate reason for thinking of ourselves in this way — a mandate if you want.

Soon the Australian Human Rights Commission will begin a national conversation on federal protections.[126] Once in a while a generation gets the opportunity to make real change to society. This Act is your opportunity to make real change to your society. It

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[121] Ed Santow, 'The Act that Dares not Speak its Name: The National Human Rights Consultation Report's Parallel Roads to Human Rights Reform,' (2010) 33(1*) UNSW Law Journal* 8 at 18.

[122] http://humanrights.vgso.vic.gov.au/legislation-development/developing-leg-policy/statements-compatibility.

[123] The Hon Justice Pamela Tate (n 113) 52

[124] The Hon Sir Gerard Brennan AC (n 18).

[125] *Human Rights Act 2019* (n 1) ss 43-47.

[126] Australian Human Rights Commission*, Free and equal: An Australian conversation in human rights,* Issues Paper April 2019.

is your opportunity to embrace being a human rights lawyer above all other labels the profession might seek to pin on you. Autonomy is actually about choice — your choices included.

I thank the Society for their invitation and to you all for listening tonight.