Lecture for the Inaugural Event of the Human Rights Law Association

Proportionality Under the Australian State-Level Human Rights Statutes

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I Introduction

I applaud the Human Rights Law Association on its choice of topic for my speech tonight, 'Proportionality Under the Australian State-level Human Rights Statutes'. I will seek to demonstrate that proportionality analysis lies at the heart of modern human rights law — it is not an optional extra or a technical device that only the most committed public lawyers need understand. Proportionality is the key concept underlying laws aimed at human rights protection and it has its proper place in each of the three human rights jurisdictions in Australia. Those jurisdictions are the Australian Capital Territory ('ACT'), Victoria and Queensland and the human rights statutes are, respectively, the *Human Rights Act 2004* (ACT) ('*ACT HRA*'), the *Charter of Human Rights and Responsibilities* (Vic) ('*Charter*'),[1] enacted in 2006, and the *Human Rights Act 2019* (Qld) ('*Qld HRA*').

My aim is to try to ensure that those who have never before confronted proportionality analysis in a human rights context, as well as those who are specialists, and those whose understanding lies somewhere in between, all derive some utility out of what I have to say.

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1 'This Act may be referred to as the Charter of Human Rights and Responsibilities and is so referred to in this Act': *Charter of Human Rights and Responsibilities* (Vic) s 1(1) ('*Charter*').

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My speech will fall into three Parts. In Part II, I consider the provenance of proportionality as an analytical tool for decision-making in the context of human rights law, what it means and what are its elements.

In Part III, I examine how the concept of proportionality has been captured in the human rights statutes of each of the Australian human rights jurisdictions starting with Victoria, then Queensland, and then the ACT. To illustrate how a proportionality analysis plays out in practice, I consider how the concept has been applied in some of the leading cases in each jurisdiction. I will seek to highlight the common ground between the jurisdictions but also to identify some differences.

In Part IV, I compare the approach to proportionality adopted in human rights law with the proportionality analysis applied by the majority of the High Court in the context of the constitutionally implied freedom of political communication. I am by no means the first to make that connection. Kent Blore, the Deputy President of the Human Rights Law Association, has shed light on that connection in his academic writing.[2]

II. The Historical Origins of 'Proportionality' Within a Human Rights Context

Let me start by considering what it is we are talking about — what does 'proportionality' mean?

Proportionality within a human rights context is probably best understood as an analytical tool for assessing whether we can justify restrictions on, or interferences with, human rights — if the restrictions are proportionate to the outcome to be achieved, they pass the test. If the restrictions are not proportionate, they fail the test and amount to an unjustified interference with human rights.

A good example of how this analysis works is *PJB v Melbourne Health* (*Patrick's Case*).[3] This is the case of a mentally ill man detained involuntarily in a hospital in Victoria for whom an administrator was appointed by the State. The administrator was to have complete power over the management and control of Patrick's money and property. They would probably sell Patrick's house. In the Victorian Supreme Court, Bell J held that the appointment of an administrator, with unlimited powers, infringed Patrick's right not to be subjected to arbitrary interference with his home and his privacy, including his autonomy to choose where to live. The interference with his right could not be justified as there was not a sufficient purpose for such broad-ranging restrictions and there were other less restrictive

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2 Kent Blore, 'Proportionality under the *Human Rights Act 2019* (Qld): When are the Factors in s 13(2) Necessary and Sufficient, and When are They Not?' (2022) 45(2) *Melbourne University Law Review* 419 ('Factors'); Kent Blore, 'Six Unexplored Aspects of Proportionality under Human Rights Legislation in Australia' (2022) 105 (September) *Australian Institute of Administrative Law Forum* 42.

3 (2011) 39 VR 373 ('*Patrick's Case*').

alternatives available to guard against the risk of mismanagement. The interference with Patrick's right to privacy was disproportionate and therefore unlawful under the *Charter*.[4]

Notions of proportionality in law have been applied since at least the development of the concepts of corrective justice and distributive justice in classical Greek times.[5] Early Roman law also understood the concept and by 1215, it was recognised in the Magna Carta as a principle governing the infliction of punishment in the following way: 'For a trivial offence a free man shall be fined *only in proportion to the degree of his offense*, and *for a serious offence correspondingly*'.[6]

In the eighteenth century, Sir William Blackstone, in his *Commentaries on the Laws of England*, reflected upon the natural liberty of humankind. Influenced by John Locke,[7] he considered what each person had to relinquish in order to enter into society and become subject to its laws. He observed that:

> every man, when he enters into society, gives up a part of his natural liberty, as the price of so valuable a purchase; and, in consideration of receiving the advantages of mutual commerce, obliges himself to conform to those laws, which the community has thought proper to establish.[8]

He concluded that the exchange must be one of restraining one's liberty only to the extent of what is necessary for security and society. He said:

> For no man, that considers a moment, would wish to retain the absolute and uncontrolled power of doing whatever he pleases; the consequence of which is, that every other man would also have the same power; and then there would be no security to individuals in any of the enjoyments of life. *Political* therefore, *or civil*, *liberty*, which is that of a member of society, is no other than natural liberty *so far restrained by human laws (and no farther) as is necessary and expedient* for the general advantage of the publick.[9]

The former Chief Justice of the Supreme Court of Israel, Professor Aharon Barak, argues that 'the historical roots of proportionality as a public-law standard can be found in eighteenth-century German administrative law'.[10] In the Prussian Civil Code of 1794 proportionality was considered a social ideal to be

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4 Ibid 395 [85], 455–6 [373].

5 Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge University Press, 2012) 175–6.

6 Ibid 176 (emphasis added).

7 Locke's social compact was based on consent: 'MEN being … by nature, all free, equal, and independent, no one can be put out of this estate, and subjected to the political power of another, without his own consent. The only way whereby any one divests [themselves] of [their] natural liberty, and puts on the bonds of civil society, is by agreeing with other men to join and unite into a community, for their comfortable, safe, and peaceable living one amongst another, in a secure enjoyment of their properties, and a greater security against any, that are not of it': John Locke, *The First and Second Treatises of Government* (Pantianos Classics, 2016) bk 2, ch 8 [95].

8 William Blackstone, *Commentaries on the Law of England*, ed David Lemmings (Oxford University Press, 2016) bk 1, 85 [121].

9 Ibid (emphasis added).

10 Barak (n 5) 177.

adopted by the state to protect against the government making arbitrary decisions, rather than as an enforceable standard. The word 'proportionality' was not expressly used[11] but, in what has since been described as 'an important textual "hook" for proportionality's later doctrinal development',[12] the Code included, within the provision dealing with discretionary police powers, the statement that: 'The office of the police is to take *the necessary measures* for the maintenance of public peace, security, and order'.[13]

Police action was conceived broadly as including state measures aimed at promoting public welfare, morality and public safety.[14] It was recognised, building on Blackstone's insight, that '[t]he social contract justified the state's authority, but also fixed the outer bounds of that authority.'[15] The legitimacy of interventions by the police, broadly understood, were to be based on principles that resolved the conflict between different interests, especially private autonomy and the public good.[16] Autonomy was to be restricted only in the service of legitimate goals or objectives and, adopting in effect a 'least restrictive means' test, the measures employed were to be limited to what was necessary. It was said:

> The first law … is this: the police power may go no farther than its own goals require. The police law may abridge the natural freedom of the subject, but only insofar as a lawful goal requires as much. This is its second law.[17]

There was to be a balancing of interests, but this was to occur 'with a thumb on the scale in favour of rights'.[18] In the words of the drafter of the Prussian Civil Code:

> Only the achievement of a weightier good for the whole can justify the state in demanding from an individual the sacrifice of a less substantial good. So long as the difference in weights is not obvious, the natural freedom must prevail … The [*social] hardship*, which is to be averted through the restriction of the freedom of the individual, has to be *more substantial by a wide margin than the disadvantage* to the individual or the whole that results from the infringement.[19]

In the second half of the 19th century, proportionality came to be applied as an enforceable restraint on the power of the state, that is, as an analytical tool within the context of positive law.

The Supreme Administrative Court of Prussia repeatedly ruled that police conduct was illegal because it was disproportionate. For example, in 1886 the Supreme Administrative Court of Prussia overruled a police order directing the

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11 Ibid 178.

12 Alec Stone Sweet and Jud Mathews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47(1) *Columbia Journal of Transnational Law* 72, 100.

13 Ibid 100 (emphasis added).

14 Ibid 98.

15 Ibid 98–9.

16 Ibid 98.

17 Günther Heinrich von Berg, quoted in Stone Sweet and Mathews (n 12) 99 (emphasis added).

18 Ibid 99.

19 Carl Gottlieb Svarez, *Lectures on the State and Law*, quoted in ibid 99 (emphasis added).

closure of a liquor store because the store owner had violated the liquor licence several times. The Court held that a 'complete closure was a disproportional sanction in the case, given the clear option of revoking the store's liquor license.'[20]

The approach of the Court was summarised at the time, in a saying that is revealing of the historical context, namely: 'You should never use a cannon to kill a sparrow.'[21]

The imagery has been softened only a little in more contemporary times with the maxim: 'A sledgehammer should not be used to crack a nut.'[22]

By the middle of the 20th century, the Basic Law for the Federal Republic of Germany was enacted. This established the Federal Constitutional Court and introduced a Constitution aimed at protecting a broad range of rights. Proportionality soon became elevated to the status of constitutional principle to be applied in upholding all the rights mentioned in the Basic Law other than the absolute right to human dignity.[23] It was applied in a long line of major cases, including a leading case in 1958 that challenged a Bavarian law regulating pharmacies ('*Pharmacies Case*').[24]

A Bavarian statute required those who sought to operate a pharmacy to obtain a permit. Permits would only be granted if the new pharmacy would not harm the commercial success of neighbouring pharmacies. The law was challenged on the grounds that it infringed an individual's freedom of occupation.[25] The Court invalidated the legislation primarily because the legislature had not chosen the least restrictive means of regulation.[26] In doing so, the Court 'began to develop a framework for testing whether a limitation on a right was permissible'[27] from which developed the structured proportionality test of suitability, necessity and balancing.[28] This is the test I will discuss in Part IV, in the context of the implied freedom of political communication.

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20 Barak (n 5) 179. Similarly, in 1886, the Court ruled against the police when they ordered a property owner to remove a post at the edge of his property because it was not visible at night and, therefore, a hazard to pedestrians. The Court recognised that a less drastic measure would be for the installation of proper lighting to eliminate the risk, for, as it remarked, 'the chosen measures may not extend farther than they must to meet the goal of eliminating the danger': Stone Sweet and Mathews (n 12) 101, n 70.

21 Barak (n 5) 179, attributed to F Fleiner, *Institutionen des Deutschen Verwaltungsrechts* (Tubingen, 1928), 404.

22 *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9, 16 [18].

23 Barak (n 5) 180.

24 *Apothekenurteil*, *Bundesverfassungsgericht* [German Constitutional Court], 1 BvR 596/56, 11 June 1958 reported in (1958) BVerfGE 7, 377 ('*Pharmacies Case*').

25 Freedom of occupation is protected under the Basic Law: *Grundgesetz für die Bundesrepublik Deutshland* [Basic Law for the Federal Republic of Germany] art 12(1).

26 Niels Petersen, 'Balancing and Judicial Self-Empowerment: A Case Study on the Rise of Balancing in the Jurisprudence of the German Federal Constitutional Court' (2015) 4(1) *Global Constitutionalism* 49, 62. The Court also based its judgment on a lack of rational connection.

27 Anne Carter, *Proportionality and Facts in Constitutional Adjudication* (Hart Publishing, 2022) 64.

28 Ibid; Petersen (n 26) 62.

By 1968, proportionality was declared 'to be a "transcendent standard for all state action" binding all public authorities.'[29] It is estimated that by 1973, the Federal Constitutional Court in Germany had used proportionality analysis in 132 cases.[30]

Proportionality analysis spread from Germany to multiple jurisdictions. As some commentators have said approvingly, '[f]rom a comparative law perspective, PA [proportionality analysis] exhibits a viral quality, spreading relatively quickly from one jurisdiction to another.'[31] In particular, it spread, post-1989, throughout Central and Eastern Europe against the background of the earlier case law of the German Federal Constitutional Court and the European Court of Human Rights.[32] Proportionality analysis has also spread more recently to Canada, South Africa and Israel.[33]

It is argued that the extent of the migration has meant that: 'proportionality is the post-war paradigm of human rights protection.'[34]

Different legal systems attribute somewhat different content to the components of a proportionality analysis. Restrictions on, or interferences with, rights are often expressed as 'limits' or 'limitations' on rights. In essence, the test of proportionality in contemporary times in respect of a legislative interference with rights, in the words of Professor Barak in highlighting the elements of proportionality, means that a court:

> must find a proper purpose and a rational connection between the means used by the limiting statute and the proper purpose, the absence of less intrusive means, and a proper balance between the limitation on the right and the benefit gained by the limiting statute.[35]

These elements can be expressed in a variety of ways. Sometimes all these elements are jointly considered to express a general test of proportionality and sometimes the focus is on the third element, the balancing exercise, as requiring a relationship of strict proportionality.[36] Each of these elements is reflected in the human rights statutes in all of the relevant Australian jurisdictions.

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29 Stone Sweet and Mathews (n 12) 109–10.

30 Ibid 110, n 111.

31 Ibid 112.

32 The European Court of Human Rights had been established in 1959 under the European Convention for the Protection of Human Rights and Fundamental Freedoms.

33 Stone Sweet and Mathews (n 12) 112.

34 Barak (n 5) 181, indicating his agreement with LE Weinrib, 'The Postwar Paradigm and American Exceptionalism', in S Choudry (ed), *The Migration of Constitutional Ideas* (Cambridge University Press, 2006), 84.

35 Barak (n 5) 180.

36 In *R v Oakes* [1986] 1 SCR 103, 139 ('*Oakes*'), Dickson CJ describes a test of proportionality as having three components, the third element of which also requires a proportional relationship between certain matters: see (n 45). In the context of the implied freedom of political communication, the High Court applies an overall test of structured proportionality and describes the third component of its test, namely, adequacy of balance, as expressing a relationship of 'strict proportionality': see discussion at (n 166) below.

III. The Statutory Elements of Proportionality in the Australian Human Rights Jurisdictions

A *Victoria*

1 *The* Charter

In Victoria, the statutory formulation of proportionality seeks to capture the analysis embraced in Canada and the methodology applied in South Africa.

The Victorian *Charter* includes a general limitations clause that applies to all of the rights the *Charter* protects. The rights are principally drawn from the *International Covenant on Civil and Political Rights* ('*ICCPR*').[37] The general limitations clause is an umbrella statement about the types of interference with rights that may be justifiable. It governs the analytical exercise and inherently requires a balance between rights and limitations. It is based on s 1 of the *Canadian Charter of Rights and Freedoms*.[38] This provides:

> The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.[39]

The Supreme Court of Canada, in *R v Oakes* ('*Oakes*'),[40] famously interpreted the notion of 'reasonable' limits that can be 'demonstrably justified in a free and democratic society' as reflecting a proportionality test. Dickson CJ, on behalf of the Court, held that s 1 demanded the identification of an objective that is of 'sufficient importance'[41] to warrant limiting a right or freedom. There must be a 'sufficiently significant objective';[42] one that relates to 'concerns which are pressing and substantial in a free and democratic society before it can be characterised as sufficiently important'.[43] Dickson CJ said that once the sufficiently important objective is identified,

> [T]hen the party invoking s 1 must show that the means chosen are reasonable and demonstrably justified. *This involves 'a form of proportionality test' …* Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups.[44]

The Chief Justice went on to identify three components of a proportionality test:

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37 Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
38 *Canada Act 1982* (UK) c 11, sch B pt I ('*Canadian Charter of Rights and Freedoms*').
39 Ibid, s 1 (emphasis added).
40 (n 36).
41 Ibid 138, quoting *R v Big M Drug Mart Ltd* [1985] 1 SCR 295, 352.
42 *Oakes* (n 36) 139.
43 Ibid 138–9.
44 Ibid 139 (emphasis added) (citations omitted).

> There are, in my view, *three important components of a proportionality test*. First, *the measures adopted* must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they *must be rationally connected to the objective.* Second, the *means*, even if rationally connected to the objective … *should impair 'as little as possible' the right or freedom in question …* Third, there must be *a proportionality between the effects of the measures which are responsible for limiting the … right or freedom, and the objective* which has been identified as of 'sufficient importance'.[45]

The Court later clarified that the means chosen need not be 'the least restrictive … [it] suffices if the means adopted fall within a range of reasonable solutions to the problem confronted'.[46] Moreover, the third component requires that the beneficial and restrictive effects of the measures must be identified and balanced against each other because, as Lamer CJ said in *Canadian Broadcasting Corporation v Dagenias*:

> there must be a proportionality between the deleterious effects of the measures which are responsible for limiting the rights or freedoms in question and the objective, *and there must be a proportionality between the deleterious and the salutary effects of the measures*.[47]

In Victoria, the Human Rights Consultation Committee that recommended the enactment of the *Charter*, explicitly relied upon the proportionality test as expounded in *Oakes*, in a generalised way, as providing the intended meaning and operation of the Charter's general limitations clause. The Committee was aware that the *New Zealand Bill of Rights Act 1990* ('*NZ BORA*') contains a general limitations clause in almost identical language to Canada's.[48] However, Victoria drafted the clause a little differently from the Canadian and New Zealand versions. It did this in two ways. First, it opted for a form of words that made clear certain values to which our society is committed, namely, the values of human dignity, equality and freedom.[49] These were drawn from the general limitations clause applicable in South Africa under s 36 of its *Bill of Rights*.[50]

The second difference was to look at the specific guidance given under South Africa's *Bill of Rights* with respect to the factors that were required to be considered in determining if a limit on a right was reasonable and demonstrably

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45 Ibid (emphasis added, underlining as in original).

46 *R v Sharpe* [2001] 1 SCR 45, 102 [96]. See also *RJR-MacDonald Inc v Attorney-General (Canada)* [1995] 3 SCR 199, 342 [160] (McLachlin J).

47 *Canadian Broadcasting Corporation v Dagenais* [1994] 3 SCR 835, 889 [95] (emphasis in original).

48 *New Zealand Bill of Rights Act 1990* (NZ) ('*NZ BORA*') s 5: 'Subject to section 4 [no implied repeal], the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.'

49 These values are infused throughout the *Charter*. For example, ss 22 (dignity in detention), 8 (equality right), 21 (liberty).

50 *Constitution of the Republic of South Africa 1996* (South Africa) ch 2. Carter (n 27) 66–7 emphasises the similarity between the factors used in the proportionality analysis of Canada, Germany and South Africa.

justified, as spelt out in s 36. Unlike Canada or New Zealand, South Africa's *Bill of Rights* includes *both* a general limitations clause *and* a set of enumerated factors to be considered.[51] In s 36, the general limitations clause is set out by way of opening words governing a series of individual factors to be considered in assessing whether a limit placed on a right is reasonable and justified. The same is true of the *Charter*. The factors are mandatory considerations — all of them *must* be taken into account. However, the factors identified are expressly not exhaustive, neither in the South African *Bill of Rights* nor under the *Charter*. Rather, *all relevant considerations* are to be taken into account. The factors need not be applied in a particular step-by-step sequence. Some factors may be more relevant, and therefore given primacy, than others, in the circumstances of a case. There is to be a global and holistic approach adopted in assessing the overall proportionality of a measure. I develop this consideration further in Part IV.

Just as in South Africa, the exhortation under the *Charter* is to assess the restriction placed on a right by 'taking into account all relevant factors' including the five identified factors. The five factors are set out in s 7(2) of the *Charter.* These are:

(a) the nature of the right; and

(b) the importance of the purpose of the limitation; and

(c) the nature and extent of the limitation; and

(d) the relationship between the limitation and its purpose; and

(e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

This section of the *Charter*, s 7(2), is the key to how the *Charter* is intended to operate. It is the lynchpin in determining whether a public authority has discharged the express obligation the *Charter* imposes on it to act compatibly with human rights. That is, it provides the basis for determining compatibility. For '[w]here a public authority limits a right but the limit is *justified*, the human right is *not breached*, and there is *no contravention* of the obligation on a public authority to act *compatibly* with human rights'.[52] Conversely, if a public authority has limited a right in a manner that is *not justified* under s 7(2), a court may declare that the conduct of the public authority is *unlawful* — because it is *incompatible* with a human right.[53]

The obligation on public authorities to act compatibly with human rights is characterised as the substantive obligation — this obligation now appears in all three Australian human rights jurisdictions. There is a twin obligation, a

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[51] Some describe this as a 'hybrid' model of limitations: Michael Brett Young, *From Commitment to Culture: the 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (Parliamentary Paper No 77, September 2015) 157.

[52] *Baker v DPP (Vic)* (2017) 270 A Crim R 318, 331–2 [57] ('*Baker*') (emphasis added).

[53] *Thompson v Minogue* (2021) 67 VR 301, 326 [96] ('*Minogue*') (emphasis added).

procedural obligation, that governs the process of decision-making; this is the obligation imposed on public authorities to give proper consideration to human rights in the course of their decision-making. This obligation is imposed in a variety of ways in the three jurisdictions[54] and some of those differences are significant, as I'll attempt to show.

Victoria chose to spell out specific factors supporting the proportionality test in s 7(2) partly because it was informed during the process leading up to the enactment of the *Charter* that government lawyers in New Zealand, in giving advice on the human rights implications of legislation or executive action, informally relied on the factors identified under s 36 of the South African *Bill of Rights* as a means of consistently breaking down the exercise of assessing whether a restriction on a right is reasonable and demonstrably justified as required by the general limitations clause in the *NZ BORA*. The five factors were set out in the *Charter* to facilitate rigorous assessments of when an interference with a human right is lawful.

2 *The Victorian Case Law*

The analysis adopted by Justice John Dixon in *Certain Children v Minister for Families and Children (No 2)* ('*Certain Children*')[55] is a good illustration of how the five factors in s 7(2) of the *Charter* are applied. He gave a particular focus to the *purpose* of the limitations.

The background to this case involved a riot at a youth justice centre that destroyed parts of the centre. There was an accommodation crisis for detainees. Following the riot, the Governor in Council made orders establishing a unit, the Grevillea Unit, as a remand centre and youth justice centre for children. Some renovations were to take place to the unit in an attempt to make it suitable. However, the unit was on the site of Barwon prison, a maximum-security male adult prison. Young detainees, aged between 15 and 18, were transferred to the Grevillea Unit.[56]

Dixon J began by identifying the dignity right as engaged in the circumstances — this is the right of persons who are deprived of their liberty to be treated with humanity and respect for the inherent dignity of the human person.[57] The other relevant right was the right of every child to such protection as is in their best interests and is needed by reason of being a child.[58]

He identified the limits placed upon those rights by looking in detail at the circumstances of the detention and the likely effect on the young detainees. He held that there were significant limits on the children's dignity right because the built environment of the prison remained immutably an adult maximum-

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54 *Charter* (n 1) s 38(1); *Human Rights Act 2019* (Qld) s 58(1)(b) ('*Qld HRA*'); *Human Rights Act 2004* (ACT) s 40B(1)(b) ('*ACT HRA*').

55 *Certain Children v Minister for Families and Children (No 2)* (2017) 52 VR 441 ('*Certain Children*').

56 Ibid 503 [197].

57 *Charter* (n 1) s 22(1).

58 Ibid s 17(2).

security gaol. There were extensive lockdowns and isolation up to 23 hours a day. Handcuffs were sometimes used in the brief periods in which children were released from cells. There was a presence of high-level security staff reinforcing a sense of adult punishment.

He identified the limits imposed on the children's best interests right as consisting in the disciplinary measures applied, including isolation and handcuffing, as well as the constraints imposed on contact with families because of the remoteness of the prison. He considered that there was a failure to give due regard to the children's need for privacy and sensory stimulation, including the need for peer contact, especially in sport and recreation, and this amounted to an interference with their best interests right. So too did the inadequate opportunity for education and vocational training and the risk of inadequate medical and psychological care.

Dixon J then considered whether the limits he had identified on the relevant rights were reasonable and demonstrably justified because they were proportionate. He held that they were not.

He arrived at that conclusion by looking at each of the five factors under s 7(2). Starting with the nature of the right,[59] he considered both relevant rights protected the values of bodily integrity, mental health, dignity, and self-worth. He understood that, as Bell J observed in *Patrick's Case*:

> The meaning of the right is identified broadly and purposefully in terms of the fundamental interests which it protects and from the cardinal values which it embodies. Starting with this consideration is intended to anchor the analysis in the Charter.[60]

Dixon J considered the context to be important because children in detention are particularly vulnerable by reason of age and circumstance and are not to be treated like adults.

Looking at the purposes for which the limits were imposed on the rights,[61] he considered that they were complex. He took a dim view of the purpose of the limitations, refusing to look only at the recent events. He saw the predominant purpose of the regime of isolation and lockdown, and the handcuffing restraints, as managerial. This arose from the need to control the environment for safety in the context of the renovation and modification of the built environment. He considered that, in the absence of a proper explanation, the accommodation crisis that led to the need for the modification of the maximum-security prison must have been the result of past policy failure on resource allocation. He concluded that the riot that immediately led to the crisis was symptomatic of past poor decisions within youth justice rather than causal of the accommodation shortage.

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59 Ibid s 7(2)(a).

60 *Patrick's Case* (n 3) 449 [335]. As Dame Sian Elias has observed: 'the meaning of the right is to be ascertained from the "cardinal values" it embodies': *R v Hansen* [2007] 3 NZLR 1, 15 [22].

61 *Charter* (n 1) s 7(2)(b).

He also considered that the manner in which isolation times and behaviour management plans operated indicated that the purpose of the limits on the rights was, at times, punitive.

Considering the nature and extent of the limitations on the rights,[62] he said that the detainees experienced long periods of lockdown and isolation in their cells because appropriate facilities and services at Grevillea Unit were still being put in place. The limitations were not due to the need to ensure safe custody but were due to the unsuitability of the facility.

The judge reflected on whether there was a rational connection between the limitations imposed on the rights and the purpose of the limitations.[63] He again characterised the purpose of the limitations negatively, observing that the limitations were imposed to make the built environment, which was *inappropriate*, function.

This raised as a significant issue the question of whether there were any less restrictive means reasonably available.[64] It was not necessary for the judge to consider whether Grevillea Unit amounted to the least possible impairment on the relevant rights because the proportionality analysis adopted in the *Charter* does not impose such an exacting test. As noted in the development of the Canadian jurisprudence, the test rather invites a consideration of whether there are any less restrictive means that fall within a range of reasonable solutions and are reasonably available to achieve the purpose that the limitation seeks to achieve.

There was no evidence of the decision-makers being financially constrained. The judge was ultimately satisfied that the allocation of much greater financial resources was an option that was reasonably available to achieve the purposes of management relating to safety and security. So too was the option of reducing time spent in remand by reducing the delays in the court process for youth charged with offences.

He therefore concluded that the limits on the dignity right and the best interests right 'were not demonstrably justified';[65] he held that '[i]n a free and democratic society based on human dignity equality and freedom, these limits were unreasonable.'[66] The public authorities were in breach of their substantive obligation under the *Charter* not to act incompatibly with human rights.[67]

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62 Ibid s 7(2)(c).

63 Ibid s 7(2)(d).

64 Ibid s 7(2)(e).

65 *Certain Children* (n 55) 581 [476].

66 Ibid. He also held that there had been a breach of the duty to give proper consideration to the relevant rights because there had been a failure to properly consider the potential of the built environment to impact negatively upon the mental health and wellbeing of the children detainees in breach of both relevant rights.

67 The relief granted included declarations of unlawfulness and mandatory and prohibitory injunctions: *Certain Children* (n 55) 607–8 [588].

The second Victorian case I'll discuss to illustrate how proportionality is applied under the *Charter* is *Thompson v Minogue* ('*Minogue*').[68] The case is authority for what is required of a public authority to discharge the procedural obligation under the *Charter*. However, it is also important in its examination of the nature and extent of limitations upon rights and the availability of less restrictive alternatives.

The case also involved Barwon prison. The Court of Appeal held that strip-searches before random urine tests for drugs were carried out, were unlawful. This was because the manner in which the searches were carried out was incompatible with prisoners' rights to privacy and dignity while they were held in detention.

The protocol at Barwon prison for strip-searching required the removal of all clothing while facing a prison officer. This requirement imposed limits on both the right to privacy and the right to dignity. Prisoners were required to bend over and part their buttocks to show that they were not concealing contraband.

The Court concluded that the limits imposed on the privacy and dignity rights were not proportionate to achieve their purpose; the limits were unjustified.

Applying the elements of s 7(2), the Court focused first upon the nature of the rights and observed that, in particular, the dignity right is fundamental. It identified the purpose of the limitation as being to avoid adulteration of a person's urine sample, or substitution of another person's sample, thereby assisting the security of the prison and the safe custody and welfare of prisoners. This was recognised as an important purpose.

In examining the nature and extent of the limitation, the Court emphasised that the manner in which the strip-searching was carried out was extremely invasive and demeaning and amounted to a severe limitation on Minogue's privacy and dignity rights.

The Court examined the relationship, or rational connection, between the limitation and its purpose and whether there were any less restrictive means reasonably available to achieve the purpose.

The Court considered that the claim that full strip-searches were necessary to prevent interference with urine samples, through adulteration or substitution, was not adequately explained. Random urine tests occurred with at least one officer watching the sample being delivered. Given that random urine tests were always conducted without warning the requirement that strip-searches be conducted prior to a random urine test was seen as excessive to achieve the purpose.[69]

There was evidence of alternative search methods that were clearly less restrictive of a prisoner's rights to dignity and privacy. These included top and bottom

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68 (n 53).

69 There was no independent evidence that a strip-search prior to taking a urine sample ensured that the random urine testing regime was effective. The requirement to bend over and part the buttocks was only used for female prisoners when it was a targeted strip-search of a particular suspected prisoner and not part of random drug testing.

strip-searches which involved a person being searched with only half the clothes being removed at any one time. It was used for female prisoners in other prisons.

In some prisons low-dose X-ray body scans were used. The primary judge referred to the random alcohol and drug testing of motorists that occurs without strip-searching every person tested. All of these measures indicated that there were alternative means reasonable available to the public authorities to achieve the same purpose as the strip-searching that was carried out, yet they had the benefit of being less restrictive of human rights.

The measures were therefore not demonstrably justified and the public authorities had breached their substantive obligation under the *Charter* not to act incompatibly with human rights.

When it came to the procedural obligation, the obligation to properly consider relevant human rights, the Court of Appeal somewhat controversially concluded that the public authorities had not breached their procedural obligation, although they had not dealt separately and expressly with each of the elements of the proportionality analysis set out in s 7(2). On this issue, they reversed the finding of the primary judge.

The Court of Appeal held that the obligation to give proper consideration involves a decision-maker in a 'forward-looking' process and this requires only that they adopt 'a broad and general assessment' of whether the impact of their decision upon relevant human rights is justified in the sense of 'appropriate in all the circumstances'.[70] The factors in the proportionality test under s 7(2) need not be individually considered. The factors *may* be considered by a public authority, in appropriate cases, in arriving at the broad and general assessment but 'that does not mean that those matters [in s 7(2)] are incorporated into the procedural limb so as to make them mandatory relevant considerations.'[71]

The Court held that it is wrong to conflate the test for 'proper consideration' with the proportionality test encapsulated by s 7(2). It relied on the statutory language. It noted there is no express definition of 'compatible with human rights' under the *Charter*. Nevertheless, it recognised that a conclusion about 'compatibility' demands a proportionality analysis. However, the Court remarked that, under the *Charter*, while there is a reference in the substantive obligation to 'incompatibility with human rights — [which] therefore engages s 7(2)' there is no such reference to 'compatibility' in respect of the procedural obligation.[72] It said the *Charter* 'does not use that language [of compatibility] in the procedural limb.'[73] Its conclusion that proper consideration does not demand a proportionality analysis was therefore supported by the text of the *Charter*. The statutory language in the *ACT HRA* is similar to Victoria's.

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70 *Minogue* (n 53) 343 [147], 325 [89], [91].
71 Ibid 325 [89].
72 Ibid 324–5 [88].
73 Ibid 325 [88].

However, the meaning of the procedural obligation is not quite so straightforward under the *Qld HRA*.

B *Queensland*

1 *The* Human Rights Act 2019

The *Qld HRA* improves upon Victoria's *Charter* in a number of ways. The improvements include the stipulation that the unlawfulness of a decision does not result in invalidity.[74] The improvements also include the addition of rights to education and health services.[75] Furthermore, there is access to the Queensland Human Rights Commission for the ventilation and potential resolution of human rights complaints.[76] Queensland is the only one of the three human rights Australian jurisdictions to make available a cheap, speedy, and efficient forum for voluntary dispute resolution.

Queensland also improves upon Victoria's interpretive requirement in a number of ways. Under s 48(1) of the *Qld HRA*, '[a]ll statutory provisions must, to the extent possible that is consistent with their purpose, be interpreted in a way that is compatible with human rights.'[77] The interpretive requirement is an improvement upon the Victorian model by including a directive, in s 48(2), that if a provision cannot be interpreted compatibly with human rights, it 'must, to the extent possible that is consistent with its purpose, be interpreted in a way that is most compatible with human rights'.

The most significant improvement, in my view, is the inclusion of an express definition of what is meant by 'compatible with human rights' in s 8. The definition provides that:

> An act, decision or statutory provision is *compatible with human rights* if the act, decision or provision —
>
> (a) does not limit a human right; or
>
> (b) limits a human right only to the extent that is reasonable and demonstrably justifiable in accordance with section 13.[78]

Section 13 sets out Queensland's test for proportionality and is the equivalent of s 7(2) of the *Charter*.

Can I say immediately that the express definition of '*compatible with human rights*' brilliantly avoids, in the stroke of a legislative pen, the vexed dispute

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74 *Qld HRA* (n 54) s 58(6)(a). Such a stipulation would have been very useful for the Victorian Court of Appeal, and no doubt practitioners, in *Bare v Independent Broad-Based Anti-Corruption Commission* (2015) 48 VR 129 ('*Bare*').

75 *Qld HRA* (n 54) ss 36 and 37.

76 Ibid pt 4, div 2.

77 Cf s 32(1) of the *Charter*: 'So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.'

78 *Qld HRA* (n 54) s 8 (emphasis in original).

played out in the High Court in *Momcilovic v The Queen* ('*Momcilovic*')[79] about the appropriate methodology to be adopted to discharge the interpretive requirement. This is the dispute that focused upon whether, in interpreting a statutory provision, regard should be had to the fact that a construction, arrived at according to the ordinary principles of statutory interpretation, would unjustifiably limit a human right — assessed by means of the proportionality analysis — so that an alternative rights-compatible interpretation should be investigated to assess whether that would still achieve the statutory purpose.[80]

In my view, Gummow, Hayne and Bell JJ were correct in *Momcilovic* in accepting that this was the appropriate methodology to adopt under the *Charter*.

The express definition of '*compatible with human rights*' in s 8, in effect, accepts that the appropriate methodology for meeting the interpretive requirement is one that incorporates a proportionality analysis. The definition is unique to Queensland. The 2015 Review of the *Charter* recommended that a definition of '*compatible with human rights*' in similar terms as that now adopted by s 8 of the *Qld HRA* be introduced by way of amendment to the *Charter*.[81] Sadly for Victoria, the recommendation has not yet been acted upon.

The proportionality test in s 13 of the *Qld HRA* includes a general limitations clause in the same terms as Victoria's, that is, drawing on Canada's article 1, famously interpreted in *Oakes*, informed by the values embraced by the South African *Bill of Rights*. The general limitations clause is contained in a standalone sub-section[82] and the sub-section that follows it identifies seven relevant factors to be used in the analysis.

Amongst the factors are those common to Victoria (and South Africa) but some of them enjoy a more expansive and useful description. There is a requirement to assess whether the purpose of the limitation is consistent with a free and democratic society, separately from the overall assessment of the compatibility of the limitation.[83] There are also two additional factors, one is the

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79 *Momciolovic v The Queen* (2011) 245 CLR 1 ('*Momcilovic*').

80 The argument in support of the interpretive requirement incorporating a proportionality analysis is that this follows from the basic proposition that the word 'compatible' must carry the same meaning whenever it appears in the *Charter.* The obligation on public authorities under s 38(1) to act compatibly, or its converse, not to act incompatibly, demands a proportionality analysis. The obligation on parliamentarians to table compatibility statements for proposed legislation, pursuant to s 28(1), also attracts a proportionality analysis and this is evident in the detailed proportionality assessments made in the statements that have routinely accompanied legislation in Victoria after the *Charter* was enacted. For the High Court to leave the central issue of the methodology unresolved in *Momcilovic* has rendered the interpretive requirement under Victoria's *Charter* uncertain and largely ineffective. As mentioned, the *Qld HRA* has resolved this issue.

81 Young (n 51) 148, recommendation 28(c).

82 *Qld HRA* (n 54) s 13(1): 'A human right may be subject under law only to reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.'

83 Ibid s 13(2)(b).

importance of preserving the right and the other is the need to balance that factor with the importance of the purpose of the limitation.[84]

The seven factors to be included in the proportionality analysis under s 13(2) of the *Qld HRA* are:[85]

(a) *the nature of the* human *right*;[86]

(b) the nature of *the purpose of the limitation*, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom;[87]

(c) *the relationship between the limitation and its purpose*, including whether the limitation helps to achieve the purpose;[88]

(d) whether there are *any less restrictive* and *reasonably available* ways *to achieve the purpose*;[89]

(e) *the importance of the purpose of the limitation*;[90]

(f) the importance of preserving the human right, taking into account the *nature and extent of the limitation* on the human right;[91]

(g) the balance between the matters mentioned in paragraphs (e) and (f).

By contrast with the mandatory character of the statutory language of the *Charter*, the *Qld HRA* states that, in deciding whether a limit on a human right is reasonable and justified, the factors set out '*may* be relevant'.[92] It is unlikely that this represents a wholly permissive authorisation to select only one or other factor, whatever or whichever, of those that seem relevant to any particular case. The Queensland Parliament has chosen a set of elements as representing the proportionality analysis it has directed to be undertaken, many of which represent the core features of proportionality analysis, the history and meaning of which I have been discussing, and s 13(2) has a step-by-step quality, reflected especially in the last three factors.[93]

The proportionality analysis set out in s 13 will clearly be relevant when determining whether a public entity has breached its substantive obligation under the *Qld HRA*.

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84 Ibid ss 13(2)(f) and (g).

85 I have italicised aspects of the factors that s 13(2) *Qld HRA* has in common with s 7(2) of the *Charter*.

86 Cf *Charter* (n 1) s 7(2)(a).

87 Ibid s 7(2)(b).

88 Ibid s 7(2)(d).

89 Ibid s 7(2)(e).

90 Ibid s 7(2)(b).

91 Ibid s 7(2)(c).

92 *Qld HRA* (n 54) s 13(2).

93 Blore, 'Factors' (n 2) 461. Blore argues that, with certain exceptions, the factors in s 13(2) are both necessary and sufficient for the conclusion that a limit on a human right is reasonable and justified.

The question arises whether s 13 will be relevant to the procedural obligation in Queensland; that is, will it be consistent with the statutory scheme for a decision-maker in Queensland to discharge the obligation of giving proper consideration to a human right without giving direct and express consideration to each of the factors set out in s 13(2)? Will it be sufficient for a public entity in Queensland to take the approach now countenanced in Victoria in *Minogue* of adopting simply 'a broad and general assessment' of whether the impact of its decision upon a relevant human right is appropriate?[94] I mentioned earlier that this conclusion has been controversial in Victoria and it will be interesting to see what unfolds in Queensland.

It strikes me that in Queensland it may be difficult to give an easy answer. There are two indicia in the *Qld HRA* that lean in different directions.

The first indicia supports the procedural obligation being a precise exercise. This includes the stipulation in s 58(5)(a) that giving proper consideration to a human right includes 'identifying the human rights that may be affected by the decision'. In the leading case of *Owen-D'Arcy v Chief Executive, Queensland Corrective Services*,[95] Martin J contrasted the *Charter*, where 'proper consideration need not involve formally identifying the "correct" rights [yet] [u]nder s 58(5) HRA the contrary is the case — proper consideration includes identification of the human rights that may be affected by the decision.'[96]

The rigour of the procedural obligation under the *Qld HRA* extends in terms to the requirement, under s 58(5)(b), for public entities to 'consider … whether the decision would be *compatible* with human rights.'[97] Compatibility therefore directly qualifies the procedural obligation. The s 8 definition of '*compatible with human rights*', and the elements for testing whether a limit is reasonable and demonstrably justified under s 13, are engaged. This is reinforced by s 4(b) that provides that the main objects of the *Qld HRA* are to be achieved primarily by, amongst other things, 'requiring public entities to act and *make decisions* in a way *compatible* with human rights'.[98] Furthermore, s 58(1) provides that it 'is unlawful for a public entity … to act or *make a decision* in a way that is *not compatible* with human rights'. These indicia reinforce the conclusion that the requirement for compatibility straddles both the decision-making process as well as acts of a public entity.

The Victorian Court of Appeal, in *Minogue*, made much of the fact that the *Charter* does not require, in terms, that the decision-making process be '*compatible*' with human rights and this severs the textual link between the procedural obligation and a full proportionality analysis.[99] By contrast, the text of the *Qld HRA* does not support the severance of that link; on the contrary, the

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94 See (n 70) above.
95 (2021) 9 QR 250.
96 Ibid 298 [136].
97 *Qld HRA* (n 54) s 58(5)(b) (emphasis added).
98 *Qld HRA* (n 54) s 4(b) (emphasis added).
99 See (n 73) above.

statutory text favours the need for decision-makers to apply a proportionality analysis; that is, to apply each of the elements of s 13(2), to meet the standard of 'proper consideration'.

However, the second indicia supports the more generalised approach to the procedural obligation adopted by the Victorian Court of Appeal. This also turns on the statutory text. As mentioned, s 13(2) of the *Qld HRA* identifies a list of considerations that '*may*' be taken into account. Although, as I've argued, this does not seem to me to permit in general an ability for a public entity to choose which of any of the elements of the test for justification it will apply, nevertheless the *Qld HRA* seems to allow for the possibility that, in some circumstances, only one or two of the factors will be relevant. The legislative context is one in which, as Emerton J said in *Castles v Secretary of the Department of Justice* ('*Castles*'),[100] '[t]he consideration of human rights is … intended to become a "common or garden" activity for persons working in the public sector, both senior and junior.'[101] This context supports public entities concentrating on the elements that appear most relevant in the circumstances. If so, just as in Victoria, in discharging the procedural obligation, no error of law would arise from a public entity failing to give 'direct and express consideration to each of the matters set out' in s 13(2).[102]

This could be an area of significant departure between Victoria and Queensland, given the differences in statutory language between the *Charter* and the *Qld HRA*, and we may see the jurisprudence on this topic reflect a marked divide.

2 *The Queensland Case Law*

A good illustration of how Queensland's proportionality test operates in practice is the case of *Johnston v Carroll*,[103] a judgment of Martin SJA. The case demonstrates the force of the procedural obligation by showing that a contravention of the procedural obligation can lead to effective relief independently of whether or not there has been a breach of the substantive obligation.

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100 (2010) 28 VR 141 ('*Castles*').

101 Ibid 184 [185].

102 *Minogue* (n 53) 324 [87]. Perhaps, as Kent Blore has argued, the word 'may' in s 13(2) is explicable, not as allowing for a justification analysis to be generally undertaken by being selective about which of the elements to apply but as providing a recognition that expectations of everyday decision-making cannot be unrealistically high because 'the standard of proper consideration required cannot be so onerous that it proves unworkable in the day-to-day reality of government decision-making': Blore, 'Factors' (n 2) 456.

103 (2024) 329 IR 365 ('*Johnston*').

The relevant issue concerned the lawfulness of two directions given by the Commissioner of Police to the effect that, with some exemptions, each police officer or staff member was required to receive doses of the COVID-19 vaccine.[104]

Martin SJA carefully considered the range of rights relied upon. Ultimately, the only right that was found to be engaged and limited by the circumstances of the case was the right not to be subjected to medical or scientific experimentation or treatment without the person's full, free and informed consent.[105] This finding was made on the basis that there was a practical compulsion to comply with the directions,[106] especially as a potential consequence of non-compliance was disciplinary action, including termination of employment for police officers.[107]

With respect to the decision-making process leading up to the making of the directions, the judge described the evidence of the Commissioner of Police as 'vague and inconclusive.'[108] The Commissioner was said to be 'reluctant to commit to having read particular documents, [and] … frequently could not recall how she received information or what the information was, and she frequently evaded these issues by referring in a vague way to briefings, discussions, summaries and the like.'[109]

On the basis of what was clearly unsatisfactory evidence, Martin SJA concluded that the Commissioner of Police failed to demonstrate that she understood even in general terms which rights of the persons affected by the decision might be relevant and how those rights would be interfered with by her decision. Nor did she demonstrate that she had turned her mind to the possible impact of the decision on a person's human rights, nor identified the countervailing interests and obligations, nor balanced competing private and

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104 Ibid 414 [224], 415 [230]–[231], 459 [469(c)]. The directions contained exemptions for medical contraindications, genuinely held religious beliefs, and other exceptional circumstances. The directions had been revoked but there was concern about any liability that might have arisen under them. A separate matter concerned the lawfulness of a similar direction given by the Director General of Queensland Health, to employees of the Queensland Ambulance Service ('the ambulance directions') but the focus here is only on the police directions as the ambulance directions were found to be of no effect, independently of any human rights considerations.

105 *Qld HRA* (n 54) s 17(c); *Johnston* (n 103) 434 [332]–[333]. The rights relied on by the applicants included the right to equal and effective protection against discrimination; the right to life; the right to freedom of thought, conscience, religion and belief; the right to take part in public life; the right to privacy, and the right to liberty and security. These rights were held either not to be engaged or not limited. It is not unusual, at this comparatively early stage in Australian human rights jurisprudence, for litigants to rely on rights that, on close inspection, are not relevant in the circumstances of the case. An example from Victoria is *Baker* (n 52). It might be noted that, as in *Johnston*, this can require extensive analysis by judges as to the rights that are engaged before they can begin to examine whether the public entity is in breach of the procedural or substantive obligations.

106 *Johnston* (n 103) 434 [332].

107 Ibid 429 [314].

108 Ibid 397 [134].

109 Ibid.

public interests.[110] He did not accept that the Commissioner had either identified the human rights that might be affected by the decision or considered whether the decision would be *compatible* with human rights.[111]

On the basis of the evidence, it was unnecessary for him to examine whether the Commissioner applied any of the specific factors of the proportionality analysis under s 13(2) because it was clear she had not — she had neither engaged in a full proportionality analysis under s 13 nor engaged in the broad general assessment found to be sufficient in other circumstances for 'proper consideration' under the *Charter.* The Commissioner had failed to give proper consideration to the rights of those affected by her directions and the making of the police directions was, therefore, unlawful.[112]

Orders were made that the Commissioner was restrained from taking any steps to enforce the directions or taking any disciplinary proceedings against the applicants.

It was held, however, that there was no breach of the substantive obligation. The critical factor in the proportionality analysis was whether there were any less restrictive measures reasonably available that would achieve the purpose of ensuring Queensland police officers were 'frontline-ready and available for deployment'[113] and would minimise the risk of transmission of COVID-19 throughout the Queensland police force and members of the community. Could the purpose be achieved by a regime of voluntary vaccination (the rate of which was high) together with requirements for the unvaccinated to wear masks or use personal protective equipment? Could the workforce be organised so as divide vaccinated personnel into a different area from the unvaccinated?

Martin SJA ultimately favoured the expert medical evidence that alternatives to mandatory vaccination would *not* achieve the same purpose.[114] In arriving at this conclusion, he considered each of the factors under s 13(2), noting especially the nature of the right and its importance as an absolute right under the ICCPR.[115] He considered that there was a rational relationship between the limitation and its purpose because there was evidence that the vaccination had an effect in protecting against serious infections.[116]

He also emphasised that the directions were given in the context of an emergency and at a time when there was limited knowledge available about the virus, its variants, its virulence and its transmissibility.[117] On the basis of these considerations, he was not satisfied that the balancing exercise between the

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110 Ibid 386 [75], [77], 397 [136], applying the test from *Bare* (n 74) 223 [288], 297–8 [535]–[536], 298–9 [538], and *Castles* (n 100) 184 [185]–[186].

111 *Johnston* (n 103) 397 [137]–[138].

112 Ibid 397 [139].

113 Ibid 454 [438]; *Qld HRA* (n 54) s 13(2)(b).

114 *Johnston* (n 103) 456 [452]; *Qld HRA* (n 54) s 13(2)(d).

115 *Johnston* (n 103) 454 [437]; *Qld HRA* (n 54) s 13(2)(a).

116 *Johnston* (n 103) 454 [440]; *Qld HRA* (n 54) s 13(2)(c).

117 *Johnston* (n 103) 457 [457].

importance of preserving the human right and the importance of the purpose of the limitation favoured the right-holders.[118]

An illustration of how the proportionality analysis operates within the context of Queensland's interpretive requirement is *The Australian Institute for Progress Ltd v Electoral Commission of Queensland* ('*Progress*'),[119] a judgment of Applegarth J. At stake was whether a statutory prohibition on political donations by prohibited donors was compatible with human rights.

Under the *Electoral Act 1992* (Qld), it was unlawful for prohibited donors to make a political donation.[120] Prohibited donors included property developers.[121] At issue was the interpretation to be given to the expression 'political donations'. The *Electoral Act* defined a 'political donation' to include, in s 274(1)(a), a gift made to or for the benefit of a political party, or an elected member, or a candidate in an election. It also included, in s 274(1)(b), a 'gift made to or for the benefit of another entity … to enable the entity (directly or indirectly) to make a gift mentioned in paragraph (a) or *to incur electoral expenditure*'.[122] The relevant limb was the limb prohibiting gifts to, or for the benefit, of another entity to enable it to incur electoral expenditure.

The question arose whether the prohibited gifts to entities should be narrowly confined to those that enabled the entity to incur electoral expenditure *on behalf of* a political party, or an elected member, or a candidate in an election.[123] If it was so narrowly confined, the Australian Institute for Progress ('the Institute'), a think tank, could receive financial gifts from property developers and could use those funds to encourage votes in an election campaign for a political party, elected member, or a candidate providing it did not do so *on behalf of* a political party, elected member, or a candidate. The Institute would be largely free to incur electoral expenditure without it being transparent to the public that its funds came from property developers.

If the prohibition on political donations was more broadly understood, property developers would be prohibited from making gifts to an entity like the Institute to enable it to incur electoral expenditure more generally.

However, the broad construction would have the effect of clearly limiting the funds available to the Institute for election campaigns and this would affect, directly or indirectly, rights to freedom of expression and political participation

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118 Ibid 456–7 [453]–[459]; *Qld HRA* (n 54) s 13(2)(g) in respect of ss 13(2)(e), (f). Martin SJA also dismissed the judicial review grounds, eg the unreasonableness ground, at 457 [460].

119 (2020) 4 QR 31 ('*Progress*').

120 *Electoral Act 1992* (Qld) s 275.

121 Ibid s 273(1)(a)(i).

122 Emphasis added. 'Electoral expenditure' was relevantly defined, under s 197, as at the date of the hearing, to mean 'expenditure incurred for the purposes of a campaign for an election, whether or not the expenditure is incurred during the election period for the election': *Progress* (n 119) 41 [4].

123 That is, on behalf of any one of the entities mentioned in s 274(1)(a).

protected under the *Qld HRA*.[124] A proportionality analysis was therefore required in respect of the broad construction to determine if it was compatible with human rights, as required by s 48(1).

The general purpose of the limitation was preventing corruption and undue influence in the government of the State and improving transparency and accountability in State elections, an important purpose.[125] Queensland had learned the lessons of New South Wales about the risks associated with property developers in the State planning framework.[126] The nature and purpose of the limitation was assessed as consistent with a free and democratic society because, by improving transparency and accountability in State elections and reducing corruption, it would enhance the democratic system.[127]

There was a rational relationship between the limitation and its purpose because the limitation clearly helped to achieve its purpose. It did this by seeking to ensure that the prohibition on making gifts to political parties, or elected members, or candidates, was not thwarted by prohibited donors, instead, giving money to an entity that in turn used that money to urge votes for the party or member or candidate of the prohibited donor's choice.[128] In effect, this would amount to property developers being able to do indirectly what they could not do directly, namely, make donations to achieve their favoured electoral outcome by providing gifts to, or for the benefit of, parties, members or candidates. To permit this would be to defeat the purpose of the prohibition. The measure would not achieve the transparency and accountability in State elections that was sought nor reduce the risk of undue influence and corruption in the State government.

No less restrictive and reasonably available ways to achieve the purpose was apparent or seriously advanced by the Institute.[129]

In considering the importance of preserving the human right and the nature and extent of the limitation on the right, it was recognised that preserving freedom of expression and the right to take part in public life is important. However, the limitation still permitted prohibited donors to participate in the political process through 'direct and open means', for example, by purchasing advertisements in their own name in favour of a political party or candidate.[130]

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124 *Progress* (n 119) 75 [130]; *Qld HRA* (n 54) s 13(2)(a). The evidence did not disclose whether the prohibited donors to the Institute were corporations or individuals and only individuals have human rights: *Qld HRA* s 11(2). In any event, it was recognised that the prohibition on political donations from prohibited donors would indirectly limit individuals' freedom of expression and the right to take part in public life insofar as it affected gifts that could be made to an entity to enable it to incur electoral expenditure and the information individuals would receive: *Progress* 73 [119]–[120], 75 [129].

125 *Progress* (n 119) 73–4 [122]–[123]; *Qld HRA* (n 54) s 13(2)(e).

126 *Progress* (n 119) 74 [122].

127 Ibid 75 [127]; *Qld HRA* (n 54) s 13(b).

128 *Progress* (n 119) 74 [125]; *Qld HRA* (n 54) s 13(c).

129 *Progress* (n 119) 75 [126]; *Qld HRA* (n 54) s 13(d).

130 *Progress* (n 119) 75 [131]; *Qld HRA* (n 54) s 13(f).

Prohibited donors could still buy political advertisements that made public that they had paid for them. They could openly engage in political debates.[131]

What prohibited donors could not do was to make gifts — either to a candidate, a member, or a political party or, relevantly, to an entity for the purpose of it incurring electoral expenditure because the public would not know that the source of the expenditure ultimately came from funds of property developers.

Prohibited donors were also free to donate to the Institute for expenditure on other forms of political participation, such as policy research and advocacy, or other activities that did not fall within the scope of the prohibition, for example, expenditure that was not to be used for the purposes of a campaign for an election.[132] This was critical to the conclusion that, balancing the importance of the purpose of the limitation and the importance of preserving the human right,[133] the broad construction of s 274(1)(b) was a reasonable limit demonstrably justified in a free and democratic society based on human dignity, equality and freedom. Applegarth J expressed the conclusion in these terms:

> The [prohibitions on political donations by prohibited donors] seek to prevent corruption and undue influence in the government of the State. They enhance our democratic system. The nature and extent of the limitations on freedom of expression and the right of individuals to participate in public life does not preclude prohibited donors from participating in public affairs, including election campaigns, by *direct and open means*, including by incurring expenditure on activities which they undertake in order to influence the outcome of an election, including advertising which urges electors to vote for or against political parties and candidates.[134]

The broad construction of the meaning of a 'political donation' was therefore compatible with human rights. There was no need to look for an alternative interpretation.[135] The proportionality analysis had done its work.

C *The ACT*

1 *The* Human Rights Act 2004

The *ACT HRA* is the only legislation in the three Australian human rights jurisdictions to provide for a separate standalone cause of action for a contravention by a public authority of its substantive or procedural obligations. The 2015 review of the *Charter* called for such a separate standalone cause of action for breach, to remove the requirement to 'piggyback' on a ground of

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131 *Progress* (n 119) 77 [144].
132 Ibid 75 [131], 78 [150]–[151].
133 Ibid 76 [133]; *Qld HRA* (n 54) s 13(g) in respect of ss 13(2)(e), (f).
134 *Progress* (n 119) 76 [135] (emphasis added).
135 *Qld HRA* (n 54) s 48(2).

judicial review or other matter before commencing legal proceedings for breach,[136] but this recommendation has also not been acted upon.

The obligations on public authorities are imposed by s 40B(1) of the *ACT HRA*. The cause of action is provided for under s 40C; it confines claims of breaches by public authorities to proceedings that can be commenced in the Supreme Court.[137] The *ACT HRA* imposes a requirement for standing, namely, that the person is or would be a victim of the contravention.[138] There is a time restriction on the commencement of the proceeding of one year from the date of the alleged contravention.[139] Similarly to the Victorian and Queensland human rights statutes, it excludes damages from the relief than can be granted.[140]

In determining if there has been a contravention, recourse is to be had to the proportionality test set out in the general limitations clause and the factors identified in s 28. The general limitations clause, s 28(1), is a standalone sub-section, similarly to Queensland's.[141] It is in much the same terms as in the *Charter* and the *Qld HRA* insofar as it commands that rights be subject only to reasonable restrictions that can be demonstrably justified, but the limits are required to be 'set by laws' rather than 'under law'.[142] There is no reference to the values of human dignity, equality and freedom.

The same five factors identified as relevant under the *Charter* to determine the lawfulness of a restriction on rights are enumerated in s 28(2).[143] Similarly to the *Charter*, *all* relevant factors must be considered, including each of the five enumerated factors.

2 *The ACT Case Law*

A good illustration of the force of the general limitations clause and the application of the enumerated factors is to be found in a decision of Loukas-Karlsson J, *Davidson v Director-General, Justice and Community Safety Directorate* ('*Davidson*').[144]

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136 *Charter* (n 1) s 39(1); Young (n 51) 133, Recommendation 27(a). The *Qld HRA* also imposes a requirement for a separate cause of action to which a breach of human rights can be attached before a person can seek relief for the breach by means of a legal proceeding: *Qld HRA* (n 54) ss 59(1), (2).

137 *ACT HRA* (n 54) s 40C(2). By being restricted to litigation in the Supreme Court, it may not be available to many victims who would seek access to justice. Nevertheless, the *ACT HRA* does not impose the preconditions imposed by the *Charter* and the *Qld HRA*.

138 *ACT HRA* (n 54) s 40C(1)(b).

139 Ibid s 40C(3).

140 Ibid s 40C(6). However, there is a right to compensation for unlawful arrest or detention under s 18(7), and for wrongful conviction under s 23(2).

141 See (n 82).

142 *ACT HRA* (n 54) s 28(1): 'Human rights may be subject only to reasonable limits set by laws that can be demonstrably justified in a free and democratic society.'

143 The factors are identical to those enumerated under Victoria's *Charter* with the exception that the nature of the right to be considered is the right 'affected' in the circumstances.

144 (2021) 18 ACTLR 1 ('*Davidson*').

Davidson concerned a prisoner who was held in separate or solitary confinement in the 'Management Unit' of ACT's prison for a total of 63 days. When in the Management Unit, he was granted access, on request, to what was euphemistically called 'the rear courtyard' of his cell. This was a small adjoining area at the rear of his cell enclosed by four walls and a mesh ceiling. These areas were often used by detainees to smoke. Davidson was not permitted to use a larger outdoor exercise yard.

Davidson brought proceedings in the Supreme Court of the ACT, alleging, relevantly, that the Director-General had acted in contravention of the obligation to act compatibly with the right Davidson had to be treated with humanity and with respect for the inherent dignity of the human person when deprived of his liberty, the dignity right.[145]

Her Honour accepted that once a plaintiff has given evidence that their rights have been interfered with, the burden of proof shifts to the defendant to justify the limitation on the right and the burden is a heavy one.[146] She observed that the 'assessment of proportionality requires a greater intensity of review [than judicial review]'.[147] She noted the evidence of the Director-General that there were practical obstacles to compliance with the *ACT HRA*. Detainees from the Management Unit were required to be kept in handcuffs during any period spent in the general access areas because of safety and security risks. Davidson had been violent towards other prisoners. The doors for the general exercise yards did not contain a hatch for detainees to insert their hands through to be handcuffed. Another obstacle was the need for more staff to assist in taking detainees to the general exercise yard. She treated these obstacles as matters that could be met by proper resourcing.[148]

Her Honour determined that the rear courtyard of Davidson's cell was not located in 'open air' and nor did it amount to providing an opportunity for Davidson to exercise. This constituted a failure to protect Davidson from conduct that lacked humanity given that he was a person deprived of his liberty and therefore vulnerable.[149]

There was a deeming provision in an Operating Manual, cl 4.3, that purported to authorise the arrangements as amounting to the provision of open air and opportunities for exercise, as required under the *Corrections Management Act 2007* (ACT). The judge found the deeming provision to be inconsistent with its enabling Act and therefore invalid as ultra vires. The limitations on the dignity right were therefore not authorised under the relevant legislation, and were thus not 'set by

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145 *ACT HRA* (n 54) s 19(1).

146 *Davidson* (n 144) 71 [354], 72 [360]–[361].

147 Ibid 73 [362].

148 Ibid 81 [408].

149 She relied upon the decision of the New Zealand Supreme Court in *Taunoa v Attorney-General (NZ)* [2008] 1 NZLR 429 for the proposition that the deprivation of open air and exercise is a failure to treat a detained person with humanity, especially for a detainee the subject of segregation or separate confinement.

laws', as the threshold condition of the general limitations clause required. Her Honour said:

> The limit is not 'set by law' because cl 4.3 is invalid. The … 2011 Operating Policy did not and could not authorise a policy of non-compliance with the open air and exercise requirements in s 45 of the *Corrections Management Act*. The limit is not proportionate because the reasons for non-compliance, that is, the absence of a hatch and that taking detainees to the general exercise yard would require more staff, are practical obstacles that are readily overcome with the application of sufficient resources. The open air and exercise requirements are basic entitlements that countries with lesser economic means are required to resource. The limit is not something that only occurs in an emergency or occasionally.[150]

She noted, wryly, that the Director-General had not even sought to justify the limitations as reasonable under the *ACT HRA*.

The ACT Director-General had therefore breached the obligation to act compatibly with Davidson's dignity right. The judge also found that there been a failure to give proper consideration to the dignity right; there was 'no evidence that any consideration was given to the right in s 19(1) of the [*ACT HRA*], let alone "proper consideration".'[151]

Loukas-Karlsson J made a declaration that the defendant had breached Davidson's human rights but refused to grant what would have been novel relief under the *ACT HRA*, namely, a reduction to Davidson's sentence.

Let me move then to the final Part of my speech to address the question: 'What similarities and differences exist between the proportionality analysis under Australia's human rights statutes and the test for proportionality developed at common law by the High Court in the context of the implied freedom of political communication?'

Let me start with the similarities.

IV The Implied Freedom and Proportionality

A *Similarities*

I have argued elsewhere that the juridical task undertaken in a proportionality analysis, directed at assessing the compatibility of the conduct of a public authority with human rights, is substantially similar to that undertaken by courts when determining if the implied freedom of communication on government and

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150 *Davidson* (n 144) 81 [408].

151 Ibid 82–3 [414].

political matters has been unjustifiably burdened.[152] These similarities can serve to clarify and simplify the task of determining if a measure that restricts a human right is reasonable and demonstrably justified. Just as one can ask, as the key question in the context of the implied freedom of political communication, whether a legislative or executive measure *imposes a disproportionate burden* on the implied freedom, one might ask, as the key question in the human rights context, whether a restriction *imposes a disproportionate burden* on a right. The broad conceptual approach to the task of determining whether a limit on a human right is reasonable and demonstrably justified would be the familiar one employed in the context of the implied freedom of political communication.[153]

Notwithstanding that the implied freedom is concerned with constitutional validity and is to be understood as a restraint on legislative and executive action and not as a personal right,[154] the similarities remain. This is apparent from the articulation of the test in *LibertyWorks Inc v Commonwealth* ('*LibertyWorks*'),[155] where the majority of the High Court reaffirmed the structured proportionality test set out in *McCloy v New South Wales* ('*McCloy*')[156] and commented that:

> In *Lange v Australian Broadcasting Corporation*, the final question as to the validity of a law effecting a burden on the freedom was stated to be whether the burden is 'undue' having regard to its purpose. Whether that question should be determined by reference to a test of whether the law is 'reasonably appropriate and adapted' or of whether it is 'proportionate' was left open by the Court, as were the means by which those

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152 Pamela Tate, 'Judicial Review and Rights Review' (2023) 30(1) *Australian Journal of Administrative Law* 30, 45–7. Other contexts may also attract a proportionality analysis, eg a proportionality test was applied by three judges in the context of the guarantee of freedom of interstate trade, commerce and intercourse among the states under s 92 of the *Constitution*: *Palmer v Western Australia* (2021) 272 CLR 505, 526–9 [50]–[58] (Kiefel CJ and Keane J), 596–8 [261]–[265] (Edelman J) ('*Palmer*'). More recently, in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005, 1017–18 [52]–[54], Edelman J adopted an approach of asking whether a law authorising detention could be characterised as punitive because it employs means that are disproportionate to its legitimate purpose. The use of a proportionality test in the context of Ch III of the *Constitution* has been viewed as controversial: see Zachary Gomes, Aryan Mohseni, Charlie Ward, 'Going Out on a *Lim*: Reconceptualising the Constitutional Limit on Preventative Detention' *Australian Law Journal* (forthcoming).

153 This would be so regardless of the exact nature of the proportionality test under the respective human rights statutes.

154 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 560 ('*Lange*'); *Unions NSW v New South Wales* (2013) 252 CLR 530, 554 [36]; *Tajjour v New South Wales* (2014) 254 CLR 508, 558 [59]. With respect to the level of analysis to be considered in respect of executive action, see *Comcare v Banerji* (2019) 267 CLR 373, 405–6 [43]–[45], 421–2 [96]; *Palmer* (n 152) 545–7 [117]–[124] (Gageler J).

155 (2021) 274 CLR 1 ('*LibertyWorks*').

156 (2015) 257 CLR 178, 194–5 [2] ('*McCloy*'). See also 195–6 [3]–[4], 200–1 [23], 215–16 [73]–[74] (French CJ, Kiefel, Bell and Keane JJ); *Brown v Tasmania* (2017) 261 CLR 328, 363–4 [104], 368–9 [123]–[127] (Kiefel CJ, Bell and Keane JJ), 416–17 [277]–[280] (Nettle J) ('*Brown*'); *Clubb v Edwards*; *Preston v Avery* (2019) 267 CLR 171, 200–2 [70]–[74] (Kiefel CJ, Bell and Keane JJ), 264–5 [266] (Nettle J), 330–1 [463] (Edelman J). The modification in *Brown* of the words of Questions 2 and 3 of the test set out in *McCloy* 194–5 [2] does not impact upon the use of the structured proportionality test to answer Question 3.

> conclusions might be reached. But in *McCloy v New South Wales* a majority of this Court provided the answer, holding that the final question to be addressed is whether a law is a proportionate response to its purpose and that that is to be ascertained by a structured method of proportionality analysis.[157]

The structured proportionality test broadly reflects the elements favoured by the German Federal Constitutional Court following the *Pharmacies Case* in 1958.[158] Once it is established that the measure burdens the freedom, it is necessary to identify the statutory purpose of the legislation to determine if it is legitimate: if not, no further enquiry is needed. The plurality in *LibertyWorks* went on to say:

> In addition to having the requisite purpose, the law must be shown to be proportionate to the achievement of that purpose. In order to justify a burdensome effect on the freedom a law must be a proportionate, which is to say a rational, response to a perceived mischief … A law will satisfy the requirements of proportionality if it is suitable, necessary and adequate in its balance.[159]

There are three stages that are to be examined in sequence, each stage building upon the last. A failure at any stage brings the exercise to a halt. An advantage of this approach, is that 'it allows the person conducting proportionality analyses to think analytically, not to skip over things which should be considered, and to consider them in their time and place.'[160]

As explained by the plurality in *McCloy*, the first stage is to assess *suitability*:

> Suitability is also referred to as 'appropriateness' or 'fit' … If the measure cannot contribute to the realisation of the statute's legitimate purpose, its use cannot be said to be reasonable. This stage of the test requires that there be a rational connection between the provision in question and the statute's legitimate purpose, such that the statute's purpose can be furthered … It is an inquiry which logic requires.[161]

As suitability involves determining whether the measure is capable of achieving the objective, in general terms this requires an understanding of the nature and extent of the restriction or limitation imposed. Suitability also reflects

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157 *LibertyWorks* (n 155) 23 [48]. See also *Farm Transparency International Ltd v New South Wales* (2022) 277 CLR 537, 545 [5], 552 [29] (Kiefel CJ and Keane J); 616 [250] (Edelman J); 623 [269] (Steward J); 624 [271] (Gleeson J).

158 (n 24).

159 *LibertyWorks* (n 155) 23 [46] (Kiefel CJ, Keane and Gleeson JJ). Edelman J also agreed with the use of the structured proportionality test to determine validity: 75 [194].

160 Barak (n 5) 461. See also 460–1: 'A person applying proportionality must think in stages … during the stage of justification of the limitation of the right and its protection, they should distinguish between the threshold question regarding a proper purpose and questions relating to the means selected to advance that purpose, as well as the relation between the fulfillment of the purpose and the harm caused to the … right. In other words, once the threshold requirement of proper purpose has been satisfied, the focus shifts to the three sub-questions relating both to the rational connection of the means selected … to advance [the] proper purpose, the necessity of the law, and the balance struck between the advancement of this purpose and the harm caused to the right in question.'

161 *McCloy* (n 156) 217 [80].

the requirement, reflected in all of the Australian human rights statutes, that there be a relationship, understood as a need for a rational connection, between a limitation imposed on a right and the purpose or objective of that limitation.[162]

Necessity reflects the requirement to consider whether there are less restrictive alternatives reasonably available. The plurality in *McCloy* observed that:

> The second stage of the test – necessity – generally accords with the inquiry … as to the availability of other, equally effective, means of achieving the legislative object which have a less restrictive effect on the freedom and which are obvious and compelling. If such measures are available, the use of more restrictive measures is not reasonable and cannot be justified.[163]

The inquiry directed to necessity is not an exercise in seeking a preferred, or *the* preferred, alternative. Rather, the existence of a range of less restrictive reasonably practicable alternatives for achieving the same purpose assists in drawing a conclusion that the burden imposed is undue or disproportionate, but this remains a conclusion about the impugned law and not an attempt to substitute some alternative for the impugned law.[164] The stage of necessity is addressed by all three human rights jurisdictions.[165]

The third stage, adequacy of balance, is one whereby the importance of the purpose of the law is to be measured against the extent of the restriction. The High Court has described this third stage, the balancing exercise, as an assessment of 'strict proportionality'.[166] This was explained in *McCloy* as follows:

> It requires an 'adequate congruence between the benefits gained by the law's policy and the harm it may cause', which is to say, a balance. Balancing is required because it is rare that the exercise of a right or freedom will be prohibited altogether. Only aspects of it will be restricted, so what is needed, to determine whether the extent of this restriction is reasonable, is a consideration of the importance of the purpose and the benefit sought to be achieved. Logically, the greater the restriction on the freedom, the more important the public interest purpose of the legislation must be for the law to be proportionate.[167]

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162 *Charter* (n 1) s 7(2)(d); *Qld HRA* (n 54) s 13(2)(c); *ACT HRA* (n 54) s 28(2)(d). The nature and extent of the limitation is addressed in the *Charter* s 7(2)(c), *Qld HRA* s 13(2)(f), and the *ACT HRA* s 28(2)(c). While the test in respect of the implied freedom speaks more generally of the purpose of the statute rather than the purpose of the limitation, there is a focus upon identifying objectives and assessing the rationality of the connection between the objectives and the means to achieve them.

163 *McCloy* (n 156) 217 [81].

164 Ibid 217 [82]: 'It is important to recognise that the question of necessity does not deny that it is the role of the legislature to select the means by which a legitimate statutory purpose may be achieved. It is the role of the Court to ensure that the freedom is not burdened when it need not be. Once within the domain of selections which fulfil the legislative purpose with the least harm to the freedom, the decision to select the preferred means is the legislature's.'

165 *Charter* (n 1) s 7(2)(e); *Qld HRA* (n 54) s 13(2)(d); *ACT HRA* (n 54) s 28(2)(e). *Minogue* (n 53) 398 [357].

166 *McCloy* (n 156) 219 [87].

167 Ibid.

This reflects, although it is neither identical in terms to, nor an exact expression of, the balancing test expressly provided for under s 13(2)(g) of the *Qld HRA,* in its requirement to balance the importance of the purpose of the limitation against the importance of preserving the human right, taking into account the nature and extent of the limitation on the right.[168] There may be other comparisons that can be made.

Kent Blore has argued, and he is probably correct, that, overall, the proportionality test in s 13(2) of the *Qld HRA* more closely resembles the structured proportionality test favoured in the High Court for assessing whether a restriction on the implied freedom is justified than does the test applicable in the context of human rights in Victoria and the ACT.[169]

Section 13(2) of the *Qld HRA* appears to set out steps to be dealt with in sequence leading to the final requirement of fair balance between the importance of the purpose of the limitation and the importance of preserving the human right. While both the *Charter* and the *ACT HRA* require an assessment of the importance of the purpose of the limitation,[170] neither of them expressly requires that a balancing exercise be undertaken with respect to that particular factor and the importance of preserving the human right, although the nature of the right is, as Bell J commented, the starting point and the 'anchor' of the proportionality analysis under the *Charter*.[171] Blore argues that, under s 13(2) of the *Qld HRA*, '[t]he "factors" are more definitive, the balancing is more explicit, and, overall, s 13(2) more clearly suggests the path of reasoning to follow.'[172]

Although, as I have sought to describe, the core elements of proportionality are expressed in all three human rights statutes, there is arguably a greater reflection in the *Qld HRA* of the test for proportionality used by the High Court in the context of the implied freedom.

B *Differences*

The first difference to note is one already identified. There is a set structure, and perhaps rigidity, to the test favoured by a majority of the High Court in the implied freedom cases. While that set structure might be reflected in s 13(2) of the *Qld HRA*, it is not reflected in Victoria and the ACT.

By contrast, the proportionality test expressed under the *Charter* and the *ACT HRA* invites a *global* assessment of whether a limit imposed on a right is

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168 *Qld HRA* (n 54) s 13(2)(g). The balance between the matters mentioned in ss 13(2)(e) (the importance of the purpose of the limitation) and (f) (the importance of preserving the human right, taking into account the nature and extent of the limitation on the human right).

169 Blore, 'Factors' (n 2).

170 *Charter* (n 1) s 7(2)(b); *ACT HRA* (n 54) s 28(2)(b).

171 See (n 60). See *Charter* s (n 1) s 7(2)(a); *ACT HRA* (n 54) s 28(2)(a).

172 Blore, 'Factors' (n 2) 434.

justified.[173] All of the factors enumerated (including, of course, the nature of the right)[174] cumulatively assist with an *overall balancing* process; that is, the balance between the nature and extent of the limit imposed on the human right and what it is that the limit achieves. In other words, overall, does the benefit justify interfering with the particular right to the extent of the limitation?

Moreover, as I've mentioned, the factors identified under the *Charter* and the *ACT HRA* are non-exhaustive. Rather, *all* relevant considerations are to be taken into account. This means that the proportionality tests under the *Charter* and the *ACT HRA* avoid the risk that considerations that are relevant in the circumstances of a case will be ignored because they fail to fall under any particular prescribed element of the proportionality test. There may be features of the circumstances of a case that reveal, for example, that a public authority has a history of refusing to explore potentially less restrictive alternatives or a history of repeatedly engaging in conduct that is incompatible with a human right. Alternatively, it may be relevant that a public authority had taken steps to avoid acting incompatibly.

Moreover, while all of the enumerated factors under the statutory tests have to be taken into account, they are not necessarily to be considered in the sequence in which they are set out because the circumstances may make one of the factors the primary focus. This promotes flexibility and avoids rigidity.

It was emphasised in the judgment of the Constitutional Court of South Africa in *S v Manamela* ('*Manamela*')[175] that a mechanical approach is to be avoided in engaging in a proportionality analysis under s 36 of the South African *Bill of Rights*. The majority said:

> It should be noted that the five factors expressly itemised in section 36 are not presented as an exhaustive list. They are included in the section as key factors that have to be considered in an overall assessment as to whether or not the limitation is reasonable and justifiable in an open and democratic society. In essence, the Court *must engage in a balancing exercise and arrive at a global judgment on proportionality and not adhere mechanically to a sequential check-list*. As a general rule, the more serious the impact of the measure on the right, the more persuasive or compelling the justification must be. Ultimately, the question is one of degree to be assessed in the concrete legislative and social setting of the measure, paying due regard to the means which are realistically available … but without losing sight of the ultimate values to be protected.[176]

A flexible and non-mechanistic approach ensures that no particular consideration invariably becomes dominant and the proportionality analysis

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173 *Charter* (n 1) s 7(2); *ACT HRA* (n 54) s 28(2); Carter (n 27) 66–7.

174 *Charter* (n 1) s 7(2)(a); *ACT HRA* (n 54) s 28(2)(a). The importance of the right is likely to be considered as an aspect of the nature of the right but this factor is not expressly singled out in the way it is in Queensland: *Qld HRA* (n 54) s 13(2)(f). However, in eg both *Patrick's Case* (n 3) and *Minogue* (n 53), the Court emphasised the significance of the rights at issue and the fundamental interests the rights protected.

175 [2000] 3 SA 1 (Constitutional Court).

176 Ibid 29–30 [32] (Madala, Sachs and Yacoob JJ) (emphasis added).

undertaken is able to capture the range of considerations relevant to the circumstances.[177]

V Conclusion

In my view, the differences between the forms of proportionality analysis adopted under the *Qld HRA* and that adopted under the *Charter* and the *ACT HRA*, interesting though they may be, are ultimately matters of detail, although the differences may be significant in individual cases. The *Qld HRA* includes a form of proportionality analysis that is perhaps more closely aligned to the structured proportionality test applied in the context of the implied freedom of political communication than is the global and holistic form of proportionality analysis expressed in the *Charter* and the *ACT HRA*. However, all the tests adopted in the Australian State-level human rights statutes express, by one means or another, the concepts Professor Barak identified as central to an understanding of proportionality.[178] Each of them is directed to the important objective of determining whether a restriction imposes a disproportionate burden on a right or is justified, by facilitating a rigorous and transparent process of reasoning.

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177 The inflexibility of the structured proportionality test in the context of the implied freedom appears to be one of the sources of disagreement in the High Court about the utility and merits of the test, alongside the concern that there is a risk that other relevant considerations may be overlooked. This is apparent from two reservations made by Gageler J, namely, that it may not be that 'one size fits all … irrespective of the subject matter of the law and no matter how large or small, focused or incidental, that restriction on political communication might be' (*McCloy* (n 156) 235 [142]) and a concern that the structured proportionality test will not 'adequately … reflect the reasons for the implication of the constitutional freedom and adequately … capture considerations relevant to the making of a judicial determination as to whether or not the implied freedom has been infringed' (*McCloy* 236 [145]).

178 See (n 35).