



CRIME AND CORRUPTION COMMISSION

TRANSCRIPT OF INVESTIGATIVE HEARING

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FORTITUDE VALLEY WITH RESPECT TO

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LEGEND

30 PO Presiding Officer – ALAN MACSPORRAN QC
CA Counsel Assisting – JULIE FOTHERINGHAM
HRO Hearing Room Orderly – KIMBERLEY SAUNDERS
W Witness – SCOTT McDOUGALL
LR Legal Representative – N/A

CA I call Scott McDOUGALL.

PO Good morning, Mr McDOUGALL. Would you prefer an oath or affirmation?

W Affirmation.

HRO I solemnly affirm and declare.

W I solemnly affirm and declare.

10

HRO That the evidence given by me.

W That the evidence given by me.

HRO In these proceedings.

W In these proceedings.

HRO Shall be the truth.

20

W Shall be the truth.

HRO The whole truth.

W The whole truth.

HRO And nothing but the truth.

W And nothing but the truth.

30

CA Good morning, Mr McDOUGALL. Were you provided with an attendance notice today?

W Yes.

CA I'll just show you a copy of that.

W Yes.

40

CA I tender that document.

PO Exhibit 167.

ADMITTED AND MARKED EXHIBIT 167

CA Mr McDOUGALL, you're the Commissioner for the Human Rights Commission in Queensland?

W Yes.

CA And you have held that position since July this year?

W That position, yes. Prior to that I was the Anti-Discrimination Commissioner.

CA Prior to that you were the Anti-Discrimination Commissioner and before that you were the Director and Principal Lawyer at the Caxton Legal Centre for several years?

10

W That's correct.

CA And you also have spent several years previously as the President of the Queensland Association of Independent Legal Services?

W Yes.

CA Yes. You hold a Bachelor of Laws Degree from the Queensland University of Technology.

20

W Yes.

CA And you are a board member of the University of Queensland Pro Bono Centre Advisory Board.

W I've actually resigned from all of those committees.

CA Okay.

30 W Unfortunately regularly get bandied around at various times, but yes, I'm no longer on that committee or the others that are regularly mentioned.

CA Are you able to provide an overview of what the Commission does?

W Yes, so the Commission has functions under the Anti-Discrimination Act and now has functions under the Human Rights Act. Various functions set out in section 61 of the Human Rights Act. Several of them commenced on 1st July, most notably the function of providing education and information to the community. The important functions of dealing with human rights complaints and reviewing public entities, policies and procedures will commence on the 1st of January next year.

40

CA So with the Human Rights Act, that was passed in Queensland on the 27th of February this year?

W Yes.

CA Yes. And the Anti-Discrimination Commission that you mentioned earlier transitioned to the Queensland Human Rights Commission on the 1st of July this year?

W That's right.

CA And the remaining functions and obligations, as you just alluded to, will commence on the 1st of January next year?

10 W That's right.

CA And there are two other jurisdictions with human rights legislation in Australia.

W Yes, the ACT and Victoria.

CA And the ACT has the Human Rights Act 2004 and Victoria has the Charter of Human Rights Responsibilities Act 2006.

20 W That's right.

CA So there are 23 protected human rights under the new Act?

W Yes, it is probably more accurate to say categories of rights because some of the rights actually contain a number of rights.

CA Yes. And the right to privacy is under section 25?

W Yes.

30 CA And what does that encompass?

W Well, it's actually quite a broad right and it is one of the rights that has featured probably more prominently in the Victorian cases. I could read you a - well, essentially section 25 says, "A person has the right not to have his or her privacy, family or home correspondence unlawfully or arbitrarily interfered with."

40 It's been interpreted very broadly and there's a passage that I think might be helpful from Justice BELL in a case from 2009 called *CRACK v Mental Health Review Board*, where he summarised the right to privacy as:

"The purpose of the right to privacy is to protect people from unjustified interference with their personal and social individuality and identity. It protects the individual's interest in the freedom of their personal and social sphere in the broad sense. This encompasses their right to individual identity, including sexual identity and personal development, to establish and develop meaningful social relations and to physical and psychological integrity, including personal security and mental stability. The fundamental values which the right to privacy

expresses are the physical and psychological integrity, the individual and social identity and the autonomy and inherent dignity of the person."

I think you can see from that it's a very broad right and it's starting to pull in notions about the effect that decisions can have on the integrity and autonomy of individuals.

CA And in our Act, the words "Unlawfully or arbitrarily", could you expand on that a little?

W Yes, so the right is only engaged where an interference is unlawful or arbitrary. So interference can be lawful, but if it's arbitrary then it will offend the right. Before we get to looking at the definition of unlawful and arbitrary, it is useful to look at what "interfered with" means.

CA Yes.

W Because there is a case from 2012, *CARIPIS v Victoria Police*, where it was decided that a protester's right to privacy was not interfered with when police retain photographs of a protest and use those photographs in ongoing training about how to manage protests. And one of the reasons put forward for why it wasn't interfered with, wasn't serious enough to interfere with her right to privacy, was the fact that there was a reasonable expectation that if you attended a protest in that way that you would be photographed. Also the fact that her images were published on various websites and in social media. So that's the first sort of hurdle, if you like, has to be gotten over, has the right actually been interfered with.

The second issue of lawful, the Victorian decisions have followed the United Nations Human Rights Committee in interpreting "Lawful" as meaning "provided by the law". However, the authorising law has to be formulated with sufficient precision to enable a person to regulate their conduct by it. So the law that authorises the interference needs to be clear enough and specific enough, and I think that may potentially have implications for the IPA.

And then this issue of arbitrary, there are two opposing interpretations of arbitrary in this context. The first one is referred to as the human rights meaning which again Justice BELL in *CRACK-*

CA Is that another Victorian case?

W Yes, it is. That's 2019 VCAT at 646. He referred to it - sorry, his Honour referred to it as, "Proportional to the end sought to be necessary in the circumstances of any given case."

The other view which was set out by Justice KAYE in *WBM v Chief Commissioner of Police*, in 2010, I'm sorry, I don't have the specific reference, he said, "Arbitrary is a decision or action which is not based on any relevant

identifiable criterion, but which stems from an act of caprice or whim." So a very different definition there.

The human rights meaning approach was subsequently relied on by a Victorian Supreme Court Judge in 2013 in the context of arbitrary deprivation of liberty. So a different right, but same word, where it relied on the human rights meaning. And the explanatory notes to the Act actually referred to the words "Unreasonable, unnecessary and disproportionate." Which reflects the proportionality analysis in section 13 of the Act which is really what goes to the heart of the Act.

CA And could you talk more about section 13 and the proportionality test? I believe it involves a balancing of several factors. So if you could explain it a bit more and say what some of those factors are?

W It is useful to start at section 58 which is Impose the Obligations on Public Entities and there's two limbs to the obligation.

CA Yes.

W One is to - and this is the substantive limbs, "To act compatibly with human rights." And there's a procedural limb which is, "To give proper consideration to human rights." So that raised the question what does compatible with human rights mean? You then have to go to section 8 of the Act which, thankfully, Queensland inserted section 8, which Victoria doesn't have the equivalent provision. And it explains with that, "Compatible with human rights means an Act, decision or provision does not limit a human right or limits a human right only to the extent that is reasonable and demonstrably justifiable in accordance with to section 13."

CA And that's an Act, a decision or statutory provision?

W That's right.

CA Across the board those three have to be compatible?

W That's right.

CA Yes.

W And section 13(1) says, "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."

And at 13(2) it sets out the factors that may be relevant in determining whether a limit on a human right is reasonable and justifiable.

And again, Queensland has added a couple of factors to those that are in the Victorian legislation. So there's F and G in 13(2) added.

CA And what are they?

W They're, essentially, the importance of preserving the human right.

CA Yes.

10 W And then the balance between the importance of preserving it with the importance of the purpose of the limitation. But essentially what 13(2) does and this really is the value where the heavy work is done by the Act is, requires decision-makers to look at the reason why they're imposing a limit on a human right and consider whether there are less restrictive alternatives reasonably available to them. And if they are, they don't have to follow those, but they do need to give proper consideration to them.

20 And they also need to make sure there's a rational connection between the objective they're trying to achieve through the limitation, and the actual limitation itself.

CA So for all new legislation going forward, they've got to pass a compatibility test. Did you want to explain about that?

W Yes, I probably should have explained it at the start.

CA No, that's fine.

30 W So the Act is called a dialogue model. It applies to the three arms of government. So for Parliament it imposes an obligation on all ministers when tailoring new bills to also table a statement of compatibility. So that statement will need to address the human rights that are engaged by the legislation and identify whether or not the legislation is and how it is compatible with human rights. There is the option of Parliament making an override declaration in recognition of the fact that the legislation is going to be incompatible with human rights. The impact of that is that legislation cannot be subject to a declaration of incompatibility by the Supreme Court. So that's the obligations on the Parliament.

40 There's the obligations on the Executive through section 58, and then there's an interpretation command in section 48, which applies to everybody in interpreting the Act, but, you know, in particular the courts. And also the courts are deemed to be public entities when they're acting in an administrative capacity. And there's some uncertainty as to when exactly courts will be acting in that capacity.

CA So with public entities they are defined in section 9?

W Yes.

CA And could you just go through the definition there of which entities come under that banner?

10 W Yes, so there's what we call core public entities which are government entities within the meaning of the Public Service Act. Public Service employees, Queensland Police Service, Local Government, Ministers, and entity established under an Act when the entity is performing functions of a public nature. So I think, for example, Justices of the Peace would probably fall in that category. A member of a portfolio committee when the committee is acting in an administrative capacity. An entity whose functions are, and this is what we call functional entities, functions of a public nature when it is performing the functions for the State. And that will cover a lot of non-government organisations who are providing contracted services for public housing and so forth. And then a person not otherwise mentioned who is a staff member or executive member of a public entity. And any entity prescribed by regulation. So there is the option, and I'm always the optimist that some entities will put their hand up and ask the Attorney-General to actually gazette them as public entities.

20

CA And one of the three main objects of the Human Rights Act is stated at section 3, "To help build a culture in the Queensland public sector that respects and promotes human rights"?

W Yes.

30 CA With respect to any claims for breaches of human rights, could you explain - we've had Professor McDONALD here last week, on the 15th of November, to go through the different causes of action relevant to our Terms of Reference for misuse of information, and the potentials for the future in that area with respect to tort. So if there is one of those causes of action that she delineated last week, what can happen with respect to a human rights breach intersecting with that? Could you explain about that?

W Yes, so there's section 59 of the Act is modelled on the Victorian provision.

CA Yes.

40 W And it's often referred to as the piggy-back provision. So it entitles a person who has an existing standalone cause of action to attach their human rights argument to that cause of action, to raise it within the proceedings. The substantive cause of action doesn't need to succeed in order for the human rights argument to succeed. However, in any event, a person is not entitled to recover damages purely for the human rights claim. I mean, that section has come under heavy criticism, I have to say, however, it is not entirely toothless and I expect that it will be used and we will see jurisprudence develop in Queensland by that provision.

The other addition to the Queensland legislation is the ability to make a complaint directly to the Human Rights Commission.

CA Yes, could you explain that process?

W Yes, so that's a remedy that's not available in Victoria, and essentially they're able to make a complaint to the Commission. We have powers to-

10 CA Is that after they've gone to the agency for a period of time?

W Yes, so they're required to complain to the public entity at first instance and a period of 45 days has to elapse before they can then make a complaint to the Commission. Although there is a provision for exceptional circumstances for a complaint to be accepted earlier than that in exceptional circumstances.

CA What type of circumstances?

20 W I've been thinking about that. Potentially, you know, at the beginning of next year, if there are children that need to be enrolled at the beginning of the year, in third week of January, that might be an exceptional circumstance. But otherwise, it's, you know, it's hard to foresee "exceptional". Yes, and the Commission has a range of powers available to it to respond to the complaints.

CA And what are the range of powers?

30 W Well, they can investigate the complaint. They can conduct a conciliation and a compulsory attendance at that conciliation. At the end of the conciliation, we have a power to provide a report to the parties, including recommendations for how a party may act compatibly with human rights in the future. And there is also an additional power to publish information in relation to that report publicly.

CA And with respect to the Crime and Corruption Commission, there is a role to play with respect to referrals. Could you explain about that?

40 W Yes. So this is a provision for arrangements to be made and there are continuing discussions at the moment with the CCC, the Information Commissioner, the Office of the Health Ombudsman, and the Ombudsman in relation to the handling of complaints and the referral of complaints between each of the agencies. Obviously, some agencies have – it will be more appropriate that some agencies deal with complaints due to the nature of the complaint. And as the Human Rights Commissioner I'm certainly looking to refer matters where I think other agencies can add more value than we could add to the resolution of a complaint.

CA And what do you see as your validity to add more value? Could you explain in a little bit of detail?

10 W Yes, so we deal with about 960 complaints a year under the Anti-Discrimination Act, and about 55% of them settle favourably, and a percentage of them then go on to QCAT. With the human rights complaints the complainant won't have that ability to take the matter on any further. So that's going to be interesting to see how that affects the dynamics of the conciliation process. I'd like to think, however, that a lot of the complaints are going to be of a nature where complainants will be satisfied by having, you know, it won't be a day in court, but it will be an opportunity to sit face-to-face with the respondent and actually discuss the nature of their issue. And that we will be successful in resolving a number of complaints. And hopefully that will lead to improved procedures and policy development within the public entities.

CA Just one second. I don't have any further questions.

PO Thanks, very much. Thanks, Mr McDOUGALL, thanks for coming. You're excused.

20 CA Thank you, Mr McDOUGALL.

W Thank you.

CA Chair the next witness is at 2 o'clock.

PO Okay. All right, we'll adjourn till 2.

HRO All stand. This hearing has adjourned.

30 END OF SESSION