# The riddle of s 5(2)(a) of the *Human Rights Act 2019* (Qld): when are courts and tribunals required to apply human rights directly?

*Kent Blore**

Some of the most obvious impacts on human rights — both positive and negative — come at the hands of courts and tribunals wielding judicial power. Every day, courts vindicate rights to property, deprive people of their liberty and safeguard the right to a fair hearing. The 'dialogue model' adopted by the *Human Rights Act 2019* (Qld) gives the judiciary a role to play in protecting and promoting human rights.[1] One aspect of that role which remains unclear is the question of when courts and tribunals are required to apply human rights themselves in the exercise of judicial power. Cryptically, s 5(2)(a) of the Human Rights Act hints that courts and tribunals are required to apply some human rights sometimes, but it gives no further guidance as to which human rights or in what circumstances the obligation arises. This article sets out the competing approaches that have been put forward with respect to the equivalent provision in s 6(2)(b) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Charter). The article then sets out the approach Queensland courts have taken to s 5(2)(a) to date. On the whole, practitioners and courts in Queensland have so far failed to grapple with s 5(2)(a) as well as the case law from Victoria. Each time s 5(2)(a) has been overlooked represents a missed opportunity for the protection and promotion of human rights.

## Structure of the Human Rights Act

The human rights set out in the Human Rights Act do not have freestanding operation. Instead, the Human Rights Act 'stat[es] the human rights Parliament specifically seeks to protect and promote' and then sets out detailed operative provisions by which those rights are to be protected and promoted (s 4).[2] One of the key operative provisions is s 58, which requires public entities to act compatibly with human rights and to consider human rights when making a decision. Courts and tribunals are not public entities subject to these requirements when they are acting in a judicial capacity. This is because s 9(4)(b) provides that courts and tribunals are only public entities to the extent they are 'acting in an administrative capacity'. Whether a court or tribunal is acting in an administrative capacity turns on the traditional divide between judicial and administrative functions.[3] So, for example, when the Industrial Relations Commission decides whether to grant an exemption under the *Anti-Discrimination Act 1991* (Qld),[4] or the Queensland Civil and Administrative Tribunal (QCAT)

* Kent Blore is Senior Principal Lawyer, Crown Law, Queensland. The views expressed in this article are the author's own and not those of Crown Law.

1 Explanatory Note, Human Rights Bill 2018 (Qld) 6; George Williams, 'The Distinctive Features of Australia's Human Rights Charter' in Matthew Groves and Colin Campbell (eds), *Australian Charters of Rights A Decade On* (The Federation Press, 2017) 22, 23.

2 *Innes v Electoral Commission of Queensland [No 2]* [2020] QSC 293 [197] (Ryan J). See also in respect of the equivalent legislation in Victoria and the ACT: Alistair Pound and Kylie Evans, *Annotated Victorian Charter of Rights* (Lawbook Co, 2nd ed, 2019) 6 [0.70]; *Nona v The Queen* (2013) 8 ACTLR 168, 187 [95] (Penfold J).

3 *Sabet v Medical Practitioners Board* (2008) 20 VR 414, 432−433 [119]−[127] (Hollingworth J); *Re Kracke and Mental Health Review Board* (2009) 29 VAR 1, 68 [282] (Bell J); *Slaveski v The Queen* (2012) 40 VR 1, 24 [75] (Warren CJ), 31 [106]−[108] (Nettle and Redlich JJA).

4 *Re Ipswich City Council* [2020] QIRC 194 [29]−[30] (Merrell DP).

exercises its merits review jurisdiction,[5] it will generally be exercising an administrative function and therefore be bound by the Human Rights Act as a 'public entity'. Outside of their administrative functions, courts and tribunals escape the human rights obligations of public entities by virtue of s 9(4)(b). For example, when QCAT is exercising its original jurisdiction it will generally be exercising a judicial function[6] and therefore be a 'tribunal'[7] to which the carve-out in s 9(4)(b) applies.

However, this neat carve-out for courts and tribunals is complicated by a provision tucked away at the beginning of the Act. Under s 5(2)(a), the Human Rights Act also applies to courts and tribunals 'to the extent the court or tribunal has functions under part 2 and part 3, division 3'. In the dictionary to the Act, 'function' includes a 'power'. Part 3, Div 3 of the Act contains obvious functions for courts, such as the obligation to interpret legislation, if possible, in a way that is compatible with human rights (s 48) and the power of the Supreme Court to issue a declaration of incompatibility in the event that such an interpretation is not possible (s 53). The reason for the reference to Pt 2 in s 5(2)(a) is less clear. Part 2 sets out the protected human rights.

**The broad, intermediate and narrow constructions of s 5(2)(a)**

According to the Victorian authorities on the equivalent provision of the Victorian Charter, 'Given that [s 5(2)(a)] refers to both the interpretive functions of courts and tribunals in pt 3, div 3, and to their functions under pt 2, it appears that [s 5(2)(a)] implicitly reads down [s 9(4)(b)], so that pt 2 applies directly to courts and tribunals'.[8]

As to what that direct application of human rights entails, three possible interpretations have been advanced in Victoria:[9]

1. the broad construction, which holds that the function of courts is to enforce directly *any and all* of the rights enumerated in Pt 2;

2. the intermediate construction, which holds that the function is to enforce directly only those rights enumerated in Pt 2 that *relate* to court proceedings; and

5 *Storch v Director-General, Department of Justice and Attorney-General* [2020] QCAT 152 [38]−[45], [439] (Member Stepniak); *RE and RL v Department of Child Safety, Youth and Women* [2020] QCAT 151 [22]−[23] (Members Murray, Allen and Garner).

6 *Re Director of Housing and Sudi* (2010) 33 VAR 139, 164 [119] (Bell J) (overturned on appeal, but not on this point).

7 Although QCAT is a 'court' (see *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 164; *Owen v Menzies* [2013] 2 Qd R 327), 'court' is defined in the schedule to the Human Rights Act in a way that does not include QCAT. While 'tribunal' is not defined in the Act, in the context of the Victorian Charter it has been held to mean 'a person or body who, under a statute, operates independently of government and possesses a limited and specified jurisdiction or authority to make particular decisions of a judicial or administrative character applying general principles of law or policy': *Re Kracke and Mental Health Review Board* (2009) 29 VAR 1, 72 [305] (Bell J).

8 *De Simone v Bevnol Constructions and Developments Pty Ltd* (2009) 25 VR 237, 247 [52] (Neave JA and Williams AJA), cited with approval in *Slaveski v Smith* (2012) 34 VR 206, 221 [54] n 27 (Warren CJ, Nettle and Redlich JJA). See also *Innes v Electoral Commission of Queensland [No 2]* [2020] QSC 293 [220] (Ryan J).

9 *Victoria Police Toll Enforcement v Taha* (2013) 49 VR 1, 80 [246] (Tate JA). See also *Innes v Electoral Commission of Queensland [No 2]* [2020] QSC 293 [221] (Ryan J).

3. the narrow construction, which holds that the function of courts is to enforce directly only those rights that are *explicitly and exclusively* addressed to the courts.

Although the Victorian Court of Appeal has left open which approach is correct,[10] courts in Victoria have generally applied the intermediate construction,[11] perhaps under the influence of the Goldilocks effect. The intermediate construction gives the impression that it gives s 5(2)(a) neither too little work to do nor too much.

There are, in any event, good reasons to doubt that the other two constructions are open. A broad construction would require courts to apply all human rights in all cases, effectively erasing the explicit carve-out from the definition of 'public entity' in s 9(4)(b) for courts and tribunals exercising a judicial function.[12] If courts and tribunals were required to apply all human rights regardless of whether they were exercising a judicial or administrative function, there would be no need for s 9(4)(b).

The narrow construction would only bring in the handful of rights which are specifically directed to courts, namely:[13]

- the right of a person arrested or detained to be released if they are not promptly brought before a court or brought to trial without unreasonable delay (s 29(5)(c));
- the right of a person awaiting trial not to be automatically detained (s 29(6));
- the right to have the lawfulness of one's detention determined by a court (s 29(7));
- the right not to be imprisoned only because of an inability to perform a contractual obligation (s 29(8));
- the open justice principle (s 31(2)); and
- the requirement to publish judgements and decisions (s 31(3)).

The narrow construction is so narrow that it would not even include the right to a fair hearing (s 31(1)), as that right is not 'explicitly and exclusively' directed at courts, nor would it include the criminal process rights set out in ss 32−34.[14] If the intention behind s 5(2)(a) were merely to require courts to apply ss 29(5)(c), (6)−(8) and 31(2)−(3) directly, and no other rights, a far simpler drafting technique would have been to say so.[15]

10 *Victoria Police Toll Enforcement v Taha* (2013) 49 VR 1, 81 [248] (Tate JA). See also *Momcilovic v The Queen* (2011) 245 CLR 1, 90 [162] (Gummow J).

11 See the examples collected in *Cemino v Cannan* (2018) 56 VR 480, 514−515 [110] n 71 (Ginnane J). See also *Momcilovic v The Queen* (2011) 245 CLR 1, 204 [525] (Crennan and Kiefel JJ).

12 *Victoria Police Toll Enforcement v Taha* (2013) 49 VR 1, 80 n 275 (Tate JA); *Re Kracke and Mental Health Review Board* (2009) 29 VAR 1, 62 [244]−[246] (Bell J).

13 *Victoria Police Toll Enforcement v Taha* (2013) 49 VR 1, 80 [246] n 277 (Tate JA), quoting Caroline Evans and Simon Evans, *Australian Bills of Rights* (LexisNexis, 2008) 13 [1.43].

14 *Victoria Police Toll Enforcement v Taha* [2013] VSCA 37; (2013) 49 VR 1, 80−81 [246] n 277 (Tate JA), quoting Evans and Evans, above n 13, 14 [1.44].

15 See also *Re Kracke and Mental Health Review Board* (2009) 29 VAR 1, 62 [242]−[248] (Bell J).

**The 'list of rights' and functional approaches to the intermediate construction**

Under the intermediate construction, the relevant 'functions' of courts and tribunals under Pt 2 of the Human Rights Act specified in s 5(2)(a) are 'the functions of applying or enforcing those human rights that relate to court and tribunal proceedings'.[16] The authorities in Victoria have again divided on how to go about identifying these rights that relate to court proceedings. The early approach was to focus on the nature of the right to determine whether it confers a function on the court (the so-called 'list of rights' approach).[17] More recently, Victorian courts have instead focused on the nature of the function the court is performing (the so-called 'functional' approach).[18]

The list of rights approach has the advantage of certainty. In addition to the rights that a narrow construction would bring in, the functional approach would include:[19]

- (in the context of sentencing) the right not to be punished in a cruel, inhuman or degrading way (s 17(c));
- the right to a fair hearing (s 31(1));
- rights in criminal proceedings (s 32);
- the right of child defendants to be brought to trial as quickly as possible (s 33(2));
- the right of a convicted child to be treated in a way that is appropriate for their age (s 33(3));
- the double jeopardy right (s 34); and
- rights relating to retrospective criminal laws (s 35).

Again, if Parliament only intended to capture those rights in ss 17(c); 29(5)(c), (6), (7) and (8); 31; 32; 33(2) and (3); 34; and 35, and no others, it could easily have listed those provisions in s 5(2)(a).

The functional approach has the advantage of allowing the court to apply human rights which have an obvious bearing on its work — for example, the right to equality before the law in s 15(3),[20] freedom of expression in s 21 in the context of deciding whether to make a suppression order,[21] or even cultural rights in ss 27 and 28 when deciding bail conditions for

16 *Matsoukatidou v Yarra Ranges Council* (2017) 51 VR 624, 636 [37] (Bell J).
17 *Re Kracke and Mental Health Review Board* (2009) 29 VAR 1, 68 [253]−[254] (Bell J).
18 *Matsoukatidou v Yarra Ranges Council* (2017) 51 VR 624, 636 [37]−[39] (Bell J). See also *Innes v Electoral Commission of Queensland [No 2]* [2020] QSC 293 [225]−[230] (Ryan J).
19 Adapting the list from *Re Kracke and Mental Health Review Board* (2009) 29 VAR 1, 63−64 [253]−[254] (Bell J).
20 *Matsoukatidou v Yarra Ranges Council* (2017) 51 VR 624, 636−638 [40]−[46] (Bell J).
21 *X v General Television Corporation Pty Ltd* (2008) 187 A Crim R 533, 538−540 [34]−[45] (Vickery J); *News Digital Media Pty Ltd v Mokbel* (2010) 30 VR 248, 259 [38] (Warren CJ and Byrne AJA).

an Indigenous defendant[22] or whether to transfer a proceeding to the Murri Court.[23] However, taking a functional approach risks collapsing the intermediate construction into the broad construction. If the court is to apply any human right which has a bearing on the task before it then potentially any and all human rights in Pt 2 are capable of being caught by s 5(2)(a).[24]

**The drafting error construction**

A fourth possible construction is to put the inclusion of 'Part 2' in s 5(2)(a) down to a slip of the drafter's pen. By including the reference to Pt 2, perhaps the drafter only meant to recognise that courts and tribunals will necessarily apply the rights in Pt 2 in the process of interpreting legislation compatibly with those rights pursuant to s 48. The problem with that explanation is that Parliament and public entities are also conferred with functions by s 5(2)(b) and (c), without any reference to Pt 2. Both Parliament and public entities have human rights obligations which necessarily call up the rights in Pt 2. The explicit reference to Pt 2 for courts and tribunals in s 5(2)(a) must be given work to do.

Courts and commentators have both rejected the drafting error approach to s 6(2)(b) of the Victorian Charter.[25] The drafting error approach is even more difficult to sustain in Queensland. The Queensland Parliament adopted the same wording as s 6(2)(b) of the Charter *after* the difficulties of that provision had been pointed out by commentators and *after* courts in Victoria had offered their reading of what the provision means. Where the Parliament of one jurisdiction adopts the law of another jurisdiction, it generally also intends to adopt the interpretation that has been given to that law.[26] Even if s 6(2)(b) of the Victorian Charter was a mistake, the choice to pick up that mistake in Queensland must have been by design.

**Approach of Queensland courts to s 5(2)(a)**

So how have courts and tribunals in Queensland approached the puzzle presented by s 5(2)(a) of the Human Rights Act? With one notable exception, they have tended to ignore the existence of s 5(2)(a) altogether, as well as the Victorian authority on point.

In two early cases — *R v Logan*[27] and *R v NGK*[28] — the District Court ruled that a no-jury order under s 614 of the *Criminal Code* involves an exercise of judicial power, such that the District Court was not a public entity and therefore not required to take human rights into account. In neither case did the Court consider whether the Court might be required to apply

22 *DPP (Vic) v SE* [2017] VSC 13, [21] (Bell J). See also, in the context of bail, *Re HL* [2016] VSC 750 [68]−[72] (Elliott J); *Re HL [No 2]* [2017] VSC 1 [134] (Elliott J).

23 In respect of the Koori Court, see *Cemino v Cannan* (2018) 56 VR 480, 483 [11], 515−517 [111]−[122], 523 [147]−[149] (Ginnane J).

24 Timothy Lau, 'Section 6(2)(b) of the Victorian Charter: A Problematic Provision' (2012) 23 *Public Law Review* 181, 188, 193.

25 *Cemino v Cannan* [2018] VSC 535; (2018) 56 VR 480, 513−515 [107], [110] (Ginnane J); Lau, above n 24, 189, 190−191.

26 *Vella v Commissioner of Police (NSW)* (2019) 93 ALJR 1236, 1243−1244 [19] (Kiefel CJ), 1250 [52] (Bell, Keane, Nettle and Edelman JJ)

27 *R v Logan* [2020] QDCPR 67.

28 *R v NGK* [2020] QDCPR 77.

human rights directly by force of s 5(2)(a).[29] One might have thought that the right to a fair hearing in s 31(1) of the Human Rights Act would be relevant to the question of whether to order a no-jury trial. On any view bar the narrow construction, the right to a fair hearing would have been capable of direct application by the District Court under s 5(2)(a).[30]

In *R v Morrison*,[31] the Court of Appeal appeared to treat the right to liberty and security of the person in s 29 as a right which courts must apply directly. In that case, the appellant sought to rely on the right to liberty under s 29 in his appeal against sentence. Justice Davis (with whom Sofronoff P and Philippides JA agreed) noted that '[m]any of the provisions of the Human Rights Act apply to the exercise of executive power. Few apply to the exercise of judicial power, although s 29 is one that does'.[32] If his Honour meant only the rights in s 29(5)−(8) then his Honour's observation is consistent with the narrow construction, as well as the list of rights approach to the intermediate construction. However, his Honour went on to find that the Human Rights Act 'ha[d] no relevance to the appeal', because '[t]he applicant's liberty ha[d] been deprived pursuant to a criminal process'.[33] In any event, the Court did not refer to s 5(2)(a) or any other operative provision in the Human Rights Act.

Justice Davis made an oblique reference to s 5(2)(a) in *Re JMT*, which concerned an application for bail. His Honour noted that:

> [The Human Rights Act] primarily casts obligations upon the executive and the parliament[34] and only impacts the exercise of judicial power in limited ways.[35] Obligations under the Human Rights Act may fall upon the Chief Executive. Whether any alleged failure by the Chief Executive to honour his obligations under the Human Rights Act (which is not alleged here) is a matter relevant to bail is a matter that need not be considered on this application.[36]

Presumably, his Honour's attention was not drawn to the Victorian authorities in which human rights were applied directly by courts in the context of deciding bail applications.[37]

In *Attorney-General (Qld) v Sri*,[38] Applegarth J took into account freedom of movement (s 19) and the right of peaceful assembly (s 22) when deciding whether to grant an injunction to restrain an unlawful protest.[39] Unless human rights are freestanding norms of conduct, the only way that those rights might have been relevant to the Court's task was via s 5(2)(a) of the Human Rights Act, although Applegarth J did not refer to that provision. Seen through

29 *R v Logan* [2020] QDCPR 67 [12]−[17] (Horneman-Wren SC DCJ); *R v NGK* [2020] QDCPR 77 [14]−[15] (Long DCJ).
30 *AB v CD & EF* [2017] VSCA 338 [170] (Ferguson CJ, Osborn and McLeish JJA); *De Simone v Bevnol Constructions and Developments Pty Ltd* (2009) 25 VR 237, 247 [51]-[52] (Neave JA and Williams AJA).
31 *R v Morrison* [2020] QCA 187.
32 Ibid [75] (Davis J, Sofronoff P and Philippides JA agreeing).
33 Ibid [79] (Davis J, Sofronoff P and Philippides JA agreeing).
34 Sections 4, 5(2), 9, Pt 3, Divs 1, 2 and 4.
35 See cases such as *Re Kracke v Mental Health Review Board* (2009) 29 VAR 1, 68 [282]; and *Matsoukatidou v Yarra Ranges Council* (2017) 51 VR 625, 633−634 [32].
36 *Re JMT* [2020] QSC 72 [68] (Davis J).
37 *DPP (Vic) v SE* [2017] VSC 13, [21] (Bell J); *Re HL* [2016] VSC 750 [68]−[72] (Elliott J); *Re HL [No 2]* [2017] VSC 1 [134] (Elliott J).
38 *Attorney-General (Qld) v Sri* [2020] QSC 246.
39 Ibid [27]−[29] (Applegarth J).

the prism of the Victorian authorities, his Honour adopted the functional approach to the intermediate construction.

Finally, s 5(2)(a) received detailed attention for the first time in Queensland in *Innes v Electoral Commission of Queensland [No 2]*[40] (*Innes*). That case concerned a dispute of the result in a local government election. In the absence of detailed human rights submissions from the applicant candidate, Ryan J considered that the matter was not 'an appropriate vehicle for reaching solid conclusions about the operation of the [Human Rights Act] in Queensland'.[41] Nonetheless, her Honour considered the Victorian authorities on the equivalent of s 5(2)(a) in depth.

Her Honour decided to apply the 'intermediate construction', according to which 'the functions under Part 2 referred to in [s 5(2)(a)] are the functions of applying or enforcing those human rights that relate to court and tribunal proceedings'.[42] To identify the relevant functions, her Honour also applied the 'functional approach', which 'focuses upon the functions that are performed by a court or tribunal in legal proceedings in a given case' rather than by reference to the nature of the human right.[43]

Her Honour then identified the function of the Court of Disputed Returns as vindication of the right to take part in public life by ensuring that the election reflects the free expression of the will of the electors. The various rights in s 23 of the Human Rights Act — including the right to vote — are 'promoted by the proper exercise of the Court's discretion'.[44] Ultimately, 'responsibility for the enforcement of s 23 rights underpins the role of the Court of Disputed Returns'.[45] It follows that the Court of Disputed Returns applies the right in s 23 directly by force of s 5(2)(a).

**Conclusion — what does it matter?**

Curiously, having concluded that the Court of Disputed Returns applies the right to take part in public life directly, Ryan J did not go on to apply that right in *Innes*. It would seem that, for her Honour, any appropriate exercise of the Court's powers would be consistent with that right. Indeed, it might be wondered whether the application of human rights via s 5(2)(a) could ever alter the result in a disputed election. Given that courts and tribunals are required to act judicially, there will usually be a principled (and therefore justifiable) basis for any limit they impose on human rights. Accordingly, thinking of pre-existing legal problems in human rights terms should not alter the result in the vast majority of cases.

Why then should we bother with the riddle of s 5(2)(a) of the Human Rights Act? First, courts and tribunals do not get to pick and choose which legislation to apply. Parliament has spoken. By enacting s 5(2)(a) of the Human Rights Act, Parliament has directed courts

40 *Innes v Electoral Commission of Queensland [No 2]* [2020] QSC 293.
41 Ibid [202] (Ryan J). See also at [242].
42 Ibid [222]−[224] (Ryan J), quoting *Re Kracke v Mental Health Review Board* (2009) 29 VAR 1, 63 [250] (Bell P).
43 *Innes v Electoral Commission of Queensland [No 2]* [2020] QSC 293 [229]−[230] (Ryan J), quoting *Matsoukatidou v Yarra Ranges Council* (2017) 51 VR 624, 636 [37] (Bell J).
44 *Innes v Electoral Commission of Queensland [No 2]* [2020] QSC 293 [237] (Ryan J).
45 Ibid [238] (Ryan J).

and tribunals to think in human rights terms, at least for some human rights sometimes. It is up to courts and tribunals to interpret that direction and comply with it as best they can. Secondly, there may be value in seeing old problems through a human rights lens. Human rights bring a renewed focus on the dignity and autonomy of the individual.[46] When it comes to justifying limits on human rights, the proportionality test in s 13 may also give courts and tribunals new tools of analysis to reason through old problems. The analytical rigour of structured proportionality may even help to identify errors in reasoning.[47] Thirdly, while the Human Rights Act does not spell out the consequences if a court or tribunal does not apply human rights directly via s 5(2)(a), failure to do so may give rise to judicial review or an appeal.[48] Finally, the protection of human rights is enhanced if courts and tribunals themselves observe human rights rather than merely *enforce* the human rights obligations of others.[49] How we solve the riddle of s 5(2)(a) therefore has far-reaching consequences for the role that courts and tribunals play under the Human Rights Act and the extent to which human rights are protected and promoted. We can only begin to solve that riddle if we are aware of it. Unfortunately, the first year of case law under the Human Rights Act reveals that, with a few exceptions, s 5(2)(a) has not yet been raised in proceedings or considered by courts and tribunals.

46 *PJB v Melbourne Health* (2011) 39 VR 373, 448−449 [333] (Bell J).
47 See *Clubb v Edwards* (2019) 267 CLR 171, 199 [64], 200−201 [70] (Kiefel CJ; Bell and Keane JJ).
48 Lau, above n 24, 185.
49 *Re Kracke and Mental Health Review Board* (2009) 29 VAR 1, 61−62 [243] (Bell J) (albeit in the context of discussing the broad construction).