

BREATHING LIFE INTO THE *HUMAN RIGHTS ACT 2019* (QLD): THE ETHICAL DUTIES OF PUBLIC SERVANTS AND LAWYERS ACTING FOR GOVERNMENT

KENT BLORE* AND BRENNA BOOTH-MARXSON†

Much of the work of government is carried out by public servants with the assistance of lawyers. Because the Human Rights Act 2019 (Qld) ('Human Rights Act') is intended to change the way government works, it also has consequences for the way public servants and lawyers carry out the work of government. This article explores the impact of the Human Rights Act on the ethical duties of public servants to give frank advice and to implement policy decisions faithfully, as well as the ethical duty of lawyers to act in their client's best interests. While the Human Rights Act brings a new rigour to the frank advice that public servants must give, they must still respect the ultimate decision of the government of the day. Similarly, the Human Rights Act brings lawyers closer to the edge of legal and policy advice, but this article puts forward a 'supervisory' approach as one way that lawyers can avoid straying too far into policy development and debate. The Human Rights Act breathes new life into old ethical duties by reminding us of the importance of candour and fidelity. Equally, frank advice and collaboration between lawyers and policy officers breathe life into the ambition of the Human Rights Act.

I INTRODUCTION

The *Human Rights Act 2019* (Qld) ('*Human Rights Act*') seeks to introduce a 'culture of justification' into the Queensland public sector.¹ Now, whenever an act,

* Senior Principal Lawyer, Human Rights Stream, Constitutional and Advocacy Branch, Crown Law, Queensland.

† Principal Legal Officer, Human Rights Unit, Strategic Policy and Legal Services, Department of Justice and Attorney-General, Queensland. The views expressed in this article are entirely our own and not necessarily those of Crown Law or the Department of Justice and Attorney-General. We wish to thank the librarians at the Crown Law Library who were, as always, unfailingly helpful.

¹ Queensland, *Parliamentary Debates*, Legislative Assembly, 31 October 2018, 3184 (YM D'Ath, Attorney-General); Explanatory Notes, Human Rights Bill 2018 (Qld). On the 'culture of justification' generally, see Etienne Mureinik, 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10(1) *South African Journal on Human Rights* 31, 32; S v *Makwanyane* [1995] 3 SA 391, 454 [156] n 171 (Ackermann J); *PJB v Melbourne Health* (2011) 39 VR 373, 448–9 [333] (Bell J) ('*PJB*'); Moshe Cohen-Eliya and Iddo Porat, 'Proportionality and the Culture of Justification' (2011) 59(2) *American Journal of Comparative Law* 463; Murray Hunt, 'Introduction' in Murray Hunt, Hayley J Hooper and Paul Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart Publishing, 2015) 1, 15–16.

decision or statutory provision in Queensland limits a human right, that limit must generally be justified according to a test of proportionality. This new culture of justification interacts with the ethical duties of public servants and lawyers in unfamiliar ways. Public servants have an ethical duty to implement the policy agenda of the government of the day. That deference to the policy choices of government is accentuated for lawyers advising government. The traditional view is that lawyers must stick to the law without straying into questions of policy. But now that limits on human rights must be justified, public servants may need to second-guess the government's policy choices, and lawyers advising on whether the limit is justified will be drawn more closely into the merits of the decision.

This article is divided into three substantive parts. Part II sets out the structure of the *Human Rights Act* and how it gives rise to a new culture of justification for the public service in Queensland. In Part III, the article explores the ethical duties of public servants, setting out the pre-human rights understanding of those duties, before considering the impact of the *Human Rights Act*, asking: can public servants provide full and frank advice that is incompatible with human rights? Does their ethical duty to faithfully implement government policy still apply if the policy breaches human rights? Does the conferral of new human rights on public entities — such as the right to take part in public life — alter their ethical duties?

Part IV segues to the ethical duties of lawyers acting for government. Again, it sets out the traditional view of these duties prior to the introduction of the *Human Rights Act*, and then goes on to explore the new role of lawyers in a human rights paradigm. In particular: can lawyers still stick doggedly to the law when proportionality is a question of mixed fact and law? How can they avoid crossing over from legal advice to policy advice and getting caught up in the merits of a proposal? In considering human rights compatibility, what is the appropriate division of labour between lawyers (who seek to identify options that are 'open') and policy officers (who seek to identify the 'best' option)?

Given that Queensland is the latest Australian jurisdiction to adopt human rights legislation, this article focuses on the Queensland context, grappling with the impact on ethical duties by reference to Queensland laws, professional rules and ethical codes of conduct. However, the article also has relevance for public servants and lawyers operating under a human rights framework in other jurisdictions, such as the Australian Capital Territory ('ACT') and Victoria,² as well as for those advising the Commonwealth as to whether proposed federal legislation is compatible with human rights.³

² *Human Rights Act 2004* (ACT); *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('Victorian Charter').

³ *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

II THE NEW CULTURE OF JUSTIFICATION

The *Human Rights Act* adopts a 'dialogue model' in line with equivalent legislation in the ACT, Victoria and the United Kingdom. Under the dialogue model, each of the three branches of government are given a role to play in protecting and promoting human rights, creating a dialogue between them about how best to achieve that goal. However, at the end of the day, Parliament has the final say.⁴ In Parliament, members who propose new legislation must now table a statement of compatibility, which sets out whether the legislation would be 'compatible with human rights'.⁵ As to the executive, 'public entities' must now act and make decisions in a way that is 'compatible with human rights' (sometimes called the 'substantive limb'), as well as give proper consideration to human rights whenever they make a decision (the 'procedural limb').⁶ Finally, the courts must interpret legislation, if possible, in a way that is 'compatible with human rights'.⁷ If the Supreme Court or Court of Appeal is unable to interpret legislation compatibly with human rights, they have a discretion to issue a declaration of incompatibility.⁸ Rather than invalidate the legislation, the declaration enlivens a procedure that sends the matter back to Parliament for reconsideration. And on goes the dialogue.

The common thread running through these new obligations is the concept of 'compatib[ility] with human rights'.⁹ According to s 8, a measure will be compatible with human rights if (a) it does not limit human rights at all, or (b) it does limit a human right, but that limit is nonetheless justified according to the test of proportionality set out in s 13. Section 13 then sets out a structured way of thinking through whether a limit on human rights is justified. It broadly aligns with the structured proportionality test applied in human rights jurisprudence around the world.¹⁰ According to that test, a limit on human rights will be justified if it meets four requirements:

⁴ 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* (Federation Press, 2017) 22, 23. See also *R v Momcilovic* (2010) 25 VR 436, 462–3 [93]–[96] (Maxwell P, Ashley and Neave JJA). Cf criticisms of the term 'dialogue model': *Momcilovic v The Queen* (2011) 245 CLR 1, 67–8 [95]–[96] (French CJ) ('*Momcilovic*').

⁵ *Human Rights Act 2019* (Qld) s 38 ('*Human Rights Act*').

⁶ *Ibid* ss 58(1)(a), (b).

⁷ *Ibid* s 48.

⁸ *Ibid* s 53(2). While s 53(2) provides that the 'Supreme Court' may make a declaration of incompatibility, the Court of Appeal is a division of the Supreme Court: *Supreme Court of Queensland Act 1991* (Qld) s 5(1)(b).

⁹ *Human Rights Act* (n 5) ss 38(2), 48(1), (2), 53(2), 58(1)(a), (5)(b).

¹⁰ 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* (advance). See also Explanatory Notes, *Human Rights Bill 2018* (Qld) 5, 17; *Owen-D'Arcy v Chief Executive, Queensland Corrective Services* [2021] QSC 273, [104] (Martin J) ('*Owen-D'Arcy*'); *Re*

- the measure must have a proper purpose or legitimate aim;¹¹
- the measure must be rationally connected to that purpose, meaning that it actually helps to achieve that purpose;¹²
- the measure must be necessary, meaning the purpose cannot be achieved in some other way that has a lesser impact on human rights;¹³ and,
- the measure must strike a fair balance between its purpose and the impact on human rights.¹⁴

In combination, these provisions mean that whenever an act, decision or statutory provision in Queensland limits a human right, subject to certain exceptions, that limit must now be justified using the test of proportionality in s 13. In this way, the *Human Rights Act* introduces a ‘culture of justification’.¹⁵ The question explored in this article is what this new culture of justification means for public servants and lawyers who act for government.

III HOW THE *HUMAN RIGHTS ACT* IMPACTS THE ETHICAL DUTIES OF PUBLIC SERVANTS

A *The Ethical Duties of Public Servants Pre-Human Rights*

Public servants in Queensland are required to comply with the Code of Conduct for the Queensland Public Service.¹⁶ The Code of Conduct reflects the ethics values set out in the *Public Sector Ethics Act 1994* (Qld). According to those values, public servants have a ‘duty to uphold the system of government’.¹⁷ Our system of government is one of responsible government, meaning that the executive government is carried out by Ministers who are answerable to Parliament, and through Parliament to the people.¹⁸ Thus, public servants have a ‘duty to operate within the framework of Ministerial responsibility to government, the Parliament

Application under the Major Crime (Investigative Powers) Act 2004 (2009) 24 VR 415, 449 [148] (Warren CJ) (‘*Re Major Crime*’); *R v Oakes* [1986] 1 SCR 103, 138–40 [69]–[71] (Dickson CJ for Dickson CJ, Chouinard, Lamer, Wilson and Le Dain JJ) (‘*R v Oakes*’); *R v Hansen* [2007] 3 NZLR 1, 28 [64] (Blanchard J), 40–1 [103]–[104] (Tipping J), 69 [203]–[204] (McGrath J) (‘*R v Hansen*’); *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, 80 (Lord Clyde for the Judicial Committee); *Huang v Secretary of State for the Home Department* [2007] 2 AC 167, 187 [19] (Lord Bingham for the Judicial Committee); *Bank Mellat v Her Majesty’s Treasury* [No 2] [2014] AC 700, 790–1 [73]–[74] (Lord Reed JSC).

¹¹ *Human Rights Act* (n 5) s 13(2)(b).

¹² *Ibid* s 13(2)(c).

¹³ *Ibid* s 13(2)(d).

¹⁴ *Ibid* ss 13(2)(e)–(g).

¹⁵ See generally n 1.

¹⁶ *Public Sector Ethics Act 1994* (Qld) s 12H.

¹⁷ *Ibid* s 8(1)(a).

¹⁸ *Constitution of Queensland 2001* (Qld) s 42(2). See also *Comcare v Banerji* (2019) 267 CLR 373, 436–7 [148] (Gordon J) (‘*Comcare*’).

and the community'.¹⁹ With the burden of responsibility, Ministers also have democratic legitimacy. For this reason, they have the final say on policy, not public servants.²⁰

The origins of responsible government can be traced back to the Glorious Revolution of 1688.²¹ However, it was the expansion of the franchise in England from the 1830s that gave ministerial responsibility its democratic hue: Ministers became responsible indirectly to the people through a Parliament that reflected the will of the people.²² Around the same time, the increasing size and complexity of government led to the Northcote-Trevelyan civil service reforms, which replaced ministerial patronage with a permanent professional public service based on competitive recruitment and promotion.²³ As a permanent institution, the civil service built an ethos of political neutrality in order to serve successive governments, irrespective of which political party was in power. Queensland inherited responsible government upon separation from New South Wales in 1854.²⁴ Soon afterwards, Queensland also adopted the British model of a permanent civil service.²⁵

Since the mid-1800s, the professionalism of the public service has centred around two key duties:²⁶ (1) to give full and frank advice, but (2) once the government has made a decision with the benefit of that advice, to implement whatever that decision may be.²⁷ As long ago as 1929, the Head of the UK Home Civil Service, Sir Warren Fisher, said:

¹⁹ *Public Sector Ethics Act 1994* (Qld) s 8(1)(c).

²⁰ *Comcare* (n 18) 437–8 [150] (Gordon J). 'Were this not so, the result would be government by the unelected': Ian Killey, *Constitutional Conventions in Australia* (Anthem Press, 2014) 116, quoting Treasury Board of Canada Secretariat, *Meeting the Expectations of Canadians, Review of the Responsibilities and Accountabilities of Ministers and Senior Officials, Report to Parliament* (President of the Treasury Board, 2005) 13.

²¹ Alpheus Todd, *On Parliamentary Government in England: Its Origin, Development, and Practical Operation* (Longmans, Green & Co, 1867) vol 1, 8, 45–6.

²² Elizabeth Wicks, *The Evolution of a Constitution: Eight Key Moments in British Constitutional History* (Hart Publishing, 2006) 61, 76–7.

²³ Stafford H Northcote and C E Trevelyan, *Report on the Organisation of the Permanent Civil Service* (Report, 1854). See also *Comcare* (n 18) 400 [31] (Kiefel CJ, Bell, Keane and Nettle JJ), 413 [70] (Gageler J), 456 [203] (Edelman J).

²⁴ *Australian Constitutions Act 1842* (Imp) 5 & 6 Vict, c 76, s 52.

²⁵ *Civil Service Act 1889* (Qld). That original regulation of the civil service can be traced through the *Public Service Act 1896* (Qld), the *Public Service Act 1922* (Qld), the *Public Service Management and Employment Act 1988* (Qld), and the *Public Service Act 1996* (Qld), to the current *Public Service Act 2008* (Qld).

²⁶ See William Edward Hearn, *The Government of England: Its Structure and its Development* (Robertson, 1867) 238–9, quoted in *Comcare* (n 18) 414–15 [72] (Gageler J).

²⁷ Subject only, perhaps, to 'a fundamental issue of conscience', in which case the public servant should seek to resolve the matter, and then either carry out the instructions as resolved, or resign: Robert Armstrong, 'The Duties and Responsibilities of Civil Servants in Relation to Ministers' in Geoffrey Marshall (ed), *Ministerial Responsibility* (Oxford University Press, 1989) 140, 143–4 [10]–[11]. The importance of civil servants maintaining personal (as distinct from professional) ethical standards is only likely to come to the fore in extreme scenarios, such as the example of the role senior civil servants played in Nazi Germany in implementing the government's policy of the Final Solution: see Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (Penguin Books, first published 1963, 2006 ed) 112–14.

Determination of policy is the function of ministers, and once a policy is determined it is the unquestioned and unquestionable business of the civil servant to strive to carry out that policy with precisely the same good will whether he agrees with it or not. That is axiomatic and will never be in dispute. At the same time it is the traditional duty of civil servants, while decisions are being formulated, to make available to their political chiefs all the information and experience at their disposal, and to do this without fear or favour, irrespective of whether the advice thus tendered may accord or not with the minister's initial view.²⁸

A public servant who provides advice that is obsequious and simply what the government wishes to hear fails to fulfil their duty to provide advice which is full and frank. Not only is such advice less useful to their Minister, it also risks reinstating the old system of patronage by another name. As Ian Killey points out, 'a public service is politicised if public servants are not able to provide frank and fearless apolitical advice, or if "public servants censor themselves as political sycophants"'.²⁹ If necessary, public servants must be bold enough to say to their Minister, as one apparently did in England in the 1920s, 'if you will do such a silly thing, of course you must, but is it essential to you to do it in that silly way'?³⁰ Of course, public servants can ask such bold questions with more tact.

These two key duties are reflected today in the ethics values set out in the *Public Sector Ethics Act 1994* (Qld). Public servants have a 'duty to provide advice which is objective, independent, apolitical and impartial'.³¹ Once decisions are made with the benefit of that advice, public servants 'are committed to effecting official public sector priorities, policies and decisions professionally and impartially'.³² Of course, public servants also have other ethical duties,³³ but it is these two ethical duties that have endured the longest and which will tell us most about the impact of the *Human Rights Act*.

²⁸ Royal Commission on the Civil Service, *Minutes of Evidence Taken Before the Royal Commission on the Civil Service (1929–30)* (His Majesty's Stationery Office, 1930) 1268 [11], quoted in Ivor Jennings, *Cabinet Government* (Cambridge University Press, 3rd ed, 1959) 125. Generations later, another Head of the Home Civil Service, Sir Robert Armstrong, restated the same principle in remarkably similar terms: Armstrong (n 27) 141–2 [5].

²⁹ Killey (n 20) 121–22, quoting RFI Smith and David Corbett, 'Responsiveness Without Politicisation: Finding a Balance' in Colin Clark and David Corbett (eds), *Reforming the Public Sector: Problems and Solutions* (Allen & Unwin, 1997) 27, 28.

³⁰ Killey (n 20) 122.

³¹ *Public Sector Ethics Act 1994* (Qld) s 6(b).

³² *Ibid* s 8(b).

³³ In particular, s 7 of the *Public Sector Ethics Act 1994* (Qld) recognises a duty to promote the public good. Notions of the public trust and the public interest are influential in the US and Canada but have been criticised as allowing public servants to determine what is in the public interest according to subjective considerations: see, eg, Bradley Selway, 'The Duties of Lawyers Acting for Government' (1999) 10(2) *Public Law Review* 114, 120–1. While that debate is important, it need not be explored in this article in order to consider the impact of the *Human Rights Act* (n 5) on the ethical duties of public servants more broadly.

B *The New System of Government that Public Servants Uphold*

On a fundamental level, the *Human Rights Act* tinkers with the system of government that public servants are to uphold. As we saw in the last section, public servants help Ministers to be responsible to Parliament, and through Parliament to the people. The traditional view is that human rights are unnecessary in a system of responsible government. The worst excesses of executive power are curbed by holding Ministers to account in Parliament, and the worst excesses of legislative power are curbed by holding Parliament to account at the ballot box. As Sir William Harrison Moore said in 1902, ‘the rights of the individual are sufficiently secured by ensuring, as far as possible, to each a share, and an equal share, in political power’.³⁴ On this view, should Parliament abuse its power, it is up to ‘the people themselves to resent and reverse’ the abuse.³⁵ The traditional faith in parliamentary supremacy was formed at a time when it was thought that the only alternative on offer was the American model of entrenching a bill of rights and giving unelected judges the final say about human rights.

By passing the *Human Rights Act*, the Queensland Parliament has acknowledged that ministerial responsibility and democratic elections do not always guarantee respect for human rights. The Queensland Parliament also recognised that the American model is not the only alternative on offer. Beginning in 1990, one by one, New Zealand, the United Kingdom, the ACT and Victoria have all shown that there is a third way, what Stephen Gardbaum terms the ‘new Commonwealth model of constitutionalism’.³⁶ Queensland’s *Human Rights Act* follows in that Commonwealth tradition by adopting a ‘dialogue model’ for the protection of human rights, meaning that Parliament has the final say about the protection of human rights, not the courts. The dialogue model also harnesses the accountability mechanisms of responsible government and democracy. Through statements of compatibility, Ministers must now be upfront with Parliament about whether any legislation they propose would be compatible with human rights.³⁷ Parliamentary committees then scrutinise Bills for compatibility with human rights and double check the Minister’s workings.³⁸ When these processes reveal that the proposed legislation would not be compatible with human rights,

³⁴ William Harrison Moore, *The Constitution of the Commonwealth of Australia* (John Murray, 1902) 329. See also *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 136, 139–40 (Mason CJ); *McCloy v New South Wales* (2015) 257 CLR 178, 202 [27] (French CJ, Kiefel, Bell and Keane JJ), 226 [110]–[111] (Gageler J), 258 [219] (Nettle J) (‘McCloy’); *Murphy v Electoral Commissioner* (2016) 261 CLR 28, 68 [87] (Gageler J).

³⁵ *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 152 (Knox CJ, Isaacs, Rich and Starke JJ).

³⁶ Stephen Gardbaum, ‘The New Commonwealth Model of Constitutionalism’ (2001) 49(4) *American Journal of Comparative Law* 707; Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge University Press, 2013).

³⁷ *Human Rights Act* (n 5) s 38.

³⁸ *Ibid* s 39.

Parliament is ‘required to confront that choice squarely’³⁹ and ‘accept the political cost’.⁴⁰ The *Human Rights Act* not only works to bring human rights questions to the attention of Parliament and the people, it also safeguards their say by protecting human rights that are essential to a functioning democracy, including the right to take part in public life.⁴¹ Indeed, as the preamble states, ‘[h]uman rights are essential in a democratic and inclusive society’. In this way, the *Human Rights Act* moves beyond a narrow view of democracy as brute majoritarianism to a richer conception of democracy, in which ‘each citizen ha[s] not only an equal part in government but an equal place in its concern and respect’.⁴²

What all of this means is that public servants in Queensland now work to uphold a subtly, yet profoundly, different system of government. Public servants are no longer mere tools to pursue the public good at any cost. In a system of government committed to self-restraint, it is ultimately public servants who do the restraining. They are now like Ulysses’ crew who tied him to the mast of the ship to help him resist the lure of the Sirens’ call. In one sense, this is a new and uncomfortable position for public servants to find themselves in. In another sense, none of this is revolutionary. If public servants were not counselling against the worst excesses of executive and legislative power before the *Human Rights Act*, then they were not doing their job of giving frank advice to assist Ministers in their responsibility to Parliament. However, as will be seen, the *Human Rights Act* does bring a new clarity to old duties.

C Public Servants Developing and Implementing Policy Post-Human Rights — New Rights and New Duties

The *Human Rights Act* affects public servants in two ways. It imposes new duties on them to act compatibly with human rights, but it also extends new human rights to public servants. We argue that nothing in the *Human Rights Act* displaces the two core ethical duties of public servants: (1) to fearlessly advise in the formulation of policy, and then (2) to loyally implement the policy choices of the government of the day. Rather, a human rights framework reinforces those ethical duties and offers public servants a more detailed roadmap for how to go about fulfilling their ethical duties.

³⁹ *Minogue v Victoria* (2018) 264 CLR 252, 277 [76] (Gageler J) (albeit in relation to the override clause) (‘*Minogue v Victoria*’).

⁴⁰ *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115, 131 (Lord Hoffman) (albeit in relation to the principle of legality).

⁴¹ *Human Rights Act* (n 5) s 23.

⁴² Ronald Dworkin, *Freedom’s Law: The Moral Reading of the American Constitution* (Harvard University Press, 1996) 70.

Public servants are, of course, human beings. By virtue of being human, they hold human rights,⁴³ some of which are critical to fulfilling the ethos of public service. For example, the right of equal access to the public service⁴⁴ helps to ensure a diverse and professional public service appointed on merit.⁴⁵ And it is only by exercising their freedom of expression⁴⁶ that public servants can give full and frank advice to Ministers. As citizens, public servants also retain a right to take part in their political community.⁴⁷ Public servants do not surrender these rights upon entering the public service.⁴⁸ Indeed, the *Human Rights Act* recognises that human rights are inalienable and incapable of being forfeited.⁴⁹ However, the human rights of public servants do need to be balanced against the right of the community as a whole to an 'effective political democracy'.⁵⁰ An independent and apolitical public service is critical to ensuring an effective political democracy.⁵¹

Ethical duties that demand too much of public servants may not be compatible with human rights. Case law in Canada and Europe tells us that a duty of loyalty that prevents a public servant from making allegations of corruption would be incompatible with their freedom of expression.⁵² Likewise, a blanket ban on all public servants being a member of a political party would not strike a fair balance between the human rights of public servants and the need for an apolitical public service.⁵³ For example, it would go too far to prevent school teachers from belonging to a political party. In Queensland, the Code of Conduct recognises this by stating, '[o]ur work as a public service employee does not remove our right to be active privately in a political party, professional organisation or trade union.'⁵⁴ On the other hand, even deep limits on the political rights of public servants may be justified if the measure is targeted at particular public servants for whom there is a particular need for independence. For example, the Electoral Commission of

⁴³ See *Human Rights Act* (n 5) Preamble cl 2, s 11.

⁴⁴ *Ibid* s 23(2)(b).

⁴⁵ Human Rights Committee, *General Comment No 25*, 57th sess, UN Doc CCPR/C/21/Rev.1/Add.7 (27 August 1996) annex V ('General Comments under Article 40, Paragraph 4 of the International Covenant on Civil and Political Rights') 7 [23]. We contend that the right of equal access to the public service is largely fulfilled by the merit principle set out in s 27 of the *Public Service Act 2008* (Qld). Of course, to ensure a truly diverse public service, there may need to be special measures or affirmative action as envisaged by s 15(5) of the *Human Rights Act* (n 5): see, eg, *Re Ipswich City Council* [2020] QIRC 194, [54]–[66] (Merrell DP).

⁴⁶ *Human Rights Act* (n 5) s 21.

⁴⁷ *Ibid* s 23(1).

⁴⁸ *Lane v Franks*, 573 US 228, 231 (Sotomayor J for the Court) (2014).

⁴⁹ See *Human Rights Act* (n 5) Preamble cl 2, s 41.

⁵⁰ *Ahmed v United Kingdom* (2000) 29 EHRR 1, 35–7 [49]–[54]. See also *Goryaynova v Ukraine* (2021) 73 EHRR 4, 102 [49] ('Goryaynova').

⁵¹ Albeit in the context of the implied freedom of political communication, see *Comcare* (n 18) 399 [31], 404–5 [42] (Kiefel CJ, Bell, Keane and Nettle JJ), 423 [100]–[101] (Gageler J), 439 [155] (Gordon J), 451–2 [190], 455–6 [202] (Edelman J).

⁵² *Goryaynova* (n 50) 102 [50], 104–5 [61].

⁵³ *Osborne v Canada (Treasury Board)* [1991] 2 SCR 69, 100 (Sopinka J for Sopinka, Cory and McLachlin JJ); *Vogt v Germany* (1996) 21 EHRR 205, 237–9 [59]–[61]. See also *Comcare* (n 18) 422 [98] (Gageler J).

⁵⁴ Public Service Commission, *Code of Conduct for the Queensland Public Service* (at 1 January 2011) 6 [1.4].

Queensland must stand above any suggestion of party politics to ensure trust in the outcome of elections. Accordingly, it may be legitimate to demand that the Commission's employees forfeit any membership of a political party.⁵⁵

For the most part, it is clear that the human rights of public servants do not trump their ethical duties to provide impartial advice and to faithfully implement government policies. They cannot rely upon their freedom of conscience⁵⁶ to thwart government policy. They cannot exercise their freedom of expression⁵⁷ to give advice to a Minister that is subjective, partisan or partial. This was recently made clear by the Queensland Industrial Relations Commission in the case of *Gilbert v Metro North Hospital Health Service*.⁵⁸ That case concerned an alleged breach of the Public Service Code of Conduct by a nurse for speaking to the media without making clear she was speaking in her capacity as a representative of a trade union, rather than as a public service employee. The Industrial Relations Commission found that the Code of Conduct limits freedom of expression under the *Human Rights Act*, but that that limit is justified by the need to maintain 'a high performing apolitical public service'.⁵⁹ Ultimately, 'a public sector employee cannot contravene the behavioural expectations of their employer and expect immunity in reliance on the [*Human Rights Act*] in respect of their rights to freedom of expression and freedom of association'.⁶⁰ Otherwise, the human rights of public servants will come at the cost of an effective political democracy.

New rights are only one side of the coin. The other side of the coin is that the *Human Rights Act* imposes new human rights obligations on 'public entit[ies]' under s 58. It is clear that public servants are 'public entit[ies]'.⁶¹ But do they owe these human rights obligations when carrying out their functions of advising Ministers and implementing government policy?

There are good arguments that public servants are not directly subject to these human rights obligations when helping to formulate policy or to implement policy. In the context of the *New Zealand Bill of Rights Act 1990* (NZ), Andrew Butler and Petra Butler have argued that 'policy development work, including proposals in Cabinet papers', are not caught by the obligation to act compatibly with human rights, because they do not amount to 'acts' at all.⁶² They have 'no legal or

⁵⁵ *Re Victorian Electoral Commission* (2009) 31 VAR 445, 459 [90], 460 [92], [99], 465–6 [139]–[140] (Harbison VP). The *Electoral Act 1992* (Qld) does disqualify party members from certain roles in the Electoral Commission of Queensland: see ss 13(b), 22(4), 25(2)(b), 30(4), 31(2)(b), 32(2)(b), 32A, 121C(3).

⁵⁶ *Human Rights Act* (n 5) s 20(1).

⁵⁷ *Ibid* s 21.

⁵⁸ [2021] QIRC 255.

⁵⁹ *Ibid* [375] (O'Connor VP). See also at [376]–[380], [473]. However, those observations may be obiter dicta given that the Commission found there was no piggy-back cause of action available in respect of the applicant's complaints about the Code of Conduct: at [358].

⁶⁰ *Ibid* [377].

⁶¹ *Human Rights Act* (n 5) s 9(1)(b).

⁶² Andrew Butler and Petra Butler, *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis, 2nd ed, 2015) 116 [5.2.11].

practical effect or status'.⁶³ Arguably, for the same reasons, policy development in Queensland might not amount to an 'act' or 'decision', such that s 58 of the *Human Rights Act* does not apply.

The counterargument is that the *Human Rights Act* is intended to apply to all acts and decisions of public entities, no matter how large or small the action, and no matter how junior or senior the public entity: the 'consideration of human rights is intended to become part of decision-making processes at all levels of government'.⁶⁴ Further, 'Parliament in enacting [s 58 of the *Human Rights Act*] clearly intended that human rights would be considered from the early stages of the development of government policy'.⁶⁵ On this view, public servants have an obligation to think about human rights in everything they do, including the formulation of policy.

But even on this view, public servants are largely shielded from scrutiny before the courts by the 'piggyback clause' in s 59 of the *Human Rights Act*. The piggyback clause provides that a person can only challenge a public entity's act or decision on human rights grounds if the person is able to say that the public entity's act or decision was already unlawful for some other reason. For policy work, any piggyback cause of action is likely to lie against the person ultimately responsible for the policy: generally, a more senior public servant or the Minister.⁶⁶

Consequently, in the vast majority of cases, the public servant's obligation under s 58 of the *Human Rights Act* will likely be an imperfect obligation: they have to comply with it, but there are no legal consequences if they do not.⁶⁷ That the obligation is imperfect does not detract from its importance. Still, public servants should not shy away from giving full and frank advice for fear that they will be acting unlawfully in doing so. For example, they should not hesitate to recommend that an override declaration be enacted where the government can only achieve its policy objective by breaching human rights, even though the

⁶³ Ibid.

⁶⁴ *Waratah Coal Pty Ltd v Youth Verdict Ltd* [2020] QLC 33, [43] (Kingham P) ('*Waratah Coal*'), quoting *Castles v Secretary of the Department of Justice* (2010) 28 VR 141, 184 [185] (Emerton J) ('*Castles*'). See also *Bare v Independent Broad-Based Anti-Corruption Commission* (2015) 48 VR 129, 203 [235] (Tate JA): 'the Charter [is] intended to have a normative effect on the conduct of public authorities' ('*Bare*').

⁶⁵ *Certain Children v Minister for Families and Children* [No 2] (2017) 52 VR 441, 503 [195] (Dixon J) ('*Certain Children* [No 2]').

⁶⁶ See *Minogue v Dougherty* [2017] VSC 724, [8]–[11], [76]–[78] (Dixon J) (where the absence of a delegation suggested that the prison Governor was the appropriate public entity, not the more junior prison officer whose decision was challenged).

⁶⁷ However, it should be noted that a breach of s 58(1) of the *Human Rights Act* (n 5) may be the subject of a complaint to the Queensland Human Rights Commission under pt 4, even if the complainant does not have available an independent cause of action.

recommendation itself may not be compatible with human rights.⁶⁸ The *Human Rights Act* allows for this course of action.⁶⁹

Further, once the Minister has landed upon a policy choice, arguably, a public servant cannot decline to implement the policy on human rights grounds. The Directors-General — who head up the public service for each department — are required to follow the directions given by their Minister, and they are required to implement goals in accordance with the government's policies and priorities.⁷⁰ Below the Director-General, the public servants of each department have an obligation at common law to follow any lawful and reasonable direction given in the course of their employment, which would include a direction to implement the policy of the government of the day.⁷¹ Failure to do so may give rise to disciplinary action.⁷² Arguably, this means that the exception in s 58(2) of the *Human Rights Act* applies. That exception provides that public entities are relieved of their human rights obligations under s 58(1) where 'the [public] entity could not reasonably have acted differently or made a different decision ... under law'.⁷³ The counterargument would be that the public entity still has a discretion not to follow the direction.⁷⁴ This is because the common law duty of employees is only to comply with 'lawful' directions, and a direction which breaches s 58(1) would not be 'lawful'. However, a breach of s 58(1) is a non-jurisdictional error of law, meaning that Parliament intended for the act or decision to have continuing validity despite the breach.⁷⁵ That is, Parliament intended for a direction to a public servant in breach of s 58(1) to be valid, even though it is 'unlawful'. It is unlikely that a public servant can ignore a valid direction because they consider it would breach human rights. At least, '[i]t would be a brave officer who chose in such circumstances to disobey and chance his or her luck with testing the [lawfulness of the direction] in the courts.'⁷⁶ Unless and until a public servant takes that drastic step, the direction would remain binding, such that s 58(2)

⁶⁸ An example might be a recommendation to include an override declaration for national uniform legislation in order to ensure that the application of the *Human Rights Act* (n 5) in Queensland does not result in a different interpretation in Queensland, compared to another jurisdiction, undermining the objective of uniformity. See, eg, *Legal Profession Uniform Law Application Act 2014* (Vic) s 6; Explanatory Memorandum, *Legal Profession Uniform Law Application Bill 2013* (Vic) 4. Cf Michael Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (Victorian Government Printer, 2015) 203–9 (recommendation 47).

⁶⁹ *Human Rights Act* (n 5) s 43. In relation to the Victorian Charter, see *Minogue v Victoria* (n 39) 277 [75]–[76] (Gageler J).

⁷⁰ *Public Service Act 2008* (Qld) ss 98(1)(a), 100.

⁷¹ *R v Darling Island Stevedoring & Lighterage Co Ltd; Ex parte Halliday; Ex parte Sullivan* (1938) 60 CLR 601, 621–2 (Dixon J); *Bennett v President, Human Rights and Equal Opportunity Commission* (2003) 134 FCR 334, 362 [117] (Finn J).

⁷² *Public Service Act 2008* (Qld) s 187(1)(d).

⁷³ *Human Rights Act* (n 5) s 58(2).

⁷⁴ For Victorian authority that the equivalent exception in the Victorian Charter applies where the public entity does not have a discretion, see *PJB* (n 1) 423 [230] (Bell J); *Bare* (n 64) 201 [227] (Warren CJ), 234 [324], 235–6 [326] (Tate JA), 301 [547] (Santamaria JA).

⁷⁵ *Human Rights Act* (n 5) s 58(6)(a).

⁷⁶ Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Lawbook Co, 6th ed, 2017) 201 [4.70].

would apply to relieve them of their human rights obligations. Accordingly, public servants should not withhold their advice or decline to implement policy choices for fear of breaching their own human rights obligations.

D *Consideration of Human Rights by Proxy*

Whether or not policy officers owe human rights obligations themselves, it is clear they will be advising entities that do have such obligations. The consideration public entities give to human rights is inextricably linked to the consideration given by the ultimate decision-maker. When a Minister introduces a Bill into the Legislative Assembly, they must set out in a statement of compatibility whether, in their opinion, the Bill is compatible with human rights.⁷⁷ Ministers can only form that opinion with the benefit of the full and frank advice of public servants. Further, when a Minister makes a major decision — such as a decision to grant a mining approval⁷⁸ — they must do so in a way that is compatible with human rights.⁷⁹ Ministers will rely on full and frank advice to come to such a conclusion. Some public servants themselves will also make important decisions, which must be compatible with human rights. For example, the Director-General of the Department of Justice and Attorney-General makes important decisions about blue cards under the *Working with Children (Risk Management and Screening) Act 2000* (Qld), which have repercussions for access to employment as well as the safety of children.⁸⁰ In turn, the Director-General will rely on the advice of more junior public servants about whether the decision is compatible with human rights. When providing advice to the Minister or more senior public servants, public servants may not themselves be exposed to litigation or a complaint for failing to consider human rights. But it would be remiss of them not to turn their minds to the human rights obligations of Ministers or more senior public servants, and to provide advice about whether proposed legislation, acts or decisions would be compatible with human rights.

The risk of not doing so was borne out in *Certain Children v Minister for Families and Children [No 1]* ('*Certain Children [No 1]*'), the first iteration of the *Certain Children* litigation in Victoria.⁸¹ A briefing paper had been prepared for the Minister to support a decision to gazette the Grevillea unit — a wing of an adult maximum security prison — as a 'youth justice centre'.⁸² The conditions in the Grevillea unit were harsh. Children were kept in solitary confinement in cells built

⁷⁷ Human Rights Act (n 5) ss 38(1), (2).

⁷⁸ See, eg, *Waratah Coal* (n 64) [53] (Kingham P).

⁷⁹ Human Rights Act (n 5) s 58.

⁸⁰ See, eg, *Storch v Director-General, Department of Justice and Attorney-General* [2020] QCAT 152 (Member Stepniak) (albeit in relation to the subsequent human rights obligations of QCAT).

⁸¹ *Certain Children v Minister for Families and Children [No 1]* (2016) 51 VR 473 ('*Certain Children [No 1]*').

⁸² *Ibid* 478 [17] (Garde J).

for adult men for up to 20 hours a day, the children were handcuffed when being escorted to exercise yards, and corrections officers carried capsicum spray.⁸³

There could have been little doubt that the human rights of the children were, at the very least, raised on the facts of the decision. Yet, in the 14 paragraphs that made up the briefing paper to the Minister, there was no mention of human rights at all. In the absence of any hint that human rights had been considered, Garde J noted that the serious impact on human rights of the children was ‘unplanned and largely unforeseen’:

It is not a situation where a meticulous decision-maker fully evaluated the human rights in question coming to a careful and controlled decision limiting the impact on human rights.

Rather the impacts on human rights were collateral and unintended in the circumstances that occurred. They were not proportionate. There was no diligent or methodical analysis of the nature of the human rights, the purpose, nature, extent or importance of any limitation. There was no consideration as to whether there were less restrictive means available. The consequences were serious ...⁸⁴

The complete failure to consider human rights meant that the Minister’s decision was unlawful under the procedural limb. Justice Garde made a declaration to that effect. Thus, a public servant’s failure to consider human rights can have very real consequences for the person they are advising, as well as for the government more broadly.⁸⁵

During the transition to a culture of justification, it is only natural that public servants will be reluctant to engage with human rights, being unfamiliar with the concepts and wary of the risks. Yet, some of the reasons for hesitancy people may have should be dispelled. First, policy objectives and human rights are not mutually exclusive. In fact, the ultimate objective of many policies is the fulfilment of human rights.⁸⁶ Take, for example, the implementation of policy measures to enforce social distancing requirements and other COVID-19 responses. The goal of those measures was to protect the health and safety of the community in a global pandemic. Protection of health and safety by the State of its citizens is the fulfilment of the right to life.⁸⁷ Similarly, legislation designed to strengthen the response to domestic and family violence fulfils the right to

⁸³ Ibid 482 [50], 484 [62], 485 [65], 491 [108] (Garde J).

⁸⁴ Ibid 515 [221]–[222] (Garde J).

⁸⁵ Conversely, ‘[a] detailed brief that informed the decision’ may lead a court to give some deference to the decision when reviewing on human rights grounds: *Certain Children [No 2]* (n 65) 508 [217] (Dixon J).

⁸⁶ Vanessa MacDonnell, ‘The Civil Servant’s Role in the Implementation of Constitutional Rights’ (2015) 13(2) *International Journal of Constitutional Law* 383, 388.

⁸⁷ *Human Rights Act* (n 5) s 16. See, eg, *Innes v Electoral Commission of Queensland [No 2]* (2020) 5 QR 623, 683 [295] (Ryan J) (‘Innes’); Statement of Compatibility, COVID-19 Emergency Response Bill 2020 (Qld) 22.

security of the person and the protection of families and children.⁸⁸ Right to information legislation is the fulfilment of freedom of expression.⁸⁹ Facilitating traditional Torres Strait Islander adoption practices is the fulfilment of cultural and kinship rights.⁹⁰ Policy goals are very often human rights goals.

Second, the questions asked by the test of proportionality in s 13 of the *Human Rights Act* are the same questions that are already asked in any sound policy-making process. All of the elements of the test in s 13 reinforce good policy work.⁹¹ It asks all the same questions: what am I doing? Why am I doing it?⁹² Is it going to work?⁹³ Is there something else I could do that better respects the rights of individuals?⁹⁴ Does this strike a fair balance between the competing considerations?⁹⁵ At its core, s 13 really just offers public servants an opportunity to double check their policy rationale (or the policy rationale offered by the government). While there is nothing new in policy officers second-guessing the policy proposals of government when providing advice, there is something new in the sophistication demanded by the proportionality test in s 13.⁹⁶ It gives rigour to the advice that public servants must give to their Minister or to the government.

As Mary Dawson, a very senior public servant in Canada, put it after a decade of the *Canadian Charter of Rights and Freedoms*:

The *Charter* has had a salutary effect on the policy-development process. Certainly, it has complicated the responsibilities of the policy planner. However, the need to identify evidence, rationales, and alternatives, when assessing policies for *Charter* purposes, has enhanced the rationality of the policy-development process.⁹⁷

Of course, the gold standard of policy work is not always possible. The reality is that public servants do not always have the luxury of time to consider the issues and gather evidence when formulating policy. In the face of a direction from above, they may also not be at liberty to adapt the policy to avoid impacts on

⁸⁸ *Human Rights Act* (n 5) ss 26, 29(1). It is clear victims of crime have human rights: see, eg, *R v Mills* [1999] 3 SCR 668, 718 [72], 723–4 [85], 727 [90], 729 [94] (McLachlin and Iacobucci JJ for L'Heureux-Dubé, Gonthier, McLachlin, Iacobucci, Major, Bastarache and Binnie JJ).

⁸⁹ *Human Rights Act* (n 5) s 21. See, eg, *T34 and Queensland Police Service* [2020] QICmr 1, [26], citing *XYZ v Victoria Police* (2010) 33 VAR 1, 98 [573] (Bell J); *Horrocks v Department of Justice* [2012] VCAT 241, [110] (Ginnane J).

⁹⁰ *Human Rights Act* (n 5) s 28(2)(c). See, eg, Statement of Compatibility, Meriba Omasker Kaziw Kazipa (Torres Strait Islander Traditional Child Rearing Practice) Bill 2020 (Qld) 2.

⁹¹ Chris Humphreys, Jessica Cleaver and Catherine Roberts, 'Considering Human Rights in the Development of Legislation in Victoria' in Julie Debeljak and Laura Grenfell (eds), *Law Making and Human Rights* (Lawbook Co, 2020) 209, 215 [7.40]; Mattias Kumm, 'The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review' (2010) 4(2) *Law & Ethics of Human Rights* 141, 150.

⁹² *Human Rights Act* (n 5) s 13(2)(b).

⁹³ *Ibid* s 13(2)(c).

⁹⁴ *Ibid* s 13(2)(d).

⁹⁵ *Ibid* ss 13(2)(e)–(g).

⁹⁶ *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, 547 [27] (Lord Steyn) (the proportionality criteria 'are more precise and more sophisticated').

⁹⁷ Mary Dawson, 'The Impact of the Charter on the Public Policy Process and the Department of Justice' (1992) 30(3) *Osgoode Hall Law Journal* 595, 603.

human rights. The *Human Rights Act* will often bend to meet the reality of those pressures, but sometimes the *Human Rights Act* will demand a higher standard of policy work despite those pressures.

Insofar as these pressures are time constraints, the time available in which to make a decision may be relevant to the level of consideration that must be given to human rights.⁹⁸ But time constraints will not excuse a complete failure to consider human rights. As Garde J said in *Certain Children [No 1]*:

In an emergency or extreme circumstance, or where critical decisions have to be made with great haste, there are grave risks that human rights may be overlooked or broken, if not life or limb endangered. The existence of an emergency, extreme circumstance or need for haste confirms, not obviates, the need for proper consideration to be given to relevant human rights.⁹⁹

Public servants may need to make time to consider the impact on human rights, and to be brave enough to ask for more time when the impact on human rights cannot be properly thought through in the time available.¹⁰⁰

When it comes to evidence, public servants need to remember that the burden of justifying a limit on human rights rests with the State or the public entity.¹⁰¹ Evidence will not always be needed to justify limits on human rights. For example, in some cases it may be ‘obvious or self-evident’ that the measure is effective and that no other alternative would be as effective.¹⁰² But more often than not, evidence will be required. Not only that, the evidence will need to be ‘cogent and persuasive’.¹⁰³ In this way, s 13 reinforces an evidence-based approach to policy development. Sometimes it will require a public servant to advise their Minister that a limit on human rights cannot be justified unless evidence can be found to support the measure.

Sometimes, the government will have a rigid policy agenda, which policy officers have little ability to influence. Their role may be confined to attempting to justify the limits the policy imposes on human rights. Retrofitting is not bad in principle, provided the outcome of the justification analysis is not predetermined. If a policy’s impact on human rights cannot be justified, a public servant has an ethical duty to tell their Minister, and all the more so if they think their Minister

⁹⁸ *Minogue v Thompson* [2021] VSC 56, [66], [69] (Richards J) (*‘Minogue v Thompson’*).

⁹⁹ *Certain Children [No 1]* (n 81) 508 [188].

¹⁰⁰ On the impact on proposed legislation of compressed timeframes, see: Humphreys, Cleaver and Roberts (n 91) 219 [7.70].

¹⁰¹ *R v Oakes* (n 10) 136–7 (Dickson CJ for Dickson CJ, Chouinard, Lamer, Wilson and Le Dain JJ); *Multani v Commission Scolaire Marguerite-Bourgeoys* [2006] 1 SCR 256, 282 [43] (Charron J); *R v Hansen* (n 10) 42 [108] (Tipping J); *Re Major Crime* (n 10) 448–9 [147] (Warren CJ); *PJB* (n 1) 441–2 [310] (Bell J); *Owen-D’Arcy* (n 10) [108], [128], [175] (Martin J).

¹⁰² *R v Oakes* (n 10) 138 [68] (Dickson CJ for Dickson CJ, Chouinard, Lamer, Wilson and Le Dain JJ). See also *R v Hansen* (n 10) 76 [232] (McGrath J); *DPP (Vic) v Kaba* (2014) 44 VR 526, 572–3 [161] (Bell J).

¹⁰³ *R v Oakes* (n 10) 138 [68] (Dickson CJ for Dickson CJ, Chouinard, Lamer, Wilson and Le Dain JJ), quoted in *Re Major Crime Act* (n 10) 448–9 [147] (Warren CJ); *Owen-D’Arcy* (n 10) [109], [133] (Martin J).

does not want to hear it. The public service risks being politicised if public servants only provide the advice their Ministers want to hear.

Public servants have a particularly important role to play in the final balancing stage of the proportionality analysis. To conclude that a proposed measure would be compatible with human rights, the public servant must form the view that it would strike a fair balance between the benefit to be gained from achieving the purpose of the measure, weighed against the harm it would cause to human rights.¹⁰⁴ In considering the harm, the policy officer must place themselves in the shoes of the rights-bearers who will be impacted by the measure and consider what is at stake. This final weighing analysis involves a value judgment.¹⁰⁵ But the nature of the value judgment should not be misunderstood. It is a judgment informed by the values of our society, including respect for human rights.¹⁰⁶ It is not a judgment informed by the *personal* values of any particular public servant; it does not provide a backdoor for subjective or partisan advice from public servants.¹⁰⁷

Some might think that public servants should refrain from entering into the value judgment in the final balancing exercise in s 13(2)(g), leaving the most political of the stages of s 13 to those who are politically accountable. But public servants would shirk their duty to provide full and frank advice if they provided incomplete advice on whether a measure is compatible with human rights. To skip the final weighing analysis would be to skip the most important step in answering that question. Moreover, public servants will give bad advice if they simply advise a Minister that the measure will strike a fair balance if the Minister thinks it will. Because our society now places value on human rights, the value judgment is not a blank cheque, even for Ministers.

In helping the Minister to balance the competing values, the public servant must bring to the Minister's attention all available information that bears on the value judgment. This may include statements from international materials and case law about the relative importance of the human right at stake, with which the Minister may not be familiar. For example, if *ad hominem* legislation is being considered to detain a particular person indefinitely, the public servant has a duty to raise the growing international consensus that such legislation would necessarily strike an unfair balance between the need to protect the safety of the

¹⁰⁴ Human Rights Act (n 5) ss 13(2)(e)–(g); Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press, 2012) 340.

¹⁰⁵ *Bank Mellat v Her Majesty's Treasury [No 2]* [2014] AC 700, 790–1 [74] (Lord Reed); *McCloy* (n 34) 219 [89] (French CJ, Kiefel, Bell and Keane JJ).

¹⁰⁶ *R v Oakes* (n 10) 136 (Dickson CJ for Dickson CJ, Chouinard, Lamer, Wilson and Le Dain JJ).

¹⁰⁷ *Dawson* (n 97) 598.

community, on the one hand, and the right not to be subjected to cruel, inhuman or degrading punishment,¹⁰⁸ on the other hand.¹⁰⁹

Not only must public servants bring relevant information to the Minister's attention, as policy officers, their role extends to advising the Minister about where the balance should be struck. This can legitimately include a recommendation to give greater protection to human rights than the bare minimum required to meet the threshold of 'compatibility with human rights'.¹¹⁰ Policy can strive for better than that. Of course, it is the Minister's prerogative to determine where the balance should lie, as well as the level of risk they are willing to incur that a court will disagree, but that does not diminish the task of the policy officer to provide frank and fearless advice. Section 13 not only provides public servants with a platform for giving more rigorous advice, it requires them to do so, consistently with their ethical duties.

IV HOW THE *HUMAN RIGHTS ACT* IMPACTS THE ETHICAL DUTIES OF LAWYERS ACTING FOR GOVERNMENT

A *The Ethical Duties of Lawyers Acting for Government Pre-Human Rights*

Solicitors and barristers hold distinct ethical obligations. If they are also public servants, they will have overlapping ethical duties,¹¹¹ but their ethical duties as public servants may be attenuated by the nature of their role as a lawyer. Legal practitioners are required to act in their client's best interests,¹¹² 'unaffected by their own interests or those of other person(s) or by their perception of the public interest'.¹¹³ Of course, lawyers have other ethical duties, including an overriding duty to the court. However, it is the duty to act in the client's best interests that will tell us most about the impact of the *Human Rights Act* on the role of a lawyer.

That a lawyer's client is the government does not alter the duty to act in that client's best interests. Lawyers acting for government serve the public interest by

¹⁰⁸ *Human Rights Act* (n 5) s 17(b).

¹⁰⁹ See *Vinter v United Kingdom* (2016) 63 EHRR 1, 38 [114]; *Minogue v Victoria* (n 39) 272 [53] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ), 276 [72] (Gageler J); Legal Affairs and Safety Committee (Qld), *Police Powers and Responsibilities and Other Legislation Amendment Bill 2021* (Report No 15, November 2021) 35–7.

¹¹⁰ *Human Rights Act* (n 5) s 8.

¹¹¹ Selway (n 33) 123.

¹¹² Queensland Law Society, *Australian Solicitors Conduct Rules 2012* (at 1 June 2012) rr 4.1.1, 12.1; Bar Association of Queensland, *Barristers' Conduct Rules 2011, as amended* (at 23 February 2018) rr 4(d), 37. The Conduct Rules do not apply to government lawyers who do not hold a practising certificate: *Legal Profession Act 2007* (Qld) s 12. Nonetheless, government lawyers still hold ethical duties, and the Conduct Rules remain a useful reference point: QLS Ethics and Practice Centre, *Guidance Statement No 19 Government Lawyers: Independence and Privilege* (2020) 2 [3], 6 [8].

¹¹³ G E Dal Pont, *Lawyers' Professional Responsibility* (Lawbook Co, 7th ed, 2021) 122 [4.05].

seeking to preserve the legislative and executive power of the State, so that the legislature and the executive have the widest scope possible in which to pursue the public good.¹¹⁴ That is why, in constitutional cases, the Attorney-General will often intervene in court proceedings to support the validity of legislation, even though the government of the day would not necessarily introduce similar legislation. The Attorney-General is concerned with preserving the State's power, not necessarily to exercise that power today, but in case that power is one day needed to achieve the public interest. Lawyers advise government about the limits of legislative and executive power, and trust that whatever government does within those parameters will be in the public interest. The branches of government that have been elected by the public are, after all, best qualified to say what is in the public interest.¹¹⁵ The traditional view is that lawyers avoid invoking their own personal views about the public interest by giving their client advice 'only about the law; the law is a lawyer's area of expertise and they should confine themselves to that expertise'.¹¹⁶ As Bradley Selway, a former Solicitor-General for South Australia, put it:

Considerable care needs to be taken to ensure that any role of lawyers in relation to the ethical behaviour of governments, their agencies and employees does not become an excuse for the involvement of lawyers in moral and policy issues for which they may have no particular expertise and certainly have no authority.¹¹⁷

On the other hand, advice to government agencies may only be helpful if it takes account of the overall policy context. To properly advise in the overall context, lawyers may sometimes need to stray into questions of policy. Doing so is not unethical.¹¹⁸ But, a lawyer advising government must make 'clear to the client what parts of the advice relate to matters where the client is bound to comply and what parts relate to matters where the client's policy opinion is the ultimate determinant'.¹¹⁹ Otherwise, the client may be led to believe that the lawyer's personal views about policy have the sanction of law.

However, when advising government, sometimes lawyers must go beyond the letter of the law to the deeper legal principles at stake. According to Selway, this is because the government has a unique obligation to uphold the rule of law. 'With this in mind, the task for the lawyer acting for government is not to identify his or her own moral beliefs, but rather to identify and apply the accepted moral beliefs and practices of the relevant government system.'¹²⁰ In the Australian context, Gabrielle Appleby has identified three 'core government principles' that

¹¹⁴ Gabrielle Appleby, *The Role of the Solicitor-General: Negotiating Law, Politics and the Public Interest* (Hart Publishing, 2016) 218–23.

¹¹⁵ *Bare* (n 64) 305–6 n 510 (Santamaria JA).

¹¹⁶ Brian J Preston, 'Climate Conscious Lawyering' (2021) 95(1) *Australian Law Journal* 51, 52.

¹¹⁷ Selway (n 333) 121.

¹¹⁸ Dal Pont (n 113) 473 [13.95].

¹¹⁹ Selway (n 333) 121–2.

¹²⁰ *Ibid* 122.

senior government lawyers may need to ‘remind’ government about when government appears to have forgotten about them. These principles are the rule of law (which includes the prohibition on arbitrary exercise of government power, protections of judicial independence and fair process, and extends at least some way towards protecting individual rights), the democratic principle and the federal principle.¹²¹ Lurking in those core government principles is a nascent concern for human rights. But prior to the *Human Rights Act*, a lawyer would generally have been out of place if they were to provide robust and unsolicited advice about the impact of a government measure on human rights.

In the private sector, a parallel development has been the idea of corporate responsibility for human rights. In 2011, the UN Human Rights Council unanimously endorsed¹²² the *UN Guiding Principles on Business and Human Rights*,¹²³ which set out the corporate responsibility of businesses for respecting and promoting human rights. Lawyers’ associations around the world have since adapted the Guiding Principles to the work of lawyers.¹²⁴ In 2015, the International Bar Association recommended that bar associations draw ‘to their members’ attention the ethical considerations that a lawyer should take into account in the field of business and human rights when advising clients’.¹²⁵ The Law Council of Australia has taken up that baton, releasing a position paper in 2016, which sets out the relevance of the Guiding Principles to the Australian legal profession.¹²⁶ The emerging consensus is that lawyers have an ethical duty to give holistic advice to their clients, which extends beyond advice about risks that are strictly legal, to the financial risks and reputational risks that may flow from breaching human rights.¹²⁷ Even before the *Human Rights Act*, an emerging view was that if a lawyer has a duty to provide holistic advice to private companies, *a fortiori* they must have a duty to provide holistic advice to government.

¹²¹ Appleby (n 114) 141.

¹²² Human Rights Council, *Human Rights and Transnational Corporations and Other Business Enterprises*, HRC Res 17/4, 17th sess, Agenda Item 3, UN Doc A/HRC/RES/17/4 (6 July 2011, adopted 16 June 2011) 2 [1].

¹²³ United Nations, *Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework* (2011) <https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf>.

¹²⁴ See, eg, the summary in Law Council of Australia, *Business and Human Rights and the Australian Legal Profession* (Position Paper, January 2016) 11–12 <<https://www.lawcouncil.asn.au/publicassets/23a50215-bed6-e611-80d2-005056be66b1/1601-Position-Paper-Business-and-Human-Rights-and-the-Australian-Legal-Profession.pdf>>.

¹²⁵ International Bar Association, *IBA Business and Human Rights Guidance for Bar Associations* (2015) 13 <<https://www.ibanet.org/document?id=Business%20and%20Human%20Rights%20Guidance%20for%20Bar%20Associations>>.

¹²⁶ See Law Council of Australia (n 124).

¹²⁷ See, eg, David Nersessian, ‘Business Lawyers as Worldwide Moral Gatekeepers? Legal Ethics and Human Rights in Global Corporate Practice’ (2015) 28(4) *Georgetown Journal of Legal Ethics* 1135, 1183–7.

B The Fundamental Shift in Principle for Lawyers Acting for Government

On a fundamental level, the *Human Rights Act* draws lawyers into advising about matters within the limits of power, not only in extreme scenarios when government needs reminding about the core principles of government, but as a matter of course. Advice about whether proposed legislation would be compatible with human rights is not advice about whether Parliament *can* pass that legislation. Parliament can always enact an override declaration to wind back the operation of the *Human Rights Act*.¹²⁸ Even if Parliament does not enact an override declaration and the Supreme Court later finds that the legislation is incompatible with human rights, the legislation would remain valid.¹²⁹ Similarly, advice about whether a decision of a public entity is compatible with human rights is not advice about whether the decision is valid. Breach of the human rights obligations in s 58 is a non-jurisdictional error.¹³⁰ That is, public entities are authorised 'to go wrong' and make a decision that is not compatible with human rights.¹³¹ Unless and until the decision is set aside on appeal or in a judicial review proceeding, it remains valid.

Of course, the *Human Rights Act* has made these legal questions, which a lawyer is qualified to answer. And in many ways, the *Human Rights Act* merely draws out more explicitly the human rights aspects of the 'core government principles', which already informed advice to government. But the lodestar for the lawyer acting for government is no longer the maximisation of State power. The *Human Rights Act* imposes self-restraint within the limits of power. When providing advice, lawyers now have a role to play in informing government about whether its legislative and executive measures remain within the bounds of its own self-imposed restraints. When conducting litigation, there remains a State interest in defending government measures on human rights grounds,¹³² but not

¹²⁸ *Human Rights Act* (n 5) s 43. Parliament even has power to impliedly repeal the sunset clause in s 45(2) of the *Human Rights Act* (n 5). Victoria did this, for example, in s 74AB(5) of the *Corrections Act 1986* (Vic). Cf *Minogue v Victoria* (n 39) 277 [76] (Gageler J) (the sunset clause 'ensures that a person's human rights once overridden cannot be permanently forgotten. The justification for that person's human rights being overridden must be periodically re-evaluated').

¹²⁹ *Human Rights Act* (n 5) ss 48(4), 54.

¹³⁰ *Ibid* s 58(6).

¹³¹ *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 141 [163] (Hayne J) (in relation to non-jurisdictional errors generally, not non-jurisdictional errors under the *Human Rights Act* (n 5) specifically).

¹³² This was foreseen in the UK long before it was subject to human rights litigation: J Edwards, *The Law Officers of the Crown: A Study of the Offices of Attorney-General and Solicitor-General of England with an Account of the Office of the Director of Public Prosecutions of England* (Sweet & Maxwell, 1964) 308 n 70.

at the cost of undermining the coherence of the *Human Rights Act*.¹³³ That may be why the *Human Rights Act* provides the Attorney-General with a right of intervention in human rights litigation,¹³⁴ even though some manifestation of the State is likely to be a party already.¹³⁵ Whereas a public entity has an immediate interest in winning by any route, the Attorney-General represents the longer-term interest in maintaining an effective human rights system.¹³⁶ Of course, lawyers acting for the Attorney-General act on her instructions, and she has the final say on the submissions to be put to the court on how the *Human Rights Act* is intended to operate (and successive Attorneys-General may hold different views about that). But the Attorney will be aware that the whole point of allowing courts to review government measures for compliance with human rights is to allow for the possibility that sometimes the government will lose. Were it otherwise, litigation under the *Human Rights Act* would be for show and would make a mockery of human rights.

C *Lawyers Acting for Government Post-Human Rights — New Rights and New Duties*

Apart from changes at the level of principle, how exactly does the *Human Rights Act* affect the ethical duties of lawyers who act for government? Like public servants, lawyers may have new rights and duties under the *Human Rights Act*. Again, we argue that these new rights and duties under the *Human Rights Act* do not alter the broad contours of the existing ethical duties of lawyers who act for government, but they do bring lawyers closer to the outer edges of legal advice.

Lawyers, too, believe it or not, are human beings who hold human rights. An important human right for lawyers is freedom of expression.¹³⁷ The *UN Basic Principles on the Role of Lawyers* ('*UN Basic Principles*'), adopted in 1990, recognise

¹³³ A parallel might be drawn to the approach of some Solicitors-General to 'resist the short-term kill, in ignorance of what the long-term aim is': Appleby (n 114) 225, quoting Thomas Pauling, former Solicitor-General of the Northern Territory. Another parallel might be the prosecutor's duty to give a full and firm presentation of the prosecution case, but not to secure a conviction at any cost, and certainly not at the cost of a fair trial. The prosecutor's role is to assist the court to arrive at the truth, 'without any concern as to whether the case is won or lost': *Livermore v The Queen* (2006) 67 NSWLR 659, 669 [48] (McClellan CJ at CL, Johnson and Latham JJ).

¹³⁴ *Human Rights Act* (n 5) s 50(1).

¹³⁵ A contrary view might be that the Attorney-General may only intervene where the State is not already a party. This view has been taken with respect to the Attorney-General's right of intervention under s 78B of the *Judiciary Act 1903* (Cth): *Mullholland v Australian Electoral Commission* (2003) 128 FCR 523, 529 [14] (Black CJ, Weinberg and Selway JJ). However, there is precedent in Queensland and Victoria of the Attorney-General intervening under the *Human Rights Act* (n 5) or the Victorian Charter, even though the State was already a party: *Johnston v Commissioner of Police (Qld)* [2021] QSC 275, [54] (Dalton J); *Kerrison v Melbourne City Council* (2014) 228 FCR 87, 97 [38] (Flick, Jagot and Mortimer JJ).

¹³⁶ See, eg, *Hospice New Zealand v Attorney-General (NZ)* [2021] 3 NZLR 71, 77 [7] (Mallon J): '[t]he Attorney-General represents the public interest, with no particular stance one way or the other on the propriety of assisted dying'.

¹³⁷ *Human Rights Act* (n 5) s 21.

that '[l]awyers like other citizens are entitled to freedom of expression'.¹³⁸ Freedom of speech is not only important to the lawyer personally, but also to their clients, on whose behalf they speak, fearlessly if need be.¹³⁹ Nonetheless, the human rights of lawyers do not trump their ethical duties. According to the *UN Basic Principles*, when lawyers exercise their human rights, they still need to conduct themselves 'in accordance with the law and the recognized standards and ethics of the legal profession'.¹⁴⁰ Ethical rules must be read in light of human rights,¹⁴¹ and in some cases may need to be adjusted to be compatible with human rights.¹⁴² But as a general rule, the limits on what lawyers can do under the ethical rules are justified by reference to the need to protect 'the administration of justice' as well as 'the public'.¹⁴³ Thus, for example, freedom of expression is not a licence to communicate with the court and others in a discourteous or offensive manner. Similarly, freedom of expression is not a licence to express private opinions about policy in the course of providing legal advice.

As to new duties under the *Human Rights Act*, it should first be noted that it is highly unlikely that private lawyers will have any human rights obligations under the Act. They would not be converted into 'functional' public entities¹⁴⁴ merely because they have a retainer to advise or act for government.¹⁴⁵ As public service employees, it is true that government lawyers will themselves be public entities.¹⁴⁶ But that does not mean that their human rights obligations (to the opposing litigant, for example) will trump their ethical duties of partisanship and fidelity to the State as their client. At general law, lawyers owe a fiduciary obligation to give undivided loyalty to their client.¹⁴⁷ Where there is any conflict between acting in the client's best interests and complying with human rights, the exception in s 58(2) of the *Human Rights Act* will relieve the government

¹³⁸ The Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, *Basic Principles on the Role of Lawyers*, Havana, Cuba 27 August to 7 September 1990, [23]. These principles were 'welcome[d]' by UN General Assembly, *Human Rights in the Administration of Justice*, GA Res 45/166, 45th sess, Agenda Item 12[1], UN Doc A/RES/45/166 (18 December 1990) 279 [4].

¹³⁹ *Clyne v New South Wales Bar Association* (1960) 104 CLR 186, 200 (Dixon CJ, McTiernan, Fullagar, Menzies and Windeyer JJ); *Lander v Council of the Law Society (ACT)* (2009) 168 ACTR 32, 51 [37]–[38], 53 [57] (Higgins CJ, Gray and Refshauge JJ); *McDonald v Legal Services Commissioner [No 2]* [2017] VSC 89, [26] (Bell J) ('*McDonald*') (overturned on appeal, but not on Charter grounds).

¹⁴⁰ The Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (n 138) [23].

¹⁴¹ *McDonald* (n 139) [20], [40] (Bell J).

¹⁴² Ethical duties of lawyers will not be compatible with human rights merely because they are ethical duties. Likewise, not all regulation of lawyers will be compatible with human rights: see, eg, *Steur v Netherlands* (2004) 39 EHRR 33, 713–14 [45]–[46].

¹⁴³ *Histed v Law Society of Manitoba* (2007) 287 DLR (4th) 577, [60] (Steel JA, Hamilton and Joyal JJA agreeing).

¹⁴⁴ *Human Rights Act* (n 5) s 9(1)(h).

¹⁴⁵ Certainly, there is New Zealand authority that a lawyer who provides advice to a private client in relation to dealings with government is not thereby performing a public function for the purposes of s 3(b) of the *New Zealand Bill of Rights Act 1990* (NZ): see *Fan v The Queen* [2012] 3 NZLR 29, 42 [51] (Asher J for the Court).

¹⁴⁶ *Human Rights Act* (n 5) s 9(1)(b).

¹⁴⁷ *Dal Pont* (n 113) 225 [6.05].

lawyer of their human rights obligations.¹⁴⁸ This is also consistent with the *UN Guiding Principles on Business and Human Rights*, adopted in 2011, as well as the earlier *UN Basic Principles on the Role of Lawyers*, adopted in 1990. According to the *UN Basic Principles*, '[l]awyers shall always loyally respect the interests of their clients.'¹⁴⁹ While lawyers have a duty to 'seek to uphold human rights and fundamental freedoms', they are to do this by 'protecting the rights of their clients and in promoting the cause of justice'.¹⁵⁰

Of course, there will often be occasions when government lawyers can act compatibly with human rights *and* simultaneously act in their client's best interests. In those circumstances government lawyers will likely still need to comply with their human rights obligations under s 58. For example, when lawyers provide advice to government, they can often provide advice that is both compatible with human rights and in the client's best interests (especially given the client's own human rights obligations).¹⁵¹ Further, when conducting litigation, government lawyers act in accordance with the model litigant principles and the standard of 'fair play'.¹⁵² To some extent, this involves considering the impact of litigation on others, which is entirely consistent with taking into account their human rights, such as the right to a fair hearing.¹⁵³ Beyond the conduct required by the model litigant principles, the client's interests likely take precedence.¹⁵⁴

Nor does the nature of advice about the *Human Rights Act* alter the general rule that lawyers should avoid straying too deeply into questions of policy. It is true that compatibility with human rights is a question of mixed law and fact.¹⁵⁵ For this reason, assessing a policy proposal for compatibility with human rights 'draws [lawyers] more deeply into the facts, the balance that has been struck and the resolution of the competing interests', compared to traditional legal advice, which avoids questions of policy altogether.¹⁵⁶ But it is still possible to draw a

¹⁴⁸ In *Innes* (n 87), the applicant submitted that the Solicitor-General was a public entity and had breached his human rights obligations. Ryan J did not address this submission in the judgment and implicitly rejected it.

¹⁴⁹ The Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (n 138) [15].

¹⁵⁰ Ibid [14].

¹⁵¹ Lawyers may not always be able to provide human rights compatible advice that is also in their client's best interests. For example, government lawyers may advise that it would be appropriate to enact an override declaration under s 43 of the *Human Rights Act* (n 5).

¹⁵² *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333, 342 (Griffith CJ). See also Queensland Government, 'Model Litigant Principles' (4 October 2010) <https://www.justice.qld.gov.au/___data/assets/pdf_file/0006/164679/model-litigant-principles.pdf>.

¹⁵³ *Human Rights Act* (n 5) s 31.

¹⁵⁴ Lawyers may also be shielded from scrutiny as to whether they complied with s 58 of the *Human Rights Act* (n 5) because potential litigants will not have an independent cause of action available to them, as required to agitate a breach of s 58 by the piggyback clause in s 59. In fact, doctrines such as advocates' immunity may remove independent causes of action: see *Attwells v Jackson Lalic Lawyers Pty Ltd* (2016) 259 CLR 1.

¹⁵⁵ *Thompson v Minogue* [2021] VSCA 358, [99] (Kyrou, McLeish and Niall JJA) ('*Thompson*').

¹⁵⁶ *PJB* (n 1) 444 [317] (Bell J) (albeit in relation to the role of a court, rather than a lawyer), quoted in *Certain Children [No 2]* (n 65) 506 [211] (Dixon J).

distinction between the policy inputs that go into a s 13 analysis, and the legal conclusion that results from a s 13 analysis. One way to do this is to mirror the approach taken by courts when reviewing a measure for compatibility with human rights.

When a court reviews an act or decision for compatibility with human rights, its jurisdiction is ‘supervisory’, not ‘substitutionary’.¹⁵⁷ That means the court cannot find that the act or decision breached human rights simply because it takes a different view of the matter on the merits.¹⁵⁸ That said, of course, ‘in the end, the Court must decide for itself whether the public authority has acted incompatibly with human rights’.¹⁵⁹

In the same way, lawyers should approach their role in human rights matters as ‘supervisory’, not ‘substitutionary’. By ‘supervisory’, we do not mean to suggest a hierarchy between policy officers and lawyers. We mean only that lawyers should recognise that their role is one step removed. As Vanessa MacDonnell puts it, lawyers should play a ‘framing or guiding’ role in a human rights context, and should ‘not dictate the finer details of polic[y]’.¹⁶⁰ When a lawyer is asked to give advice about whether a major policy initiative is compatible with human rights, ideally a policy officer will already have attempted the justification analysis called for by s 13 (perhaps with the benefit of high-level, preliminary legal advice). The lawyer can then ‘supervise’ that analysis by drawing attention to any deficiencies or recommending changes to bolster compatibility with human rights. Even if a first attempt has not been made, a lawyer might still be able to undertake the justification analysis if the client has provided clear instructions regarding the policy inputs, including what the policy objective is,¹⁶¹ the evidence that the measure will actually help to achieve that objective,¹⁶² and any consideration given to alternative measures.¹⁶³ Of course, there may be other cases where the policy inputs are self-evident.¹⁶⁴ For example, the purpose of a statutory provision (and therefore the purpose of the limit it imposes on human rights)¹⁶⁵ is ultimately a question of statutory construction, for which a lawyer should not need instructions.

On the other hand, a supervisory approach would not mean eschewing questions of policy altogether. Given the exacting and fact-intensive nature of the justification analysis in s 13, the lawyer may be required to go further in second-guessing policy choices than has previously been considered appropriate.¹⁶⁶ For

¹⁵⁷ *PJB* (n 1) 443–4 [314]–[317] (Bell J); *Certain Children [No 2]* (n 65) 506–8 [211]–[216] (Dixon J); *Minogue v Thompson* (n 98) [81] (Richards J); *Owen-D’Arcy* (n 10) [146]–[149] (Martin J).

¹⁵⁸ *PJB* (n 1) 443 [314] (Bell J).

¹⁵⁹ *Thompson* (n 155) [100] (Kyrou, McLeish and Niall JJA). See also at [98]–[99].

¹⁶⁰ MacDonnell (n 86) 396.

¹⁶¹ *Human Rights Act* (n 5) s 13(2)(b).

¹⁶² *Ibid* s 13(2)(c).

¹⁶³ *Ibid* s 13(2)(d).

¹⁶⁴ *Momcilovic* (n 4) 250 [684] (Bell J).

¹⁶⁵ *Cf Re Application for Bail by Islam* (2010) 4 ACTLR 235, 247 [36], 308 [343] (Penfold J).

¹⁶⁶ Dawson (n 97) 603.

example, a lawyer will need to put to their client any obvious alternative that would appear to achieve the policy objective without harming human rights (or which harms them to a lesser extent). Even if raising the alternative may imply that the client should have made a different policy choice, the lawyer's duty to their client is to advise with candour and courage. Ultimately, lawyers may need to advise that a policy proposal falls down at one of the hurdles in s 13 of the *Human Rights Act* and this may come uncomfortably close to policy advice. 'The degree of risk that will compel the advice that a proposed law [or act or decision] is [incompatible with human rights] is difficult to quantify.'¹⁶⁷ Nevertheless, 'lawyers have to be prepared to give a frank and realistic assessment and to state when a proposed law [or act or decision] is not likely to be acceptable.'¹⁶⁸ While policy officers may see this as an intrusion in the initial stages of the new human rights culture, we know from the experience overseas that the resistance to input from lawyers will likely subside as lawyers and policy officers reconfigure the way they work together in a human rights context.¹⁶⁹

D The Problems with Lawyers Adopting a 'Substitutionary' Approach, and why Policy Officers should Take Up the Challenge of Human Rights Compatible Policy Development

If lawyers themselves attempt to come up with the policy inputs required for a s 13 analysis, they risk 'substituting' their own views on matters of policy. That may not be unethical per se, and the experience in New Zealand, the UK and Canada suggests that, over time, lawyers may come to be embedded as 'important member[s] of the policy-development team'.¹⁷⁰ But the role of lawyers in Queensland has not yet evolved in that direction. Until then, a 'substitutionary' approach by lawyers may prove problematic for a number of reasons.

First, there may be forensic value in policy officers undertaking the compatibility assessment. While the *Human Rights Act* does not require public entities to keep a record of their consideration of human rights,¹⁷¹ practically, such a record will be critical to meet any allegation that the public entity failed to give

¹⁶⁷ Ibid 598.

¹⁶⁸ Ibid. On the courage lawyers may need when advising on human rights matters in a highly charged environment, see: Chief Justice Marilyn Warren, 'Being a Government Lawyer' (Speech, Government Lawyers Conference, 23 June 2017) 15 <<https://www.supremecourt.vic.gov.au/sites/default/files/assets/2017/09/93/569bb23c7/speechgovernmentlawyersconference23062017.pdf>>.

¹⁶⁹ Dawson (n 97) 596, 599; James B Kelly, *Governing with the Charter: Legislative and Judicial Activism and Framers' Intent* (UBC Press, 2005) 493–4; Janet L Hiebert, 'Rights-Vetting in New Zealand and Canada: Similar Idea, Different Outcomes' (2005) 3(1) *New Zealand Journal of Public and International Law* 63, 70.

¹⁷⁰ Dawson (n 97) 599. See also Hiebert (n 169) 69–70, 77; Christopher McCorkindale and Janet L Hiebert, 'Vetting Bills in the Scottish Parliament for Legislative Competence' (2017) 21(3) *Edinburgh Law Review* 319, 331.

¹⁷¹ *Minister for Families and Children v Certain Children* (2016) 51 VR 597, 620 [94] (Warren CJ, Maxwell P and Weinberg JA).

proper consideration to human rights as required by the ‘procedural limb’ in s 58. The court will ‘assume that the respondent decision-maker, doubtless wishing to uphold the validity of the decision, will seek to put into evidence all such materials as will demonstrate that the relevant considerations were taken into account’.¹⁷² As we saw with *Certain Children [No 1]*, a failure to adduce any evidence that human rights were considered will likely lead to a finding that the public entity breached the procedural limb.¹⁷³ But where the only evidence is set out in a legal advice, the public entity will be placed in the invidious position of having to choose whether to waive legal professional privilege or risk failing to provide sufficient evidence to satisfy the procedural limb.¹⁷⁴

Another strategic consideration is that a compatibility assessment carried out by lawyers may be scrutinised more closely by a court. The standard of ‘proper consideration’ for the purposes of the procedural limb is a variable standard which depends on all the circumstances.¹⁷⁵ You will recall that, in *Certain Children [No 1]*, Garde J ruled that the decision to gazette an adult maximum-security prison as a youth justice centre was unlawful, in part because no consideration had been given to the impact on human rights. Following that ruling, a team of government lawyers prepared a human rights assessment for a fresh decision to again gazette the Grevillea unit as a youth justice centre. When the new decision was challenged in *Certain Children v Minister for Families and Children [No 2]*, one reason why Dixon J demanded a higher standard of proper consideration was that ‘the Charter compatibility [had been] carried out by, or under the direction of, the VGSO [the Victorian Government Solicitor’s Office]’.¹⁷⁶ At the very least, when lawyers are asked to prepare a human rights compatibility assessment, they should be aware of these forensic risks, and they should advise their clients where appropriate.

Second, lawyers do not necessarily have any particular expertise in matters of policy.¹⁷⁷ Not only do they not have general training in policy development, more likely than not, they will not have any specific knowledge about the policy proposal at hand. Generally, lawyers will be disconnected from the process of developing the policy under consideration. Because of that disconnect, there is a risk that any policy rationale that a lawyer comes up with will not reflect the actual reason for limiting human rights. We noted above that policy officers do not always have free rein in the policy choices they make. But lawyers are likely to feel

¹⁷² Ibid 620 [95] (emphasis omitted).

¹⁷³ *Certain Children [No 1]* (n 81) 510–11 [197]–[199], [202]–[203] (Garde J). See also *LG v Melbourne Health* [2019] VSC 183, [80]–[83] (Richards J).

¹⁷⁴ Legal professional privilege may also be waived inadvertently: see, eg, *Loiolo v Giles* [2020] VSC 619, [18] (Ginnane J). Further, if legal advice strays too far into questions of policy and was not prepared for the dominant purpose of providing legal advice, legal professional privilege may be lost for the whole advice: eg, *Re King* [2018] FWC 6006, [14]–[16] (Commissioner Wilson).

¹⁷⁵ *Minogue v Thompson* (n 98) [54] (Richards J). See also at [66], [69], [75].

¹⁷⁶ *Certain Children [No 2]* (n 65) 584 [491] (Dixon J).

¹⁷⁷ Selway (n 333) 121; Hiebert (n 169) 100.

even more constrained by the ultimate policy choice of the client, meaning they are more likely to undertake a human rights assessment with a fixed outcome in mind. By contrast, a policy officer who undertakes a compatibility assessment usually has some ability to adjust the policy to make it more compatible with human rights. By aiming to make the justification fit the policy outcome, rather than the other way around, lawyers are more likely to engage in window dressing (though, of course, policy officers are not immune from doing the same). If lawyers do find themselves straining to justify a limit on human rights, they must remember that ultimately it is not their role to ‘rubber stamp a policy that has already been predetermined’.¹⁷⁸

Third, there is value in policy officers considering human rights from the outset of policy development, rather than outsourcing that work to lawyers as an afterthought. After all, one of the objectives of the *Human Rights Act* is to inaugurate a culture of justification across the public sector.¹⁷⁹ As Emerton J said in relation to the equivalent legislation in Victoria:

The Charter is intended to apply to the plethora of decisions made by public authorities of all kinds. The consideration of human rights is intended to become part of decision-making processes at all levels of government. It is therefore intended to become a ‘common or garden’ activity for persons working in the public sector, both senior and junior.¹⁸⁰

Policy officers can only develop human rights expertise by engaging with human rights. If lawyers monopolise human rights, policy officers will never have that opportunity, giving rise to the impression that human rights are a ‘lawyers’ picnic’.¹⁸¹ Moreover, if consideration of human rights does not form an organic part of policy development, the transformative potential of the *Human Rights Act* will be lost. When policy officers think about human rights from the outset, and human rights considerations permeate all steps in the policy process, the policy will be formed under the influence of human rights. If policy officers encounter problems in the process of justifying the policy under s 13, they can tweak the policy to make it more compatible with human rights.¹⁸² Generally, those opportunities have already passed by the time a lawyer thinks about human rights — after the policy has already been developed.

¹⁷⁸ Philippe Sands, ‘Torture Team: Abuse, Lawyers, and Criminal Responsibility’ (2009) 48(2) *Washburn Law Journal* 353, 371.

¹⁷⁹ *Human Rights Act* (n 5) s 3(b).

¹⁸⁰ *Castles* (n 64) 184 [185] (Emerton J), endorsed in *Bare* (n 64) 199 [221] (Warren CJ), 219–20 [279], 223 [288]–[289] (Tate JA), 297–9 [535]–[536], [538] (Santamaria JA); *Hoskin v Greater Bendigo City Council* (2015) 48 VR 715, 725 [35]–[36] (Warren CJ, Osborn and Santamaria JJA).

¹⁸¹ *Director of Housing v Sudi* (2011) 33 VR 559, 596 [212] (Weinberg JA) (albeit in relation to the piggyback clause).

¹⁸² Joanna Davidson, ‘Impact of the Victorian Charter upon Policy and Legislative Development’ in Julie Debeljak and Laura Grenfell (eds), *Law Making and Human Rights* (Lawbook Co, 2020) 324, 351–2 [10.220].

Finally, lawyers and policy officers bring a fundamentally different perspective to human rights questions. As Brems puts it, '[d]etermining whether or not any particular measure that restricts a human right constitutes a violation of that right is the main pre-occupation of the human rights lawyer...'¹⁸³ The lawyer's focus on 'violation' is a focus on the borderline between compatibility and incompatibility with human rights. That tends to result in advice about what is the bare minimum required to meet the threshold of 'compatibility with human rights'.¹⁸⁴

The ultimate risk that guides a lawyer's advice is the risk of an adverse ruling by a court.¹⁸⁵ But in Queensland, where a body of human rights case law is yet to develop, lawyers may hesitate to advise that a court will likely find a breach of human rights in the absence of any adverse ruling on the point to date.¹⁸⁶ Moreover, when that case law does begin to develop, and human rights begin to intersect with difficult questions of policy, the courts will likely apply a form of deference to Parliament and the executive, whether consciously or otherwise.¹⁸⁷ For instance, in the UK case of *R (Conway) v Secretary of State for Justice*, the courts '[w]eigh[ed] the views of Parliament heavily in the balance' in order to conclude that assisted suicide laws imposed a justified limit on the right to privacy.¹⁸⁸ The courts reasoned that 'Parliament [wa]s a far better body for determining the difficult policy issue'.¹⁸⁹ Deference may even be required by s 13(1) of the *Human Rights Act*, as it calls for justification in a 'democratic society'. Democracy 'generally requires that significant policy decisions be left to the branch[es] of government best suited to make them: the Parliament [and the executive]'.¹⁹⁰ But a deferential ruling by a court does not mean that the measure is compatible with human rights; a deferential ruling simply means that the court recognises it is not

¹⁸³ Eva Brems, 'Human Rights: Minimum and Maximum Perspectives' (2009) 9(3) *Human Rights Law Review* 349, 350.

¹⁸⁴ *Human Rights Act* (n 5) s 8.

¹⁸⁵ Janet Hiebert, 'Governing under the Human Rights Act: The Limitations of Wishful Thinking' [2012] *Public Law* 27, 34; McCorkindale and Hiebert (n 170) 331; MacDonnell (n 866) 393, 396, 398, 403. MacDonnell notes that this focus of legal advice may give too much power to courts. She ultimately sees a role for legal advice that goes beyond the risk of an adverse court ruling to advice about the executive's obligation to implement and promote human rights.

¹⁸⁶ Section 48(3) of the *Human Rights Act* (n 5) encourages recourse to human rights jurisprudence in other jurisdictions to fill this lacuna, but there are some human rights which are relatively unique to Queensland (such as the right not to have one's property arbitrary deprived in s 24(2) and the right to a name in s 26(3)), and even for comparable rights there is no guarantee Queensland courts will follow case law developed elsewhere: see *Momcilovic* (n 4) 36–8 [18]–[19] (French CJ). On the difficulties presented for lawyers by the absence of case law on point, see: Dawson (n 97) 601; McCorkindale and Hiebert (n 170) 336.

¹⁸⁷ See *R v Hansen* (n 10) 43–5 [113]–[119] (Tipping J); *PJB* (n 1) 446 [324] (Bell J); *Certain Children [No 1]* (n 81) 513 [213] (Garde J); *Certain Children [No 2]* (n 65) 508–9 [218]–[219] (Dixon J); *Minogue v Thompson* (n 98) [50] (Richards J). Cf *Thompson* (n 155) [100] (Kyrrou, McLeish and Niall JJA).

¹⁸⁸ *R (Conway) v Secretary of State for Justice* [2018] 3 WLR 925, 968 [193] (Etherton MR, Leveson P and King LJ). The Supreme Court refused permission to appeal: *R (Conway) v Secretary of State for Justice* [2019] 1 WLR 1125 (Baroness Hale PSC, Lord Reed DPSC and Kerr JISC).

¹⁸⁹ *R (Conway) v Secretary of State for Justice* (n 188) 967 [186] (Etherton MR, Leveson P and King LJ).

¹⁹⁰ *Palmer v Western Australia* (2021) 388 ALR 180, 251 [276]; 95 ALJR 229, 287 [276] (Edelman J) (albeit in the context of constitutional freedoms).

in a position to say otherwise. The political branches of government are still required to consider for themselves whether the limit on human rights is justified; they are only relieved of scrutiny by the courts. Unfortunately, because lawyers are so focused on the risk posed by adverse court rulings, they are likely to interpret a deferential court ruling as meaning that the threshold of compatibility with human rights is pushed downwards. Through the lens of litigation risk, the range of options which are 'open' appears to be wider. With legal advice like this, the political branches of government are also likely to interpret a deferential ruling by a court 'as a licence to proceed with a restrictive measure without having to perform their own in-depth evaluation' of human rights compatibility.¹⁹¹

Not only are lawyers guided by the deference of courts, they are themselves prone to defer to their client when it comes to value judgments. Yet, the final step in justifying a limit on human rights is a value judgment about where the balance should lie between human rights and countervailing societal interests.¹⁹² That weighing exercise is the crux of the test of proportionality. If compatibility assessments are outsourced to lawyers, but lawyers decline to enter into the value judgment in the final stage of that analysis, no one will truly grapple with the question of whether the benefits of the policy outweigh the harm it causes to human rights. This could entrench a form of the bystander effect — the social phenomenon where no one offers aid in an emergency because they assume someone else will. The policy officer will assume the lawyer has done the heavy lifting for the human rights assessment, and the lawyer will assume the policy officer has done that work. Effectively, the result will be that limits on human rights will only need to pass through proper purpose, suitability and necessity,¹⁹³ as lawyers will feel qualified to pass judgment on those elements. Everyone will assume the limit strikes a fair balance,¹⁹⁴ but no one will have actually considered that question meaningfully. The result, in practical terms, can only be a further lowering of the threshold of compatibility with human rights.¹⁹⁵

Policy officers are uniquely placed to engage in the weighing analysis.¹⁹⁶ Weighing up competing goals is the essence of their work. More importantly, they are uniquely placed to look beyond the borderline between compatibility and

¹⁹¹ Brems (n 183) 353 (albeit in relation to the related concept of 'margin of appreciation'). Cf Human Rights Statement of Compatibility, Voluntary Assisted Dying Bill 2021 (Qld) 2 (where it was acknowledged that the likelihood of deference did not relieve the Minister of her obligation to grapple with human rights compatibility).

¹⁹² *Human Rights Act* (n 5) ss 13(2)(e)–(g).

¹⁹³ *Ibid* ss 13(2)(b)–(d).

¹⁹⁴ *Ibid* ss 13(2)(e)–(g).

¹⁹⁵ Another possibility is that lawyers may be more ready to conclude that a limit on human rights is not justified because they are not familiar enough with the policy rationale that justifies the measure. This may explain the propensity of lawyers in the New Zealand Ministry of Justice to advise that Bills are incompatible with human rights: Hiebert (n 169) 77, 92–3, 98–101, 103; Grant Huscroft, 'The Attorney-General's Reporting Duty' in Paul Rishworth et al (eds), *The New Zealand Bill of Rights* (Oxford University Press, 2003) 195, 196, 214–6.

¹⁹⁶ See also Hiebert (n 169) 92–3, 99–101. Hiebert makes the point that political actors are better placed to engage in the weighing analysis than government lawyers.

incompatibility with human rights, to degrees of human rights protection beyond the borderline. This is because policy officers are seeking to adopt the ‘best’ option, not merely the option which is ‘open’. A human rights culture in the hands of policy officers carries the promise of optimising human rights beyond the bare minimum.¹⁹⁷ They can make policies ‘inspired and guided by’ human rights.¹⁹⁸ Whereas lawyers see human rights protection as ‘a bottom line’, policy officers have the capacity to see human rights promotion as ‘a horizon line — which does not signal a maximum, but rather approaches “best practice” or at least “good practice”’.¹⁹⁹ In Greek myth, Ulysses’ strategy of tying himself to the mast was not the only strategy for resisting the lure of the Sirens. Orpheus opted instead to play the lyre to drown out the Sirens’ call. Rather than resist the temptation to abuse power through self-restraint, governments can drown out the temptation by actively promoting human rights. In a human rights system that goes beyond ‘protection’ of human rights to the ‘promotion’ of human rights:

Instead of asking their advisers how to draft a bill or make policy choices in such a way as to avoid human rights violations, governments should ask them guidance on how to make norms and policies that offer the most and the best guarantees for human rights protection.²⁰⁰

While that may seem utopian, that is the stated goal of the *Human Rights Act*: not only to ‘protect’, but also to ‘promote’ human rights.²⁰¹ Outsourcing all consideration of human rights to lawyers has the potential to imperil both objectives.

¹⁹⁷ Indeed, for some theorists, human rights are ‘optimization requirements’, meaning they must be realised ‘to the greatest extent possible given the legal and factual possibilities’: Robert Alexy, ‘Proportionality and Rationality’ in Vicki C Jackson and Mark Tushnet (eds), *Proportionality: New Frontiers, New Challenges* (Cambridge University Press, 2017) 13, 14, quoting Robert Alexy, *A Theory of Constitutional Rights*, tr Julian Rivers (Oxford University Press, 2002) 47. The proportionality analysis required by s 13 of the *Human Rights Act* (n 5) ‘express[es] this idea of optimisation — the first and second [steps], suitability and necessity, refer to optimisation relative to the factual possibilities and the third [step], the law of balancing, concerns optimisation of the legal possibilities’: *Clubb v Edwards* (2019) 267 CLR 171, 307–8 [397] (Gordon J).

¹⁹⁸ MacDonnell (n 86) 388. This has, apparently, been the experience in Victoria: Humphreys, Cleaver and Roberts (n 91) 224 [7.130]. See also Human Rights Council, *Report of the United Nations High Commissioner for Human Rights on the Role of the Public Service as an Essential Component of Good Governance in the Promotion and Protection of Human Rights*, 25th sess, Agenda Items 2 and 3, UN Doc A/HRC/25/27 (23 December 2013) 4 [9]: ‘[h]uman rights principles provide a set of values to guide the work of Governments and other political and social actors ... Moreover, human rights principles inform the content of good governance efforts: they may inform the development of legislative frameworks, policies, programmes, budgetary allocations and other measures.’

¹⁹⁹ Brems (n 183) 355.

²⁰⁰ *Ibid* 370.

²⁰¹ *Human Rights Act* (n 5) s 3(a). See also the long title of the Act, which commences, ‘[a]n Act to respect, protect and promote human rights’.

IV CONCLUSION

In many ways, the *Human Rights Act* alters very little about the role of public servants and lawyers acting for government. Public servants and lawyers have always had ethical duties to give full and frank advice, including to counsel against breaches of the rule of law and against the worst excesses of government power. The only change is that that advice now extends explicitly to impacts on human rights. While public servants and lawyers bear new human rights, such as a right to freedom of expression, this does not give them licence to provide anything but independent and impartial advice. With the benefit of that advice, the Minister will come to a landing on a policy proposal, which the public servant will then be duty-bound to implement. Likewise, the lawyer is duty-bound to act on instructions with undivided loyalty to their client. Public servants and lawyers cannot shirk these duties because they take a different view on whether the measure is compatible with human rights. An important exception built into s 58(2) of the *Human Rights Act* means that public servants must continue to comply with their common law obligation to follow reasonable directions, and lawyers must continue to comply with their fiduciary obligation to give undivided loyalty to their client. As the aphorism goes, the more things change, the more they stay the same.

Yet, there is also something revolutionary about the *Human Rights Act*. On a fundamental level, it alters the system of government that public servants are required to uphold. The old view that public servants are merely a tool to pursue the public good at any cost has given way to a new role for public servants in helping government to stay within the boundaries of compatibility with human rights. Similarly, the old view that lawyers help government to pursue the public good by working to maximise legislative and executive power is no longer a complete picture. The *Human Rights Act* gives a new role to lawyers to advise government about how to comply with its self-imposed constraints *within* the limits of its powers. These shifts in the roles of public servants and lawyers are subtle but profound.

For public servants, the *Human Rights Act* brings a new rigour to the frank advice they must give about whether a policy proposal is justified. While the factors in s 13 align with pre-existing principles about robust policy development, the factors test the rationality of the measure more meticulously and, in many cases, demand evidence to support the proposal. The final balancing exercise in s 13 requires particular frankness from public servants. They must openly grapple with whether the policy objective outweighs the impact on human rights. Failure to do so not only undermines the protection and promotion of human rights; it also represents a breach of the public servant's ethical duty to give full and frank advice, without fear and without seeking the Minister's favour.

For lawyers, s 13 of the *Human Rights Act* brings them closer to the border between law and policy. Until we become accustomed to the new order of things, that will be uncomfortable for everyone involved. One way lawyers can stick to the law side of the border is by following a ‘supervisory’ approach, rather than a ‘substitutionary’ approach. This means the lawyer reviews the policy rationales put forward by policy officers, instead of coming up with their own policy inputs. There are a number of reasons why lawyers should take this approach, not least of which is that lawyers generally lack policy expertise. Moreover, the human rights culture that the *Human Rights Act* is meant to inaugurate is a culture that applies at all levels of government. Human rights considerations are supposed to saturate all government decision-making. That culture shift is doomed to fail if lawyers hold a monopoly on human rights.

Fundamentally, lawyers and policy officers bring a different perspective to human rights. Lawyers are concerned with risk, asking what is the bare minimum needed to safeguard against an adverse court ruling? A human rights culture concerned with the bare minimum is an impoverished human rights culture. By contrast, policy officers are focused on making the best policy possible in the factual and legal context. They can look beyond the bare minimum of human rights ‘protection’ to the horizon line of human rights ‘promotion’. Policy officers hold in their hands — in their advice, in their briefs and in their recommendations — the ability to realise the full potential of the human rights framework. Ultimately, policy officers and lawyers each have a role to play in protecting and promoting human rights. Human rights are best served by policy officers and lawyers working together collaboratively, bringing their different skillsets to their common enterprise.

The *Human Rights Act* breathes new life into old ethical duties and reminds us of the importance of candour and fidelity for both public servants and lawyers acting for government. But those ethical duties of candour and fidelity also breathe life into the ambition of the *Human Rights Act*. It is through compliance with ethical duties — through frank advice and collaboration between lawyers and policy officers — that the promise of the *Human Rights Act* is to be fulfilled.

