**Rights-Based Environmental Advocacy - Coming to a Court Near You**

The *Human Rights Act (Qld) 2019* has created a confluence of two streams of law – human rights and environmental. Judges, lawyers, and experts are gathering in the riparian zone. Some of you are already boldly fording the river. Some are wondering whether they need a bridge and how it will be built. Some are sailing blind, ignorant of the waters ahead and at the mercy of the tide.

I will place myself on the bank, with one foot in the steam. Rights-based advocacy has already set sail in the Land Court, and this new punt will only gather speed as it travels downstream. But it is not only the Land Court that will be drawn into the main channel. Rights-based advocacy is emerging in other courts too. Tonight, I want to share the limited experience in the Land Court to lay a foundation stone for your bridge.

**What is rights-based environmental advocacy?**

I am using this term to mean the use of human rights laws and concepts to further environmental protection. I am not talking about another emerging trend, evident in New Zealand, to assign rights to features of the environment, such as rivers.

A rights-based approach flows naturally from the concept of sustainable development, described by the 1987 Brundtland Commission Report as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs." According to UNESCO:

> "There are four dimensions to sustainable development – society, environment, culture and economy – which are intertwined, not separate. Sustainability is a paradigm for thinking about the future in which environmental, societal and economic considerations are balanced in the pursuit of an improved quality of life. For example, a prosperous society relies on a healthy environment to provide food and resources, safe drinking water and clean air for its citizens."[1]

[1] 'What is ESD' (Web Page, 29 March 2021) <https://en.unesco.org/themes/education-sustainable-development/what-is-esd/sd>.

This human centred goal of sustainable development provides a neat intersection between human rights and environmental protection.

**The purpose of the *Human Rights Act 2019 (Qld)***

The HRA is an Act to respect, protect and promote human rights.

It imposes obligations on each arm of government to act compatibly with these human rights: parliament, public entities and courts and tribunals. I am not going to talk about parliament, but will come back to the others shortly.

**Does the Human Rights Act protect the environment?**

First, I want to identify some human rights that might be relevant to environmental protection.

The Act protects 23 human rights. I am not going to list them all here. The word "environment" appears only once. I will show you where in a moment. Unlike many countries in our region, there is no constitutionally enshrined right to a clean and healthy environment.

That approach to human rights might present an impediment to rights-based environmental advocacy, but international experience suggests otherwise. Internationally, human rights that, at first blush, do not appear to relate to environmental concerns, have been relied on for decades to further advocacy on environmental issues.

**What rights are relevant?**

Because of objections to the mine, the Land Court is now seized of Waratah Coal's applications for relevant approvals for a thermal coal mine in the Galilee basin. The objectors have raised human rights objections that illustrate how laws dealing with human rights and environmental protection might be brought together.

Those rights are:

- recognition and equality before the law;[2]
- right to life;[3]
- property rights;[4]

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2 *Human Rights Act 2019* ('HRA') s 15.

3 Ibid s 16.

4 Ibid s 24.

- the right not to have the person's privacy, family, home or correspondence unlawfully or arbitrarily interfered with;[5]
- the right of every child, without discrimination, to the protection that is needed by the child, and is in the child's best interests, because of being a child;[6] and
- the cultural rights of Aboriginal peoples and Torres Strait Islander peoples.[7]

**How do those rights relate to environmental concerns?**

I won't explore the objections for obvious reasons, but I will briefly touch on how equivalent rights have been engaged internationally.

**S 15 – Right to recognition and equality before the law… 2. Every person has the right to enjoy the person's human rights without discrimination 3. Every person is equal before the law and is entitled to the equal protection of the law without discrimination[8]**

Sometimes this right is engaged for procedural purposes, such as to afford standing or to access relevant information. It has also been used for arguments about disproportionate negative impacts of activities on marginalised or disadvantaged groups. This has special significance for climate change litigation and for the location of hazardous facilities in or near less affluent communities.

**S16 – Right to Life: Every person has the right to life and has the right not to be arbitrarily deprived of life[9]**

This right has a negative and positive duty. The positive duty, to take steps to protect life, is often raised in environmental cases. Although the success of such claims is varied, because the risks to human health must be grave, it has led to Courts and committees examining whether governments have breached the right by failing to take reasonable steps in response to the risk.

It was successfully raised against a gold mine in Turkey because of its proposed use of cyanide.[10] A Columbian court found the government's failure to reduce deforestation and

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5 Ibid s 25(a).
6 Ibid s 26(2).
7 Ibid s 28.
8 Equivalent rights are enshrined in Articles 2, 16 and 26 International Covenant on Civil and Political Rights.
9 Equivalent rights enshrined in Article 6(1) International Covenant on Civil and Political Rights and Article 2 European Convention on Human Rights
10 Taskin v Turkey [2004] Eur Court HR 179, 208.

ensure compliance with a target for zero-net deforestation in the Amazon by 2020 threatened the plaintiffs' fundamental rights, including a right to life and health.[11] In Netherlands, the applicants relied on the threat to life posed by climate change in successfully arguing before the Hague Court of Appeal that the government's actions were inadequate.[12]

Recently in the United Kingdom, a coroner found a causative link between the death of a 9 year old girl after an asthma attack and excessive environmental pollution from one of London's busiest roads. The lawyers for the girl's family argued the UK government had violated the human right to life, by not adequately responding to dangerously high levels of air pollution. As well as finding a link between the air pollution and the girl's death, the coroner found the lack of information available to the family about the risk probably contributed to her death.

In the context of infrastructure planning, a Victorian Coroner investigating 29 deaths at level crossings relied on the Victorian Charter of Rights to investigate the possibility of systemic failure on the part of authorities to protect life.

**S 24 Property rights… 2. A person must not be arbitrarily deprived of the person's property[13]**

This right is used more often to protect private property from regulation. An example from Victoria is where VCAT considered whether a hotel owner's property rights were unlawfully limited by restrictions on patron numbers and trading hours.[14]

**Right to Privacy S25(a) A person has the right…not to have the person's privacy, family, home or correspondence unlawfully or arbitrarily interfered with[15]**

In Europe, this right has been used for cases involving health and amenity impacts arising from a whole range of industrial and commercial activities. The right was relied on to protect a burial

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11 Demanda Generaciones Futuras v Minambiente (2018) STC4360-2018 (unofficial translation)

12 Court of Appeal of The Hague, The State of the Netherlands (Ministry of Infrastructure and the Environment) v Urgenda Foundation, C/09/456689 / HA ZA 13-1396, 9 Oct. 2018, available at: (Urgenda 2) [40], [43].

13 There is an equivalent right in Article 17 International Covenant on Civil and Political Rights.

14 *Swancom Pty v Yarra CC* [2009] VCAT 923.

15 Equivalent rights in Article 17 International Covenant on Civil and Political Rights and Article 8 European Convention on Human Rights Right.

ground in France from a hotel development[16] because the Committee accepted the applicants' relationship with their ancestors constituted an important part of their identity.

Perhaps more conventionally, in Victoria, this right was engaged in a case about a condition of a planning approval dealing with overlooking a neighbour's property.[17]

**S 26 Right to protection of children… 2. Every child has the right, without discrimination, to the protection that is needed by the child, and is in the child's best interests, because of being a child[18]**

This right has been used to raise the intergenerational impacts of activities, a principle of particular significance in climate change litigation.

**S 28 Cultural rights of Aboriginal and Torres Strait Islander peoples[19]**

(1) Aboriginal peoples and Torres Strait Islander peoples hold distinct cultural rights.

(2) Aboriginal peoples and Torres Strait Islander peoples must not be denied the right, with other members of their community—

(a) to enjoy, maintain, control, protect and develop their identity and cultural heritage, including their traditional knowledge, distinctive spiritual practices, observances, beliefs and teachings; and

(b) to enjoy, maintain, control, protect, develop and use their language, including traditional cultural expressions; and

(c) to enjoy, maintain, control, protect and develop their kinship ties; and

(d) to maintain and strengthen their distinctive spiritual, material and economic relationship with the land, territories, waters, coastal seas and other resources with which they have a connection under Aboriginal tradition or Island custom; and

**(e) to conserve and protect the environment and productive capacity of their land, territories, waters, coastal seas and other resources.**

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16 Hopu and Bessert v France (549/93)

17 *Smith v Hobsons Bay CC [2010] VCAT 668*

18 Equivalent Articles 23 and 24(1) International Covenant on Civil and Political Rights.

19 Equivalent Article 27 International Covenant on Civil and Political Rights

(3) Aboriginal peoples and Torres Strait Islander peoples have the right not to be subjected to forced assimilation or destruction of their culture.

I have only included one of the bundle of cultural rights of Aboriginal and Torres Strait Islander peoples. This is the one use of the word environment.

There is very little by way of international experience to draw on for this particular right. There are numerous examples of cultural rights being successfully asserted. For those of you with children and grandchildren, you will know of the Nordic Sami peoples who feature in the Disney pic Frozen. They have successfully asserted reindeer husbandry is a cultural practice, because culture includes social and economic activities that are part of the group's tradition, as well as their traditional beliefs and practices.[20] Likewise commercial and non-commercial fishing rights of Maori people have been identified as cultural rights, as has effective participation in decisions that affect indigenous people.

Closer to home, a group of Torres Strait Islander people complained to the UN Human Rights Committee alleging the Australian Government has failed to take action to reduce greenhouse gas emissions or to fund adequate coastal defences against sea level rise. As people living on a low-lying island, they rely on their right to culture as well as their right to life, and privacy.

**What do these rights and their potential use in environmental and planning cases, mean for QELA members?**

So, let me move away from the rights that might be engaged, and talk about how those rights might affect your practice. As QELA members you are likely to be:

- Decision makers in local authorities and other government agencies;
- Experts and lawyers who advise decision makers or applicants; or
- Lawyers who appear and experts who give evidence in relevant courts and tribunals.

So, you need to understand their human rights obligations if you are going to be able to engage in or respond to rights based advocacy.

[20] Kitok v Sweden (197/85).

**The obligations of a public entity**

Looking first at decision makers, the HRA uses the concept of a public entity fulfilling a public function. Section 58 provides that it is unlawful for a public entity to:

(a) Act or make a decision in a way that is not compatible with human rights; or
(b) In making a decision, fail to give proper consideration to a human right relevant to the decision.

The equivalent provision in Victoria has been interpreted to impose a substantive and a procedural duty.

The substantive duty is not to act or make a decision in a way that is incompatible with a human right, unless the public entity could not reasonably have acted differently, or made a different decision, because of a legal requirement applying to the act or decision.

The procedural duty is to give proper consideration to a relevant human right in making a decision.

The rights are cumulative. It is possible to fulfill one while breaching the other. For example, the act may be compatible with a human right, but the public entity may have failed to give proper consideration to it. Or a decision may be incompatible with a human right, even though the public entity did give it proper consideration. Either way, it would be unlawful.

The consequence of unlawfulness is limited. It does not provide a cause of action itself. It can only be raised under what is called the piggyback provision of s 59, that is, where the person has a right, independent of the HRA, to seek relief or remedy about the act or decision.

So, if there is an avenue to appeal an administrative decision, whether it is merits or judicial review, human rights might be raised as one ground for setting aside the decision.

One example is the P&E Court decision of *Optus Mobile Pty Ltd v Sunshine Coast Regional Council & Ors* [2020] QPEC 15. That case involved an appeal by Optus against the

Sunshine Coast Regional Council's refusal to provide development approval for a proposed telecommunications facility. A co-respondent-by-election, who appears to have been self-represented, raised the Human Rights Act as a reason for refusal. However, in accordance with usual case management directions, she had already agreed to a definition of issues that did not include the human rights ground. She was held to that agreement.

You can expect, though, that there will be cases where a party maintains and raises unlawfulness of a local authority's decision under the HRA.

Before moving away from this topic, I want to remind you that the HRA has an aspect you don't find in, for example, the Victorian Charter – a complaint and conciliation process. So, while an aggrieved person may not have an independent right to pursue relief in the Courts, that does not mean a public entity cannot be drawn into a complaint, investigation and conciliation process before the HR Commission.

**The court as a public entity**

There is another way the duty imposed on a public entity might affect proceedings in a court or tribunal. The definition of public entity excludes a court or tribunal, except when acting in an administrative capacity.[21] This raises an interesting question for courts involved in consideration of administrative decisions on the merits.

In Waratah, I decided the Land Court was acting in an administrative capacity when hearing objections to a mining lease or an environmental authority. My reasons are on the record and I won't go into them.

It may be that the P&E Court will have to consider whether, in undertaking some of its functions, it is also acting in an administrative capacity. The most obvious candidate is the planning appeal which is a hearing anew. QCAT has interpreted its role in undertaking merits review as acting in an administrative capacity. Likewise, VCAT, which exercises the equivalent planning appeal jurisdiction in Victoria, is considered to be acting in an administrative capacity in doing so.

I believe this is an open question for the P&E Court as it is for the Land Court in undertaking any merits review in its other jurisdictions. So I will not say anything more about that.

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21 HRA s 9(4)(b).

**The interpretive function**

The other way in which human rights will be engaged for our decision makers and in our courts involves statutory interpretation. The HRA mandates that statutory provisions must be interpreted, to the extent possible, consistent with their purpose, in a way that is compatible with human rights.[22]

***Statutory provision*** means an Act or statutory instrument or a provision of an Act or statutory instrument.[23] Interpretation of a statutory provision is bread and butter work in our two Courts, and in most planning decisions and appeals in the P&E Court, a number of them will be in issue.

Section 48(1) of the HRA does not authorise an interpretation of statutory provisions which is inconsistent with their purpose. You must start with the purpose. Then, to the extent that is consistent with their purpose, they must be interpreted in a way that is "compatible with human rights".

**What does compatibility mean?**

Whether the obligations relate to how a decision is made, what the decision should be, or how a statutory provision should be interpreted, you are likely to have to consider compatibility with human rights.

It is clear that human rights are not absolute. An act, decision or statutory provision is compatible with human rights if:

(a) it does not limit a human right; or
(b) limits a human right only to the extent that is reasonable and demonstrably justifiable.[24]

The HRA defines how a human right may be limited.[25] A human right can only be subject to "reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom." The HRA specifies a number of factors that may be relevant including the importance of the purpose of the limitation, the

22 HRA s 48.
23 HRA Sch.
24 HRA s 8.
25 HRA s 13.

importance of preserving the human right, given the nature and extent of the limitation, and the -balance between those two matters.

There are a couple of cases in the Supreme Court that give some guidance about compatibility – a case involving a protest organised by councillor Jonathon Sri on the Story Bridge, and some cases involving elections at local government and state level.

**What will this mean for you in advising applicants, objectors and decision makers?**

In conclusion:

1. The HRA protects a number of human rights that, although not explicitly addressed to the environment, have been relied on in other jurisdictions to further environmental protection.
2. Public entities have procedural and substantive obligations under the HRA. Local authorities and other statutory decision makers, including, for some purposes, courts and tribunals, are public entities.
3. Public entities must:
    a. properly consider a human right relevant to their decision; and
    b. not act or make a decision that is incompatible with a human right, unless they have not reasonable alternative, by law.
4. Statutory provisions must, to the extent possible consistent with their purpose, be interpreted compatibly with human rights.
5. Human rights are not absolute and an act, decision or interpretation will be compatible with human rights if any limit is reasonable and demonstrably justified.