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Your Ref: 602456/1, 6119444

7 April 2022

The Honourable Tony Fitzgerald AC QC
The Honourable Alan Wilson QC
Commission of Inquiry Relating to
the Crime and Corruption Commission

email: submissions@cccinquiry.qld.gov.au

Dear Commissioners,

RE: Call for submissions to the Commission of Inquiry into specific matters relating to the Crime and Corruption Commission

I refer to your letter of 2 March 2022 inviting me to provide a submission to the Commission of Inquiry established by the Queensland Government by an Order in Council made under the *Commissions of Inquiry Act 1950* on 31 January 2022.

1. The role of your office, insofar as it is relevant to the matters identified in the terms of reference;

Section 10 of the *Crime and Corruption Act 2001* (the CC Act) states that the Parliamentary Crime and Corruption Commissioner is an officer of the Parliament who helps the Parliamentary Crime and Corruption Committee in the performance of its functions. The Committee's functions are set out in section 292 of the CC Act. Essentially, my office assists the Committee to monitor and review the CCC's performance of its functions.

The functions of my office are set out in section 314(2) of the CC Act. These functions are performed as required by the Committee and include auditing the CCC's records and operational files to decide whether: the CCC has exercised power in an appropriate way; matters under investigation are appropriate for investigation by the CCC; registers are up to date; proper authorisations have been obtained; and policy and procedural guidelines have been complied with. Additionally my office has the function to investigate complaints made against the conduct or activities of the CCC or CCC officers, either at the request of the Committee or on my own initiative under section 314(4).

The Parliamentary Commissioner must inspect the CCC's surveillance device warrants records to determine the CCC's compliance with the provisions of the *Police Powers and Responsibilities Act 2000* (the PPRA). I report to the Committee every six months on the results of these inspections. I also inspect the CCC's controlled operations records every 12 months to determine compliance with the PPRA provisions. I prepare an annual report for the Committee on the work and the activities of the CCC under the controlled operations provisions. I audit the CCC's assumed

identities records every six months and provide a written report for the CCC Chairperson. Lastly, I conduct six-monthly inspections of the CCC's telecommunications interception records and prepare an annual report to the Attorney-General.

In the main, apart from audits and inspections, the office acts in response to specific complaints and referrals from the Committee. Without a specific reference from the Committee, there is limited scope to investigate the adequacy and appropriateness of legislation, procedures, practices and processes relating to the charging and prosecution of criminal offences arising from CCC investigations. Those matters would generally be subject to the Committee's consideration in the course of its periodic reviews of the CCC conducted under section 295(f) and (g) of the CC Act. As discussed below, the office of the Parliamentary Commissioner has made submissions on these issues to the Committee's reviews.

2. The adequacy of section 49 of the *Crime and Corruption Act 2001*;

Section 49 of the Act reflects, to a certain extent, observations made in the *Report of a Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct* (the Fitzgerald Report) concerning the structure of the proposed Criminal Justice Commission, it states (page 314):

> *The Official Misconduct Division* [now the Corruption Division] *will not prosecute. It will be obliged, when investigations reveal the need for prosecution, to provide all materials pertinent to the investigation, including those potentially damaging to any prosecution case, to the Director of Prosecutions. The fundamental right of defendants to know of and have available to them all evidence potentially of assistance in their defence must be preserved.*

Similarly, in the Fitzgerald Report's Recommendations dealing with the establishment and functions of the proposed CJC (page 373) it is stated that the Official Misconduct Division will direct reports of its investigations to the Director of Prosecutions for consideration of prosecution.

In accordance with the recommendations of the Fitzgerald Report, the CCC is not set up under the CC Act as a prosecutorial agency and has never prosecuted criminal matters. The same applies to its predecessors - the Criminal Justice Commission and the Crime and Misconduct Commission. Police officers seconded to the CCC have routinely laid criminal charges but those charges are invariably prosecuted by the Police Prosecution Corps in the Magistrates Court or the Director of Public Prosecutions (DPP) in the superior courts.

However it is unclear whether the passages referred to above advocated reporting to the DPP before a CCC seconded police officer charged a person or after the charge is laid. The Local Government Association's submission to the Committee's Inquiry was that the CCC should provide a full brief of evidence to the DPP before (certain) charges are laid.

<u>Section 49 prior to amendment in 2018</u>

Section 49 of the CC Act applies in circumstances where the CCC investigates a complaint involving corruption and decides that prosecution proceedings or disciplinary action should be considered. Prior to its amendment in 2018[1], section 49(2)(a) stated that the CCC **may** report on a corruption investigation to the *"director of public prosecutions, or other appropriate prosecuting authority, for the purposes of any prosecution proceedings the director or other authority considers warranted."*

[1] *Crime and Corruption and Other Legislation Amendment Act 2018*, section 12

That is, a report was not mandatory under section 49(2)(a) and nothing in the CC Act precluded a police officer seconded to the CCC from laying a criminal charge in a corruption investigation without first having provided a report for the consideration of the DPP. Nonetheless, and certainly in more complex investigations, the CCC referred matters to the DPP for consideration before laying criminal charges prior to the 2018 amendment.

However, in a submission to the Parliamentary Crime and Corruption Committee's 2015 Review of the CCC,[2] then Acting DPP, Mr Michael Byrne QC (as his Honour then was), noted that due to their sensitivity, size and complexity, consideration of CCC briefs was time consuming and an impost on his Office's limited budgetary resources. He stated that due to competing priorities, CCC briefs regularly languished for months in the Office of the DPP (ODPP) before an advice could be provided to the CCC. He referred to the undesirability of delaying criminal investigations and/or prosecutions and possible adverse effects on public confidence in the administration of the criminal justice system in general and the CCC in particular.

Mr Byrne QC also noted that the referral of an investigation report for advice **prior to charging** is a procedure not generally available to other investigative bodies in Queensland. He referred to the Director of Public Prosecutions Guideline 26 which provides, *"In circumstance **where the Police have charged a person** with an offence, the Police may refer the matter to the Director for advice as to whether the prosecution should proceed…"*

I acknowledge Mr Byrne's QC concern that the referral of an investigation report to the DPP for advice prior to charging *"has the effect of bridging the divide between the investigative function and the independent prosecutorial function."* Should the DPP endorse a CCC submission that criminal charges be laid, the DPP might then be perceived to have a partisan interest in the matter such that its independent prosecutorial function is perceived as compromised.

Mr Byrne QC considered that the lawyers and police officers attached to the CCC had the experience and capability to provide appropriate advice as to whether charges should result from an investigation or not. That view appears to have been brought into question recently by events which have led to this Commission of Inquiry.

The thrust of Mr Byrne's QC submission however was that recent High Court decisions of *X7* v *Australian Crime Commission* (2013) 248 CLR 93, *Lee* v *New South Wales Crime Commission* (2013) 248 CLR 196 and *Lee* v *The Queen* (2014) 88 ALJR 656 resulted in practical reasons why the power of referral under section 49 was undesirable. (I will return to those matters below.)

In June 2016 the Parliamentary Crime and Corruption Committee's Report No. 97 on the Review of the CCC endorsed the submission of Mr Byrne QC and recommended that the government give consideration to amending section 49 of the CC Act to remove the power for the CCC to refer corruption investigation briefs to the DPP for the purpose of considering prosecutions proceedings.

On 1 August 2016 the then Parliamentary Commissioner, Mr Paul Favell, wrote to the Director-General, Department of Justice and Attorney-General to provide his views on the Committee's recommendations. He noted that section 49(2) of the Act was not mandatory in operation and the CCC **may** report on an investigation to the DPP. He suggested that rather than amending section 49 to remove the mechanism for the CCC to report to the DPP, consideration might be given to the

[2] Submission 24 from the Acting Director of Public Prosecutions, Mr Michael Byrne QC, dated 28 July 2015.

establishment of a protocol between the CCC and the ODPP to allow reports to be provided in limited circumstances.

Section 49 as amended

Section 12 of the *Crime and Corruption and Other Legislation Amendment Act 2018* amended section 49 by removing reference to the DPP from subsection (2)(a). Section 49(2)(a) now provides that the CCC may report on a corruption investigation to *"a prosecuting authority, for the purposes of any prosecution proceedings the authority considers warranted."* A new subsection (5) was inserted to clarify that *"prosecuting authority"* does not include the DPP.

In terms of criminal prosecutions, the present section 49 essentially leaves the Police Prosecution Corps as the only prosecuting authority to which the CCC may report on an investigation. I think it unlikely that the CCC would take that course if a police officer attached to the CCC considered that criminal charges should be laid.

As it presently stands, I do not see that section 49(2)(a) has any practical utility. It only applies to corruption investigations. There is no provision equivalent to section 49 which contemplates the referral of CCC briefs to a prosecuting authority for consideration of prosecution proceedings arising from major crime investigations.

There is no **statutory** requirement that a police officer seconded to the CCC must first seek the approval of the DPP or any other person (including a senior CCC officer) before laying a criminal charge arising from a corruption investigation or a major crime investigation. In this respect, a police officer seconded to the CCC is in exactly the same situation as any other QPS officer. This position is reinforced by section 255(5) of the CC Act which provides that a police officer seconded to the CCC continues to be a police officer for all purposes and to have the functions and powers of a police officer, without being limited to the performance of the CCC's functions.

Section 174(2) of the CC Act reiterates that a person who is a member of a relevant office (for example a police officer) whose services are seconded to the CCC under section 255 retains, and may exercise, all powers had by the person as a member of the office. According to the legislation then, secondment to the CCC has no impact on a police officer's discretion to lay criminal charges.

Should it be considered desirable that decisions to bring criminal charges (or at least, certain categories of criminal charges) following CCC investigations be subject to prior independent approval, section 49 as it presently stands, is not the appropriate mechanism. If the mechanism is to be legislative, section 49 must be amended or a new section enacted. Alternatively an appropriate approval process could be set out in the CCC's policies and procedures.

3. The adequacy of any policies, practices, procedures and laws designed to ensure that decisions to commence criminal prosecutions arising out of Crime and Corruption Commission investigations are made by competent persons and are subject to appropriate oversight;

It is not unusual for police officers to receive material that is inadmissible at trial in the course of carrying out investigations in relation to matters. It is assumed that their training and experience equip them with the skills and judgment to approach a consideration of the charging discretion in an impartial, independent and principled manner, that is, without their discretion being consciously or unconsciously affected by inadmissible material or individual or organisational influence.

A police constable historically had a common law power to arrest and charge any person whom they suspected on reasonable grounds of having committed a criminal offence. The police constable's common law power remains, pursuant to s section 9(a) of the PPRA and section 3.2 of the *Police Service Administration Act 1990*. The legislative framework for charging persons with offences is set out in Chapter 14 of the PPRA – Arrest and Custody Powers. Police may charge a person after arrest, on complaint and summons, or by dispensing with arrest and serving a notice to appear. Section 42 of the *Justices Act 1886* requires all criminal matters to be commenced by way of a complaint under that Act. It does not otherwise impact upon the common law power to charge.

Section 382 of the PPRA allows a police officer to issue and serve a notice to appear on a person if the police officer reasonably suspects the person has committed or is committing an offence. Section 382 supplies an extension of power, beyond the common law power to arrest and charge, in order to give police officers flexibility in determining whether a particular matter can be dealt with without the immediate engagement of the court following arrest, via the issue of a notice to appear. Section 382 does not impact upon the common law power to charge.

The QPS Operational Procedures Manual states that (my emphasis):

> *The decision to commence proceedings against a person for an offence initially rests with the arresting officer. Generally, an officer may commence proceedings without seeking further advice or approval, upon being satisfied on reasonable grounds:*
>
> *(i) an offence has been committed;*
> *(ii) the person against whom prosecution is proposed has committed the offence;*
> *…*
> *(v) the elements of the intended charge can be proven.*
>
> *Before charging a person with an offence, the investigating officer is to ensure there is sufficient* ***admissible*** *evidence to prove the charge to the requisite standard.*

In *PRS v Crime and Corruption Commission* [2019] QCA 255 (at [12]), Morrison JA cited with approval the remarks of Davis J at first instance [2019] QSC 83 to the effect that the CCC cannot direct a police officer seconded to that body to act and that it is the police officer who must exercise the powers under the PPRA to issue a notice to appear. In *X v Callanan* [2016] QCA 335 (at [24]), McMurdo P pointed out that the CCC is an investigative, evidence gathering body without general powers, itself, to charge suspects or prosecute offences.

During the hearings of the Committee's Inquiry into the CCC's Investigation of Former Councillors of Logan City Council (the Logan Councillors inquiry) Mr MacSporran QC was asked (at page 38):

> *So there is no express power, obviously, under the Crime and Corruption Act for anyone in the CCC to charge, but you rely upon the power of seconded police officers to charge in the time-honoured way?*

Mr MacSporran QC confirmed, *"Yes. The CCC is an investigative agency, not a charging agency."*

Two key issues arise when considering whether the usual approach to charging is appropriate in circumstances where inadmissible material is compulsorily obtained by the CCC through the legislative withdrawal of the right to silence and the charging police officer is on secondment to the CCC.

The first issue is whether the seconded police officer is truly able to exercise independence from the CCC and its officers in the exercise of the statutory charging power. Detective Inspector Preston gave evidence on this issue during the Logan Councillors inquiry (page 342):

> Dr Horton QC: *So if the chair said no, there would be no charges laid?*
>
> Det.Insp. Preston: *I would say yes to that; however, I put the caveat on it that it is always up to the option of the office of constable, but it would be highly unlikely that the chair would say no to charge and that we would then continue with the charge, because it just would not happen.*

Mr MacSporran QC also conceded (page 521, my emphasis):

> *I suppose nice questions of procedure would apply if we said no and they went ahead and charged anyway, as they are entitled to do,* ***but it would be career threatening****, I suspect.*

Conversely, Mr MacSporran QC referred to one recent occasion when he recommended that charges be laid by the investigating officer, he said (page 78):

> *…but the word came back that they were not prepared to lay a charge or charges. I saw the memo that came back from the officer. I did not agree with it, but that is what happened. As you know, no charges were laid…*

The officer who charged the Logan Councillors also stated (page 280):

> *In the case that any police officer decides to make a decision, that decision has to be made in comfort and that officer has to be content to charge. There is never any direction provided by any person in any authority, whether they are in this organisation – I am referring to the Crime and Corruption Commission – or the Queensland Police Service. The commissioner would not direct me to charge someone. That is my duty as the officer, as constable. My detective inspector would never. I would never give a subordinate that direction to charge. It is not something that is taken lightly.*

Whether or not any actual pressure is placed upon seconded police officers responsible for charging by the CCC, systemically or by individual CCC officers, the evidence from the Logan Councillors inquiry gives little confidence that seconded police officers truly exercise their charging discretion independently of the CCC's assessment of the matter.

For the above reasons, some distance should be placed between the CCC and investigating police officers seconded to the CCC and the police officer that exercises the discretion to charge. That may be achieved by a brief of the admissible evidence being delivered outside of the CCC to the QPS for consideration of charges.

At the Logan Councillors inquiry, Mr MacSporran QC referred (page 560) to stricter practices that had more recently been implemented in the CCC, such that a full brief of evidence and observations are prepared for consideration of senior officers. Such an approach does not deal with the structural problem of seconded police officers being fettered in the exercise of their charging discretion. If this approach is to be taken, the CCC should simply be given statutory charging power.

An alternative option is to require that all decisions to lay criminal charges (or classes of charges) arising out of CCC investigations be made or endorsed by the DPP. That option unnecessarily interferes with deep historical structures, part of which is the distinct investigation and charging functions of the QPS and the prosecutorial function of the ODPP.

The second issue is whether it is just that the person exercising the charging power has access to inadmissible compelled material (as opposed to derivatively obtained, admissible material). As noted above, historically, there has been no perceived difficulty with investigating police using their judgment to approach charging on the basis of a consideration of the admissible evidence available in relation to a particular matter. The ODPP subsequently reviews briefs of evidence and runs the material through a finer filter of admissibility commensurate with its officers' education and training. This system has functioned well in common law based criminal law systems around the world for centuries.

The present legislative system does not prevent a charging officer having access to inadmissible compelled material. In *PRS* v *CCC* [2019] QCA 255 (at [63] and also see [69]), Morrison JA stated that nothing in the CC Act prevented an officer privy to compelled material from forming a reasonable suspicion so as to authorise the issue of a notice to appear. His Honour said (at [72]) that the CC Act did not prohibit a police officer's consideration of coerced material in the process of forming a reasonable suspicion and thus making a decision whether to lay a charge.

Unfairness, real or perceived, starts to creep into the equation when there is a blending of the investigative and prosecutorial limbs of the criminal process. That is, when a seconded police officer takes a more active role with assisting the prosecution team, as the investigative contact point. Suspicions of some active or inadvertent guiding of the prosecution team by the charging police officer who led the investigation, which included compulsory examination of the defendant, are naturally easy to hold by persons charged and perhaps sometimes their lawyers. Similarly, inadvertent guiding may be unintentional and difficult to detect. Decisions such as *Lee* v. *The Queen* (2014) 253 CLR 455 (*Lee (No 2)*) have recognised the injustice that can flow from the improper use, actual or inadvertent, of compelled material. The question is where to draw the line with respect to the involvement of the investigating and charging police officer in the criminal process. In arriving at the appropriate point, it has to be kept in mind that the perception of unfairness undermines the public confidence in the criminal process.

Taking all matters into account, a cautious and careful approach would be for the investigative police officer seconded to the CCC to provide a brief of evidence, containing the admissible non-compelled evidence, to an appropriately experienced officer at the QPS to consider for the purpose of charging and for that police officer, who has not had any access to or awareness of the contents of the inadmissible compelled material, to be the point of contact for the ODPP for the prosecution phase of the matter. The investigative police officer seconded to the CCC would take no active part in the management of the matter after it is handed over to the charging police officer and the ODPP.

4. **The Crime and Corruption Commission's intention in the future to obtain an independent external advice on complex prosecutions before charges are laid, either from the Director of Public Prosecutions or other appropriately qualified and independent advisor, as described in the Crime and Corruption Commission's Outline of Submissions to the Committee dated 15 October 2021, paragraph 267:**

> ***267.*** *The Commission intends in the future to obtain independent external advice on complex prosecutions before charges are laid, either from the DPP where appropriate, or some other appropriately qualified and independent advisor. The Commission respectfully notes for the PCCC's benefit the evidence of Mr Heaton (3 September 2021, pp 8 - 9) relevant to the question of the DPP providing advice about charges;*

The CCC's intention to obtain independent external advice on complex prosecutions before charges are laid, whilst well intentioned, continues the charging fallacy; an individual police officer is the decision maker with respect to charging, not the CCC.

It is desirable that the QPS have systems in place for officers exercising the statutory charging power to be able to access high quality advice, where necessary. Historically, the QPS has sought advice from the ODPP when necessary.

5. **The proposition (which is reflected in paragraph 183 of the submission to the Committee by McInnes Wilson Lawyers dated 26 July 2021) that concerns about compelled evidence that may arise from a requirement that referrals to the Director of Public Prosecutions should be made before prosecutions stemming from Crime and Corruption Commission corruption investigations are commenced can be better managed by limiting the evidence that is provided to the Director of Public Prosecutions:**

> ***183.*** *Whilst the DPP's concerns about being disclosed coerced materials are understandable, this should be better met by greater regulation of the evidence that goes to the DPP – limited as it should be to admissible evidence in respect of the particular charges favoured in respect of particular persons – rather than by removing this important check on the exercise of power;*

Continuing on my theme from above, if decisions to charge following CCC investigations are to be considered by independent police officers who are not seconded to the CCC, the evidence that is considered by the person exercising the charging power should be limited to the evidence that is admissible in the criminal proceeding. Knowledge of inadmissible compelled material, in circumstances where the decision to charge has been placed into clean hands, can only work to contaminate the charging process, if not actually, by perception.

The provision of the brief of evidence to the prosecuting authority, following charging, should be similarly limited to the admissible material considered by the charging police officer.

A longstanding practice exists for the CCC to provide the ODPP with all evidence collected by it, including compelled evidence. The ODPP meets the injustice of the prosecution authority having access to compelled material by siloing that material within the ODPP, thereby duplicating resources, such that one legal team holds all material and ensures that the other team, the prosecutorial team, is not contaminated by having access to the inadmissible compelled material.

The precise reason for that practice is not particularly clear. It may be done in order to comply with section 49(4) of the CC Act, which requires that a report made to a prosecuting agency under subsection (2) contains, or be accompanied by, all relevant information known to the CCC that (a) supports a charge that may be brought against any person as a result of the report; or (b) supports a defence that may be available to any person liable to be charged as a result of the report. Though, as noted above, section 49(5) expressly exempts the DPP from its operation. Part of the reason may

be found in the organisational understanding of disclosure obligations under the *Code* (see sections 590AB-AX). The present policy, as I understand it, is that if an accused person makes a request to the ODPP for material concerning any compelled hearing conducted by the CCC, which may have some factual relevance to the subject matter of the charges, then that material is provided to the defendant.

In criminal cases involving multiple defendants who are not aligned in their defence, it is routine for one defendant to be cross-examined by one or more of the other co-defendants about inconsistent answers given by the defendant at a compelled hearing. I am not aware of any case in which the legality of such a cross-examination has been challenged. The argument seems to be that a defendant has the power to use the compelled hearing material of a co-defendant to challenge that co-defendant's evidence at trial, to prove a prior inconsistent statement under sections 18 and 101 of the *Evidence Act 1977*.

However, section 197(2) of the CC Act deals with the admissibility of answers compelled to be given by an examinee over a claim of self-incrimination privilege, it states:

> *The answer, document, thing or statement given or produced is not admissible in evidence against the individual in any civil, criminal or administrative proceeding.*

Section 197(2) does not limit its coverage to use by the Crown of an answer, document, thing or statement given or produced by an examinee who invokes section 197(1) during a compulsory examination by the CCC. A plain reading of section 197(2), considered in the context of the CC Act as a whole and its objects and purpose (*Project Blue Sky* v. *Australian Broadcasting Authority* (1998) 194 CLR 335 at [60-[69]) indicates that it is an ambulatory provision that is not intended to carry the restriction that it has to this point been assumed to have, with respect to use by a co-accused. An argument is available that an answer, document, thing or statement given or produced by a defendant in the CCC is not admissible against that defendant, at the instance of a co-accused.

The Queensland provisions in this regard may be contrasted with the Western Australian equivalent, which was referred to in *A* v. *Maughan* [2016] WASCA 128 by Martin CJ (at [80]-[86]). Section 145 of the *Corruption and Crime Commission Act 2003* (WA) supplies direct use immunity in similar terms to those of section 197(2) of the CC Act in relation to statements made under compulsion. However, section 145(2) provides:

> *Despite subsection (1), the witness may, in any civil or criminal proceedings, be asked about the statement under section 21 of the Evidence Act 1906.*

Section 21 supplies the general power to cross-examine upon prior inconsistent statements, that is, an analogue to section 18 of the *Evidence Act 1977* (Qld).

I have gone through the above matters to highlight a number of points. First, the present process of defendants being supplied with compelled material from CCC hearings of their co-defendants is legally suspect. It is a process that can work to produce injustice in cases involving multiple co-defendants because a defendant can be armed going into trial with access to the compelled thoughts and position of a co-defendant. It is not always the case that the positions of co-defendants at trial substantially align and they invariably differ in varying degrees. This presents a substantial unfairness, though, it is not something that has been adjudicated on by the courts, as yet.

Second, if it is accepted that it is not permissible for a defendant to cross-examine a co-defendant about an answer, document, thing or statement given or produced by the co-defendant in a compelled hearing before the CCC, it begs the question of why that material is being disclosed to the other defendants at all. The answer to that question may lie in the present interpretation of the *Code* disclosure provisions, referred to above. The alternate interpretation is that the material is required to be disclosed, upon request by a defendant, but its use is limited to pre-trial derivative evidence gathering and trial preparation work. Given the impingement on the privilege against self-incrimination that the CC Act provides, it is more likely that the intention was to withdraw the privilege in order to assist investigators to further their stalled investigations and supply them with the prospect of fresh leads in order to obtain admissible derivative evidence, rather than to assist a co-accused in preparing for the combat of trial. The policy question still remains though, as to where to draw the line with respect to the broader disclosure entitlements of defendants to inadmissible material compulsorily obtained by the CCC, against the backdrop of the CC Act provisions prohibiting publication (see sections 197, 201 and 202).

Third, irrespective of the width of the disclosure entitlements of defendants, disclosure requests for inadmissible compelled material may be more efficiently handled by the CCC than the ODPP, taking into account the siloing required in the ODPP and the consequent resource wastage.

6. the proposition (reflected in paragraph 16 of the submission by Local Government Association of Queensland to the Committee dated 22 July 2021) that section 49 of the *Crime and Corruption Act* should be amended to require report to and review by the Director of Public Prosecutions before criminal charges are laid in respect of "disqualifying offences" (within the meaning of section 153(6) of the *Local Government Act 2009*):

> ***16.*** *Accordingly, in response to this term of reference, it is the LGAQ's submission that section 49 is not appropriate and sufficient and should be amended to prevent what happened to the former councillors of Logan City Council from ever occurring again. At the very least, from the LGAQ's perspective, section 49 should be amended to require an intended CCC decision to lay criminal charges for a "disqualifying offence" (see section 153(6) of the Local Government Act 2009 - discussed further in response to term of reference k below) to be first subject to a report to, and review by, the DPP, prior to such charges being laid;*

The fact of charging is likely to have a non-curial impact on most defendants, in varying degrees. For most people, the fact of being charged, irrespective of the ultimate outcome of the criminal process, is likely, in a practical sense, to be an irremovable stain on their reputation and standing in their work and social life. The personal strain associated with being charged is no doubt substantial. This reality is an unfortunate bi-product of the criminal law system in circumstances where prosecutions are unsuccessful.

The issue that the Logan Councillors inquiry highlighted is that the mere fact of charging can have a substantial impact upon the stability and operation of government, in that case, local government. In these circumstances, there are higher reasons, beyond the individual, for great care to be exercised with charging. There is merit in the LGAQ's submission. However, a requirement of pre-charging advice should extend beyond the confines of the *Local Government Act 2009* and extend to offences under other pieces of legislation that have the capacity to destabilise all arms of local and state government. That expert advice need not necessarily be obtained from the DPP and may also be obtained internally or externally by the QPS.

7. the use of seconded police officers in investigations conducted by the Crime and Corruption Commission and in the processes connected with decisions to commence prosecutions arising from those investigations;

This issue is largely answered above. Police officers who are expert in conducting investigations are necessary for the proper functioning of the CCC.

Seconded police officers also, in theory, supply a layer of impartiality and balance in the conduct of the work of the CCC. However, the evidence from the Logan Councillors inquiry, referred to above, indicates that institutional capture of seconded police officers by the CCC is a real and substantial issue.

Those expert in organisational psychology would be better positioned to comment on measures that would assist to ensure that seconded police officers are able to maintain their independence whilst on secondment. However, the impact of the issue of institutional capture on systemic integrity would be ameliorated to some extent by the charging function sitting with the QPS, external to the CCC. That is, irrespective of the degree of capture, impartial eyes would consider the material and determine charges.

8. Any issues arising from the use of seconded police officers at the Crime and Corruption Commission and how those issues are managed by the Queensland Police Service.

The Fitzgerald Report stated (pages 311 and 313):

> *The Official Misconduct Division* [now the Corruption Division] *will be served by police seconded to it for appropriate finite periods and on guidelines to be established by the Criminal Justice Committee.*
>
> *…*
>
> *All secondments to serve in the Official Misconduct Division should be for a relatively short time of two to three years, and non-renewable save when necessary to complete particular investigations where continuity is essential.*
>
> *…*
>
> *To be effective, the Official Misconduct Division must have a wide variety of skilled staff and consultants. Those will have to include specially screened police of proven competence and experience, lawyers, accountants, finance consultants, linguists, computer programmers engineers and operators, electronics engineers, telecommunications specialists, computer operators, public administrators, statisticians, analysts, surveillance specialists and scientists.*

Section 255 of the CC Act deals with the secondment of QPS officers to CCC:

> ***255 Secondment of officers***
>
> *(1) The chief executive officer may arrange with the chief executive of a department, or with another unit of public administration, for the services of officers or employees of the department or other unit to be made available (**seconded**) to the commission.*
>
> *(2) The arrangement is not effective unless it has been approved by—*
>
> *(a) for a secondment of an officer or employee of the parliamentary service—the Speaker; or*

(b) for a secondment of a member of the police service— the Minister and the Minister administering the Police Service Administration Act 1990; or

…..

(3) An officer or employee seconded to the commission under this section is subject to the direction and control of the chief executive officer.

(4) However, if police officers are seconded to the commission, their efficient deployment is to be the joint responsibility of the chief executive officer and the most senior police officer seconded to the commission.

(5) Without limiting section 174(2), a police officer seconded to the commission under this section continues to be a police officer for all purposes and to have the functions and powers of a police officer without being limited to the performance of the commission's functions.

Example for subsection (5) –

A police officer seconded to the commission may exercise the powers of a police officer under the Police Powers and Responsibilities Act 2000 for an investigation of alleged corruption involving a relevant offence as defined in section 323 of that Act.

My comments in relation to the independence of seconded police officers exercising the charging discretion, which concerns section 255(5), are set out above. I have no other comments to make about the balance of section 255.

I am not in a position to comment on how the QPS manages issues arising from the use of seconded police officers, save for two matters. First, I understand from the interaction of my office with the CCC over time that when a seconded QPS officer is suspected of improper conduct, the officer is immediately returned to the QPS. This amounts to a significant and regrettable injustice to those serving police officers who are subsequently cleared of any wrongdoing and it must have some impact upon their reputation and career progression. A more balanced approach to dealing with a suspicion of improper conduct may be that the police officer is placed on leave within the CCC, at least while a preliminary investigation into the allegation is conducted and considered.

Second, as a matter of operational expertise, corruption investigation teams appear to be overweight with investigative police officers. The skill and expertise of investigative police in those teams is certainly needed, however, the tendency of those teams is to see criminal charges as the focus. A broader range of experience in corruption investigation teams may lead to an approach more focussed on the main purpose of the CC Act in the corruption sphere, namely, to continuously improve the integrity of, and to reduce the incidence of corruption in, the public sector (see section 4(1)(b) of the CC Act).

Yours faithfully

Michael Woodford
Parliamentary Crime and Corruption Commissioner

Office of the Parliamentary Crime and Corruption Commissioner

Parliament House
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Brisbane Qld 4000
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Your Ref: 602456/1, 6158961

20 April 2022

The Honourable Tony Fitzgerald AC QC
The Honourable Alan Wilson QC
Commission of Inquiry Relating to
the Crime and Corruption Commission

email: submissions@cccinquiry.qld.gov.au

Dear Commissioners,

RE: Submission to the Commission of Inquiry into specific matters relating to the CCC

I refer to your letter of 13 April 2022 seeking further information in relation to the submission I provided to the Commission of Inquiry on 7 April 2022.

My submission stated that the functions of my office include auditing the CCC's records and operational files to decide whether: the CCC has exercised power in an appropriate way; matters under investigation are appropriate for investigation by the CCC; registers are up to date; proper authorisations have been obtained; and policy and procedural guidelines have been complied with.

You inquired whether these audits include consideration of individual investigation files, including the appropriateness of decisions taken in investigations and decisions to commence prosecutions (such as whether those decisions have a proper basis in evidence and complied with Crime and Corruption Commission policies and procedures, including the Code of Conduct).

These audits are performed *"as required by the Committee"* pursuant to section 314(2) of the *Crime and Corruption Act 2001*. The audits (as well as investigations undertaken pursuant to section 314(2)(b)) can relate to individual investigation files and may involve consideration of the appropriateness of decisions to commence prosecutions if the Committee so required, or if that were an issue relevant to Committee's referral of the matter to me.

As stated in my submission, apart from statutory audits and inspections of the CCC's records of surveillance device warrants, telecommunications interception warrants, controlled operations and assumed identities, the office mainly acts in response to specific complaints and referrals from the Committee. The Committee may ask me to consider the appropriateness of decisions to commence prosecutions but, without a specific reference from the Committee, there is limited scope for consideration of individual investigation files, including decisions to commence prosecutions.

Yours faithfully

[redacted]

Michael Woodford
Parliamentary Crime and Corruption Commissioner

Office of the Parliamentary Crime and Corruption Commissioner

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Your Ref: 602456/1, 6158961

22 April 2022

The Honourable Tony Fitzgerald AC QC
The Honourable Alan Wilson QC
Commission of Inquiry Relating to
the Crime and Corruption Commission

email: [redacted]

Dear Commissioners,

RE: Submission to the Commission of Inquiry into specific matters relating to the CCC

I sent a submission to the Commission of Inquiry on 7 April 2022 and a supplementary response to a specific question on 20 April 2022.

I had noted in my submission that I was not aware of any decision that had considered the issue of the availability of compelled Crime and Corruption Commission hearing evidence to a co-defendant in criminal proceedings.

I have recently become aware of the decision in *SQH v Scott* [2022] QSC 16 (copy attached), which touches, to some extent, upon that issue.

Yours faithfully

[redacted]

Michael Woodford
Parliamentary Crime and Corruption Commissioner

SUPREME COURT OF QUEENSLAND

CITATION:	*SQH v Scott* [2022] QSC 16
PARTIES:	**SQH** **(applicant/appellant)** **v** **MICHAEL JOHN SCOTT** (respondent) **ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (first intervenor**)** **QUEENSLAND HUMAN RIGHTS COMMISSION** (second intervenor)
FILE NO/S:	BS No 11211 of 2020
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	23 February 2022 (restricted); 4 March 2022 (public)
DELIVERED AT:	Brisbane
HEARING DATE:	26 May 2021; 18 June 2021
JUDGE:	Williams J
ORDER:	**The Court orders that:** **1. Leave to appeal is granted.** **2. The appeal is dismissed.** **I will hear further from the parties in respect of costs and as to whether any further orders are required.**
CATCHWORDS:	CRIMINAL LAW – FEDERAL AND STATE INVESTIGATIVE AUTHORITY – QUEENSLAND –APPEAL – GROUND OF APPEAL – ERROR OF LAW – where the respondent, as the presiding officer at a Crime and Corruption Commission hearing, made a decision to require the applicant to answer the question "what is your knowledge of the involvement of [names of alleged co-offenders] in the trafficking of dangerous drugs", after ruling that the applicant did not have a reasonable excuse, pursuant to section 194 of the *Crime and Corruption Act* 2001 (Qld) (CC Act) – where the applicant applies for leave to appeal under section 195(1) of the CC Act and, if leave

is granted, an order setting aside the respondent's decision – where the Attorney-General for the State of Queensland and the Queensland Human Rights Commission have intervened pursuant to sections 50 and 51 of the *Human Rights Act* 2019 (Qld) (HR Act) – where the applicant claims a reasonable excuse because compulsory examination would lock the applicant into a version of events from which the applicant cannot depart at trial, especially when that version would include details about co-defendants – where the respondent claims that the fact of the applicant's existing charge is not capable of constituting a reasonable excuse – whether the respondent erred in finding that the applicant did not have a reasonable excuse under section 194(1) of the CC Act because the coercive hearing occurred after the applicant had been charged and therefore had the capacity of constraining the applicant's legitimate forensic choices in the future conduct of the applicant's trial and, in the circumstances of this case, constituted a reasonable excuse

CRIMINAL LAW – FEDERAL AND STATE INVESTIGATIVE AUTHORITY – QUEENSLAND –APPEAL – GROUND OF APPEAL – RELEVANT CONSIDERATIONS – FAILURE TO CONSIDER – where the applicant submits that the applicant's answers can be made available to the legal representatives for each co-defendant, which would limit the applicant's forensic choices at trial – where the respondent claims that the applicant has not advanced any factual or legal basis, beyond assertion, for why section 201 of the CC Act is relevant to a claim of reasonable excuse – whether the respondent failed to have regard to a relevant consideration, namely section 201 of the CC Act and the impact that the availability of the coerced material to the applicant's co-defendants would have on the capacity of the safeguards in the CC Act to quarantine coerced answers from the applicant's trial

HUMAN RIGHTS – HUMAN RIGHTS LEGISLATION – where the applicant submits that the limits on human rights imposed by the presiding officer's decision are not justified – where the applicant further submits that the respondent's consideration of less restrictive alternatives lacked logic and substance and the fair balance must take into account that the evidence would be made available to the legal representatives for each co-defendant – where the respondent claims that the jurisdictional prerequisite in section 59(1) of the HR Act is not met, with the consequence that the applicant cannot raise any purported non-compliance with section 58(1) of the HR Act – where the respondent further claims that, in any event, the respondent's decision is compatible with the human right in section 32(2)(k) of the HR Act – whether the respondent acted unlawfully pursuant to section 58(1)(a) of the HR Act in that the decision that he made was not compatible with

	the applicant's human right protected by section 32(2)(k) of the HR Act
	Crime and Corruption Act 2001 (Qld), s 4, s 180, s 189, s 190, s 194, s 195, s 197, s 200A, s 201, s 202 *Evidence Act* 1977 (Qld), s 130 *Human Rights Act* 2019 (Qld), s 3, s 4, s 8, s 13, s 25, s 26, s 31, s 32, s 48, s 50, s 51, s 58, s 59
	Crime and Misconduct Commission v WSX & EDC [2013] QCA 152, considered *Lee v New South Wales Crime Commission* (2013) 251 CLR 196; [2013] HCA 39, considered *Lee v The Queen* (2014) 253 CLR 455; [2014] HCA 20, considered *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24; [1986] HCA 40, considered *Momcilovic v The Queen* (2011) 245 CLR 1; [2011] HCA 34, considered *Norbis v Norbis* (1986) 161 CLR 513; [1986] HCA 17, considered *NS v Scott* [2018] 2 Qd R 397; [2017] QCA 237, considered *PJB v Melbourne Health* [2011] VSC 327; (2011) 39 VR 373, considered *Re Application under Major Crime (Investigative Powers) Act 2004* (2009) 24 VR 415; [2009] VSC 381, considered *Strickland (a pseudonym) v Director of Public Prosecutions (Cth)* (2013) 266 CLR 325; [2018] HCA 53, considered *X7 v Australian Crime Commission* (2013) 248 CLR 92; [2013] HCA 29, considered
COUNSEL:	S C Holt QC, with M J Jackson, for the applicant/appellant N Kidson QC, with R Berry, for the respondent G A Thompson QC, with K J E Blore, for the first intervenor P Morreau for the second intervenor
SOLICITORS:	Hannay Lawyers for the applicant/appellant Crime and Corruption Commission for the respondent Crown Law for the first intervenor The Queensland Human Rights Commission for the second intervenor

[1] The applicant[1] seeks leave to appeal a decision of the respondent made on 13 October 2020 under s 194(3)(b) of the *Crime and Corruption Act* 2001 (Qld) (the CC Act).

---

[1] For ease of reference, the applicant/appellant is referred to as the applicant in these reasons.

[2] The Further Amended Originating Application[2] and Further Amended Notice of Appeal Subject to Leave,[3] relate to a decision by the respondent that the applicant did not have a reasonable excuse not to answer a question from the respondent, namely: "what is your knowledge of the involvement of [names of alleged co-offenders] in the trafficking of dangerous drugs?"

[3] The Further Amended Originating Application and the Further Amended Notice of Appeal Subject to Leave, contains the following three grounds of appeal:

> "1. The respondent erred in finding that [the applicant] did not have a reasonable excuse under s 194(1) of the [CC Act] because the coercive hearing occurred after [the applicant] had been charged and therefore had the capacity of constraining [the applicant's] legitimate forensic choices in the future conduct of [the applicant's] trial and, in the circumstances of this case, constituted a reasonable excuse.
>
> 2. The respondent failed to have regard to a relevant consideration, namely s 201 of the [CC Act] and the impact that the availability of the coerced material to [the applicant's] co-defendants would have on the capacity of the safeguards in the [CC Act] to quarantine coerced answers from the applicant's trial.
>
> 3. The respondent acted unlawfully pursuant to s 58(1)(a) of the *Human Rights Act* 2019 in that the decision that he made was not compatible with the applicant's human right protected by s 32(2)(k) of the *Human Rights Act* 2019."

[4] Subject to the grant of leave to appeal, the applicant seeks orders that the appeal be allowed, the decision of the respondent be set aside and costs.

[5] Both the Attorney-General for the State of Queensland and the Queensland Human Rights Commission have intervened to make submissions in respect of Ground Three. The intervention is pursuant to ss 50 and 51 of the *Human Rights Act* 2019 (Qld) (HR Act) respectively.

[6] The intervenors do not address Grounds One and Two and their involvement is confined to the application of the HR Act, specifically in respect of Ground Three, but also relevant preliminary issues that arise under the HR Act.

[7] The preliminary issues include the following:

(a) The requirement of leave to appeal.[4]

(b) The requirement of s 59 of the HR Act (the piggyback clause) and the impact on Ground Three.

---

2 A Further Amended Originating Application was filed by leave on 22 June 2021.

3 A Further Amended Notice of Appeal (subject to leave) was filed by leave on 22 June 2021.

4 Generally but also relevant to the next issue in respect of section 59 of the HR Act.

(c) The proper approach to s 48 of the HR Act (the interpretive clause).

(d) The exception in s 58(2) of the HR Act.

[8] It is appropriate to consider these issues prior to considering the more substantive issues.

Confidentiality

[9] The hearing of the application for leave to appeal and the appeal was conducted in closed court as required by s 195(9) of the CC Act. Orders were made protecting the confidentiality of the transcript of the hearing, exhibits, submissions and documents on the Court file. These orders are consistent with the requirements of s 200A of the CC Act.

[10] Further, an order was made that these reasons may be published consistent with s 200A(7) of the CC Act. Section 200A(7) states:

> "Nothing in this section prevents the publication of reasons for a decision in the proceeding if the publication does not identify–
>
> (a) a person; or
>
> (b) information that may prejudice–
>
> (i) an investigation being conducted by the commission; or
>
> (ii) a specific intelligence operation being undertaken by the commission; or
>
> (iii) the performance of another function of the commission."

[11] To facilitate compliance with s 200A(7), these reasons will be provided to the parties for the identification of any information of concern prior to the reasons being made publicly available.

[12] If necessary, information will be redacted in the public version of these reasons to protect information identified as being within s 200A(7)(b)(i) to (iii) of the CC Act.

Statutory scheme – CC Act

[13] The application for leave to appeal is made pursuant to s 195 of the CC Act. Section 195 of the CC Act relevantly states:

> "**195 Appeals to Supreme Court**
>
> (1) A person may appeal against a decision of a presiding officer given under section 194(3)(b) if—
>
> (a) the person applies for leave to appeal the decision within 7 court days after the person is given the presiding officer's reasons for decision; and
>
> (b) the Supreme Court grants leave to appeal.
>
> (2) The Supreme Court may grant leave to appeal only if the court is satisfied—

(a) if the appeal relates to a document or thing—the document or thing has been given to the commission and placed in safe custody; and

(b) in all cases—the appeal has a significant prospect of success or there is some important question of law involved.

(3) An application for leave to appeal must state the grounds of the application.

(4) The Supreme Court must deal with an application for leave to appeal and the appeal expeditiously.

(5) On hearing the appeal, the Supreme Court may make an order—

(a) affirming the presiding officer's decision; or

(b) setting aside the presiding officer's decision.

(6) If the court affirms the presiding officer's decision about a document or thing, the commission may access the document or thing.

(7) If the court sets aside the decision about a document or thing, the court must make an order directing that the document or thing be delivered to the person.

(8) A person may appeal only once under subsection (1) in relation to a particular reasonable excuse claimed by the person for not answering a question or producing a document or thing at a commission hearing.

(9) An application for leave to appeal, and an appeal, under this section are to be heard in closed court.

Note—

See also section 200A in relation to the confidentiality of proceedings under this section.

(10) However, the court may permit a person to be present at a hearing for the application for leave to appeal, or appeal, in the interests of justice."

[14] The relevant decision the subject of the application is a decision pursuant to s 194 of the CC Act. Section 194 of the CC Act states:

"**194 Presiding officer to decide whether refusal to answer questions or produce documents or things is justified**

(1) This section applies if a person claims to have a reasonable excuse, including a reasonable excuse based on a claim of

legal professional privilege, for not complying with a requirement made of the person at a commission hearing—

(a) to answer a question put to the person; or

(b) to produce a document or thing that the person was required to produce.

(1A) The presiding officer must decide whether or not there is a reasonable excuse.

(1B) The presiding officer must decide, after hearing the person's submissions—

(a) that the requirement will not be insisted on; or

(b) that the officer is not satisfied the person has a reasonable excuse.

(2) If the presiding officer decides, after hearing the person's submissions, that the person has a reasonable excuse based on self-incrimination privilege for not complying with the requirement—

(a) the presiding officer may require the person to comply with the requirement; and

(b) section 197 applies in relation to the answer, document or thing given or produced.

(3) If the presiding officer decides the person did not have a reasonable excuse for not complying with the requirement, the presiding officer must—

(a) give the person reasons for the decision; and

(b) require the person to answer the question, or to produce the document or thing as required by the attendance notice, subject to the person's right of appeal under section 195; and

(c) advise the person that the person may appeal the presiding officer's decision to the Supreme Court within the time allowed under section 195.

Note—

A refusal to comply with the requirement to answer the question or produce the document or thing is an offence against section 185 or 192.

(4) If—

(a) the person is required to produce a document or thing under subsection (3); and

(b) the person informs the presiding officer that the person wishes to appeal or consider an appeal under section 195;

the person must immediately seal the document or thing and give it to the commission for safekeeping.

Maximum penalty—85 penalty units or 1 year's imprisonment.

(5) The commission must—

(a) give the person a receipt for the sealed document or thing (the ***sealed evidence***); and

(b) place it in safe custody at the commission's place of business at the earliest reasonable opportunity.

(6) A person must not open the sealed evidence unless authorised to open it under this Act or a court order.

Maximum penalty—85 penalty units or 1 year's imprisonment.

(7) If the person fails to apply for leave to appeal within the time allowed under section 195, or leave to appeal is refused under that section, the commission may access the sealed evidence."

[15] Section 4 sets out the statutory purpose of the CC Act as follows:

"**4 Act's purposes**

(1) The main purposes of this Act are—

(a) to combat and reduce the incidence of major crime; and

(b) to continuously improve the integrity of, and to reduce the incidence of corruption in, the public sector.

(2) The Act also has as the purpose to facilitate the commission's involvement in a confiscation related investigation."

[16] Further, s 5 of the CC Act sets out how those purposes are to be achieved and includes in s 5(2) as follows:

"The commission is to have investigative powers, not ordinarily available to the police service, that will enable the commission to effectively investigate major crime and criminal organisations and their participants."

[17] Chapter 4 deals with hearings, deciding claims, privilege and excuse. Pursuant to s 176 of the CC Act, the Crime and Corruption Commission (the Commission) may authorise the holding of a hearing in relation to any matter relevant to the performance of its functions. Further, pursuant to s 177 of the CC Act, generally a hearing is not open to the public (however, that is subject to stated exceptions).

[18] Section 180 of the CC Act sets out generally how hearings are to be conducted:

> "**180 Conduct of hearings**
>
> (1) When conducting a hearing, the presiding officer—
>
> (a) must act quickly, and with as little formality and technicality, as is consistent with a fair and proper consideration of the issues before the presiding officer; and
>
> (b) is not bound by the rules of evidence; and
>
> (c) may inform himself or herself of anything in the way he or she considers appropriate; and
>
> (d) may decide the procedures to be followed for the hearing.
>
> (2) The presiding officer or a person nominated by the presiding officer for the purpose may administer an oath, or take a statutory declaration, required by the presiding officer.
>
> (3) The presiding officer may, by order, prohibit the publication of—
>
> (a) an answer given, or document or thing produced, at a commission hearing or anything about the answer, document or thing; or
>
> (b) information that might enable the existence or identity of a person who is about to give or has given evidence before the commission at a hearing to be ascertained.
>
> (4) The presiding officer is taken, for the purposes of the hearing, to be the commission."

[19] Section 183 of the CC Act, which is contained in Part 2, provides that a person attending at a Commission hearing to give sworn evidence must not fail to take an oath when required by the presiding officer.

[20] Division 3 (Refusal to answer) Subdivision 1 (Crime investigations and intelligence and witness protection functions) contains ss 189 and 190 of the CC Act which state as follows:

> "**189 Application of sdiv 1**
>
> This subdivision applies only in the context of the following—

(a) a crime investigation;

(b) an intelligence function hearing; or

(c) a witness protection function hearing.

190 Refusal to answer question

(1) A witness at a commission hearing must answer a question put to the person at the hearing by the presiding officer, unless the person has a reasonable excuse.

Maximum penalty—200 penalty units or 5 years imprisonment.

(2) The person is not entitled—

(a) to remain silent; or

(b) to refuse to answer the question on a ground of privilege, other than legal professional privilege.

(3) If—

(a) the person refuses to answer a question on the ground the answer to the question would disclose a communication to which legal professional privilege attaches; and

(b) the person has no authority to waive the privilege;

the person must, if required by the presiding officer, tell the officer the name and address of the person to whom or by whom the communication was made.

Maximum penalty—200 penalty units or 5 years imprisonment."

[21] Sections 194 and 195 of the CC Act appear in Division 4 (Deciding claims) and apply in relation to crime investigations, intelligence and witness protection functions.

[22] Section 197 of the CC Act, contained in Division 5 (Restrictions on use) states:

"**197 Restriction on use of privileged answers, documents, things or statements disclosed or produced under compulsion**

(1) This section applies if—

(a) before an individual answers a question put to the individual by the commission or a commission officer or produces a document or thing or a written statement of information to the commission or a commission officer, the individual claims self-incrimination privilege in relation to the answer or production; and

(b) apart from this Act, the individual would not be required to answer the question or produce the document, thing or statement in a proceeding if the individual claimed self-incrimination privilege in relation to the answer or production; and

(c) the individual is required to answer the question or produce the document, thing or statement.

(2) The answer, document, thing or statement given or produced is not admissible in evidence against the individual in any civil, criminal or administrative proceeding.

(3) However, the answer, document, thing or statement is admissible in a civil, criminal or administrative proceeding—

(a) with the individual's consent; or

(b) if the proceeding is about—

(i) the falsity or misleading nature of an answer, document, thing or statement mentioned in subsection (1) and given or produced by the individual; or

(ii) an offence against this Act; or

(iii) a contempt of a person conducting the hearing; or

(c) if the proceeding is a proceeding, other than a proceeding for the prosecution of an offence, under the Confiscation Act and the answer, document, thing or statement is admissible under section 265 of that Act.

(4) Also, the document is admissible in a civil proceeding about a right or liability conferred or imposed by the document.

(5) In a commission hearing, the presiding officer may order that all answers or a class of answer given by an individual or that all documents or things or a class of document or thing produced by an individual is to be regarded as having been given or produced on objection by the individual.

(6) If the presiding officer makes an order under subsection (5), the individual is taken to have objected to the giving of each answer, or to the producing of each document or thing, the subject of the order.

(7) Subsection (2) does not prevent any information, document or other thing obtained as a direct or indirect consequence of the individual giving or producing the answer, document,

thing or statement from being admissible in evidence against the individual in a civil, criminal or administrative proceeding."

[23] Section 201 of the CC Act is set out in full below at [237]. Generally, it provides that the Commission must give evidence to the defence unless a Court orders otherwise and the evidence must only be used for the defence to the charge.

[24] Section 202 of the CC Act provides other protective features and states as follows:

"**202 Publication of names, evidence etc.**

(1) A person must not, without the commission's written consent or contrary to the commission's order, publish—

(a) an answer given, or document or thing produced, at a commission hearing, or anything about the answer, document or thing; or

(b) information that might enable the existence or identity of a person who is about to give or has given evidence before the commission (***witness***) at a hearing to be ascertained.

Maximum penalty—85 penalty units or 1 year's imprisonment.

(2) A person does not contravene subsection (1) if any of the following applies to the publication—

(a) the answer given, or document or thing produced, was given or produced at a public hearing and the publication is not contrary to the commission's order;

(b) the witness appeared at a public hearing and the publication is not contrary to the commission's order;

(c) the publication is made—

(i) for the purpose of defending a charge of an offence and is relevant to the defence; and

(ii) to a person charged with the offence or a lawyer representing a person charged with the offence;

(d) the publication is made for the purpose of making a submission to the parliamentary committee about the conduct of the commission's investigation;

(e) the publication is made for the purposes of a disciplinary proceeding or to start a prosecution for an offence.

(3) Also, a person does not contravene subsection (1)(b) if—

(a) the person is the witness, or the publication is made with the witness's implied or express consent; or

(b) the information mentioned in the provision has been generally made known by the witness or by the commission.

(4) The commission may apply to a Supreme Court judge for an order prohibiting a publication mentioned in subsection (2)(e).

(5) In this section—

publish includes publish to a single person, whether the publication is made orally or in writing."

Statutory scheme – HR Act

[25] The HR Act commenced in Queensland on 1 January 2020.

[26] Section 3 of the HR Act states the main objects as follows:

"**3 Main objects of Act**

The main objects of this Act are—

(a) to protect and promote human rights; and

(b) to help build a culture in the Queensland public sector that respects and promotes human rights; and

(c) to help promote a dialogue about the nature, meaning and scope of human rights."

[27] Section 4 of the HR Act outlines how the objects are to be primarily achieved as follows:

"**4 How main objects are primarily achieved**

The main objects are to be achieved primarily by—

(a) stating the human rights Parliament specifically seeks to protect and promote; and

(b) requiring public entities to act and make decisions in a way compatible with human rights; and

(c) requiring statements of compatibility with human rights to be tabled in the Legislative Assembly for all Bills introduced in the Assembly; and

(d) providing for a portfolio committee responsible for examining a Bill introduced in the Legislative Assembly to consider whether the Bill is compatible with human rights; and

(e) providing for Parliament, in exceptional circumstances, to override the application of this Act to a statutory provision; and

(f) requiring courts and tribunals to interpret statutory provisions, to the extent possible that is consistent with their purpose, in a way compatible with human rights; and

(g) conferring jurisdiction on the Supreme Court to declare that a statutory provision can not be interpreted in a way compatible with human rights; and

(h) providing for a Minister and a portfolio committee to report to the Legislative Assembly about declarations of incompatibility; and

(i) providing for how to resolve human rights complaints; and

(j) providing for the Queensland Human Rights Commission to carry out particular functions under this Act, including, for example, to promote an understanding and acceptance of human rights and this Act in Queensland."

[28] Section 5 of the HR Act states that the Act binds all persons, including the State. In respect of public entities, the Act applies to the extent the public entity has functions under Part 3, Division 4.

[29] The statutory scheme includes Division 2 dealing with interpretation. Section 6 refers to Schedule 1 which contains definitions of particular words used in the HR Act.

[30] Section 6 of the HR Act defines "human rights" to mean the rights stated in Part 2, Divisions 2 and 3.

[31] Further, s 8 of the HR Act defines "compatible with human rights". This provision is set out in full at [110] below.

[32] Relevantly to the current application, "public entity" is defined as including "(f) an entity established under an Act when the entity is performing functions of a public nature". Further, "perform a function" is defined in Schedule 1 as "includes exercise a power".

[33] Part 2 of the HR Act deals with human rights in Queensland. The starting position under s 11 of the HR Act is that all individuals in Queensland have human rights.

[34] Section 12 recognises that the human rights under the Act are in addition to other rights and importantly states:

"A right or freedom not included, or only partly included, in this Act that arises or is recognised under another law must not be taken to be

abrogated or limited only because the right or freedom is not included in this Act or is only partly included."

[35] Section 13 of the HR Act sets out the circumstances in which a limitation may be placed on a human right. This provision is set out in full at [111] below.

[36] Division 2 sets out specific civil and political rights. These rights largely draw on the International Covenant on Civil and Political Rights (ICCPR), however there are some differences in language and not all rights in the ICCPR have been incorporated into the HR Act.

[37] Relevant to the current application are ss 25(a), 26, 31 and 32(2)(k) of the HR Act, which provide as follows:

"**25 Privacy and reputation**

A person has the right—

(a) not to have the person's privacy, family, home or correspondence unlawfully or arbitrarily interfered with; and

(b) not to have the person's reputation unlawfully attacked.

26 Protection of families and children

(1) Families are the fundamental group unit of society and are entitled to be protected by society and the State.

(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.

(3) Every person born in Queensland has the right to a name and to be registered, as having been born, under a law of the State as soon as practicable after being born.

…

31 Fair hearing

(1) A person charged with a criminal offence or a party to a civil proceeding has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing.

(2) However, a court or tribunal may exclude members of media organisations, other persons or the general public from all or part of a hearing in the public interest or the interests of justice.

(3) All judgments or decisions made by a court or tribunal in a proceeding must be publicly available.

32 Rights in criminal proceedings

(1) A person charged with a criminal offence has the right to be presumed innocent until proved guilty according to law.

(2) A person charged with a criminal offence is entitled without discrimination to the following minimum guarantees—

(a) to be informed promptly and in detail of the nature and reason for the charge in a language or, if necessary, a type of communication the person speaks or understands;

(b) to have adequate time and facilities to prepare the person's defence and to communicate with a lawyer or advisor chosen by the person;

(c) to be tried without unreasonable delay;

(d) to be tried in person, and to defend themselves personally or through legal assistance chosen by the person or, if eligible, through legal aid;

(e) to be told, if the person does not have legal assistance, about the right, if eligible, to legal aid;

(f) to have legal aid provided if the interests of justice require it, without any costs payable by the person if the person is eligible for free legal aid under the *Legal Aid Queensland Act 1997*;

(g) to examine, or have examined, witnesses against the person;

(h) to obtain the attendance and examination of witnesses on the person's behalf under the same conditions as witnesses for the prosecution;

(i) to have the free assistance of an interpreter if the person can not understand or speak English;

(j) to have the free assistance of specialised communication tools and technology, and assistants, if the person has communication or speech difficulties that require the assistance;

(k) not to be compelled to testify against themselves or to confess guilt.

(3) A child charged with a criminal offence has the right to a procedure that takes account of the child's age and the desirability of promoting the child's rehabilitation.

(4) A person convicted of a criminal offence has the right to have the conviction and any sentence imposed in relation to it reviewed by a higher court in accordance with law.

(5) In this section—

legal aid means legal assistance given under the *Legal Aid Queensland Act 1997*."

[38] Part 3 deals with the application of human rights in Queensland and Division 3 deals with the interpretation of laws. Section 48 of the HR Act is contained within Division 3 and sets out the requirements in relation to the interpretation of all statutory provisions. The provision is set out in full at [107] below.

[39] Section 49 contains a process for a referral of a question of law on the interpretation of the HR Act to the Supreme Court for determination. Section 50 relates to the application of the HR Act or in relation to the interpretation of a provision in the HR Act.

[40] Section 53 of the HR Act provides for the Supreme Court to make a declaration of incompatibility where the Court is of the opinion that a statutory provision cannot be interpreted in a way compatible with human rights.

[41] Division 4 sets out obligations on public entities. Section 58 of the HR Act states as follows:

"**58 Conduct of public entities**

(1) It is unlawful for a public entity—

(a) to act or make a decision in a way that is not compatible with human rights; or

(b) in making a decision, to fail to give proper consideration to a human right relevant to the decision.

(2) Subsection (1) does not apply to a public entity if the entity could not reasonably have acted differently or made a different decision because of a statutory provision, a law of the Commonwealth or another State or otherwise under law.

Example—

A public entity is acting to give effect to a statutory provision that is not compatible with human rights.

(3) Also, subsection (1) does not apply to a body established for a religious purpose if the act or decision is done or made in accordance with the doctrine of the religion concerned and is necessary to avoid offending the religious sensitivities of the people of the religion.

(4) This section does not apply to an act or decision of a private nature.

(5) For subsection (1)(b), giving proper consideration to a human right in making a decision includes, but is not limited to—

(a) identifying the human rights that may be affected by the decision; and

(b) considering whether the decision would be compatible with human rights.

(6) To remove any doubt, it is declared that—

(a) an act or decision of a public entity is not invalid merely because, by doing the act or making the decision, the entity contravenes subsection (1); and

(b) a person does not commit an offence against this Act or another Act merely because the person acts or makes a decision in contravention of subsection (1)."

[42] Section 59 of the HR Act deals with relief and is set out in full at [82] below.

[43] Section 108 of the HR Act deals with the application of the Act and states:

> "This Act applies to all Acts and statutory instruments, whether passed or made before or after the commencement."

[44] This is subject to ss 106 and 107 but those sections are not relevant to the current application.

Factual background

[45] The background facts will only be referred to in these reasons in general terms and to the extent necessary. The background facts are not controversial between the parties.

[46] The applicant and the applicant's partner were charged in relation to a number of offences. The charges followed police officers executing a search warrant at the residence of the applicant and the applicant's partner, during which certain items were located.

[47] Subsequently, an attendance notice was issued by the Commission pursuant to s 82(1)(a) of the CC Act requiring the applicant to attend to be examined in relation to the applicant's knowledge of offending in a specified geographical area.

[48] The applicant attended in accordance with the attendance notice. The respondent was the presiding officer for the purposes of the hearing. The full transcript of the hearing is in evidence.

[49] The hearing proceeded as a closed hearing pursuant to s 178(3) of the CC Act and a non-publication order was also made pursuant to s 180(3) of the CC Act.

[50] The respondent also ordered a "blanket" self-incrimination protection pursuant to s 197(5) of the CC Act.[5]

[51] Further, pursuant to s 60(2) of the CC Act, the respondent informed the applicant that the Commission may, in effect, share information with other entities.

[52] The applicant was represented by Counsel and a solicitor at the hearing.

[53] Following the applicant being sworn, the respondent asked the applicant "what is your knowledge of [Co-accused#1][6] and [Co-accused#2][7]'s involvement in the trafficking of dangerous drugs?".

[54] The applicant declined to answer the question and claimed to have a reasonable excuse not to answer the question. The applicant indicated "this question touches on my current charge" and that answering the question "has an impact on [the applicant] receiving a fair trial."

[55] The respondent then indicated that he "provisionally require[d] [the applicant] to answer that question". The applicant confirmed that despite being required to answer the question the applicant claimed a reasonable excuse not to answer the question.

[56] Counsel on behalf of the applicant then made submissions to the respondent in respect of the applicant's claim of a reasonable excuse. These submissions included:

(a) The applicant had been charged together with Co-accused#1.

(b) The risk of derivative evidence being obtained.[8]

(c) The right protected by s 32(2)(k) HR Act: "not to be compelled to testify against themselves or to confess guilt".[9]

[57] Counsel for the applicant placed particular reliance on the statement by Hayne and Bell JJ in *X7 v Australian Crime Commission* at [124]:

> "Even if the answers given at a compulsory examination are kept secret, and therefore cannot be used directly or indirectly by those responsible

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5 The parties were requested to provide further submissions on the relevance of this order to the issues raised in the application and appeal. No party considered there were any additional issues that needed to be considered arising out of the respondent's order pursuant to s 197(5) of the CC Act.

6 The applicant's partner and co-accused in respect of the offences arising out of the execution of the search warrant.

7 The evidence does not identify what offence Co-accused#2 was charged with (though reference was made to the applicant being charged) and it is not clear whether Co-accused#2 was a co-offender with the applicant. However, Co-accused#2 was alleged to be involved with Co-accused#1.

8 Particularly as considered in *X7 v Australian Crime Commission* (2013) 248 CLR 92.

9 As considered in *DAS v Victorian Human Rights & Equal Opportunity Commission* [2009] VSC 381 and also *X7 v Australian Crime Commission* (2013) 248 CLR 92.

> for investigating and prosecuting the matters charged, the requirement to give answers, after being charged, would fundamentally alter the accusatorial judicial process that begins with the laying of a charge and culminates in the accusatorial (and adversarial) trial in the courtroom. No longer could the accused person decide the course which he or she should adopt at trial, in answer to the charge, according *only* to the strength of the prosecution's case as revealed by the material provided by the prosecution before trial, or to the strength of the evidence led by the prosecution at the trial. The accused person would have to decide the course to be followed in light of that material and in light of any self-incriminatory answers which he or she had been compelled to give at an examination conducted after the charge was laid. That is, the accused person would have to decide what plea to enter, what evidence to challenge and what evidence to give or lead at trial according to what answers he or she had given at the examination. The accused person is thus prejudiced in his or her defence of the charge that has been laid by being required to answer questions about the subject matter of the pending charge."[10]

[58] Counsel Assisting then made submissions, including:

(a) The statutory scheme in the CC Act, including the purposes (s 4), the powers of the Commission (s 5(2)), the Commission's major crime function (s 25), the power to hold hearings (s 176) and the major referral regime (ss 26, 27(5) and 60(2)).

(b) The respondent's orders authorised the provision of information from the hearing to certain entities, including investigators. However, the information would not be given to prosecutors consistent with the requirements in *Lee v The Queen*.[11]

(c) The "blanket" protection against self-incrimination made pursuant to s 197(5) provided that any answers given under compulsion at the examination would not be admissible in a prosecution against the applicant.

(d) "Reasonable excuse" has previously been considered by the Court of Appeal in *Crime and Misconduct Commission v WSX*[12] where it was recognised as an objective test as follows:

> "[37] Whether reasonable excuse exists is a matter for objective determination, and the consequences of a refusal to answer, to both the examinee and the appellant Commission, are relevant considerations."

(e) There were two purposes to the examination of the applicant:

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10 In submissions on this application, it is noted that this statement was approved by the High Court in *Lee v The Queen (No 2)* (2014) 253 CLR 455 at [41] and also in *Strickland (a pseudonym) v Director of Public Prosecutions (Cth)* (2018) 266 CLR 325 at [76].

11 (2014) 253 CLR 455.

12 (2013) 229 A Crim R 286 at 293 per de Jersey CJ, Gotterson JA and Mullins J.

(i) To obtain information in relation to other targets of the investigation;[13] and

(ii) To obtain derivative evidence which may be used in the prosecution of any person who may be charged in relation to the investigation.[14]

(f) Section 331 of the CC Act makes it clear that the Commission may commence an investigation or a hearing despite criminal proceedings having been commenced.

(g) Section 331(2) provides safeguards to the witness' right to a fair trial. These include a closed hearing, a direction under s 202 and an order under s 180(3). In respect of the application, it was a closed hearing and non-publication orders were made under s 180(3) and orders under s 60 identifying the entities to which disclosure could be made.

(h) Section 197 abrogated the right to silence, with Parliament's intention evidenced in the clear terms of the section.

(i) Reliance was placed on the decisions in *Strickland (a pseudonym) v Director of Public Prosecutions (Cth)*,[15] *X7 v Australian Crime Commission* and *NS v Scott*,[16] particularly in respect of derivative use evidence and the discretion to exclude evidence under s 130 of the *Evidence Act* 1977 (Qld), or at common law.

(j) On balance, the "protective" orders dealt with the issue identified in *Strickland* and in the circumstances ensured the applicant's right to a fair trial.

[59] Counsel Assisting also specifically addressed the HR Act and in particular sections 8 and 13. It was submitted that by operation of the relevant sections of the CC Act[17] the limitations on human rights were authorised by law. That is, the limitations were not incompatible with the applicant's human rights as a result of the protective measures in place and the limitations were reasonable and demonstrably justifiable.

[60] In support of this conclusion, Counsel Assisting referred to and relied on a number of contentions including:

(a) There were similarities between the current facts and the facts in *DAS v Victorian Human Rights & Equal Opportunity Commission*: namely, an investigation into organised crime, involved serious offences with considerations of detriment to society and the difficulty in obtaining evidence other than from the individuals involved in the alleged organised crime.

(b) While there was a limitation on the applicant's human right, whether the limitation was proportionate required consideration of the nature and severity of the offending and the number of people involved in the alleged syndicate.

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13 This would include Co-accused#1 and Co-accused#2 who were primary targets of the investigation.

14 It is foreseeable that this could be the offences the applicant was then currently charged with, as well as any new charges brought as a result of the investigation.

15 (2018) 266 CLR 325.

16 [2018] 2 Qd R 397.

17 Sections 82, 176, 183, 190 and 331.

(c) Further, considerations of public interest supported the questioning of people involved in organised crime, particularly those lower in the hierarchy or who were less culpable due to their knowledge or actions. The objective of the questioning was to gather information on the principal targets and, also, specific individuals who in effect enable the expansion or the criminality or assist in the avoidance of detection.

[61] Following the submissions, the respondent proceeded to give a ruling on the applicant's claim of a reasonable excuse not to answer the question asked.

[62] The respondent's reasoning included the following:

(a) Co-accused#1 was the applicant's partner and co-accused in respect of the charges. Co-accused#2 had also been charged in respect of matters covered by the investigation.

(b) Protective orders were made at the commencement of the examination, including:

(i) Protection in respect of self-incrimination privilege under s 197(5) of the CC Act.

(ii) Non-publication order under s 180(3) of the CC Act.

(iii) No publication of information under s 202 of the CC Act, together with information to be shared only with identified agencies under s 60 of the CC Act.

(c) These orders addressed the concerns recognised by the High Court in *Lee v The Queen*.[18] As a result, answers given by the applicant at the examination would not be provided to the prosecutors in respect of the applicant's prosecution.

(d) The claim of reasonable excuse was "not particularly factual, it was rather legally based".

(e) The claim had two bases:

(i) The applicant's answers might be used derivately against the applicant, to the extent that they touched upon the subject matter of the applicant's own criminal charges. Consistently with the principles identified in *X7 v Australian Crime Commission*, this could give rise to a reasonable excuse.

(ii) Being compelled to answer questions about the applicant's own alleged criminal conduct would infringe the applicant's human rights under the HR Act, particularly the rights in s 32(1) and 32(2)(k).

(f) The relevant provisions of the CC Act included the purpose in s 4; the powers of the Commission in s 5; the major crime function in ss 25, 26 and 27; and the conduct of hearings in ss 82, 183 and 190 of the CC Act.

(g) The application of s 197 and the "use immunity" in s 197(2) which operates so that the "answer, document, thing or statement" given or produced at the examination is not admissible against the applicant. The making of the "blanket order" pursuant to s 197(5) attracts that protection.

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18 (2014) 253 CLR 455.

(h) A consideration of the authorities in respect of examinations at coercive hearings of individuals with existing or pending charges against them, including the High Court decisions in *Hammond v The Commonwealth*,[19] *X7 v Australian Crime Commission*, *Lee v The Queen* and *Strickland (a pseudonym) v Director of Public Prosecutions (Cth)*. The respondent concluded that these cases could be distinguished given s 331 of the CC Act.

(i) Section 331 of the CC Act is a clearly expressed legislative statement that a person charged with a criminal offence may be subject to a compulsory examination by the CCC.

(j) The facts in *NS v Scott* are very similar to the facts concerning the applicant. In *NS v Scott* the Chief Justice recognised that the use of derivative use evidence does not necessarily prejudice a fair trial. The nature of the evidence and whether it is available from other sources are relevant factors. Section 130 of the *Evidence Act* 1977 (Qld) may also provide a basis for an application to exclude the evidence on the ground of unfairness.

(k) In *NS v Scott*, the Chief Justice also stated that "in particular circumstances" a charged person who fears a derivative use of answers may have a reasonable excuse. An example of this would be questions designed to incriminate the witness by eliciting the nature of the defence, in order to "arm the prosecution with the means of rebutting it". The respondent concluded that the forensic purposes of the examination did not establish such an intention.[20]

(l) Section 197(7) of the CC Act clearly provides that evidence "obtained as a direct or indirect consequence" of evidence given at the examination was not inadmissible by reason of s 197(2).

(m) By reason of s 197(7) and s 331 of the CC Act and the community interest in obtaining the information sought[21], the applicant did not have a reasonable excuse on the first basis claimed.

[63] The respondent then proceeded to consider the second basis in respect of the HR Act:

(a) The respondent identified the two key provisions to be considered: ss 13 and 32 of the HR Act, in particular s 32(2)(k).

(b) The respondent concluded that s 32 of the HR Act was engaged even though the examination proceedings were administrative and not criminal.

(c) The respondent acknowledged that the decision made at the Commission hearing could impinge upon the rights of a person charged in a criminal proceeding, including the right not to be compelled to testify against themselves or to confess guilt (s 32(2)(k) HR Act).

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19 (1982) 152 CLR 188.

20 The purposes of the examination were identified in the absence of the applicant and the applicant's legal representatives. The respondent then stated them as part of the reasons.

21 Identified as the purpose for calling the applicant.

(d) In respect of s 13 of the HR Act the respondent identified that the human rights enshrined in the HR Act can be subject to reasonable limits provided that they can be demonstrably justified for the "reasons" set out in s 13.

(e) The respondent concluded that:

(i) The legislative intention is clear that a person charged with a criminal offence can be compelled to give evidence at a Commission hearing and can be compelled to testify against themselves or to confess guilt.

(ii) But for the "legislative protections in place" there would be an infringement of the right in s 32(2)(k) of the HR Act.

(iii) The protective features and orders mitigate against that limitation of the right.[22]

(iv) The legislation also clearly shows the legislative intention that there is no derivative use immunity pursuant to s 197(7) and a witness can be called to give evidence even though criminally charged.

(f) The respondent then considered the specific factors set out in s 13(2) of the HR Act in considering whether the limit on the human right in s 32(2)(k) was "reasonable and justifiable". The respondent concluded that these factors were not exhaustive and were not mandatory, but "may be relevant".

(g) The respondent's reasoning can be summarised as follows:

(i) Section 13(a) – the nature of the human right: it is a long standing and fundamental right. The respondent took into account the importance of the right to silence; that is, an accused person is not to be required to assist the prosecution in the discharge of the onus of proving its case beyond reasonable doubt.

(ii) Section 13(b) – the nature of the purpose of the limitation: the legislative purpose of the limitation is to enable major crime, including organised crime, to be investigated, including where a witness is facing criminal charges. Criminal activity of this nature causes harm to the community.

(iii) Section 13(c) – the relationship between the limitation and its purpose: obtaining evidence that may lead to further evidence would be helpful to achieve the purpose of investigating organised crime.

(iv) Section 13(d) – whether there are any less restrictive and reasonably available ways to achieve the purpose: there are not any less restrictive and reasonably available ways to achieve the purpose. In reaching this conclusion the respondent considered:

(A) The applicant had previously exercised the applicant's right to silence and declined to participate in a police record of interview.

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[22] These include the closed hearing, the blanket order in respect of self-incrimination, information from the examination not to be provided to the prosecution and cannot be used in evidence against the applicant.

(B) Whether there was any other practical way to obtain the information sought from the witness which was less restrictive and reasonably available. None could be identified.

(C) The applicant's compelled evidence together with the protections in place was the only option available to achieve the purpose.

(v) Section 13(e) – the importance of the purpose of the limitation: the legislature has spoken very clearly about the importance of investigating organised crime.

(vi) Section 13(f) – the importance of preserving the human right: but for the protective features, the importance of preserving the human right may have prevailed.

(vii) Section 13(g) – the balance between the matters in (e) and (f): on balance, when the protective features are taken into account, the limits that the legislation and the case law put on the human right can be demonstrably justified in a democratic society.

(h) On these bases, the respondent concluded that the applicant did not have a reasonable excuse for not answering the question on the basis of the applicant's human rights under s 31 of the HR Act.[23]

[64] As a result of these conclusions, the respondent indicated that he did not think the applicant had a reasonable excuse not to answer the question and required the applicant to answer the question. The applicant was informed of the applicant's appeal rights as required by s 194(3)(c) of the CC Act. The applicant indicated that the applicant wished to appeal the decision and the matter was adjourned.

Leave to appeal

[65] Pursuant to s 195(1) of the CC Act, leave to appeal is required. Further, s 195(2) sets out the matters that the Court must be satisfied of to grant leave. Section 195(2) relevantly states as follows:

> "The Supreme Court may grant leave to appeal only if the court is satisfied–
>
> …
>
> (b) in all cases – the appeal has a significant prospect of success or there is some important question of law involved."

[66] The Further Amended Originating Application and the Further Amended Notice of Appeal Subject to Leave, state the reasons relied upon by the applicant as to why leave should be granted. The applicant contends that leave to appeal should be granted as:

> "1. The appeal has significant prospects of success.

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[23] Section 31 is the right of a person charged with a criminal offence to have the charge decided including "after a fair and public hearing".

2. The appeal raises important questions of law because the decision of *NS v Scott* [2018] 2 Qd R 397 considered s 331 of the *Crime and Corruption Act 2001* but was decided prior to the *Human Rights Act 2019* and *Strickland v Director of Public Prosecutions (Cth)* (2018) 266 CLR 325, in particular:

   a. Whether the requirement to act compatibly with s 32(2)(k) of the *Human Rights Act 2019* alters the approach to the question of reasonable excuse for persons already charged with criminal offences and who are questioned about matters associated with those alleged offences.

   b. Whether, in a case where a person is coercively questioned about matters relating to alleged offences with which they have already been charged, the likelihood of the answers to those questions being disclosed to a co-defendant under s 201 of the *Crime and Corruption Act* 2001 amounts to a reasonable excuse for refusing to answer those questions."

[67] The application for leave to appeal was heard at the same time as the appeal. Lengthy written and oral submissions were made as to the substantial grounds of appeal, including submissions by the Attorney-General for the State of Queensland and the Queensland Human Rights Commission in respect of the issues under the HR Act.

[68] The threshold issue of leave to appeal is also relevant to the submissions about the operation of s 59 of the HR Act, which is discussed further below.

[69] The applicant relied upon its substantive submissions in support of the application for leave to appeal. Further, Counsel for the applicant also contended that the "row of parties at the bar table indicate the answer to the [important question of law involved], at least in respect of Ground Three, is yes".[24]

[70] The questions of law that the applicant identifies as arising in the appeal are:

"3. **First,** whether the decision of ***Strickland v Director of Public prosecutions (Cth)*** alters the approach to the question of 'reasonable excuse' under section 194(1) of the CC Act when the coerced hearing occurred after the appellant had been charged and [the applicant's] answers have the capacity to constrain [the applicant's] legitimate forensic choices in the future conduct of [the applicant's] trial.

4. **Second**, the impact of section 201 of the CC Act and the likelihood of the appellant's answers being disclosed to a co-defendant under that provision and whether that amounts to a reasonable excuse for refusing to answer those questions under section 194 of the CC Act.

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[24] T1–13, L8-9 (26 May 2021).

> 5. **Third**, whether the requirement to act compatibly with section 32(2)(k) of the [HR Act] alters the approach to the question of 'reasonable excuse' for persons already charged with criminal offences and who are questioned about matters associated with those alleged offences." (footnotes omitted)

[71] Counsel appearing on behalf of the Queensland Human Rights Commission addressed the question of leave to appeal in oral submissions in the following terms:

> "… our submissions do not traverse as to the merits … of the grounds raised in one and two, but we would suggest, respectfully, that there is an important question of law involved in the questions raised, and it is of that kind principally because the questions raised now must be looked at in light of the requirements of the Human Rights Act. So … grounds 1 and 2 require the court to engage with the application of the Human Rights Act to those grounds by way of the interpretive mandate in section 48, sub (1) of the … [HR] Act."[25]

[72] Counsel for the respondent contended in respect of the issue of leave to appeal:

> "With leave to appeal … under the [CC] Act … the test for leave to appeal is fairly rigorous. It's either an important question of law or significant prospects of success. So it's a higher bar, even on a leave to appeal application generally.
>
> So in the [CC] Act itself … there is an indication of also limiting … appeals to important questions of law or significant prospects of success. And it can be masked to some extent when applications for leave to appeal are just heard instanter with the actual appeal. "[26]

[73] Further submissions were also made by the respondent in respect of how the requirement for leave interacts with s 59 of the HR Act. These will be considered further below in respect of the "piggyback" issue.

[74] The issues considered by the Court of Appeal decision in *NS v Scott* are very similar to the issues raised here. However, that decision was before the HR Act came into operation and also before the High Court decision in *Strickland (a pseudonym) v Director of Public Prosecutions (Cth)*.

[75] It is not disputed that the operation of the HR Act raises important questions of law, particularly those identified in the third question set out above. While there are now a few single judge decisions of this Court considering the operation of the HR Act, the

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25 T1-45, L9-15 (26 May 2021).

26 T1-14, L12-20 (18 June 2021).

operation of the HR Act in conjunction with the CC Act, and in particular coercive examinations, has not been the subject of judicial consideration.[27]

[76] However, given s 59 of the HR Act, some focus needs to be given to the non-human rights questions, namely the first and second questions identified above.

[77] It is apparent from the cases referred to in submissions that whilst general principles have been identified from the various authorities, they often turn on the particular facts being considered. Each of the decisions by the High Court on these issues highlights the fundamental importance of the right of an accused person to a fair trial and associated rights in the context of criminal proceedings.

[78] This case presents facts with the additional element of there being co-accused, which is relevant to both the first and second questions. At the risk of oversimplifying the issue, the applicant's case raises whether the outcome in *NS v Scott* should still be arrived at taking into account the principles identified by the High Court in *Strickland (a pseudonym) v Director of Public Prosecutions (Cth)* and also the operation of s 201 of the CC Act by which evidence from the examination may need to be provided to the co-accused.

[79] In all of the circumstances, these are important questions of law. They go to issues central to the administration of the criminal justice system in Queensland and the intersection of the criminal justice system with coercive examination of a charged person by a statutory body. I am satisfied that leave to appeal should be granted in respect of Grounds One and Two.

[80] In respect of Ground Three, similarly important questions of law are raised. The HR Act in Queensland is relatively new and there is not mature jurisprudence on its application generally,[28] let alone in respect of the important powers and functions of the Commission contained in the CC Act.

[81] Accordingly, leave to appeal is granted in respect of Ground Three. In reaching this view I have also factored in my consideration of the issues raised in respect of s 59 of the HR Act discussed below.

The requirements of s 59 HR Act (the piggyback clause) in respect of Ground Three

[82] Section 59 of the HR Act deals with relief and states as follows:

> "**59 Legal proceedings**
>
> (1) Subsection (2) applies if a person may seek any relief or remedy in relation to an act or decision of a public entity on the ground that the act or decision was, other than because of section 58, unlawful.

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[27] Extensive reference has been made in submissions to decisions in Victoria and overseas jurisdictions all of which are helpful. However, there are differences in the various human rights statutory schemes and this may have some impact on the application of the relevant principles.

[28] While Victoria has extensive judicial consideration of the *Charter of Human Rights and Responsibilities Act* 2006 (Vic) (Victorian Charter), there are differences between the HR Act and the Victorian Charter which require careful consideration in the application of some of the authorities.

(2) The person may seek the relief or remedy mentioned in subsection (1) on the ground of unlawfulness arising under section 58, even if the person may not be successful in obtaining the relief or remedy on the ground mentioned in subsection (1).

(3) However, the person is not entitled to be awarded damages on the ground of unlawfulness arising under section 58.

(4) This section does not affect a right a person has, other than under this Act, to seek any relief or remedy in relation to an act or decision of a public entity, including—

(a) a right to seek judicial review under the *Judicial Review Act 1991* or the *Uniform Civil Procedure Rules 1999*; and

(b) a right to seek a declaration of unlawfulness and associated relief including an injunction, a stay of proceedings or an exclusion of evidence.

(5) A person may seek relief or remedy on a ground of unlawfulness arising under section 58 only under this section.

(6) Nothing in this section affects a right a person may have to damages apart from the operation of this section."

[83] Generally, s 59 of the HR Act contains a mechanism that allows human rights claims to be brought in conjunction with other proceedings brought on a ground of unlawfulness: that is, a claim for unlawfulness arising on a human rights basis is "piggybacked" on to proceedings claiming unlawfulness on another basis.

[84] At the outset there was some consensus that if a ground of appeal under s 195 of the CC Act is based on an independent allegation of unlawfulness, then a human rights claim may be "piggybacked" on it. However, there was a dispute about a number of issues including:

(a) Whether the applicant's Grounds One and Two were allegations of unlawfulness as required by s 59 HR Act.

(b) Whether the applicant's Grounds One and Two meet the leave threshold in s 195(2)(b) of the CC Act.

[85] The applicant and the Queensland Human Right Commission adopt the written submissions on behalf of the Attorney-General in respect of this issue.

[86] The Attorney-General submitted that the requirements of s 59 of the HR Act may be met in circumstances where an appeal may, but need not, be based on a ground of unlawfulness. For example, an error of law. Provided an allegation of unlawfulness was made, then an allegation of human rights unlawfulness may be "piggybacked".

[87] Further, the Attorney-General submitted that this interpretation is consistent with the purpose of s 59; that is, to only allow human rights to be agitated in court proceedings that would otherwise be brought, and not to increase litigation.

[88] The written submissions on behalf of the Attorney-General helpfully developed these contentions, including by reference to Victorian authorities considering s 39 of the Victorian Charter on which s 59 is based.

[89] Additionally, whilst not commenting on the substance of Grounds One and Two, the Attorney-General's submissions recognise that Grounds One and Two could be characterised, respectively, as an error in finding there was no reasonable excuse and a failure to have regard to a relevant consideration.

[90] These two grounds are akin to administrative law grounds of unlawfulness and for the purposes of s 59 of the HR Act are clearly capable of providing an independent ground of unlawfulness.

[91] The respondent originally submitted that Grounds One and Two did not amount to unlawfulness.[29] However on the second day of submissions, Counsel for the respondent conceded the point in the following terms:

> "I can say now that, having had the benefit of hearing the applicant's submissions the previous day and a better understanding of the way in which their cases are put, is that we don't take any issue that they've made allegations of unlawfulness in relation to both of their grounds."[30]

[92] In these circumstances, it is not necessary to consider further the issue of whether Grounds One and Two provide independent allegations of unlawfulness.

[93] Whilst I have already addressed the issue of leave to appeal above, it remains necessary to consider the second issue as to whether the applicant's Grounds One and Two meet the leave threshold in s 195(2)(b) of the CC Act to the extent that it is relevant to the ability of the human rights claim to be "piggybacked".

[94] The respondent submits that Grounds One and Two do not raise important questions of law.[31] It is also inherent in the respondent's substantive submissions that the applicant does not have "significant prospects of success" and in these circumstances the respondent contends that leave to appeal should be refused.

[95] This position is highlighted in the respondents reply submissions which state:

> "4. … whilst all parties (including the respondent) have been proceeding on the basis that, if leave to appeal is granted under s 195(2) of the CC Act then the Court should hear and determine the appeal instanter, that does not alter the fact that an application for a grant of leave is separate to, and a precondition for, an appeal.

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29 Respondent's written submissions at [47] and reply submissions at [3].

30 T1-13, L30-34.

31 Respondent's written submissions at [48].

> If, as the [respondent] has submitted, it is the *appeal* that would constitute the relevant proceeding for the purposes of s 59(1) of the HR Act – so that an independent ground of *appeal* must be available upon which a human rights ground can 'piggyback' – the issue is whether it would be permissible for an appeal to be prosecuted *solely* on the basis of a ground of unlawfulness under the HR Act in the event that *neither* proposed ground 1 or 2 satisfies the threshold for a grant of leave."

[96] In respect of the respondent's submissions on this issue, the Attorney-General's submissions at [29] state:

> "… That appears to be a submission that the applicant will not succeed on the first and second grounds of [the applicant's] application. As s 59(2) of the HR Act makes clear, that is irrelevant to whether s 59(1) is satisfied. Provided the independent grounds of unlawfulness are 'non-colourable'[32] and able to withstand a strike-out application,[33] the applicant may agitate human rights arguments 'even if [the applicant] may not be successful in obtaining relief or remedy' on the independent grounds of unlawfulness (s 59(2)).[34]"

[97] The respondent and the Attorney-General's submissions consider the case of *PJB v Melbourne Health*[35] in respect of this issue. The Attorney-General refers to the case as authority for the proposition that a requirement to seek leave to appeal is not an impediment to satisfying the "piggyback" clause. The respondent submits that the case is distinguishable as leave to appeal was granted in respect of independent grounds alleging unlawfulness.

[98] *PJB v Melbourne Health* concerned an appeal from a decision of the Victorian Civil and Administrative Tribunal including a ground that the Tribunal had taken an irrelevant consideration into account and unreasonableness in the *Wednesbury* sense. Bell J concluded at [303] that under s 39(1) of the Victorian Charter the appellant was entitled to rely on unlawfulness under the Charter whether or not the other grounds of unlawfulness were determined.

[99] It appears from the reasons that leave to appeal had been granted by the Court and the appeal proceeded on the eight questions of law set out in the notice of appeal. It does not appear to be an example of where the application for leave to appeal and appeal are heard together.

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32 *Kheir v Robertson* [2019] VSC 422 [99]–[101] (McDonald J).

33 Pamela Tate SC S-G, 'A Practical Introduction to the Charter of Human Rights and Responsibilities' (Speech, Seminar Program of the Victorian Government Solicitor's Office, 29 March 2007) 15 [95(8)].

34 An example of this from Victoria is provided by *Certain Children v Minister for Families and Children [No 2]* (2017) 52 VR 441, 598 [549] (Dixon J).

35 (2011) 39 VR 373, 440 [303] (Bell J).

[100] In the current case, the issues raised in Grounds One and Two arise in the context of a coerced examination by the Executive of a person charged with a criminal offence about matters relevant to the offences for which the witness and co-accused have been charged. These are matters which by their very nature are likely to raise issues of the proper exercise of the powers of the decision maker and, now with the operation of the HR Act, human rights issues, including the interpretation of the governing statute.

[101] It is now accepted that Grounds One and Two raise a ground of unlawfulness. They are clearly arguable grounds as is evidenced by the submissions made orally and in writing in respect of the merits on these two grounds. I have concluded that the two grounds raise important questions of law and accordingly leave has been granted.

[102] Section 59 is an "enabling provision" and I agree with the submission of the Attorney-General that it should not be read unduly narrowly. In the context of the Victorian Charter, it has been recognised that:

> "… [t]he additional jurisdiction that it confers on courts and tribunals to grant relief or remedy is an important means of giving effect to and vindicating human rights."[36]

[103] Further, s 59(2) makes it clear that the ability to include a ground based on human rights unlawfulness does not depend on the ultimate success of the non-human rights unlawfulness grounds. A good illustration of this is the decision of Dixon J in *Certain Children v Minister for Families and Children [No 2]*.[37] In that case, his Honour stated at [550]:

> "In this proceeding, the plaintiffs sought relief in the nature of certiorari, injunctions and declarations in relation to the impugned acts and decisions, on the basis of jurisdictional error. Those claims failed, but the plaintiffs having succeeded on their Charter claim are entitled to relief. In this proceeding, on the finding of s 38(1) Charter unlawfulness, regardless of whether the administrative law claims were made out, s 39(1) of the Charter permits declaratory relief, as well as mandatory and prohibitory injunctions directed at the impugned acts and decisions."

[104] Given the approach I have taken in respect of leave, it is not necessary for me to determine whether Ground Three must fail if leave was refused on the basis that on the merits those two grounds could not be established.

[105] As leave has been granted, all three grounds should be considered on their merits. By virtue of s 59(2) of the HR Act there is no impediment to an outcome where the applicant is only successful on Ground Three.

The proper approach to s 48 HR Act (interpretive clause)

[106] A preliminary issue has also been raised in respect of the proper approach to s 48 of the HR Act.

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36 *Goode v Common Equity Housing Ltd* [2014] VSC 585 at [25] (Bell J).

37 (2017) 52 VR 441, 598 [549].

[107] Section 48 of the HR Act states as follows:

> "**48 Interpretation**
>
> (1) All statutory provisions must, to the extent possible that is consistent with their purpose, be interpreted in a way that is compatible with human rights.
>
> (2) If a statutory provision can not be interpreted in a way that is compatible with human rights, the provision must, to the extent possible that is consistent with its purpose, be interpreted in a way that is most compatible with human rights.
>
> (3) International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision.
>
> (4) This section does not affect the validity of—
>
> (a) an Act or provision of an Act that is not compatible with human rights; or
>
> (b) a statutory instrument or provision of a statutory instrument that is not compatible with human rights and is empowered to be so by the Act under which it is made.
>
> (5) This section does not apply to a statutory provision the subject of an override declaration that is in force."

[108] In submissions the parties agreed, at a general level, that s 48 of the HR Act does not change the construction of the CC Act. However, there remains disagreement on the proper approach to the application of s 48.

[109] It is uncontroversial that s 48(1) contains two elements: first, consistency with the purpose and second, compatibility with human rights.

[110] Section 8 of the HR Act defines "compatible with human rights" as follows:

> "**8 Meaning of *compatible with human rights***
>
> An act, decision or statutory provision is ***compatible with human rights*** if the act, decision or provision—
>
> (a) does not limit a human right; or
>
> (b) limits a human right only to the extent that is reasonable and demonstrably justifiable in accordance with section 13."

[111] Section 13 of the HR Act sets out the circumstances in which a limitation may be placed on a human right and states as follows:

"**13 Human rights may be limited**

(1) A human right may be subject under law only to reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

(2) In deciding whether a limit on a human right is reasonable and justifiable as mentioned in subsection (1), the following factors may be relevant—

(a) the nature of the human right;

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

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

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

(e) the importance of the purpose of the limitation;

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

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

[112] At the outset it is important to note that the Victorian Charter does not have a provision equivalent to s 8 of the HR Act: it does have an equivalent to s 48 (except for s 48(2)) and s 13. In respect of the Victorian authorities which are referred to in submissions, this difference needs to be kept in mind.

[113] It is necessary to consider the proper approach to the interpretive clause.

[114] There was some debate initially about whether ambiguity was required as a precondition to the application of s 48 of the HR Act:

(a) The applicant and the Queensland Human Rights Commission submit that ambiguity is not required.

(b) Whilst the Attorney-General in written submissions contended that it is appropriate to treat ambiguity as a threshold enquiry, it was ultimately submitted that there was some "confusion" as the parties were speaking about different meanings of ambiguity.[38] Grammatical or language ambiguity is not required, rather ambiguity

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[38] T1-56, L16-17 (18 June 2021).

> of meaning as a whole is required. That is, there needs to be a constructional choice open.[39]

[115] The parties agree that a remedial approach is not permissible under s 48, which is consistent with the High Court authority of *Momcilovic v The Queen*.[40]

[116] Different approaches may be permitted so long as the consistency with purpose is maintained. The application of the standard principles of statutory interpretation are to be applied. The consideration of human rights is now incorporated as part of context and also purpose where consistent with the purpose of the provisions.

[117] Ultimately, the applicant, the respondent and the Attorney-General reach the position that s 48 of the HR Act does not result in a different interpretation of s 194 of the CC Act.

[118] The Attorney-General also acknowledges that the impact of human rights is already relevant to the notion of "reasonable excuse": similar to the construction of "unacceptable risk".[41] In this case, the impact on the witness' human rights is "intrinsic to the notion of reasonable excuse".[42] This is evidenced in the comments of the Court of Appeal in *Crime and Misconduct Commission v WSX & EDC*[43] and also the Queensland Court of appeal in *NS v Scott*[44] as to the balancing exercise that is required to be undertaken to determine whether there is a reasonable excuse.

[119] The Queensland Human Rights Commission submits that as a result of s 48 of the HR Act, the exercise of the power in s 194 is conditioned on a human-rights compatible decision.

[120] The Attorney-General submitted that:

> "Section 48 does not alter that understanding of 'reasonable excuse'. While the impact on human rights is already relevant to determining what is a reasonable excuse, that enquiry is given more structure by the obligations under s 58(1) of the HR Act to consider human rights and to make decisions that are compatible with human rights".[45]

[121] I accept this articulation of the approach and find it particularly helpful in the current context.

[122] In the circumstances of this case, it is not necessary for me to exhaustively determine how s 48 of the HR Act operates more broadly and I do not do so.

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39 T1-57, L13-27 (18 June 2021).

40 (2011) 245 CLR 1.

41 *Nigro v Secretary, Department of Justice* (2013) 41 VR 359, 387 [102] (Redlich, Osborn and Priest JJA).

42 Attorney-General's submissions at [12].

43 (2013) 229 A Crim R 286 [37], [41] (de Jersey CJ, Gotterson JA and Mullins J agreeing).

44 At [35]-[36].

45 Attorney-General's submissions at [14].

The exception in s 58(2) of the HR Act

[123] Another issue arises under the HR Act which also needs to be considered at this initial stage.

[124] Division 4 of the HR Acts sets out obligations on public entities. It is accepted that the respondent was a public entity for the purposes of s 58 of the HR Act when making the decision that is the subject of the current application.

[125] Section 58 of the HR Act is set out in full at [41] above.

[126] Relevantly, s 58(1)(a) of the HR Act provides that it is unlawful for a public entity to decide in a way that is not compatible with human rights.

[127] Section 58(2) of the HR Act carves out from that obligation the situation where the public entity "could not reasonably have acted differently or made a different decision because of a statutory provision". This brings into focus the scope of the discretion itself under s 194 of the CC Act.

[128] The Attorney-General has addressed this issue in the written submissions and the applicant and the Queensland Human Rights Commission adopt those submissions.

[129] The respondent agrees with the Attorney-General's contention that s 58(2) will not be relevant where more than one course of action is reasonably open.

[130] There is then some divergence as to the discretion in s 194 of the CC Act.

[131] The Attorney-General, with whom the applicant and the Queensland Human Rights Commission agrees, submits that the discretion in s 194 leaves it to the presiding officer to decide whether any claim constitutes a reasonable excuse.

[132] Further, it is contended that the presiding officer can only decide whether a witness has a reasonable excuse under s 194 after balancing the public benefit against the harm caused to the witness' interests.

[133] In support of this position, the Attorney-General identifies:

(a) This is consistent with the exercise of a discretion, not the absence of a discretion.

(b) The existence of a reasonable excuse is not "objective and self-executing".[46]

(c) To say that the presiding officer has no choice but to find that the applicant did not have a reasonable excuse "inverts the analysis". That is, it confuses a conclusion about "how to" exercise a discretion with the existence of the discretion in the first place.[47]

(d) This is consistent with the decision in *NS v Scott*.

[134] In addition, the applicant submits:

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46 *Lyons v Queensland* (2016) 259 CLR 518, 534 [50] (Gageler J).

47 Attorney-General's submissions at [32].

(a) The phrase "reasonable excuse" is "quintessentially the language of discretion".[48]

(b) The Court of appeal held in *NS v Scott* that the exercise of the discretion can be informed by issues of self-incrimination. This is so even though there is the "general and obvious legislative intention" to permit the abrogation of the privilege where appropriate and to permit derivative use of coerced evidence obtained by such abrogation.[49]

(c) The statutory scheme does not compel the abrogation of the privilege.

(d) *NS v Scott* is not authority for the proposition that there is no discretion.

[135] Conversely, the respondent submits that *NS v Scott* is authority for the following:

(a) The legislature expressed its intention "with irresistible clearness" that a witness can be compelled to answer even if the result may be the obtaining of further evidence in relation to a charge against him.

(b) The legislature did not intend by the reasonable excuse provision to provide "any *general* or *complete* protection against self-incrimination through derivative use."[50]

[136] The respondent acknowledges that in accordance with *NS v Scott*, there may be particular circumstances where a charged person who fears a derivative use of their answers may have a reasonable excuse. The applicant did not advance any factual circumstances in support of the applicant's claim.[51] It is in this circumstance, that the respondent submits that the presiding officer could not reasonably have made a different decision.[52]

[137] The Queensland Human Rights Commission provided supplementary submissions addressing the issue of whether *NS v Scott* should be reconsidered given the operation of the HR Act.[53] Relevantly, the submission was made that the answer depends on how the Chief Justice's reasons in *NS v Scott* are understood:

(a) The decision would need to be reconsidered under the HR Act if its effect is as contended for by the respondent. That is, if a claim for reasonable excuse would not be established where the claim was based upon "fair trial rights"[54] without anything more than the usual detriment that accrues to an accused in such circumstances.

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48 Applicant's reply submissions at [32].

49 Applicant's reply submissions at [32].

50 Respondent's submissions at [33].

51 Such as questions designed to incriminate the person by eliciting the nature of their defence.

52 As a result of the decision in *NS v Scott* and s 197(7) of the CC Act.

53 The submissions were filed to clarify a point made during oral argument.

54 This includes the privilege against self-incrimination, the right to silence, the right to an adversarial trial process with the onus of proof beyond reasonable doubt on the prosecution and the right to a fair trial: ss 31(1), 32(1) and 32(2)(k) HR Act.

(b) The decision would not need to be reconsidered under the HR Act if the reasons are understood to mean that at the reasonable excuse stage there is no complete privilege and the obligation is placed upon the presiding officer to assess whether the claim should be accepted in the particular circumstances of the case.

[138] Ultimately, the Queensland Human Rights Commission submits that the discretion is as follows:

> "Consistent with the application of s 58(1) to it, s 194 would be construed under s 48(1) of the HR Act to allow for the discretion to be exercised without a presumption in favour of the person's fair trial rights being limited. Rather, the importance of a person's fair trial rights (which are inevitably limited by post-charge coercive questioning but in any particular case may include a specific risk of prejudice) must be identified and weighed against the importance of the public interest in the particular investigation at hand."

[139] Section 194 of the CC Act must be the starting point. The language is consistent with a discretion of a broad nature:

(a) In sub-section (1A) the presiding officer "must decide whether or not there is a reasonable excuse".

(b) In sub-section (1B) the language used is clear that the decision may be that the requirement to answer the question will not be insisted on. Alternatively, it may be that there is no reasonable excuse (and therefore the requirement to answer will be insisted on).

(c) In sub-section (2) the provision:

(i) Expressly applies where the presiding officer decides "that the person has a reasonable excuse based on self-incrimination privilege for not complying with the requirement". This language is consistent with an intention of self-incrimination privilege being capable of forming the basis of a finding of reasonable excuse (which seems to be directly at odds with the respondent's contentions).

(ii) Further states in (a) that where a reasonable excuse is found based on self-incrimination privilege then the presiding officer ***may*** (not must) require the person to answer and section 197 applies.

(d) If the intention of Parliament was that there was no discretion where a reasonable excuse was claimed on the basis of self-incrimination privilege this is the section that could have made it clear. In fact, the language used supports the opposite conclusion. The language used supports a reasonable excuse being able to be found based on self-incrimination privilege with the requirement to answer not being insisted upon.

[140] These factors support the existence of a real discretion; not the absence of one as contended by the respondent.

[141] Further, the Chief Justice's reasons in *NS v Scott* (with whom Philippides JA and Flanagan J agreed) also support this conclusion, including:

(a) At [32]:

> "The starting point for consideration of these questions is to recognise that the Act distinguishes between entitlement to refuse to answer on the basis of self-incrimination privilege and reasonable excuse for such a refusal on the basis of the privilege. Section 190(2) deals with the first; s 194(2) contemplates the second, because it provides for the presiding officer firstly, to decide whether there is a reasonable excuse on that basis, and secondly, if he or she decides that there is, to exercise a discretion as to whether to require the witness to answer notwithstanding, in which case there is only a protection against direct use …"

(b) At [33]:

> "Section 190(2) on its face removes any *entitlement* to rely on the self-incrimination privilege; and … the Act makes it clear that it is not to be construed as operating differently when charges have been laid. The necessary intendment of s 331(4)(b) is that the removal of the privilege against self-incrimination effected by s 190(2) applies whether or not the witness has been charged and whether or not the questions concern the subject matter of the charge …"

(c) At [34]:

> "Nor does the Act leave any room for reading a limitation into s 331(4)(b) to the effect that answers cannot be required where they may result in the obtaining of derivative evidence. Section 190(2) does not distinguish between the prospect of self-incrimination through the direct use of answers given and the prospect of self-incrimination through the derivative use of answers given …"

(d) At [35]:

> "… Section 194(2) … raises the possibility that a claim … might amount to reasonable excuse, but it also precludes the conclusion that it must do so. The provision leaves it to the presiding officer to decide whether any claim based on self-incrimination constitutes reasonable excuse and then gives that officer the discretion to require an answer; it is clear from the conferring of that power and discretion that the legislature did not intend by the reasonable excuse provision to provide any general or complete protection against self-incrimination through derivative use."

(e) At [36]:

> "Plainly enough, in particular circumstances, a charged person who fears a derivative use of his answers may have a reasonable excuse. An example might be an accused person who is asked to

> answer questions designed to incriminate him by eliciting the nature of his defence, in order to arm the prosecution with the means of rebutting it. But there is no general rule that an accused's concern as to the obtaining of derivative evidence will constitute a reasonable excuse".

[142] What is apparent from these reasons is that the entitlement to claim the privilege against self-incrimination is removed. The legislation provides a discretion to the presiding officer to decide whether a reasonable excuse exists. Where a reasonable excuse is found to exist based on self-incrimination privilege, the presiding officer has a discretion to decide whether the witness is required to answer or not.

[143] The nature of the discretion in s 194 of the CC Act is such that s 58(2) of the HR Act does not apply: the discretion did not compel a particular result.

[144] The exercise of the discretion by the presiding officer requires the balancing of the relevant factors, including the benefits and harms. Section 58(1) of the HR Act therefore applies to the exercise of the discretion in this case.

Appeal to the Supreme Court

[145] The appeal under s 195 of the CC Act is to the Supreme Court. The section provides that the relevant decision appealed against is under s 194(3)(b): that is, the decision to require the person to answer the question. This decision must be made by the presiding officer if the presiding officer decides that the person did not have a reasonable excuse.[55]

[146] The appeal is subject to certain statutory requirements, including relevantly:

(a) The appeal is subject to the Supreme Court granting leave to appeal.

(b) Leave to appeal may be granted only if the Court is satisfied the appeal has a significant prospect of success or there is some important question of law involved.

(c) The Supreme Court is limited in the relief that may be granted to an order affirming or setting aside the decision of the presiding officer.

[147] It is an appeal by way of rehearing and it is necessary to establish some error by the respondent, either legal, factual or discretionary.[56]

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[55] It may also be that if the presiding officer finds a reasonable excuse exists, but exercises the discretion to nevertheless require the witness to answer the question that decision is covered by the appeal provision. In the current circumstances it is not necessary to decide this issue as here the respondent found no reasonable excuse and gave a direction to the applicant to answer the question.

[56] *Crime and Misconduct Commission v WSX & EDC* [2013] QCA 152 at [32] (De Jersey CJ, with whom Gotterson JA and Mullins J agreed), citing *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573, 596-7.

The discretion in s 194 of the CC Act

[148] Whether or not there is a reasonable excuse pursuant to s 194 of the CC Act is a value judgment involving a balancing of the various factors. This exercise was described by de Jersey CJ in *Crime and Misconduct Commission v WSX & EDC* as follows:[57]

(a) "Whether reasonable excuse exists is a matter for objective determination, and the consequences of a refusal to answer, to both the examinee and the appellant Commission, are relevant considerations."[58]

(b) "In determining whether or not there was "reasonable excuse", the decision maker had to balance the respective considerations of the public interest in tracking those responsible for violent crime, and the private concerns of those who may be able to disclose those responsible".[59]

[149] In that case, reference was also made to the reasons of Muir J in *Schultz v CMC*[60] where his Honour commented as follows:

> "Curiously, the Act is silent as to what may constitute a reasonable excuse. It is not, so far as I am aware, a concept capable of precise definition. Presumably it was intended to give the presiding officer a degree of practical latitude so as to prevent the consequences of answering a question from causing harm disproportionate to the benefit resulting from the answer."

[150] In *Crime and Misconduct Commission v WSX & EDC* the "balancing test" was considered by the presiding officer. De Jersey CJ concluded on the appeal to the Court of Appeal that this statement identified a relevant consideration but was not binding as a "test". The statement does, however, provide some assistance in understanding the nature of the exercise being undertaken pursuant to s 194 of the CC Act.

[151] The applicant needs to identify an error on the part of the respondent to enliven the Court's discretion on an appeal. This may include an error in finding, as a matter of fact, that a reasonable excuse did not exist.[61]

[152] The general principles relevant to appeals from the exercise of a judicial discretion are also of some assistance in understanding the nature of the value judgment being undertaken. In *Norbis v Norbis*[62] the High Court considered the application of a provision of the *Family Law Act* 1975 (Cth) relating to the alteration of property interests. The issue concerned the approach to be taken to the distribution of property. Mason and Deane JJ described the discretion as follows:

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57 (2013) 299 A Crim R 286, 293 (Gotterson JA and Mullins J (as her Honour then was) agreeing).

58 At [37].

59 At [41].

60 Unreported, Supreme Court, Qld, Muir J, 31 October 2003.

61 *Crime & Misconduct Commission v WSX* (2013) 229 A Crim R 286, 292 at [32].

62 (1986) 161 CLR 513 .

> "… Here the order is discretionary because it depends on the application of a very general standard – what is "just and equitable" – which calls for an overall assessment in the light of the factors mentioned [in the section], each of which in turn calls for an assessment of circumstances. Because these assessments call for value judgments in respect of which there is room for reasonable differences of opinion, no particular opinion being uniquely right, the making of the order involves the exercise of a judicial discretion. The contrast is with an order the making of which is dictated by the application of a fixed rule to the facts on which its operation depends.
>
> The principles enunciated in *House v The King* … were fashioned with a close eye on the characteristics of a discretionary order in the sense which we have outlined. If the questions involved lend themselves to differences of opinion which, within a given range, are legitimate and reasonable answers to the questions, it would be wrong to allow a court of appeal to set aside a judgment at first instance merely because there exists just such a difference of opinion between the judges on appeal and the judge at first instance. In conformity with the dictates of principled decision-making, it would be wrong to determine the parties' rights by reference to a mere preference for a different result over that favoured by the judge at first instance, in the absence of error on his part. According to our conception of the appellate process, the existence of an error, whether of law or fact, on the part of the court at first instance is an indispensable condition of a successful appeal."[63] (footnotes omitted)

[153] *House v The King*[64] identifies that error in exercising a discretion may be:

(a) Acting upon a wrong principle.

(b) Being guided or affected by extraneous or irrelevant matters.

(c) Mistaking the facts.

(d) Not taking into account a material consideration.

[154] Further, if the decision "upon the facts it is unreasonable or plainly unjust" it may be inferred that there has been a failure to properly exercise the discretion. While the precise error may not be identifiable, the ground justifying a review of the decision is "that a substantial wrong has in fact occurred".

[155] The decision of *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* highlights the difference between failing to take into account a relevant consideration that the decision maker is bound to take into account and the failure to give adequate weight to a relevant factor. The latter is relevant to whether the decision is "manifestly unreasonable" in the sense that the decision is so unreasonable that no reasonable person could have come to

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63 At 518–9.

64 (1936) 55 CLR 499, 504-5.

it.[65] A decision within the boundaries of the discretion cannot be impugned on the basis of "Wednesbury unreasonableness".

[156] Mason J in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* also recognised the close analogy between judicial review of administrative action and appellate review of a judicial discretion. In respect of the latter, Mason J observed that a discretionary judgment may be reviewed where there is a failure to give proper weight to a particular matter, but that a court should be slow to do so. A mere preference for a different outcome is not sufficient.[66]

[157] The requirement to identify error to enliven the Court's jurisdiction in respect of reasonable excuse also requires consideration of the relationship between the doctrine of jurisdictional fact and "Wednesbury unreasonableness". This relationship was considered by Spigelman CJ in *Timbarra Protection Coalition Inc v Ross Mining NL*[67] where his Honour observed:

> "Where the process of construction leads to the conclusion that parliament intended that the factual reference can only be satisfied by the actual existence (or non-existence) of the fact or facts, then the rule of law requires a court with a judicial review jurisdiction to give effect to that intention by inquiry into the existence of the fact or facts.
>
> Where the process of construction leads to the conclusion that parliament intended that the primary decision-maker could authoritatively determine the existence or non-existence of the fact then, either as a rule of the law of statutory interpretation as to the intent of parliament, or as the application of a rule of the common law to the exercise of a statutory power – it is not necessary to determine which, for present purposes – a court with a judicial review jurisdiction will inquire into the reasonableness of the decision by the primary decision-maker (in the *Wednesbury* sense *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223), but not itself determine the actual existence or non-existence of the relevant facts".[68]

[158] These comments inform the approach to determining whether or not there has been an error by the decision-maker. As this is an appeal by way of rehearing, if an error is made out then this Court would re-exercise the discretion. This would involve undertaking the balancing exercise to decide whether there is a reasonable excuse or not.

[159] It is necessary to consider each of the grounds of appeal in respect of whether one or more errors are established.

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65 (1986) 162 CLR 24, 41.

66 At 42.

67 (1999) 46 NSWLR 55.

68 At [40]-[41].

Ground One

[160] The applicant's first ground of appeal is that:

> "The respondent erred in finding that [the applicant] did not have a reasonable excuse under s 194(1) of the [CC Act] because the coercive hearing occurred after [the applicant] had been charged and therefore had the capacity of constraining [the applicant's] legitimate forensic choices in the future conduct of [the applicant's] trial and, in the circumstances of this case, constituted a reasonable excuse."

[161] In summary, in respect of this ground the applicant:

(a) Specifically raises whether the decision of *Strickland (a pseudonym) v Commonwealth Director of Public Prosecutions* (2018) 266 CLR 325 alters the approach to reasonable excuse in s 194 of the CC Act.

(b) Identifies that the focus is on whether the applicant had a reasonable excuse as a result of the coercive examination locking the applicant into a version of events which the applicant could not depart from at trial. The applicant also points to the further circumstance that this is especially the case when it would include evidence about the applicant's co-defendants.

(c) Points to the use of the coerced evidence against the applicant's forensic interests at trial as being contrary to the reasoning of the High Court in *Strickland*.

[162] In response, the respondent points to the following:

(a) A claim for reasonable excuse based on the applicant being already charged is not capable of constituting a reasonable excuse consistent with the authority of *NS v Scott*. It is submitted that *Strickland* does not change the conclusion reached by the Court of Appeal in *NS v Scott*.

(b) The particular facts which determined the outcome of the case in *Strickland* are not present here.

[163] These factors are considered in more detail below.

Applicant's position

[164] The applicant starts with the reasoning of Holmes CJ in *NS v Scott* who quotes the joint judgment of Hayne and Bell JJ in *X7 v Australian Crime Commission.*[69] The focus of the Court's comments is the impact of the coerced examination on the individual's forensic choices at a criminal trial.

[165] The relevant passage in the reasons of Hayne and Bell JJ at [124] states as follows ("**X7 statement**"):

> "… No longer could the accused person decide the course which he or she should adopt at trial, in answer to the charge, according *only* to the strength of the prosecution's case as revealed by the

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69 (2013) 248 CLR 92

> material provided by the prosecution before trial, or to the strength of the evidence led by the prosecution at the trial. The accused person would have to decide the course to be followed in light of that material and in light of any self-incriminatory answers which he or she had been compelled to give at an examination conducted after the charge was laid. That is, the accused person would have to decide what plea to enter, what evidence to challenge and what evidence to give or lead at trial according to what answers he or she had given at the examination. The accused person is thus prejudiced in his or her defence of the charge that has been laid by being required to answer questions about the subject matter of the pending charge."

[166] Subsequent to the decision in *NS v Scott*, the High Court decided the matter of *Strickland (a pseudonym) v Commonwealth Director of Public Prosecutions* (2018) 266 CLR 325 . In that case, the majority of the High Court approved the comments of Hayne and Bell JJ in *X7*. In *Strickland*, the Court allowed the appeal and ordered a permanent stay in the particular circumstances where coerced examinations were unlawful.

[167] The applicant contends that the applicability of the High Court's comments in *Strickland* is not altered by a finding of unlawfulness and the absence of unlawfulness here is not a basis to distinguish the Court's reasoning.

[168] Relevantly, the majority of the High Court in *Strickland* stated at [75] as follows:

> "The Court of Appeal were not correct, however, in rejecting the primary judge's conclusion that the prosecution derived a forensic advantage from the examinations. If nothing else, the prosecution derived the forensic advantage, which the examinations were expressly calculated to achieve, of compelling the appellants to answer questions that they had lawfully declined to answer and thereby locking the appellants into a version of events from which they could not credibly depart at trial. For the same reason, the primary judge was right to hold that, with the exception perhaps of Galloway, the appellants suffered a forensic disadvantage as the result of the examinations. They suffered the forensic disadvantage of being locked into a version of events from which they could not credibly depart at trial."

[169] The applicant submits that the reasoning of the majority in *Strickland* does not impact on the correctness of the reasoning in *NS v Scott*. However, it does impact on the weight to be given to the principles concerning what constitutes a reasonable excuse. The applicant contends that here the applicant does not have to demonstrate practical unfairness, but rather, a reasonable excuse.

[170] In *NS v Scott*, Holmes CJ recognised there could be particular circumstances which constitute a reasonable excuse.

[171] More broadly, the applicant contends that the compulsory examination of the applicant, where the applicant was already charged, inevitably leads to the very situation identified by the majority in *Strickland*. That is, the applicant is forced to make decisions as to the

conduct of the applicant's trial based on matters other than the prosecution case. As a result, there is inherent prejudice to the applicant by virtue of the applicant being locked into a version of events, especially when that version includes details about co-defendants.

[172] The applicant acknowledges that to make out a reasonable excuse, more needs to be established than the mere "inchoate prejudice" identified in the *X7* case. The applicant contends that the respondent, in making the decision pursuant to s 194 of the CC Act, dismissed the inchoate prejudice on the basis that the cases of *X7* and *Strickland* were cases involving stay applications or issues in dealings with unlawfulness. In doing so, it is submitted that the respondent improperly disregarded the inchoate prejudice.

[173] The applicant's position is that the inchoate prejudice is not a theoretical one, and is very real in the circumstances of this case and is relevant to the exercise of the discretion.

[174] The applicant contends that the respondent erred by not taking the inchoate prejudice into account in making the decision whether there is a reasonable excuse in the circumstances. It is acknowledged that it is an open textured question which depends on the specific facts. The error pointed to is that the respondent dismissed the constraint on the applicant's forensic choices and did not properly consider that as one of the factors "in the mix" to be considered in deciding whether there was a reasonable excuse.

[175] The current circumstances do not give rise to concerns about unlawfulness as in *Strickland* . Nor is there an application for a stay of proceedings as in *X7*. Here, what was being considered was a decision as to whether the applicant should be required to answer questions at the coercive hearing. In evaluating the various relevant factors in the particular circumstances, the applicant alleges that the respondent failed to consider in the balancing exercise the inchoate prejudice that had been identified in cases such as *X7* and *Strickland*.

[176] The applicant contends that the prejudice was the relevant consideration that needed to be considered by the respondent and not distinguished as a result of the different legal context.

Respondent's position

[177] The applicant's first ground identifies "in the circumstances of this case". The respondent submits that the only circumstance put forward by the applicant as the basis for the applicant's claim of reasonable excuse was the fact of the applicant's existing charge. As a result, the asserted forensic disadvantage is whatever flows "inevitably" from the compulsory examination of a person already charged.

[178] The respondent submits that as a result, Ground One must mean that "any and every person" subject to an existing charge has a reasonable excuse not to answer a question put to them at a Commission hearing that touches upon the subject matter of the charge.

[179] The respondent's position is that the proposed ground of appeal should be rejected because the circumstance relied upon by the applicant is not capable of constituting a reasonable excuse.

[180] In this regard, the respondent points to s 331(4)(b) of the CC Act as evidencing an express alteration to the accusatorial process of criminal justice by permitting an accused person

to be questioned about the subject matter of their charge. This is also in the context of s 190(2) where the entitlement to rely upon the privilege against self-incrimination has been abrogated.

[181] Ultimately, the respondent contends that the asserted forensic disadvantage resulting from this express alteration is implicitly authorised by the legislature, subject to the protective measures prescribed by the statute being put in place. It is on this basis that the respondent contends that the applicant's claim cannot constitute a reasonable excuse.

[182] It is submitted that this is the effect of the Queensland Court of Appeal decision in *NS v Scott*. It is also submitted that the High Court decision in *Strickland* does not affect the construction of the CC Act in *NS v Scott*.

[183] In considering the *X7* statement, the respondent contends that it is important to consider the context of the statement and the principle stated by the Court.

[184] In *X7 v Australian Crime Commission,*[70] *Lee v New South Wales Crime Commission*,[71] *Lee v The Queen,*[72] and finally, *R v Independent Broad-Based Anti-Corruption Commissioner*,[73] the High Court considered and developed principles in respect of statutory powers of compulsory investigation. These principles include:

(a) a statutory provision is not to be construed as effecting an alteration to the accusatorial system, unless the statute uses clear language compelling that result.

(b) the "right to silence" is not a single right, but rather a group of immunities which differ in scope and effect.

[185] This second issue is considered further in respect of Ground Three below.

[186] The High Court in *X7 v Australian Crime Commission* held that legislation that authorised the coercive questioning of persons as part of an Australian Crime Commission investigation did not authorise questioning after criminal charges had been laid, even in circumstances where orders had been made to ensure that the prosecution would not become aware of any answers given during the examination.

[187] In that case, it was not disputed that the legislation clearly abrogated the privilege against self-incrimination. The ultimate issue addressed by the High Court in the *X7* statement is that the position of the accused at trial would be altered on the basis of forensic choice. This was held to prejudice the defence of the accused.

[188] Given this change to the accused's position at a trial, there was a fundamental departure from the accusatorial system and this could only be effected by express words or necessary intendment. This was not found in the relevant legislation.

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70 (2013) 248 CLR 92.

71 (2013) 251 CLR 196.

72 (2014) 253 CLR 455.

73 (2016) 256 CLR 459.

[189] In the next decision of the High Court in *Lee v New South Wales Crime Commission (**Lee No 1**)*,[74] the majority of the High Court held that the relevant legislation in that case empowered the Court to make an order for the examination of a person charged with criminal offences about conduct that was the subject of the charges. French CJ was prepared to accept that the examinee could be said to have suffered a forensic disadvantage of the kind described in the *X7* statement, but this did not deprive the Court of the power to order an examination.

[190] Crennan J considered the loss of the forensic advantage to be incidental to the achievement of legitimate legislative objects and implicitly authorised by the legislature.

[191] Gageler and Keane JJ did not accept that an examinee was deprived of a legitimate forensic choice.[75]

[192] The respondent submits that it was not part of the reasoning of the High Court that the forensic disadvantage, even where it was accepted, prejudiced the fair trial of the accused.

[193] Next, the High Court considered the *X7* statement in the decision of *Lee v The Queen (Lee No 2)*.[76] In that case, the *X7* statement formed part of the rationale for setting aside convictions in the particular circumstances where there had been unlawful provision of transcripts of compelled evidence directly to the prosecution in contravention of a non-publication order. That case concerned a finding that the accusatorial trial had been altered in a fundamental respect without legislative authority. The relevant legislation authorised compulsory examinations on certain terms and those terms had not been complied with.[77]

[194] The decision of the High Court in *Strickland* followed these authorities. *Strickland* concerned compulsory examinations prior to charges being laid. However, the compulsory examinations were found to be unlawful as the investigation under which the compulsory examinations were purportedly held had not been properly constituted. Further, there were also other issues including the examination materials being provided to both police and prosecutors.

[195] In *Strickland*, Kiefel CJ, Bell and Nettle JJ referred to the *X7* statement and found that the forensic disadvantage had occurred.[78] However, the decisive element in that case was that an alteration to the accusatorial process had occurred without lawful authority.[79]

[196] Therefore, it is a critical element of the reasoning in that decision that the forensic disadvantage itself would not constitute a sufficient basis to stay the prosecution.[80] In

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74 (2013) 251 CLR 196.

75 At [323]-[324].

76 (2014) 253 CLR 455.

77 See [46] and [51].

78 See [75]-[76].

79 See [77]-[79].

80 At [86].

accordance with the comments at [90], examinations themselves and the resulting forensic disadvantage could have occurred lawfully if they had been undertaken "strictly in accordance with the statute".

[197] It is also relevant to note that Keane and Edelman JJ found in the circumstances it was unnecessary to consider whether any forensic disadvantage had been suffered.[81]

[198] The respondent submits that the authority of *Strickland* has no application to the facts of the current case. In *Strickland*, the unlawfulness of the examinations was central to the Court's reasoning. That issue does not arise here as there is no issue that the examination was unlawfully constituted, or any allegations of unlawful dissemination of materials. It is in these circumstances that the respondent ultimately contends that the respondent did not err in distinguishing *Strickland*.

[199] Further, the respondent submits that the authority of *Strickland* is consistent with the principles earlier identified by the High Court, particularly in *Lee No 1*. That is, it is open to the legislature to authorise the compulsory examination of a person, including after being charged, by express statement or necessary intendment.

[200] The respondent also points to the decision of the High Court in *Commonwealth v Helicopter Resources Pty Ltd*.[82]

[201] In that case, the High Court confirmed in a joint judgment of six members of the Court the following principle at [22]:

> "[I]f a compulsory investigative procedure is sufficiently authorised by statute, it may be invoked notwithstanding that, as a matter of practical reality, the result will fundamentally alter the ability of an accused to defend charges that may have been or may be laid against him or her."

[202] In respect of Ground One, the respondent also places particular emphasis on the Court of Appeal decision in *NS v Scott*.

[203] The respondent submits that the starting point for considering *NS v Scott* is that s 190(2) of the CC Act abrogated the common law privilege against self-incrimination. What was in issue was whether 'reasonable excuse' in s 194(1) in effect operated to reinstate the protection that Parliament had taken away: that is, to permit an accused person to refuse to answer a question that may lead to the obtaining of derivative evidence.

[204] Holmes CJ, with whom Philippides JA and Flanagan J agreed, considered the High Court authorities at that time and specifically recognised the *X7* statement.

[205] Holmes CJ found the necessary intendment of s 331(4)(b) of the CC Act was that the removal of the privilege against self-incrimination in s 190(2) applies:

(a) whether or not the witness has been charged; and

(b) whether or not the questions concern the subject matter of a charge.

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81 See [169], [182] and [187] (per Keane J) and [255] (per Edelman J).

82 (2020) 94 ALJR 466 at [22] (per Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

[206] Her Honour recognised that the section was "plainly" designed to change the accusatorial process and permitted a person to be questioned about the subject matter of the charge notwithstanding that some prejudice to the defence may result.[83]

[207] It is submitted that the reference by her Honour "to prejudice to [the] defence" was a reference to the forensic disadvantage as identified in the *X7* statement.

[208] Further, her Honour also recognised that s 331(2) of the CC Act recognises the risk of prejudice to the accused's right to a fair trial and protective mechanisms are provided for, being the suite of protections which have been previously discussed.

[209] The respondent also contends that it is necessary to keep in mind that where Parliament has abrogated the privilege against self-incrimination expressly, a statute will not be construed as simply restoring the privilege in another form. That would have the effect of frustrating the legislative purpose in abrogating the privilege in the first place.

[210] Reliance is placed on the decision in *Taikato v The Queen*[84] as authority for the proposition that what constitutes a reasonable excuse is affected by the purpose of the provision to which the defence of reasonable excuse is an exception.

[211] Further, the respondent refers to the decision of the High Court in *Controlled Consultants Pty Ltd v Commissioner for Corporate Affairs*.[85] In that case, a statutory defence of "reasonable excuse" against the compelled production of financial records was held not to include the privilege against self-incrimination. The statute in that case indicated a clear intention to exclude the privilege.

[212] Reference is also made to the decision in *Hamilton v Oades*.[86] Relevantly, in the reasons of Mason CJ, it is recognised that a court overseeing the examination of a company director could not ordinarily give directions that would protect the witness from the consequences of a statutory abrogation of the privilege against self-incrimination insofar as they include the derivative use of answers given, as that would operate to frustrate the statutory purpose.

[213] Similar comments are made in *Lee No 1*, where Crennan J also recognised that protective steps could be implemented in respect of a compelled examination "short of restoring the expressly abrogated privilege".[87]

[214] The Court of Appeal decision in *NS v Scott* considered the same statutory scheme and in particular, the text of s 331 together with s 190(2), in the context of the Commission's functions and powers under the CC Act. This is identical to the considerations in the current matter.

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83 At [33].

84 (1996) 186 CLR 454, 464 (per Brennan CJ, Toohey, McHugh and Gummow JJ).

85 (1985) 156 CLR 385, 391-392 (per Gibbs CJ, Mason and Dawson JJ, Brennan J agreeing on this issue).

86 (1989) 166 CLR 486, 497-9.

87 See [139]-[141].

[215] Holmes CJ, with whom Philippides JA and Flanagan J agreed, concluded that the legislature had expressed a clear intention that a witness can be compelled to answer even if the result may be the obtaining of further evidence in relation to a charge against the witness. Further, her Honour concluded that construing the CC Act provisions, the legislature did not intend by the reasonable excuse provision to provide a "general or complete protection" against self-incrimination through derivative use.

[216] In the particular circumstances of Ground One, the respondent submits that the same result must follow. That is, the forensic disadvantage relied upon by the applicant is not capable of providing a reasonable excuse within the meaning of s 194(1) of the CC Act.

Consideration

[217] Section 194 of the CC Act contains a broad discretion and involves a value judgment to be made in the balancing of the various factors and interests. As identified in *Norbis v Norbis*, as a result there is room for "reasonable differences of opinion". If the decision is "within a given range" of legitimate and reasonable answers to the question, the decision should not be set aside merely because the Court favours a different result.

[218] In this case the relevant factors include:

(a) The respondent made a blanket protection order in terms of ss 180(3), 197(2) and 202 of the CC Act.

(b) The applicant had been charged and was asked a question about the applicant's knowledge of offending by the applicant's co-accused.

(c) The applicant claimed a reasonable excuse on the basis of the applicant's existing charge (it may be inferred that this included that the applicant was charged with the co-accused).

[219] When s 194 is construed taking into account the context and purpose, it is clear that Parliament intended that a witness' entitlement not to answer a question asked in a coerced examination on the basis of self-incrimination was removed. This was regardless of whether a witness had been charged with a criminal offence or not. This could be done so long as the intention was clear, which is the case here.

[220] The CC Act provided a mechanism for determining whether a witness had a reasonable excuse and the presiding offer could decide whether the requirement to answer the question would not be complied with or require the person to answer the question.

[221] It is clear from s 194(2) of the CC Act that self-incrimination could be the basis for a reasonable excuse. However, Parliament expressly provided that the presiding officer may still require the person to comply with the requirement but the safeguards in s 197 would apply.

[222] The value judgement involved in deciding whether or not there is a reasonable excuse means that there is no "uniquely right" answer. However, this is subject to the context, scope and purpose of the CC Act (taking into account s 48 of the HR Act).

[223] To establish the alleged error, the applicant needs to show that the respondent acted upon a wrong principle, was guided or affected by extraneous or irrelevant matters, mistook facts or did not take into account a material consideration.

[224] In making the decision here, the respondent:

(a) Was aware of the forensic disadvantage discussed in the *X7* case and subsequently in *NS v Scott*.

(b) Distinguished the cases concerning unlawfulness and applications for a stay on a legitimate basis as the considerations of the Court of Appeal in *NS v Scott* were more relevant as it had considered and factored in the forensic disadvantage issue.

(c) Did not mistake any identified facts.

(d) Did not fail to take into account a material consideration.[88]

[225] The error alleged by the applicant focuses on the "inchoate prejudice" referred to in *Strickland.* This is in effect the same "inchoate prejudice" discussed in *X7*. The reasons of the Chief Justice in *NS v Scott* fully considered the issue as identified in *X7*.

[226] In *Strickland*, the High Court considered the "inchoate prejudice" in the very specific circumstances of the investigation being unlawfully constituted.[89] In circumstances where an investigation is lawfully constituted such as the current case, the reasoning in *Strickland* does not add to the principles identified and considered in *NS v Scott*.

[227] The principles identified in *NS v Scott* are clearly applicable to the claim for a reasonable excuse by the applicant and the respondent's decision. The facts are strikingly similar and the same legislative scheme and provisions are considered and construed. Further, the reasons of the Chief Justice are consistent with relevant authorities of the High Court and other jurisdictions with similar provisions.

[228] The reasons of Holmes CJ in *NS v Scott* directly consider these issues as follows:

> "[33] Section 190(2) on its face removes any *entitlement* to rely on the self-incrimination privilege; and, unlike the legislation in *X7*, the Act makes it clear that it is not to be construed as operating differently when charges have been laid. The necessary intendment of s 331(4)(b) is that the removal of the privilege against self-incrimination effected by s 190(2) applies whether or not the witness has been charged and whether or not the questions concern the subject matter of the charge. The subsection would have no work to do if a person charged could not be subject to examination about the alleged offence. It plainly is designed to effect a change to the accusatorial process of criminal justice by permitting the accused person to be questioned about the subject matter of his charge, notwithstanding the prejudice to his defence (identified by the majority in *X7*) which may result. The risk of prejudice to the accused's right to a fair trial is specifically recognised in s 331(2), which provides remedial mechanisms.

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88 See discussion of Ground Two below.

89 The issue of distribution of material also arose but is dealt with in the current case by the specific protective orders that have been made.

[34] Nor does the Act leave any room for reading a limitation into s 331(4)(b) to the effect that answers cannot be required where they may result in the obtaining of derivative evidence. Section 190(2) does not distinguish between the prospect of self-incrimination through the direct use of answers given and the prospect of self-incrimination through the derivative use of answers given. Section 331(4)(b), in giving power to ask questions about the subject matter of the appellant's charges, clarifies the Commission's power, given in s 331(1), to continue and complete an investigation notwithstanding a pending trial. Those powers are conferred in the context of an Act which gives the Commission investigative power in relation to major crime and provides the investigative hearing as a tool for that purpose. Use of the evidence obtained to enable police officers to investigate further and obtain more evidence is consistent with the Commission's statutory function of investigating crime, which includes the gathering of evidence for prosecution. The capacity to second police officers or secure the assistance of a police task force to assist the Commission in the exercise of its functions further supports the view that information may be provided to police officers for investigative purposes. The legislature has expressed its intention 'with irresistible clearness' that a witness can be compelled to answer even if the result may be the obtaining of further evidence in relation to a charge against him.

[35] The intention manifest in the provisions I have discussed weakens the appellant's proposition that Parliament cannot have intended an accused person to be required to give answers which may enable the gathering of further evidence against him, as well as the further contention that the reasonable use exception is intended to provide a mechanism to prevent that occurring. Section 194(2) further undercuts the latter argument; it raises the possibility that a claim in such circumstances might amount to reasonable excuse, but it also precludes the conclusion that it must do so. The provision leaves it to the presiding officer to decide whether any claim based on self-incrimination constitutes reasonable excuse and then gives that officer the discretion to require an answer; it is clear from the conferring of that power and discretion that the legislature did not intend by the reasonable excuse provision to provide any general or complete protection against self-incrimination through derivative use.

[36] Plainly enough, in particular circumstances, a charged person who fears a derivative use of his answers may have a reasonable excuse. An example might be an accused person who is asked to answer questions designed to incriminate him by eliciting the nature of his defence, in order to arm the prosecution with the means of rebutting it. But there is no general rule that an accused's

> concern as to the obtaining of derivative evidence will constitute a reasonable excuse."

[229] In *NS v Scott*, the "inchoate prejudice" was recognised but the conclusion was reached that Parliament's intention was clear:

(a) Pursuant to s 190(2) of the CC Act the privilege against self- incrimination is abrogated.

(b) Pursuant to s 331 of the CC Act a witness may be required to attend a Commission hearing to answer questions about a matter relating to a criminal offence with which they have been charged.

(c) Pursuant to s 331(2) protective measures are to be put in place where an accused's right to a fair trial might be prejudiced, including one or more of:

(i) Pursuant to s 180(3) a prohibition on the publication of information and answers given.

(ii) Pursuant to s 197(2) answers given are not admissible in evidence against the individual in any civil, criminal or administrative proceeding.

(iii) Pursuant to s 202 information about the examination or the witness must not be published.

(d) Section 197(7) expressly provides that evidence obtained as a "direct or indirect consequence" of the answers given at a coerced hearing are admissible in evidence against the individual in a civil, criminal or administrative proceeding.

[230] The respondent heard submissions on *NS v Scott* and applied it in making his decision. He was not in error in doing so.

[231] The argument that the respondent incorrectly distinguished the cases of *Strickland* and *X7* as being in respect of unlawfulness or an application for a stay cannot be maintained given the principles from those decisions, the principles in *NS v Scott* and the proper construction of the CC Act.

[232] In these circumstances, the applicant has not established that the respondent erred in finding that the applicant did not have a reasonable excuse because the coercive hearing occurred after the applicant had been charged and had the capacity to constrain the applicant's forensic choices.

[233] Consistent with the Court of Appeal's reasoning in *NS v Scott*, the legislative scheme clearly intends that the coercive hearing can occur after a witness has been charged subject to protective measures being put in place. It was not intended that a claim for reasonable excuse could be established on the fact that a witness has been charged alone as that would be inconsistent with the language and purpose of the provisions.

[234] In the current case, the basis raised by the applicant for a reasonable excuse was that the applicant was already charged. If the absence of derivative use immunity is also raised by that claim, then *NS v Scott* also considered that issue. Holmes CJ concluded at [39] that:

> "… the use of derivative evidence does not necessarily prejudice a fair trial. It will depend on the nature of the evidence, and whether it is

> available from other sources. Those are not matters likely to be apparent at a Commission hearing. If there were a question of unfairness in the adducing at trial of evidence thus obtained, it would be open to the appellant to apply for its exclusion on the ground of unfairness, under s 130 *Evidence Act* 1977. Given the availability of that recourse, the prospective obtaining of derivative evidence and its provision to the prosecution did not amount to a reasonable excuse under s 190(1)."

[235] In respect of Ground One, no error by the respondent has been established. The respondent's decision that the applicant's claim did not constitute a reasonable excuse was open and was not so unreasonable that no decision maker could reach that conclusion.

Ground Two

[236] Ground Two is as follows:

> "The respondent failed to have regard to a relevant consideration, namely s 201 of the [CC Act] and the impact that the availability of the coerced material to [the applicant's] co-defendants would have on the capacity of the safeguards in the [CC Act] to quarantine coerced answers from the applicant's trial."

[237] Section 201 of the CC Act states as follows:

> "**201 Commission must give evidence to defence unless court certifies otherwise**
>
> (1) This section applies if a person is charged with an offence before a court and anything stated at, or a document or thing produced at, a commission hearing (the ***evidence***) is relevant evidence for the defence against the charge.
>
> (2) On being asked by the defendant or the defendant's lawyer, the commission must give the evidence to the defendant or the defendant's lawyer unless the court makes an order under subsection (4).
>
> (3) A request under subsection (2) may generally identify evidence to be given to the defendant or defendant's lawyer.
>
> (4) On application by an authorised commission officer, the court must order that the evidence not be given to the defendant or defendant's lawyer if the court considers that it would be unfair to a person or contrary to the public interest to do so.
>
> (5) Evidence given to a defendant or a defendant's lawyer under subsection (2) may be used only for the defence to the charge.

(6) A person who uses the evidence as permitted under subsection (5) does not contravene section 202."

Applicant's position

[238] The applicant contends that the effect of s 201 is that:

(a) Co-accused at a joint trial would have the benefit of the answers given by the applicant and/or other co-accused at the coerced examination.

(b) The applicant and/or other co-accused may be cross-examined – if they elect to give evidence – by a co-accused who would have the benefit of knowing the answers they gave at the coerced examination.

[239] Section 201 in its terms provides that the Commission must give the evidence to the defence. But this is subject to a Court ordering otherwise upon being satisfied that it is unfair or "contrary to the public interest to do so".

[240] The applicant submits that the potential for a co-accused to obtain the coerced answers means that:

(a) The applicant's decisions at trial are no longer based only on the prosecution's case, but also include a co-accused having the benefit of the applicant's coerced answers.

(b) This is the issue discussed in the *X7* statement identified above.[90]

(c) The applicant's forensic choices are limited in a way equivalent to the prosecution having and using the coerced answers.

(d) The applicant's trial is inescapably and profoundly altered as the applicant's decision to call or give evidence is distorted.

[241] In oral submissions the applicant developed these points further:

(a) The three protective measures (namely closed hearing under s 178(3), blanket self-incrimination protection under s 197 and non-publication order under s 180(3)) do not operate in respect of the co-defendant's access to coerced answers.

(b) The respondent was aware of this and the respondent of his own volition makes reference to the effect of s 201 and the likely disclosure of the applicant's coercive hearing transcript to the applicant's co-defendants.

(c) The protective effect of s 202 also does not assist in respect of s 201 disclosure to a co-defendant. In particular:

(i) The non-publication of coercive hearing transcripts under s 202 prevents the transcript being given to the prosecutor conducting the trial (which was the concern identified in *Lee No 2*).

(ii) The operation of s 201 in the current circumstances where there are co-accused means that the protective mechanisms in s 202 are, in effect, "undone".

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90 See [124] of the reasons of Hayne and Bell JJ in *X7 v Australian Crime Commission* (2013) 248 CLR 92.

(iii) It is "equally as dangerous for the coercive hearing transcript to end up in the hands of the Crown prosecutor, as it is [the] co-defendant's trial counsel".[91]

(d) Applying under s 597B of the *Criminal Code* for a separate trial is not an adequate remedy where:

(i) Any application under s 590AA to sever the trial is likely to be met with the question whether the risk was theoretical as it is not known in advance whether the accused is going to be cross-examined by a co-defendant at trial.

(ii) There remains the risk that the applicant could be cross-examined by a co-accused's trial counsel who is in possession of the coercive hearing transcript, including the possibility of being cross-examined about the evidence in that transcript.

(iii) There remains a further risk that the applicant will be forced to make forensic decisions based on matters beyond the strength of the prosecution case, including whether to give evidence or not at a trial, factoring in that the co-defendant has the coercive hearing transcript.

(e) Section 130 of the *Evidence Act* 1977 (Qld) may be available but as the risk only manifests when cross-examination occurs, this may in effect be too late and a trial may miscarry as a result.

[242] In response to criticisms by the respondent, the applicant confirmed that it is not contending that the mere existence of a co-accused provides a reasonable excuse. The existence of a co-accused does, however, make the considerations more complicated and complex and requires careful consideration. The applicant submits that whether a reasonable excuse exists depends on the circumstances of each case.

[243] In particular, the risk crystallised when the specific question was asked, as it was a question about the applicant's co-defendants. Consequently, the issue arises as to whether the question could have been put differently. For example, questions could have been asked about other aspects of the investigation, rather than about co-defendants.

[244] The applicant submits that s 201 has a profound impact in the circumstances under consideration as it effectively undoes the protective infrastructure that has been set up to avoid coercive material possibly entering a criminal trial. It presents a very real risk because the terms of s 201 cut across that protective infrastructure.

Respondent's position

[245] The respondent relies upon several matters in response, including:

(a) The issue was never raised by the applicant at the Commission hearing.

(b) In these circumstances, there is no explanation as to the basis upon which the respondent "failed to have regard" to this issue.

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91 T1-72, L41-43 (18 June 2021).

(c) There is no explanation as to the basis that s 201 is engaged or the effect of it.

(d) Given s 197(2) provides that the applicant's answers are not admissible against the applicant, there is no explanation as to how the "safeguards" are affected.

(e) The only basis relied upon by the applicant is that the applicant has co-defendants.

(f) The existence of co-defendants being capable of founding a reasonable excuse not to answer a question that touches upon the subject matter of the pending charge is not consistent with the statutory purpose.

(g) The statutory purpose includes holding hearings to investigate "organised crime" which necessarily involves two or more persons.

(h) The accusatorial principle and the companion rule are concerned with the forensic balance between the prosecution and the accused. This is what the *X7* statement is addressing.

(i) The existence of co-defendants does not add to the forensic disadvantage referred to in *X7 v Australian Crime Commission*.

[246] Further, the respondent points to a "circularity to the applicant's argument". Section 201 is structured on the basis that persons have been examined and answers given. However, the applicant seeks to deploy the "presence" of s 201 of the CC Act as the basis for a reasonable excuse for a co-defendant to refuse to answer questions.

[247] The respondent also points to other protective measures available in respect of s 201 of the CC Act. These include:

(a) Separate trials for co-defendants pursuant to s 597B of the Criminal Code.

(b) An order pursuant to s 201(4) of the CC Act, which could be sought by the Commission to prevent the provision of evidence if it would be unfair or contrary to the public interest.

[248] The respondent acknowledges that the respondent informed the applicant at the commencement of the hearing of the potential for defence representatives of other charged persons to obtain information from the hearings. However, the respondent further says:

(a) The applicant did not raise any concerns with the respondent.

(b) The applicant was legally represented and the applicant's counsel did not raise any concerns with the respondent.

(c) It is open for the applicant to raise any concerns at a resumed hearing or other time. This would include with respect to the Commission's power under s 201(4) of the CC Act.

(d) The applicant may still pursue the "usual protective mechanisms" that are available to co-defendants to ensure a fair trial.

[249] The respondent in oral submissions further clarified some of these points, including:

(a) The applicant did not raise the issue of s 201 of the CC Act as part of the reasonable excuse claimed at the hearing. As a result, it cannot be a factual error: it is not that

it was raised by the applicant and the respondent overlooked it and failed to take it into account.

(b) The respondent raised s 201 of the CC Act and no issue was raised about it by the applicant in relation to the claim of reasonable excuse.

(c) Section 201 of the CC Act deals with evidence already gathered. It is a provision for dealing with the product of a hearing that is at a different stage of the process than the consideration of a claim for reasonable excuse.

(d) The issue of co-defendant's also arose in *NS v Scott*.[92]

(e) To exclude co-defendants from coercive examinations is irreconcilable with the overall legislative scheme that is designed to conduct hearings in relation to organised crime that necessarily involved multiple people engaged with each other. It cannot be the case that the presence of s 201 renders a co-defendant non-compellable.

(f) Pursuant to s 201(4) of the CC Act, the Commission, or an authorised Commission officer, can make an application to the Court to have a judicial decision about whether the transcript from the coerced hearing should be released or not. It is not the position that evidence given at a coerced hearing inevitably leads to the provision of the information to a co-defendant. This, in effect, is another protective mechanism that may operate if necessary.

(g) As s 201 of the CC Act was not factually raised by the applicant at the hearing, to make out the error in the respondent not considering it the applicant needs to point to an obligation in the statute for the respondent to consider it.

(h) Section 201 does not form part of the suite of protective measures that are required to be considered and put into place in order to proceed with the hearing. That is, s 201 is concerned with post-hearing matters.

(i) Section 197(2) of the CC Act provides a relevant protective measure in that the direct use of immunity conferred is absolute. The applicant's compelled answers are not admissible against the applicant by anyone. This addressed the risk of the applicant being cross-examined on a prior inconsistent statement as a result of the answers given at the coerced hearing.

[250] Ultimately, the respondent contends that s 201 of the CC Act is not a mandatory consideration that the respondent was obliged to take into account as there is no factual implication or legal obligation on the respondent to take it into account. Particularly:

(a) The respondent says that the applicant does not put forward a statutory construction as to how the obligation arises. Further, the applicant does not address how the obligation (if it can be inferred) is to be used in the making of a decision about reasonable excuse and the effect of s 201(4) in that exercise.

(b) The statute needs to be construed in accordance with the principles identified in the *Minister for Aboriginal Affairs v Peko-Wallsend Limited.*[93]

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92 [2018] 2 Qd R 397.

93 (1986) 162 CLR 24, 39.

(c) There is an inherent difficulty construing the CC Act so as to make the respondent bound to take into account the operation of s 201 when deciding under s 194(1A) whether the applicant had a reasonable excuse not to answer the question put to the applicant.

Consideration

[251] The starting point is the test identified in the judgment of Mason J (as his Honour then was) in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [94] as follows:

> "The failure of a decision-maker to take into account a relevant consideration in the making of an administrative decision is one instance of an abuse of discretion entitling a party with sufficient standing to seek judicial review of ultra vires administrative action. … it has been discussed in a number of decided cases, which have established the following propositions:
>
> (a) The ground of failure to take into account a relevant consideration can only be made out if a decision-maker fails to take into account a consideration which he is *bound* to take into account in making that decision …
>
> (b) What factors a decision-maker is bound to consider in making the decision is determined by construction of the statute conferring the discretion. If the statute expressly states the considerations to be taken into account, it will often be necessary for the court to decide whether those enumerated factors are exhaustive or merely inclusive. If the relevant factors – and in this context I use this expression to refer to the factors which the decision-maker is bound to consider – are not expressly stated, they must be determined by implication from the subject-matter, scope and purpose of the Act. In the context of judicial review on the ground of taking into account irrelevant considerations, this Court has held that, where a statute confers a discretion which in its terms is unconfined, the factors that may be taken into account in the exercise of the discretion are similarly unconfined, except in so far as there may be found in the subject-matter, scope and purpose of the statute some implied limitation on the factors to which the decision-maker may legitimately have regard … By analogy, where the ground of review is that a relevant consideration has not been taken into account and the discretion is unconfined by the terms of the statute, the court will not find that the decision-maker is bound to take a particular matter into account unless an implication that he is bound to do so is to be found in the subject-matter, scope and purpose of the Act.

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[94] (1986) 162 CLR 24, 39-40.

(c) Not every consideration that a decision-maker is bound to take into account but fails to take into account will justify the court setting aside the impugned decision and ordering that the discretion be re-exercised according to law. A factor might be so insignificant that the failure to take it into account could not have materially affected the decision … A similar principle has been enunciated in cases where regard has been had to irrelevant considerations in the making of an administrative decision …

(d) The limited role of a court reviewing the exercise of an administrative discretion must constantly be borne in mind. It is not the function of the court to substitute its own decision for that of the administrator by exercising a discretion which the legislature has vested in the administrator. Its role is to set limits on the exercise of that discretion, and a decision made within those boundaries cannot be impugned …

It follows that, in the absence of any statutory indication of the weight to be given to various considerations, it is generally for the decision-maker and not the court to determine the appropriate weight to be given to the matters which are required to be taken into account in exercising the statutory power ..." (citations omitted)

[252] Section 194 of the CC Act requires the respondent to decide whether or not there is a reasonable excuse.

[253] The nature of the power under s 194 of the CC Act is broad and unconfined. Applying the approach in *Peko-Wallsend*, as the relevant factors are not expressly stated, they must be determined by implication from the subject matter, scope and purpose of the Act.

[254] Section 201 contains a qualified obligation to provide a copy of any transcript of coerced evidence to a co-defendant's lawyers on request. There are several safeguards:

(a) The non-publication orders mean that the fact a witness has been examined is confidential and will not necessarily be known.

(b) The Commission may make an application pursuant to s 201(4) to the Court for an order that a copy of any transcript not be provided.

(c) Pursuant to s 201(5) the evidence may only be used "for the defence to the charge".

[255] The submissions of the applicant proceed on the basis that the existence of s 201 means that the transcript of any coerced examination will end up in the hands of the co-defendant. That is not the case.

[256] The Supreme Court has the ability to hear any application in a way to protect the interests of various persons involved and to decide where the interests of justice lie.[95] The outcome is not a "foregone conclusion" as suggested by the applicant.

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95 See for example, *DBH v Australian Crime Commission & Ors* [2014] QCA 265.

[257] An application for reasonable excuse under s 194 of the CC Act occurs at a stage in the process before s 201 of the CC Act is directly applicable. The application concerns whether a witness should be compelled to answer a question, whereas s 201 is concerned with the future use of any answer given. The presiding officer in making a decision about whether there is a reasonable excuse and whether a witness should be required to answer, may consider the future potential operation of s 201 but it is not a decisive factor.

[258] In circumstances where s 201 does apply, it has a safeguard built in. The Commission may make an application to the Court of its own volition or the applicant could raise concern with the Commission and request they make an application to the Court to prevent the provision of the transcript from a coerced hearing to the co-defendants. This is in addition to the safeguards in ss 180, 197 and 202 of the CC Act.

[259] Given the scope and nature of the power in s 194, the purpose as outlined in ss 4 and 5 of the CC Act and the terms of s 201, I do not consider that s 201 of the CC Act can be classified as a relevant consideration that the decision-maker was bound to take into account. It is not a natural implication from the subject matter, scope and purpose of the CC Act to make it a mandatory consideration.

[260] No error, therefore, is made out in respect of Ground Two on the basis that s 201 was a mandatory consideration.

[261] Section 201 of the CC Act may, however, be one of the various factors to be considered in the exercise of the discretion given the general nature of the power.

[262] The respondent was aware of s 201 and gave a general statement about its effect prior to any questions being asked. No complaint or issue was raised by the applicant at that time.

[263] Further, neither the applicant nor the applicant's Counsel raised the effect of s 201 in submissions following the claim of a reasonable excuse being made.

[264] In accordance with the statement of principle in *Peko-Wallsend*, the respondent as decision-maker is to consider the weight to be given to relevant factors, and therefore the existence of co-accused and s 201 given the broad and unconfined nature of the decision under s 194.

[265] Here the failure of the respondent to address s 201 in his ruling is not a factual error: it was not raised by the applicant. Nor is it an error in the *Wednesbury* sense. While the existence of co-accused and the question being aimed at co-accused raises the potential application of s 201, s 201(4) provides a mechanism to safeguard the applicant from "unfairness" which is to be determined at a later stage. It cannot be determined at the time of the claim of a reasonable excuse.

[266] In these circumstances, it could not be said that the respondent's decision in not considering s 201 of the CC Act was so unreasonable that a reasonable decision maker could not have reached that decision.

[267] No error, therefore, is made out in respect of Ground Two on the basis that the respondent failed to give proper weight to s 201 of the CC Act.

Ground Three

[268] Ground Three is in respect of the HR Act and is as follows:

> "The respondent acted unlawfully pursuant to section 58(1)(a) of the [HR] Act in that the decision that he made was not compatible with the applicant's human right protected by s 32(2)(k) of the [HR] Act."

[269] As previously indicated, the HR Act came into force on 1 January 2020. The decision of the Court of Appeal in *NS v Scott* predates the operation of the HR Act.

[270] The Attorney-General and the Queensland Human Rights Commission have made submissions about this ground. These submissions will be addressed together with the submissions from the applicant and the respondent.

[271] The following questions require consideration:

(a) Which of the human rights under the HR Act are relevant here and have they been limited by the respondent's decision? This requires a consideration of the scope of the relevant human rights.

(b) Is the respondent's decision substantially not compatible with human rights and accordingly, is the decision unlawful for the purposes of s 58(1)(a) of the HR Act? This requires consideration of whether the limit is justified under the test for proportionality set out in s 13.

(c) Does deference have a role in these considerations?

Which of the human rights under the HR Act are relevant here and have they been limited by the respondent's decision?

[272] The applicant, the Queensland Human Rights Commission and the Attorney-General agree that s 32(2)(k) of the HR Act, being the right not to be compelled to testify against oneself, is a relevant human right and is engaged for the purposes of the respondent's decision.

[273] Conversely, the respondent contends that the right in s 32(2)(k) of the HR Act is confined to the criminal judicial process and is not applicable in the current circumstances.

[274] The respondent and the Attorney-General have made substantial submissions in respect of the scope of s 32(2)(k) of the HR Act which will be considered further below.

[275] The Queensland Human Rights Commission and the Attorney-General also identify that s 31 of the HR Act, the right to a fair hearing, is also engaged. The Attorney-General submits that this right largely overlaps with s 32(2)(k) and that the two rights should be considered together.

[276] The respondent contends that s 31 of the HR Act is a different scope to s 32(2)(k) of the HR Act. Further, the respondent points to the decision in *Re Application under Major Crime (Investigative Powers) Act 2004* in support of the contention that there is no specific overlap between the two rights.

[277] Further, the respondent submits that a consideration of the right to a fair hearing requires consideration of the public interest to be taken into account, as it is a component of the scope of the right to a fair hearing.

[278] The Queensland Human Rights Commission identifies s 25(a) of the HR Act, the right to non-interference with privacy and family, as also being relevant as the specific questions in this case related to the applicant's partner. However, the Queensland Human Rights Commission recognises that it is difficult to assess the impact without greater detail.

[279] The Attorney-General acknowledges that this right may also be relevant but submits that the underlying values overlap with those of ss 31 and 32(2)(k) of the HR Act and it need not be considered separately.

[280] The Queensland Human Rights Commission also identifies s 26(1) of the HR Act, the right to protection of families, may be a relevant right. Again, its relevance cannot be assessed without further evidence.

[281] Given these positions, it is necessary to consider in further detail the right in s 32(2)(k) and ascertain its scope to be able to determine its relevance in the current matter.

[282] It is appropriate to start with the submissions of the Attorney-General, as these submissions have been adopted by the applicant and the Queensland Human Rights Commission.

[283] The Attorney-General has undertaken a comprehensive review of the relevant authorities in respect of the approach to a consideration of "compatible with human rights" in s 8 of the HR Act. The first question is whether the relevant Act or decision placed a "limit" on a human right. This involves:

(a) determining the scope of the right; and

(b) considering whether any limitation, restriction or interference comes within the scope of the right.

[284] The Attorney-General contends that s 32(2)(k) is not confined to the "criminal justice process" for a number of reasons. These include:

(a) The approach provided for in s 8 of the HR Act requires that human rights be construed in the broadest possible way at the first stage.

(b) A narrow construction is inconsistent with the purpose and underlying values of s 32(2)(k) of the HR Act. Reliance is placed on the comments of Warren CJ in *Re Application under Major Crime (Investigative Powers) Act 2004* considering the equivalent right in the Victorian Charter where her Honour stated:

> "[Section 25(2)(k) of the Victorian Charter] define[s] the relationship between the individual and the state and protect[s] people against aggressive behaviour of those in authority. [It] reflect[s] the philosophy that the state must prove its case without recourse to the suspect."[96]

(c) Initially, the respondent took a similar approach in describing the nature of the right at the time of making the decision. It is further contended that to confine s 32(2)(k)

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96 (2009) 24 VR 415, 448 [146] per Warren CJ.

to compelled testimony before a court would be to "hollow out the right and divorce it from its rationale."

(d) *Re Application under Major Crime (Investigative Powers) Act 2004* supports the right not being confined to the criminal judicial process.

(i) That case concerned issues of the proper interpretation of legislation clearly abrogating the privilege against self-incrimination and providing limited statutory immunity in the context of coercive questioning. Warren CJ in that case found that a failure to provide derivative use immunity constituted a limit on the equivalent right in s 25(2)(k) of the Victorian Charter.[97]

(ii) While her Honour used the interpretive clause to resolve the ambiguity in favour of a derivative use immunity by adopting the more human rights compatible interpretation, the Attorney-General submits that the judgment should not be distinguished on the basis of the approach to the statutory interpretation.

(iii) The Attorney-General submits that her Honour did not undertake a remedial interpretation and the interpretation of the scope of the right stands and is consistent with the approach to be taken in this case.[98]

(iv) The case remains authority for the principle that coercive questioning by the equivalent of the Commission outside of criminal judicial proceedings is capable of limiting the equivalent self-incrimination right in Victoria.

(e) The right in s 32(2)(k) is derived from Article 14(3)(g) of the ICCPR. Article 14(3)(g) of the ICCPR applies to coercive questioning by the Executive.

(f) This position is supported by the Human Rights Committees' General Comment No 32 on the scope of the right:[99]

> "… [A]rticle 14, paragraph 3 (g), guarantees the right not to be compelled to testify against oneself or to confess guilt. This safeguard must be understood in terms of the absence of any direct or indirect physical or undue psychological pressure from the investigating authorities on the accused, with a view to obtaining a confession of guilt. A fortiori, it is unacceptable to treat an accused person in a manner contrary to article 7 of the Covenant [which protects the freedom from torture or cruel, inhumane or degrading treatment] in order to extract a confession."

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97 At [84] and [143].

98 It is not necessary for me to consider the Chief Justice's reasoning in respect of the extension of the right to protect uncharged suspects. I note the submissions on behalf of the Attorney-General in this regard. The applicant in the current case is charged and therefore it is unnecessary to consider that issue further.

99 Human Rights Committee, General Comment No 32 – Article 14: Right to equality before courts and tribunals and to a fair trial, 90th sess, UN Doc CCPR/C/GC/32 (23 August 2007) 13 [41].

(g) The statement of the Committee places the burden of complying with Article 14(3)(g) on "the investigating authorities". It is submitted that the courts have a secondary duty to exclude evidence in appropriate cases.[100]

(h) The Attorney-General notes that provision was first proposed by the Philippines, and the delegate explained that it was aimed at "preventing the authorities from forcing" an accused to confess.[101]

(i) The CCPR Commentaries also note that Article 14(3)(g) aligns with "the prohibition of self-incrimination" which "has its roots in English common law".[102]

(j) In case law of the Human Rights Committee concerning this provision, it is noted that the Committee often focuses upon the conduct of the investigating authorities, rather than the domestic court's decision about whether to exclude evidence.[103]

(k) This construction is also consistent with the approach taken to equivalent rights in other jurisdictions, including New Zealand, Europe, South Africa and Canada.[104]

(l) The Attorney-General acknowledges:

  (i) Section 48(3) of the HR Act invites consideration of international law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right.

  (ii) However, the position of other jurisdictions must be approached "with due caution … for the particular statutory and constitutional framework in the consideration in any variations in the words used of the sections under consideration".[105]

(m) Ultimately, the Attorney-General contends that the HR Act is designed to apply international laws at a domestic level and in effect it recognises that the protection of human rights "crosses borders". It is in these circumstances, that the Attorney-General submits that the international consensus about the scope of the same right supports the construction contended for.

(n) This construction is consistent with the heading of s 32 "[r]ights in criminal proceedings". The rights in ss 32(1) and (2) are only in respect of "person[s] charged with a criminal offence". Other rights are expressly applicable to all

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100 This is reinforced by the *travaux préparatoires*.

101 See Commission of Human Rights, *Summary Record of the 159th Meeting*, 6th sess, UN Doc E/CN.4/SR. 159 (27 April 1950) 9 [39].

102 See William A Schabas, U.N. International Covenant on Civil and Political Rights: Nowak's CCPR Commentary (N.P. Engel, 3rd ed, 2019) 410 [108].

103 See for example Human Rights Committee, *Views: Communication No 2017/2010*, 114th sess, UN Doc CCPR/C/114/D/2017/2010 (25 April 2015) [8.2] ('*Burdyko v Belarus*').

104 I note the comprehensive references in the Attorney-General's submissions in respect of this point but do not set them out in full. I incorporate those references without repeating them.

105 *Islam v Director-General, Justice and Community Safety Directorate* [2021] ACTSC 33, [77] (McWilliam AsJ, citing *Momcilovic v The Queen* (2011) 245 CLR 1, 36-7 [18] (French CJ), 83 [146] (Gummow J).

individuals in Queensland. It is contended that as criminal proceedings commence when a person is charged that is the point in time at which the rights in s 32(2) of the HR Act are engaged. The heading supports the construction that rights in s 32 are enjoyed by persons who have been charged.[106]

(o) Relevant authorities[107] recognise there is considerable overlap between the right to a fair hearing in s 31(1) and the right not to incriminate oneself in s 32(2)(k). Bell J in *Re Kracke and Mental Health Review Board* describes the rights in s 32 as being "additional to and in many cases more explicit than, but do not derogate from, the rights in" s 31.[108]

(p) Section 31 of the HR Act clearly applies to the Executive and accordingly, it would be "curious" if the overlapping rights in ss 31 and 32(2)(k) did not equally apply to the Executive in compelling self-incriminating evidence.

(q) The case of *Sabet v Medical Practitioners Board of Victoria*,[109] which the respondent relies upon, is not authority to the contrary. Hollingworth J did not consider the equivalent of s 32(2)(k) and specifically did not decide the broader point. For the purposes of that hearing it was assumed the presumption of innocence is capable of direct application to a disciplinary hearing, but concluded that the Board did not limit that right. What was being considered was the capacity to practice medicine, as opposed to his guilt.[110]

[285] In light of these considerations, the Attorney-General submits that s 32(2)(k) of the HR Act is not confined to criminal judicial proceedings.

[286] Relevantly here, in response to a question at the coerced hearing, the applicant indicated that the applicant's answer would "touch … on [the applicant's] current charge …" and would "impact on [the applicant] receiving a fair trial". The respondent's ultimate decision pursuant to s 194 to require the applicant to answer the question effectively required the applicant to testify against the applicant.

[287] It is in this respect that it is submitted by the applicant, Attorney-General and the Queensland Human Rights Commission that the respondent's decision limited the applicant's rights under s 32(2)(k) of the HR Act.

[288] Consideration of safeguards and other protective measures goes to whether the limit was justified (the next step in the considerations to be undertaken), not whether the right itself was limited.

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106 As the applicant in this case has been charged, it is not necessary to consider the point raised in passing by the Attorney-General as to whether "charge" has an autonomous meaning as it does in Europe.

107 In Victoria and other jurisdictions, including New Zealand and Canada as identified in footnote 93 of the Attorney-General's submissions.

108 (2009) 29 VAR 1, 86 [373]. See also *Re Application under Major Crimes (Investigative Powers) Act 2004* (2009) 24 VR 415, 425 [40].

109 [2008] VSC 346.

110 (2008) 20 VR 414, 441-2 [181]-[185].

[289] The Attorney-General also recognises that the applicant's right to a fair hearing in s 31(1) was also engaged, particularly given the overlap previously identified. This is consistent with the reasoning of Warren CJ in *Re Application under Major Crime (Investigative Powers) Act 2004* where her Honour found that the right to a fair hearing was engaged by coercive questioning before the Victorian equivalent of the Commission.

[290] Warren CJ acknowledged "it would be unhelpful to proceed on the basis that the fair hearing right and the self-incrimination right are separate and unrelated, or that they necessarily require individual analysis".[111] The Attorney-General submits that the two rights may be considered together for the purposes of the analysis to be undertaken.

[291] Further, it is also acknowledged that other human rights may be impacted, such as the right to non-interference with privacy and family. It is however submitted that the values underlying the right to privacy largely overlap with the values underlying the right to a fair hearing and the right not to incriminate oneself. In these circumstances, it is sufficient to consider the impact on human rights in respect of s 31(1) and s 32(2)(k) in this hearing.

Respondent's position

[292] The respondent's position is that requiring the applicant to answer a question at a Commission hearing does not directly engage the right in s 32(2)(k) of the HR Act, as an investigative hearing before the Commission is not a criminal proceeding. This is a change to the position taken by the respondent in his reasons.

[293] It is acknowledged that it was appropriate for the respondent to consider whether a decision made at the hearing creates the potential for interference with the right "down the track". Section 331(2) of the CC Act specifically recognises that a Commission hearing may prejudice an accused person's right to a fair trial.

[294] However, the respondent contends that the right to a fair trial is different in scope to the right in s 32(2)(k) of the HR Act. The respondent submits that the right in s 32(2)(k) is the testimonial immunity of an accused person at trial. On that basis, the right has not been breached unless and until the compelled testimony is sought to be tendered against the person in judicial proceedings. The potential for breach would arise at the time of the coercive examination. As the compelled testimony is subject to a direct use immunity by the provisions of the CC Act, the right is unlikely to ever be breached.

[295] The respondent submits that the approach to identifying the scope of the human right is by "a process of interpretation, one that is focussed on the words of the enabling provision of pt 2, but is purposive and takes account of the fundamental values and interests that the right is intended to express and ensure".[112]

[296] Section 32(2)(k) starts with "a person charged". The respondent acknowledges that this is significant as the laying of a charge marks the first step in engaging the "exclusively judicial

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111 *Re Application under Major Crimes (Investigate Powers) Act 2004* (2009) 24 VR 415, 425 [40].

112 *McDonald v Legal Services Commissioner (No 2)* [2017] VSC 89 at [21] (Bell J); *Director of Public Prosecutions (DPP) v Kaba* (2014) 44 VR 526 at [108] and the cases cited therein.

task" of adjudicating and punishing criminal guilt.[113] The respondent also refers to the heading to s 32, namely "criminal proceedings" which forms part of the HR Act and is to be used in its interpretation.[114] It is submitted that criminal proceedings are ordinarily regarded as commencing with a charge and continuing until conviction or acquittal.[115]

[297] The respondent also refers to the full heading, namely "[r]ights ***in*** criminal proceedings" as supporting a construction that s 32(2) does not create independent rights, which are exercisable outside of the criminal proceedings as a result of a person being charged with a criminal offence. That is, the identified rights pertain to the criminal judicial process.

[298] The respondent submits that this is consistent with the rights reflecting Article 14(3) of the ICCPR. Article 14(3) applies "in the determination of any criminal charge".

[299] The explanatory note is relied upon by the respondent in support of a plain text reading. The explanatory note states:

> "Clause 32 provides for **certain rights in criminal proceedings**. This right is also modelled on article 14 of the ICCPR, but on those provisions regarding the right to certain minimal procedure guarantees in criminal trials."[116]

[300] It is in this context that the respondent submits that this section is plainly not directed to executive, administrative, or other civil processes which do not adjudicate upon or determine criminal responsibility. This is so even if they touch upon the subject matter of a charge.[117]

[301] Warren CJ in *Re Application under Major Crime (Investigative Powers) Act 2004* considered the scope of the right equivalent to s 32(2)(k). Her Honour treated the corresponding Victorian human right as commensurate with the common law privilege against self-incrimination. That formed the basis for the ultimate conclusion that the Charter right provided "both direct and derivative immunity because a person could not be compelled to answer".[118]

[302] In that case, her Honour stated:

> "The purpose and intention of Parliament in enacting the Charter was to give effect to well-recognised and established rights in the criminal justice system. The Charter should be construed in a way that is consistent with, and gives effect to, the right against self-incrimination. It

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113 *X7* at [110], [124] (Hayne and Bell JJ).

114 *Acts Interpretation Act* 1954 (Qld) s 14(2).

115 *Lee No 1* at [188] (Kiefel J, as her Honour then was).

116 Explanatory notes to *Human Rights Bill* 2018 at p 26.

117 The respondent relies upon the decision in *Sabet v Medical Practitioners Board of Victoria* (2008) 20 VR 414 at [176].

118 See [25], [41]-[49], [80]-[81].

> should not be assumed that the Charter has narrowed traditional common law rights." (footnotes omitted)

[303] The respondent submits that these comments need to be considered in light of the subsequent decisions by the High Court which have dealt with the "traditional common law rights" that interact with the criminal justice system. In this regard, the respondent submits the High Court has clarified that the "right to silence" is not a single "monolithic right" but rather a group of immunities which differ in scope and effect.

[304] In support of this, the respondent points to the line of cases of *X7 v Australian Crime Commission*,[119] *Lee No 1*,[120] *Lee No 2*[121] and *R v Independent Broad-Based Anti-corruption Commissioner*[122] (together, the *X7* line of cases). The High Court in these cases affirmed its earlier acceptance of the "separate and distinct" immunities identified by Lord Mustill in *R v Director of Serious Fraud Office; ex parte Smith*.[123] Lord Mustill stated as follows:[124]

> "I turn from the statutes to 'the right of silence'. This expression arouses strong but unfocused feelings. In truth it does not denote any single right, but rather refers to a disparate group of immunities, which differ in nature, origin, incidence and importance, and also as to the extent to which they have already been encroached upon by statute. Amongst these may be identified:
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> (1). A general immunity, possessed by all persons and bodies, from being compelled on pain of punishment to answer questions posed by other persons or bodies.
>
> (2). A general immunity, possessed by all persons and bodies, from being compelled on pain of punishment to answer questions the answers to which may incriminate them.
>
> (3). A specific immunity, possessed by all persons under suspicion of criminal responsibility whilst being interviewed by police officers or others in similar positions of authority, from being compelled on pain of punishment to answer questions of any kind.
>
> (4). A specific immunity, possessed by accused persons undergoing trial, from being compelled to give evidence, and from being compelled to answer questions put to them in the dock.
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> (5). A specific immunity, possessed by persons who have been charged with a criminal offence, from having questions material to the

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119 (2013) 248 CLR 92.

120 (2013) 251 CLR 196.

121 (2014) 253 CLR 455.

122 (2016) 256 CLR 459.

123 [1993] AC 1.

124 At [30]-[31].

offence addressed to them by police officers or persons in a similar position of authority.

(6). A specific immunity (at least in certain circumstances, which it is unnecessary to explore), possessed by accused persons undergoing trial, from having adverse comment made on any failure (a) to answer questions before the trial, or (b) to give evidence at the trial.

Each of these immunities is of great importance, but the fact that they are all important and that they are all concerned with the protection of citizens against the abuse of powers by those investigating crimes makes it easy to assume that they are all different ways of expressing the same principle, whereas in fact they are not. In particular it is necessary to keep distinct the motives which have caused them to become embedded in English law; otherwise objections to the curtailment of one immunity may draw a spurious reinforcement from association with other, and different, immunities commonly grouped under the title of a 'right to silence'."

[305] The respondent also submits that it is useful to consider statements of principle from *Environment Protection Authority v Caltex Refining Co Pty Ltd*[125] which also adopted and analysed Lord Mustill's comments. In that case, Mason CJ and Toohey J distinguished the privilege against self-incrimination from:[126]

(a) The fundamental principle that the onus of proof beyond reasonable doubt rests on the Crown; and

(b) The "companion rule" that an accused person cannot be required to testify to the commission of the offence charged.

[306] Deane, Dawson and Gaudron JJ also examined Lord Mustill's analysis and differentiated between:

(a) The privilege against self-incrimination, which "extends beyond a court of law to other forms of compulsory examination"; and

(b) The right of an accused person to refrain from giving evidence and to avoid answering incriminating questions.[127]

[307] Further, Deane, Dawson and Gaudron JJ described the right of an accused person to refrain from giving evidence and to avoid answering incriminating questions in the following terms:

"… is by no means wholly explained by reference to the maxim nemo tenetur seipsum prodere. Rather it is to be explained by the principle,

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125 (1993) 178 CLR 477.

126 At 503.

127 At 526-7.

> fundamental in our criminal law, that the onus of proving a criminal offence lies upon the prosecution and that in discharging that onus it cannot compel the accused to assist it in any way …
>
> [T]he immunity enjoyed by an accused in a criminal trial extends to evidence of any kind, whether incriminating or not. The immunity is, perhaps, better explained by the principle that the prosecution bears the onus of proving its case, than by the more confined principle that an accused has a privilege against self-incrimination, notwithstanding that both have a common origin."[128]

[308] The right described in these paragraphs corresponds with the "companion rule" as described by Mason CJ and Toohey J and also Lord Mustill's fourth immunity.

[309] The respondent submits that the passages from the decision in *Caltex* form the foundation for the terminology used in the *X7* line of cases.[129] This analysis was endorsed and further developed in the *X7* line of cases.

[310] It is in this respect that the respondent contends that it is "now firmly established" that:

(a) The common law privilege against self-incrimination is not to be equated with the more limited "companion rule" that an accused person cannot be required to testify to the commission of the offence charged.

(b) The companion rule is an aspect of the judicial process – it is a "companion" of criminal trials.

[311] Further, the respondent contends that Parliament is taken to have been aware of the state of the law at the time the HR Act was enacted and that considerations of text, context and purpose all point to the conclusion that the right in s 32(2)(k) is intended to be commensurate with specific procedural rights accorded to an accused in a criminal trial at common law.

[312] The respondent submits that s 32(2)(k) does not reflect the wider common law privilege against self-incrimination and that there are several factors which tend to support this conclusion including:

(a) The right only applies in criminal proceedings;

(b) It is only conferred upon the accused and not other witnesses; and

(c) Does not use the language of self-incrimination.

[313] In relation to this last factor, the respondent contends that the lack of a reference to self-incrimination is "not mere semantics". In this regard, reference is made to ss 10 and 15 of the *Evidence Act* 1977 (Qld) which reflects the abolition of the old rule that an accused was not a competent witness in his or her own trial and the express removal of the privilege against self-incrimination if the accused chose to give evidence.

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128 At 527-8.

129 See for example at [46]-[47] in *X7*.

[314] The respondent contends that if Parliament, by enacting s 32(2)(k) of the HR Act, had intended to confer a right upon the accused to elect to give only non-incriminating evidence, then this would be a dramatic shift in the law. There is no reference to any such shift in the explanatory notes.

[315] Further, the respondent points to the plain words in s 32(2)(k) as supporting the "specific" immunity of an accused person undergoing trial. It is contended there is no reason of context or purpose to read them as anything else.

[316] It is on this basis that the respondent contends that s 32(2)(k) should be understood as the "*testimonial* immunity of an accused person at trial", which includes immunity from direct use of compelled testimony. However, it does not include immunity from derivative use and does not affect the rules governing the admissibility or exclusion of evidence.

[317] The respondent similarly acknowledges that care must be taken when referring to international and foreign domestic judgments due to the variety of legal systems and constitutional settings involved.

[318] However, the respondent submits that some assistance can be obtained from the decision of the Hong Kong Final Court of Appeal in *HKSAR v Lee Ming Tee & Anor.*[130]

[319] The Court in that case was interpreting the Bill of Rights applying the common law rules of construction. Relevantly, Article 11(2)(g) of the Hong Kong Bill of Rights it is submitted closely resembles s 32(2)(k) of the HR Act. Further, the article was interpreted having regard to decisions of the Australian High Court and the House of Lords, including reference to Lord Mustill's group of immunities.

[320] Ribeiro PJ distinguished the right in Article 11(2)(g) from the common law privilege against self-incrimination (the latter being classified as Lord Mustill's second immunity).[131] In reaching this conclusion, Ribeiro PJ stated:

> "[The common law privilege against self-incrimination] is self-evidently of a broad application, protecting every person against any questioner … Article 11(2)(g), on the other hand, only applies to persons who face a criminal charge and the immunity then conferred is only a testimonial immunity, namely, the right 'not to be compelled to testify against himself or to confess guilt'. It is therefore of a much narrower scope than the common law privilege … Derivative use of independently obtained evidence, even if obtained pursuant to clues provided by the compelled testimony falls outside the purview of art.11(2)(g) since, in adducing such independent, albeit derivative, evidence, the prosecution does not seek to compel either respondent to testify against himself or to confess guilt."

[321] Warren CJ in *Major Crime* considered the case of *Lee Ming Tee* and rejected its conclusion. Her Honour considered that too much attention was paid to the terms of the Bill of Rights.

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130 [2001] HKCFA 32.

131 At 40-2, 70-172.

It is in this context that the respondent submits that Warren CJ adopted a "remedial" approach to interpretation, that in light of the High Court decision in *Momcilovic*, the *X7* line of cases and the text of s 32 itself, that Warren CJ's construction of the human right, is in error and should not be followed.

[322] Considering the reasoning outlined above, the respondent ultimately submits that the decision does not limit the applicant's human rights in s 32(2)(k) of the HR Act and consequently, it is compatible with human rights within the meaning of s 8(a) of the HR Act.

[323] Further, the respondent submits that even if it was concluded that the right in s 32(2)(k) was construed as conferring some sort of immunity from derivative evidence, that only creates "the *possibility* of derivative evidence". Being required to answer a question at a Commission hearing only creates "the *possibility*" of derivative evidence. Ultimately whether any derivative evidence is obtained and the nature and extent of any such evidence, it is not apparent at a Commission hearing itself. This point was made by Holmes CJ in *NS v Scott*.[132] Accordingly, it is submitted that it cannot be assumed that a compulsory examination will necessarily lead to the discovery of further and significant evidence.

Consideration

[324] After considering the various authorities and materials referred to in submissions, I accept the position contended for by the Attorney-General[133] on the construction of the right. I have reached the conclusion that the better view is that s 32(2)(k) of the HR Act is a relevant human right and is engaged for the purposes of the respondent's decision. While this conclusion is not beyond some doubt, the right should be given the broadest possible construction consistent with the authorities and the purpose of the HR Act.

[325] To limit s 32(2)(k) of the HR Act to only criminal proceedings does not have regard to the cross over between the right to a fair trial in s 31 and that the right attaches to persons charged with a criminal offence. The provision has a role in protecting rights at stages before a trial which have a likely and significant impact on the trial itself.

[326] This view is consistent with the view reached by the respondent at the time of making the decision.

Whether the limit is justified under the test for proportionality set out in s 13?

[327] The next issue to be considered is the second stage of the two stage enquiry, namely whether the limit is justified under the tests for proportionality set out in s 13 of the HR Act.

[328] To provide some structure to the discussion of the various positions below, at the outset I will identify the various positions of the parties.

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132 See at [39].

133 The applicant and the Queensland Human Rights Commission agreed with this construction.

[329] First, the applicant contends that the limits on human rights imposed by the respondent's decision are not justified. Particular focus is given to the respondent's lack of logic and substance in the consideration of the less restrictive alternatives and also that the balancing exercise must take into account that the evidence would be made available to co-accused under s 201 of the CC Act.

[330] The Queensland Human Rights Commission also contends that the limits on human rights imposed by the respondent's decision are not justified. The focus is on the existence of less restrictive alternatives and further that there is insufficient evidence at the balancing stage.

[331] Both the respondent and the Attorney-General contend that any limit of human rights by the respondent's decision was justified.[134]

[332] The respondent focuses, in particular, on s 197(7) which recognises that to otherwise allow for a derivative use immunity would undermine the purposes of the CC Act to combat and reduce major crime. The respondent also focuses on, in respect of the balancing stage, the extensive safeguards implemented to ensure that the balance struck is fair.

[333] The Attorney-General adopts the alternative submissions of the respondent. The Attorney-General makes the additional point that the Court should be slow to disturb the balance struck by the respondent where he gave detailed consideration to human rights.

Applicant's position on compatibility

[334] The issue of compatibility requires a consideration of:

(a) Section 58(1) which makes it unlawful for public entities to act or make decisions in a way that is not compatible with human rights.

(b) Section 8 which contains the meaning of "compatible with human rights".

(c) Section 13 which provides that a human right may be subject under law "only to reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom". Section 13(2) sets out seven factors that are relevant to deciding whether a limit on a human right is reasonable and justifiable.

[335] Importantly, the applicant points to the onus being on the Commission as the public entity which seeks to limit a human right to demonstrate the limits are justified in the circumstances.

[336] The approach to the exercise was described by the Victorian Court of Appeal in *RJE v Secretary to the Department of Justice*.[135] Nettle JA (as his Honour then was) endorsed the approach of Mason NPJ in *HKSAR v Lam Kwong Wai.*[136] Mason NPJ stated as follows:

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134 This is an alternative position on behalf of the respondent, whose primary position is that the decision does not limit the right.

135 (2008) 21 VR 526 at 554 [105] per Nettle J and adopted by Warren CJ in *Re Application under Major Crime (Investigative Powers) Act 2004* (2009) 24 VR 415 at [53].

> "… first task is to ascertain the meaning of the [relevant statutory provisions] according to accepted common law principles of interpretation as supplemented by any relevant statutory provisions. Our second task is to consider whether that interpretation derogates from [the rights in question] as protected by [the Charter]. If that question is answered "Yes", we have to consider whether the derogation can be justified and, if not, whether it could result in contravention of the [Charter] … and consequential [reinterpretation of the legislative provision consistently with the purpose of the Act or a declaration of inconsistency] …"

[337] It is the third step which is being considered here and it is submitted that the standard of proof is high, requiring a "degree of probability which is commensurate with the occasion".[137]

[338] The applicant identifies the ultimate question as being:

> "[W]hether the limitation on the right against self-incrimination as guaranteed by s 32(2)(k) 'demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors'?"[138]

[339] The applicant submits that the answer to that question is "no" and relies on the following reasons:

(a) The respondent correctly made findings that the nature and importance of the right has an important role in the accusatorial process.

(b) The purpose is prima facie important to justify any limitation. Further, the relationship between the purpose and whether any less restrictive means exists exist in a general sense. Here, the objective of identifying others is not sufficiently specific.

(c) The safeguards are insufficient to justify the limitation because of the two additional consequences placed on the applicant's human right, namely, the constraint on the applicant's forensic choices and the impact of s 201 of the CC Act.

[340] Looking at each of the factors in s 13(2), the applicant's position is:

(a) Section 13(2)(a) nature of human right: s 32(2)(k) right is an important feature of the criminal justice system and it is a right "the importance of which cannot be overstated". The applicant refers to the High Court authorities considering the bundle of rights including the right to silence and the privilege against self-

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136 (2006) 9 HKCFAR 574.

137 *Bater v Bater* [1951] P 35 at 37 per Denning LJ.

138 *Re Application under Major Crime (Investigative Powers) Act 2004* (2009) 24 VR 415 at [144].

incrimination. Further, from a practical perspective, the applicant points to the very purpose of the questioning as being to gather evidence that could and likely would be used against the applicant at the applicant's trial. It is in these circumstances that the requirement to answer questions by "an emanation of the executive" for that purpose is a limitation on the right and demonstrates the foundational importance of it.

(b) Section 13(2)(b) nature of the purpose of the limitation: the applicant acknowledges there is a public interest in identifying those responsible for serious criminal offending. The applicant points to the non-specific and general nature of the current investigation (that is a geographical region and organisational structure) as not meeting that purpose in this case.

(c) Section 13(2)(c) rational connection: the applicant accepts that the limitation has a rational connection to the purpose. That is, requiring answers for the purpose of gathering evidence has the capacity to advance an investigation.

(d) Section 13(2)(d) no less restrictive and reasonably available ways: the applicant submits that the respondent's consideration of this issue lacked logic and substance. The reasoning does not address the statutory criteria. The respondent identified that the applicant had declined to participate in a police interview and that the various protective measures could only be afforded in a coercive context. The applicant contends that if coercive questioning becomes the only option merely because someone exercised their lawful right to silence then the bar in respect of s 13 would be set "extraordinarily low".

(e) Section 13(2)(e) the importance of the purpose of the limitation: the applicant contends that the respondent's reasons do not permit a meaningful assessment of the importance of the purpose of the limitation. It is contended that no effort is made by the respondent to identify the importance of the limitation on the right that justifies the interference with it.

(f) Section 13(2)(f) the importance of preserving the human right, taking into account the nature and extent of the limitation: the applicant contends that the limitation on the human right is profound. It is submitted:

> "[T]he use of derivative evidence in a trial of a person already charged, together with the high likelihood that the actual coerced evidence will be in the possession of the co-defendants, is as significant a limitation as can realistically be conceived."

It is submitted that the respondent's reasons do not provide a justification for the limitation.

(g) Sections 13(2)(e), (f) and (g) fair balance: the applicant submits that the protective features are insufficient to cure or justify the limitation on the applicant's human rights in the circumstances of this case. It is accepted that the protective features can alleviate the imbalance but in the circumstances where the applicant has co-defendants and the very question asked was in relation to the role of the applicant's co-defendants, this is a different situation. The applicant points to s 201 of the CC Act and that the answers given can be made available as being a significant feature. The applicant puts this as highly as that the evidence "almost certainly will be" made available to the legal representatives for each co-defendant.

In respect of s 201, the applicant relies upon sub-section (2) which provides that the Commission must give the evidence consequently to co-defendants. The applicant contends that the provision of the evidence under s 201 and its potential use at trial undermines the other protective features.

[341] Ultimately, the applicant contends that the respondent has not discharged the high onus.

Queensland Human Rights Commission's position on compatibility

[342] The Human Rights Commission made separate submissions in respect of the proportionality exercise and the application of s 13(2) of the HR Act.

[343] In respect of the requirements of s 58(1)(a) of the HR Act, the Queensland Human Rights Commission submits that the judicial task involves a more significant level of intensity than is ordinarily encompassed under traditional judicial review grounds. In this respect, reference is made to the decision of *R (Daly) v Secretary of State for the Home Department*:[139]

> "… The starting point is that there is an overlap between the traditional grounds of review and the approach of proportionality … But the intensity of review is somewhat greater under the proportionality approach … I would mention three concrete differences without suggesting that my statement is exhaustive. First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations. Thirdly, … the intensity of the review … is guaranteed by the twin requirements that the limitation of the right was necessary in a democratic society, in the sense of meeting a pressing social need, and the question whether the interference was really proportionate to the legitimate aim being pursued.
>
> The differences in approach between the traditional grounds of review and the proportionality approach may therefore sometimes yield different results. It is therefore important that cases involving Convention rights must be analysed in the correct way. This does not mean that there has been a shift to merits review … And Laws LJ rightly emphasised in *Mahmood*, at p 847, para 18, 'that the intensity of review in a public law case will depend on the subject matter in hand'. That is so even in cases involving Convention rights. In law context is everything."

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139 [2001] 2 AC 532, 547-8.

[344] The Queensland Human Rights Commission notes that Garde and John Dixon JJ adopted this approach in *Certain Children v Minister for Families and Children*[140] and *Certain Children v Minister for Families and Children (No 2)*.[141]

[345] The Human Rights Commission submits that these cases indicate the following principles:

(a) The determination of human rights unlawfulness requires "an assessment that is closer to merits review than is usual in judicial review". That is, it goes further into the facts and reasons and what is required varies from case to case.

(b) There is a limited degree of deference to the decision-maker and this reflects the different institutional functions of the Court and executive decision-making. The Court is exercising supervisory jurisdiction and the degree of weight given to the original decision-maker's views will vary in accordance with the context, relevant expertise and experience and whether the decision is supported and justified by transparent reasoning.

(c) The proportionality must be judged objectively by the Court.

[346] In respect of the specific decision of the respondent, the Queensland Human Rights Commission acknowledges that it is a balance between the applicant's fair trial rights, privacy and family rights and the public interest in the effective investigation and prosecution of major crime.

[347] Considering the s 13 factors, the Queensland Human Rights Commission's position is as follows:

(a) Section 13(2)(a) and (f) in relation to the nature of the human right and the importance of preserving the human right, taking into account the nature and extent of the limitation on the human right, the relevant human rights here form a fundamental component of a fair trial and the criminal justice system. They are of high importance and the impact of not observing the right is significant.

(b) Section 13(2)(b) and (e), the purpose of the limitation may be consistent with societal views depending upon the circumstances being considered. For example, societal attitudes to interrogation may be less justifiable for lower level criminal cases but for more serious organised crime, the purpose of the limitation is likely to be important.

(c) Section 13(2)(c), it is acknowledged that the limitation does help to achieve its purpose.

(d) Section 13(2)(d) as to whether there are any less restrictive and reasonably available ways to achieve the purpose, the question should be asked whether there are any reasonable alternatives which would result in an "as effective investigation" but which lessen the effect of the limitation. This includes consideration of alternatives such as:

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140 (2016) 51 VR 473 [2016] at [212]-[213].

141 (2017) 52 VR 441 at [208]-[212], [216]-[218].

(i) A requirement that answers are "necessary" to achieve the purpose, rather than merely "helpful".

(ii) Consideration of other sources for the information first.

(iii) Allowing for derivative use immunity for any evidence that would not have otherwise been available without the compelled account.

(iv) The applicant not be required to give evidence against the applicant but only as to others.

(v) The applicant not be required to give evidence as against the applicant's partner.

(e) Section 13(2)(g) being the balance of the matters at paragraphs (e) and (f), it is acknowledged that:

> "The balance here is fine, and must be considered case-by-case. Both sides of the scales represent important public interests. The impact on human rights is significant (jeopardising criminal law rights relating to personal liberty)."

This is in the context that the CC Act provides a discretion to be exercised with an ability to not invoke coercive powers on a case by case basis.

[348] It is ultimately contended that to justify the decision pursuant to s 13, the onus on the respondent assumes greater relevance in a case such as the current case. Further, additional evidence or reasoning may be required, particularly to demonstrate the effectiveness of deploying such powers in meeting crime-fighting aims.

[349] It is in this context that the Queensland Human Rights Commission contends that coercive power is more likely to be justified where it is necessary to obtain evidence showing or tending to show culpability of a serious organised crime. That is, whether testimony is needed to effectively investigate and prosecute systemic and structural serious criminal offending.

[350] The Queensland Human Rights Commission's ultimate position is that the respondent's decision finding that there was no reasonable excuse and compelling the applicant to answer the question was not compatible with human rights, within the meaning of s 58(1)(a) of the HR Act.

Respondent's position on compatibility

[351] The respondent's position in relation to the second stage of the enquiry in relation to justifiable limits is presented in the alternative. The respondent submits that any limit on the right in s 32(2)(k) is reasonable and demonstrably justifiable in accordance with s 13(2) of the HR Act. The respondent relies upon analysis undertaken in respect of the factors in s 13(2) of the HR Act.

[352] Considering the factors in s 13(2) of the HR Act, the respondent's position is as follows:

(a) Section 13(2)(a) nature of the human right: the respondent accepts that it is a fundamental principle of the common law for the prosecution to prove the guilt of an accused person beyond reasonable doubt. That principle is complemented by

the "companion rule" that an accused person cannot be required to testify to the commission of the offence charged.

(b) Section 13(2)(b) purpose of limitation: the respondent points to the provisions of the CC Act which provide the Commission with a variety of investigative powers, not ordinarily available to the Police Service. The purpose of the investigative powers is to enable the Commission to investigate major crime, criminal organisations and also their participants. It is submitted that there is a high public interest in identifying those responsible for serious criminal offending. In respect of the particular investigation in these proceedings, the respondent points to the organised crime activity in the relevant region in Queensland.

(c) Section 13(2)(c) limitation helps achieve purpose: The respondent's position is that the power to compel answers and use the evidence obtained enables further investigations to be undertaken and further evidence to be obtained consistent with the Commission's statutory function. The function of investigating crime includes the gathering of evidence for prosecution. In this regard, reliance is placed on [34] of *NS v Scott*. Further, it is submitted that the limitation is rationally connected to its purpose.

(d) Section 13(2)(d) no less restrictive in reasonably available ways: it is submitted that the respondent expressly turned his mind to whether there was any less restrictive and reasonably available way to achieve the purpose. The respondent was satisfied that in circumstances where the applicant had declined to participate in a police interview and the protections that could be afforded to the applicant under the CC Act were only available in a coercive context.

(e) Sections 13(2)(e), (f) and (g) balance: the respondent submits that whilst the applicant may be compelled to give an answer which might otherwise be the subject of a claim of privilege against self-incrimination, this is balanced against the protections in place in respect of the applicant being tried fairly, including:

(i) A direct use immunity preventing the evidence given by the applicant being admissible against the applicant. It is submitted that the principle of being convicted "out of [the applicant's] own mouth" is a principle matter to which the privilege against self-incrimination is directed.

(ii) Non-publication orders to ensure that no answers given by the applicant, the applicant's identity as a witness or any record of the hearing can be included in any brief of evidence against the applicant and this material cannot be published to any officer of a prosecuting agency with carriage of, or involvement in the prosecution of the applicant for any charge whether arising from a current, or any other investigation.

(iii) The Court's inherent jurisdiction to supervise and control its own processes. This includes considerations of admissibility of evidence, including under s 130 of the *Evidence Act* 1977 (Qld).

(iv) The Court's obligation under s 5(2)(a) of the HR Act to ensure a fair hearing under s 31 of the HR Act.

[353] In respect of the consideration relevant to s 13(2)(d) above, the respondent points to the Explanatory Notes in relation to the enactment of s 197(7) of the CC Act. This provision was implemented following a recommendation of the Parliamentary Crime and Corruption

Committee Report No 97. The Explanatory Notes recognise that if the Commission were unable to derive evidence from answers provided by individuals under compulsion, this would significantly undermine the effectiveness of the coercive powers under the CC Act and also the objective of combating and reducing the incidence of major crime and corruption in Queensland.[142]

[354] These amendments were consistent with reforms in Victoria and the Commonwealth. The Victorian Reforms in 2014 included the effective removal of the derivative use immunity that had been found by Warren CJ in *Re Application under Major Crime (Investigative Powers) Act 2004*. The statement of combability under s 28 of the Victorian Charter in respect of the reforms states that:

> "There are significant difficulties in detecting and prosecuting organised crime offences. Criminal organisations are well known to engage in serious violence against persons who provide information to police. They use that reputation to ensure that even persons who are not involved in the offences do not assist police with their investigation. This code of silence can operate both within the criminal organisation and outside it. The [amendment] aims to assist in the detection and prosecution of such offences and thereby prevent further offences.
>
> The inability to use any evidence derived from answers, against the person who gave them, significantly undermines the effectiveness of the coercive powers scheme in achieving that aim. Because of the code of silence and culture of fear, the chief examiner may examine a person without being aware of the level of criminal activity in which that person is involved or which the person knows about. By providing answers that lead to the discovery of evidence against them, that person can be effectively immunised from prosecution. This undermines the ability to prosecute persons responsible for serious organised criminal offences, which is an important purpose of the act. In addition, the risk of a person immunising themselves from prosecution adversely affects the way in which Victoria police and the chief examiner use the powers under the act, reducing the scope and value of the chief examiner's powers …
>
> I consider that ensuring that derivative evidence is able to be used is necessary to enable serious organised crime to be investigated and prosecuted. While it may limit the privilege against self-incrimination, the reading in of a derivative use immunity significantly undermines the important purposes of the act and there are no other less restrictive means reasonably available."[143]

[355] The respondent also refers to the Commonwealth reforms which were amendments in 2015 to the *Australian Crime Commission Act* 2002 (Cth). This included authorising

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142 Explanatory Notes to the Crime and Corruption and Other Legislation Amendment Bill 2018 at p 9.

143 Parliament of Victoria, Parliamentary Debates (Hansard), Legislative Assembly, 57th Parliament, 1st Session, 26 June 2014 (Book 9), 2382.

derivative use of examination and hearing material. In respect of those amendments, the Explanatory Memorandum stated:[144]

> "The measures in Schedule 1 to specifically authorise the derivative use of examination material are necessary to achieve the legitimate aim of protecting the community from serious and organised crime. ACC examinations are used in support of special operations and special investigations that deal with some of the most serious criminal activities, including drug trafficking, child sex offences, cybercrime, superannuation fraud and other financial crime, and terrorism. These activities cause significant harm to individuals in the Australian community, to Australian society and the economy, and ultimately undermine Australia's national security.
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> …
>
> Further, examinations and hearings are used in support of investigations into serious and organised criminal activities and law enforcement corruption issues, both of which have demonstrated a long-standing resistance to traditional law enforcement methodologies.
>
> …
>
> Further, it would not be appropriate to include a derivative use immunity in these provisions. Previous experience under the *National Crime Authority Act 1984* (NCA Act) demonstrated that providing a derivative use immunity for examination material undermined the capacity of the National Crime Authority (NCA) to assist in the investigation of serious criminal activities. Prior to its removal under the *National Crime Authority Legislation Amendment Act* 2001, the derivative use immunity in the NCA Act required the prosecution to prove the provenance of every piece of evidence in the trial of a person that the NCA had examined before it could be admitted. This position was unworkable and did not advance the interests of justice as pre-trial arguments could be used to inappropriately delay the resolution of charges against the accused."

[356] The respondent further refers to and relies on the comments by Holmes CJ in *NS v Scott* that the use of derivative evidence does not necessarily prejudice a fair trial. This depends on the nature of the evidence and whether it is available from other sources.

[357] It is in these circumstances that the respondent submits that any limit imposed on the applicant's human rights by the CC Act is demonstrably justified under s 13(2) and therefore compatible with human rights under s 8(b) of the HR Act.

[358] The Attorney-General adopts the respondent's submission that the limits on human rights are justified at the second stage of the analysis under ss 8(b) and 13. The Attorney-

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144 Explanatory Memorandum, Law Enforcement Legislation Amendment (Powers) Bill 2015 (Cth), 18-9.

General raises a further reason in addition to that referred to by the respondent in relation to deference which is discussed below.

Consideration

[359] In respect of the compatibility test pursuant to s 13, this is a balancing exercise requiring a consideration of the various competing interests in respect of each factor. Ultimately here the compatibility considerations largely come down to balancing the public interest in combating and reducing major crime and the private or personal concerns of those with information that may assist with the investigations.

[360] In respect of some of the factors, there is not much of a difference between the parties. The divergence really is the factor in (d) (other less restrictive and available ways) and the balancing exercise in (e), (f) and (g).

[361] While it is submitted that there are other less restrictive available ways of achieving the purpose, this does not address the "code of silence" that is often present in respect of organised crime. Theoretically there may be other less restrictive options available. However the reality, as discussed in the explanatory material quoted above, is that due to the nature of organised crime the objects and purpose of the CC Act would be undermined if evidence derived from coerced examinations could not be used by the Commission in undertaking its statutory task.

[362] The protections put in place in accordance with the legislative scheme provide direct use immunity and confidentiality in respect of the identity of the witness and any evidence given. A further protective order requires limited disclosure of the evidence to prevent it from being given to the prosecution.

[363] The Court still has a supervisory role to play under s 31 of the HR Act at the ultimate trial and also has a discretion in respect of admissibility of evidence under s 130 of the *Evidence Act* 1977 (Qld).

[364] Parliament in passing the amendment to include s 197(7) of the HR Act intended that derivative use immunity was not to be available in the context of coercive examinations, including of charged persons being asked about the subject matter of the charges.

[365] In all of the circumstances, while the decision of the respondent limited the applicant's human rights in ss 31 and 32(2)(k) of the HR Act, the limit was justified under ss 8(b) and 13 of the HR Act and it was substantively compatible with human rights under s 58(1)(a) of the HR Act.

[366] The respondent's compatibility analysis was not as extensive as the analysis and submissions at the hearing of the application for leave and the appeal. However, it is largely consistent with the approach contended for by the respondent and the Attorney-General at the hearing of the application for leave and appeal. No error is made out in respect of the respondent's reasoning and decision.

[367] Accordingly, Ground Three is not established.

Deference

[368] It is agreed by all parties that the respondent's decision is not challenged on the basis of the procedural limb in s 58(1)(b) of the HR Act. However, the role of deference is in dispute.

[369] At a general level, the applicant contends that deference should not be accorded to the primary decision-maker as this would blur the distinction between the two limbs identified in s 58(1) of the HR Act, compatibility is a legal conclusion and the principle of deference has never been adopted in Australian administrative law.

[370] The Queensland Human Rights Commission acknowledges that in appropriate cases there can be limited deference, particularly if there is well-reasoned and transparent human rights reasoning. However, this is to be considered in the context that it is submitted that the intensity of the review under s 58(1)(a) is greater than is usual in judicial review.

[371] The Attorney-General raises the issue of deference as an additional basis for the conclusion that any limit imposed on the human right was justified. It is on this basis that the Attorney-General submits that there is a need to give appropriate weight to the primary decision-maker's decision when reviewing compatibility with human rights.

[372] That is, in circumstances where there is a thorough and well-reasoned consideration of human rights, more weight can be given to that assessment. Here, it is submitted that the respondent engaged in a robust proportionality analysis and complied with the procedural limb in s 58(1)(b) of the HR Act. It is submitted that the Court should be slow to disturb the balance arrived at by the respondent.

[373] It is convenient to start with the Attorney-General's submissions as to why deference should be accorded to the respondent's compatibility assessment in this case.

[374] The Attorney-General submits that the substantive and procedural limbs of s 58(1), while they are distinct, are not unrelated. The Attorney-General also refers to a number of cases in support of this proposition including:

(a) *PJB v Melbourne Health* where Bell J recognised:

> "The better … the consideration given to human rights at first instance, the harder it will be to challenge the act or decision concerned".[145]

(b) In *Minogue v Thompson*, Richards J observed:

> "… more weight can be given to a decision-maker's assessment that a limit on a human right is justifiable, in accordance with s 7(2),[146] where that assessment is the result of a thorough and well-reasoned consideration of relevant rights".[147]

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145 (2011) 39 VR 373, 441-2 [310].

146 The equivalent of s 13 of the HR Act.

147 [2021] VSC 56 at [50].

[375] Ultimately, it may be a question of what weight is to be given to the judgment of the primary decision-maker.

[376] Here, the Attorney-General submits that the respondent gave detailed consideration to human rights which discharged his procedural obligation under s 58(1)(b) and (5) of the HR Act. The consideration was assisted by submissions from Counsel Assisting and also from the applicant's Counsel.

[377] In the reasons for his decision, the respondent construed the right in s 32(2)(k) in a broad way and recognised that his decision could impinge upon the right of an accused person in a criminal proceeding at a future point in time. It is submitted that in effect, the respondent also took into account the right to a fair hearing in s 31(1) of the HR Act as well as the right in s 32(2)(k).

[378] It is submitted that the decision-maker here considered the wide impact of the decision on human rights.[148]

[379] Considering the analysis that was undertaken by the respondent, the Attorney-General considers that appropriate weight and latitude should be given to that reasoning and that is a further factor that this Court should take into account in being slow to disturb the balance struck by the respondent.

[380] The applicant submits that this submission is wrong for three reasons.

(a) First, the two limbs of s 58 are distinct and the concept of deference based on exposed reasoning interferes with the statutory regime. That is, it blurs the distinction between the two independent limbs.

(b) Second, compatibility is a legal conclusion and if a decision is incompatible with human rights, it is unlawful because of that status. The conclusion of incompatibility is not affected by an expression of reasoning of the decision-maker and accordingly, there is no place for deference.

(c) Third, on a more general level, administrative law in Australia has not adopted a principle of deference. The applicant submits that the High Court has expressly refused to do so when the issue has been raised.[149]

[381] The Queensland Human Rights Commission also addresses the issue of deference. In this regard reference is made to the High Court decision in *McCloy v New South Wales*[150] and also the decisions in *Certain Children v Minister for Families and Children*[151] and *Certain Children v Minister for Families and Children (No 2)*.[152]

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148 *Innes v Electoral Commission of Queensland (No 2)* [2020] QSC 293 at [268] (Ryan J).

149 See *Corporation of the City of Enfield v Development Assessment Commission* (2000) 199 CLR 135.

150 (2015) 257 CLR 178.

151 (2016) 51 VR 473.

152 (2017) 52 VR 441.

[382] It is submitted that these cases recognise there can be "limited" deference. This may include fact finding, discretionary considerations and balancing. It is acknowledged that this position remains good law pursuant to the recent decision in *Minogue v Thompson*.[153]

[383] However, this needs to be considered in the context that the compatibility analysis is necessarily more intense than traditional review as it requires an objective assessment of the fact-finding that was undertaken and an evaluation on review of the balance struck between the competing considerations.

Consideration

[384] Given my reasoning above it is not necessary to determine the issue in respect of deference and I do not do so.

[385] However, I note, at a general level, that while deference may have a role as contended for in the submissions, until there is a "mature" practice of engagement with the principles in the HR Act, this may have an impact on the weight to be given to the analysis in any event.

Orders

[386] Accordingly, the orders of the Court are:

1. Leave to appeal is granted.
2. The appeal is dismissed.

[387] I will hear further from the parties in respect of costs and as to whether any further orders are required.

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153 [2021] VSC 56 at [80]-[82].