SUPREME COURT OF QUEENSLAND

CITATION:	*Sandy v Queensland Human Rights Commissioner* [2022] QSC 277
PARTIES:	**ALEC RICHARD SANDY** (applicant) **v** **QUEENSLAND HUMAN RIGHTS COMMISSIONER** (respondent)
FILE NO/S:	BS No 644 of 2022
DIVISION:	Trial Division
PROCEEDING:	Hearing
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	9 December 2022
DELIVERED AT:	Brisbane
HEARING DATE:	19 September 2022
JUDGE:	Williams J
ORDER:	**Given my findings set out in these reasons, I will hear further from the parties in respect of the appropriate form of orders, including costs.**
CATCHWORDS:	HUMAN RIGHTS – DISCRIMINATION LEGISLATION – HUMAN RIGHTS LEGISLATION – where the complainant is a 30 year old Aboriginal man diagnosed with gastric cancer – where the complainant made an application for exceptional circumstances parole for the purpose of receiving culturally appropriate medical care in community – where the parole board rejected the application for exceptional circumstances parole – where the complainant contends that the treatment by the parole board constitutes unlawful direct and indirect discrimination on the attribute of race ADMINISTRATIVE LAW – JUDICIAL REVIEW – REVIEWABLE DECISIONS AND CONDUCT – DECISIONS TO WHICH JUDICIAL REVIEW APPLIES – DECISIONS UNDER AN ENACTMENT – where the complainant lodged a Human Rights and Anti-Discrimination complaint with the Queensland Human Rights Commission – where the Human Rights Commissioner accepted the Human Rights complaint – where the Human Rights Commissioner purportedly made a decision to refuse to accept a complaint under s 136 of the *Anti-Discrimination Act* 1991 (Qld) – where the complainant seeks a review of the Commissioner's decision – where the complainant alleges that the

Commissioner failed to take into account a relevant consideration, took into account an irrelevant consideration, or that the decision was unreasonable – whether the decision of the Commissioner is reviewable under s 20 of the *Judicial Review Act* 1991 (Qld) – whether the decision of the commissioner was made beyond power and amounts to jurisdictional error

Anti-Discrimination Act 1991 (Qld), s 6, s 7, s 8, s 9, s 10, s 11, s 101, s 134, s 135, s 136, s 138, s 139, s 140, s 140A, s 141, s 142, s 154A, s 155, s 156, s 166, s 164A, s 166, s 168, s 168A, s 169, s 170, s 174A, s 204, s 205, s 208, s 209, s 210
Corrective Services Act 2006 (Qld), s 194
Human Rights Act 2019 (Qld), s 8, s 13, s 28, s 58
Judicial Review Act 1991 (Qld), s 4, s, 5, s, 20, s 21, s 23

Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT) (2009) 239 CLR 27
Black & White (Quick Service) Taxis Ltd v Sailor & Anor [2008] QSC 77
Buderim Ginger Ltd v Booth [2003] 1 Qd R 147
Certain Children v Minister for Families and Children [No 2] (2017) 52 VR 441
CIC Insurance Ltd v Bankstown Football Club Inc (1997) 187 CLR 384
Goode v Common Equity Housing Ltd [2014] VSC 585
Griffith University v Tang (2005) 221 CLR 99
Kirk v Industrial Court (NSW) (2010) 239 CLR 531
Langley v Niland [1981] 2 NSWLR 104
Mabo v Queensland (No 2) (1992) 175 CLR 1
Owen-D'Arcy v Chief Executive Queensland Corrective Services [2021] QSC 273
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355
R v A2; R v Magennis; R v Vaziri (2019) 269 CLR 507
R v Australian Broadcasting Tribunal and Others; Ex Parte Hardiman and Others (1980) 144 CLR 13
Ryle v Venables (2021) 7 QR 615
Sharma v Legal Aid (Qld) [2002] FCAFC 196
State Electricity Commission v Rabel & Ors [1998] 1 VR 102
Toodayan & Anor v Anti-Discrimination Commissioner of Queensland [2018] QCA 349

COUNSEL: D P O'Gorman SC with B I Coyne for the applicant;
A L Wheatley KC with V G Brennan as contradictor

SOLICITORS: Legal Aid for the applicant
J Ball, Queensland Human Rights Commission, for the respondent.

[1] The applicant lodged a complaint (the **Complainant**) under the *Anti-Discrimination Act* 1991 (Qld) (**AD Act**)(**AD Complaint**)[1] with the respondent, the Queensland Human Rights Commissioner (the **Commissioner**), together with a complaint under the *Human Rights Act* 2019 (Qld) (**HR Act**) (**HR Complaint**).[2]

[2] The Complainant is a 30 year old Aboriginal man from Lockhart River who was in prison[3] when he was diagnosed with gastric cancer[4] and commenced a treatment program involving chemotherapy, investigation, surgery, and then further chemotherapy.

[3] On 23 June 2020, the Complainant applied to the Parole Board of Queensland (**Parole Board**) for exceptional circumstances parole pursuant to s 194 of the *Corrective Services Act* 2006 (Qld) (**CS Act**), which was refused on 4 December 2020 (**Parole Board decision**).

[4] The HR Complaint and the AD Complaint arise out of the consideration of the application for exceptional circumstances parole, including:

(a) The Complainant contends that the Complainant's treatment by the Parole Board constituted unlawful direct and indirect discrimination on the attribute of race.

(b) The Complainant sought release on exceptional circumstances parole so he could return to the Lockhart River and receive culturally appropriate health care services for his medical condition.

(c) In respect of direct discrimination, the Complainant contends that by refusing the application for exceptional circumstance parole and/or by failing to properly consider his race and its characteristics in reaching that decision, the Parole Board has treated the Complainant unfavourably by denying him the ability to enjoy his cultural rights (s 28 of the HR Act) and receive an equivalent standard of medical care to that which is available in the community, during a period of significant, potentially life-threatening illness.

(d) In respect of indirect discrimination, the Complainant contends that:

(i) In rejecting the application for exceptional circumstances parole, the Parole Board imposed the term or condition that the Complainant was to receive his health care in prison where it had been indicated that this would be difficult to manage in custody, would not provide an equivalent level of medical care to that available in the community, and the Complainant would be removed from country and kinship ties.

(ii) In considering the application for exceptional circumstances parole, the Parole Board imposed an unduly narrow interpretation of the exceptional circumstances parole test which failed to have proper regard to culturally appropriate health care that was available in the community and the Complainant's distinct cultural rights as an Aboriginal person.

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1 On 15 March 2021.
2 On 4 March 2021.
3 Subsequent to the decision the Complainant was granted parole and is currently on parole.
4 In March 2020.

(iii) Because of his Aboriginality, the Complainant was not able to comply with the term/s because he would (and did) suffer serious disadvantage from having to undergo treatment and recover from surgery in custody, without the same level of culturally appropriate health care that was available in the Lockhart River community, while being forcibly removed from country and kinship ties.

(iv) The term/s were not reasonable, having particular regard to the factors under s 13(2) of the HR Act which are relevant in considering whether a limit on a human right is reasonable and justifiable.

[5] The AD Complaint was lodged by email dated 15 March 2021 and the material lodged in support included:

(a) Two letters of the Prisoners Legal Service to the Parole Board dated 23 June 2020 and 15 October 2020.

(b) Letter from Karen Koko, Indigenous Senior Health Worker, Lockhart River Primary Health Care Centre in support of the application for exceptional circumstances parole.

(c) Letter of Josh Stafford, Director of Nursing (Lockhart River & Coen), Torres and Cape Hospital and Health Service dated 25 May 2020.

(d) Email of Dr Margaret Purcell, Senior Medical Officer at Lotus Glen Correctional Centre dated 19 June 2020, providing an overview of the applicant's diagnosis and treatment plan.

(e) Letter of Dr Tasafin Hossain, Medical Oncology Advanced Trainee at Cairns & Hinterland Hospital & Health Service Medical Oncology Clinic dated 20 May 2020.

(f) Email of Jesse Pardon, Clinical Nurse Consultant, Prison Health Services – Lotus Glen Correctional Centre dated 26 May 2020.

(g) Letter of the applicant's mother, Lorraine Kennell.

(h) Letter of the Parole Board dated 22 September 2020 providing a preliminary view.

(i) Letter of the Parole Board dated 4 December 2020 providing a final decision rejecting the application for exceptional circumstances parole.

[6] Initially, a delegate of the Commissioner refused to accept both complaints. Subsequently, on 17 December 2021, following an internal review, the Commissioner considered the complaints afresh and decided to accept the HR Complaint (**HR Complaint Decision**) but did not accept the AD Complaint (**AD Complaint Decision**).

[7] The Complainant seeks review pursuant to pursuant to s 20 of the *Judicial Review Act* 1991 (Qld) (**JR Act**) of the AD Complaint Decision on five grounds:[5]

(a) Ground 1: The Commissioner took an irrelevant consideration into account.

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5 At the hearing on 19 September 2022, the applicant was granted leave to file an amended application for a statutory order of review containing two additional grounds.

(b) Ground 2: The Commissioner failed to take a relevant consideration into account.

(c) Ground 3: The Commissioner exercised his power so unreasonably that no reasonable person could so exercise the power.

(d) Ground 4: The decision was unlawful for the purpose of s 58 of the HR Act because the decision:

(i) was made in a way that was not compatible with human rights within the meanings of s 8 and s 58(1)(a) of the HR Act (the **substantive limb obligation**); and/or

(ii) was made in a way that failed to give proper consideration to human rights relevant to the decision within the meaning of s 58(1)(b) of the HR Act (the **procedural limb obligation**).[6]

(e) Ground 5: The decision involved an error of law, in that it applied an incorrect interpretation of s 136, s 10 and s 11 of the AD Act.

[8] The Commissioner did not take an active part in the proceedings.[7] Ms Wheatley KC and Mr Brennan of Counsel were appointed to act as contradictor by the President of the Queensland Bar Association (**Contradictor**).[8]

What is the AD Complaint Decision?

[9] The AD Complaint Decision and the reasons for the decision are set out in the Commissioner's letter dated 17 December 2021.

[10] Relevantly, the first page of the letter states as follows:

> "On 26 November 2021 the complainant's representative sought a review of the original decision. In light of the above history, I have decided to review both the decisions. I have considered all the documents referred to above and **decided** to deal with the complaint under the HR Act, but **not to accept the complaint under the AD Act**. I do not intend to convene a conciliation conference." (emphasis added)

[11] The balance of the letter then proceeds under three headings:

(a) Heading 1: Review of the original decision – [HR] Act 2019;

(b) Heading 2: Review of the original decision under the [AD] Act 1991; and

(c) Heading 3: Further complaint against the delegate.

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6 At the hearing, the applicant clarified ground 4 in respect of s 58 of the HR Act.

7 *R v Australian Broadcasting Tribunal and Others; Ex Parte Hardiman and Others* (1980) 144 CLR 13 at 35-36.

8 Pursuant to an order of Boddice J on 25 March 2022.

[12] In respect of the AD Complaint Decision, logically the reasoning appears under heading 2 and potentially under heading 3.[9] The reasoning under heading 1 deals with the HR Complaint Decision.

[13] The Commissioner's reasons in respect of the AD Complaint Decision included:

(a) The threshold issue of the application of the AD Act: namely, the AD Act prohibits direct (s 10 AD Act) and indirect (s 11 AD Act) discrimination on the basis of specific attributes in certain defined areas of activity, including the administration of State laws and programs. The Parole Board, when performing a function and exercising a power under State law in respect of the application for exceptional circumstances parole, would be subject to the prohibition on discrimination in s 101 of the AD Act.

(b) Consideration of the applicant's arguments in respect of what was said to constitute direct discrimination and indirect discrimination, including the contention that:

> "The Commission's delegate has applied the wrong test in assessing the complaint in relation to both direct and indirect discrimination. The test is whether, the complaint sets out reasonably sufficient details to indicate an alleged contravention of the AD Act (section 136) that is not frivolous, trivial, vexatious, misconceived or lacking in substance (section 139)."

(c) Acknowledgement that a complaint alleging race discrimination in the exercise of power in relation to a person's liberty is "neither frivolous nor trivial" and there was no "indication that this complaint is vexatious".

(d) Recognition that guidance in respect of the assessment of complaints "in the context of sections 136 and 139 of the AD Act" is provided by the decision in *Toodayan & Anor v Anti-Discrimination Commissioner of Queensland*.[10] The reasons set out a quote from the Court of Appeal's reasons in respect of the forming of an opinion under s 139(b) of the AD Act.

(e) Consideration of the circumstances of the Parole Board decision, including stating:

> "In my view there is nothing in the material provided to indicate that the Parole Board treated the complainant less favourably than a non-Aboriginal applicant for exceptional circumstances for parole would have been treated in the same or not materially different circumstances. Nor is there any information to indicate that a higher proportion of non-Aboriginal applicants would be able to comply with the Board's terms, conditions, practices or requirements regarding its consideration of their cultural rights and need for culturally appropriate health services, and thereby satisfy the Board of their exceptional circumstances.

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9 It is not clear whether the reasoning under heading 3 is to be applied in respect of both the HR complaint and the AD complaint. This may be relevant to considerations in respect of ground 4, and partly for grounds 2 and 3.

10 [2018] QCA 349.

> In reaching this view, I accept that the complaint alleges that the complainant had specific cultural needs in relation to the treatment of his illness and that these were less able to be met while he remained in custody. The complainant also alleges that the complainant's cultural rights, right to access health services without discrimination and right to humane treatment when deprived of liberty were not adequately considered by the Parole Board and that their decision to refuse parole was not compatible with his human rights.
>
> While these allegations may amount to an alleged contravention of section 58 of the HR Act, they are not sufficient to indicate alleged race discrimination by the Parole Board. It follows that I have not identified any error in the decision not to accept the complaint under the AD Act and I affirm the delegate's decision in that regard."

[14] Under heading 3 the Commissioner considered the assertion that the delegate had erred in making the original decision by failing to give proper consideration to the Complainant's human rights, being his right to recognition and equality before the law and his cultural rights as an Aboriginal person. The reasons state:

> "I acknowledge that the delegate responsible for the original decision did not provide reasons to demonstrate how the complainant's human rights had been properly considered. However it is clear from the decision to act under section 70(1)(a) that the delegate had given consideration to the complainant's human rights in her assessment of the complaint as alleging a contravention of section 58. While I do not concede that her decision was incompatible with the complainant's human rights, to the extent that it may have been, I trust that my revocation of the original decision adequately addresses the complaint."

[15] The application for review is made on the basis that the AD Complaint Decision was made pursuant to s 136 of the AD Act[11] which states:

> "A complaint must—
>
> (a) be in writing; and
>
> (b) set out reasonably sufficient details to indicate an alleged contravention of the Act; and
>
> (c) state the complainant's address for service; and
>
> (d) be lodged with, or sent by post to, the commissioner."

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[11] By email dated 22 December 2021, a delegate of the Commissioner confirmed the decision not to accept the complaint under the AD Act was "not a decision to reject the complaint under s 139 of the AD Act. It was merely a decision not to accept the complaint because in the Commissioner's view, it did not meet the threshold test for a complaint under s 136 of the AD Act". This position was also confirmed by the Commissioner's submissions filed on 23 March 2022.

[16] The AD Complaint Decision not to accept the AD Complaint can therefore be understood to be that the AD Complaint failed to set out reasonably sufficient details to indicate an alleged contravention of the AD Act as required by s 136(b) of the AD Act.

[17] A decision purportedly under s 136 of the AD Act is in contrast to a decision under s 139 of the AD Act. Section 139 states:

> "The commissioner must reject a complaint if the commissioner is of the reasonable opinion that the complaint is—
>
> (a) frivolous, trivial or vexatious; or
>
> (b) misconceived or lacking in substance."

[18] The Commissioner's reasons raise some ambiguity as to what provision the AD Complaint Decision was made under, including:

(a) The acknowledgement that the complaint is neither frivolous nor trivial nor vexatious is consistent with s 139(a) of the AD Act.

(b) The reference to the reasons of the Court of Appeal in *Toodayan & Anor v Anti-Discrimination Commissioner of Queensland* is in the context of forming an opinion under s 139(b) as to whether a complaint is misconceived or lacking in substance.

(c) The language used in the final paragraph under the second heading "not sufficient to indicate" is consistent with the language in s 136, namely "reasonably sufficient details to indicate an alleged contravention of the Act."

[19] Despite this ambiguity, the application for review is of a decision allegedly made under s 136 of the AD Act and the Court needs to consider that application.

[20] Accordingly, it is necessary to construe s 136 of the AD Act in accordance with the accepted principles to determine if the AD Complaint Decision is a "decision to which the [JR] Act applies" for the purposes of s 20 of the JR Act.

Was the AD Decision made under an enactment?

[21] The application is brought pursuant to s 20 of the JR Act on the basis that the Complainant is a person who is aggrieved by the AD Complaint Decision. That is not in issue.

[22] The grounds of review include the grounds in:

(a) s 20(2)(e), that the making of a decision was an improper exercise of the power conferred by the enactment under which it was purported to be made; and

(b) s 20(2)(f), that the decision involved an error of law.

[23] Section 23 recognises that an improper exercise of power includes:

(a) Taking an irrelevant consideration into account in the exercise of a power;

(b) Failing to take a relevant consideration into account in the exercise of a power; and

(c) An exercise of a power that is so unreasonable that no reasonable person could so exercise the power.

[24] The hearing proceeded on the basis that it was not contentious between the Complainant and the Contradictor that the AD Complaint Decision pursuant to s 136 of the AD Act was a decision to which the JR Act applied.

[25] Section 4 of the JR Act defines "decision to which this Act applies" as follows:

> "(a) a decision of an administrative character made, proposed to be made, or required to be made, under an enactment (whether or not in the exercise of a discretion); or …"

[26] Section 5 of the JR Act sets out the meaning of "making a decision" and "failure to make a decision" as follows:

> "**5 Meaning of making of a decision and failure to make a decision**
>
> In this Act, a reference to the ***making of a decision*** includes a reference to—
>
> (a) making, suspending, revoking or refusing to make an order, award or determination; or
>
> (b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission; or
>
> (c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument; or
>
> (d) imposing a condition or restriction; or
>
> (e) making a declaration, demand or requirement; or
>
> (f) retaining, or refusing to deliver up, an article; or
>
> (g) doing or refusing to do anything else;
>
> and a reference to a ***failure to make a decision*** is to be construed accordingly."

[27] The written and oral submissions did not address whether the AD Complaint Decision was a decision under an enactment and reviewable under the JR Act. Following the hearing, the parties were requested to provide further brief submissions addressing whether the AD Complaint Decision made pursuant to s 136 of the AD Act was a decision to which the JR Act applied, particularly taking into account the criteria identified by the High Court in *Griffith University v Tang*.[12]

[28] In *Griffith University v Tang* Gummow, Callinan and Heydon JJ stated at [89]:

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12 (2005) 221 CLR 99.

> "The determination of whether a decision is 'made … under an enactment' involves two criteria: first, the decision must be expressly or impliedly required or authorised by the enactment; and, secondly, the decision must itself confer, alter or otherwise affect legal rights or obligations, and in that sense the decision must derive from the enactment. A decision will only be 'made … under an enactment' if both these criteria are met. It should be emphasised that this construction of the statutory definition does not require the relevant decision to affect or alter *existing* rights or obligations, and it would be sufficient that the enactment requires or authorises decisions from which new rights or obligations arise. Similarly, it is not necessary that the relevantly affected legal rights owe their existence to the enactment in question. Affection of rights or obligations derived from the general law or statute will suffice."

[29] In supplementary submissions the Contradictor accepted that "it is finely balanced as to whether the [AD Complaint Decision] is a decision to which the JR Act applies" and the second criteria in *Tang* "tends towards it not being a 'decision under an enactment'".[13]

[30] Supplementary submissions on behalf of the Complainant maintain the position that the AD Decision is a decision to which the JR Act applies and that the application is properly brought under s 20 of the JR Act. In support of this contention the Complainant points to factors including the following:

(a) Section 4 is to be read in conjunction with s 5 of the JR Act in respect of "making a decision" and a "failure to make a decision".[14]

(b) The decision not to accept the AD Complaint can be characterised as "refusing to give … approval, consent or permission" pursuant to s 5(b) of the JR Act, "imposing a condition or restriction" pursuant to s 5(d) of the JR Act and/or "refusing to do anything else" pursuant to s 5(g) of the JR Act.[15]

(c) Sections 20(2)(e), 21(2)(e) and 23 of the JR Act refer to the "exercise of a power" as a ground of review and the Commissioner's functions and powers in ss 235 and 236 of the AD Act impliedly include administering the complaints process under Chapter 7 Part 1, including deciding whether or not to accept or not accept a complaint.[16]

[31] In the Supplementary Reply Submissions the Contradictor expands on the reasoning in support of the conclusion that the AD Decision was not a decision under an enactment. In particular, the Contradictor submits:

(a) the decision not to accept the AD Complaint can not be properly interpreted as a refusal to do anything authorised or required by the AD Act and is not a refusal within s 5(b) of the JR Act.

(b) the decision not to accept the AD Complaint did not involve any conditions or restrictions being "imposed" for the purposes of s 5(d) of the JR Act.

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13 Supplementary submissions filed 7 October 2022 at [4(a)] and [60].
14 Supplementary submissions filed 1 November 2022 at [15].
15 Supplementary submissions filed 1 November 2022 at [17].
16 Supplementary submissions filed 1 November 2022 at [19].

(c) the decision not to accept the AD Complaint was not "refusing to do anything else" for the purposes of s 5(g) of the JR Act.

(d) the applicant's construction of ss 20(2)(e), 21(2)(e) and 23 of the JR Act should not be accepted.

[32] In respect of the Complainant's expanded construction of ss 20(2)(e), 21(2)(e) and 23 of the JR Act, the Contradictor contends that the correct approach is that stated in *Tang* and not as contended for by the applicant. Further, the Commissioner's powers are defined and limited by the AD Act and are not at large.

[33] The starting point is the proper construction of the relevant statutory provision: here, s 136 of the AD Act. This involves the determination of the intention of the legislature expressed through the actual words used in the text of the relevant provision[17] and consideration of context, including the statute as a whole and the history of the legislation.[18]

[34] The accepted principles of construction were restated in *R v A2; R v Magennis; R v Vaziri*:[19]

> "32 The method to be applied in construing a statute to ascertain the intended meaning of the words used is well settled. It commences with a consideration of the words of the provision itself, but it does not end there. A literal approach to construction, which requires the courts to obey the ordinary meaning or usage of the words of a provision, even if the result is improbable, has long been eschewed by this Court. It is now accepted that even words having an apparently clear ordinary or grammatical meaning may be ascribed a different legal meaning after the process of construction is complete. This is because consideration of the context for the provision may point to factors that tend against the ordinary usage of the words of the provision.
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> 33 Consideration of the context for the provision is undertaken at the first stage of the process of construction. Context is to be understood in its widest sense. It includes surrounding statutory provisions, what may be drawn from other aspects of the statute and the statute as a whole. It extends to the mischief which it may be seen that the statute is intended to remedy. 'Mischief' is an old expression. It may be understood to refer to a state of affairs which to date the law has not addressed. It is in that sense a defect in the law which is now sought to be remedied. The mischief may point most clearly to what it is that the statute seeks to achieve.
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> 34 This is not to suggest that a very general purpose of a statute will necessarily provide much context for a particular provision or that the words of the provision should be lost

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17 Subject to the *Acts Interpretation Act* 1954 (Qld). *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27 at [47].

18 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [69].

19 (2019) 269 CLR 507.

> sight of in the process of construction. These considerations were emphasised in the decisions of this Court upon which the Court of Criminal Appeal placed some weight.
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> 35 The joint judgment in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* rejected an approach which paid no regard to the words of the provision and sought to apply the general purpose of the statute, to raise revenue, to derive a very different meaning from that which could be drawn from the terms of the provision. The general purpose said nothing meaningful about the provision, the text of which clearly enough conveyed its intended operation. Similarly, in *Saeed v Minister for Immigration and Citizenship* the court below was held to have failed to consider the actual terms of the section. A general purpose of the statute, to address shortcomings identified in an earlier decision of this Court, was not as useful as the intention revealed by the terms of the statute itself. In *Baini v The Queen*, it was necessary to reiterate that the question of whether there had been a 'substantial miscarriage of justice' within the meaning of the relevant provision required consideration of the text of the provision, not resort to paraphrases of the statutory language in extrinsic materials, other cases and different legislation.
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> 36 These cases serve to remind that the text of a statute is important, for it contains the words being construed, and that a very general purpose may not detract from the meaning of those words. As always with statutory construction, much depends upon the terms of the particular statute and what may be drawn from the context for and purpose of the provision.
>
> 37 None of these cases suggest a return to a literal approach to construction. They do not suggest that the text should not be read in context and by reference to the mischief to which the provision is directed. They do not deny the possibility, adverted to in *CIC Insurance Ltd v Bankstown Football Club Ltd*, that in a particular case, 'if the apparently plain words of a provision are read in the light of the mischief which the statute was designed to overcome and of the objects of the legislation, they may wear a very different appearance'. When a literal meaning of words in a statute does not conform to the evident purpose or policy of the particular provision, it is entirely appropriate for the courts to depart from the literal meaning. A construction which promotes the purpose of a statute is to be preferred." (internal citations omitted)

[35] Further in *CIC Insurance Ltd v Bankstown Football Club Inc*[20] it was recognised that:

> "[T]he modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later

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20 (1997) 187 CLR 384.

> stage when ambiguity might be thought to arise, and (b) uses 'context' in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy."[21] (internal citations omitted)

[36] Accordingly, in the construction of s 136 of the AD Act it is necessary to consider the AD Act as a whole, being the relevant context.

[37] The preamble to the AD Act sets out Parliament's reasons for enacting the AD Act including:

> "6 The Parliament considers that—
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> (a) everyone should be equal before and under the law and have the right to equal protection and equal benefit of the law without discrimination; and
>
> (b) the protection of fragile freedoms is best effected by legislation that reflects the aspirations and needs of contemporary society; and
>
> (c) the quality of democratic life is improved by an educated community appreciative and respectful of the dignity and worth of everyone.
>
> 7 It is, therefore, the intention of the Parliament to make provision, by the special measures enacted by the Act, for the promotion of equality of opportunity for everyone by protecting them from unfair discrimination in certain areas of activity and from sexual harassment and certain associated objectionable conduct."

[38] Section 6 of the AD Act states the relevant purpose:

> "(1) One of the purposes of the Act is to promote equality of opportunity for everyone by protecting them from unfair discrimination in certain areas of activity, including work, education and accommodation.
>
> (2) This purpose is to be achieved by—
>
> (a) prohibiting discrimination that is—
>
> (i) on a ground set out in part 2; and
>
> (ii) of a type set out in part 3; and
>
> (iii) in an area of activity set out in part 4;
>
> unless an exemption set out in part 4 or 5 applies; and
>
> (b) allowing a complaint to be made under chapter 7 against the person who has unlawfully discriminated; and

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21 At 408.

(c) using the agencies and procedures established under chapter 7 to deal with the complaint."

[39] Part 2 sets out in ss 7 and 8 of the AD Act the prohibited grounds of discrimination. Section 7 prohibits discrimination on the basis of the listed attributes. The listed attributes include race.

[40] Section 8 defines "discrimination on the basis of an attribute" to include direct and indirect discrimination on the basis of:

(a) a characteristic that a person with any of the attributes generally has; or

(b) a characteristic that is often imputed to a person with any of the attributes; or

(c) an attribute that a person is presumed to have, or to have had at any time, by the person discriminating; or

(d) an attribute that a person had, even if the person did not have it at the time of the discrimination.

[41] Part 3 then deals with prohibited types of discrimination. Section 9 prohibits direct and indirect discrimination.

[42] Section 10 provides the meaning of direct discrimination as:

> "If person treats, or proposes to treat, a person with an attribute less favourably than another person without the attribute is or would be treated in circumstances that are the same or not materially different."

[43] Further, s 10(2) provides that it is not necessary that the person who discriminates considers the treatment is less favourable. Further, the motive for discrimination is irrelevant (s 10(3)).

[44] Section 11 sets out the meaning of indirect discrimination. That is:

> "If a person imposes, or proposes to impose, a term—
>
> (a) with which a person with an attribute does not or is not able to comply; and
>
> (b) with which a higher proportion of people without the attribute comply or are able to comply; and
>
> (c) that is not reasonable."

[45] Section 11(2) sets out considerations in assessing whether a term is reasonable.

[46] Part 4 deals with areas of activity in which discrimination is prohibited. Division 10 is relevant to the current application dealing with administration of State laws and programs area. Relevantly, s 101 of the AD Act states:

> "A person who—
>
> (a) performs any function or exercises any power under State law or for the purposes of a State Government program; or

(b) has any other responsibility for the administration of State law or the conduct of a State Government program;

must not discriminate in—

(c) the performance of the function; or

(d) the exercise of the power; or

(e) the carrying out of the responsibility."

[47] Relevantly for the current application, it is not contentious that the Parole Board in deciding an application for exceptional circumstances parole is within s 101 of the AD Act.

[48] Chapter 7 of the AD Act deals with enforcement. Part 1 Division 1 deals with the complaint process. Section 134 of the AD Act provides that a person who has been subjected to the alleged contravention may complain to the Commissioner. Section 135 of the AD Act provides "a person may make a complaint alleging more than 1 contravention of the Act".

[49] Section 136 of the AD Act deals with making a complaint and what is required to be lodged with the Commissioner.[22]

[50] Section 138(1) of the AD Act provides that a person is only entitled to make a complaint within one year of the alleged contravention of the Act. This is subject to subsection (2). Subsection (2) provides a discretion for the Commissioner to decide whether to accept the complaint if the complainant has shown good cause or not to accept the complaint.

[51] Section 139 of the AD Act contains a discretion and provides that the Commissioner must reject a complaint if the Commissioner has "the reasonable opinion" that the complaint is frivolous, trivial or vexatious or misconceived or lacking in substance.[23]

[52] Further, s 140 of the AD Act provides a further discretion to the Commissioner to reject or stay complaints where they are dealt with elsewhere as follows:

"(1) The commissioner may reject or stay a complaint if—

(a) there are concurrent proceedings in a court or tribunal in relation to the act or omission the subject of the complaint; or

(b) the commissioner reasonably considers the act or omission that is the subject of the complaint may be effectively or conveniently dealt with by another entity.

(2) The commissioner may also reject a complaint if the commissioner reasonably considers the act or omission the subject of the complaint has been adequately dealt with by another entity."

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22 See [15] above.

23 See [17] above.

[53] Section 140A of the AD Act also provides a mechanism for whether the Commissioner considers that a complaint would be more appropriately dealt with as an alleged contravention of the HR Act. This requires the consent of the complainant for the complaint to be dealt with as a complaint under the HR Act.

[54] Section 141 of the AD Act provides that the Commissioner must decide whether to accept or reject a complaint within 28 days of receiving the complaint. Further, it provides that the Commissioner must promptly notify the complainant of the decision.

[55] Section 142 of the AD Act provides that if a complaint is rejected then it lapses and the complainant is not entitled to make a further complaint relating to the act or omission that was the subject of the complaint (s 142(1) AD Act).

[56] Further, under s 142(2), the complainant may, within 28 days of receiving notice of the rejection, ask the Commissioner for written reasons. The written reasons must be given promptly (s 142(3)).

[57] Section 142(4) of the AD Act also states:

> "To remove any doubt, it is declared that a reference in this section to rejecting a complaint includes a reference to deciding not to accept a complaint under section 137(1) or 138(2)(b)."

[58] Section 143 of the AD Act provides that if a complaint is accepted, the Commissioner must promptly notify the respondent in writing of the substance of the complaint. The provision then sets out a procedure in respect of the various steps that are then to occur in respect of the respondent.

[59] Division 2 sets out the investigation process. Pursuant to s 154A the Commissioner may investigate a complaint at any time after the complaint is received by the Commissioner. Further, pursuant to s 155, the Commissioner may instigate an investigation if an allegation is made that an offence against the Act has been committed.

[60] Pursuant to s 156 of the AD Act, the Commissioner may obtain information and documents by the process outlined in that section.

[61] Division 3 sets out a conciliation process which applies if the Commissioner believes that a complaint may be resolved by conciliation.

[62] Division 4 deals with unconciliated complaints. This includes complaints that had proceeded to a conciliation conference and have not been resolved by conciliation (s 164A). This Division also applies in respect of complaints where the Commissioner believes that a complaint cannot be resolved by conciliation.

[63] Section 166 of the AD Act provides for referral of the complaint to the Queensland Civil and Administrative Tribunal (QCAT) or, in respect of complaints including a work related matter, the Industrial Relations Commission. The relevant referral in the current circumstances would be to QCAT.

[64] Division 5 sets out a number of provisions dealing with how complaints are to be dealt with where:

(a) Section 168 – after a complaint is accepted and before it is referred to the Tribunal, the Commissioner is of the reasonable opinion that the complaint is frivolous, trivial or vexatious or misconceived or lacking in substance. Under s 168(2), unless the complainant is able to show to the Commissioner's satisfaction within 28 days that the complaint is not frivolous, trivial, vexatious, misconceived or lacking in substance the complaint lapses and in those circumstances, the complainant can not make a further complaint relating to the act or omission that was the subject of the complaint.

(b) Section 168A – where a complaint is accepted and before it is referred to the Tribunal, the Commissioner reasonably considers the act or omission the subject of the complaint has been adequately dealt with by another entity or may be effectively or conveniently dealt with by another entity. Pursuant to s 168A(2), the Commissioner may give the complainant a notice inviting the complainant to show cause why the complaint should not lapse.

(c) Section 169 – if the Commissioner is of the reasonable opinion that a complainant has lost interest in continuing with a complaint, the Commissioner must tell the complainant that the complaint will lapse unless the complainant indicates that the complainant wishes to continue with it.

[65] Section 170 also provides the mechanism by which a complainant can give notice to the Commissioner by written notice that the complainant does not want to continue with the complaint.

[66] Part 2 deals with the Tribunal. Section 174A sets out the functions of QCAT which includes to hear and decide the complaints. Subsequent provisions then deal with the pre-hearing process, the hearing process and a post-hearing process. Relevant provisions include:

(a) Pursuant to s 204, it is for the complainant to prove, on the balance of probabilities, that the respondent contravened the Act.

(b) Section 205 however provides that in a case involving an allegation of indirect discrimination, the respondent must prove, on the balance of probabilities, that a term complained of is reasonable.

(c) Pursuant to s 208, the Tribunal is not bound by the rules of evidence.

(d) Section 209 sets out the orders that the Tribunal may make if the complaint is proven.

(e) The relief that the Tribunal may order includes, pursuant to s 209(1)(b), compensation for loss or damage caused by the contravention. It also includes redress (s 209(c)) and an apology (s 209(d)).

(f) Pursuant to s 210, after a hearing, the tribunal may make an order dismissing a complaint.

[67] Considering the AD Act as a whole, the complaint process in Chapter 7, Part 1, Division 1, Subdivision 1 of the AD Act is the gateway to the conciliation process or a hearing by the Tribunal.[24] The complaint process is the procedural mechanism

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[24] The Queensland Civil and Administrative Tribunal (**QCAT**) or the Industrial Relations Commission in respect of certain complaints.

that enables an individual to seek redress in respect of a contravention of the substantive provisions in the AD Act contained in Chapters 2 to 6.

[68] Davis J in *Ryle v Venables*[25] in considering Chapter 7 of the AD Act commented as follows at [90]:

> "The language used in Ch 7 is a little awkward but the intention is clear. Chapter 7 concerns alleged breaches of the AD Act. These contraventions do not trigger the powers of the Chapter until they are acted upon by the complainant. They are acted upon when a complaint is made. The complaint, though, is a complaint of contravention of the AD Act. A complaint of more than one contravention of the AD Act may be made.[26] The complaints of contraventions are regulated by ss 138 and 139. There is, in my view, no reason to think that the legislative intention was to limit the discretion created by ss 138 and 139 to rejecting or accepting all allegations of contravention which may be complained of in the one document lodged with the Commissioner".

[69] Further, Chapter 7 dealing with enforcement delineates two separate roles: the Queensland Human Rights Commission and the Tribunal. There are separate functions and powers for each. The Tribunal[27] has the function to "hear and decide the complaints".[28] The Commissioner's relevant functions and powers are set out in the provisions in Part 1 of Chapter 7.

[70] Section 136 is the formal or jurisdictional requirements of a complaint. The section does not authorise the Commissioner taking any steps or identify any power in the Commissioner in respect of the complaint. Further, while s 136(b) does require "reasonably sufficient details to indicate an alleged contravention of the Act", there is no requirement that the Commissioner have a requisite level of satisfaction in respect of that requirement.

[71] This is in contrast to s 139 of the AD Act. Section 139 provides that the Commissioner must reject a complaint if the Commissioner has the requisite level of satisfaction in respect of complaint. That is that the Commissioner has the reasonable opinion that the complaint is frivolous, trivial or vexatious or misconceived or lacking in substance.

[72] Section 136 is to be construed in particular in the context of the provisions that form part of the statutory framework in respect of the complaints process. Section 139 provides the Commissioner with the power to reject a complaint in certain circumstances. Parliament has identified those as being where the complaint is frivolous, trivial or vexatious or misconceived or lacking in substance. The evident intention is that s 139 provides a mechanism to stop complaints lacking any proper basis from proceeding past the lodgement stage.

[73] The approach of the Commissioner in purporting to decide not to accept a complaint under s 136 of the AD Act is not consistent with the interpretation of s 136 in the

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25 (2021) 7 QR 615.
26 AD Act, s 135.
27 Here it would be QCAT.
28 Section 174A of the AD Act.

context of the statutory scheme in Chapter 7, Part 1, Division 1, Subdivision 1. Whilst s 136 does contain in (b) a requirement of reasonably sufficient details to indicate an alleged contravention, the section does not contain a power for the Commissioner to, in effect, filter out non-compliant complaints.

[74] Further, it would be inconsistent with the statutory scheme to imply into s 136 an authority for the Commissioner to determine whether or not the jurisdictional requirements for a complaint are met. Parliament has expressly provided that authority to the Commissioner in s 139 of the AD Act.

[75] It would be open for the Commissioner to apply for a declaration that a complaint did not comply with the jurisdictional requirements in s 136 of the AD Act. However, s 136 itself does not provide a basis for the Commissioner to not accept a complaint lodged.

[76] This construction is consistent with the approach to these provisions in the authorities. Davis J in *Ryle v Venables*[29] described the intersect between s 136 and s 139 as follows:

> "[78] Under s 136 AD Act, a complaint made by a complainant identified in s 134 may be made. Sections 138 and 139 both provide circumstances where a discretion arises which may lead to the summary dismissal of the complaint.
>
> [79] Section 139 AD Act is similar to Uniform Civil Procedure Rules 1999, r 171. A judgment may be made by the Commissioner as to whether the complaint is frivolous or lacking in substance, etc so that its continuation is not warranted. Relevant considerations to the exercise of that discretion go to the substance and merits of the allegations.[30]"

[77] In *Toodayan & Anor v Anti-Discrimination Commissioner Queensland*[31] Burns J, with whom Fraser and Philippides JJA agree, also considered these provisions. After summarising the effect of ss 141, 154A and 168 of the AD Act Burns J stated:

> "[39] There are other provisions of the ADA that may be engaged to reject, stay or lapse complaints where the complaint is, or has been, the subject of a proceeding in a court or tribunal (ss 140 and 168A) or where the complainant appears to 'lose interest' (ss 160(1) and 169). However, those provisions aside, **the only power to reject or lapse a complaint because it is frivolous, trivial, vexatious, misconceived or lacking in substance arises under ss 139 and 168**." (emphasis added)

[78] In considering a decision made under s 139(b) of the AD Act, Burns J further considered the intersect between s 136 and s 139 of the AD Act and stated as follows:

> "[40] As s 136(b) ADA provides, a complaint must set out 'reasonably sufficient details to indicate an alleged

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29 (2021) 7 QR 615.
30 *Buderim Ginger Ltd v Booth* [2003] 1 Qd R 147, 156 [23].
31 [2018] QCA 349.

contravention'. There is **no requirement at the lodgement stage to support a complaint with evidence**, although that no doubt commonly occurs to varying degrees. When the complaint is supplemented with supporting material, that material will of course also form part of the details to be considered by the commissioner. Furthermore, on receipt of a complaint, the commissioner may request further information or documents and such a request may extend to a request of the complainant for supporting evidence **in order to assist in the formation of the opinion required under s 139(b)**, although there will be limited time to do so because the commissioner must decide whether to accept or reject a complaint within 28 days of its receipt. But, however the complaint is constituted and whatever the commissioner does after it is received, it is plain that **the obligation on the part of the complainant at this early stage does not extend beyond the provision of *reasonably sufficient* details to *indicate* a contravention.**

[41] It is also to be observed that, although the statutory test is expressed in the same way, s 139 operates differently to s 168. In the first place, s 168 will only be engaged after the complaint has been accepted, a written response has been invited from the respondent and any attempt at conciliation has taken place. In addition, the commissioner may by that stage have investigated the complaint. Because such a complaint will already have been accepted under s 141 following consideration by the commissioner whether it was, relevantly, misconceived or lacking in substance, s 168 will only be engaged where something has emerged, either from the respondent or from the investigation, to change the commissioner's opinion. But, even more importantly, if under s 168(1) the commissioner forms the reasonable opinion that the complaint is, relevantly, misconceived or lacking in substance, the complainant must show cause to the commissioner's satisfaction why that is not so to avoid the complaint lapsing under s 168(4) whereas, **under s 139, there is no onus on the complainant to prove anything**.

[42] **The nature of the commissioner's task under s 139(b) is informed by these statutory features as well as the protective purpose of the legislation**.[32] A complaint cannot be expected to 'allege the relevant facts with the particularity of an indictment or of a pleading'.[33] Nor should it be assumed that the details supplied are comprehensive or that they aspire to do any more than indicate what is intended to later be proved to establish the complaint. Thus, when forming an

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32 Section 6(1) ADA. And see *Black & White (Quick Service) Taxis Ltd v Sailor & Anor* [2008] QSC 77, [36].

33 *Langley v Niland* [1981] 2 NSWLR 104, 108. And see: *State Electricity Commission v Rabel & Ors* [1998] 1 VR 102, 116-117; *Black & White (Quick Service) Taxis Ltd v Sailor & Anor* (Ibid), [32].

> opinion under that provision, the question for the commissioner is whether the details provided in and with the complaint, if proved at a hearing of the tribunal, are indicative of a contravention that is neither misconceived nor lacking in substance. **A complaint will be 'misconceived' if it is based on a false conception or notion such as an allegation of discrimination on the basis of an attribute that is not protected by the ADA and 'lacking in substance' where the detail provided in the complaint fails to point to conduct on the part of the named respondent that is capable, if proved, of amounting to a contravention under the ADA. Obviously, because rejection will deprive the complainant of a hearing, it must clearly appear that the complaint is misconceived or lacking in substance before the requisite opinion may reasonably be formed.**
>
> [43] Often, a conclusion of discrimination will only arise as a matter of inference.[34] So, in the absence of direct proof, the commissioner will need to consider whether the details provided in and with the complaint are indicative of circumstances that, if ultimately proved, are capable of supporting such an inference. However, where more than one inference is reasonably open on the indicated circumstances, it is not for the commissioner when forming an opinion under s 139 ADA to decide which inference is more probable; that is a matter within the exclusive province of the tribunal." (emphasis added)[35]

[79] The Commissioner's reasons included a substantive quote from the reasons of Burns J in *Toodayan & Anor v Anti-Discrimination Commissioner Queensland* in respect of the operation of s 139(b) of the AD Act, but then the Commissioner proceeded to purport to undertake that approach under s 136 of the AD Act.

[80] This reasoning of Burns J is consistent with a construction of the statutory scheme that the power at the initial stage to reject a complaint lodged under s 136 because it is frivolous, trivial, vexatious, misconceived or lacking in substance arises under s 139 of the AD Act. The power does not arise in s 136 itself.

[81] *Toodayan & Anor v Anti-Discrimination Commissioner Queensland* also provides some guidance on the practical task that is to be undertaken in the exercise of the power under s 139 of the AD Act. Burns J commented at [50]:

> "[50] It is apparent that the delegate approached the task under s 139(b) ADA as though the detail contained in, with and subsequent to the complaint was comprehensive of the matters relied on by the appellants to support an inference of discrimination. That was not only the wrong approach in circumstances where the appellants had expressly advised the Commission that they had made requests for potentially

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34 See *Sharma v Legal Aid (Qld)* [2002] FCAFC 196, [40].

35 Underlining identifies the quote included in the Commissioner's reasoning under heading 2 in respect of the AD Complaint Decision.

> relevant material from the hospital that were still outstanding, but also because **s 139(b) requires no more of a complainant than to provide reasonably sufficient details to indicate a contravention.** The correct approach should have been to reach an opinion as to whether the details were indicative of a contravention that was not, relevantly, lacking in substance…". (emphasis added)

[82] It was submitted at the hearing before me that the second reference to s 139(b) in [50][36] was in error and that the correct reference should have been to s 136(b) of the AD Act.[37] I do not accept this submission. This highlights the central misconception in the Commissioner's approach and in this application. Section 136(b) provides what is to be included in a complaint: "reasonably sufficient details to indicate an alleged contravention of the Act". It is that level of particularity that is to be considered in the exercise of the power in s 139 of the AD Act in determining whether a complaint is lacking in substance in the reasonable opinion of the Commissioner to warrant the summary disposal of the complaint. A complaint is not to be evaluated at that stage to a higher level of particularity. The intersection between s 136(b) and s 139 is clear on an interpretation of the statutory scheme and the role that both provisions have in Chapter 7.

[83] This is further highlighted in *Toodayan & Anor v Anti-Discrimination Commissioner Queensland* at [51] where Burn J observes:

> "Of course, **it should not be thought that s 139(b) does not require an evaluation of the substance of each complaint; it does. Indeed, there might be some irremediable defect in the chain of reasoning or logic behind a complaint or some incurable gap in the evidence that might be gathered in support of it that makes it clear that there can be no substance in it**, but where, as here, the details provided are indicative of circumstances that, if ultimately proved, are capable of supporting a conclusion of discrimination under the ADA it cannot reasonably be concluded that the complaint lacks substance." (emphasis added)

[84] It appears that what the Commissioner did in the current case was to undertake the exercise of evaluating the complaint to determine if there was an "irremediable defect in the chain of reasoning or logic". The power to undertake that exercise is found in s 139, not s 136.

[85] Properly construed, where a written complaint with supporting details is lodged the Commissioner is empowered by s 139 to consider and form an opinion as to whether the complaint is misconceived or lacking in substance.

[86] A decision under s 139 of the AD Act is clearly a decision to which the JR Act applies: see *Toodayan & Anor v Anti-Discrimination Commissioner of Queensland*.[38] But what about a decision purportedly under s 136?

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36 Underlined above.

37 This submission was made by both the Complainant and the Contradictor. Applicant's Outline of Submissions in Reply at [24]; T1-30, line 39 – T1-31, line 4.

38 [2018] QCA 349.

[87] On the proper construction of s 136, the decision made by the Commissioner purportedly pursuant to s 136 not to accept the AD Complaint was not a decision made or required to be made under an enactment. Accordingly, it is not a decision to which the JR Act applies and the decision is not reviewable under s 20 of the JR Act.

[88] Consequently, grounds 1, 2, 3 and 5 arising under the JR Act must fail.

[89] In these circumstances, the AD Complaint Decision was made beyond power and amounts to jurisdictional error.[39] Declaratory relief and an order setting aside the decision may be appropriate but was not addressed in oral or written submissions. Accordingly, it is appropriate that I hear further from the parties in respect of what orders should be made in light of these reasons.

[90] It is also appropriate to briefly deal with ground 4.

Does ground 4, that the decision was unlawful for the purpose of s 58 of the HR Act, survive?

[91] Grounds 1, 2, 3 and 5 are grounds pursuant to section 20 of the JR Act. Ground 4 does not arise under the JR Act. The question remains as to whether ground 4 can be pursued despite the other grounds pursuant to the JR Act not being established.

[92] Section 58 of the HR Act deals with conduct of public entities and states as follows:

> "(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.
>
> (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

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39 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531.

(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)."

[93] Section 59 is also relevant in considering s 58 and deals with legal proceedings and states as follows:

"(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.

(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."

[94] Section 59 of the HR Act is referred to as the "piggy-back" provision. The statutory scheme does not provide for a person to bring any proceedings for contravention of s 58 of the HR Act alone. What is provided for is a mechanism by which a person can seek relief or remedy in respect of s 58 by adding – or "piggy-backing" – that claim to another action seeking relief for unlawfulness.

[95] The operation of this provision was recently discussed and applied by me in *SQH v Scott*[40] and Martin SJA in *Owen-D'Arcy v Chief Executive Queensland Corrective Services*.[41]

[96] In the current case, the Complainant commenced judicial review proceedings seeking review of the AD Complaint Decision based on grounds of unlawfulness: being, failure to take into account a relevant consideration, taking into account an irrelevant consideration and unreasonableness. A ground based on s 58 of the HR Act was brought in conjunction with the JR Act proceedings in accordance with s 59 of the HR Act. The s 58 ground was properly brought as part of the application.

[97] Victorian authorities considering s 39 of the *Charter of Human Rights and Responsibilities Act* 2006 (Vic) (**Victorian Charter**), on which s 59 of the HR Act is based, are of assistance in relation to whether the s 58 ground can be maintained if a person is unsuccessful in respect of the other unlawfulness grounds.

[98] Section 59 is an "enabling provision" and 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."[42]

[99] 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]*.[43] 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."

[100] By the operation of s 59(2) of the HR Act, ground 4 in respect of unlawfulness under s 58 of the HR Act can, in theory, still be maintained despite the finding in respect of the applicability of the JR Act affecting the other grounds.

[101] However, in circumstances where the act or decision of the Commissioner was beyond power it is difficult to see there is any utility in this ground being considered. Practically, there is no lawful decision (or conduct).

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40 [2022] QSC 16.
41 [2021] QSC 273.
42 *Goode v Common Equity Housing Ltd* [2014] VSC 585 at [25] (Bell J).
43 (2017) 52 VR 441.

[102] Section 58(1) of the HR Act provides that it is unlawful for a public entity to act or decide in a way that is not compatible with human rights (s58(1)(a)) or in making a decision to fail to give proper consideration to a human right relevant to the decision (s58(1)(b)). Both the substantive limb obligation and the procedural limb obligation are raised by the Complainant.

[103] Section 9 of the HR Act sets out the meaning of public entity. This includes, under s 9(1)(f), an entity established under an Act when the entity is performing functions of a public nature. This would include the Parole Board. Equally, it would include the Commissioner when considering a complaint under the HR Act or the AD Act or other legislation.

[104] Section 58(2) of the HR Act carves out from these obligations the situation where the public entity "could not reasonably have acted differently or made a different decision because of a statutory provision". The Commissioner identified the issue of whether there is any discretion in s 136 of the AD Act.[44]

[105] As discussed above, on the proper construction of s 136, there is no authority or power in the Commissioner under s 136 of the AD Act.[45] Consequently, while there is no discretion in s 136 it is illogical to apply s 58(2) to a decision beyond power.

[106] Here, the Commissioner could have acted differently by considering the complaint under s 139 of the AD Act. Further, it was not the case that the Commissioner could not reasonably have made a different decision because of a statutory provision. In fact, s 139 of the AD Act is consistent with the proper construction of s 136 and the exercise of the power under s 139 would have facilitated the Commissioner forming a relevant opinion about the substance, or lack thereof, of a complaint.

[107] It is also illogical to undertake the analysis in respect of the substantive limb obligation and the procedural limb obligation.

[108] The reasons show that the Commissioner did not identify or acknowledge the potential or actual impact on human rights in the reasoning process, let alone consider whether the limit was reasonable or justified. Further, the Commissioner did not identify the relevant human rights that may be affected by the decision or at all.

[109] However, where the act or decision of "not accepting" the complaint purportedly under s 136 of the AD Act was beyond power and not authorised by that section, there is no effective decision to consider for the purposes of s 58 of the HR Act.

[110] Accordingly, while ground 4 may remain in the circumstances there is no utility in undertaking the required analysis as the AD Complaint Decision under s 136 of the AD Act is beyond power.

Orders

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44 This issue was recognised by the Respondent in the submissions filed on 23 March 2022 at [13].

45 In contrast, s 139 of the AD Act provides a discretion for the Commissioner to summarily dismiss a complaint: *Ryle v Venables* (2021) 7 QR 615 at [78] and [79].

[111] Given my findings set out in these reasons, I will hear further from the parties in respect of the appropriate form of orders, including costs.