

R v QX (No 2) [2021] ACTSC 244

Court/tribunal

ACT Supreme Court (Loukas-Karlsson J)

Cause of action

Application in criminal proceedings – appointment of witness intermediary

Application of *Human Rights Act 2004*

Interpretive obligation (s 30) – meaning of “not in the interests of justice” in s 4AK of *Evidence (Miscellaneous Provisions) Act 1991*

Rights engaged / discussed

- Right to a fair trial (s 21)
- Rights of children (s 11)
- Rights in criminal proceedings (s 22(2)(g))
- Right to equality and non-discrimination (s 8)

Commission intervened?

Yes – application for leave filed on 27 November 2020

Hearing:

18 December 2020

Reasons delivered:

1 October 2021

About the intervention

The Human Rights Commission intervened in the ACT Supreme Court to clarify the human rights arguments supporting the use of an intermediary for a child witness in a sexual offence proceeding:

[R v QX \(No 2\) \[2021\] ACTSC 244](#)

Summary

The ACT Supreme Court confirmed that the appointment of an intermediary, in and of itself, does not engage an accused’s right to a fair hearing or their right to examine witnesses on the same terms as the prosecution (as recognised in s 22(2)(g) of the *Human Rights Act 2004* (HR Act)). In reaching its decision, the court also affirmed that a fair trial involves a “triangulation of interests” of taking into account the position of the accused, the victim and his or her family, and the public. The decision is a timely recognition of the role of witness intermediaries in upholding the rights of complainants in the conduct of court proceedings, including equality, protection of children and the right to a fair hearing.

Facts and background

In April 2020, the accused (QX) was charged with various sexual offences against a young person. In May 2020, QX applied to the ACT Supreme Court seeking an order that it would not be in the interests of justice for a witness intermediary to be appointed for the child complainant in their matter.

Section 4AK of the *Evidence (Miscellaneous Provisions) Act 1991* (EMPA Act) provides that the court *must* appoint a witness intermediary for prescribed categories of witness, including a complainant in a sexual offence proceeding who was a child at the time of the relevant offending.

The Court found that, on its plain meaning, s 4AK of the EMPA does not require that a prescribed witness also have “a communication difficulty” as a precondition to a witness intermediary being appointed. Instead, the “interests of justice” encompass competing considerations of fairness to the parties and the public interest in the administration of justice, with regard to all particular circumstances of the case.

Significantly, Her Honour endorsed the Commissioner’s submission that the appointment of an intermediary will not, of itself, undermine the fairness of a trial where it occurs in accordance with the EMPA. Instead, the Court acknowledged the close relationship between the right to a fair hearing and the right of equality, observing that rules and practices (like appointment of an intermediary) can ensure that vulnerable witnesses are treated fairly. In this context, Her Honour drew on ACT, UK and Victorian case law in accepting the Commissioner’s submission that the fairness of a trial requires a triangulation of interests taking account of the position of the accused, the victim and their family, and the public.

The Court drew on General Comment No 32 of the UN Human Rights Committee to articulate the content of an accused’s right to cross-examine witnesses. Rather than an absolute right to any witness or a right of confrontation per se, it seeks to ensure to an accused the same legal powers of compelling the attendance of witnesses and examining and cross-examining any witnesses as are available to the prosecution. In this way, s 22(2)(g) of the HR Act applies the principle of “equality of arms”.

Commentary

R v QX (No 2) [2021] ACTSC 244 provides timely recognition of the significant role of witness intermediaries in upholding the rights of complainants in the conduct of court proceedings, including equality, protection of children and the right to a fair hearing. The ACT Supreme Court’s acceptance that whether a hearing is fair, for the purposes of s 21 of the HR Act, involves a “triangulation of interests”, including those of the accused, the victim and their family and the public is significant. The acceptance of these arguments marks an expanded recognition of victims’ rights as inherent in the right to a fair hearing. This decision accordingly provides an important example of how the HR Act can be used to enhance the protection of victims’ rights.

In oral submissions, the Commissioner further submitted that there is no “formal role” for the reasonable limits provision in s 28 in, so far as it is possible to do so consistently with its purpose, interpreting a Territory law in a way that is compatible with human rights. To this end, the Commissioner submitted that “reasonable limits are imported into s 30 by the words ‘so far as possible’”. Her Honour noted considerable force in the view that s 28 of the HR Act is to be considered after a statutory provision has been interpreted in accordance with s 30. This distinction did not, however, affect the matter’s outcome.