In the Supreme Court of the Australian Capital Territory

No SC 328 of 2020

Nathan Davidson
Plaintiff

Director General of the Justice and Community Safety Directorate
Defendant

ACT Human Rights Commissioner
Intervener

INTERVENER'S OUTLINE OF SUBMISSIONS

A. INTRODUCTION

1. On 27 November 2020 the Commissioner was granted leave to intervene in these proceedings under s 36 of the *Human Rights Act 2004* (the **HRA**).

2. Relevant to the Commissioner's intervention, the plaintiff claims that the defendant's decisions to deny him access to an outdoor area for an hour a day while being detained in solitary confinement, and to open his rear cell door in lieu of access to an outdoor area (the **Decisions**):

    (a) resulted in actions that were incompatible with his human rights in ss 10(1)(b), 18(1), 18 (2) and 19(1) of the HRA;

    (b) failed to give proper consideration to his human rights in ss 10(1)(b), 18(1), 18(2) and 19(1) of the HRA.

3. Also relevant to the Commissioner's intervention, the plaintiff claims that clause 4.3 of the *Corrections Management (Separate Confinement) Operating Procedure 2019* (**Clause 4.3**) is incompatible with s 45 and other sections of the *Corrections Management Act 2007* (**CMA**) and his human rights in ss 10(1)(b), 18(1), 18 (2) and 19(1) of the HRA.

4. The Commissioner will make submissions with respect to the following issues arising under the HRA:

    (a) the contents of the right to humane treatment in s 19(1);

    (b) the operation of the interpretation provision in s 30;

    (c) the s 40B(1) obligations of public authorities;

    (d) the operation of s 28 with respect to reasonable limits set by laws;

    (e) the obligation to act compatibly with human rights;

    (f) the obligation to give proper consideration to human rights;

    (g) the exceptions to the above obligations contained in s 40B(2);

    (h) compliance with s 40B in this case.

B. SECTION 19(1): THE CONTENTS OF THE RIGHT TO HUMANE TREATMENT

5. The plaintiff raises the rights in ss 10(1)(b), 18(1), 18 (2) and 19(1) of the HRA. Whilst all of these rights are relevant to an extent, the Commissioner considers that in this case the primary impact on rights is appropriately and conveniently considered through the right to humane treatment while deprived of liberty in s 19(1) of the HRA. The Victorian Supreme Court has distinguished the rights in s 22(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the **Charter**) from those in s 10(b) – the equivalent of ss 19(1) and 10(1)(b) of the HRA – by noting that s 10(b) prohibits "bad conduct" towards any person whilst s 22(1) mandates "good conduct" towards persons who are detained.[1]

6. Before using s 19(1) to interpret s 45 of the CMA using s 30 of the HRA, or considering the obligations that s 19(1) imposes on public authorities using s 40B of the HRA, the contents of the right to humane treatment must be ascertained. Whilst this specific aspect of the right in s 19(1) has not been considered by any Territory court, s 19(1) more

[1] *Castles v Secretary, Department of Justice* (2010) 28 VR 141, [99].

broadly has received judicial consideration, as has the equivalent right in s 22(1) of the Charter.

7. The rights in the HRA are to be construed in "the broadest possible way".[2]

8. In *Eastman v CEO Department of Justice and Community Safety* Mansfield J rejected a claim that the failure to provide Mr Eastman with employment of his choosing involved a failure to treat him with humanity and with respect for the inherent dignity of the human person.[3] Mansfield J's observations in *Eastman* were cited with approval by Mossop J in *Islam v Director-General, Justice and Community Safety Directorate* when his Honour concluded that s 19(1) provides a "general entitlement to humane treatment" and that the question of whether or not "that statutory entitlement has been denied is a question of fact and degree to be assessed in all the circumstances".[4]

9. In *Castles v Secretary to the Department of Justice* the Supreme Court of Victoria held that when analysing the right to humane treatment the starting point should be that prisoners not be subjected to hardship or constraint other than the hardship or constraint that results from the deprivation of liberty.[5]

10. Section 31(1) of the HRA provides that international law, and the judgments of foreign and international courts and tribunals relevant to a human right may be considered in interpreting the human right. The international materials that should be considered by the Court in this case are set out below. The Victorian Supreme Court has taken international non-binding rules on detention (including the *United Nations Standard Minimum Rules for the Treatment of Prisoners*, known as the Nelson Mandela Rules, discussed below) into account when defining the scope of Charter rights.[6]

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[2] *Islam v Director General, Justice and Community Safety Directorate* [2021] ACTSC 33, [79] (McWilliam AsJ).

[3] *Eastman v CEO Department of Justice and Community Safety* [2011] ACTSC 33, [73] (Mansfield J).

[4] *Islam v Director-General, Justice and Community Safety Directorate* [2015] ACTSC 20, [87] (Mossop J).

[5] *Castles v Secretary to the Department of Justice* (2010) 28 VR 141; [2010] VSC 310 [108].

[6] *Certain Children v Minister for Families and Children* (2016) 51 VR 473, [154]; *Certain Children v Minister for Families and Children (No 2)* (2017) 52 VR 441, [264] – [265]; *De Bruyn v Victorian Institute of Forensic Mental Health* (2016) 48 VR 647, [176] – [178].

11. The Nelson Mandela Rules, which were adopted by the General Assembly of the United Nations in December 2015, set out the international law requirements for the humane treatment of prisoners. Rule 23(1) of the Nelson Mandela Rules provides:

> Every prisoner who is not employed in outdoor work shall have at least one hour of suitable exercise in the open air daily if the weather permits.

12. In their text, *A Human Rights Approach to Prison Management: Handbook for Prison Staff 3rd Ed*, Andrew Coyle and Helen Fair discuss the exercise and open air entitlement in rule 23(1) of the Mandela Rules:[7]

> Many prisoners, in particular pre-trial prisoners, spend the majority of their days indoors in conditions of relatively close confinement, with limited access to light and fresh air. In these circumstances it is essential for both physical and mental health that they should be given an adequate amount of time each day in the open air and should have the opportunity to walk about or to take other exercise.
>
> The minimum recommended time in the fresh air is one hour each day. During this period prisoners should be able to walk about in relatively large areas and should also, if at all possible, be able to see natural growth and vegetation. **The practice in some countries of placing large numbers of prisoners into small walled yards, which are in effect cells without roofs, for an hour each day does not satisfy the obligation to give the opportunity to exercise in the open air.**
>
> The right to exercise in the open air applies to all prisoners, including those who are under any kind of segregation or punishment.

13. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment has also considered the exercise and open air requirement. In its Second General Report it noted:[8]

> Specific mention should be made of outdoor exercise. The requirement that prisoners be allowed at least one hour of exercise in the open air every day is widely accepted as a basic safeguard... [A]ll prisoners without exception (including those undergoing cellular confinement as a punishment) should be offered the possibility to take outdoor exercise daily. It is also axiomatic that outdoor exercise facilities should be reasonably spacious and whenever possible offer shelter from inclement weather...

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[7] Andrew Coyle and Helen Fair, *A Human Rights Approach to Prison Management: Handbook for Prison Staff 3rd Ed*, 2018, page 47 (emphasis added).

[8] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *Second General Report* [CPT/Inf (92) 3], [48].

14. The jurisprudence of the European Court of Human Rights is consistent with the above position.[9] The following comments made in *Muršić v Croatia* reflect the settled position of that Court:[10]

> [O]utdoor exercise facilities should be reasonably spacious and whenever possible offer shelter from inclement weather.

15. The physical characteristics of outdoor exercise facilities have featured prominently in the European Court's analysis.[11] For instance, an exercise yard that is just two square metres larger than the cell, is surrounded by three-metre-high walls, and has an opening to the sky covered with metal bars and a thick net has been held not to offer inmates proper opportunities for recreation and recuperation.[12]

16. The United Nations Office for Project Services has provided the following technical guidance on these issues for the purposes of prison planning:[13]

> International standards require that prisoners receive a minimum of one hour access to open air per day (excluding weather limitations) to ensure their health and well-being.
>
> Prison facilities must provide a suitable space and equipment to provide prisoners with indoor or outdoor exercise. In the case of inclement weather, alternative arrangements for exercise should be provided...
>
> All prisoners should have access to controlled outdoor space, with a minimum area of at least $4m^2$ per person. This is based on a reasonable expectation of space for movement and recreation activities. In wet weather and hot climates where sun shading is needed to maintain suitable shelter, a covered area may provide a suitable space for recreational and cultural activities.

17. A useful apex court decision in a comparable jurisdiction is the decision of the Supreme Court of New Zealand *Taunoa v Attorney-General* with respect to a "behaviour modification/management regime" (**BMR**) to manage very difficult and dangerous

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[9] The European Convention on Human Rights (ECHR) does not contain a stand-alone right to humane treatment when deprived of liberty, however, it is treated as an implied right within the scope of article 3 of the ECHR, which prohibits torture and inhuman or degrading treatment or punishment (the equivalent to s 10(1) of the HRA).

[10] *Muršić v Croatia* (Application no. 7334/13) (20 October 2016), [133].

[11] *Ananyev and Others v Russia* (Applications nos. 42525/07 and 60800/08) (10 January 2012), [52].

[12] *Moiseyev v Russia* (Application no. 62936/00) (6 April 2009), [125].

[13] United Nations Office for Project Services, *Technical Guidance for Prison Planning: Technical and Operational Considerations Based on the Nelson Mandela Rules* 2016, p 171.

prisoners.[14] Somewhat confusingly for Australians, the Supreme Court is New Zealand's highest court and sits above both the New Zealand High Court and its Court of Appeal. As can be seen from the excerpts set out below, the NZ Supreme Court relied extensively on international materials to determine the requirements for the humane treatment of prisoners.

18. For example in Elias CJ's judgment her Honour used international materials to inform the scope of the rights of those deprived of liberty:[15]

> As already discussed, in phase 1 of the BMR no yard exercise at all was permitted and the prisoners were unlocked only for one hour per day. In that hour they had access to the smaller exercise cell, but Ronald Young J found it barely adequate for exercise purposes….
>
> In addition to non-compliance with the minimum entitlement under the regulations, the exercise component of the regime fell far short of that required by the United Nations Standard Minimum Rules for the Treatment of Prisoners. These are the standards which New Zealand, in its reports to the United Nations Human Rights Committee, has said are observed by New Zealand legislation and regulations. Rule 21 of the standards sets as a minimum requirement "one hour of suitable exercise in the open air daily if the weather permits", in which the able-bodied shall receive "physical and recreational training" with suitable equipment. The importance of outdoor exercise for prisoner well-being is emphasised by the Committee for the Prevention of Torture in the 1991 report cited by Blanchard J at para [194]. And as the Court of Appeal in the present case commented of the minimum entitlement:
>
> > "[180] It should not be underestimated how important such an entitlement would be to someone confined for 22 or 23 hours per day in a cell."

19. Her Honour also referred to the specific requirements for exercise, particularly in the open air, and what the source of that requirement is at international law:[16]

> Lack of opportunity for exercise, particularly in the open air, features in a number of assessments of whether treatment is inhuman. Again, the United Nations Standard Minimum Rules and reg 42(1), establishing minimum standards in New Zealand prisons, indicate the importance of such exercise for prisoner welfare. The link between provision of minimum standards for exercise and compliance with art 7 (and therefore s 9) is made by New Zealand in its

[14] *Taunoa v Attorney-General* [2008] 1 NZLR 429.

[15] *Taunoa v Attorney-General* [2008] 1 NZLR 429, [50] – [51].

[16] *Taunoa v Attorney-General* [2008] 1 NZLR 429, [85].

periodic reports to the United Nations Human Rights Committee referred to at para [29].

20. Her Honour also commented on the need for a compelling justification when "elemental human needs" are interfered with:[17]

> The position in relation to exercise was, in the administration of the BMR, even more restricted than the non-complying entitlement in the programme as designed. Because of his very lengthy period of segregation, that impacted most severely on Mr Taunoa, but all prisoners were affected. Ronald Young J accepted the deprivations were serious for the inmates. No penological justification for deprivation of such elemental human needs as fresh air, exercise, and "constructive use of time" is suggested. Such deprivation, as the setting of minimum standards suggests, risked the physical and mental integrity of the prisoners, contrary to the standards described above at para [72]. These were not privileges, around the gradual introduction of which some incentive for good behaviour could legitimately be constructed. They were minimum human needs, recognised as such by the legislation and by international standards.

21. In the same judgment Blanchard J also compared the conditions faced by prisoners on the behaviour modification program with the standards set by the Committee established under the European Convention for the Prevention of Torture:[18]

> The entitlement to outside exercise sometimes was not met for significant periods because of prison staff shortages, malfunctioning of yard doors and, to a lesser extent, the choice of the prisoner not to take a "yard", for example because of bad weather. This does not sit comfortably with the emphasis placed by, for example, the Committee established under the European Convention for the Prevention of Torture upon the importance of regular outdoor exercise to sentenced prisoners:
>
> > "The requirement that prisoners be allowed at least one hour of exercise in the open air every day is widely accepted as a basic safeguard (preferably it should form part of a broader programme of activities). The CPT wishes to emphasise that all prisoners without exception (including those undergoing cellular confinement as a punishment) should be offered the possibility to take outdoor exercise daily. It is also axiomatic that outdoor exercise facilities should be reasonably spacious and whenever possible offer shelter from inclement weather."

[17] *Taunoa v Attorney-General* [2008] 1 NZLR 429, [96].

[18] *Taunoa v Attorney-General* [2008] 1 NZLR 429, [194].

22. The right to humane treatment when deprived of liberty in s 19(1) of the HRA should be understood as the same universal human right to be treated with humanity when deprived of liberty as is discussed in the international materials.

23. The area to which the plaintiff's cell has access is in reality another small enclosed room. It is comprised of four solid block concrete walls, covered by a roof made of perforated metal sheeting and is about the same size as the cell itself (measuring 2.33m x 3.6m).[19] It has no view outdoors, and only a very limited view of the sky that is completely screened by perforated metal sheeting. The Commissioner submits that this area does not meet the open air and exercise requirements established by the international jurisprudence.[20] In particular this room is not suitable for or equipped for recreation and exercise and does not provide access to *open air* – it is a fully enclosed space with a ventilated roof.

C. SECTION 30: INTERPRETATION

24. Section 30 of the HRA provides:

> So far as is possible to do so consistently with its purpose, a Territory law must be interpreted in a way that is compatible with human rights.

25. Section 30 of the HRA is relevant to the questions to be determined by the Court in this matter including because:

    (a) it is necessary to consider what s 45 of the CMA means in order to determine whether Clause 4.3 is inconsistent with it;

    (b) it is necessary to consider what regulations s 14 of the CMA are intended to authorise in order to determine whether Clause 4.3 is within power.

26. Section 30 of the HRA was wholly replaced in 2008, before the High Court's decision with respect to s 32 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**Charter**) in *Momcilovic*.[21] In determining the meaning of an Act, s 142 of the *Legislation Act 2001* provides that the explanatory statement to the Act may be

[19] *Affidavit of Timothy Andrew Rust*, [20] and Exhibit TAR-1.

[20] *Moiseyev v Russia* (Application no. 62936/00) (6 April 2009), [125].

[21] *Momcilovic v The Queen* (2011) 245 CLR 1.

considered. The *Explanatory Statement* for the bill introducing the s 30 amendment states:[22]

> Clause 5 replaces the existing interpretative provision in the *Human Rights Act 2004*. It clarifies the interaction between the interpretive rule and the purposive rule such that as far as it is possible a human rights consistent interpretation is to be taken to all provisions in Territory laws. This means that unless the law is intended to operate in a way that is inconsistent with the right in question, the interpretation that is most consistent with human rights must prevail. This is consistent with the Victorian approach contained in subsection 32(1) of the *Charter of Human Rights and Responsibilities Act 2006*.

27. The statement makes it clear that s 30, like s 32 of the Charter, is an interpretation provision. The statement also suggests that s 30 will result in varying levels of consistency with human rights depending on the purpose of the particular legislation, and on what interpretations are available in any particular case.[23]

28. The ACT Court of Appeal confirmed in *Andrews v Thomson* that s 30 of the HRA should be interpreted in the same way as the "closely equivalent" s 32 of the Charter, and applied the High Court's decision in *Momcilovic* to s 30 of the HRA.[24]

29. In *Momcilovic*, six Justices of the High Court held that s 32 of the Charter is an ordinary rule of interpretation.[25] The proper interpretation and application of s 32 of the Charter in light of the decision of the High Court in *Momcilovic* has been the subject of extensive consideration by the Victorian Court of Appeal in various cases since that decision by the High Court.[26] The Victorian Court of Appeal has interpreted *Momcilovic* as preserving a role for s 32 of the Charter where the words of a statute are capable of more than one meaning:[27]

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[22] *Explanatory Statement, Human Rights Amendment Bill 2007*.

[23] Whether this means that s 28 of the *Human Rights Act* (the equivalent of s 7(2) of the *Charter*) is a part of the interpretive process, and if so the nature of that role, remains to be determined.

[24] *Andrews v Thomson* [2018] ACTCA 53, [45] (Elkaim , Loukas-Karlsson JJ and Robinson AJ).

[25] *Momcilovic v The Queen* (2011) 245 CLR 1; [51] (French CJ); [146], [170] (Gummow J with Hayne J agreeing at [280]), [545] – [546], [565], [574] (Crennan and Kiefel JJ), [684] (Bell J).

[26] *Slaveski v Smith* (2012) 34 VR 206; *Noone, Director of Consumer Affairs Victoria v Operation Smile (Australia)* Inc (2012) 38 VR 569; *Nigro v Secretary, Department of Justice* (2013) 41 VR 359; *WBM v Chief Commissioner of Police* (2012) 43 VR 446; *DPP v Leys* (2012) 44 VR 1; *Victoria Police Toll Enforcement v Taha* (2013) 49 VR 1.

[27] *Slaveski v Smith* (2012) 34 VR 206, [24] (the Court: Warren CJ, Nettle and Redlich JJA).

> Consequently, if the words of a statute are clear, the court must give them that meaning. If the words of a statute are capable of more than one meaning, the court should give them whichever of those meanings best accords with the human right in question.

30. The Victorian Court of Appeal has also found, applying its understanding of *Momcilovic*, that s 32 applies in the same manner as the principle of legality:[28]

> Section 32(1) is not to be viewed as establishing a new paradigm of interpretation which requires courts, in the pursuit of human rights compatibility, to depart from the ordinary meaning of the statutory provision and hence from the intention of the parliament which enacted the statute. Accordingly, as was observed in *Slaveski v Smith*, the court must discern the purpose of the provision in question in accordance with the ordinary techniques of statutory construction essayed in *Project Blue Sky*. The statute is to be construed against the background of human rights and freedoms set out in the Charter in the same way as the principle of legality is applied. The human rights and freedoms set out in the Charter incorporate or enhance rights and freedoms at common law. Section 32(1) thus applies to the interpretation of statutes in the same way as the principle of legality but with a wider field of application.

31. The interpretation of s 45 of the CMA should be approached in the manner discussed above. That section provides that:

> **45 Access to open air and exercise**
>
> (1) The director-general must ensure, as far as practicable, that detainees—
>
> (a) have access to the open air for at least 1 hour each day; and
>
> (b) can exercise for at least 1 hour each day.
>
> (2) The standards under subsection (1) may both be satisfied during the same hour on any day.
>
> (3) For chapter 10 (Discipline), this section is taken to provide an entitlement for each detainee in relation to access to the open air and exercise.

32. When considering what is required by the phrases "as far as practicable", "access to the open air" and "can exercise" in that section, s 30 of the HRA requires the Court to give those phrases the meaning that "best accords with the human right in question", in the words of the Victorian Court of Appeal, or "the interpretation that is most consistent with

[28] *Nigro v Secretary, Department of Justice* (2013) 41 VR 359, [85] (Redlich, Osborn and Priest JJA).

human rights" in the words of the *Explanatory Statement*. The human right that is most directly relevant to s 45 of the CMA is the right to humane treatment when deprived of liberty, contained in s 19(1) of the HRA.

33. Further, the CMA was clearly drafted with an eye to the protection of human rights, and the following provisions are particularly relevant to the interpretation of its provisions using s 30 of the HRA because they aim to ensure the protection of the right in s 19(1):

> **7 Main objects of Act**
>
> The main objects of this Act are to promote public safety and the maintenance of a just society, particularly by —
>
> …
>
> (c) ensuring that detainees are treated in a decent, humane and just way; …
>
> **8 Management of correctional services**
>
> Correctional services must be managed so as to achieve the main objects of this Act, particularly by —
>
> …
>
> (b) ensuring respect for the humanity of everyone involved in correctional services, including detainees, corrections officers and other people who work at or visit correctional centres; and
>
> (c) ensuring behaviour by corrections officers that recognises and respects the inherent dignity of detainees as individuals; …
>
> **9 Treatment of detainees generally**
>
> Functions under this Act in relation to a detainee must be exercised as follows:
>
> (a) to respect and protect the detainee's human rights;
>
> (b) to ensure the detainee's decent, humane and just treatment;
>
> (c) to preclude torture or cruel, inhuman or degrading treatment;
>
> (d) to ensure the detainee is not subject to further punishment (in addition to deprivation of liberty) only because of the conditions of detention;
>
> (e) to ensure the detainee's conditions in detention comply with section 12 (Correctional centres—minimum living conditions); …
>
> **12 Correctional centres—minimum living conditions**

> (1) To protect the human rights of detainees at correctional centres, the director-general must ensure, as far as practicable, that conditions at correctional centres meet at least the following minimum standards:
>
> …
>
> (e) detainees must have reasonable access to the open air and exercise; …

34. The content of the right in s 19(1) of the HRA is canvassed above. Section 30 of the HRA requires that the phrases "as far as practicable", "access to the open air" and "can exercise" in s 45 of the CMA be interpreted consistently with rights of prisoners to access the open air and exercise as they are more fully described at international law (as discussed above). This interpretation is consistent with the rights protective purpose of s 45 of the CMA, which is reinforced by ss 7, 8, 9 and 12 of the CMA. That purpose is promoted by reliance on the considered guidance provided by international materials, as a means of scoping the entitlements to access to the open air and exercise discussed above. The interpretation of the three phrases from s 45 of the CMA is canvassed below.

35. The international materials suggest an interpretation of "access to the open air" as meaning "an outdoor space". This is evident in the requirement in those materials that provision also be made for inclement weather.

36. The international materials suggest an interpretation of "can exercise" as meaning "suitable to exercise in", including a requirement that exercise equipment be available. Although a highly motivated prisoner *could* exercise in the area provided, using bodyweight alone, this area is not suitable for or equipped for recreation and exercise in the way envisaged by the international materials.

37. Something being "practicable" involves it being put into practice or feasible.[29] The phrase "as far as practicable" means "as far as it is possible to go"[30] or "to the maximum extent possible"[31]. Accepting that security requirements in prisons will affect what is

[29] *Pioneer Concrete Services v Yelnah Pty Ltd and Others* (1986) 5 NSWLR 254, 268.

[30] *CNK v R* (2011) 32 VR 641, [8].

[31] *CNK v R* (2011) 32 VR 641, [8] quoting from *Owen v Crown House Engineering Ltd* [1973] 3 All ER 618, 622–3.

"possible" the international case law should be used to guide what this Court expects from the defendant in terms of what is possible for first world prisons.

38. Applying s 30 of the HRA to this already onerous phrase, the Court should not allow easily resolved obstacles to be placed in the way of giving prisoners their entitlement to open air and exercise. For example:

    (a) the fact that a particular area of the prison has been built in a manner that does not provide a "trap" through which a prisoner can be handcuffed cannot limit what is considered "possible" because it is possible (in fact it is necessary) to change the built environment if the current environment makes it impossible to provide basic entitlements whilst maintaining prison security;

    (b) the fact that providing prisoners with their basic entitlements would require an increase in staffing cannot limit what is considered "possible" because it is possible (in fact it is necessary) to increase staffing if the current staffing level makes it impossible to provide basic entitlements whilst maintaining prison security.

39. The Commissioner submits that in using the phrase "as far as practicable" Parliament has made provision for unexpected or non-routine events, that make providing the entitlement on any particular day impossible. An example of this would be a prison lockdown. The examples provided in the *Explanatory Statement* similarly emphasise the unanticipated and non-everyday nature of the type of event that may prevent the provision of the entitlement:[32]

> **Clause 45 — Access to open air and exercise**
>
> Clause 45 prescribes a statutory minimum of an hour's access to open air per day for each detainee, and an hour's access to exercise.
>
> Access to open air and exercise may be combined in the same hour for each detainee.
>
> The entitlement is not absolute, as **there may be practical reasons why the entitlement cannot be implemented every day. For example a state of emergency, or a natural disaster etc.** (emphasis added)

[32] *Explanatory Statement, Corrections Management Bill 2006.*

> Clause 45(3) stipulates that all of the matters in the clause are entitlements and not to be regarded as privileges for the purposes of disciplinary action.

40. In addition to its use when interpreting s 45 of the CMA, s 30 of the HRA is also relevant to the interpretation of s 14(1) of the CMA, which provides:

> The director-general may make corrections policies and operating procedures, consistent with this Act, to facilitate the effective and efficient management of correctional services.

41. Section 30 of the HRA requires the broad policy making power in s 14(1) to be interpreted compatibly with human rights, where consistent with its purpose, so as to only authorise the making of policies that are compatible with human rights. This approach has been taken by the New Zealand Court of Appeal under the NZ *Bill of Rights Act 1990*:[33]

> To the extent that it is necessary to refer to the Bill of Rights, the regulation is invalid because the empowering provision, read, just like any other section, in accordance with [the interpretation obligation in] s 6 of the Bill of Rights, does not authorise the regulation. The Court merely gives s 45 [the empowering provision] a meaning that is consistent with the rights and freedoms contained in the Bill of Rights. In accordance with s 6, that meaning is to be preferred to any other meaning.

42. The relevant instruments made under s 14 of the CMA regarding the entitlement to fresh air and exercise are:

- the *Corrections Management (Management Unit) Policy 2011* (**2011 Policy**), which was in force until June 2019 and provided (on p 2):

> **<u>Access to exercise</u>**
>
> Prisoners in the Management Unit will have access to the exercise yard at the rear of their cell. Prisoners may also have access to a larger exercise yard in the unit, subject to the operational requirements of the unit and the prisoner's conformity to the unit's routine. The CO4/CO3s will determine access to the yard.

- the *Corrections Management (Separate Confinement) Operating Procedure 2019*, which commenced in June 2019 and provides at Clause 4.3:

[33] *Drew v Attorney-General* [2002] 1 NZLR 58, [68].

> The open rear cell door will count as the minimum one (1) hour of fresh air and exercise.

43. In contrast to the 2011 Policy, Clause 4.3 attempts to "deem" compliance with the requirements of the right to humane treatment, and is incompatible with that right. It is also inconsistent with the rights-protective purposes of the CMA, discussed above. Section 14(1) only authorises the making of policies and operating procedures that are "consistent with" the Act. Clause 4.3 is therefore not authorised by s 14(1) and is invalid.

44. To the extent that Clause 4.3 is inconsistent with s 45 of the CMA or ss 7, 8, 9 and 12 of the CMA, it is beyond power for that reason also. Because Clause 4.3 attempts to "deem" compliance with the open air and exercise requirements using a means that does not in fact provide open air and exercise, it is inconsistent with s 45 of the CMA (once it is interpreted using s 30 of the HRA) and ss 7, 8, 9 and 12 of the CMA.

D. SECTION 40B(1): OBLIGATIONS ON PUBLIC AUTHORITIES

45. Section 40B(1) of the HRA provides:

> It is unlawful for a public authority—
>
> (a) to act in a way that is incompatible with a human right; or
>
> (b) in making a decision, to fail to give proper consideration to a relevant human right.

46. Section 28 of the HRA provides that human rights may only be subject to reasonable limits set by law:

> (1) Human rights may be subject only to reasonable limits set by laws that can be demonstrably justified in a free and democratic society.
>
> (2) In deciding whether a limit is reasonable, all relevant factors must be considered, including the following:
>
> (a) the nature of the right affected;
>
> (b) the importance of the purpose of the limitation;
>
> (c) the nature and extent of the limitation;
>
> (d) the relationship between the limitation and its purpose;

(e) any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.

47. Section 40B was inserted into the HRA by the *Human Rights Amendment Act 2008*. The *Explanatory Statement* for that amending Act explained this new obligation:

> Sub-section 40B(1) is modelled on section 38 of the Victorian *Charter of Human Rights and Responsibilities Act 2006* and section 6 of the United Kingdom *Human Rights Act 1998*. It is intended to ensure that public authorities act and make decisions compatibly with human rights. An action that affects a protected right will be compatible with human rights where the extent to which that right is affected is justifiable in accordance with section 28 of the *Human Rights Act 2004*.

48. The defendant is a public authority to which the requirements of s 40B of the HRA apply. The obligation in s 40B(1)(a) requires a public authority to act in a way that either does not limit human rights at all or only limits those rights in a manner that complies with s 28 – so much is clear from the *Explanatory Statement*. This conclusion is also supported by the small amount of jurisprudence that has developed in the ACT and the more developed jurisprudence in relation to the Victorian Charter.

49. The obligation in s 40B(1)(b) is less straightforward. The Commissioner submits that the obligation in s 40B(1)(b) requires a public authority to give a certain level of consideration to "relevant" human rights, the extent of which will be explored below. A relevant human right is a right in the HRA that could be curtailed or limited by the decision that is being made (even if that limitation is prima facie reasonable).

50. The Supreme Court of the ACT first considered the obligations in s 40B in *Hakimi v Legal Aid Commission (ACT)*.[34] The Court required proper consideration to be given where there is any limit on a human right, even if that limit is subsequently found to be proportionate under s 28 of the HRA.[35] This approach is similar to the approach taken in Victoria:[36]

> The procedural and substantive limbs of s 38(1) of the Charter are cumulative. That is, in making a decision, a public authority must both give proper

[34] *Hakimi v Legal Aid Commission (ACT)* [2009] ACTSC 48; (2009) 3 ACTLR 127 (Refshauge J).

[35] *Hakimi v Legal Aid Commission (ACT)* [2009] ACTSC 48; (2009) 3 ACTLR 127, [52] (Refshauge J).

[36] *Certain Children v Minister for Families and Children (No 2)* [2017] VSC 251; (2017) 52 VR 441, [177] (John Dixon J).

consideration to engaged human rights and reach an outcome that is, in substance, compatible with those rights.

51. A number of Victorian decisions[37] have adopted the following questions as being relevant for determining whether a public authority has complied with its obligations under the Victorian equivalent of s 40B:

    (a) The relevance or engagement question: is any human right relevant to the decision or action that a public authority has made, taken, proposed to take or failed to take?

    (b) The limitation question: if so, has the public authority done or failed to do anything that limits that right?

    (c) The proportionality or justification question: if so, is that limit under law (in the ACT: "set by laws") reasonable and demonstrably justified having regard to the matters set out in s 7(2) of the Charter (ie s 28 of the HRA)?

    (d) The proper consideration question: even if the limit is proportionate, if the public authority has made a decision, did it give proper consideration to the right?

    (e) The inevitable infringement question: was the act or decision made under an Act or instrument that gave the public authority no discretion in relation to the act or decision, or does the Act confer a discretion that cannot be interpreted in a way that is consistent with the protected right?

E. SECTION 28: REASONABLE LIMITS SET BY LAWS

52. In *Hakimi* the Court raised, but did not resolve, the question of whether justifiable limits permitted in s 28 of the HRA are able to be relied on in the absence of a law authorising the limit.[38] The Victorian jurisprudence with respect to the equivalent to s 28 of the HRA (discussed below) makes it clear than in order to constitute a reasonable limit under that section, the limit must be imposed "under law". Arguably, the phrase "set by laws" used

[37] *Certain Children v Minister for Families and Children (No 2)* [2017] VSC 251; (2017) 52 VR 441, [174]; *Minogue v Doherty* [2017] VSC 724, [74]; *Haigh v Ryan* [2018] VSC 474, [46].

[38] *Hakimi v Legal Aid Commission (ACT)* [2009] ACTSC 48; (2009) 3 ACTLR 127, [92] (Refshauge J).

in s 28 makes it even clearer than the Victorian provision that the reasonable limit must be authorised by law in order to be considered a reasonable limit.

53. The issue of the lawfulness of any limits under s 7(2) of the Victorian Charter was extensively considered by Justice Bell in *Kracke v Mental Health Review Board*.[39] His Honour concluded that the phrase "under law" confined the types of limitation that were permitted under that section, imposing a "legality requirement".[40] His Honour confirmed that limitations can only be imposed under law, and that the relevant law must possess certain attributes.[41] These attributes were summarised by reference to the case of *Olsson v Sweden (No 1)* in which the European Court of Human Rights said the three requirements that were part of being "in accordance with law" under art 8(1) of the *European Convention on Human Rights* (**ECHR**) were: (a) precision and foreseeability (which did not mean excessive rigidity); (b) protection against arbitrariness, consistent with the rule of law; and (c) reasonable indication of the scope of any discretion, having regard to its legitimate aims.[42]

54. It has been observed that the legality requirement in the Victorian reasonable limits provision is an "essential component of fundamental importance".[43] The purposes of the legality requirement are described by Lord Bingham in the context of that same requirement in the ECHR:[44]

> The lawfulness requirement in the Convention addresses supremely important features of the rule of law. The exercise of power by public officials, as it affects members of the public, must be governed by clear and publicly accessible rules of law. The public must not be vulnerable to interference by public officials acting on any personal whim, caprice, malice, predilection or purpose other than that for which the power was conferred. This is what, in this context, is meant by arbitrariness, which is the antithesis of legality. This is the test which any interference with or derogation from a Convention right must meet if a violation is to be avoided.

[39] *Kracke v Mental Health Review Board* [2009] VCAT 646; (2009) 29 VAR 1 (Bell J).

[40] *Kracke v Mental Health Review Board* [2009] VCAT 646; (2009) 29 VAR 1, [162] Bell J.

[41] *Kracke v Mental Health Review Board* [2009] VCAT 646; (2009) 29 VAR 1, [165] Bell J.

[42] *Olsson v Sweden (No 1)* (Application no. 10465/83) (24 March 1988), [61].

[43] *Kracke v Mental Health Review Board* [2009] VCAT 646; (2009) 29 VAR 1, [168] Bell J.

[44] *R (Gillan) v Commissioner of Police for the Metropolis* [2006] 2 WLR 537, [34].

55. In *DPP v Kaba* the Supreme Court of Victoria confirmed that under s 7(2) of the Charter a person's human rights can only be limited "subject to law".[45] Because the police had no lawful authority for the coercive questioning that limited Mr Kaba's privacy and freedom of movement, "the police actions could not satisfy the legality component of the limitations test in s 7(2)".[46]

56. The Victorian Supreme Court has held that in order to rely upon a law to provide reasonable justification for an action that limits human rights, the public authority must act within the confines of that law.[47]

57. The Commissioner submits that the requirement that a limitation be "set by law" similarly requires that any act that limits human rights must be based in law and authorised by law. It also means that any limiting act must conform to any legislative safeguards or requirements of the law relied upon to authorise it. Before the proportionality or justification question is asked, the defendant must show that any limit sought to be justified is a limit "set by law".

58. The law that may be relied upon by the defendant in this case is Clause 4.3 from June 2019 onwards, and the 2011 Policy that applied previously. However if Clause 4.3 or the 2011 Policy conflicts with s 45 of the CMA they are invalid and cannot be used to justify a limit on human rights.

59. Even if Clause 4.3 and the 2011 Policy are valid, the limit that they authorise(d) must be justified under the test in s 28 of the HRA. In *Minogue v Thompson* the Supreme Court of Victoria recently confirmed that the burden of establishing that a limit on rights is justified, or proportionate, rests with the party limiting (or seeking to limit) that right, and that this is a heavy burden:[48]

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[45] *DPP v Kaba* [2014] VSC 52; (2014) 44 VR 526 (Bell J), [468].

[46] *DPP v Kaba* [2014] VSC 52; (2014) 44 VR 526 (Bell J), [468].

[47] *Certain Children v Minister for Families and Children (No 2)* [2017] VSC 251; (2017) 52 VR 441, [202] (John Dixon J).

[48] *Minogue v Thompson* [2021] VSC 56, [82].

> The standard of justification required is stringent; evidence required to prove that a limit on human rights is justified, having regard to the matters set out in s 7(2), should be 'cogent and persuasive'.

60. When assessing whether the test in s 7(2) had been met, Richards J found that justification under s 7(2) had not been demonstrated by the prison governor's evidence of his belief that certain measures were necessary for the security and good order of the prison.[49] Her Honour held that "anecdotal evidence is an insufficient basis upon which to limit human rights".[50] In particular, her Honour concluded that the requirements of s 7(2) of the Charter (equivalent to s 28 of the HRA) were not met because the evidence did not show why alternative procedures that were less intrusive had not been adopted.[51]

61. *Minogue v Thompson* makes it clear that when considering the evidence put forward in support of any limit on rights by the defendant, s 28 of the HRA will require the Court to robustly examine that evidence to assess whether it demonstrably justifies the limits on rights. In doing so, the defendant must demonstrate that each of the individual factors in s 28 have been met.

F. THE OBLIGATION TO ACT COMPATIBLY

62. The obligation to "act compatibly" under s 40(1)(a) of the HRA was raised in the Supreme Court of the ACT in *DPP v Close*.[52] In considering the obligation to act compatibly the Court first considered whether a forfeiture order interfered with the right to home in s 12 of the HRA.[53] The Court then considered whether any limitation was demonstrably justified in a free and democratic society, applying the reasonable limits test in s 28 of the HRA.[54] The Court concluded that the "actions of the DPP have not breached the human rights of the defendants and that s 40B of the HRA [is] not engaged".[55]

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[49] *Minogue v Thompson* [2021] VSC 56, [88].

[50] *Minogue v Thompson* [2021] VSC 56, [88].

[51] *Minogue v Thompson* [2021] VSC 56, [88].

[52] *DPP v Close & Anor* [2015] ACTSC 10 (Burns J).

[53] *DPP v Close & Anor* [2015] ACTSC 10, [52] - [68] (Burns J).

[54] *DPP v Close & Anor* [2015] ACTSC 10, [69] (Burns J).

[55] *DPP v Close & Anor* [2015] ACTSC 10, [69] (Burns J).

63. The obligation to act compatibly was also considered by the Court in *DPP v Nikro*.[56] In that case the Court held that the DPP's action in initiating confiscation proceedings was "not the operative cause of any confiscation order, and as such cannot be the cause of any breach of the defendant's human rights under s 24 of the HRA, even assuming that the making of any such order constituted a breach of those rights".[57]

64. The Court has also considered this obligation in *Miles v Director-General of the Justice and Community Safety Directorate*.[58] In that case the Court acknowledged that the HRA gave the Court powers to provide relief where public authorities act contrary to the HRA "and it should not hesitate to do so in appropriate circumstances".[59] The Court noted that it was for the applicant to establish that the respondent was acting in such a way as to breach his rights.[60] However the Court has previously confirmed that once a limitation has been shown to have occurred, the burden of proof shifts to the party seeking to justify the limitation of the right (albeit that decision involved a consideration of that question in the context of statutory interpretation not when applying s 40B).[61]

65. Consistently with the decisions of the Supreme Court of the ACT, Victorian courts have assessed whether an act is "incompatible" with a human right by reference to the reasonable limits provision in s 7(2) of the Victorian Charter.[62] Whilst the jurisprudence in Victoria has similarly recognised that it is for a plaintiff to show that their rights have been limited by the action of a public authority, the Supreme Court of Victoria has provided the following additional guidance about the practical demands of this burden:

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[56] *DPP v Nikro* [2017] ACTSC 15; (2017) 265 A Crim R 158 (Burns J).

[57] *DPP v Nikro* [2017] ACTSC 15; (2017) 265 A Crim R 158, [33] (Burns J).

[58] *Miles v Director-General of the Justice and Community Safety Directorate* [2016] ACTSC 70, (Burns J).

[59] *Miles v Director-General of the Justice and Community Safety Directorate* [2016] ACTSC 70, [35] (Burns J).

[60] *Miles v Director-General of the Justice and Community Safety Directorate* [2016] ACTSC 70, [41] (Burns J).

[61] *Re Application for Bail by Islam* [2010] ACTSC 147; (2010) 4 ACTLR 235, [241] (Penfold J).

[62] *Baker v DPP* [2017] VSCA 58; (2017) 270 A Crim R 318, [57], *Certain Children v Minister for Families and Children (No 2)* [2017] VSC 251; (2017) 52 VR 441, [199] and [206] (John Dixon J), *De Bruyn v Victorian Institute of Forensic Mental Health* 2016] VSC 111; (2016) 48 VR 647[, [100] (Riordan J); *DPP v Kaba* [2014] VSC 52; (2014) 44 VR 526 (Bell J), [468]; *Kracke v Mental Health Review Board* [2009] VCAT 646; (2009) 29 VAR 1, [99] (Bell J).

(a) Once a plaintiff has established *prima facie* incompatibility, the burden shifts to the defendant to justify the limitations caused by their actions and decisions.[63]

(b) The burden on a public authority to justify limitations is a heavy one, the standard of proof is high, requiring a degree of probability commensurate with the occasion, and must be strictly imposed in circumstances where the plaintiff is particularly vulnerable.[64]

66. The Supreme Court of Victoria has also confirmed that the statutory task given to the courts by s 38(1) of the Charter (the equivalent to s 40B) is not the same as the task that the Court performs when undertaking judicial review of a decision. Under s 38(1) of the Charter:

(a) Proportionality is to be judged by the court, it is not to be assessed by the original decision maker.[65]

(b) The court itself must objectively assess the nature and extent of the limit on the right and the relationship between the limit and its purpose.[66]

(c) The determination of Charter unlawfulness requires "an assessment that is closer to merits review than is usual in judicial review".[67]

(d) The assessment of proportionality requires a greater intensity of review.[68]

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[63] *Certain Children v Minister for Families and Children (No 2)* [2017] VSC 251; (2017) 52 VR 441, [203] (John Dixon J).

[64] *Certain Children v Minister for Families and Children (No 2)* [2017] VSC 251; (2017) 52 VR 441, [203] (John Dixon J).

[65] *Certain Children v Minister for Families and Children (No 2)* [2017] VSC 251; (2017) 52 VR 441, [218] (John Dixon J).

[66] *Certain Children v Minister for Families and Children (No 2)* [2017] VSC 251; (2017) 52 VR 441, [206] (John Dixon J); *Re Application under the Major Crimes (Investigative Powers) Act 2004* (2009) 24 VR 415, [150] (Warren CJ).

[67] *Certain Children v Minister for Families and Children (No 2)* [2017] VSC 251; (2017) 52 VR 441, [206] (John Dixon J); *PJB v Melbourne Health* (*Patrick's Case)* (2011) 39 VR 373, 421 [223].

[68] *Certain Children v Minister for Families and Children (No 2)* [2017] VSC 251; (2017) 52 VR 441, [206] (John Dixon J); *PJB v Melbourne Health* (*Patrick's Case)* (2011) 39 VR 373, 421 [223].

67. In discussing the "intensity of review" when considering proportionality, John Dixon J has referred to the judgment of Lord Steyn in *Regina (Daly) v Secretary of State for the Home Department*:[69]

> 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, even the heightened scrutiny test developed in *R v Ministry of Defence, Ex p Smith* [1996] is not necessarily appropriate to the protection of human rights … [T]he intensity of the review, in similar cases, 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.

68. The Victorian Supreme Court has recently compared the review that a court undertakes to assess the compatibility of the acts of a public authority under s 38(1) of the Charter with the courts' functions in their traditional judicial review jurisdiction, noting it involves fact finding and an evaluation of competing considerations:[70]

> In a judicial review proceeding such as this one, the Court's jurisdiction is supervisory, not substitutionary. The Court is not engaged in merits review, although judicial review for compatibility with human rights is necessarily more intense than traditional grounds of judicial review. The task is to determine whether the impugned act or decision is compatible with relevant Charter rights, an objective assessment that involves both fact-finding and an evaluation of competing considerations. The degree of intensity required, and the deference due to the judgment of the primary decision-maker, depend on the context and circumstances in which the decision was made. Relevant considerations include the decision-maker's experience and expertise, the accuracy of the information on which the decision was based, and the quality of any human rights assessment that informed the decision.

69. Importantly, a failure to "act compatibly" can arise under the HRA from the failure to take action, where that failure to act is incompatible with HRA rights. This is clear from the definition of "act" in the HRA's Dictionary, which provides that "act" for the

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[69] *Certain Children v Minister for Families and Children (No 2)* [2017] VSC 251; (2017) 52 VR 441, [213] (John Dixon J).

[70] *Minogue v Thompson* [2021] VSC 56, [81].

purposes of Part 5A (which includes the obligation in s 40B) "includes fail to act and propose to act". Further, a breach of s 40B does not depend upon a finding that the public authority intended to act incompatibly.

G. THE OBLIGATION TO GIVE PROPER CONSIDERATION

70. In *DPP v Nikro* the Court dealt with an allegation that there was a failure to give proper consideration to the right in s 24 of the HRA when commencing confiscation proceedings.[71] The Court suggested that it was for the individual to prove that the DPP had failed to give proper consideration, when concluding that there was "no evidence that the DPP failed to give proper consideration to the rights of the defendant under s 24 of the HRA before commencing these proceedings".[72] The Court disagreed with the assumption that there had been any limit on the rights in s 24, upon which the defendant's submission that there had been a failure to give proper consideration was based.[73] The Court's view was that forfeiture under the relevant scheme was not double punishment and the provisions of s 24 of the HRA were not limited at all.[74] As a result the Court concluded there was no obligation to consider the right in s 24.

71. The nature of the obligation imposed on a decision maker by s 40B(1)(b) has not been the subject of consideration by the Court. Given that obligation is based on the obligation in s 38(1) of the Charter, this Court should be guided by the Victorian jurisprudence.

72. In Victoria the courts have interpreted s 38(1) of the Charter as requiring that the obligation to give proper consideration arises when a right is "relevant" to a decision. The ACT provision also uses the phrase "proper consideration to a relevant human right" so this approach is also appropriate when applying s 40B(1)(b). When determining which rights are relevant for the purposes of the proper consideration requirement, the Supreme Court of Victoria has held that courts should construe the rights in the Charter "in the

[71] *DPP v Nikro* [2017] ACTSC 15; (2017) 265 A Crim R 158, [34] (Burns J).
[72] *DPP v Nikro* [2017] ACTSC 15; (2017) 265 A Crim R 158, [34] (Burns J).
[73] *DPP v Nikro* [2017] ACTSC 15; (2017) 265 A Crim R 158, [34] (Burns J).
[74] *DPP v Nikro* [2017] ACTSC 15; (2017) 265 A Crim R 158, [59] (Burns J).

broadest possible way",[75] or "broadly and in a non-technical sense"[76]. Reasonable and demonstrable limitation is not taken into account when identifying the scope of the right for these purposes.[77]

73. In *Certain Children (No 2)* the Supreme Court of Victoria observed that the requirement to give proper consideration is not confined to circumstances where the right is in fact limited, rather the right merely needs to be "engaged".[78] Justice John Dixon noted that there is a low threshold set for determining whether a human right is relevant to a decision such that it ought be given proper consideration.[79]

74. The issue was also addressed by Riordan J in *De Bruyn v Victorian Institute of Forensic Mental Health*, who observed:[80]

> For the defendant to be required to give proper consideration to human rights under s 38(1), such rights must be 'relevant'. Human rights will be relevant if the proposed decision will **apparently limit** such rights. A decision, which will apparently limit a right (without consideration of s 7(2) factors), is said to have 'engaged' the right. Engagement, in this sense, is to be contrasted with 'incompatibility', which applies when the limitation of the right cannot be demonstrably justified according to s 7(2).

75. Once the Court has determined which rights are relevant to a decision being made by a public authority, it must consider whether they were considered by that public authority at all, and if so, whether that consideration was "proper". This has been interpreted as imposing the following requirements:

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[75] *Re Application under the Major Crimes (Investigative Powers) Act 2004* [2009] VSC 381; (2009) 24 VR 415, [80] (Warren CJ) followed in *Castles v Secretary to the Department of Justice* (2010) 28 VR 141, 157-8 [55] (Emerton J); *De Bruyn v Victorian Institute of Forensic Mental Health* (2016) 48 VR 647, 691 [126].

[76] *DPP v Ali (No 2)* [2010] VSC 503, [29] (Hargrave J).

[77] *DPP v Kaba* [2014] VSC 52; (2014) 44 VR 526, [108] (Bell J).

[78] *Certain Children v Minister for Families and Children (No 2)* [2017] VSC 251; (2017) 52 VR 441, [220] (John Dixon J).

[79] *Certain Children v Minister for Families and Children (No 2)* [2017] VSC 251; (2017) 52 VR 441, [221] (John Dixon J).

[80] *De Bruyn v Victorian Institute of Forensic Mental Health* [2016] VSC 111; (2016) 48 VR 647, [102] (Riordan J) (emphasis added).

(a) It requires a public authority decision-maker to understand in general terms which rights may be relevant and whether and how those rights will be interfered with by the decision that is being made.[81]

(b) It requires a decision maker to have seriously turned his or her mind to the possible impact of the decision on an affected person's human rights and the implications for that person; and to identify the countervailing interests or obligations.[82]

76. The Supreme Court of Victoria has recently indicated that the second step identified above requires that the public authority assess whether limits are justifiable using the reasonable limits provision (in the ACT this is s 28):[83]

> … Proper consideration requires both identifying the human rights impacts of a decision on those it may affect, and, where a right may be limited, assessing whether the limit is justifiable in accordance with s 7(2).
>
> …
>
> The expressions 'identifying countervailing interests and obligations' and 'balancing competing public and private interests' are used in many of the authorities concerning proper consideration. Those expressions are useful shorthand descriptions of the proportionality analysis that s 7(2) requires…
>
> In a prison context, the exercise of justification required by s 7(2) of the Charter requires attention to a wider range of matters than whether the human rights impact of a decision is justifiable in the interests of the management, good order or security of the prison. Section 7(2) also requires a decision-maker to have regard to the nature and extent of the limitation of human rights, the relationship between the limitation and its purpose, and any less restrictive means reasonably available to achieve that purpose.

77. It has been held that the language of the obligation in s 38(1) of the Charter (the equivalent of s 40B of the HRA) imposes a higher standard than the obligation to take a

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[81] *Castles v Secretary to the Department of Justice* (2010) 28 VR 141, 184 [185]–[186] (Emerton J) cited in *Certain Children v Minister for Families and Children (No 2)* [2017] VSC 251; (2017) 52 VR 441, [221] (John Dixon J). In one case this requirement was said to be satisfied when the impact was 'fully exposed': *De Bruyn v Victorian Institute of Forensic Mental Health* [2016] VSC 111; (2017) 52 VR 441, [144].

[82] *Castles v Secretary to the Department of Justice* (2010) 28 VR 141, 184 [185]–[186] (Emerton J) cited in *Certain Children v Minister for Families and Children (No 2)* [2017] VSC 251; (2017) 52 VR 441, [221] (John Dixon J).

[83] *Minogue v Thompson* [2021] VSC 56, [51] – [53].

consideration into account at common law or under statute.[84] It has been described as "an obligation of some stringency".[85] Justice of Appeal Tate explained the basis of this interpretation of the obligation in *Bare v IBAC*:[86]

> The difference between the statutory language in s 38(1) and the manner in which the common law ground of review is expressed supports the view that s 38(1) is intended to impose a test that is more strict than that applicable at common law. The word proper must be given some work to do in accordance with the maxim that all words in a statutory provision must be given meaning and effect. This is particularly so given that the word "proper" describes the nature of the consideration that is to be given; it qualifies the exercise in which a decision-maker is obliged to engage.

78. Even in a case where a decision maker was found to have "seriously turned her mind to the possible limitations on human rights" and has identified the correct rights,[87] the Supreme Court of Victoria has held that the nature of the consideration that followed was not sufficient for the purposes of s 38(1). In doing so the Court took into account the particular circumstances in which the decision had been made (namely following a decision of the Court that had identified a number of significant human rights concerns with the juvenile justice facility in question) and the Court observed:[88]

> The contentious area is whether the Minister correctly balanced the competing public and private interests. I bear in mind that I ought not undertake the review overzealously…
>
> The circumstances here are exceptional, however, in that the Minister was guided by the Certain Children decision and the Charter compatibility was carried out by, or under the direction of, the VGSO. The standard of the decision makers' discharge of responsibility ought to be higher that what was expected of the Secretary in *Castles*.

[84] *Bare v IBAC* [2015] VSCA 197; (2015) 326 ALR 198, [275]-[276] (Tate JA); [217] – [221] (Warren CJ).

[85] *Bare v IBAC* (2015) 48 VR 129; (2015) 326 ALR 198, [299].

[86] *Bare v IBAC* [2015] VSCA 197; (2015) 326 ALR 198, [276].

[87] *Certain Children v Minister for Families and Children (No 2)* [2017] VSC 251; (2017) 52 VR 441, [490] (John Dixon J).

[88] *Certain Children v Minister for Families and Children (No 2)* [2017] VSC 251; (2017) 52 VR 441, [491] (John Dixon J).

79. One important aspect of "proper" consideration is that it must be based on correct factual assumptions, or at the very least there must be a procedure in place to avoid such errors before the consideration can be said to be "proper":[89]

> The balancing decision was significantly impaired by these wrong factual assumptions. As a result, it was unreal. The process contained no procedure to avoid such error or otherwise achieve checks and balances that would ensure proper consideration was given.

80. Even more importantly, a public authority cannot give proper consideration to human rights if the consideration given to the rights is not genuine:[90]

> Giving lip-service to the Charter whilst working towards a pre-determined outcome does not amount to proper consideration.

81. In *Minogue v Thompson* the Supreme Court of Victoria has recently found that a court on judicial review should not give any latitude to a decision maker in determining whether they gave proper consideration to relevant rights:[91]

> I do not agree that any latitude is to be given to a decision maker in determining whether that decision-maker gave proper consideration to relevant rights in making a decision. It is primarily a question of fact whether, in a given case, a decision-maker has given proper consideration to relevant rights, as required by the procedural limb of s 38(1). This is a different exercise from proportionality review of a decision for compatibility with human rights, under the substantive limb of s 38(1).

H. SECTION 40B(2): EXCEPTIONS TO THE PUBLIC AUTHORITY OBLIGATION

82. Section 40B(2) provides two separate exceptions to the obligations on public authorities to act (and make decisions) compatibly with human rights:

    (a) First, where the law expressly requires the act to be done (or decision to be made) in a particular way and that way is incompatible with a human right; or

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[89] *Certain Children v Minister for Families and Children (No 2)* [2017] VSC 251; (2017) 52 VR 441, [498] (John Dixon J).

[90] *Certain Children v Minister for Families and Children (No 2)* [2017] VSC 251; (2017) 52 VR 441, [515] (John Dixon J).

[91] *Minogue v Thompson* [2021] VSC 56, [49].

(b) Second, where the law cannot be interpreted in a way that is consistent with a human right.

83. The *Explanatory Statement* to the *Human Rights Amendment Bill 2007* states that:

> Sub-section 40B(2) sets out the circumstances in which the duty to act consistently with human rights does not apply. It is not unlawful for public authorities to act in a way that is incompatible with human rights, if:
>
> - as the result of one or more provisions of a Territory law or a Commonwealth law in force in the Territory, the public authority could not have acted differently or made a different decision. **In other words, the public authority was expressly directed in legislation to act in a particular way**; or
>
> - the public authority was acting so as to give effect to or enforce one or more provisions of a Territory law that cannot be read or given effect in a way that is compatible with human rights. **In other words, the public authority was acting in accordance with a Territory law that was incapable of being interpreted consistently with human rights** ... (emphasis added)

84. In short, s 40B(2)(a) concerns laws that impose a duty on the public authority to act (or make decisions) in a particular way, whereas s 40B(2)(b) concerns laws that create a discretion for the public authority to act (or make a decision) in a particular way (or a range of ways).

85. The interpretive rule in s 30 of the HRA applies to both provisions, but arguably it is likely to have only a marginal role to play in relation to s 40B(2)(a), as it concerns laws that expressly direct a public authority to act in an incompatible way. In both circumstances, however, for the exceptions to apply to an inconsistent act by a public authority, the relevant laws themselves must involve an incompatibility with the HRA – either expressly on the face of the legislation for s 40B(2)(a), or because the law is incapable of being interpreted consistently with human rights for s 40B(2)(b).

86. Neither the provisions themselves, nor the explanatory material contemplate any circumstance where a public authority may exercise a discretion inconsistently with human rights and be quarantined from consequence, if the enabling legislation is shown to be capable of being interpreted consistently with human rights.

87. In this case the exceptions in s 40B(2) do not apply because the only provision that potentially falls within its ambit is Clause 4.3 and that provision is invalid.

I. COMPLIANCE WITH SECTION 40B IN THIS CASE

88. The questions relevant to whether the defendant has complied with its obligations under s 40B, and the Commissioner's answers to those questions, are set out below:

    (a) The relevance or engagement question: is any human right relevant to the decision or action that a public authority has made, taken, proposed to take or failed to take?

        Yes, the right to humane treatment in s 19(1) is relevant.

    (b) The limitation question: if so, has the public authority done or failed to do anything that limits that right?

        Yes, the failure to provide the plaintiff with an hour of "open air" and access to a suitable place to exercise, consistent with the requirements set out in the international materials, limits the right to humane treatment.

    (c) The proportionality or justification question: if so, is that limit set by laws reasonable and demonstrably justified having regard to the matters set out in s 28 of the HRA?

        Firstly, the limit is not "set by laws" because Clause 4.3 is invalid and the predecessor 2011 Policy did not and could not authorise a blanket policy of non-compliance with the open air and exercise requirements in s 45 of the CMA. Secondly, the limit is not proportionate because:

        - *the reasons for non-compliance (the absence of a trap for handcuffing and the fact that taking prisoners to the exercise yard would require more staff) are practical obstacles that are readily overcome with the application of sufficient resources;*
        - *these are basic entitlements that countries with lesser economic means are required to resource;*

- *these entitlements are viewed as fundamental to ensuring that a person's incarceration does not become inhumane;*

- *the limit is built into the status quo and not something that merely happens in an emergency or occasionally.*

(d) The proper consideration question: even if the limit is proportionate, if the public authority has made a decision, did it give proper consideration to the right?

There is no evidence that any consideration was given to the right in s 19(1) of the HRA given by either Mr Rust or Mr Kelly, let alone "proper consideration".

(e) The inevitable infringement question: was the act or decision made under an Act or instrument that gave the public authority no discretion in relation to the act or decision, or does the Act confer a discretion that cannot be interpreted in a way that is consistent with the protected right?

Whilst the Commissioner's view is that Clause 4.3 is invalid, neither Clause 4.3 nor the 2011 Policy that applied previously required the rear courtyard to be the only place where access to exercise and open air was available to prisoners in the Management Unit.

J. CONCLUSION

89. The scope of the right in s 19(1) of the HRA reflects the universal right to humane treatment when deprived of liberty. Section 45 of the CMA should be interpreted, using ss 19(1) and 30 of the HRA, as reflecting the requirements that prisoners be provided with one hour of open air and exercise at international law. The international materials discussed above outline what that hour of open air and exercise should involve from a practical perspective.

90. Clause 4.3 is inconsistent with s 45 of the CMA, interpreted using s 30 of the HRA, the requirements of the right to humane treatment in s 19(1) of the HRA and the objects and purposes of the CMA itself. Clause 4.3 is invalid because of that first mentioned conflict

and also because s 14 of the CMA (interpreted using s 30 of the HRA and the purposes of the CMA) only empowers policies that are compatible with human rights.

91. When the Decisions were made, the defendant was required to give proper consideration to the right in s 19(1) and act compatibly with it. If the Court finds that the Decisions involved a limit on the full enjoyment of the right in s 19(1), the defendant is required to demonstrably justify why this limit was necessary (to a stringent standard of justification), in accordance with the test in s 28 of the HRA and must also show that the Decisions gave consideration to each of the matters in s 28 of the HRA.

Dated: 6 April 2021

SARALA M C FITZGERALD

Castan Chambers