CASTLES v SECRETARY OF THE DEPARTMENT OF JUSTICE and Others

EMERTON J

1–3, 9 June, 9 July 2010
[2010] VSC 310

Human rights — Charter of Human Rights and Responsibilities — Application to all levels of government decision-making — Right to found a family — Right to respectful privacy and family life — Right to be treated with dignity and humanity — Content of rights — Inherent limitations on scope of judicial guidance — IVF treatment — Access — Prisoners — Health services and humane treatment when incarcerated — Proportionality — Charter of Human Rights and Responsibilities Act 2006 (No 43) ss 5, 7(2), 8(2), 13(a), 17(1), 22(1), 32(1), 38(1).

Prison and prisoners — Prisoners — Rights — Right to receive reasonable medical care and treatment necessary for preservation of health — Reproductive health — Leave permit from prison — Decison-maker's obligations — Failure to give proper consideration to human rights — "Reasonable" — "Necessary for the preservation of health" — Corrections Act 1986 (No 117) ss 47(1)(f), 57A, 57D.

Prison and prisoners — Gaoler and prisoner — Absence of fiduciary relationship.

Section s 47(1)(f) of the Corrections Act 1986 provided that every prisoner had the right to have access to reasonable medical care and treatment necessary for the preservation of health including, with the approval of the principal medical officer but at the prisoner's own expense, a private registered medical practitioner chosen by the prisoner.

Section 57A of the Corrections Act 1986 provided for a prisoner to leave prison on a temporary basis for specific purposes of medical care or treatment through the issuing of a corrections administration permit, which was a form of custodial community permit.

Section 8 of the Charter of Rights and Responsibilities Act 2006 ("the Charter") provided for a right to recognition and equality before the law.

Section 13(a) of the Charter provided that a person had the right not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with ("the privacy right").

Section 22 of the Charter provided for persons deprived of liberty to be treated with humanity and with respect for the inherent dignity of the human person ("the dignity right").

The plaintiff, a woman who was born on 9 December 1964, had been sentenced in November 2009 to a term of three years' imprisonment to be released on her own recognisance after 18 months. Since January 2010, she had been serving that sentence at HM Minimum Security Women's Prison Tarrengower near Maldon in Central Victoria. It was possible that she would become eligible for home detention on 29 November 2010. Prior to her conviction, the plaintiff had been receiving in vitro fertilisation ("IVF") treatment for more than one year. Due to the nature of the prison and her classification as a low security prisoner, the plaintiff was able to go on trips with an accompanying officer out of the prison. Between her admission to the prison and the hearing of this action she had made 36 such trips. She was also entitled to leave the prison on unaccompanied trips.

For each cycle of it, the treatment sought by the plaintiff involved self-administration of a number of drugs and three or four visits to the Melbourne IVF Clinic ("the clinic"). Her treating physician was of the opinion that the plaintiff needed to have the treatment without delay because the closer she approached the age of 46, at which date she would become ineligible for treatment at the clinic, the less likely she was to fall pregnant.

Commencement of such treatment when she became eligible for home detention in November 2010 would be too late to undergo a cycle of IVF treatment at the clinic.

From the time she commenced serving her term of imprisonment, the plaintiff made numerous requests for the approvals and permits that she needed to continue her IVF treatment whilst in prison. In May 2010, the first defendant decided not to issue the permits required by the plaintiff to leave the prison to obtain the treatment. The plaintiff applied for relief in the form of declarations that:

- She had the right under s 47(1)(f) of the Corrections Act to continue, and to have access to, IVF treatment at the clinic at her own expense;
- It was and remained unlawful under s 38 of the Charter for the first and fourth defendants to neglect, fail and refuse to facilitate and permit the plaintiff to have access to IVF treatment at the clinic at her own expense, whether by way of a corrections administration permit under s 57A of the Corrections Act or otherwise under that Act;
- The neglect, failure and refusal of the first defendant to facilitate and permit the plaintiff to have access to IVF treatment at the clinic at her own expense, whether by way of corrections administration permit under s 57A of the Corrections Act or otherwise, constituted a breach of that defendant's statutory, common law and fiduciary duties to take reasonable care in relation to the plaintiff's health, custody and welfare.

The plaintiff also applied for an order that the first defendant be restrained from continuing to neglect, fail or refuse to facilitate her access to IVF treatment through the clinic at her own expense.

Held, upholding the claim in part: (1) The Victorian Parliament did not intend to create in the Charter a right to found a family. To construe s 13(a) of the Charter (or any other right specifically protected and promoted by the Charter) as incorporating a right to become a parent (by whatever means) would be inconsistent with Parliament's stated intention in the explanatory memorandum accompanying the Bill for the Charter. [62], [66]–[68].

> *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384; *Re Application under the Major Crime (Investigative Powers) Act 2004* (2009) 24 VR 415; *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252; *R v Momcilovic* (2010) 25 VR 436 referred to.

(2) The privacy right was one of considerable amplitude, but it did not encompass a right to become a genetic parent and thereby found a family. [79]–[81].

> *Dickson v United Kingdom* [2007] ECHR 1050; *Kracke v Mental Health Review Board* [2009] VCAT 646; *Director of Housing v Sudi* [2010] VCAT 328 referred to.

(3) The plaintiff's infertility was not a substantial reason for the denial of a permit under s 57A of the Corrections Act. There was therefore no basis upon which the court could conclude that the defendants' conduct in refusing the plaintiff access to IVF treatment discriminated against her on the grounds of her infertility. [90]–[92].

(4) The starting point for giving content to the dignity right of prisoners was that they should not be subjected to hardship or constraint other than the hardship or constraint that resulted from the deprivation of liberty. Access to health care was a fundamental aspect of the dignity right. Prisoners were entitled to have access to health services available to the wider community without discrimination on the grounds of their legal situation. However, that did not translate to a right to every conceivable form of medical treatment that was available in the community. Although prisoners did not forgo their human rights, their enjoyment of many of the rights and freedoms enjoyed by other citizens would necessarily be compromised by the fact that they had been deprived of their liberty. The right of

prisoners to medical treatment was a more limited one, but one that guaranteed that the health of the prisoner was protected and accorded no less importance than the health of other members of the community. [108], [109], [113].

> *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532; *Ilascu v Moldova* (unreported, European Court of Human Rights, 8 July 2004); *Istratii v Moldova* [2005] ECHR 8721/05, 8705/05, 8742/05 referred to.

(5) The word "reasonable" in the phrase "necessary for the preservation of health" in s 47(1) of the Corrections Act limited the right to access medical treatment, even if the prisoner was able to pay for medical treatment. [120].

(6) For medical treatment or care to be "necessary for the preservation of health", there had to be a risk that a prisoner's health would be compromised if treatment was not provided. There was evidence before the court that the plaintiff's reproductive health, that is her ability to bear a child, was compromised and would become further compromised the longer she delayed undertaking IVF treatment. [121], [126].

(7) The plaintiff's particular circumstances were very relevant to the question of the reasonableness of the IVF treatment that she had requested. [139].

(8) The court could do no more than set out the broad parameters for the lawful administration of the Corrections Act. Even in a human rights context, where the proportionality assessment was a key part of the court's role and involved it engaging in a high standard of review, including, in appropriate circumstances, assessing the balance which the decision-maker had struck, and considering the relative weight accorded to interests and considerations, the court could not enter into the process of fine-tuning arrangements that would satisfy the requirements of the Corrections Act, meet the health needs of the plaintiff and overcome the practical difficulties created by competing demands for resources within the corrections system. [145].

(9) In the circumstances of this case, IVF treatment was both reasonable and necessary for the preservation of the plaintiff's health. The plaintiff had a right to such treatment pursuant to s 47(1)(f) of the Corrections Act and the first defendant who had the legal custody of the plaintiff had a corresponding duty to provide the necessary approval to enable that treatment to take place. That did not necessarily entail the right to receive such treatment specifically from her physician at the clinic. It would accord with the requirements of s 47(1)(f) of the Corrections Act for the first defendant in consultation with the plaintiff to investigate whether IVF treatment could be provided nearer to Tarrengower and to approve treatment at an alternative location. [147].

(10) Permits to leave the prison ought not be based on the prisoner having been of good behaviour at least where medical treatment was necessary for the preservation of the health of the prisoner. For the grant of a current health permit, the relevant considerations were those that bore directly on the matters referred to in s 57D(1)(a) and (b) of the Corrections Act (prisoner and public safety and availability to transport and escorts if necessary) and the health needs of the prisoner. [166].

(11) A blanket requirement for an escort for health permits was not responsive to the obligation imposed by s 47(1)(f). The person authorised to issue the permit was to treat each application on its merits and with proper regard for the importance of the health purpose for which the permit was to be issued. The secretary could not have granted a permit in the form apparently sought by the plaintiff. Permits could not be issued or guaranteed to be issued months, weeks or even days in advance. The plaintiff was obliged

to accept that permits to leave the prison for IVF treatment would only be issued a short time before they were needed and they could be refused if circumstances so dictated. [170]–[172].

(12) In so far as the dignity right encompassed the right to medical treatment that was reasonable and necessary for the preservation of health, a refusal to grant any permit to leave the prison for such treatment would be unreasonable and would constitute a limitation on that right in circumstances where no justification for the limitation was given. A limitation could be justified on the basis that there was a security issue at the prison on a given day or that no vehicle was available to transport the plaintiff to her treatment. However, any such justification could not be put forward in the abstract. It would depend upon circumstances at the time the permit was required. [173].

> *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 applied.

(13) Where legislation set out a specific regime for temporary absences from prison, it was not open to the secretary to rely on some more general power to circumvent the requirements that the legislature had built into that routine. [176].

(14) The requirement in s 38(1) of the Charter to give proper consideration to human rights was to be read in the context of the Charter as a whole, and its purposes. The Charter was intended to apply to the plethora of decisions made by public authorities of all kinds. The consideration of human rights was intended to become part of decision-making processes of all levels of government. It was therefore intended to become a "common or garden" activity for persons working in the public sector, both senior and junior. In these circumstances, proper consideration of human rights should not be a sophisticated legal exercise. Proper consideration may not involve formally identifying the correct rights or explaining their content by reference to legal principles or jurisprudence. Rather, proper consideration would involve understanding in general terms which of the rights of the person affected by the decision may be relevant and whether, and if so how, those rights would be interfered with by the decision that was made. As a part of the exercise of justification, proper consideration would involve balancing competing private and public interests. There was no formula for such an exercise and it should not be scrutinised over-zealously by the courts. The requirements of s 38(1) to give proper consideration to a relevant human right required a decision-maker to do more than merely invoke the Charter like a mantra; it will be sufficient in most circumstances that there is some evidence that shows the decision-maker seriously turned his or her mind to the possible impact of the decision on a person's human rights and the implications thereof for the affected person, and the countervailing interests or obligations were identified. [185], [186].

> *Tuncok v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 1069; *Nezovic v Minister for Immigration and Multicultural and Indigenous Affairs* (2003) 133 FCR 190 distinguished.

(15) The relationship between gaoler and prisoner was not one of the recognised categories of fiduciary duty and did not bear the characteristics which would enable it to be described so. The secretary and the governor were not in a position where their interests and duties conflicted or where they might profit from their respective positions. [92], [93].

(16) The plaintiff's right to continue to undergo IVF treatment did not, however, require that such treatment be provided by the clinic. The plaintiff was entitled to relief commensurate with that finding. [195], [196].

Action

This was an action by a prisoner at HM Women's Prison Tarrengower near Maldon in Central Victoria for declaratory and injunctive relief following the refusal of the Secretary of the Department of Justice to issue a permit to the prisoner, pursuant to s 57A of the Corrections Act 1986, to enable her to undertake in vitro fertilisation treatment at a clinic in Melbourne. The facts are stated in the judgment.

D S Mortimer SC and *M I Borsky* for the plaintiff.

P J Hanks QC, *R M Niall* and *K L Walker* for the defendants.

S P Donaghue for the Victorian Equal Opportunity & Human Rights Commission.

Cur adv vult.

Emerton J.

Summary

1 The plaintiff, Ms Castles, is a prisoner at HM Prison Tarrengower ("Tarrengower"). Ms Castles seeks from the court declaratory and injunctive relief against the Secretary of the Department of Justice, the Director of Justice Health and the Operations Manager (also referred to as the Governor) of Tarrengower to enable her to resume the in vitro fertilisation ("IVF") treatment at the Melbourne IVF Clinic where she was undergoing treatment prior to her imprisonment.

2 Ms Castles says that IVF treatment is necessary to enable her to conceive a second child with her partner, Gregory Castles. That Ms Castles requires IVF treatment to help her to have a child is not a matter of controversy. Ms Castles is 45 years old and will turn 46 on 9 December 2010. She has two biological children: an adult daughter from a previous marriage and a two year old daughter from her more recent relationship with Mr Castles. Ms Castles' infertility is age-related; she suffers from a "condition" shared by many women her age. The significance of Ms Castles' age is that once she turns 46, she will no longer be eligible for IVF treatment under the policies of the Melbourne IVF Clinic.

3 For the reasons which follow, I have reached the following conclusions:

(a) Section 47(1)(f) of the Corrections Act 1986 confers on Ms Castles the right to continue to undergo IVF treatment for her infertility, although not necessarily at the Melbourne IVF Clinic. IVF treatment is both necessary for the preservation of Ms Castles' reproductive health and reasonable given the commitment to the treatment that Ms Castles has already demonstrated, her willingness to pay for further treatment, her age and the fact that she will become ineligible for further treatment before she is released from prison.

(b) However, Ms Castles' request for a permit that enables her to leave the prison to undergo such treatment as is required over a number of months cannot be accommodated under the scheme in the Corrections Act. The Secretary of the Department of Justice has not acted unlawfully in refusing such a request. Ms Castles will be eligible for permits on a visit by visit basis, providing that the secretary can be satisfied that adequate

consideration has been given to the safety and welfare of Ms Castles and members of the public and that facilities exist for the provision of adequate and suitable escort and transport if necessary.

4 In reaching these conclusions, I have had regard to the right of prisoners in s 22(1) of the Charter of Human Rights and Responsibilities Act 2006 ("the Charter") to be treated with humanity and with respect for their human dignity. However, despite the attention that was given to the Charter during the hearing of this matter, the principal issues before the court have been determined on the basis of the express right in the Corrections Act for prisoners to have access to reasonable medical care and treatment necessary for the preservation of their health. The application of the Charter served to confirm the interpretation that had been arrived at in any event.

5 IVF treatment is recognised as a legitimate medical treatment for a legitimate medical condition. I see no proper basis to treat IVF treatment differently from other forms of medical intervention that are considered to be necessary to enable people to live dignified and productive lives, unencumbered by the effects of disease or impairment.

Issues and proceedings

Factual background

6 Ms Castles was convicted of social security fraud in the Magistrates' Court at Melbourne on 20 November 2009. She was sentenced to three years' imprisonment, to be released on her own recognisance after 18 months. She may become eligible for home detention on 20 November 2010.

7 Prior to her conviction and imprisonment, Ms Castles had been receiving IVF treatment for over a year. Ms Castles began IVF treatment with Dr Jim Tsaltas at the Melbourne IVF Clinic in mid-2008. This treatment continued well into 2009. After several cycles of treatment, Ms Castles became pregnant with twins, which she later, sadly, miscarried. She was due to resume the IVF treatment with Dr Tsaltas in January or February 2010.

8 Upon conviction and sentence in November 2009, Ms Castles was imprisoned at the Dame Phyllis Frost Centre in Laverton ("DPFC"), a maximum security prison in which female prisoners of all security classifications are accommodated. On 11 January 2010, Ms Castles was transferred to Tarrengower. Tarrengower is a minimum security women's prison located on a rural property near Maldon in central Victoria and its security and living arrangements are very different from those at DPFC. It has no perimeter fence and is organised around self-contained units (or "cottages") which offer a combination of single and dual bed accommodation, with shared kitchen and living areas.[1] It accommodates women who are nearing the end of their prison terms, and emphasises release preparation and community integration.

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1. The current Governor of Tarrengower, Ms Mandy Smith, described the physical appearance of Tarrengower as follows:

> "It's a minimum security prison, so it has no perimeter security, it doesn't have sensors or anything. If you were to drive up to it, it looks like cottages or dwellings in a farm setting. The prison is situated on about 360 acres, it has farm animals, livestock, and essentially consists of 12 cottages and some administration facilities."

9 On 12 January 2010, the day after her admission to Tarrengower, Ms Castles' two year old daughter, Stephanie, came to live with her. Stephanie continues to live at Tarrengower with her mother. Ms Castles' evidence is that at Tarrengower, she and Stephanie live in a unit with a back yard. There is a farm, a big playground and a visitor centre where Stephanie can play with toys. Stephanie also attends a local kindergarten in Maldon. The conditions at Tarrengower are such that Ms Castles believes that Stephanie is not aware that she is living in a prison.

10 Ms Castles is classified as a low security prisoner. When she was sent to Tarrengower, Ms Castles had a C1 classification (minimal escape risk, but requires limited supervision). She now has a C2 classification (very low escape risk, and can be trusted in open conditions without constant supervision).

11 Accordingly, at Tarrengower, Ms Castles enjoys significant freedom. As a low security prisoner, she can go out on trips with an accompanying officer for eight hours at a time. In fact, Ms Castles has been allowed out of the prison on 36 occasions since January 2010, including visits to a medical centre, an optometrist, a dentist, a foot clinic and her daughter's child care centre, and for the purposes of physical fitness (a 5 km supervised walk or run) and performing community work at a local fire station and cemetery. She has recently become entitled to leave the prison on unaccompanied movements, although she has not yet exercised that entitlement. She is also entitled to conjugal visits with Mr Castles.

The IVF treatment

12 The IVF treatment for which Ms Castles seeks approval is described in Ms Castles' first affidavit sworn on 22 April 2010 as follows:

> My treatment must begin on the second day of my menstrual cycle. My next menstrual cycle begins on 12 May 2010.
>
> To begin my treatment, I commence using a prescribed medicinal spray. This is followed by the commencement of a series of injections, which I have administered myself (but which could instead be administered by prison officers) on a daily basis. This causes my body to make as many eggs as it possibly can.
>
> Approximately 10 days later, I must attend Melbourne IVF to have my eggs counted using a microscope.
>
> Approximately a week later, I must attend Melbourne IVF to have my eggs extracted. This procedure takes a few hours and involves the use of an anaesthetic. The extracted eggs are then floated or injected by Melbourne IVF in one of its laboratories after I leave.
>
> Two days later I must attend Melbourne IVF to have the fertilised eggs injected into my womb.
>
> In total, I need only attend Melbourne IVF three times per cycle.

13 Dr Tsaltas has provided a brief report on the treatment that Ms Castles would undergo, which contains the following description her treatment:

> Her treatment usually involves three to four visits to the ART provider. One of those visits is as a day procedure patient requiring anaesthetic. This will involve arriving in hospital an hour before her procedure, having her procedure and staying three to four hours afterwards. Her other visits are usually about an hour to an hour and a half … As you know she will require [sic] to have injections and these injections are administered by the patient on a daily basis.

14 Dr Tsaltas' report continues:

> With respect to timing if it is deemed appropriate for her to have treatment she needs to have treatment now because the closer she gets to 46 the less likely she is to get pregnant. In fact her chance of pregnancy now would also be very small.

Ms Castles' requests to continue IVF treatment

15 From the time that she was first imprisoned at DPFC on 20 November 2009, Ms Castles made numerous requests for the approvals and permits that she needed to allow her to continue the IVF treatment while in prison:

(a) On 27 November 2009, Ms Castles wrote to the general manager of DPFC introducing herself, explaining that prior to her incarceration she was on the IVF program with Dr Jim Tsaltas at Melbourne IVF and expressing her "desperate wish" to continue with the IVF treatment. She asked to be advised of Corrections' policy regarding IVF treatment and for any other advice that the addressee could give her.

(b) On 11 December 2009, Ms Castles wrote to the Governor of DPFC making "a formal request" to continue with IVF treatment, explaining that she was halfway through the program and needed to re-start treatment in "Jan/Feb 2010". Ms Castles said that she realised she would need to conform with and adhere to strict prison conditions and protocol and indicated her willingness to negotiate an acceptable solution: "all things can be carefully negotiated or compromises made to accommodate and to benefit all parties involved".

(c) On 17 December 2009, Ms Castles wrote to the general manager of DPFC complaining about the lack of response to her letters and requesting an appointment or, alternatively, a response in writing.

(d) On 22 December 2009, Ms Castles wrote to Justice Health seeking intervention and advice, pointing out that she was scheduled to continue the IVF treatment in January/February 2010. She said that to facilitate this treatment, she only required three appointments to have eggs safely implanted.

(e) On 26 December 2009, Ms Castles wrote to the Governor of DPFC requesting a meeting to discuss the matter.

(f) On 8 January 2010, Ms Castles completed an application form for approval to consult a private medical practitioner. The practitioner is named as Dr Tsaltas of Melbourne IVF and the reason for the application is given as "to continue much needed medical treatment".

16 In late January 2010, the Human Rights Law Resources Centre ("HRLRC") began representing Ms Castles. HRLRC immediately agitated for the persons responsible at Tarrengower and the Department of Justice to give Ms Castles what it described as "approval to attend consultations with Dr Tsaltas at Melbourne IVF Clinic in East Melbourne". Between late January and April 2010, there were ongoing written and oral communications between HRLRC on behalf of Ms Castles and the Director of Justice Health on behalf of the Department of Justice concerning the grant of the relevant approvals and permits that Ms Castles would require to attend the Melbourne IVF Clinic for treatment. From the outset, HRLRC emphatically asserted Ms Castles' right to access the IVF treatment under the Charter. It is unnecessary to reproduce the correspondence here. Suffice to say that the written communications between HRLRC and Justice Health

proceeded on the basis that Ms Castles claimed an entitlement to whatever permits and approvals were required to enable her to undergo IVF treatment at the Melbourne IVF Clinic until she became pregnant or ineligible for further treatment by reason of her age. Although her own correspondence with prison authorities sought an accommodation that would permit her to continue the IVF treatment, following the intervention of her lawyers, her request became a demand that, on its face, was unqualified in character.

17 On 20 April 2010, Blake Dawson wrote to the Deputy Victorian Government Solicitor advising that the firm now acted for Ms Castles and referring to the large number of letters written by or on behalf of Ms Castles seeking approval to undertake treatment with Dr Tsaltas. The letter stated:

> We are instructed to make it clear that Ms Castles' request is based on s 47(1)(f) of the Corrections Act 1986 (Vic) and all the discretionary powers available to the Secretary of the Department of Justice under that Act, in particular s 57.

18 Ms Castles did not receive a response to her requests until 3 May 2010, when the Secretary of the Department of Justice ("the secretary") made a decision not to issue the permits required for Ms Castles to leave prison to access the IVF treatment. The secretary's decision was made in the following terms:

> After careful deliberation of the matter, over a period suitable to the gravity of the matter, I have balanced the considerations, taking into account the Charter issues and my obligations under the Corrections Act in maintaining the security and good order of the prison and the prison system. Having done that I have reached the conclusion to deny the IVF treatment by not supporting the granting of Ms Castles with the necessary corrections administration permit that would allow her to be released from prison to attend IVF treatment in the community.
>
> She does not in my view have an entitlement to this form of medical treatment and the granting of a permit for this purpose is an unreasonable diversion of public resources, which would otherwise be focussed in maintaining the security and good order of the prison, and therefore is not in the interest of Ms Castles and other prisoners. Furthermore, granting a permit for the reason of attending IVF treatment would set a precedent that would impose an unreasonable burden on the entire male and female prison system that is not in the public interest.
>
> I do believe that Ms Castles is able to maintain her family relations via the provisions available to her at Tarrengower Prison.

19 Ms Castles submits that the effect of refusing her application is to deny her the chance to conceive a second child with her partner. Her prospects of falling pregnant diminish each month and, on 9 December 2010, she will become ineligible for treatment at the Melbourne IVF Clinic by reason of her age. Although she will be eligible for home detention from 19 November 2010, by that time it will be too late to undergo a cycle of IVF treatment. When she first made her request for approval to resume IVF treatment, she was eligible for a further 12 cycles. Following months of waiting for a decision from the defendants, Ms Castles now has a maximum of only six further cycles in which to conceive with the aid of IVF treatment.[2]

2. In fact, she now has only five further cycles.

20 Ms Castles points out that psychological effects of infertility are profound and should not be assumed to be any less for people such as she and her partner, who have started a relationship and a family relatively late in life and have one child for whom they are unable to provide a sibling.

21 Ms Castles submits that in the context of the other privileges and accommodations afforded to minimum security prisoners at Tarrengower, the refusal to allow her continue the IVF treatment is arbitrary and capricious. Tarrengower already accommodates pregnant prisoners and prisoners who are mothers of newborn babies. Its policies include "considering the complex and personal needs of female prisoners, in particular the strengthening of their relationships with the children"[3] and "facilitating the reintegration of prisoners into society".[4] Ms Castles says that four prisoners at Tarrengower have given birth during 2010 (the evidence of the governor, Ms Smith, was that there had been one birth at Tarrengower this year). Tarrengower permits prisoners to have accompanied and unaccompanied absences from the prison for a variety of medical and non-medical purposes. She simply cannot understand why she will not be allowed to leave the prison to travel to Melbourne on a regular basis to undergo the IVF treatment.

The proceeding

22 On 23 April 2010, Ms Castles commenced the current proceeding seeking declaratory and injunctive relief to enable her to resume the IVF treatment with Dr Tsaltas. The proceeding was brought by writ and statement of claim against the first to fourth defendants. The defendants are the secretary, the Director of Justice Health, the person identified as the "principal medical officer at Tarrengower" and the Governor of Tarrengower respectively. The treatment in issue is defined in para 12 of the statement of claim as "in vitro fertilisation treatment from Dr Jim Tsaltas at the Melbourne IVF Clinic in East Melbourne".

23 During the course of the trial, it was conceded that no relief could be claimed against the third defendant, who is employed by the private health care provider at Tarrengower and has no relevant responsibilities or powers under the Corrections Act and no obligations under the Charter. The relief sought against the remaining defendants was also amended in the course of the trial.

24 On 30 April 2010, Osborn J heard an application for an interlocutory injunction restraining the defendants from continuing to neglect, fail or refuse to grant the permits and approvals necessary to allow Ms Castles to access IVF treatment with Dr Tsaltas at the Melbourne IVF Clinic. His Honour refused the injunction on the grounds, inter alia, that Ms Castles was not then legally entitled to IVF treatment, because she had not obtained the criminal record checks required by the Assisted Reproductive Treatment Act 2008. Those checks have now been satisfactorily completed.

25 In amended draft minutes of orders handed to the court on the final day of the trial, Ms Castles claims relief in the form of the following declarations:

(a) Ms Castles has the right under s 47(1)(f) of the Corrections Act to continue, and to have access to, IVF treatment through the Melbourne IVF Clinic at her own expense.

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3. Tarrengower Operating Procedure No 3.5/1 (Ex SA4 to the second affidavit of Steven Amendola sworn 27 May 2010) at p 1 and para 7 of the defence.
4. Ibid.

(b) It was and remains unlawful under s 38 of the Charter for the first defendant to neglect, fail and refuse to facilitate and permit Ms Castles to have access to IVF treatment through the Melbourne IVF Clinic at her own expense, whether by way of a corrections administration permit under s 57A of the Corrections Act or otherwise under the Corrections Act.

(c) It was and remains unlawful under s 38 of the Charter for the fourth defendant to neglect, fail and refuse to facilitate and permit Ms Castles to have access to IVF treatment through the Melbourne IVF Clinic at her own expense, whether by way of a corrections administration permit under s 57A of the Corrections Act or otherwise under the Corrections Act.

(d) The neglect, failure and refusal of the secretary to facilitate and permit Ms Castles to have access to IVF treatment through the Melbourne IVF Clinic at her own expense, whether by way of corrections administration permit under s 57A of the Corrections Act or otherwise, constitutes a breach of the secretary's statutory and common law duties to take reasonable care in relation to Ms Castles' health, custody and welfare.

(e) The neglect, failure and refusal of the secretary to facilitate and permit Ms Castles to have access to IVF treatment through the Melbourne IVF Clinic at her own expense, whether by way of a corrections administration permit under s 57A of the Corrections Act or otherwise, constitutes a breach of the secretary's fiduciary duties in relation to Ms Castles' health, custody and welfare.

26 Ms Castles also seeks an order that the secretary, whether by her servants and agents or howsoever otherwise, be restrained from continuing to neglect, fail or refuse to facilitate access by Ms Castles to IVF treatment through the Melbourne IVF Clinic at her own expense.

27 The statement of claim has not been formally amended since the proceeding was commenced. Since that time, the factual substratum for the grant of relief has changed, in that the secretary has now made a decision to refuse to grant the permit requested by Ms Castles to enable her to leave the prison on a number of occasions to attend Dr Tsaltas' rooms in East Melbourne. The statement of claim has not been amended to reflect this development, as it is contended that the relevant rights had accrued and the relevant duties were owed to Ms Castles to facilitate her access to the IVF treatment from the time that she first requested access in November 2009. The secretary's decision does not affect this position.

28 Ms Castles submits that under s 47(1)(f) of the Corrections Act, she has the right to access the IVF treatment at her own expense. Further, she contends that she is entitled to access such treatment by reason of s 38(1) of the Charter, which makes it unlawful for a public authority to act in a way that is incompatible with relevant human rights. The human rights which entitle her to treatment are the right not to have her privacy and family unlawfully or arbitrarily interfered with (s 13(a)), the right to protection of her family (s 17(1)), the right as a detained person to be treated with humanity and with respect for her inherent dignity (s 22(1)) and the right to enjoy her human rights without discrimination (s 8).

29 Ms Castles contends that the secretary and the governor have failed to recognise her rights by "neglecting, failing and refusing" to facilitate and permit her access to the IVF treatment, in essence, by granting the permits and approvals

that are necessary for her to obtain treatment outside of the prison. In so doing — she says — the secretary and the governor have acted in a way that is incompatible with her human rights and is therefore unlawful under s 38 of the Charter. As a corollary, Ms Castles says that the secretary and the governor have failed to give proper consideration to her human rights and for that reason have also acted unlawfully pursuant to s 38(1) of the Charter.

30 Further, it is alleged that the secretary and the governor are under a duty to take reasonable care in relation to Ms Castles' health, custody and welfare and are under a fiduciary duty to act in Ms Castles' interests in relation to those matters, and their failure to grant the permits and approvals necessary to allow Ms Castles to access the IVF treatment at her own expense constitutes a breach of those duties.

The relevant approvals and permits

31 The application made by Ms Castles to this court concerns, in essence, whether the secretary or any other person within the Department of Justice is required to facilitate her access to the IVF treatment by granting the necessary approvals and permits for her to leave the prison on a number of occasions to undergo treatment at the Melbourne IVF Clinic.

32 Undertaking IVF treatment with Dr Tsaltas at the Melbourne IVF Clinic would involve Ms Castles first embarking on a period of daily hormone treatments that could take place at Tarrengower, and then leaving Tarrengower to travel to East Melbourne for checks and treatment on three or four separate occasions per cycle. The dates of the treatments in Melbourne cannot be predicted precisely in advance. One of those appointments is very time sensitive — there is a small window following a trigger injection during which eggs are released and are available to be harvested. The harvesting involves a general anaesthetic and Ms Castles would be required to spend several hours at the clinic for this purpose.

33 Given the uncertainty as to whether and, if so, when Ms Castles will fall pregnant as a result of the IVF treatment, it is possible that Ms Castles' IVF treatment will involve her needing to leave Tarrengower and travel to the Melbourne IVF Clinic in East Melbourne three to four times per month until mid to late November 2010.

34 Were it not for the IVF treatment, it is unlikely that Ms Castles would need to travel to Melbourne to receive medical treatment during the term of her imprisonment. Most of the medical treatment required by prisoners at Tarrengower can be provided within the prison by the prison health service provider. Alternatively, appointments with local medical practitioners and health care providers can be organised through the prison health service provider. Trips to Maldon or Castlemaine for routine medical purposes are regularly arranged through the health services provider at Tarrengower. Prisoners attending those appointments are escorted and appointments are organised in clusters, so that a number of prisoners can attend appointments at the same time.

35 Section 47(1) makes specific provision for certain prisoner rights which, by reason of s 47(2), are additional to, and do not affect any other rights which the prisoner has under an Act other than the Corrections Act or at common law. Among other things, s 47(1) provides that every prisoner has:

(f) the right to have access to reasonable medical care and treatment necessary for the preservation of health including, with the approval of the principal medical officer but at the prisoner's own expense, a private registered medical practitioner physiotherapist or chiropractor chosen by the prisoner;

36 Section 47(1)(f) thus confers on prisoners a right to certain medical care and treatment, which includes a right to such medical care and treatment provided by a private medical practitioner, if approval is given by the chief medical officer and the prisoner covers the costs of the private treatment.

37 Ms Castles has apparently not previously required approval for private medical treatment (presumably because any medical treatment that she has required has been provided by or through the prison's health care provider), but she has required and obtained permits to leave the prison on each of the many occasions that she has done so during her time at Tarrengower, including to attend medical appointments.

38 Because Ms Castles wants to access treatment provided by a private medical practitioner chosen by her, she needs the approval of the "principal medical officer" under s 47(1)(f). The court was informed that there is no principal medical officer for Tarrengower or any other Victorian prison. No person has been employed under the Corrections Act as a principal medical officer since at least 2007, when there was created within the Department of Justice the business unit known as "Justice Health". As a result, the Department of Justice has established an approval process, apparently for the purposes of s 47(1)(f), on the basis that Justice Health (or a panel of medical experts established by Justice Health) will make an assessment of any request to access medical treatment privately. What then happens is a little obscure on the evidence, but it appears that, ultimately, the secretary gives the requisite approval on the recommendation of Justice Health or delegates to Justice Health the power to give the approval.

39 Part 8 of the Corrections Act makes provision for prisoners to leave prisons on a temporary basis for specific purposes of medical care or treatment through the issuing of a corrections administration permit, which is a form of "custodial community permit". Corrections administration permits are issued under s 57A of the Corrections Act. Section 57A provides:

(1) The Secretary may issue a corrections administration permit to a prisoner for any of the following purposes—

(a) a purpose related to the health of the prisoner;

(b) a purpose related to the administration of justice, including (but not limited to) being under police protection on account of evidence given, or to be given, by the prisoner in a legal proceeding within the meaning of the Evidence (Miscellaneous Provisions) Act 1958;

(c) to visit a person with whom the prisoner has had a long-standing personal relationship if that person is seriously ill or in acute personal need;

(d) to attend the funeral of a person with whom the prisoner had a long-standing personal relationship;

(e) to visit another prison.

(2) The Secretary may issue the permit for a period of up to 3 days.

(3) Despite subsection (2), the Secretary may issue the permit for a longer period if the permit is to be issued—

(a) under subsection (1)(b) and the prisoner will be under police protection while the permit is in force; or

(b) for a purpose related to the health of the prisoner.

(4) Subject to section 6B, a prisoner who is authorised to be absent from prison under the permit continues in the legal custody of the Secretary while absent.

40 The power to issue a custodial community permit, including a corrections administration permit, is not unfettered. Section 57D relevantly provides:

(1) The Secretary may only issue a custodial community permit to a prisoner if the Secretary is satisfied that—

(a) adequate consideration has been given to the safety and welfare of the prisoner and members of the public; and

(b) facilities exist for the provision of adequate and suitable escort and transport where necessary; and

(c) in addition to the requirements of this Division, the issuing of the permit complies with any requirements set out in the regulations.

(2) In issuing a custodial community permit, the Secretary —

(a) must comply with any requirements set out in the regulations; and

(b) may impose any conditions on the permit that he or she thinks are appropriate.

(3) A custodial community permit—

(a) authorises the prisoner to be absent from the prison for the period stated in the permit; and

(b) is subject to any relevant conditions set out in the regulations and any other conditions set out in the permit.

…

(6) Nothing in this Division is intended to prevent the Secretary from re-issuing a permit that has expired.

…

41 In this case, no approval has been given for Ms Castles to access treatment through Dr Tsaltas at Melbourne IVF, even though the treatment will be at Ms Castles' own expense. Furthermore, even though the Governor of Tarrengower has a delegation from the secretary to grant permits for prisoners at Tarrengower to leave the prison for health purposes under s 57A of the Corrections Act, the secretary has decided to exercise that power for herself and has stated that she will not grant the necessary permit.

The application of the Charter

General application and the omission of a right to found a family

42 Although Ms Castles' rights as a prisoner and the corresponding duties of the secretary and the governor are principally determined by the provisions of the Corrections Act, it is convenient to commence by considering whether the Charter has anything to say about her predicament.

43 Ms Castles relies on the Charter in two respects. First, she says that s 47(1)(f) of the Corrections Act, which gives every prisoner the right to access to reasonable medical care and treatment necessary for the preservation of health, must be interpreted in a way that is compatible with the human rights contained in Pt 2 of the Charter. Second, she relies on s 38(1) of the Charter which makes

it unlawful for a public authority[5] to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.[6]

44 Ms Castles submits that the defendants, in deciding whether or not to approve the IVF treatment under s 47(1)(f) and in exercising the discretion whether or not to issue a corrections administration permit under s 57A of the Corrections Act to enable Ms Castles to undertake IVF treatment, were prohibited from acting in a way that was incompatible with her human rights and were required to give proper consideration to her human rights in making the relevant decisions.

45 The interpretative obligation in s 32 of the Charter and the obligation to act compatibly with and give proper consideration to human rights under s 38(1) of the Charter depend, of course, on whether any of the rights in the Charter are engaged by Ms Castles' request to access the IVF treatment.

46 In brief, Ms Castles says that the neglect, failure or refusal to facilitate or permit her to access IVF treatment with Dr Tsaltas at the Melbourne IVF Clinic:

(a) Discriminates against her on the basis of her "infertility impairment" contrary to s 8 of the Charter.

Ms Castles contends that in circumstances where prisoners at Tarrengower are entitled to conjugal visits, prisoners have given birth and the prison permits prisoners to care for their children, denying a person who is infertile the opportunity to conceive when other female prisoners in the same or similar circumstances have that opportunity is less favourable treatment and constitutes discrimination for the purposes of the Equal Opportunity Act 1995 and therefore under s 8 of the Charter.

(b) Constitutes an arbitrary interference in her privacy and family contrary to s 13(a) of the Charter (read in conjunction with s 17).

Ms Castles contends that her right to non-interference in her private life includes non-interference in respect of decisions pertaining to her identity and her ability to function in society as a person. While she is incarcerated, the way in which she can exercise her rights to family and privacy is entirely controlled by the defendants. She cannot take any steps to manage or improve the way her infertility is affecting her and her family unless the defendants permit her to access the IVF treatment.

(c) Fails to accord her, as a person who is in detention, humane treatment and respect for her human dignity.

Ms Castles contends that her desire to bear a child, and to complete a family, is closely aligned to her human dignity. The importance of family, and of children, to female prisoners is well recognised in the policies of the corrections system in Victoria, especially for minimum security prisoners and those reaching the end of their sentences. However, these policies have been implemented in this case by reference to inflexible limits and rules. No respect has been shown by the defendants for the human dignity of prisoners in Ms Castles'

5. It is common ground that the first, second and fourth defendants are public authorities for the purposes of the Charter and are therefore required to act compatibly with human rights and, when making a decision, to give proper consideration to human rights.

6. An act in this context includes a failure to act and a proposal to act: s 3(1) of the Charter.

position, and allowing the prisoners around her to have the chance to conceive while she cannot is inhumane.

47 For their part, the defendants submit that, in this matter, no human rights are engaged and the Charter has no role to play at all. This is because, the defendants say, the right that Ms Castles seeks to assert is a right to found a family; Ms Castles seeks to enforce her "right" to have the opportunity to become pregnant and bear another child. The defendants submit that no such right is recognised in the Charter. To the contrary, when the legislature selected the rights that it wished to protect through the enactment of the Charter, it made a decision not to include the right to found a family in the Charter, notwithstanding that such a right appears in the International Covenant on Civil and Political Rights ("ICCPR"), on which the Charter was modelled, and the European Convention on Human Rights ("European Convention").

48 In the second reading speech for the Charter of Human Rights and Responsibilities Bill 2006,[7] the Attorney-General stated that the government had decided to introduce a human rights charter based on the model recommended in the report of the Human Rights Consultation Committee ("HR committee"), but modified in the light of responses to that report. As in other jurisdictions, the ICCPR was the starting point for the rights contained in the Bill, making it consistent with other human rights instruments in places such as the Australian Capital Territory and New Zealand. However, some ICCPR rights were modified to ensure consistency with existing Victorian laws. In some instances, a right or a part of a right contained in the ICCPR was omitted from the Charter.[8]

49 The report of the HR committee to which the Attorney-General referred contains a broad-ranging discussion of human rights and makes specific recommendations in relation to the inclusion of particular rights in the Charter. Part 2.4.6 of the report deals specifically with the "right to found a family". The HR committee report records that a number of submissions to the HR committee argued that the right to found a family was a fundamental right that should be protected by the Charter. For example, the Melbourne Sexuality Law Reform Committee expressed the view that the right to found a family could help to ensure that the rights of same sex couples in respect of access to adoption and reproductive technologies were adequately protected by law.

50 The HR committee observed that the right to found a family is contained in Art 23(2) of the ICCPR and is coupled with the right to marry,[9] and then said:

> The Committee observes that this right was not included in the ACT Human Rights Act 2004 but that it is contained in the United Kingdom Human Rights Act 1998, which recognises the right to found a family "according to the national laws governing the exercise of this right".
>
> …
>
> The Committee considers the right to found a family to be an essential civil and political right that people would expect to see in a human rights instrument. However, the Committee is mindful that the Victorian Law Reform Commission is currently undertaking a reference on assisted reproduction and adoption. This has involved the

7. Hansard, Legislative Assembly, 4 May 2006, pp 1289–95.
8. Page 1291.
9. Article 23(2) of the ICCPR provides:

> "The right of men and women of marriageable age to marry and found a family shall be recognised."

> release of interim position papers and significant community consultation. The results of this reference will have implications for the right to found a family for single people and for same sex couples in areas such as access to assisted reproductive technologies, recognition of legal parentage and rights to adoption. The Victorian Law Reform Commission has stated in its latest position paper that it anticipates tabling its final report in Parliament during 2006.
>
> The Committee does not wish to pre-empt the result for this comprehensive process and therefore does not make a recommendation to include the right to found a family in the Charter. The Committee does, however, recommend that consideration be given to whether the Charter should be expanded to include the right to found a family as part of the four year review process.

51 Accordingly, the HR committee did not recommend the inclusion of a right to found a family in the Charter. It is plain that this was because it did not wish to pre-empt the outcome of the reference given to the Victorian Law Reform Commission on assisted reproduction and adoption and the "comprehensive process" that that would entail.

52 It appears that the HR committee's recommendation was taken up by the legislature, in that it did not include the right to found a family in the Charter. The explanatory memorandum for the Bill makes express reference to the right to found a family in relation to cl 17, which provides for the protection of families and children. The explanatory memorandum states:

> Subclause (1) provides that families are the fundamental group unit of society and are entitled to be protected by society and the State. This provision is modelled on Article 23(1) of the Covenant [the ICCPR]. This sub-clause recognises a right to protection. *It is not Parliament's intention to create a right to found a family in the Charter.* Parliament intends that the term "families" be given a meaning that recognises the diversity of families that live in Victoria, all of whom are worthy of protection. [Emphasis added.]

53 The defendants submit that this statement evinces an intention that the rights that have been included in the Charter should not be construed so as to give rise to or include a right to found a family. Section 7(1) of the Charter, which provides that Pt 2 of the Charter "sets out the human rights that Parliament specifically seeks to protect and promote", shows the legislature to have been selective in the rights that are to be protected. That selectivity should not be undone by bringing a right that has been deliberately omitted back into the Charter by indirect means. The Charter must be read as a whole on the basis that its provisions are intended to give effect to harmonious goals.[10] The result would not be harmonious if the substance of the right to found a family were introduced in the Charter as an instance of another right.

54 The Victorian Equal Opportunity and Human Rights Commission ("the commission") intervened in the proceeding, as it is entitled to do under s 40(1) of the Charter, to make submissions on the operation of s 38 of the Charter. These included extensive and helpful submissions on the content of the rights in ss 13(a) and 22(1) of the Charter.

55 The commission, in submissions that were adopted in their entirety by Ms Castles, submitted that the omission of a right to found a family does not restrict the scope of the rights that Ms Castles asserts, especially the right to

10. *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381–2, [69]–[71].

non-interference in privacy and family that is contained in s 13(a) of the Charter. Charter rights must be construed broadly. As Warren CJ said in *Re Application under the Major Crime (Investigative Powers) Act 2004*:[11]

> As already observed, human rights should be construed in the broadest possible way. The purpose and intention of Parliament in enacting the Charter was to give effect to well recognised and established rights in the criminal justice system … The Charter supports the approach that rights should be construed in the broadest possible way before consideration is given to whether they should be limited in accordance with s 7(2) of the Charter. That section serves the purpose of mitigating any damage to society that may arise from upholding an individual's right.

56 The approach of construing rights in the Charter in the broadest possible way is also reflected in a number of decisions of Bell J sitting as the President of VCAT.[12]

57 Moreover, the commission points to s 5 of the Charter, which provides:

> A right or freedom not included in this Charter that arises or is recognised under any other law (including international law, the common law, the Constitution of the Commonwealth and a law of the Commonwealth) must not be taken to be abrogated or limited only because the right or freedom is not included in this Charter or is only partly included.

58 The commission argues that as the legislature intended that the inclusion of particular rights in the Charter should not be taken to limit rights that have not been included, it would be a surprising construction if, the legislature having selected some rights as being particularly important and pulled them out of the general corpus of international rights to insert them in the Charter, an approach to the Charter was adopted that resulted in a diminution of the scope of the rights that had been included because something else had not specifically been selected for inclusion.

59 The commission also submits that even if a right to found a family had been included in the Charter, it is not apparent that the analysis that has been urged upon the court by Ms Castles would be any different. Jurisprudence from the European Court of Human Rights has treated a prisoner's right to artificial insemination facilities as an incident of the right to respect for private and family life (Art 8 of the European Convention). Ms Castles asserts that her right to non-interference in her privacy and family gives her an entitlement to access the IVF treatment and that this does not involve "stretching" or distorting the right to privacy to compensate for the absence of a right to found a family.

60 Further, the commission submits that the court should pay close attention to what the HR committee actually said about its reason for recommending delaying the creation of a right to found a family in the Charter. The ICCPR right is expressed as a right of men and women of marriageable age to marry and found a family. There is a conjunction between the right to marry and the right to found a family. When the ICCPR right is read together with the submission from the Melbourne Sexuality Law Reform Committee, it is possible that the HR committee's concern not to pre-empt the process being undertaken by the Victorian Law Reform Commission was a concern of "under-inclusion": if a right

11. (2009) 24 VR 415 at 434, [80] (footnote omitted).
12. *Director of Housing v Sudi* [2010] VCAT 328; *Kracke v Mental Health Review Board* [2009] VCAT 646.

to found a family was embedded in the Charter that was in the terms of the right in the ICCPR, it might be interpreted as linking the right to found a family to the right of men and women to marry. Hence, when the HR committee stressed the importance of the right to found a family, it might have been referring to a right in wider terms than the right contained in the ICCPR. The commission submits that it is open from the relevant passage in the HR committee report to conclude that the HR committee did not intend to cast doubt upon the right, but rather to avoid the limitations in it that were then under consideration by other bodies.

61 Accordingly, the commission submits that the absence of a reference to the right to found a family in the Charter does not provide a reason to subtract from the privacy right in s 13(a) of the Charter content that the right construed by itself would otherwise have. This would not be to commence the requisite human rights analysis, as the Chief Justice has urged, with a broad reading of the right and then to deal with the need, if there be a need, to limit the right by a proportionality analysis under s 7(2) of the Charter.

62 I appreciate the force of the commission's submissions on this point. However, I cannot accept them. The explanatory memorandum clearly set out the proposition, "It is not Parliament's intention to create a right to found a family in the Charter", and the legislature proceeded to enact the Charter on the basis of that proposition. Although the proposition was expressed in the context of s 17 of the Charter, it was expressed to apply to the Charter as a whole. To construe s 13(a) of the Charter (or any other right specifically protected and promoted by the Charter) as incorporating a right to become a parent (by whatever means) would be inconsistent with Parliament's stated intention.

63 It seems to me that the decision of the legislature not to include in the Charter a right to found a family was based on the HR committee's recommendation that such a right not be included in the Charter at that stage. The reason given by the HR committee was that recommendations of the Victorian Law Reform Commission on eligibility for assisted reproduction treatment ("ART") and adoption should not be pre-empted by the creation of a broad right in the Charter that would have implications for precisely those questions. The Victorian Law Reform Commission's reference required it to inquire into and report on the desirability and feasibility of changes to the Infertility Treatment Act 1995 and the Adoption Act 1984 to *expand* eligibility criteria in respect of all or any forms of assisted reproduction and adoption.[13] As the HR committee report points out, this would have implications for the right to found a family for single people and for same sex couples in areas such as access to ART, recognition of legal parentage and rights to adoption. The possible expansion of eligibility for ART was therefore an area that the HR committee recommended not be intruded

13. In making its inquiry and report, the Victorian Law Reform Commission was asked to take into account social, ethical and legal issues related to assisted reproduction and adoption, with particular regard to the rights and best interest of children, the public interest and the interests of, parents, single people and people in same-sex relationships, infertile people and donors of gamete, the nature of, and issues raised by arrangements and agreements relating to methods of conception other than sexual intercourse and other assisted reproduction in places licensed under the Infertility Treatment Act 1995 and the laws relating to eligibility criteria for assisted reproduction and adoption and other related matters which apply in other states or countries and any evidence on the impact of such laws on the rights and best interests of children and the interests of parents, single people, people in same sex relationships, infertile people and donors of gametes.

upon by the protection and promotion of rights in the Charter until the Victorian Law Reform Commission reference had been completed.

64 I consider it to be unlikely that the HR committee recommended against the inclusion in the Charter of a right to found a family because it was concerned that the right was not sufficiently inclusive (that is, sufficiently broad). To the contrary, it is more likely that the committee considered that if there was to be an expansion of rights to ART and adoption, that should not occur until the reference given to the Victorian Law Reform Commission was completed.

65 In *Saeed v Minister for Immigration and Citizenship*,[14] the High Court has very recently again warned against reliance on extrinsic materials to discern the intention of the legislature:[15]

> As Gummow J observed in *Wik Peoples v Queensland*, it is necessary to keep in mind that when it is said the legislative "intention" is to be ascertained, "what is involved is the 'intention *manifested*' by the legislation." Statements as to legislative intention made in explanatory memoranda or by Ministers, however clear or emphatic, cannot overcome the need to carefully consider the words of the statute to ascertain its meaning.

66 In *R v Momcilovic*,[16] the Court of Appeal commenced its inquiry into what the Parliament intended in enacting s 32(1) of the Charter by observing that the intention was to be discerned from the statute itself, and not from the views expressed by members of Parliament during the debate preceding the enactment. However, the court confirmed that it is now established both at common law and by statute that resort may be had to parliamentary debates for such assistance as they may properly provide.

67 Furthermore, the High Court said in *CIC Insurance Ltd v Bankstown Football Club Ltd*[17] that it was well settled at common law that the court may have regard to reports from law reform bodies to ascertain the mischief which a statute is intended to cure. The court described "the modern approach to statutory interpretation" as insisting that context be considered in the first instance and not merely at some later stage when ambiguity might be thought to arise, "context" being used in its widest sense to include such things as the existing state of the law and the mischief which the statute was intended to remedy.

68 Because of the nature of the Charter and the "open-textured"[18] way in which rights are described, it is difficult to ascertain the will of the Parliament with respect to the ambit of the right to non-interference in privacy and family (s 13(a)) and the right of families to be protected (s 17(1)) by reference only to the words of the Charter itself. These rights are, essentially, statements of principle and have to be given content.

69 Thus, for example, decisions of the European Court on Art 8 of the European Convention have interpreted the right to respect for "private life" to encompass respect for many aspects of an individual's physical and social identity, including the right to personal autonomy, personal development and to establish

14. (2010) 241 CLR 252.
15. At 264–5, [31] (footnotes omitted; emphasis in original).
16. (2010) 25 VR 436 at 458, [79] and [80].
17. (1997) 187 CLR 384 at 408.
18. Hart, *The Concept of Law*, (1961), Ch 7.

relationships with other human beings and the outside world.[19] From relatively modest beginnings, the European Court has moved to hold that respect for "private life" incorporates respect for decisions to become and not to become a parent, including the decision to become a genetic parent.[20] This is a significant expansion of what might ordinarily be considered to be encompassed in a right to non-interference in privacy and family.

70 Presently, much of the content of rights that is urged upon decision-makers and the courts here in Victoria emanates from human rights decisions and commentary from overseas. This is entirely consistent with s 32(2) of the Charter, which provides for international law and the judgments of foreign and international courts and tribunals relevant to human rights to be considered in interpreting a statutory provision, including a provision in the Charter itself.[21] This is a good thing, as it will expose Victorian jurisprudence to relevant jurisprudence from other parts of the world and, indeed, make Victorian jurisprudence more relevant in an international context.

71 However, if Charter rights are to be construed — that is, given content — by reference to decisions from a wide variety of jurisdictions emanating from consideration of a wide variety of human rights instruments — a veritable smorgasbord of jurisprudence and commentary — a clear statement in the explanatory memorandum that the legislature did not intend the Charter to create a certain kind of right must also be relevant to construing the rights that have been included in the Charter.

72 Accordingly, I consider that the statement in the explanatory memorandum that it was not Parliament's intention to create a right to found a family in the Charter has considerable bearing on the way in which the rights in the Charter that concern the protection of families, privacy, personal autonomy, self-realisation and so on are to be construed. It provides sufficient basis, in my view, not construe the rights that have been specifically selected for protection and promotion in the Charter as including a right to found a family. In my view, when the legislature expressed its intention not to create a right to found a family in the Charter, it did so because it did not want the Charter to intrude upon questions of access to ART, recognition of legal parentage and rights to adoption. Accordingly, the Charter rights which might otherwise have encompassed rights to ART, recognition of legal parentage and adoption should be construed as not encompassing such rights.

73 This is not to approach the Charter in a way that results in a diminution of the scope of the rights that have been included as a result of something else that had not being specifically selected for inclusion — rather, it is to approach the scope of the rights by reference to the clear statement by the legislature that Charter rights should not be construed so as to include the right to found a family.

74 Ms Castles submits that the right in s 17 of the Charter, which provides that families are the fundamental group unit of society and are entitled to be protected by society and the State, entitles her to have the opportunity for her family to comprise herself, her partner Gregory, her daughter Stephanie and a sibling for

19. *R (Razgar) v Secretary of State for the Home Department* [2004] 2 AC 368 at 383, [9].
20. *Dickson v United Kingdom* [2007] ECHR 1050; *Evans v United Kingdom* (2008) 46 EHRR 34.
21. See *Kracke v Mental Health Review Board* [2009] VCAT 646 at [201]–[203]; compare *WBM v Chief Commissioner of Police* [2010] VSC 219 at [49].

Stephanie. A significant part of Ms Castles' motivation to have another child is in order to provide Stephanie with a sibling close in age so that she is not raised as an only child. This is contended to be distinguishable from the right to found a family, which is not relevant and is not claimed. Ms Castles contends that she is not seeking to found a family because she already has one. Rather, she calls upon the right that families have to be protected to enable her to enlarge her family.

75 I do not accept this proposition. Ms Castles seeks to rely on her right to non-interference in her privacy and family, and on the right of her family to protection, to argue that she has a right to continue to access IVF treatment with Dr Tsaltas, notwithstanding her imprisonment. In so doing, she asserts the right to become a genetic parent once more, to procreate, to bear a child — that is, to create or "found" a family.[22] The fact that she already has a family does not mean that in attempting to have another child, she is not seeking to found a family. The family that she seeks to found is a slightly larger one than the family she already has.

The privacy right: s 13(a)

76 Ms Castles' principal focus was on the right in s 13(a) of the Charter, which provides that a person has the right not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with.

77 The nature of the privacy right was considered by Bell J (as President of VCAT) in *Kracke v Mental Health Review Board*[23] and *Director of Housing v Sudi*.[24] In *Kracke*, his Honour identified the purpose of the privacy right as follows:[25]

> The purpose of the right to privacy is to protect people from unjustified interference with their personal and social individuality and identity. It protects the individual's interest in the freedom of their personal and social sphere in the broad sense. This encompasses their right to individual identity (including sexual identity) and personal development, to establish and develop meaningful social relations and to physical and psychological integrity, including personal security and mental stability.
>
> The fundamental values which the right to privacy expresses are the physical and psychological integrity, the individual and social identity and the autonomy and inherent dignity of the person.

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22. The United Nations Human Rights Committee described the right to found a family in General Comment 19 as follows:

> "The right to found a family implies, in principle, the possibility to procreate and live together. When states parties adopt family planning policies, they should be compatible with the provisions of the Covenant and should, in particular, not be discriminatory or compulsory."

In *R (Baiai) v Secretary of State for the Home Department* [2009] 1 AC 287, Lord Bingham referred in broad terms to a number of reported cases in which the right to found a family, which is contained in Art 12 of the European Convention, was raised. The facts giving rise to these decisions were varied, and included prisoners complaining of the denial of conjugal visits to them in prison, denial to a husband of authority to oppose an abortion undergone by his wife, and denial of artificial insemination facilities to a serving prisoner: Lester, Pannick and Herberg (eds), *Human Rights Law and Practice*, 3rd ed, (2009), p 650.

23. [2009] VCAT 646 ("*Kracke*").
24. [2010] VCAT 328 ("*Sudi*").
25. [2009] VCAT 646 at [619]–[620].

78 In *Sudi*, the privacy right was more fully described in the following way:[26]

> The rights to privacy, family, home and correspondence in section 13(a) are of fundamental importance to the scheme of the Charter. Their purpose is to protect and enhance the liberty of the person — the existence, autonomy, security and wellbeing of every individual in their own private sphere. The rights ensure people can develop individually, socially and spiritually in that sphere, which provides the civil foundation for their effective participation in democratic society. They protect those attributes which are private to all individuals, that domain which may be called their home, the intimate relations which they have in their family and that capacity for communication (by whatever means) with others which is their correspondence, each of which is indispensable for their personal actuation, freedom of expression and social engagement.

79 It can be seen that the privacy right is a right of considerable amplitude. Ms Castles seeks to extend the right even further. She says that this court ought to adopt the reasoning in *Dickson v United Kingdom*,[27] in which the Grand Chamber of the European Court of Human Rights considered a corrections policy that restricted prisoners' access to artificial insemination facilities, in the light of Art 8 of the European Convention, which guarantees respect for "private life". The Grand Chamber held that a refusal to provide artificial insemination facilities concerned the private and family lives of the applicants, which incorporated the right to respect for their decision to become genetic parents. Respecting a person's right to a private and family life involved respecting a decision by that person to become a genetic parent. It concluded that the policy governing access to artificial insemination "set the threshold so high against [the prisoner and his wife] from the outset that it did not allow a balancing of the competing individual and public interests and a proportionality test by the Secretary of State or by the domestic courts in their case, as required by the Convention".[28] Denial of access to artificial insemination facilities was held to violate Art 8 of the European Convention because a fair balance had not been struck between the competing public and private interests involved.[29] An important factor in reaching this conclusion was that artificial insemination remained the only realistic hope of the applicants having a child together, and that made the matter one of vital importance to them.

80 Ms Castles submits that the following propositions can be extracted from *Dickson*:

(a) The choice to become a genetic parent is a particularly important facet of an individual's existence or identity;

(b) The right to non-interference in privacy and family life does not merely compel the State to abstain from interference but may also impose positive obligations involving the adoption of measures designed to secure respect for private and family life even in the sphere of the relations of individuals between themselves; and

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26. [2010] VCAT 328 at [29], referring to Nowak, *UN Covenant on Civil and Political Rights: ICCPR Commentary* (2nd revised ed, 2005) 377 ff.
27. [2007] ECHR 1050 at [65]–[66] ("*Dickson*").
28. At [82].
29. At [85].

(c) Whilst the inability to conceive a child might be a consequence of imprisonment, it is not an inevitable one, it not being suggested that the grant of artificial insemination facilities would involve any security issues or impose any significant administrative or financial demands on the State.

81 In my view, these submissions confirm that Ms Castles is asserting a right to become a genetic parent and thereby to found a family. For the reasons that I have given, the privacy right should not be construed so as to encompass such a right. I can see no further application for the privacy right given Ms Castles' particular complaint.[30]

Other rights under the Charter: ss 8 and 22

82 That, however, is not the end of the matter.

83 Reliance on s 8 of the Charter, which is a right to recognition and equality before the law, does not amount to the assertion of a right to access ART. Section 22, which requires prisoners to be treated with humanity and with respect for their human dignity, also provides scope to formulate the complaint other than as a right to become a genetic parent and for that purpose, to access ART. Section 22, in particular, has significant implications for the construction of the Corrections Act and the provision of medical treatment to prisoners.

Section 8 of the Charter: the equality right

84 Ms Castles contends that the failure to allow her to access the IVF treatment is discrimination on the basis of impairment in the form of a "fertility impairment". In circumstances where prisoners at Tarrengower are entitled to conjugal visits, prisoners have given birth and the prison permits prisoners to care for their children, denying a person who is infertile the opportunity to conceive when other female prisoners in the same or similar circumstances have that opportunity is less favourable treatment.[31]

85 This argument is based on s 8(2) of the Charter which provides that every person has the right to enjoy his or her human rights without discrimination.[32] Discrimination in this context means discrimination within the meaning of the Equal Opportunity Act 1995 on the basis of an attribute set out in s 6 of that Act.[33] Ms Castles argues that fertile prisoners are allowed conjugal visits and

30. Ms Castles also complains in her written submissions that no counselling was offered to her to manage the effects of not being able to have IVF treatment. However, no evidence was put before the court as to what the defendants knew about Ms Castles' mental state. The report of Professor Cook (referred to below) which was dated 24 May 2010 outlined Ms Castles' depressed and anxious mental state. That report was not available to the defendants until very recently.

31. Ms Castles made it clear in submissions before the court that she only relied on direct discrimination. She did not contend that the treatment of which she complains constitutes indirect discrimination.

32. This right was considered more fully by Bell J in *Re Lifestyle Communities Ltd (No 3) (Anti-Discrimination)* [2009] VCAT 1869.

33. Section 3(1) of the Charter. One of the attributes referred to in s 6 is "impairment", which includes total or partial loss of a body function. Ms Castles submits that infertility constitutes an impairment for the purposes of the Equal Opportunity Act. She relies on a Canadian decision, *Cameron v Nova Scotia (Attorney-General)* [1999] NSJ No 297 at [208] in which the Nova Scotia Court of Appeal held there could be unlawful discrimination on the ground of

may fall pregnant as a result of such a visit. Ms Castles cannot fall pregnant by this means; if she wishes to fall pregnant, then she must be allowed to access IVF treatment.

86 The court heard evidence that residential (or conjugal) visits at Tarrengower are available to prisoners serving a minimum sentence of 18 months or more. Once a prisoner has been at Tarrengower for two months, she can apply through the prison's review and assessment committee to have a residential visit with her partner, providing that she can satisfy the committee that the relationship is a longstanding one. In approving residential visits, other matters are considered as well, such as participation in employment and education, attendance at offending behaviour programs and whether or not the prisoner has been engaged in any activity that could give rise to disciplinary matters inside the prison.

87 A residential visit can only take place in the "residential facility", which is a stand-alone facility similar to the other cottage style accommodation at the prison. It is used not only for visits by partners, but also for visits by children and other family members. Children, in particular, are allowed to visit their mothers at the prison from Friday evening to Sunday evening when the residential facility is available.

88 The evidence before the court was that residential visits are organised on the basis of a waiting list, and that there is a heavy demand for use of the residential facility. It is currently only available to eligible prisoners about once every eight weeks due to high demand.

89 On this basis, I infer that residential visits are not organised to coincide with prisoners' periods of fertility and that a fertile prisoner would have difficulty arranging for a residential visit to occur at a time that maximised her chances of falling pregnant. Residential visits are not made available to facilitate procreation, but to enable existing family relationships to be maintained. In these circumstances, the governor's evidence that she was not aware of any prisoner at Tarrengower who had become pregnant following a residential visit was unsurprising.

90 If the comparator for the purposes of establishing that Ms Castles has been subjected to less favourable treatment is a fertile prisoner who wishes to become pregnant, then I am unpersuaded on the evidence that Ms Castles has received less favourable treatment from the authorities at Tarrengower by being denied a permit to leave the prison to access IVF treatment in Melbourne.

91 Moreover, the basic requirement that prisoners remain in prison for the term of their imprisonment does not discriminate between fertile and infertile prisoners. Health related permits are issued on the basis of health needs and there was no evidence that the decision to refuse Ms Castles a permit under s 57A of the Corrections Act was any less favourable treatment than would have been given to a fertile prisoner with a similarly assessed health need. Ms Castles' infertility was not "a substantial reason" for the denial of a permit under s 57A.

92 There is therefore no basis upon which the court could conclude that the defendants' conduct in refusing Ms Castles access to the IVF treatment discriminated against her on the grounds of her infertility.

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infertility, which qualified as a physical disability. The relevant policy was one that excluded IVF treatment from health insurance coverage.

Section 22(1) of the Charter: respect for human dignity

93 Section 22(1) provides for persons deprived of liberty to be treated with humanity and with respect for the inherent dignity of the human person. It is a special right for persons who are vulnerable and whose civil and political rights are compromised because of their imprisonment or detention.

94 The court heard substantial submissions from the commission on the scope of the right in s 22(1) of the Charter, which I shall refer to as "the dignity right". I am persuaded that the dignity right is important in the present context. It requires the secretary and other prison authorities to treat Ms Castles humanely, with respect for her dignity and with due consideration for her particular human needs, among other things. The Corrections Act must be construed consistently with the dignity right.

95 Both Ms Castles and the defendants relied on two decisions from the European Court of Human Rights to give content to the dignity right. However, both cases concerned Art 3 of the European Convention which, like s 10(b) of the Charter, provides that no-one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

96 In *Ilascu v Moldova*,[34] the Grand Chamber of the European Court held that every prisoner must be detained in conditions which are compatible with respect for his human dignity, that the manner and method of the execution of this measure should not subject the prisoner to distress or hardship "of an intensity exceeding the unavoidable level of suffering inherent in detention" and that, "given the practical demands of imprisonment, his health and wellbeing are adequately secured".[35]

97 In *Istratii v Moldova*,[36] the European Court considered complaints about a lack of medical assistance and conditions of detention, also in the context of Art 3 of the Convention. It reinforced what was said in *Ilascu* about not subjecting prisoners to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention. The court held that although Art 3 could not be construed as laying down a general obligation to release detainees on health grounds, it none the less imposed an obligation on the State to protect the physical wellbeing of persons deprived of their liberty, for example by providing them with the requisite medical assistance.[37]

98 Not surprisingly, the defendants say that these cases involved treatment that was far more severe than the treatment currently under challenge, in that it involved actual bodily injury or the infliction of intense physical or mental suffering. The secretary's refusal to grant Ms Castles permits under s 57A to enable her to travel to Melbourne for the IVF treatment is not in any way comparable with and could not, on any view, constitute inhumane treatment. The denial of a permit is a consequence of detention; any distress or suffering experienced by Ms Castles as a result is not of an intensity exceeding the unavoidable level of suffering inherent in detention. As a consequence, the defendants contend there is no violation of Ms Castles' right under s 22(1) of the Charter in this case.

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34. European Court of Human Rights, Application No 48787/99, 8 July 2004 ("*Ilascu*").
35. At [428].
36. [2005] ECHR 8721/05, 8705/05 and 8742/05.
37. At [47].

99 However, the commission correctly submits that s 22(1) of the Charter ought not to be conflated with s 10(b), which protects persons from treatment or punishment that is cruel, inhuman or degrading. Section 22(1) is a right enjoyed by persons deprived of their liberty; s 10(b) applies more generally to protect all persons against the worst forms of conduct. Section 10(b) prohibits "bad conduct" towards any person; s 22(1) mandates "good conduct" towards people who are detained.[38]

100 The Office of the High Commissioner for Human Rights has issued General Comment No 21 in relation to Art 10 of the ICCPR, upon which s 22(1) of the Charter is based. According to General Comment No 21, Art 10 imposes a positive obligation towards persons who are particularly vulnerable because of their status as persons deprived of liberty. It complements the ban on torture or other cruel, inhuman or degrading treatment or punishment contained in Art 7 of the ICCPR. Persons deprived of their liberty may not be subjected to treatment that is contrary to Art 7, but neither may they be subjected to any hardship or constraint other than that resulting from the deprivation of liberty. Respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons. "Persons deprived of their liberty enjoy all the rights set forth in the Covenant, subject to the restrictions that are unavoidable in a closed environment."

101 The commission argues, with considerable force, that s 22(1) requires a detained person to be accorded the rights they would have were they not detained, in so far as they are rights that are inherent to the human person. This construction is supported by the opening words of the Universal Declaration of Human Rights, which commences by reference to the inherent dignity and the equal and inalienable rights of all members of the human family. The ICCPR and the International Covenant on Economic, Social and Cultural Rights ("ICESCR") also recognise that the rights expressed in those instruments derive from the inherent dignity of the human person.

102 As a consequence, the commission contends, once a person is imprisoned, it becomes necessary for the authorities to justify any limitation on a prisoner's rights, other than the right to liberty. The authorities may well be able to justify many infringements of rights for the purposes of the security and good order of the prison, but they must none the less justify those infringements and cannot simply assert that there is no need for any justification because no rights are engaged. Section 22(1) is inconsistent with such a position.

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38. In *Taunoa v Attorney-General* [2008] 1 NZLR 429, Elias CJ considered the content of rights in the New Zealand Bill of Rights Act (ss 9 and 25(3)) that are equivalent to ss 10(b) and 22(1) of the Charter. She observed that they were not simply different points of seriousness on a continuum, but identify distinct, although overlapping, rights. A requirement to treat people with humanity and respect for the inherent dignity of the person imposes a requirement of humane treatment. In the context of the New Zealand Bill of Rights Act, the words "with humanity" were properly to be contrasted with the concept of inhuman treatment in s 9 and equivalent statements in other comparable instruments. Section 23(5) (s 22(1) of the Charter) is concerned to ensure that prisoners are treated humanely, while s 9 (s 10(b) of the Charter) is concerned with the prevention of treatment properly characterised as "inhuman". The concepts are not the same, although they overlap, because inhuman treatment will always be inhumane. Inhuman treatment is, however, different in quality. It amounts to a denial of humanity. Her Honour went on to say that denial of humanity may occur through deprivation of basic human needs, including personal dignity and physical and mental integrity. Inhuman treatment is treatment that is not fitting for human beings, "even those behaving badly in prison".

103 The commission submits that this proposition is supported by United Nations resolutions concerning basic principles for the treatment of prisoners.[39] These are, relevantly, as follows:

> (1) All prisoners shall be treated as human beings.
> (2) There shall be no discrimination on the grounds of race, colour, sex, language, religion, political or other opinion, national or social original, property, birth or other status.
>
> …
>
> (4) The responsibility of prisons for the custody of prisoners and for the protection of society against crime shall be discharged in keeping with a State's other social objectives and its fundamental responsibilities for promoting the wellbeing and development of all members of society.
> (5) Except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the universal declaration of human rights and, where the State concerned is a party, the international covenant on economic, social and cultural rights and the international covenant on civil and political rights and the optional protocol thereto, as well as such other rights as are set out in other United Nations conventions.
>
> …
>
> (9) Prisoners shall have access to the health services available in the country without discrimination on the grounds of their legal situation.

104 According to the commission, that is a further recognition of the right that is protected by s 22(1) and that it is a right of some width.

105 Finally, the commission submits that both the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW") and the International Covenant for Economic, Social and Cultural Rights ("ICESCR") recognise that decisions concerning the number and spacing of children, and access to health services, including in the area of sexual and reproductive health, are an aspect of the inherent dignity of a person that underlies all human rights. This assists in giving content to s 22(1) of the Charter, which recognises the fundamental principle that while incarceration necessarily involves a limitation of the right to liberty, it places an additional burden on the State to preserve human dignity notwithstanding that incarceration.

106 Article 12 of the ICESCR relates directly to the provision of health care. It recognises the right of "everyone" to the enjoyment of the highest attainable standard of physical and mental health. The United Nations Economic and Social Council has addressed the scope of Art 12 of the ICESCR in its General Comment No 14. Although ICESCR rights are not directly in issue in the current proceeding, it is instructive that the General Comment links the right to health with the right to human dignity. It refers to the obligation to respect the right to health by, inter alia, refraining from denying or limiting equal access for all persons, including prisoners or detainees, to preventative, curative or palliative health services.

107 The "Standard Guidelines for Corrections in Australia (Revised 2004)" ("the national guidelines"), which have apparently been endorsed by the Victorian Department of Justice,[40] are based on the United Nations Standard Minimum

39. 68th Plenary meeting of the General Assembly, 14 December 1990.
40. The logo for the Department of Justice appears on the cover of the national guidelines.

Rules for the Treatment of Prisoners and related recommendations, as well as the Council of Europe Standard Minimum Rules. In relation to access to health services, the national guidelines specify that every prisoner is to have access to "evidence based" health services provided by a competent, registered health professional who will provide a standard of health services comparable to that of the general community, and that every prisoner is to have access to the services of specialist medical practitioners as well as psychiatric, dental, optical and radiological diagnostic services.[41] Referral to such services should take account of community standards of health care.[42] Prisoners should be able to receive treatment from private health professionals, provided they can meet the costs and there are reasonable clinical grounds for granting the application and the request falls within the relevant statutory requirements.[43] Finally, where a prisoner is under medical treatment upon being received into prison, that prisoner should be permitted to maintain contact, on the approval of the prison health service, with the medical service that was treating the prisoner.[44]

108 It is not a simple matter to give content to broadly defined rights purporting to enshrine universal principles. In my view, however, to give content to the right of prisoners to be treated with humanity and respect for their human dignity in respect of access to medical treatment, it is necessary to go no further than the national guidelines or, indeed, the terms of s 47(1)(f) of the Corrections Act. I accept the commission's submission that 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. I also accept that access to health care is a fundamental aspect of the right to dignity. Hence, the international instruments and commentary and the domestic corrections policies to which the court was referred recognise that prisoners are entitled to have access to health services available to the wider community without discrimination on the grounds of their legal situation. Like other citizens, prisoners have a right to enjoyment of a variety of facilities, goods, services and conditions necessary for the realisation of a high standard of health. That is to say, the health of a prisoner is as important as the health of any other person.

109 However, that does not translate into a right to every conceivable form of medical treatment that is available in the community. There is no such right generally in the community. Nor does it translate into a right to leave prison every time that a prisoner wishes to enjoy medical treatment or health care that the prisoner is able to pay for. Prisoners have been deliberately removed from the community and deprived of their liberty in accordance with well-established sentencing principles. As a result, for the period of their imprisonment, they are largely deprived of their freedom of association and, to a significant extent, their autonomy. Hence, although prisoners do not forgo their human rights, their enjoyment of many of the rights and freedoms enjoyed by other citizens will necessarily be compromised by the fact that they have been deprived of their liberty.

110 In *R (Daly) v Secretary of State for the Home Department*,[45] Lord Bingham expressed the tension inherent in the exercise of rights by persons who are deprived of liberty in terms of the "curtailment" of the enjoyment, by the person confined, of rights enjoyed by other citizens:

41. Guideline 2.26.
42. Guideline 2.27.
43. Guideline 2.33.
44. Guideline 2.35.
45. [2001] 2 AC 532 at 537, [5].

> Any custodial order inevitably curtails the enjoyment, by the person confined, of rights enjoyed by other citizens. He cannot move freely and choose his associates as they are entitled to do. It is indeed an important objective of such an order to curtail such rights, whether to punish him or to protect other members of the public or both. But the order does not wholly deprive the person confined of all rights enjoyed by other citizens. Some rights, perhaps in an attenuated or qualified form, survive the making of the order.

111 As Lord Bingham observed, the effects of the deprivation of liberty are profound. Rights and freedoms which are enjoyed by other citizens will necessarily be "curtailed", "attenuated" and "qualified" merely by reason of the deprivation of liberty.

112 It is also to be noted that General Comment No 21 in relation to Art 10 of the ICCPR refers to prisoners' enjoyment of ICCPR rights, "subject to the restrictions that are unavoidable in a closed environment". This statement of principle is therefore based on the prisoner remaining in a "closed environment". Although it may be theoretically possible to enable prisoners to enjoy their human rights (other than the right to liberty) to the fullest extent by allowing them to leave prison on an escorted or accompanied basis, it would not be practicable to do so and would, arguably, be inconsistent with the very purpose of imprisonment itself.

113 In my view, therefore, the dignity right does not encompass the right to any and all medical treatment that is available in the community. The right of prisoners to medical treatment is a more limited one, but one that guarantees that the health of prisoners is protected and accorded no less importance than the health of other members of the community. The right articulated in s 47(1)(f), properly construed, satisfies this requirement.[46]

Does s 47(1)(f) confer a right to IVF treatment?

114 Ms Castles submits that she has a right to access IVF treatment under s 47(1)(f) of the Corrections Act, because such treatment is both reasonable and necessary for the preservation of her health, and further, that she has a right to access the

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46. The Director of Justice Health, Ms Gardner, gave evidence about the provision of health services in the Victorian prison system. Ms Gardner's unchallenged evidence demonstrated that the existing practices for the provision of health services to prisoners in Victoria by or through Justice Health were consistent with the requirements of s 22(1) of the Charter and the human rights instruments described above.

    Ms Gardner's evidence was that the health services provided within the corrections system include medical, psychiatric and mental health services. Some psychological services are available as well, along with drug and alcohol services. These health services are provided to community standards. The majority of health services provided to prisoners are provided "on site". However, some services, such as specialist cardiac surgery, are not provided within prisons and prisoners are required to attend a tertiary facility to access such services. That might be the secure ward at St Vincent's Hospital or another tertiary facility.

    Because Justice Health seeks to provide comprehensive health services, it also arranges for medical specialists to visit certain sites. However, sometimes patients are required to attend outpatient facilities at St Vincent's Hospital in Melbourne or, depending on what their need is, another tertiary facility, as long as it has been approved from a security point of view. Specialist obstetric care is often provided through Sunshine Public Hospital, or the Women's Hospital, depending on the level of specialisation that is required. Some basic obstetric assessment services are provided in prisons through the Obstetric Unit at Sunshine Hospital.

    Although Justice Health aims to provide extensive medical services within the prison system, some services cannot be provided in prison, and prisoners may need to access medical services externally. External appointments are regularly organised through Justice Health (or its contractors), and permits to leave the prison are granted for the purpose of attending external medical appointments.

IVF treatment provided by Dr Tsaltas, a private medical practitioner, because a clinical assessment of her request for treatment by Dr Tsaltas that was carried out by Justice Health concluded that she should have access to that treatment.

115 Ms Castles submits, generally, that the IVF treatment with Dr Tsaltas at the Melbourne IVF Clinic is necessary for the preservation of both her "reproductive health" and her "psychological health". In relation to the former, she says that her reproductive health is her ability to bear a child. IVF treatment is required to preserve that ability. In relation to her psychological health, she says that it is being detrimentally affected by the denial of the opportunity to have another child by means of the IVF treatment.

116 Ms Castles submits that IVF treatment with Dr Tsaltas at the Melbourne IVF Clinic is reasonable and that the Department of Justice (through Justice Health) has carried out an assessment and found it to be reasonable and necessary. In fact, she says that her rights under s 47(1)(f) crystallised upon this assessment. It is therefore submitted that she has a statutory right under s 47(1)(f) of the Act to have access to the IVF treatment at her own expense and that she is entitled to a declaration to that effect.

117 The defendants submit that s 47(1)(f) does not confer a right to whatever medical treatment a prisoner may desire, even if the prisoner is prepared to pay for the treatment. It confers a more limited right because, first, the treatment must be reasonable, both in the context of the particular prisoner and in the context of the management and operation of the prison system and, secondly, the treatment must be necessary for the preservation of health. Treatment that was extraordinarily expensive or treatment that could only take place outside of Australia would not be reasonable, regardless of the particular prisoner in question. Treatment that has a very low prospect of success may not be reasonable in a given prisoner's particular circumstances depending on the chance of success and nature of the problem the treatment is designed to remedy. Furthermore, the word "necessary" imposes a high threshold. Medical treatment that is elective in nature and not required to preserve the prisoner's health will not be encompassed by s 47(1)(f).

118 The defendants contend that it is not reasonable for Ms Castles to access the IVF treatment, because the chances of success are less than 4% and such treatment is not treatment for a life threatening illness. Moreover, IVF treatment is not reasonable in the context of a prison because it requires multiple absences from prison on particular, as yet unknown, dates related to Ms Castles' menstrual cycle and thereby gives rise to logistical and operational difficulties for ongoing prison management and security.

119 The defendants further contend that the IVF treatment is not necessary for the preservation of health because, as a treatment that enables a woman to become pregnant, it is quite different from treatment that preserves a person's health. To the extent that Ms Castles claims that the medical treatment is necessary for the preservation of her mental health, the defendants contend that her mental health needs could be met by appropriate counselling, psychological or psychiatric treatment provided in the prison, as appropriate. IVF treatment is not a necessary treatment for mental health problems. On this basis, s 47(1)(f) does not confer a right to IVF treatment, either generally or in Ms Castles' particular circumstances, because IVF treatment is neither reasonable nor necessary for the preservation of her health.

120 I agree with the defendants that the word "reasonable" and the phrase "necessary for the preservation of health" limit the right to access medical treatment, even if the prisoner is able to pay for medical treatment. The right to access medical treatment and care that is reasonable and necessary for the preservation of health is not a right to any and all treatment that a prisoner could possibly want or that he or she could access if not imprisoned. People in the community who have unrestricted access to the market for medical services are free to undergo many treatments that are not necessary for the preservation of their health, for example, breast enhancement, teeth whitening or similar forms of cosmetic surgery. This is not the case for prisoners.

121 For medical treatment or care to be "necessary for the preservation of health", there must be a risk that a prisoner's health will be compromised if treatment is not provided. There was evidence before the court that Ms Castles' reproductive health, that is, her ability to bear a child, is compromised and will become further compromised the longer she delays undertaking the IVF treatment. At the moment, her infertility can be treated with IVF treatment, albeit with limited prospects of success. With the passage of time, IVF treatment ceases to have any efficacy at all, and her eligibility for the treatment ceases in turn.

122 Of course, it might be said that Ms Castles' reproductive health will not decline as a result of any failure or refusal to allow her to undertake IVF treatment. It will decline, inexorably, as a function of ageing. For Ms Castles, IVF treatment does not involve preserving fertility so much as circumventing — by artificial means — the effects of ageing. Moreover, the reproductive health of a 45 year old woman will not be the same as that of a 20 year old woman, even though both may be perfectly healthy. A person whose fertility diminishes as part of the normal aging process would not commonly be thought to be suffering from poor "reproductive health".

123 None the less, I consider that IVF treatment is necessary for the preservation of Ms Castles' health on the ordinary meaning of those words. Reproductive health is a concept that is well recognised. The World Health Organization has published guidelines for the measurement of reproductive health, based on the fertility and reproductive capacities of women aged between 15 and 49.[47] A 45 year old woman is entitled to enjoy "reproductive health", including the ability to conceive a child, in circumstances where treatments are available that give her a reasonable chance of doing so. Although IVF treatment does not "cure" infertility and is only efficacious as a treatment for infertility because it does not rely on the body's natural processes to achieve fertilisation, it must none the less be recognised as a legitimate medical treatment for a legitimate medical condition. I see no proper basis to treat IVF treatment differently from other forms of medical intervention that are considered to be necessary to enable people to live dignified and productive lives, unencumbered by the effects of disease or impairment.

124 When Ms Castles was imprisoned, she was receiving treatment for her infertility. Before she was imprisoned, it was not, apparently, in issue that the treatment that she was undergoing with Dr Tsaltas at the Melbourne IVF Clinic

47. World Health Organization, "Reproductive Health Indicators, Guidelines for their Generation, Interpretation and Analysis for Global Reporting", 2006. <http://whqlibdoc.who.int/publications/2006/924156315X_eng.pdf>

was medical treatment that was necessitated by her infertility. It was not unlike the medical treatment that many women receive in relation to fertility and reproduction, and its status as a legitimate medical treatment was publicly "endorsed" through a Medicare subsidy. Ms Castles demonstrated a commitment to this form of treatment by investing considerable time, money and, no doubt, emotional energy in the process. IVF treatment is torrid. It is not a process to be undertaken lightly, and a decision to undergo the rigours of IVF treatment should not be trivialised or denigrated as a "life-style" choice.

125 In these circumstances, I must conclude that IVF treatment is necessary for the preservation of Ms Castles' reproductive health. I am reinforced in this view by a number of matters.

126 First, s 47(1)(f) itself refers to prisoners having access to treatments offered by physiotherapists and chiropractors, indicating that the medical care to which prisoners are entitled is not restricted to treatment and care that is essential to preserve life or arrest a serious decline in health. Section 47(1)(f) plainly contemplates that prisoners are entitled to do more than remain in a "holding pattern" with respect to their health while imprisoned. They, like other members of our community, are entitled to enjoy a variety of facilities, goods, services and conditions necessary for the realisation of a high standard of health. Consistently with this, I note that Tarrengower regularly organises for prisoners to visit a podiatrist. The evidence given by Ms Gardner, the Director of Justice Health, was to the effect that a wide variety of health services are available to prisoners within the Victorian corrections system. Those services are not limited to treatment and care for life-threatening or terminal conditions, and nor should they be.

127 Secondly, s 32(1) of the Charter provides that, so far as it is possible to do so consistently with its purpose, s 47(1)(f) must be construed in a way that is compatible with human rights in the sense explained by the Court of Appeal in *R v Momcilovic*.[48] I have already outlined what I understand to be the effect of s 22(1) of the Charter. The consequence is that s 47(1)(f) must be construed consistently with the requirement that prisoners be treated with humanity and with respect for their human dignity. Respecting these rights requires the provision of facilities, goods, services and conditions necessary for the realisation of the standard of health enjoyed by other members of the community. In my view, that interpretation is open under the existing rules of statutory interpretation and affords proper protection against interfering with Ms Castles' fundamental human rights.

128 Notwithstanding the beneficial construction of s 47(1)(f) that is mandated by the terms and the purpose of the provision, and by s 32(1) of the Charter, I am not persuaded that the IVF treatment is necessary for the preservation of Ms Castles' mental health. The principal reason for this is that IVF fertilisation treatment is a treatment for infertility; it is not a treatment for mental illness. Secondly, the evidence before the court did not support such a finding. The court received evidence, which I accept, from Associate Professor Cook of the Faculty of Life and Social Sciences at Swinburne University of Technology. Professor Cook is a clinical and counselling psychologist, a clinical member of the Victorian Association of Family Therapists and an approved infertility counsellor. According to Professor Cook, Ms Castles is experiencing depression

48. (2010) 25 VR 436 at 464–5, [103].

and anxiety due in part to her incarceration and in part to her inability to continue the IVF treatment. She exhibits significant and concerning symptoms of these disorders. Moreover, her mental health problems are consistent with research relating to the impact of infertility on men, women and couples. Professor Cook expressed the opinion that should Ms Castles be given the opportunity to continue the IVF treatment, her mental status would improve. However, he also expressed the view that should such treatment be unsuccessful, Ms Castles' mental health is likely to be negatively affected and she may require professional support.

129 Professor Cook's evidence was thoughtful and balanced. However, it was not sufficient in my view to establish that the provision of IVF treatment was necessary for the preservation of Ms Castles' mental health. Ms Castles' mental health is under strain due to a variety of factors, not the least of which is her incarceration.

130 Further, Professor Cook's reference to the likelihood that Ms Castles will require counselling in the (likely) event that IVF treatment is unsuccessful serves to demonstrate that any treatment that Ms Castles may require to preserve her mental health is mental health treatment, that is, treatment provided by a counsellor, a psychologist or a psychiatrist.

131 In these circumstances, on a proper construction of s 47(1)(f), IVF treatment is treatment that is necessary for the preservation of Ms Castles' reproductive health, but it is not necessary for the preservation of Ms Castles' mental health.

132 The question then arises as to how the requirement that treatment or care be "reasonable" should be construed. The medical treatment or care to which Ms Castles is entitled must not only be necessary for the preservation of her health, it must also be reasonable.

133 I accept the defendants' submission that whether treatment is reasonable is not just a question of whether treatment is reasonable on a clinical assessment, but may involve consideration of other factors, such as the cost of the treatment and the magnitude of any disruption to the prison system entailed in its provision.

134 The defendants have obtained a report from Dr John McBain, the Medical Director of the Melbourne IVF Clinic, outlining the procedure and Ms Castles' prospects of success. The relevant part of Dr McBain's report states that Ms Castles' chances of conception and live birth using her own eggs are less than 4% regardless of which technique or modification is used as she has physiological age-related infertility with eggs of very low potential. Should she conceive, the risk of subsequent miscarriage is 40–50%. Dr McBain also outlines the health risks to Ms Castles of undergoing an IVF procedure, including the risks of anaesthesia, surgical injury, infection and deep vein thrombosis.

135 It is noteworthy that even Dr Tsaltas describes Ms Castles' chance of pregnancy as "very small".

136 It is the defendants' submission that it is not reasonable to place the burden upon prison resources of transporting Ms Castles to Melbourne on three occasions per cycle, having regard to the very small possibility that the treatment will succeed.

137 Plainly, there is a point at which the provision of medical treatment and care would not be reasonable in the context of a prison environment, even if the prisoner was willing and able to pay for the treatment. For example, treatment

that involved travelling overseas is unlikely to be reasonable, other than possibly in the direst of medical cases. A prisoner might wish to visit at his or her own expense a particular chiropractor located a long way from the prison on a daily basis over a protracted period. Again, such treatment is unlikely to be reasonable for the purposes of s 47(1)(f) because the transport and supervision of the prisoner would impose an undue burden on the prison system. IVF treatment may not be reasonable in certain circumstances, as it plainly has the capacity to impose a considerable burden on the prison system.

138 On the other hand, medical treatment that qualifies under s 47(1)(f) as necessary for the preservation of the prisoner's health is likely also to be reasonable.

139 Ms Castles' particular circumstances are very relevant to the question of the reasonableness of the IVF treatment that she has requested. The treatment in question is the continuation of treatment that she was undergoing at the time of her imprisonment, it is her last chance to undertake that treatment, she is prepared to pay for it herself and, as she is a short-term prisoner, any subsequent pregnancy is unlikely to place a burden on the prison system.

140 In my view, however, a further matter relevant to the reasonableness of the IVF treatment requested by Ms Castles is that it requires her to travel to Melbourne on a regular basis to receive the treatment at the Melbourne IVF Clinic. IVF treatment has long since ceased to be an exotic and uncommon form of treatment. It is widely available throughout Victoria, including in regional centres. There is no reason to believe that Ms Castles would not receive the services necessary for the realisation of the highest attainable standard of health at a clinic offering IVF treatment closer to Tarrengower. The reasonableness of the IVF treatment sought by Ms Castles may be assessed having regard to the availability of the same treatment at alternative locations closer to the prison in the light of the undoubted logistical problems involved in transporting prisoners large distances to receive treatment.

141 If Ms Castles remains at Tarrengower for the period of the IVF treatment and is required to be transported to Melbourne to receive it, there can be little doubt that this will place considerable strain on the resources at Tarrengower. The Governor of Tarrengower, Ms Smith, was asked about the ratio of correctional staff to prisoners at Tarrengower. She said that on a weekday, excluding public holidays, the prison would be open with one senior prison officer and two or three base grade prison officers. In addition, there would be a small number of supervising staff (including Ms Smith), along with a couple of "industry" staff who take care of employment opportunities and tasks for prisoners, both in the prison and in the community.

142 The evidence before the court was also that prisoners at Tarrengower are being prepared for release back into the community, and that this involves engaging in community work and community activities, as well as rehabilitation programs. All of this will inevitably be resource intensive. There is a strong possibility that at least some of the opportunities available to the prisoners at Tarrengower will be adversely affected by the commitment of resources that would be required to ensure that Ms Castles was able to receive IVF treatment in Melbourne.

143 It was submitted on behalf of Ms Castles that no commitment of Tarrengower resources would be required because she could travel to Melbourne unaccompanied to receive the IVF treatment from Dr Tsaltas. This question is

closely related to the issuing of permits under s 57A to leave Tarrengower for health purposes. I propose to deal with that question below as part of the considerations that are relevant to the issuing of permits under s 57A of the Corrections Act. However, this court is not in a position to "second guess" the corrections authorities in relation to the security arrangements that are required for Ms Castles to travel to Melbourne.

144 In this context, I note that Mr Brendan Money, upon whose evidence the secretary principally relied as to the administration of the permit system by Corrections Victoria, said in his evidence that if Corrections Victoria were required to facilitate Ms Castles attending the Melbourne IVF Clinic for treatment, Ms Castles may need to be transferred to DPFC, from whence the regular trips to East Melbourne could be more easily managed. Although no submissions were made as to this possibility by Ms Castles, I apprehend that such a solution would not be acceptable to her.

145 This highlights the difficulty of a case such as this. The court can do no more than set out the broad parameters for the lawful administration of the Corrections Act. Even in a human rights context, where the proportionality assessment is a key part of the court's role and involves it engaging in "a high standard of review", including, in appropriate circumstances, assessing the balance which the decision-maker has struck, and considering the relative weight accorded to interests and considerations,[49] the court cannot enter into the process of fine-tuning arrangements that would satisfy the requirements of the Corrections Act, meet the health needs of Ms Castles and overcome the practical difficulties created by competing demands for resources within the corrections system. The highly adversarial approach of parties to this proceeding is not conducive to producing a result that is humane to Ms Castles and capable of being implemented in a manner that minimises disruption to the prison so as not to disadvantage the other prisoners at Tarrengower. In setting out the parameters for the lawful administration of the Corrections Act, the court would hope that an accommodation satisfactory to all parties could be reached within those parameters.

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49. In *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100 at 116, [30]–[31], Lord Bingham restated the basic principles for considering proportionality under s 6 of the Human Rights Act (UK) as follows:

> "… [T]he Court's approach to an issue of proportionality under the Convention must go beyond that traditionally adopted to judicial review in a domestic setting … There is no shift to merits review, but the intensity of review is greater than was previously appropriate, and greater even than the heightened scrutiny test adopted by the Court of Appeal in *R v Ministry of Defence; ex parte Smith* [1996] QB 517, 554. The domestic court must now make a value judgment, an evaluation, by reference to the circumstances prevailing at the relevant time … Proportionality must be judged objectively, by the Court …
>
> … [W]hat matters in any case is the practical outcome, not the quality of the decision-making process that led to it."

For his part, Lord Hoffmann said at 126, [65]:

> "In domestic judicial review the Court is usually concerned with whether the decision-maker reached his decision in the right way, rather than whether he got what the Court might think is the right answer. But Art 9 is concerned with substance, not procedure. It confers no right to have a decision in a particular way. What matters is the result: was the right to manifest a religious belief restricted in a way which is not justified under Art 9(2)?"

146 As a final but related matter, it needs to be said that the court is well aware that IVF treatment is not the only form of ART available to treat age-related infertility. There may well be other treatments available to secure Ms Castles' fertility pending her release from prison. However, there was no evidence before the court as to what, if any, other treatments might be available. The court is therefore limited to considering the application of s 47(1)(f) to Ms Castles' request for IVF treatment and, in particular, the IVF treatment to be provided by Dr Tsaltas at the Melbourne IVF Clinic.

147 In the circumstances of this case, on a proper construction of s 47(1)(f), IVF treatment is both reasonable and necessary for the preservation of Ms Castles' health. Ms Castles has a right to such treatment pursuant to s 47(1)(f) of the Corrections Act and the secretary, who has legal of custody Ms Castles, has a corresponding duty to provide the necessary approval to enable that treatment to take place. However, for the reasons given, this does not necessarily entail the right to receive such treatment from Dr Tsaltas at the Melbourne IVF Clinic. It would accord with the requirements of s 47(1)(f) of the Corrections Act for the secretary, in consultation with Ms Castles, to investigate whether IVF treatment could be provided nearer to Tarrengower, and to approve treatment at the alternative location, rather than the treatment sought by Ms Castles at the Melbourne IVF Clinic.

Has Ms Castles' right to the IVF treatment crystallised?

148 In the course of the hearing, Ms Castles also submitted that her right to IVF treatment by Dr Tsaltas had in any event already crystallised by reason of the assessment of her health need by Justice Health.

149 On 7 April 2010, well prior to the secretary's decision, the Director of Justice Health, who had been engaged in lengthy and detailed correspondence with HRLRC on behalf of Ms Castles, sent a briefing to the secretary entitled "Prisoner access to IVF treatment". The briefing records that Justice Health recommended that the secretary approve a delegation of authority to Ms Michele Gardner, as Director of Justice Health, to make a determination on Ms Castles' request. The briefing set out the background to Ms Castles' request. Under the heading "Issues/Comments", it continued:

> When considering the rights of Ms Castles and her partner, Justice Health has considered the following factors when determining the extent which [sic] a denial to continue treatment would intrude on the right of Ms Castles and her partner to private and family life:
>
> - The implication of Ms Castles' age and the reality that she will have exceeded the eligibility age to participate in IVF treatment at the time of her release.
> - The fact that Ms Castles has already commenced the expensive and invasive IVF treatment in the community and has already made a significant financial and emotional investment in the procedure.
>
> In light of the above and upon considering all the facts in hand, the relevant legislation …, at this stage Justice Health would be inclined to decide in favour of Ms Castles' application. This position may change on further consideration of all relevant factors, however Justice Health's view at the date of writing is based on the following factors:
>
> - Ms Castles is classified as a low security risk.
> - Ms Castles is entitled to conjugal visits (although she has not been able to conceive), which could imply an acceptance of a possibility of Ms Castles becoming pregnant while in prison.
> - Ms Castles is entitled to go on accompanied movements.

- Ms Castles' offending was not of a violent nature and is not such to raise any concerns about the future care of the child, nor require exclusion under the 2008 Act.
- Ms Castles' advanced age means that she will have no opportunity to access further fertility treatment once she is released from prison.
- Ms Castles has agreed to cover all costs associated with the treatment including security costs incurred by Corrections Victoria.
- Ms Castles is eligible for parole in May 2011 and could be released on home detention in eight months. Accordingly, there would only be a limited period of time, if at all, where a question would arise as to whether Ms Castles would need to keep the child in prison with her.
- It appears that Ms Castles is supported by a partner, who would look after the child in her absence if necessary.

Any approval of Ms Castles to proceed with IVF treatment would be subject to:

- Justice Health discussing the associated health risks with Ms Castles' doctor,
- confirmation of relevant criminal and child protection order checks being completed and provision of confirmation of eligibility to Justice Health,
- approval from the Sentence Management Unit, Corrections Victoria,
- all costs associated with IVF treatment including medications and security transportation costs, being met by Ms Castles, and
- any other practicalities, such as the necessity to transfer Ms Castles back to DPFC, storage of medications and supervision of daily injections, being negotiated.

150 Ms Gardner gave evidence that if a prisoner requests treatment outside the services the department provides, the prisoner must make a request to visit or be seen by an external practitioner or specialist. If the services can be provided within Justice Health's suite of services, Justice Health would make arrangements for the specialist to go into the prison, if that was appropriate and if the specialist agreed to do so. If Corrections Victoria approved the transport of the prisoner, the prisoner would go to the relevant health facility. For this to occur, there must be an assessment that the treatment is required. Justice Health's role is to review these requests and assess the need and the clinical or health aspect. Its role is to focus on the health needs of the individual.

151 In relation to the department's compliance with s 47(1)(f) of the Corrections Act, Ms Gardner explained that a principal medical officer is no longer appointed under the Corrections Act and that Justice Health will often use a panel of experts to determine whether the prisoner should access private health care. To this end, Justice Health considers the health needs of the individual and then advises whether the particular care or treatment requested is required. If so, a request is made of Corrections Victoria to provide the necessary security permits.

152 Ms Gardner emphasised that Justice Health's concerns revolve around health care. She said that she was not an expert in security matters. Accordingly, if a prisoner is required to be moved out of a prison for health care purposes, she must seek approval from the Sentence Management Unit and the Assistant Commissioner, Brendan Money. She is not able to approve permits for prisoners to move to different sites.

153 It is apparent from her evidence that Ms Gardner did not approve Ms Castles' IVF treatment for the purposes of s 47(1)(f) of the Corrections Act and, indeed, that she had no power to do so. Furthermore, even if Ms Gardner had been able to give clinical approval, she could not give approval for permits to issue allowing Ms Castles to leave the prison to travel to Melbourne to have the

treatment that she had been assessed as needing. The process, consistently with the legislative scheme, depends on Corrections Victoria putting in place the arrangements for permits to be issued enabling the prisoner to leave the prison.

154 Ms Gardiner's briefing was preceded by one day by a briefing from the Commissioner of Corrections to the Executive Director — Police, Emergency Services and Corrections. The purpose of the briefing was expressed to be "to outline Corrections Victoria's issues" regarding the potential for Ms Castles to be permitted to undergo IVF treatment while in prison. The writer expressed the view that the approval of such a request had the potential to undermine the credibility of the corrections system. Prisoners accessing IVF treatment while in prison would not be perceived to be consistent with "community expectations". According to the writer, the community could rightly expect that one of the consequences of being imprisoned was that the prisoner would forfeit the opportunity to access such treatment. The procedure could be seen as having a flavour of a costly elective procedure at the taxpayers' expense. As the medical condition (infertility) does not pose a risk to the health of Ms Castles, cause her undue discomfort, or jeopardise her rehabilitative prospects, it is difficult to regard it in the same way as non-elective medical procedures and any decision to allow Ms Castles access to IVF could be portrayed as facilitating a life-style choice rather than addressing a medical need. The briefing refers to the precedent the decision would create and Corrections Victoria's concern that any future decision to deny either a male or female prisoner with an infertility problem access to similar services would be much harder to defend.

155 The two briefings reflect contrasting positions and approaches to Ms Castles' entitlement to treatment for her infertility. The approach which is consistent with s 47(1)(f) is the approach of Justice Health: it assessed Ms Castles as having a need for IVF treatment, having regard to her rights as a prisoner to access health care of the kind and to the standard enjoyed by the wider community and the burden that this might place on the prison system. The matters raised in the Corrections Victoria briefing relating to community expectations, adverse perceptions and "life-style" choices are not, in my view, relevant to the grant of approval under s 47(1)(f). While Ms Gardner was not authorised to approve the IVF treatment under s 47(1)(f), the considerations that she raised in respect of approval were, in my view, relevant considerations for the grant of approval.

Permits to leave the prison: ss 57A and 57D

156 Persons sentenced to a period of imprisonment by the courts must spend most, if not all, of that time in prison. That is the nature of the penalty: it has at its heart the deprivation of liberty. However, in the modern prison system, it is recognised that prisoners may need to leave the prison for limited periods for a variety of purposes. The permit system in Pt 8 of the Corrections Act provides for prisoners to leave the prison on a temporary basis for specified purposes.

157 Ms Castles seeks a permit enabling her to leave Tarrengower to undergo IVF treatment with Dr Tsaltas at the Melbourne IVF Clinic. This requires her to travel to Melbourne on up to 24 occasions on unspecified dates over a six month period. The permit which she seeks is therefore a permit authorising her to be absent from Tarrengower on an unspecified number of occasions at unspecified times over this period.

158 The grant of permits to leave the prison for health purposes under the Corrections Act is governed by the terms of ss 57A and 57D. Corrections administration permits may be issued by the secretary (or the Governor of Tarrengower, as the secretary's delegate) for health purposes. However, under s 57D, the secretary (or her delegate) does not have an unfettered power to issue a permit to leave the prison. Before issuing a permit, she must be satisfied of two things: that the safety and welfare of the prisoner and the public is assured and that suitable escort and transport arrangements have been made, where necessary.

159 These requirements were previously contained in regulations made under the Corrections Act, but were inserted in the Corrections Act by amendment in early 2005[50] in view of the importance that the government attached to them.[51]

160 While any risk to the safety and welfare of Ms Castles and members of the public while Ms Castles is receiving treatment at the Melbourne IVF Clinic is likely to be relatively insignificant given her security classification, issues may arise within the prison that make it unsafe for persons to leave or re-enter the prison at particular times. Furthermore, it is likely to be very difficult, if not impossible, for the secretary (or her delegate) to be satisfied in advance about the adequacy and suitability of escort and transport arrangements for each of the visits that are contemplated over the extended period to December 2010.

161 The effect of the requirements in s 57D(1) is that a corrections administration permit can only be issued in relation to a specified absence from the prison or a small number of absences from the prison that are proximate in time. The secretary (or her delegate) could not accede to Ms Castles' request for a permit to allow her to leave Tarrengower to travel to Melbourne for all of the visits to the Melbourne IVF Clinic that she might require because she could not be satisfied of the matters specified in s 57D(1)(a) and (b).

162 On the other hand, the finding that Ms Castles has a right under s 47(1)(f) to IVF treatment because such treatment is necessary for the preservation of her health must weigh heavily in favour of the grant of a permit on a visit by visit basis. The identification of the health need in accordance with s 47(1)(f) and the issue of a corrections administration permit to leave the prison for health purposes pursuant to s 57A are intertwined. In the absence of circumstances beyond the control of the prison authorities, the latter should usually flow from the former where the prisoner is a low security prisoner without any history of management problems such as Ms Castles.

163 The court heard evidence from both Mr Brendan Money, Acting Assistant Commissioner of Corrections, and Ms Mandy Smith, the Governor of Tarrengower, concerning the issuing of corrections administration permits. It was Mr Money's evidence that each application for a corrections administration permit is considered on its merits. Many factors are taken into account when a prisoner is considered for a permit to leave the prison. These include the prisoner's offence, the length of the sentence, the prisoner's notoriety, the whereabouts of victims, the location of the offences, the prisoner's conduct while in prison, what the prisoner has done to address the offending behaviour and how settled the prisoner is.

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50. By the Corrections (Transition Centres and Custodial Community Permits) Act 2005.
51. Hansard, Legislative Assembly, 8 December 2004, p 2143.

164 Mr Money also explained that it is "prison security practice" to issue permits only a day or two before the prisoner is to use the permit. This is because it is considered unsafe for prisoners to know when they will be leaving the prison, as they may become an escape risk or have pressure applied to them by other prisoners to act as couriers or intermediaries for illegal purposes. Even though prisoners may require regular treatment or have other reasons for needing what he described as a "regular permit", it is not the practice to issue the permit until the day before or two days before the permit is required.

165 Ms Smith's evidence was to similar effect. Ms Smith provided the record of the prison's review and assessment committee deliberations concerning Ms Castles' security ratings and eligibility for permits. She explained that at Tarrengower, permits are granted for participation in community work, community assistance activities, and for health and physical fitness reasons. In considering whether to grant a permit, Ms Smith takes into account the prisoner's behaviour, risk to the community, notoriety and any medical concerns. In the context of safety to the public, she considers where the prisoner's offence was committed. Ms Castles' offence was committed in Melbourne and most of the permit activity is in the Maldon area. This means there would be minimal prospect of Ms Castles coming into contact with victims or associates in relation to her previous criminal activity. Ms Smith also considers programs that the prisoner has undertaken to address offending behaviour at DPFC and Tarrengower.

166 Mr Money and Ms Smith gave evidence in relation to the issue of permits in general terms. I understood their evidence on the matters that they take into consideration when issuing a permit to be general in its nature and to relate to permits issued for a variety of purposes. Their evidence had the flavour that permits were issued for good behaviour. That ought not to be the case for permits issued for health purposes, at least not where the medical treatment is necessary for the preservation of the health of the prisoner. It may be that in satisfying themselves of the safety and welfare of the prisoner and the general public (as they must), the authorities are required to consider matters such as the prisoner's attendance at programs to address offending behaviour and whether there are any outstanding disciplinary issues in relation to the prisoner. However, for the grant of a "health" permit, the relevant considerations are those that bear directly upon the matters referred to in s 57D(1)(a) and (b) (prisoner and public safety and the availability of transport and escorts if necessary), and the health needs of the prisoner.

167 Mr Money also gave evidence that it is the usual practice for corrections administration permits issued for medical reasons to require the prisoner to be escorted to the medical appointment. However, he said that the availability of prison escorts at any particular time could not be guaranteed. Should a prison incident (injury to a prisoner, discovery of contraband or other disturbance) occur, that incident and a possible related lock-down would take priority and may prevent the deployment of staff as escorts. Other factors that might impede a prisoner being escorted from the prison were competing urgent external medical appointments, staff sickness and the unavailability of transport vehicles.

168 For her part, Ms Smith explained that a Tarrengower prisoner on a "health" permit would be transported to the appointment in a government vehicle driven by a custodial officer. There are a number of vehicles available at Tarrengower, including a bus; which vehicle is used depends on how many prisoners need to

be transported. As appointment times are usually arranged by the prison's health services provider in blocks, more than one prisoner will usually be transported to any one set of appointments.

169 The court was referred to Tarrengower Local Operating Procedures "Operating Procedure No 3.5 of 1 — Temporary Absence from Prison". This specifies that prisoners may leave the prison in one of three ways: escorted, accompanied and unaccompanied. The first involves a custodial officer, the second some other person defined as an "officer" under s 14 or s 85 of the Corrections Act (which includes authorised volunteers), and the third involves the prisoner leaving the prison without supervision.

170 On the basis of Mr Money's evidence, there appears to be a general policy that prisoners leaving the prison for health reasons require an escort. There was no explanation for why that might be. The practice that corrections administration permits issued for health reasons require the involvement of a custodial officer in every case must at times place unnecessary strains on the resources of the prison and, worse still, make it more likely that the health appointment will be cancelled because an escort is unavailable. There is no legislative warrant for such a requirement, and it tends to undermine Mr Money's evidence that each application for a permit is considered on its merits.

171 A blanket requirement for an escort for "health" permits is not responsive to the obligation imposed by s 47(1)(f). The person authorised to issue the permit must treat each application on its merits and with proper regard for the importance of the health purpose for which the permit is to be issued.

172 Notwithstanding the forgoing concerns, the secretary could not have granted a permit in the form apparently sought by Ms Castles. Permits cannot be issued, or guaranteed to be issued, months, weeks or even days in advance. Ms Castles must accept that permits to leave the prison for IVF treatment will only be issued a short time before they are needed and that they may be refused if circumstances so dictate.

173 However, in the light of the secretary's duty to accommodate Ms Castles' health need, if her decision not to grant a permit was in fact a decision made not to grant *any* permit that Ms Castles may in due course apply for to leave the prison to access IVF treatment, then that would amount to an effective denial of Ms Castles' right under s 47(1)(f) to reasonable medical treatment necessary for the preservation of her health. Any such decision would be unreasonable in the *Wednesbury* sense and involve a failure to take into account relevant considerations: Ms Castles' health need and her right to medical treatment under s 47(1)(f). Moreover, in so far as the dignity right encompasses the right to medical treatment that is reasonable and necessary for the preservation of health, such a refusal would constitute a limitation on that right in circumstances where no justification for the limitation was given. A limitation may be justified on the basis that there is a security issue at the prison on a given day or that no vehicle is available to transport Ms Castles to her treatment. However, any such justification cannot be put forward in the abstract. It will depend on circumstances at the time the permit is required.

174 As a final matter, I observe that the transport and escort arrangements that need to be put in place to accommodate Ms Castles' need for treatment may be affected by where the treatment is to take place. The provision of IVF treatment to Ms Castles at a location closer to Tarrengower would facilitate the provision of

transport and escorts, and make the difficult job of reconciling the competing resourcing demands within the prison easier.

Can a prisoner leave prison without a permit?

175 It was submitted on behalf of Ms Castles that the secretary could in any event permit Ms Castles to leave Tarrengower for treatment, notwithstanding the regime for the issuing of corrections administration permits in Pt 8 of the Corrections Act.

176 I do not accept this submission. Where the legislation has set out a specific regime for temporary absences from prison, it is not open to the secretary to rely on some more general power to circumvent the requirements that the legislature has built into that regime.

177 Ms Castles cannot leave Tarrengower to attend medical appointments without a valid corrections administration permit issued in accordance with the requirements of Pt 8 of the Corrections Act.

Has the secretary failed to give proper consideration to Ms Castles' human rights?

178 Ms Castles' right to be treated with humanity and with respect for her human dignity was engaged by the decision made by the secretary not to issue a permit to leave Tarrengower for treatment under s 57A of the Corrections Act and thereby to deny her IVF treatment. Section 38(1) therefore required the secretary, as a public authority, to give proper consideration to Ms Castles' human rights in making her decision.

179 The commission submits that the obligation to provide "proper" consideration to human rights imposes a higher standard of review than the traditional "relevant considerations" ground for judicial review. The obligation is not satisfied by merely stating that Charter rights have been taken into account. The word "proper" must be given some meaning.

180 The defendants submit that the onus is on Ms Castles to prove that the defendants have failed to give proper consideration to her rights. They disagree with the commission that "proper consideration" imposes a higher standard than is imposed for judicial review. What needs to established is whether there was genuine consideration of the plaintiff's human rights. They submit that the briefings to the secretary and the reasons set out by the secretary at the end of the final briefing demonstrate that the secretary gave genuine consideration to Ms Castles' human rights.

181 The secretary received briefings in relation to Ms Castles' request from Justice Health and from Corrections Victoria, each of which referred to consideration of Ms Castles' human rights, in particular her right to non-interference with her privacy and family. The briefings before the court have been redacted to remove legal advice received from the Victorian Government Solicitor's Office, including in relation to human rights questions. The headings that remain give an indication that the privileged material concerned advice on human rights issues.

182 The secretary's brief reasons then refer to "taking into account Charter issues", but say no more about consideration of Ms Castles' human rights.

183 As a result of a request for reasons for decision[52] from Ms Castles, the secretary provided a formal statement of reasons dated 24 May 2010, some three weeks after the decision had been made not to grant a corrections administration

52. Under s 8 of the Administrative Law Act 1978.

permit to Ms Castles to leave Tarrengower to access the IVF treatment. Ms Castles challenged the admissibility of the statement of reasons on the grounds that it was exhibited to one of the affidavits sworn by Mr Money and was therefore hearsay. The challenge was curious in that just about everything in the formal statement of reasons was taken from the briefings that had been put into evidence by Ms Castles herself. The final part of the statement, under the heading "Reasons", replicated word for word the reasons that were given at the time the secretary's decision was made on 3 May 2010. The formal statement does, however, set out the rights which the secretary considered might be relevant to Ms Castles' application: ss 13, 17 and 22(1). The formal statement refers to balancing these rights with the rights and obligations in the Corrections Act.

184 The formal statement should be admitted into evidence for the limited purpose of ascertaining what, if any, consideration was given to human rights. The cases of *Tuncok v Minister for Immigration and Multicultural and Indigenous Affairs*[53] and *Nezovic v Minister for Immigration and Multicultural and Indigenous Affairs*[54] to which the court was referred by Ms Castles are distinguishable, in that the delay in giving reasons was significantly greater than in the present case. In the present case, there was no real delay. The reasons form part of the decision-making process.

185 The requirement in s 38(1) to give proper consideration to human rights must be read in the context of the Charter as a whole, and its purposes. The Charter is intended to apply to the plethora of decisions made by public authorities of all kinds. The consideration of human rights is intended to become part of decision-making processes at all levels of government. It is therefore intended to become a "common or garden" activity for persons working in the public sector, both senior and junior. In these circumstances, proper consideration of human rights should not be a sophisticated legal exercise. Proper consideration need not involve formally identifying the "correct" rights or explaining their content by reference to legal principles or jurisprudence. Rather, proper consideration will involve understanding in general terms which of the rights of the person affected by the decision may be relevant and whether, and if so how, those rights will be interfered with by the decision that is made. As part of the exercise of justification, proper consideration will involve balancing competing private and public interests. There is no formula for such an exercise, and it should not be scrutinised over-zealously by the courts.

186 While I accept that the requirement in s 38(1) to give proper consideration to a relevant human right requires a decision-maker to do more than merely invoke the Charter like a mantra, it will be sufficient in most circumstances that there is some evidence that shows the decision-maker seriously turned his or her mind to the possible impact of the decision on a person's human rights and the implications thereof for the affected person, and that the countervailing interests or obligations were identified.

187 It is unfortunate that the relevant parts of the briefings to the secretary are redacted. However, I am satisfied that the secretary gave proper consideration to Ms Castles' human rights from the detailed manner in which the competing interests of Ms Castles and what could be described as public interests are

53. [2003] FCA 1069.
54. (2003) 133 FCR 190.

weighed up in the briefings that were sent to her, along with the secretary's own statement that she considered Ms Castles' human rights and weighed them against the rights and obligations imposed by the Corrections Act in making her decision.

Common law and fiduciary duties

188 Ms Castles also seeks the declaratory and injunctive relief set out in the proposed orders on the basis that the defendants have breached their duty of care to her by denying her access to IVF treatment and, from January until 25 May 2010, to prison counselling, and on the basis that the secretary and the governor owe her fiduciary duties which have been breached.

189 Ms Castles submits that the defendants were aware that she had been undergoing IVF treatment for about 18 months prior to her incarceration, that she had a strong desire to continue the IVF treatment, and that she had very little time in which to undertake the treatment. She made her desperation and anxiety clear to them. She contends that in those circumstances, it was reasonably foreseeable that the defendants' refusal to facilitate access to IVF treatment and to counselling would cause the kind of harm that was identified by Professor Cook. She says that this has had an independent impact upon her, as well as exacerbating the psychological effects of being in detention.

190 The defendants accept that they have a duty of care to Ms Castles, but contend that it is displaced or at least qualified by the requirements of the Corrections Act and the duties owed by them to other persons, such as other prisoners, staff, visitors and the general public. They also say that any psychological distress experienced by Ms Castles as a result of the decision not to allow her to access IVF treatment can be reasonably managed by access to appropriate counselling, psychological or psychiatric services.

191 As to the alleged breach of fiduciary duties, Ms Castles draws an analogy between the relationship of gaoler to prisoner and that of guardian to ward, a category recognised to give rise to a fiduciary relationship. She argues that the relationship is analogous, because the secretary and the governor are required to act for and on behalf of Ms Castles and in her interests, and have special opportunity to exercise powers or discretions to her detriment in relation to her reproductive health and welfare. She is vulnerable to abuse and has little or no autonomy.

192 The defendants reject this analogy. They submit that the relationship between gaoler and prisoner is not one of the recognised categories, and does not bear the characteristics which would enable it to be described as fiduciary. The secretary and the governor are not in a position where their interests and duties conflict, or where they might profit from their positions as secretary and governor.

193 I accept the submissions of the defendants. In any event, Ms Castles seeks, in essence, the same relief for these alleged breaches of duty as she does for the allegedly unlawful conduct of the secretary and the governor, and will achieve no better result than the relief to which she is entitled in recognition of her rights under s 47(1)(f) of the Corrections Act.

Relief

194 Properly construed, s 47(1)(f) of the Corrections Act confers on Ms Castles the right to continue to undergo IVF treatment for her infertility. IVF treatment is both necessary for the preservation of Ms Castles' reproductive health and

reasonable, consistently with her right as a person deprived of liberty to be treated with humanity and with respect for her human dignity. However, such treatment need not be treatment provided by the Melbourne IVF Clinic.

195 Ms Castles is entitled to relief commensurate with this finding. The parties should have the opportunity to consider this judgment and make submissions as to what relief is appropriate in the circumstances.

Declarations accordingly.

Solicitors for the plaintiff: *Blake Dawson*.

Solicitor for the defendants: *John Cain*, Victorian Government Solicitor.

Solicitor for the Victorian Equal Opportunity & Human Rights Commission: Victorian Equal Opportunity & Human Rights Commission.

D J BRACKEN
BARRISTER-AT-LAW