CERTAIN CHILDREN (BY THEIR LITIGATION GUARDIAN, SISTER MARIE BRIGID ARTHUR) v MINISTER FOR FAMILIES AND CHILDREN and Others

GARDE J

12–15, 21 December 2016

[2016] VSC 796

Administrative law — Judicial review — Habeas corpus — Certiorari — Validity of Orders in Council — Improper or extraneous purpose — Failure to take into account relevant considerations — Power to establish centres for detention of young persons — Use of power to establish remand centre and youth justice centre within adult jail for the purpose of 'emergency accommodation' — Children, Youth and Families Act 2005 (Vic) ss 478, 482, 484.

Human rights — Charter of Human Rights and Responsibilities — Children — Protection from cruel, inhuman or degrading treatment — Protection of child in their best interests – Humane treatment when deprived of liberty — Public authorities — Obligation to give proper consideration to human rights — Effect of failure to give proper consideration — Declarations — Charter of Human Rights and Responsibilities Act 2006 (Vic) ss 10(b), 17(1), (2), 22(1), 38(1).

Section 478 of the *Children Youth and Families Act 2005* (Vic) (**the Act**) gave the Governor in Council the power to establish centres for the detention of children awaiting trial and 'youth justice centres for the care and welfare of children' ordered to be detained in such a centre. Section 482 of the Act conferred duties on the Secretary to the Department of Health and Human Services (**Secretary**) and rights upon young persons detained at a centre established under s 478. Section 484 of the Act gave the Secretary the power to cause the transfer of a young person from one centre established under s 478 of the Act to another such centre.

On 16 November 2016, the Minister for Human Services (**Minister**) recommended that the Governor in Council make orders establishing what had formerly been a part of the adult male gaol, Her Majesty's Prison Barwon, as a remand centre and youth justice centre under s 478 of the Act. The recommendation was accepted by the Governor in Council and Orders in Council were made on 17 November 2017. The new centre was given the name the 'Grevillea Youth Justice Precinct' (**Grevillea**). Shortly after the Governor in Council made the relevant orders, young persons were either transferred to, or feared they would be transferred to, Grevillea under s 484 of the Act. Some of those young persons commenced a judicial review proceeding against the Minister under O 56 of the *Supreme Court (General Civil Procedure Rules) 2015* (Vic).

Neither the Minister nor anyone advising her at the relevant time gave personal evidence about the matters considered by the Minister when deciding to recommend the establishment of Grevillea. The only evidence of these matters was documentary, in the form of a briefing paper to the Minister that was signed by the Minister, papers submitted to the Governor in Council, the Orders in Council and media statements of the Minister at or shortly before the making of the Orders in Council.

In the proceeding, the plaintiffs sought writs of habeas corpus and declarations that the Orders in Council establishing Grevillea and the decisions to transfer any of the plaintiffs to Grevillea were invalid. The grounds on which relief was sought in relation to the establishment of Grevillea was that proper consideration of the

relevant provisions of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**the Charter**) was not given when the Minister recommended the establishment of Grevillea and when the Orders in Council were made, that the Orders in Council were made for improper or extraneous purposes, or were otherwise beyond power, and that the Orders in Council disclosed an error on the face of the record. In relation to the decisions to transfer some of the plaintiffs to Grevillea, the relevant plaintiffs claimed that they were denied procedural fairness, that relevant considerations were not taken into account, that jurisdictional facts on which the legality of their transfer was dependent were absent, and that proper consideration was not given to relevant provisions of the Charter.

Section 10(b) of the Charter provided that a person must not be treated or punished in a cruel, inhuman or degrading way; s 17(2) provided that every child had the right, without discrimination, to such protection as was in his or her best interests and was needed by reason of being a child; s 22(1) provided that an accused person who was detained must be segregated from persons who had been convicted of offences, except where reasonably necessary. Section 38(1) of the Charter provided that it was unlawful for a public authority to act in a way that was incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.

Held, granting declarations:

(1) The rights protected by ss 10(b), 17(2), 22(1) of the Charter were engaged by the decision to establish Grevillea because it potentially had an adverse impact on young persons who might be transferred there in a way that was inconsistent with those rights. [157], [169], [178].

DAS v Victorian Equal Opportunity and Human Rights Commission (2009) 24 VR 415, 434 [80]; *De Bruyn v Victorian Institute of Forensic Mental Health* (2016) 48 VR 647, 683 [102], 691 [126] referred to.

(2) There was insufficient evidence to demonstrate that, in recommending the establishment of Grevillea, the Minister gave proper consideration to the engaged human rights of the plaintiffs in accordance with s 38(1) of the Charter. [202], [203], [229], [230].

Castles v Secretary to the Department of Justice (2010) 28 VR 141, 184 [185]–[186] followed.

Bare v Independent Broad-based Anti-corruption Commission (2015) 48 VR 129, 218 [276], 226 [299], 328 [619]; *PJB v Melbourne Health* (2011) 39 VR 373, 442 [311]; *De Bruyn v Victorian Institute of Forensic Mental Health* (2016) 48 VR 647, 701 [142] referred to.

(3) The Minister's decision to recommend the establishment of Grevillea on the plaintiffs' human rights occurred in the absence of any proper consideration of the impact on the rights of the plaintiffs and alternative means to achieve the desired objective. Accordingly, the decision was incompatible with the rights of the plaintiffs within the meaning of s 38(1) of the Charter. [216], [222], [223].

(4) On a proper construction of the Act, in recommending the establishment of Grevillea, the Minister was required to, but did not, consider the purposes of the Act, the specific purposes of a remand centre and a youth justice centre, the duties of the Secretary under s 482(1) and what this would entail in the new location, the entitlements of detained young persons under s 482(2), and

how they would be met in the new location, and the Secretary's responsibility under s 482(3). [278], [280].

Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24, 39–41 followed.

CIC Insurance Ltd v Bankstown Football Club Ltd (1997) 187 CLR 384, 408; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* (2009) 239 CLR 27, 46-7 [47] applied.

The Pilbara Infrastructure Pty Ltd v Economic Regulation Authority [2014] WASC 346 [126]–[130] referred to.

(5) The Orders in Council establishing Grevillea were made for the extraneous or improper purpose of providing 'emergency accommodation'. [290].

R v Toohey; Ex parte Northern Land Council (1981) 151 CLR 170, 186, 202-4; *Thompson v Randwick Municipal Council* (1950) 81 CLR 87; *Arthur Yates and Company Pty Ltd v Vegetable Seeds Committee* (1945) 72 CLR 37, 67-8 referred to.

(6) Writs of habeas corpus were unavailable because the issue in the proceeding was not whether the plaintiffs should be detained but where they could be detained. [299].

Bennett v Superintendent, Rimutaka Prison [2002] 1 NZLR 616, 633; *Day v The Queen* (1984) 153 CLR 475, 485 referred to.

(7) On a proper construction of the *Education and Training Reform Act 2006* (Vic), neither the Minister nor the Secretary were 'parents' of the plaintiffs for the purpose of that Act. [304].

(8) The evidence did not establish that officers engaged to work with the plaintiffs had infringed s 35 of the *Working with Children Act 2005*. [306].

(9) On a proper construction of the Act, the Secretary did not owe the plaintiffs an obligation of procedural fairness before making a decision to transfer them to Grevillea. [319].

Moran v Secretary to the Department of Justice and Regulation (2015) 48 VR 119, 125-7 [23]–[24], [26] applied.

Originating motion

This was an application by the plaintiffs by their litigation guardian, brought under O 56 of the *Supreme Court (General Civil Procedure) Rules 2015*, for declarations and other relief against decisions made by the defendants. The facts are stated in the judgment.

B E Walters QC and *P J Morrissey QC* with *S M C Fitzgerald, M L L Albert* and *A McBeth* for the plaintiff.

M J Richards SC with *A L Robertson, L T Brown* and *J Bayly* for the defendants.

K M Evans for the Victorian Equal Opportunity and Human Rights Commission (intervening).

Cur adv vult.

GARDE J

1 The plaintiffs include young persons on remand currently detained in a

facility known as the Grevillea Youth Justice Precinct (**Grevillea**) located within the Barwon Prison. They are under 18 years old and proceed by a litigation guardian.

2 The defendants are the Minister for Families and Children (**the Minister**), the Secretary to the Department of Health and Human Services (**the Secretary**) and the State of Victoria.

3 In an amended originating motion, the plaintiffs seek the issue of a writ of habeas corpus, and an order of the Court directing their release from Barwon Prison and transfer to a remand centre lawfully established under the *Children Youth and Families Act 2005* (Vic) (**the Act**). They seek orders of the Court declaring invalid or quashing the two Orders in Council made on 17 November 2016 which established the Grevillea unit as a remand centre and as a youth justice centre under s 478(a) and (c) of the Act ('the Orders in Council'). They also seek that the transfer decisions made by the Secretary's delegate which moved them to the Grevillea unit from the other remand centres or facilities (**the transfer decisions**) be declared invalid or quashed.

4 In substance, they claim that proper consideration of the relevant provisions of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**the Charter**) was not given by the Minister when the Orders in Council were made. They also say that the Orders in Council were made for improper or extraneous purposes, or were beyond power for other reasons. They claim that the Orders in Council should be quashed for error on the face of the record.

5 As for the transfer decisions, they claim that they were denied procedural fairness, that relevant considerations were not taken into account, and that jurisdictional facts on which the legality of their transfer is dependent were absent or not established. They also claim that proper consideration was not given to relevant provisions of the Charter when the transfer decisions were made.

6 The defendants resist the plaintiffs' claims and contend that the Orders in Council and transfer decisions were validly made and are effective.

7 The Victorian Equal Opportunity and Human Rights Commission (**the Commission**) intervened in the proceeding to make submissions concerning the application and effect of the Charter.

Litigation background

8 The proceeding has been conducted as a matter of urgency. The originating motion in the proceeding was filed on 2 December 2016, and was returnable in the Practice Court on 6 December 2016. Following the completion of discovery and inspection, the originating motion was amended by leave on 12 December 2016. The trial commenced on that day and extended until 15 December 2016.

9 Suppression orders under the *Open Courts Act 2013* (Vic) have protected the names and identity of the plaintiffs. Pseudonyms have been used to identify the plaintiffs, but otherwise the hearing was conducted in open court. The file has been closed other than to the parties and their legal representatives, except for the amended originating motion and written submissions which have been publicly available. GARDE J

10 Due to time constraints, there have been no pleadings in this proceeding. As a result, the issues are defined by the amended originating motion, the written submissions and affidavits filed by the parties, a table entitled 'Plaintiffs' case, authorities and relief' provided by the plaintiffs, the evidence and the submissions in Court. Some points are dealt with shortly in this judgment.

11 I have not set out much of the evidence that relates to the transfer decisions because it is not ultimately necessary to do so for reasons that will become plain.

Factual background

12 The Department of Health and Human Services (**the Department**) is responsible for the statutory supervision of young people in the criminal justice system. Prior to November 2016, there were two Youth Justice Custodial Precincts in Victoria: the Malmsbury Youth Justice Precinct (**Malmsbury**) and the Parkville Youth Justice Precinct (**Parkville**). These facilities accommodate young persons:

(a) being held on remand or custody after being charged with an offence;

(b) aged 10-14 years and the subject of a youth residential centre order sentencing the young person to time in custody at a youth residential centre; and

(c) aged 15-20 years and the subject of a youth justice centre order sentencing the young person to a time in custody at a youth justice centre.

13 Parkville consists of three separate centres:

(a) the Melbourne Youth Justice Centre;

(b) the Remand Complex, consisting of Remand North and Remand South; and

(c) the Parkville Youth Residential Centre, consisting of the Parkview, Cullity and Barnett units.

14 In total, there are nine secure units at Parkville. In these units, there are four accommodation blocks: the Oakview unit (single storey 17-bed unit); the Southbank unit (single storey 15-bed unit); the Westgate unit (single storey 15-bed unit) and the Eastern Hill unit (double storey 15-bed unit). There is

also a program centre used by Parkville College[1] for vocational training and other education, a gymnasium and medical and dental consulting rooms.

15 Malmsbury is located approximately 100 kilometres north of Melbourne and accommodates young men aged 15–21 years who are sentenced pursuant to a youth justice centre order or are on remand. It accommodates up to 135 clients at full capacity in a mixture of high and low security residential units. There is a secure site and a senior site. The secure site contains three 15-bed secure units. The senior site has two open units, two secure units and an intensive secure annex (a 4-bed unit).

16 The Grevillea unit is located on part of the site of Barwon Prison, 1140 Bacchus Marsh Road, Anakie. It is wholly enclosed within the prison. It was formerly a unit of the prison that held prisoners from the general prison population within Barwon Prison. There is no public transport to Barwon Prison.

17 On 17 November 2016 three Orders in Council were made by the Governor in Council – the first, to excise the Grevillea unit from Barwon Prison, and the second and third, to establish it as a remand centre and youth justice centre for use as emergency accommodation.

18 The Grevillea unit shares walls and a roof with the Melaleuca unit of Barwon Prison. It is physically separated by a vacant or 'sterile' area with separate secure doors leading to each unit. Outside, it is surrounded by a sterile area.

19 When young persons are taken to the Grevillea unit they enter through a central admissions point. Visitors access the Grevillea unit via the main gate to Barwon Prison.

20 The Grevillea unit comprises a two-storey building which is divided into two sides known as 'Side A' and 'Side B'. Each side is separated by a control office which may only be entered via secure doors. Each side of the Grevillea unit has two floors of cells. Between Side A and Side B, the Grevillea unit has 43 cells; both single and shared cells. Subject to availability, safety and security, detainees can be located in a single cell or a shared cell.

21 At present, only Side A is available as Side B is undergoing renovations.

22 The Grevillea unit has a small room, a multi-purpose common area and an outdoor yard for recreational purposes. There is a Visit Centre. It also has video-conferencing facilities and a food preparation area.

23 As at 15 December 2016, the plaintiffs being held on remand at Grevillea were Matthew Symon, Antony Kelly, Nicholas Brown, Brian Ure, Adam Albert, Benjamin Harris, James Dias and Sascha Aleksov. They are aged between 16 and 17 years. John Brereton, another plaintiff, was located at Grevillea but was released on bail on 9 December 2016.

[1] See [117] below.

24 The plaintiffs being held on remand at Parkville are Richard Muller, Michael Forsyth, Christopher Hassan and Domenic Holt. They are aged between 15 and 17 years. GARDE J

Parkville riots

25 Over the weekend of 12–13 November 2016, a series of incidents occurred at Parkville which resulted in significant property damage being caused to four units within the Melbourne Youth Justice Centre.

26 The first incident occurred on the evening of 12 November 2016 and involved extensive property damage to the Westgate and Southgate units by young persons within the Melbourne Youth Justice Centre. The Westgate unit was destroyed and the persons housed there had to be re-accommodated.

27 Early on 13 November 2016, Ian Lanyon, Director Secure Services at the Department, identified that the damage to the Westgate unit was extensive and would require significant renovation before young people could be housed there. Fifteen beds had been lost. The Southbank unit also suffered extensive damage to the common areas, although the accommodation wings were still useable.

28 On the evening of 13 November 2016 and in the early hours of 14 November 2016, further extensive property damage occurred at the Melbourne Youth Justice Centre. The result was that the young people residing in these units had to be moved to new locations. All 60 beds within the Melbourne Youth Justice Centre were lost.

29 By the end of 14 November 2016, young persons were relocated to other units at Parkville where there were vacant beds, including the girls' unit and the younger persons' unit. However, there were not enough secure beds. Once the Parkville facility was full, 27 young persons were transferred to Malmsbury and six more were transported to the Mill Park Police Station holding cells.

30 The damage meant that the Melbourne Youth Justice Centre was unable to be used and all accommodation there was lost. Nearly one half of the accommodation at Parkville was lost. Young persons were placed in safe rooms, isolation rooms and holding cells. These rooms were not designed to accommodate children in the long-term; they did not have fixed bedding, a toilet, a shower or a television. There was also the requirement to segregate the sentenced youth from the remandees and to ensure that difficult youth were housed securely.

31 On 14 November 2016, Chris Asquini, Deputy Secretary, Operations at the Department and Mr Lanyon discussed the available options for the placement of young persons.

32 At the meeting on 14 November 2016, the relocation options considered and

rejected were:

(a) Disability Forensic Assessment and Treatment Service facilities, including the facility adjacent to the Thomas Embling Hospital;

(b) Fairfield Residential Services;

(c) Plenty Residential Services;

(d) Maribyrnong Detention Centre (which required Commonwealth Government approval); and

(e) Secure Welfare Services (ineligible under s 482(1)(b) of the Act).

33 At this time, there were many young persons accommodated in far from ideal circumstances at Parkville, including on mattresses on the floor of rooms with no bathroom facilities. Some were held in the police cells at the Mill Park Police Station. No proper matching process had been undertaken. Several young people at both Parkville and Malmsbury were confined to their rooms for lengthy periods in the aftermath of the riots at Parkville. There were also significant risks at Parkville because older young males were being separately housed in the Cullity and Barnett units and in the female unit. There was pressure from police to vacate the Mill Park Police Station.

34 By late afternoon on 14 November 2016, Corrections Victoria (**Corrections**) had identified only one unit in Victoria which could meet the Department's needs – the Grevillea unit at Barwon Prison. It was considered that this was the best that could be achieved in the circumstances.

35 At this time, the Grevillea unit was housing 40 adult prisoners. The 40 adult prisoners were moved. The Grevillea unit had to be decommissioned as an adult prison and established as a remand centre and youth justice centre.

Orders in Council

36 On 16 November 2016, a Ministerial Briefing Paper (**the Briefing Paper**) was prepared for the Minister in relation to the establishment of a dedicated precinct at Barwon Prison as a remand centre and youth justice centre. A recommendation was made to sign draft orders in advance of a special Executive Council meeting on 17 November 2016.

37 The Briefing Paper details the fact that Corrections had agreed to make available a dedicated precinct, including a stand-alone unit at Barwon Prison, to accommodate up to 40 young people, while the damaged buildings at Parkville were repaired (likely 6–8 months). The Briefing Paper notes that the precinct had entry and exit points, an exercise yard and visitor space separate from the rest of the prison.

38 Following the Parkville incident, the Minister made a number of public statements about what had occurred and what would be done. These were

admitted into evidence in the proceeding without objection. GARDE J

39 On 14 November 2016, as reported on ABC News, the Minister said that a 'significant number' of the inmates would be temporarily transferred to an adult prison while the damaged facility was 'strengthened'. Later in the same interview, the Minister said 'We are taking the legal steps now to ensure that a number of these offenders will be transferred to an adult correctional facility'. She added 'Enough is enough. These perpetrators of this damage will face serious consequences'. There were reports to similar effect of the Minister's statement in *The Age* newspaper on the same day including a statement by the Minister that 'We are developing a range of tougher measures to ensure that we put a stop to this'.

40 On 16 November 2016, seven applications were made to the Youth Parole Board to transfer seven young persons to Barwon Prison. Under s 467 of the Act, the Youth Parole Board has the power, on the application of the Secretary of the Department, to transfer a young person sentenced by a court to a prison. The Youth Parole Board rejected all seven applications. In a letter dated 18 November 2016, his Honour Judge Bourke, Chairperson of the Youth Parole Board, referred to the criteria set out in s 467(2) of the Act as they applied to young persons aged between 16–18 years under a Children's Court sentence as 'stringent tests, protective of that age category; properly so in my view'.

41 On 17 November 2016, three notices of Orders in Council were published in *Victoria Government Gazette* S354. The first was made under s 10(1) and (3A) of the *Corrections Act 1986* (Vic). This revoked the appointment of Barwon Prison as a prison, simultaneously appointing the same area less the Grevillea unit as a prison. The practical effect was to excise the Grevillea unit from Barwon Prison. No challenge is made to this Order in Council.

42 The second Order in Council was made under s 478(a) of the Act. It purported to establish the area of the former Grevillea unit of the Barwon Prison amounting in all to 2943 square metres as 'a remand centre for emergency accommodation'. The third Order in Council also established the same area as 'a youth justice centre for emergency accommodation' under s 478(c) of the Act. The second and third orders are challenged in this proceeding.

43 Over subsequent days and weeks, transfer decisions were made affecting a number of plaintiffs and other young persons. Young persons were removed to Grevillea from Parkville and Malmsbury commencing on 21 November 2016. Conditions at Grevillea were harsh and austere when the young persons commenced to arrive on 21 November 2016. Aids and equipment were limited. Departmental staff had to be found for the new facility to take over from the Corrections staff.

Setting up the Grevillea unit

44 Mr Lanyon's evidence on 13 December 2016 was that the Department gained access to the Grevillea unit on 18 November 2016, which was when some of his staff attended the unit. They returned on 19 November 2016 and worked over the weekend to prepare for the first young persons who came on 21 November 2016.

45 Mr Lanyon said that the challenges he needed to address included the infrastructure, staffing and programmatic response to the young persons. A risk audit identified that the rear yard had several areas that could easily be climbed.

46 The bedrooms inside the unit were fitted with porcelain bowls and sinks which were a considerable risk. One young person self-harmed using the porcelain sink. The Visit Centre was identified as having risks of climbing and a lack of fire systems. Mr Lanyon and his staff immediately started working to try to remedy the situation. Works were needed to make the premises fire safe, including additional fire extinguishers, smoke detectors and alarms. Work is still required to the Visit Centre including an additional anti-climb.

47 On 19 November 2016, 48–50 Departmental staff were inducted with Corrections before they went into the unit on the 21 November 2016, and before young persons arrived that afternoon. Expressions of interest were subsequently received from further staff who were placed on the roster for the Grevillea unit.

48 Mr Lanyon said that from 21 November 2016, the Department had health services and cultural support in place but both had since been improved from a base level service.

49 He agreed that in the initial period, all young persons in the Grevillea unit were on Safety Separation Management Plans for several days. Time out of cells was gradually improved.

50 Mr Lanyon said that the SESG[2] was authorised to carry OC spray,[3] but was prohibited from the use of lethal force. SESG access to the Grevillea unit occurred twice in the first week of occupation, but has not occurred subsequently. Since the week commencing 5 December 2016, the SESG has been prohibited from bringing dogs into the Grevillea unit.

51 Prior to 30 November 2016, each young person who entered the Grevillea unit was provided with a copy of a document entitled 'Expectations of behaviour while at the Grevillea Youth Justice Centre (YJC) at Barwon Prison' (attached as a schedule to these reasons). Young persons who entered the

---

2 The SESG is the Security and Emergency Services Group of Corrections Victoria at Barwon Prison.

3 OC spray is Oleoresin Capsicum Spray, also known as 'capsicum spray'.

Grevillea unit after 30 November 2016 were not provided with a copy of this document but have had its contents explained to them orally. GARDE J

Removal of Aboriginal and Torres Strait Islander children

52 On 22 November 2016, the Victorian Aboriginal Legal Service commenced a proceeding alleging that the detention of Aboriginal and Torres Strait Islander children at Barwon Prison was unlawful.

53 On 29 November 2016, the Secretary undertook to the Court that she would not authorise or cause the removal of any Aboriginal or Torres Strait Islander child to any youth justice or remand centre established at Barwon Prison for a period of 18 months, unless in exceptional circumstances.

54 As a result, Aboriginal and Torres Strait Islander young persons were removed from Barwon Prison. Other young persons remain as they do not have the benefit of the Secretary's undertaking to the Court.

Evidence

55 The plaintiffs relied on the following affidavits and evidence:

(a) The affidavits of Meghan Joy Fitzgerald affirmed 2 and 6 December 2016;

(b) The affidavit of Alina Leikin affirmed 12 December 2016;

(c) The affidavit of Sascha Aleksov sworn 13 December 2016; and

(d) The evidence of Brendan Patrick Murray given on 12 December 2016.

56 The defendants relied on:

(a) The affidavit of Ian Lanyon affirmed 9 December 2016 and his evidence given on 13 December 2016;

(b) The affidavit of Matthew James Belleville affirmed 9 December 2016 and his evidence given on 13 December 2016;

(c) The affidavit of Tracey Dawn Marie Beaton affirmed 9 December 2016;

(d) The affidavit of Marcel Scott Jacques sworn 8 December 2016 and his evidence given on 13 December 2016;

(e) The affidavit of Monica Wendy Tulloch sworn 9 December 2016 and her evidence given on 13 December 2016; and

(f) The affidavit of Andrew Campbell sworn 9 December 2016.

Evidence of Ms Fitzgerald

57 On 1 and 5 December 2016, Ms Meghan Joy Fitzgerald, a solicitor with the Fitzroy Legal Service, visited Barwon Prison.[4] Ms Fitzgerald deposed as to what she saw and was told. She was not cross-examined.

The Grevillea unit

58 Ms Fitzgerald described the Grevillea unit as having two floors, with cells lining each side. The single cells were around 3 metres long and 2 metres wide. Some children were in double cells sharing the cell with another child.

59 The internal wide corridor or ground space on the bottom floor is used as a common area. The common area was completely enclosed, without natural light or airflow. All parts of the internal common room were observable by a control room through glass windows, which contains multiple CCTV cameras for monitoring the unit and the children. During Ms Fitzgerald's visit on 1 December 2016, half of the young persons were able to spend a limited time in the common area on rotation.

60 There was no facility within the design of the unit permitting individual young persons, or groups of young persons, to be separated from one another without reliance on lockdown procedures or isolation. As a result of this, it was inevitable that the children needed to be locked down for long periods of time to prevent them from associating with other children with whom they may not be able to associate safely.

61 Ms Fitzgerald observed three or four couches, one table tennis table, one or two tables and chairs, and a laundry style sink and bench. There was one microwave for use by the children. Activities available to the young persons were chess, cards, table tennis and colouring-in.

62 Young persons were escorted to and from the exercise yard in handcuffs, and use the yard in small groups of two or three.

63 Ms Fitzgerald conducted interviews in the common area and in a room adjoining the common area. The adjoining room had to be shared with others.

The circumstances of the children

64 From her conversations with the young persons on 1 December 2016 (**the first visit**), Ms Fitzgerald noted as to their circumstances:

(a) all children were on remand awaiting sentence, except for one child who had breached parole conditions;

(b) some children had limited knowledge as to the procedural stage of their substantive legal matters, and what their next hearing related

4 Affidavits of Meghan Joy Fitzgerald affirmed 2 December 2016 and 6 December 2016.

to;

(c) all children (save for one whose lawyer was in attendance) requested that their lawyers be advised of their whereabouts;

(d) one child reported being cold at night as a result of the air conditioning, advising that proper blankets had been issued to the children only the night before the visit;

(e) children reported that the food provided was either unpalatable or insufficient. Hunger was a reported issue; and

(f) one child observed a rat in his cell. Ms Fitzgerald also observed a small rat during her visit.

Lockdown conditions

65 Ms Fitzgerald was informed of the lockdown arrangements at Grevillea:

(a) all young persons reported experiencing lockdown conditions for minimum periods of 20 hours per day. This meant that they were unable to exit their cells for minimum periods of 20 hours per day;

(b) all reported a lack of consistency in lockdown conditions with slight improvements in recent days. There was no information or communication as to how lockdown conditions would be handled day-to-day, or into the future;

(c) between 22–27 November 2016, young persons were allowed out of their cells for less than one hour per day. During this time, they were allowed out in pairs on rotation at different times each day;

(d) since around Sunday, 27 November 2016, young persons reported being allowed out of their cells for between one-four hours per day. Half of the young persons were now allowed out at a time. When allowed out, they remained in the common area when cells are open;

(e) until around 27 November 2016, young persons did not have any time outside the Grevillea unit. Young persons at Grevillea did not have any time outside the unit for up to six or seven days;

(f) as at 1 December 2016, young persons were allowed outside the unit into an outdoor gym area for between 10 and 20 minutes per day, two young persons at a time; and

(g) one young person reported that he had commenced receiving medication since arriving at Barwon Prison to sleep. Another reported that there was no regularity in dispensing medication. The onus was on the young person to remember to request the medication.

66 During her visit on 5 December 2016 (**the second visit**), Ms Fitzgerald was

advised that following an incident on 4 December 2016, the whole unit was locked down from around 5 pm on 4 December 2016 to after 10 am on 5 December 2016.

Corrections staff

67 During her first visit, Ms Fitzgerald observed the presence of Corrections officers wearing light blue Corrections uniforms in the control room. They were easily visible at all times from the common room. At least twice during her visit, a Corrections officer walked through the unit and into the room where she was conducting interviews to escort tradespeople installing camera equipment in the room.

68 Young persons at Grevillea reported that Corrections staff sometimes responded from the control room when they used the intercom system to ask for assistance. One young person reported seeking a towel because he did not have one and wished to take a shower. He stated that a Corrections officer responded with words to the effect that 'if you buzz again or bang the door, you'll go in isolation or I'll call SESG.'[5] The boy understood this meant the incident response unit of the adult prison, which had dogs.

Threats

69 Ms Fitzgerald deposed that most of the young persons reported that upon arrival at Barwon Prison they were told by the Grevillea unit manager 'Clive' words to the effect that 'this is not Parkville. If you muck around, they will call the dogs, get gas or use their firearms.'[6] Young persons reported being frightened by the threats. A number of young persons reported that they heard the SESG respond to incidents involving other children in the unit. They understood SESG to be Barwon Prison's incident response unit – a unit which includes officers in black uniforms and German Shepherd dogs.

70 On her second visit, a number of the young persons reported to Ms Fitzgerald that the adults were treating them differently from how they had been treated at Parkville, with regular threats of physical harm if they 'acted up' or 'mucked up'.

Education

71 On her second visit, Ms Fitzgerald observed that there did not appear to be any adequate place for schooling at Barwon Prison. The common area is very 'noisy and chaotic.'[7] She deposed that throughout both of her visits, there had been 'consistent loud banging on doors, up to a dozen staff, the use of the kitchenette and the presence of tradespeople, Departmental staff and Corrections staff in the common area.'[8]

---

5 Affidavit of Meghan Joy Fitzgerald affirmed 2 December 2016 [47].
6 Ibid [38].
7 Affidavit of Meghan Joy Fitzgerald affirmed 6 December 2016 [18].
8 Ibid.

72 In her affidavit of 2 December 2016, Ms Fitzgerald deposed that all young persons bar one said that they were in school at Parkville or Malmsbury prior to their transfer to Barwon Prison. All said they enjoyed going to school and felt it was beneficial to them. GARDE J

73 In her affidavit of 6 December 2016, Ms Fitzgerald deposed that the young persons said that at Parkville, children participate in a wide range of classes and activities, predominantly through the Victorian Certificate of Applied Learning, including literacy, numeracy, personal development skills and industry specific skills. At Parkville, these activities occupied around six hours per day, six days per week.

74 On both of Ms Fitzgerald's visits, all young persons said that they had received no schooling since arriving at Barwon Prison. On a few occasions, Parkville College teachers had been to the Grevillea unit to see them. All young persons said that they had been unable to continue the studies they were doing at Parkville prior to being transferred to Barwon Prison. All said that they missed school.

75 There was no capacity at Grevillea for more than one classroom to facilitate the teaching of more than one subject or one cohort of young persons at a time. There was one enclosed room with a glass wall separating it from the common area. Ms Fitzgerald saw it used by doctors, lawyers and other staff or visitors requiring a separate area.

Visits

76 Ms Fitzgerald was told by the young persons on both of her visits that there have been no family visits to any young persons at Barwon Prison.

77 On her first visit, a number of young persons said that although they had weekly visits from family at Parkville or Malmsbury, they did not want their family to visit them at Barwon Prison, because they believe that their family seeing them in that environment would be too upsetting. One young person said that he did not want his family to have to go through the security screening at Barwon Prison. Another said he felt he would have no privacy with his family if they visited and he believed that visits could only last around 20 minutes. A number of young persons said that it was too far for their family to travel to Barwon Prison.

78 One young person said that he enquired about family visits, but was told words to the effect 'that's not gonna happen anytime soon'.[9]

79 During her visit, Ms Fitzgerald observed a doctor who saw a number of young persons. He used a cell as the interview and examination room to see young persons.

9 Affidavit of Meghan Joy Fitzgerald affirmed 2 December 2016 [58].

Rules of the centre and rights

80 On her first visit, Ms Fitzgerald deposed that all young persons said that they had not been told anything about their rights.

81 When asked about the rules of the centre, some said that they were not told about any rules.

82 Ms Fitzgerald deposed that at the time of her second visit, other than the young persons whose lawyers had been contacted prior to the weekend, the plaintiffs in the Grevillea unit still had not had contact with their lawyers. Phone calls with lawyers take place in a cage on the second floor where a Departmental staff member must remain in attendance.

Observations about the children

83 During her second visit, Ms Fitzgerald observed that around half of the young persons were outside their cells and the other half were 'locked down' in their cells for the duration of her visit. She saw three young persons go outside. She was informed by some of the plaintiffs that no young persons had been able to go outside between 2–4 December 2016.

84 Throughout her first visit, young persons persistently and loudly banged on their cell doors and screamed out from their cells.

85 Young persons refused to go back in their cells after being out and became visibly distressed. Staff spent around 15 minutes with one boy who was extremely upset when he was required to return to his cell.

86 Ms Fitzgerald stated that all the plaintiffs she spoke with during her second visit expressed distress about being in Barwon Prison and their circumstances. Reasons for this included 'uncertainty about their routine each day, punitive approach of staff, consistent lockdowns in the unit, lack of time outside and lack of education and engagement.'[10]

87 Each of the plaintiffs indicated that the frequency of incidents and issues in the unit resulted from these conditions.

88 A number of the young persons spoke to Ms Fitzgerald about their feelings of isolation, loneliness and boredom since being transferred to Barwon, particularly the young persons in single cells. Three of her clients no longer have key workers to check in on their general welfare.

89 One young person told Ms Fitzgerald that he had not been given a psychological assessment despite one being scheduled and overdue. Another said that he had not been given his medication for a number of days, whilst a third said that he had been given sedating or mood stabilising medication for the first time since entry to Barwon Prison.

[10] Affidavit of Meghan Joy Fitzgerald affirmed 6 December 2016 [24].

90 One young person told Ms Fitzgerald that he wished to attend a church service, but none were available. Another told her that he requested to be visited by an Imam, but no Imam had been made available to him. GARDE J

Complaints process

91 A number of young persons said they understood they were able to make complaints to the Ombudsman, whose number is located near the telephone.

92 Some said that they were afraid to voice complaints with the guards and staff.

Evidence of Alina Leikin

93 On 26 November 2016, 1 and 5 December 2016, Alina Leikin, a lawyer with the Human Rights Law Centre, visited Barwon Prison. Ms Leikin deposed as to the general conditions in the Grevillea unit that she observed during her visits. [11]

The Grevillea unit

94 Ms Leikin described the Grevillea unit as consisting of two wings, known as the A wing and the B wing. The A wing was under renovation and no young persons were housed in the A wing from 21–30 November 2016, with the exception of one young person who was placed in solitary confinement in the A wing from 22–25 November 2016. On 30 November 2016, all young persons were moved to the A wing to allow the B wing to be renovated.

95 Ms Leikin described the outdoor recreational area for the Grevillea unit as one open space, with no apparent separation. It is the only outdoor space for use at the Grevillea unit.

Reason for transfer to Barwon Prison

96 Ms Leikin asked the young persons whether they were provided with a reason for their transfer to Barwon Prison, or whether they were consulted prior to the transfer. She reported that:

(a) One young person asked why he had to go and said he did not want to go. He was told that he had to leave Parkville or they would take him by force.

(b) One young person said that when he was told he would be going to Barwon Prison, he asked not to go and was told he would be moved by force if he did not go.

(c) One young person said that he said he would come to Barwon Prison because he was told that if he didn't they would use force. He was

[11] Affidavit of Alina Leikin affirmed 12 December 2016.

told that he and the other children were brought to Barwon Prison because they were the 'compliant' prisoners.

(d) All other young persons said that they were not asked about being transferred nor provided any explanation for the transfer but did not recall asking any questions about it or explicitly requesting not to be transferred.

Attempts to speak with Sascha Aleksov

97 On 11 December 2016, Ms Leikin attempted to arrange a time for Sascha Aleksov, a young person detained in the Grevillea unit, to sign an affidavit in this matter. She was told that it was not possible to speak with Mr Aleksov, because she was not on his call list. When she asked about organising a legal visit for Mr Aleksov, Ms Leikin was advised that Mr Aleksov was on lockdown and would not be allowed out of his cell until 5.30 pm at the earliest. A 6 pm curfew applies to the entire unit.

98 Given the time of her enquiry, the time required to travel to Barwon Prison, and the small window of time in which it would be possible to see Mr Aleksov, it was suggested to Ms Leikin that she call again at 8 am on 12 December to enquire about a visit to Mr Aleksov.

Affidavit of Sascha Aleksov

99 On 12 December 2016, the first day of the trial, the plaintiffs applied for Sascha Aleksov to be added as a plaintiff in this proceeding. This application was opposed by the defendants.

100 An affidavit signed by Mr Aleksov[12] was filed with the Court on 14 December 2016. This was the penultimate day of the trial, and did not allow the defendants proper opportunity to respond to his evidence. Accordingly I will not draw inferences adverse to the defendants from his affidavit. The joinder of Mr Aleksov on a limited basis was ultimately not opposed by the defendants.

101 By order of this Court dated 15 December 2016, Mr Aleksov was joined as a plaintiff in this proceeding on a limited basis, namely for the purpose of determining the questions in the proceeding as they affect the validity of the Orders in Council.

Transfer to Barwon Prison

102 In his affidavit, Mr Aleksov states that on the morning of 22 November 2016, he was told that he would be moved to Barwon Prison by the Unit Manager at Parkville. He was told the reason for the transfer was that he showed a risk of bad behaviour.

103 Mr Aleksov states that he was not asked whether he agreed to the transfer.

[12] Affidavit of Sascha Aleksov sworn 13 December 2016.

He requested to call his mother to tell her, and was told he could not because he would be moving soon. In fact, he was not transferred to Barwon Prison until the afternoon. GARDE J

104 Shortly after his arrival at Barwon Prison, Mr Aleksov was asked to sign something to get out of his cell. He said that he thinks that what he signed said that:

> If I muck up, they can bring the dogs, weapons and the SESG. I think the weapons include guns and batons. I was told by the person who asked me to sign that what I was signing was so that they could use the weapons against me, if I play up.[13]

105 It is likely that Mr Aleksov is referring to the form in the Schedule.

Comments about Grevillea

106 Mr Aleksov states that he hates being at Barwon Prison and wants to return to Parkville or Malmsbury. He said that he does not feel safe at Barwon, feels very low and hopeless, and rarely leaves his room. He is bored and there is no routine or programs. He is not able to do the classes that he likes and is 'too down to do school',[14] which is not classes but worksheets most of the time.

107 He says that the staff are 'tense and drained'[15] and 'used to be nice, but now they are acting like guards'.[16]

108 Mr Aleksov says that every time he goes outside he is handcuffed, including when he goes to the basketball court which is the only outdoor area, or the Visit Centre. This makes him not want to go out of the unit.

109 Mr Aleksov says that on the first day he was at Grevillea, he saw from his cell the SESG officers attend the unit with a dog. They handcuffed one of the other young persons and took him into isolation.

110 He says that the workers threaten 'take downs' if the young persons do something wrong. This is when 'they drop you to the ground and restrain you'.[17]

Lockdown

111 Mr Aleksov says:

(a) On 22 November 2016 he did not get out of his cell at all;

(b) On 23 November 2016 he had half an hour out of his cell;

(c) On 24 and 25 November 2016 he had an hour and a half outside of

---

13 Ibid [19].
14 Ibid [12].
15 Ibid [10].
16 Ibid.
17 Ibid [20].

his cell, but did not have any time in the outdoor area;

(d) From 25–30 November 2016 he had three hours out of his cell and went outside for about half an hour each day with another child; and

(e) Since 1 December 2016 he has had more time out of his cell. The children are now allowed onto the basketball court six at a time, supervised by four staff members.

112 Mr Aleksov says he was locked in his cell from 8 pm on 10 December 2016 to 9 am on 12 December 2016 as a result of two fights in the unit in which he was not involved.

113 Mr Aleksov says he does not know whether he will be allowed outside his cell or in the outdoor area each day and for how long he will be out.

114 Since being at Grevillea he has been put in the punishment room, which had no power or light at the time. It had no toilet paper and there was no running water in the taps, the shower or in the toilet bowl. When he was in the punishment room he was banging his head against the wall and saying he would kill himself if they did not let him out.

Visits

115 Mr Aleksov says that he used to have family visits when he was at Parkville and Malmsbury. He does not want his family to visit him at Barwon Prison because his mother would 'break down seeing me here because it is so bad. I don't want my sisters to see the guards with guns. There is also razor wire which you can see from the windows of the visit centre.'[18]

Evidence of Mr Murray

116 Brendan Patrick Murray has been the Executive Principal of Parkville College since 2013. Mr Murray described his role as similar to a principal, but his position is designated by the Secretary for particularly complex schools. He has been in the education system, working with children in detention or otherwise needy, for 20 years.

117 Parkville College provides education to all young persons detained in custody in Victoria through the operation of four campuses: Parkville, Malmsbury, the Ascot Vale Secure Welfare Unit for Boys, and the Maribyrnong Secure Welfare Unit for Girls. It is registered as a co-educational specialist government school.

Provision of educational services at Grevillea

118 Mr Murray first visited the Grevillea unit on 22 or 23 November 2016 following a request by the Department to provide educational services for the young persons transferred there. He spoke to the young persons to ascertain

[18] Ibid [21].

whether they would like their teachers to conduct lessons at the Grevillea unit. He also assessed the unit to see what was possible in terms of providing schooling. Every young person requested that teachers come to the Grevillea unit. GARDE J

119 An agreement was made between the Department of Education and Training (**DET**) and the Department on 28 November 2016 for the provision of educational services at the Grevillea unit (**the agreement**).

120 Mr Murray defined a school as 'an institution that's been registered by the statutory authority in the State of Victoria to provide school-based education.'[19] There was no school at the Grevillea unit, however the educational services outlined in the agreement are consistent with what would be provided within a school. The agreement contained an obligation to 'seek to achieve and implement the minimum standards of school registration required under the ETRA[20] regulations, in particular the implementation and compliance with child safety standards.'[21] It was a registration requirement that instruction be provided for at least 25 hours per week.

121 Since 5 December 2016, teachers have attended the Grevillea unit. Mr Murray said that his records indicate that the highest level of a student's weekly attendance is 13 hours, which was achieved in the week commencing 5 December 2016. The lowest level for the same week was zero hours. Three students had zero hours of attendance. The ability of the teachers to maintain 25 hours of instruction is disturbed by the daily lockdowns. The lockdowns require the staff to walk off-site and wait until they are allowed to return.

122 On 2 December 2016, Mr Murray sent an email to Murray Robinson, Client Services Manager for Secure Services at the Department, and Mr Lanyon. The email stated 'I would like to request that all students be able to attend the education programs offered by Parkville College each day in their best interests.'[22] He believed the email to be necessary as he understood the program 'to be different from school, which requires that student attend for 25 hours of instruction per week, and I wanted to ensure that these children would be afforded the same opportunity.'[23]

123 On 25 November 2016, Stephen Fraser, Executive Director, Implementation at DET, told Mr Murray that the Victorian Registration and Qualifications Authority would not register the Grevillea campus as a school and no application had been received from DET. The obstacles that would prevent a campus from being registered at Grevillea were insufficient classroom space and uncertainty about Barwon Prison's compliance with child safety

19 Transcript of proceedings, *Certain Children by their Litigation Guardian Sister Marie Brigid Arthur v Minister for Families and Children* (Supreme Court of Victoria, Garde J, 12–15 December 2016) 87.2–4 (**Transcript**).
20 *Education and Training Reform Act 2006*.
21 Transcript 87.23–26.
22 Transcript 91.16–19
23 Transcript 91.24–27.

standards.

124 There are limited resources for teaching available at Barwon, inhibiting the ability to conduct classes in physical education, art, and trade skills. Comparatively, the Parkville campus has the full range of resources expected at any government school. However, Mr Murray indicated that these facilities and equipment took considerable time to accumulate after the commencement of operations at Parkville College.

125 Mr Murray stated that the significance of not operating as a school at the Grevillea unit was that the young persons could not be provided with any accreditation or qualifications for education undertaken at the Barwon site.[24] This creates a risk that students at the Grevillea unit may need to repeat a year.

Decision-making regarding the transfers

126 The defendants' written submissions summarise what was done by the Department after transfer to Grevillea began on 21 November 2016.[25]

Transfer decisions by the client movement panel

127 Shortly after 21 November 2016 the Department established a client movement panel for the purpose of transferring young persons between youth justice centres (**the Panel**).

128 The Panel met for the first time on 23 November 2016. It consists of a group of people with specific skills including the Acting General Managers of Parkville and Malmsbury, the Director of the Youth Health and Rehabilitation Service, the Acting Head of Youth Custodial Services and a representative seconded from the corporate consultancy firm KPMG.

129 The Panel was convened to consider the transfer of young persons, taking into account considerations such as health, education, client dynamics, impact on family, community engagement and considerations under the Charter.

130 The first panel meeting focused on identifying a cohort of young people for transfer to Grevillea. The Panel considered:

(a) the compromised infrastructure at Parkville;

(b) the possibility of repeat behaviour of the incidents that occurred at Parkville over the weekend of 12–14 November 2016; and

(c) the fact that the sentenced prisoners were a stable cohort, fully engaged in educational activities at Malmsbury (where their health needs were also catered for)

---

24 Transcript 94.25–27.

25 Defendants' written submissions dated 14 December 2016 [38]–[52] (**Defendants' submissions**).

and concluded that those on remand should be transferred. GARDE J

131 The second panel meeting was held on 24 November 2016.

132 The decision-making process was refined by the development of a 'decision-making matrix'.

133 At meetings between 24–26 November 2016, the Panel identified young people for transfer to Grevillea. The file of each young person for transfer was considered individually. The types of matters considered included age, ability to navigate life at Grevillea, ability to mix with the cohort already at Grevillea, group dynamics, disability, access to support network, progress with education, interaction with peer group, health, cultural needs, religious needs, case management continuity, behaviour support plan, risk of involvement in future incidents, the effect of transfer decisions on the families of potential transferees and Charter issues. Advice was sought from specialist services.

134 The Panel also considered the type of young person who should not be transferred, including young persons with psychosis, mental health conditions and young persons on sch 8 medications within the meaning of the *Drugs, Poisons and Controlled Substances Act 1981* (Vic).

135 The Panel identified potential operational risks posed by individual young persons. Decisions were made against the background of the vulnerability of the infrastructure at Parkville and the need to avoid past behaviour. On average, three to five new young persons on remand are admitted to Parkville every night. There is a lack of suitable alternative facilities in which young persons can be accommodated.

136 Decisions to transfer detainees from 24–26 November 2016 were made by a delegate of the Secretary on the advice of the Panel.

Transfer process and the Interim Youth Justice Movement Panel

137 According to the defendants, since 30 November 2016, daily status reports have been provided to Tracy Beaton, Chief Practitioner and Director of the Office of Professional Practice within the Department, detailing the number of young people held at each site and the number of beds available.

138 Transfer decisions are now made by the Secretary's delegate based on recommendations made by an Interim Youth Justice Movement Panel **(the New Panel)**. The New Panel makes transfer recommendations in accordance with a process set out in a document called 'Client Flow Process'. The New Panel considers the rights of the young person and the obligations of the Secretary by reference to internal departmental policy documents called 'Client Profile Checklist' and 'Youth Justice Client Movement – Consideration of Human Rights'.

139 The New Panel considers the Client Profile Checklist and other documents,

as well as the young person's individual circumstances, provides advice to the Secretary's delegate and makes a recommendation about the proposed transfer.

Grevillea as at 13 December 2016

140 The defendants informed the Court that conditions have improved at Grevillea:

(a) there is now a core roster of staff;

(b) there will no longer be a lunchtime lockdown;

(c) the Visit Centre is in use;

(d) teachers are now present for 25 hours a week;

(e) equipment for teachers to use in their classes has been approved and, subject to supply, can be used the next day;

(f) health services and cultural support services have improved; and

(g) the refurbishment of the B wing is expected to be completed in the near future with the result that young persons will have direct access to the outside recreational area.[26]

The Charter

141 It is the right of each child in Victoria to be protected in their best interests, and to receive humane treatment when deprived of liberty.[27]

142 The plaintiffs and the Commission submitted that Charter rights were engaged under ss 10(b), 17(1), (2) and 22(1) of the Charter when the Orders in Council and the transfer decisions were made.

143 The issue of engagement is distinct from the question of incompatibility under the Charter. A human right is engaged when a decision, without reference to s 7(2) factors, has limited a right.[28] In interpreting each of these rights, the Court construes the right in 'the broadest possible way'.[29]

Section 17(2): Protection of children in their best interests

144 Section 17(2) of the Charter provides:

> Every child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her be reason of being a child.

145 The central element of the right protected in s 17(2) is the best interests

---

26 Ibid [70].

27 *Charter of Human Rights and Responsibilities Act 2006* ss 17(2), 22(1).

28 *De Bruyn v Victorian Institute of Forensic Mental Health* (2016) 48 VR 647, 683 [102] (***De Bruyn***).

29 *DAS v Victorian Equal Opportunity and Human Rights Commission* (2009) 24 VR 415, 434 [80]; *De Bruyn* (2016) 48 VR 647, 691 [126].

of the child. This is also the paramount principle of the Act, although not applicable to ch 5 of the Act,[30] reappearing in the Secretary's duty in s 482(1)(a) of the Act. However, by reason of ss 17(2) and 38 of the Charter, the best interests principle is nonetheless imported to the acts and decisions of a public authority that engages Charter rights. GARDE J

Guidance from the Convention on the Rights of the Child

146 The United Nations Convention on the Right of the Child[31] (**CROC**) and materials from the United Nations inform the scope of the rights protected by s 17(2) of the Charter.[32]

147 Article 12 of the CROC requires 'in all matters affecting the child, the views of the child be given due weight in accordance with the age and maturity of the child.'[33] As was stated in *Department of Human Services v Sanding:*[34]

> It is unquestionably important for the voice of a child to be heard in matters affecting them. As I have said, children bear rights personally, and are entitled to respect of their individual human dignity.[35]

148 The CROC upholds various rights for children in the youth justice system. Article 3 requires that:

> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.[36]

149 This is because 'children differ from adults in their physical and psychological development, and their emotional and educational needs'.[37] Article 6(2) of CROC requires the State to ensure to the maximum extent possible the survival and development of a child. The Committee on the Rights of the Child has observed, 'the use of deprivation of liberty has very negative consequences for the child's harmonious development and seriously hampers his/her reintegration into society.'[38]

150 The CROC provides for the protection of children's dignity in the criminal process in art 40(1). It states that children should be:

> treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedom of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming

30 *Children, Youth and Families Act 2005* (Vic) s 8(4).
31 Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).
32 *Charter* s 32(2); *ZZ v Secretary to the Department of Justice* [2013] VSC 267 [55]–[70].
33 Article 12 is discussed in *A & B v Children's Court of Victoria* [2012] VSC 589 [94]–[95].
34 [2011] VSC 42.
35 Ibid [209].
36 CROC art 3.
37 UN Committee on the Rights of the Child, General Comment No 10; *Children's Rights in Juvenile Justice*, 44th sess UN Doc CRC/C/GC/10 (25 April 2007) [10] (***General Comment No 10***).
38 Ibid [11].

a constructive role in society.[39]

151 The Committee on the Rights of the Child described this right as embodying the following fundamental principles:

(1) treatment that is consistent with the child's sense of dignity and worth;

(2) treatment that reinforces the child's respect for the human rights and freedoms of others;

(3) treatment that takes into account the child's age and promotes the child's reintegration and the child's assuming a constructive role in society; and

(4) respect for the dignity of the child requires that all forms of violence in the treatment of children in conflict with the law must be prohibited and prevented.[40]

152 The United Nations Standard Minimum Rules for the Administration of Justice (**the Beijing Rules**) require the youth justice systems of States to emphasise the well-being of children and ensure that 'any reaction to juvenile offenders shall always be in proportion to the circumstance of both the offenders and the offence.'[41] The Beijing Rules provide that:

> while in custody, juveniles shall receive care, protection and all necessary individual assistance – social, educational, vocational, psychological, medical and physical – that they may require in view of their age, sex and personality.'[42]

153 The Beijing Rules also recognise that it is in the interest and well-being of the child for the child's parents or guardians to have a right of access.[43]

Relevance to the Charter

154 In my view, s 17(2) of the Charter is given context and informed by the Beijing Rules.[44] They provide an established international framework by which substance and standards can be given to s 17(2).

155 The defendants submitted that it is generally not in the best interests of a child deprived of liberty to be placed in an adult prison or other facility for adults.[45] To protect the child's best interests, State parties to the CROC are expected to 'establish separate facilities for children deprived of their liberty, which include distinct, child-centred staff, personnel, policies and

39 CROC art 40(1).
40 *General Comment No 10*, UN Doc CRC/C/GC/10 [13].
41 *United Nations Standard Minimum Rules for the Administration of Justice*, GA Res 40/33 40th sess, 96th plen mtg, UN Doc A/RES/40/33 (29 November 1985) annex [5].
42 Ibid annex [13.5].
43 Ibid annex [26.5].
44 Charter s 32(2); *ZZ v Secretary to the Department of Justice* [2013] VSC 267 [55]–[70]; *De Bruyn* (2016) 48 VR 647, 712-3 [177]–[178].
45 Defendants' submissions [146] citing *General Comment No 10,* UN Doc CRC/C/GC/10 [85].

practices.'[46] The CROC provides that: GARDE J

(a) every child deprived of liberty has the right to maintain contact with his or her family, including by placing the child in a facility as close as possible to the place of the family's residence in order to facilitate visits;

(b) children should be provided with a physical environment and accommodation in keeping with the rehabilitative aims of residential placement, with due regard given to the child's needs for privacy, sensory stimuli, opportunities to associate with peers, and to participate in sports, physical exercise, arts and leisure time activities;

(c) every child of compulsory school age should be provided with education suited to his or her needs and abilities and designed to prepare him or her to return to society, and every child should receive, where appropriate, vocational training in occupations likely to prepare him or her for future employment;

(d) every child should receive adequate medical care throughout his or her stay in the facility, provided, where possible, by health facilities and services of the community;

(e) staff of the facility should promote and facilitate frequent contacts of the child with the wider community, including communications with family, friends and other persons or representatives of reputable outside organisations, and the opportunity to visit his or her home and family; and

(f) any disciplinary measure should be consistent with upholding the inherent dignity of the young person and the fundamental objectives of institutional care, and that corporal punishment, placement in a dark cell, closed or solitary confinement, or any other punishment that may compromise the physical or mental health or well-being of the child is strictly forbidden.[47]

156 The defendants submit that s 482(1)(a) of the Act gives effect to the 'best interests principle' by obliging the Secretary to determine the form of care, custody or treatment which she considers to be in the best interests of each person detained in a youth justice facility. The entitlements in s 482(2), and the Secretary's responsibility in s 482(3) give further effect to that principle in the context of the youth justice system. The Act draws attention to protecting the best interests of children in youth justice facilities, both generally and as to matters of detail.

46 *General Comment No 10,* UN Doc CRC/C/GC/10 [85].
47 Ibid [87], [89].

Finding as to engagement of s 17(2) of the Charter

157 I find that the decisions embodied in the Orders in Council engage s 17(2) of the Charter. They directly affect young persons in many ways. The establishment of a new remand centre and youth justice centre within the walls of Barwon Prison has widespread ramifications for the young persons who may be transferred to these facilities. They include the sense of security or insecurity felt by the young persons, and the level of physical security. They include physical, social, emotional, intellectual, cultural and spiritual impacts. They include the capacity of the new centre to receive visits from parents, relatives, friends and legal advisors, and affect the ability to meet medical, religious and cultural needs. They include the capacity of the young person to receive information and make complaints about the standard of care, accommodation and treatment afforded to the young person.

158 These decisions engage a young person's right to be protected in his or her best interests as the evidence in this proceeding makes plain.[48]

Section 10(b): Protection from cruel, inhuman or degrading treatment

159 Children as well as adults are protected by s 10(b) of the Charter. Section 10(b) provides:

> A person must not be treated or punished in a cruel, inhuman or degrading way.

160 International authority suggests that the prohibition of torture, or other cruel, inhuman or degrading treatment or punishment protects against acts that cause both physical and mental suffering.[49] The particular circumstances of the individual are relevant and should be taken into account,[50] and children should be accorded treatment appropriate to their age.[51]

161 Section 23(3) of the Charter states that a child who has been convicted of an offence must be treated in a way that is appropriate for his or her age. The fact that the plaintiffs are children is significant when assessing whether the conduct is cruel, inhuman or degrading treatment or punishment.

Defendants' submissions regarding protection from cruel, inhuman or degrading treatment

162 The defendants submitted that ill-treatment must reach a minimum standard or threshold of severity or intensity before it can amount to cruel, inhuman or degrading treatment.[52] Treatment may be considered degrad-

48 Above [57]–[98], [116]–[125].

49 UN Human Rights Committee, CCPR General Comment General Comment No 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), 44th sess, UN Doc HRI/GEN/Rev.1 (10 March 1992) [2], [5].

50 UN Human Rights Committee, *Communication No 265/1987: Vuolanne v Finland*, 35th sess, UN Doc CCPR/C/35/D/265/1987 (2 May 1989) [9.2]; *Ireland v United Kingdom* (1978) 2 EHRR 25 [162]; UN Human Rights Committee, *Communication No 1184/2003: Brough v Australia*, 86th sess, UN Doc CCPR/C/86/D1184/2003) (27 April 2006) annex [9.4] (***Brough v Australia***).

51 *Brough v Australia* UN Doc CCPR/C/86/D1184/2003 annex.

52 *Kracke v Mental Health Review Board* (2009) 29 VAR 1 [559]–[560], [574], *Ireland v United Kingdom*

ing if it humiliates or debases a person, causes fear, anguish or a sense of inferiority, or is capable of possibly breaking moral or physical resistance or driving a person to act against their will or conscience.[53] Degrading treatment involves more than the usual element of humiliation which follows from the very fact of being convicted and punished by a court.[54] Similarly, inhuman treatment must reach a minimum level of severity manifesting in bodily injury or intense physical or mental suffering.[55] The assessment of the minimum threshold is relative and depends on all the circumstances of the case, including the duration of the treatment, its physical or mental effects, and the sex, age and state of health of the alleged victim.[56] GARDE J

163 Comparative case law indicates that the prohibition on cruel, degrading and inhuman treatment is concerned with the deliberate imposition of severe suffering. Though the absence of a purpose to harm, humiliate or debase a victim does not conclusively rule out a violation of the cruel treatment right, the purpose of the treatment is, at the very least, a factor to be taken into account.[57]

164 In considering s 10(b) of the Charter, Victorian courts have considered physically assaulting and using capsicum spray on a handcuffed person,[58] and dragging a person with a disability across a hallway while naked, causing bruising and grazing,[59] to constitute cruel, degrading or inhuman treatment.

165 In *DG v Ireland*,[60] the European Court of Human Rights (**the European Court**) rejected the proposition that the detention of a minor who had not been charged with an offence in an adult prison could, of itself, constitute inhuman or degrading treatment.[61] The applicant in that case was a minor with a criminal history who was to be placed in a therapeutic unit for youths.

(1978) 2 EHRR 25; see also *DG v Ireland* (2002) 35 EHRR 33 [95]; *Brough v Australia* UN Doc. CCPR/C/86/D1184/2003 annex [9.2].

53 *Kracke v Mental Health Review Board* (2009) 29 VAR 1 [561]; see also *Keenan v United Kingdom* (2001) 33 EHRR 38 [109]; *Pretty v United Kingdom* (2002) 35 EHRR 1 [52]; *DG v Ireland* (2002) 35 EHRR 33 [95]; *Denmark v Greece; Norway v Greece; Sweden v Greece; Netherlands v Greece* (1969) 12 YB 1, 186.

54 *Tyrer v United Kingdom* (1980) 2 EHRR 1 [30], [33]; *V v United Kingdom* [2000] 7 BHRC 659 [69].

55 Defendants' submissions [149] citing *A v United Kingdom* (1999) 27 EHRR 611 [20]; *Ireland v United Kingdom* (1978) 2 EHRR 25 [167].

56 *DG v Ireland* (2002) 35 EHRR 33 [95]; *Indelicato v Italy* (2002) 35 EHRR 1330 [31].

57 *Taunoa v Attorney-General* (2004) 7 HRNZ 379 [274]. The defendants note that whether treatment must be deliberate to infringe art 3 of the European Convention is unclear. Although the European Court stated in *Ireland v United Kingdom* (1978) 2 EHRR 25 that treatment need not be intentional to be inhuman, it subsequently noted in *Soering v United Kingdom* (1989) 11 EHRR 439 that its finding of inhuman treatment in *Ireland v United Kingdom* (1978) 2 EHRR 25 had been based on the premeditation of the perpetration of intense suffering.

58 Defendants' submissions [151] citing *Bare v Independent Broad-based Anti-corruption Commission* (2015) 48 VR 129, 199-200 [222], 224 [293], 280 [464], 298-9 [538], 306-7 [559] (**Bare**). The defendants note that although the police conduct was not directly in question in the case, it was acknowledged that, if true, the allegations amounted to a breach of the appellant's Charter rights, including under s 10(b).

59 *Davies v Victoria* [2012] VSC 343 [56].

60 (2002) 35 EHRR 33.

61 *DG v Ireland* (2002) 35 EHRR 33 [97].

Due to a shortage of available secure educational facilities, a court ordered the applicant to be detained temporarily in an adult prison. The Court stated:

> In the present case, the applicant was detained in a prison where a significant portion of the detainees were the same age as, or close in age to, the applicant. It was a penal institution with a regime adapted to juvenile detainees with particular educational and recreational activities of which facilities the applicant could avail himself. ... Furthermore, the fact that the applicant was subject to prison discipline does not, of itself, give rise to an issue under Article 3 given that it constituted restraint for his and other's safety in light of his history of criminal activity, of self-harm and of violence to others.[62]

166 The circumstances in *DG v Ireland*[63] can be contrasted with *Brough v Australia*.[64] In that case, the United Nations Human Rights Committee held that the transfer of an Aboriginal young offender with a mild mental disability to a segregated area of an adult prison, together with treatment that included being locked in an isolated cell for long periods, placed under constant camera surveillance, and being forcibly stripped to his underwear, constituted inhuman treatment in violation of art 10 of the *International Covenant on Civil and Political Rights* (**ICCPR**). In reaching this conclusion, the Committee emphasised that the particular vulnerabilities of the detainee, his status as an Aboriginal and his disability, were relevant to the requirements of the right against cruel treatment.[65]

167 The use of force in law enforcement may constitute cruel or inhuman treatment if it is grossly disproportionate to the purpose to be achieved and results in pain or suffering meeting a certain threshold.[66] With respect to solitary confinement, the European Court has held:

> The segregation of a prisoner from the prison community does not in itself constitute a form of inhuman treatment. In many States Parties to the Convention, more stringent security arrangements exist for dangerous prisoners. These arrangements (strict isolation, removal of association, dispersal in special, very small units etc), which are intended to prevent the risk of escape, attack or disturbance of the prison community, or even to protect a prisoner from his fellow-prisoners, are based on separation from the prison community with tighter controls.
>
> ...
>
> [The European Commission on Human Rights] has stated that prolonged solitary confinement is undesirable, especially where a person is detained on remand. However, in assessing whether such a measure may fall within the ambit of Article 3 of the Convention in a given case, regard must be had to the particular

62 Ibid citing *Herczegfalvy v Austria* (1993) 15 EHRR 437 [82]–[83].

63 (2002) 35 EHRR 33.

64 UN Doc CCPR/C/86/D1184/2003 (27 April 2006) annex.

65 *Brough v Australia* UN Doc CCPR/C/86/D1184/2003 annex [9.4].

66 Defendants' submissions citing *R v Smith* [1987] 1 SCR 1045; *Ribitsch v Austria* (1996) 21 EHRR 573 [38]; *Hurtado v Switzerland* [1994] EHCR 280; see also Manfred Nowak, Special Rapporteur, *Report of the Special Rapporteur Torture and Other Cruel, Inhuman or Degrading Punishment,* UN Doc E/CN.4/2006/6 (23 December 2005) [38]; *Raninen v Finland* (1997) 26 EHRR 563.

conditions, the stringency of the measure, its duration, the objective pursued and its effects on the person concerned.[67]

168 Courts have held that the following do not rise to the level of suffering inherent in the notions of cruel, degrading or inhuman treatment:

(a) treatment of remand prisoners, including limitation of visits, intimate body searches, delousing with pesticides,[68] and the use of handcuffs and shackles on remand prisoners in a manner that did not exceed what was reasonably necessary in the circumstances;[69]

(b) 'double-bunking' inmates in a prison cell meant for one person,[70] drug testing of prisoners,[71] and the detention of a violent offender in a 'strip cell' with limited access to proper hygiene.[72]

Findings as to engagement of s 10(b) of the Charter

169 I find that the right in s 10(b) of the Charter is engaged. There is evidence that one or more young persons have, or may have, been subject to a breach of s 10(b) by reason of the harsh conditions at the Grevillea unit of the Barwon Prison at least in the first two weeks of its occupancy as a remand centre including:

(a) very long periods of solitary and prolonged confinement of young people in cells formerly used for high security adult prisoners;

(b) uncertainty as to the length and occurrence of lockdowns;

(c) fear and threats by staff against young persons;

(d) the use of SESG inside the Grevillea unit, including German Shepherd dogs;

(e) the use of handcuffs on young people when moving to outdoor areas;

(f) the noise of loud banging on the doors or screaming;

(g) the failure to advise young people of their rights or the rules of the centre;

(h) the general lack of space and amenities for young persons and the limited opportunity to use the space and amenities available;

(i) the absence or very limited opportunity for education or other pursuits; and

---

67 *Ensslin, Baader and Raspe v Federal Republic of Germany* (1978) 14 Eur Comm HR 91, 109.

68 Defendants' submissions [156] citing *Soenen v Thomas* [1983] 8 CCC (3d) 224.

69 Maltby v Saskatchewan (Attorney-General) (1982) 2 CCC (3d) 153; see also *Raninen v Finland* (1997) 26 EHRR 563.

70 Defendants' submissions [156] citing *Piche v Solicitor-General Canada* (1984) 17 CCC (3d) 1.

71 *Galloway v United Kingdom* [1999] EHRLR 119; *Peters v Netherlands* (1994) 77-A DR 75.

72 *Carlson v Canada* (1998) 80 ACWS (3d) 316.

(j) the absence of family visits or access to religious services or advisers.

170 The evidence of Ms Fitzgerald, Ms Leikin and Mr Murray supports these findings.[73]

Section 22(1) of the Charter: Humane treatment when deprived of liberty

171 Section 22(1) of the Charter provides:

> All persons deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person.

172 The dignity right in s 22(1) of the Charter recognises the vulnerability of all persons deprived of their liberty.[74] It also acknowledges the important principle when assessing whether there has been a limitation of this right, namely that prisoners should not be subject to hardship or restraint other than the hardship or restraint that results from the deprivation of liberty.[75]

173 The content of s 22(1) of the Charter is also informed by art 10 of the ICCPR.[76]

174 In General Comment No 21 on art 10, the UN Human Rights Committee states that 'treating all persons deprived of their liberty with humanity and with respect for their dignity is a fundamental and universally applicable rule'.[77] The UN Standard Minimum Rules for the Treatment of Prisoners provide for the conditions of detention including:

> 11(d) Young prisoners shall be kept separate from adults.
>
> 12(1) Where sleeping accommodation is in individual cells or rooms, each prisoner shall occupy by night a cell or room by himself or herself. If for special reasons, such as temporary overcrowding, it becomes necessary for the central prison administration to make an exception to this rule, it is not desirable to have two prisoners in a cell or room.
>
> 21 Every prisoner shall, in accordance with local or national standards, be provided with a separate bed and with separate and sufficient bedding which shall be clean when issued, kept in good order and changed often enough to ensure its cleanliness.
>
> 23(1) Every prisoner who is not employed in outdoor work shall have at least one hour of suitable exercise in the open air daily if the weather permits.
>
> 23(2) Young prisoners, and others of suitable age and physique, shall receive physical and recreational training during the period of exercise. To this end, space, installations and equipment should be provided.
>
> 36 Discipline and order shall be maintained with no more restriction than is necessary to ensure safe custody, the secure operation of the prison and a well-ordered community life.

---

73 Above [57]–[98], [116]–[125].

74 *Castles v Secretary to the Department of Justice* (2010) 28 VR 141, 166 [93] (***Castles***).

75 Ibid 169 [108].

76 Intervener's submissions citing *De Bruyn* (2016) 48 VR 647, 713 [177]–[178].

77 Intervener's submissions citing UN Human Rights Committee, CCPR General Comment No 21: art 10 (Humane Treatment of Persons Deprived of Their Liberty) 44th sess. UN Doc HRI/GEN/1/Rev.1 (10 April 1992) [4].

GARDE J

43(1) In no circumstances may restrictions or disciplinary sanctions amount to torture or other cruel, inhuman or degrading treatment or punishment. The following practices, in particular, shall be prohibited:

(a) Indefinite solitary confinement;

(b) Prolonged solitary confinement;

(c) Placement of a prisoner in a dark or constantly lit cell;

(d) Corporal punishment or the reduction of a prisoner's diet or drinking water;

(e) Collective punishment.

58(1) Prisoners shall be allowed, under necessary supervision, to communicate with their family and friends at regular intervals:

(a) By corresponding in writing and using, where available, telecommunication, electronic, digital and other means; and

(b) By receiving visits.[78]

175 In *Castles*[79] Emerton J stated 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'.[80] Her Honour noted that a necessary consequence of the deprivation of liberty was that '[r]ights and freedoms which are enjoyed by other citizens will necessarily be "curtailed", "attenuated" and "qualified" merely by reason of the deprivation of liberty'.[81]

176 In *Dale v Director of Public Prosecutions*,[82] the Court of Appeal noted that the conditions of detention of a dangerous prisoner, which included solitary confinement, strip searches and shackling with leg irons when out of the unit, might raise questions under s 22(1), although it did not express a view on the matter.[83]

177 Detailed consideration of the right to humane treatment when deprived of liberty is found in the New Zealand decision of *Taunoa v Attorney-General*.[84] Ronald Young J held that the combination of the conditions of detention, which included lengthy unlawful segregation from other inmates, loss of ordinary inmate entitlements, inadequate exercise considerations, and cell hygiene, bedding and clothing that fell below the standards established by prison regulations, amounted to a breach of the right to humane treatment when deprived of liberty.

---

78 *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, GA Res 70/175, UN GAOR, 70th sess, 80th pln mtg, Agenda Item 106, UN Doc A/RES/70/175 (17 December 2015) annex.

79 (2010) 28 VR 141.

80 Ibid 169 [108].

81 Ibid 170 [111].

82 [2009] VSCA 212.

83 Defendants' submissions [159] citing *Dale v Director of Public Prosecutions* [2009] VSCA 212 [35]–[39]; see also *DPP v Tiba* [2013] VCC 1075 [30].

84 (2004) 7 HRNZ 379.

Finding as to engagement of s 22(1) of the Charter

178 I find that the establishment of a remand centre and youth justice centre within the confines of Barwon Prison engages a child's right to be treated with humanity while in detention at the new facility. Again I find the conditions at the Grevillea unit at least in the first two weeks of its occupation as a remand centre included:

(a) very long periods of solitary and prolonged confinement of young people in cells formerly used for high security adult prisoners;

(b) uncertainty as to the length and occurrence of lockdowns;

(c) fear and threats by staff against young persons;

(d) the use of SESG inside the Grevillea unit, including German Shepherd dogs;

(e) the use of handcuffs on young people when moving to outdoor areas;

(f) the noise of loud banging on the doors or screaming;

(g) the failure to advise young people of their rights or the rules of the centre;

(h) the general lack of space and amenities for young persons and the limited opportunity to use the space and amenities available;

(i) the absence or very limited opportunity for education or other pursuits; and

(j) the absence of family visits or access to religious services or advisers.

Section 38 of the Charter: incompatibility with the Charter

179 Section 38 of the Charter provides:

> (1) Subject to this section, it is unlawful for a public authority 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.
>
> (2) Sub-section (1) does not apply if, as a result of a statutory provision or ... under law, the public authority could not reasonably have ... made a different decision.

180 The decisions under challenge by the plaintiffs that come within the scope of s 38(1) are:

(a) the recommendations of the Minister to the Governor in Council to establish the remand centre and youth justice centre within the specified area at Barwon Prison;

(b) the decisions of the Governor in Council by the Orders in Council;

and GARDE J

(c) the decision of the Secretary or delegate to transfer each of the plaintiffs to the remand centre within Barwon Prison.

181 The defendants agree that they were public authorities for the purposes of s 38(1) of the Charter.

The proper consideration obligation

182 A public authority must give proper consideration to relevant human rights in two ways. The first is in the decision-making process undertaken by the authority. The second is not to act in a way that is incompatible with a human right. In view of the urgency of the proceeding, the plaintiffs did not press their case that the defendants had acted incompatibly with their human rights.

183 The obligation in s 38(1) to give proper consideration imposes a higher standard than the obligation to take into account a relevant consideration at common law or under statute.[85]

184 In the Court of Appeal decision of *Bare*,[86] Tate JA said:

> The difference between the statutory language in s 38(1) and the manner in which the common law ground of review is expressed supports the view that s 38(1) is intended to impose a test that is more strict than that applicable at common law. The word proper must be given some work to do in accordance with the maxim that all words in a statutory provision must be given meaning and effect. This is particularly so given that the word 'proper' describes the nature of the consideration that is to be given; it qualifies the exercise in which a decision-maker is obliged to engage.[87]

185 In the same case, Santamaria JA said that the obligation to properly consider a relevant human right is an obligation that is attached to the exercise of every power and function of a public authority.[88]

186 The nature of the obligation to properly consider was considered by Emerton J in *Castles*[89] and her Honour's conclusions were subsequently approved by the Court of Appeal.[90] The obligation requires a decision-maker to:

(a) understand in general terms which rights would be affected by the decision and how they may be interfered with by the decision;

(b) seriously turn his or her mind to the possible impact of the decision on the person's human rights;

---

85 *Bare* (2015) 48 VR 129, 198–9 [217]–[221], 217–8 [275]–[276].
86 (2015) 48 VR 129.
87 Ibid 218 [276].
88 Ibid 328 [619].
89 (2010) 28 VR 141.
90 *Bare* (2015) 48 VR 129.

(c) identify the countervailing interests or obligations; and

(d) balance competing private and public interests.[91]

187 There is no formula for the proper consideration process. It follows that the proper consideration obligation can be discharged in a manner suited to the particular circumstances.[92] However, there is nothing in the language of s 38 of the Charter to indicate that the obligation to give proper consideration is suspended or removed in an emergency or in an extreme circumstance such as a flood or a bushfire.

188 In my view, that is not the position. In an emergency or extreme circumstance, or where critical decisions have to be made with great haste, there are grave risks that human rights may be overlooked or broken, if not life or limb endangered. The existence of an emergency, extreme circumstance or need for haste confirms, not obviates, the need for proper consideration to be given to relevant human rights. In the absence of statutory provision to the contrary, s 38(1) of the Charter will operate to require proper consideration be given by public authorities to relevant human rights in emergencies or extreme circumstances or where great expedition is required in decision-making.

189 While proper consideration should not be scrutinized over-zealously by the courts, the obligation is not satisfied by merely invoking the Charter 'like a mantra'.[93] The review that is necessitated by the obligation of a decision-maker to give proper consideration is a review of the substance of the decision-maker's consideration rather than form.[94]

190 The obligation to give proper consideration is an obligation that applies, as s 38(1) of the Charter says, 'in making a decision'. The obligation to give proper consideration cannot be satisfied *after* a decision that limits rights has been made. In *Bare*[95] Tate JA said:

> To treat the obligation under s 38(1) to give proper consideration to relevant human rights as an obligation of some stringency is consistent with the model of the Charter as intended to have a normative effect on the conduct of public authorities. This model finds expression in the extrinsic materials. As the Attorney-General observed in his Second Reading Speech, s 38 of the Charter was intended to impose a standard or reference-point for public administration:
>
> > This is a key provision of the charter. It seeks to ensure that human rights are observed in administrative practice and the development of policy within the public sector without the need for recourse to the courts. The experience in other jurisdictions that have used this model is that it is in the area of administrative compliance that the real success story of human rights lies. Many public sector bodies that already deal with difficult issues of balancing

91 *Castles* (2010) 28 VR 141, 184 [185]–[186].
92 *PJB v Melbourne Health* (2011) 39 VR 373, 442 [311].
93 *Castles* (2010) 28 VR 141, 184 [185]–[186].
94 *De Bruyn* (2016) 48 VR 647, 701 [142].
95 (2015) 48 VR 129.

> competing rights and obligations in carrying out their functions have welcomed the clarity and authority that a human rights bill provides in dealing with these issues. In conjunction with the general law, the charter provides a basic standard and a reference point for discussion and development of policy and practice in relation to these often sensitive and complex issues.[96]

191 Plainly, the obligation to give proper consideration cannot be discharged after the decision has been made and the power has been exercised. As Santamaria JA said in *Bare*[97] 'the role of s 38 of the Charter is to inform the exercise of every power and function by every public authority, powers and functions that are created or delegated by *other* legislation.'[98]

Defendants' submissions regarding the proper consideration obligation

192 The defendants submitted that the procedural obligation to give proper consideration to human rights requires a decision-maker to turn his or her mind seriously to the possible impact of the decision on the person's human rights and the implications thereof for the affected person.[99]

193 While it is not enough merely to identify the Charter or even particular sections of the Charter, it is not necessary that the decision-maker identify the 'correct' right which it may interfere with, or explain the content of any right by references to legal principles or jurisprudence.[100] Instead, it is necessary to identify in general terms the nature and extent of the effect of the decision on individual rights.

194 After identifying the actual rights affected, the decision-maker is required to balance competing public and private interests. There is no formula for the exercise — it is to be carried out in a practical and commonsense manner.[101]

195 A decision-maker is only required to understand in general terms which of the rights of the person affected by the decision may be relevant. As Emerton J said in *Castles*:[102]

> [P]roper consideration of human rights should not be a sophisticated legal exercise [and] need not involve formally identifying the 'correct' rights or explaining their content by reference to legal principles or jurisprudence.[103]

196 Bell J made a similar point in *PJB v Melbourne Health*,[104] where his Honour stated:

> The so-called 'procedural' limb of s 38(1) that 'proper consideration' be given to relevant human rights requires public authorities to do so in a practical and

96 Ibid 226 [299].
97 (2015) 48 VR 129.
98 Ibid 328 [619] (emphasis in original).
99 Defendants' submissions [121] citing *De Bruyn* (2016) 48 VR 647, 700–1 [141].
100 Defendants' submissions [122] citing *De Bruyn* Ibid.
101 Defendants' submissions [123] citing: *De Bruyn* Ibid.
102 (2010) 28 VR 141.
103 Ibid 184 [185].
104 (2011) 39 VR 373.

> common-sense manner. ... Decision-makers are not expected to approach the application of human rights like a judge 'with textbooks on human rights at their elbows', said Lord Hoffmann in *R (SB) v Denbigh High School*.[105]

Did the Minister give proper consideration to the relevant human rights when she advised the Governor in Council to make the Orders in Council?

197 The Minister did not give evidence or provide an affidavit relating to her consideration of relevant human rights at or prior to the time that she advised the Governor in Council to make the Orders in Council. Nor did the defendants rely on an affidavit from any other person as to the proper consideration by the Minister of any relevant human right at the time of, or prior to, the Orders in Council.

198 As a result, the evidence of the Minister's deliberations prior to the making of the Orders in Council is purely documentary. It can be found in the Briefing Paper signed by the Minister, the papers submitted to the Governor in Council, the Orders in Council and the media statements of the Minister at or prior to the making of the Orders in Council.

199 The Briefing Paper is a two page document containing 14 paragraphs. It was prepared by a Departmental senior solicitor and was endorsed by the Chief Legal Officer. It was approved by a Deputy Secretary of the Department before being submitted to the Minister. Despite its legal authorship, it makes no mention of the Charter at all. Nor is any Charter right identifiable from any language used in the Briefing Paper. The Charter simply does not appear in any guise in the Briefing Paper.

200 The first eight paragraphs of the Briefing Paper recite events that had occurred and attach various documents for the signature of the Minister. Under the heading of 'Additional information', the last six paragraphs refer to s 478(a) and (c) and to the legal steps necessary to establish a remand centre and youth justice centre at the specified location within Barwon Prison.

201 Talking points are attached to the Briefing Paper and extend over two pages. One talking point makes reference to the safe accommodation of youth justice detainees at the cells in Barwon Prison while the Parkville facility undergoes repairs.

202 Having reviewed the Briefing Paper and the talking points, I find that there is nothing in them that suggests that the Minister or any officer on her behalf gave proper consideration to the engaged and relevant human rights before deciding to establish a remand centre and youth justice centre at the Grevillea unit. This is not a case where there is doubt as to whether the consideration given was proper consideration. Rather there is no sign that any consideration was given to Charter rights or human rights at all. This conclusion is fortified by the fact that the Briefing Paper was prepared by legal practitioners who had every capacity to refer to the Charter or to

[105] Ibid 442 [311] (citations omitted).

human rights had they been instructed or minded to do so.

203 Review of the other evidence of the Minister's deliberations does not assist. There is nothing in the documents submitted to the Governor in Council, or in the media statements made by the Minister, that advances the position. There is simply no sign that the engaged Charter rights or indeed any human rights were taken into account at all.

Defendants' submissions regarding human rights

Compatibility with human rights

204 The defendants submitted that where a relevant human right is engaged by a decision or act, the question of whether a decision or act is incompatible with that right is determined by considering:

(a) whether the decision limits the right; and

(b) if so, whether the limitation is reasonable and demonstrably justified under s 7(2) of the Charter.

205 The determination of whether a decision or act limits rights requires considering the content of the relevant rights and whether the making of the decision or the taking of the action in fact does not comply with what is required by relevant human rights. Where a conclusion is reached that an act or a decision limits human rights, it is then necessary to determine whether any such limitation is reasonable and justifiable so as not to be incompatible with human rights and consequently unlawful under s 38(1) of the Charter.

Reasonable limitation of human rights

206 A decision that is reasonable and demonstrably justified within the meaning of s 7(2) of the Charter is not incompatible with human rights and does not contravene the substantive obligation in s 38(1).[106]

207 Section 7(2) provides:

> A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including –
>
> (a) the nature of the right;
>
> (b) the importance of the purpose of the limitation;
>
> (c) the nature and extent of the limitation;
>
> (d) the relationship between the limitation and its purpose; and
>
> (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

208 The factors in s 7(2)(a)-(e) broadly correspond to the proportionality test

106 *Sabet v Medical Practitioners Board* (2008) 20 VR 414, 433 [108]; *Antunovic v Dawson* (2010) 30 VR 355, 371 [70], 385 [135]; *PJB v Melbourne Health* (2011) 39 VR 373, 440 [304]–[306].

identified in *R v Oakes*[107] by the Supreme Court of Canada.[108] In that case, the Court said:

> There are three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair 'as little as possible' the right or freedom in question … Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of 'sufficient importance'.[109]

Relationship between procedural and substantive limbs

209 The defendants accepted that the procedural limb and the substantive limb of s 38(1) are cumulative; in making a decision, a public authority must give proper consideration to relevant rights *and* reach an outcome that is, in substance, compatible with human rights. While it is unlawful for a public authority to breach either limb, the defendants submitted that unlawfulness does not of itself give rise to invalidity and, in relation to a decision, does not constitute jurisdictional error.[110] Where s 38(1) unlawfulness is established in a judicial review proceeding such as this, the relief the Court may grant is discretionary.

210 Compliance with the procedural limb and substantive compatibility with human rights are related. The quality of the decision-making process bears on the weight that the reviewing court will give to the resultant decision. As Lord Rodger concluded in *Belfast City Council v Miss Behavin' Ltd*:[111]

> Where the public authority has carefully weighed the various competing considerations and concluded that interference with a Convention right is justified, a court will attribute due weight to that conclusion in deciding whether the action in question was proportionate and lawful.[112]

211 Similarly, Baroness Hale and Lord Mance observed in the same case that:

> If a decision maker is not conscious of or does not address his or its mind at all to the existence of values or interests which are relevant under the Convention [then the Court is] deprived of the assistance and reassurance provided by the primary decision-maker's 'considered opinion' on Convention issues. The court's scrutiny is bound to be closer and the court may … have no alternative but to strike the balance for itself, giving due weight to such judgements as were made

---

107 [1986] 1 SCR 103.

108 Defendants' submissions [136] citing *Re Application under the Major Crimes (Investigative Powers) Act 2004* (2009) 24 VR 415, 449 [148]; *PJB v Melbourne Health* (2011) 39 VR 373, 440–4 [304]–[317].

109 *R v Oakes* [1986] 1 SCR 103 [43] (citations omitted).

110 Defendants' submissions [137] citing *Bare* (2015) 48 VR 129, 176–181 [139]–[153], [380]–[396], [600], [617]–[626].

111 [2007] 1 WLR 1420.

112 Defendants' submissions [138] citing *Belfast City Council v Miss Behavin' Ltd* [2007] 1 WLR 1420 [26].

by the primary decision-maker on matters he or it did consider.[113] GARDE J

212 The reasoning process adopted by a public authority in making a decision is significant for the Court's assessment of substantive compatibility, in particular whether the decision is proportionate under s 7(2) of the Charter.

213 Giving some weight to the decision-maker's conclusion as described above is not an embrace of the doctrine of deference.[114] Rather, it is simply to accord respect to 'the different institutional functions of the judiciary, the Parliament and the executive in the constitutional framework'[115] and is consistent with the manner in which similar considerations are given weight in traditional judicial review in Australia.[116] Accordingly, when a court is reviewing compatibility with human rights, it will be appropriate to give some 'weight and latitude' to the conclusions of the public authority, including in relation to justification. The degree of weight or latitude to be given in a particular case will depend on the context and circumstances, including the experience and expertise of the primary decision-maker, the information that the decision-maker acts on and the extent to which the decision is supported and objectively justified by a transparent process of reasoning.[117]

214 This statutory variation of the Court's usual role in judicial review gives rise to the question of whether, when a decision is substantively compatible with human rights, a failure to take a relevant human right into account will result in the decision being declared to be incompatible with human rights. The defendants submitted, relying on authorities from the United Kingdom, that a failure to consider a relevant human right will not have this result unless it can be said that the resulting decision is substantially incompatible with human rights.

Was the Minister's decision substantially incompatible with the human rights of the plaintiffs?

215 At the meeting on 14 November 2016, a range of options was considered. Importantly, if Grevillea was to be the preferred choice, there were options as to how this facility was best taken up, and what services would be deployed, and when and how they would be provided. There is no statutory provision or law which required the Minister to give the advice to the Governor in Council that she did, or dictated the content of the Orders in Council that were ultimately made.

216 The decision-making process leading to the Orders in Council did not involve any consideration or evaluation of the human rights of young persons

113 Defendants' submissions [139] citing *Belfast City Council v Miss Behavin' Ltd* [2007] 1 WLR 1420 [47].
114 Defendants' submissions [141] citing *PJB v Melbourne Health* (2011) 39 VR 373, 446 [324].
115 Ibid.
116 Ibid.
117 Ibid 444–8 [318]–[328].

to be transferred to the Grevillea unit. There is no evidence of:

(a) consideration of the effect on the human rights of occupants of the use of a maximum security prison building as a remand centre for young persons or a youth justice centre;

(b) consideration of the impacts on the young persons who would occupy the Grevillea unit of Barwon Prison;

(c) consideration of how the Grevillea unit would function or whether services, such as a school, could be provided.

217 Not only were there different choices that the defendants could have made, but they could have made a decision which much better anticipated the problems experienced at Grevillea. The Secretary's duties under s 482(1) of the Act and the entitlements under s 482(2) of the plaintiffs and other affected young persons were prejudiced by the absence of consideration of the problems before occupancy. It is notable that the Department only gained access to the Grevillea unit after the decision was made to move young people there.

218 The response to the human rights issues at the Grevillea unit was reactive. Had greater attention been given during the decision-making process to the need to provide for the protection, care, custody or treatment of the young persons detained at the Grevillea unit as to how their entitlements would be met on the first day of occupation of the Grevillea unit, a very different result might have ensued. A report as to the condition of the Grevillea unit and as to compliance with appropriate standards before the decision to move was made would have been very useful. Human rights complaints might have been fewer in number or not occurred at all.

219 Moreover, it is impossible to ignore the general climate of decision-making. The Minister made public statements such as 'perpetrators of the damage to Parkville will face serious consequences' and 'we are developing a range of tougher measures to ensure that we put a stop to this.'[118] There is little if any evidence that the senior personnel within the Department advising the Minister had any appreciation of what the Grevillea unit was like or had ever been to the Grevillea unit until after 17 November 2016. There was no evidence before me that the Minister visited the unit.

220 The Department's evidence and position is that Parkville was seriously damaged and significant capacity was lost. The Department says that this justified the establishment of a remand centre and youth justice centre at Barwon Prison, and that what the Minister did, she had to do. Neither the Minister nor anyone else turned their minds to the impact of the establishment of the new facilities at Barwon Prison on young persons such as the plaintiffs. Their thoughts were directed at coping with the circumstances at

[118] Above [39].

Parkville, and the pursuit of their view that tougher measures were needed and that the perpetrators of the damage had to face serious consequences. GARDE J

221 As a result, the impact on the human rights of persons such as the plaintiffs was unplanned and largely unforeseen. It is not a situation where a meticulous decision-maker fully evaluated the human rights in question coming to a careful and controlled decision limiting the impact on human rights.

222 Rather the impacts on human rights were collateral and unintended in the circumstances that occurred. They were not proportionate. There was no diligent or methodical analysis of the nature of the human rights, the purpose, nature, extent or importance of any limitation. There was no consideration as to whether there were less restrictive means available. The consequences were serious, as I have set out above.

223 I conclude that the Minister's recommendation and decision was substantively incompatible with human rights including those of the plaintiffs. Certainly, what was authorised by the Minister and done exceeded the reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom after taking into account the relevant factors set out in s 7(2) of the Charter itself.

Consequences of failure to give proper consideration

224 The plaintiffs seek a declaration that the challenged decisions were unlawful under s 38(1) of the Charter.

225 The defendants submitted that such a declaration, if made, would not interfere with the validity of the decisions made. The question of Charter unlawfulness under s 38 was considered both at first instance in *Bare v Small*[119] and on appeal in *Bare*.[120] The views expressed were:

(1) at first instance, the trial Judge concluded that s 38(1) unlawfulness did not result in invalidity;[121]

(2) on appeal:

(a) Warren CJ concluded that s 38 unlawfulness did not result in invalidity.[122]

(b) Tate JA did not consider it necessary to determine the question of whether s 38 unlawfulness resulted in jurisdictional error[123] and specifically left the question open.[124] Her Honour noted that the question was complex but that 'it might seem' that

119 [2013] VSC 129.
120 (2015) 48 VR 129.
121 *Bare v Small* [2013] VSC 129 [119].
122 *Bare* (2015) 48 VR 129, 176 [139].
123 Ibid 251 [378].
124 Ibid 252 [381].

an appropriate reading of s 38 was that it resulted in non-jurisdictional error.[125]

(c) Santamaria JA did not consider it necessary to determine the question of whether s 38 unlawfulness resulted in jurisdictional error[126] but nonetheless considered the arguments put to the Court and said (without deciding) that the structure of the Charter appeared to tell against 'a contravention of s 38(1) necessarily resulting in invalidity'.[127]

226 In these circumstances, the defendants submit that the present state of authority favours the conclusion that s 38 unlawfulness does not result in invalidity. They submit that even if there was a breach of s 38(1) by way of a failure to provide proper consideration, and the Court made a declaration to that effect, it would not affect the validity of the decisions in question.

227 The issue of whether contravention of s 38(1) by a public authority gives rise to invalidity of the decision is of major importance, and stands to be finally decided by the appellate courts at a future time.

228 It is clear that in the event of a breach of s 38(1) of the Charter, the Court has the power to grant a declaration that the defendants did not properly consider Charter rights, and were in breach of s 38(1).

Findings

229 I find in the terms of the *Castles*[128] decision that the Minister (whether personally or by anyone acting on her behalf) in recommending that the Order in Council be made and the Governor in Council in making the Orders in Council:

(a) did not understand in general terms which human rights would be affected by the making of the Orders in Council or how they may be interfered;

(b) did not seriously consider the possible impact of the Orders in Council on any person's human rights;

(c) did not identify the countervailing interests or obligations; and

(d) did not balance competing private and public interests.

230 For the reasons given, I find that the defendants failed to give proper consideration to relevant human rights when the Orders in Council were made and when the Minister recommended and advised the Governor in Council that the Orders in Council should be made. Those decisions were made in

125 Ibid 252 [380].
126 Ibid 321 [600].
127 Ibid 331 [626].
128 (2010) 28 VR 141.

contravention of s 38(1) of the Charter. I also find that s 38(2) does not apply in the present circumstances. The decisions did not impose a reasonable limit on the plaintiffs' human rights for the purposes of s 7(2). GARDE J

The *Children, Youth and Families Act 2005*

231 I now turn from the Charter to the substantive arguments advanced by the plaintiffs for the invalidity of the Orders in Council based on contravention of the provisions of the Act.

232 The Act is of crucial importance for children, youth and families in the Victorian community. The provisions of the Act are far reaching in scope. They have a strong focus on the protection, care and welfare of children.

233 The main purposes of the Act are:

(a) to provide for community services to support children and families; and

(b to provide for the protection of children; and

(c) to make provision in relation to children who have been charged with, or who have been found guilty of, offences; and

(d) to continue The Children's Court of Victoria as a specialist court dealing with matters relating to children.[129]

234 Each of the purposes of the Act is of great importance in the context of children and the criminal law. Purpose (b) looms large in the present proceeding.

235 Given that the Act has express purposes, it attracts the operation of s 35(1) of the *Interpretation of Legislation Act 1984*. In the interpretation of the Act, an interpretation that would promote the purpose or object underlying the Act shall be preferred to a construction that would not promote that purpose.

236 The establishment of corrective services for children is the subject of pt 5.7. Part 5.7 contains a number of provisions which confer rights and entitlements on children detained in remand centres, youth residential centres and youth justice centres.

237 In s 482(2), the parliament has seen fit in very general and direct terms to provide entitlements to young persons detained in remand centres, youth residential centres and youth justice centres. The declaration of entitlements in s 482(2) is addressed to the world, not just to the Secretary and the Department, although it is the responsibility of the Secretary to ensure that the entitlements are provided to all detainees in remand centres, youth residential centres and youth justice centres. Section 482(2) says that persons detained in remand centres, youth residential centres and youth justice centres:

(a) are entitled to have their developmental needs catered for;

(b) subject to section 501, are entitled to receive visits from parents, relatives,

129 *Children, Youth and Families Act 2005* s 1(a)–(d).

legal practitioners, persons acting on behalf of legal practitioners and other persons;

(c) are entitled to have reasonable efforts made to meet their medical, religious and cultural needs including, in the case of Aboriginal children, their needs as members of the Aboriginal community;

(d) are entitled to receive information on the rules of the centre in which they are detained that affect them and on their rights and responsibilities and those of the officer in charge of the centre and the other staff;

(e) are entitled to complain to the Secretary or the Ombudsman about the standard of care, accommodation or treatment which they are receiving in the centre;

(f) are entitled to be advised of their entitlements under this subsection.

238 Parliament has seen fit to define the word 'development' in very wide terms in s 3:

> development means physical, social, emotional, intellectual, cultural and spiritual development.

239 Entitlements (a), (b) and (d)–(f) are unqualified in their breadth and extent. They are to be provided. Entitlement (c) is limited to 'reasonable efforts'. Not only has parliament seen fit to declare the entitlements of detained persons under pt 5.7 of the Act in unequivocal terms, by s 482(3) the Secretary must ensure that s 482(2) is complied with. In addition, parliament has directed the Secretary to report to the Minister at least annually on the extent of compliance with sub-s (2).

240 The entitlements granted by s 482(2) represent standards required by parliament for the conduct of remand centres, youth residential centres and youth justice centres. The converse of an entitlement is a right. Young persons detained in remand centres, youth residential centres and youth justice centres have the right to be provided with the entitlements described in s 482(2).

241 Quite apart from s 482(2), the Secretary has important duties under s 482(1). Although this provision does not declare entitlements like s 482(2), it imposes onerous duties of a continuing nature on the Secretary. It provides:

> The Secretary must—
>
> (a) determine the form of care, custody or treatment which he or she considers to be in the best interests of each person detained in a remand centre, youth residential centre or youth justice centre; and
>
> (b) not detain in a community service or secure welfare service a person who is on remand or is serving a period of detention and is not released on parole; and
>
> (c) separate persons who are on remand from those who are serving a period of detention by accommodating them separately in some part set aside for the purpose unless—
>
> (i) the Secretary considers it appropriate not to separate them, having regard to the best interests, rights and entitlements of

the persons on remand; and

(ii) the persons on remand consent; and

(d) separate persons held on remand who are under the age of 15 years from those held on remand who are of or above the age of 15 years unless exceptional circumstances exist.

242 Although I am informed that there are as yet no published directions as to standards and procedures, s 481 has significance in considering the legislative scheme of pt 5.7:

> The Minister may issue directions relating to the standards of services established under section 478 or approved under section 479 or 480 and may establish procedures that are appropriate to ensure that those directions are given effect.[130]

243 Section 481 has two limbs. The first empowers the Minister to issue directions as to the standards of services established under s 478 or approved under ss 479 or 480. The second limb empowers the Minister to establish procedures appropriate to ensure that the directions are given effect. Expressly referring to the standards of services established under s 478, this provision highlights that the centres established under s 478 are required to operate in accordance with any directions issued under s 481, as well as in accordance with the duties imposed on the Secretary, and entitlements conferred on detained young persons under s 482.

244 The powers relied on by the defendants to establish the remand centre and youth justice centre at the Grevillea unit are found in s 478. Section 478 provides:

> For the purposes of this Act the Governor in Council may, by notice published in the Government Gazette, establish or abolish—
>
> (a) remand centres for the detention of children awaiting trial or the hearing of a charge or awaiting sentence or in transit to or from a youth residential centre or youth justice centre; or
>
> (b) youth residential centres for the care and welfare of children ordered under this Act, ... to be placed in a youth residential centre and which provide special direction, support, educational opportunities and supervision; or
>
> (c) youth justice centres for the care and welfare of persons ordered to be detained in youth justice centres under this Act, ... ; or
>
> (d) youth justice units for persons—
>
> (i) referred to them as a condition of a probation order, youth supervision order, youth attendance order or other order made by the Court; or
>
> (ii) referred to them as a requirement of a parole order.

130 Underlining added.

The construction of pt 5.7 of the Act

245 The parties differ on the construction of the provisions in pt 5.7. The defendants contend that s 478 is a wide discretionary power unfettered by the duties and entitlements contained in s 482. They say that those duties and entitlements arise only after a facility is opened. They do not need to be considered at all at the establishment stage.

246 The plaintiffs contend that the power given to the Governor in Council in s 478 is subject to what are 'jurisdictional facts' namely that the requirements of s 482(2) are met, and the resulting services are in place. They say that if the requirements of s 482(2) are not met, the power contained in s 478 cannot be exercised by the Governor in Council. They rely on the decision of the High Court in *M70/2011 v Immigration and Citizenship*[131] (***Malaysian Declaration Case***) where French CJ described the term 'jurisdictional fact' and said:

> The term 'jurisdictional fact' applied to the exercise of a statutory power is often used to designate a factual criterion, satisfaction of which is necessary to enliven the power of a decision-maker to exercise a discretion. The criterion may be 'a complex of elements.' When a criterion conditioning the exercise of statutory power involves assessment and value judgments on the part of the decision-maker, it is difficult to characterise the criterion as a jurisdictional fact, the existence or non-existence of which may be reviewed by a court. The decision-maker's assessment or evaluation may be an element of the criterion or it may be the criterion itself. Where a power is expressly conditioned upon the formation of a state of mind by the decision-maker, be it an opinion, belief, state of satisfaction or suspicion, the existence of the state of mind itself will constitute a jurisdictional fact. If by necessary implication the power is conditioned upon the formation of an opinion or belief on the part of the decision-maker then the existence of that opinion or belief can also be viewed as a jurisdictional fact. The primary submission on the part of the plaintiffs, however, looked to the existence of the matters set out in s 198A(3)(a) as conditioning the Minister's power to make a declaration.[132]

247 The plaintiffs also rely on the decision of Edelman J in *The Pilbara Infrastructure Pty Ltd v Economic Regulation Authority*,[133] where his Honour said:

> In *Corporation of the City of Enfield v Development Assessment Commission*, Gleeson CJ, Gummow, Kirby and Hayne JJ said that 'the term "jurisdictional fact" (which may be a complex of elements) is often used to identify that criterion, satisfaction of which enlivens the power of the decision-maker to exercise a discretion'. The determination of whether a particular criterion is a jurisdictional fact is a matter of proper construction of the text, context and purpose of the Code.
>
> ...
>
> The concept of a jurisdictional fact is related to, but distinct from, the other grounds of jurisdictional error described above. In his submissions, including in relation to review based upon the existence of a jurisdictional fact, senior counsel

131 (2011) 244 CLR 144.
132 Ibid 179-180 [57], see also 181 [61]–[62].
133 [2014] WASC 346.

GARDE J

for the Regulator submitted that the exercise of judicial review should not become an exercise of merits review.

It is not necessary for the purposes of this case to decide whether senior counsel's assertion about the limits of jurisdictional fact review is correct. It suffices to say that, putting aside the difficulties with the label 'merits review', there are powerful arguments to the contrary which recognise an important difference between jurisdictional facts and other types of jurisdictional error. As Justice Leeming has observed, the process of 'jurisdictional fact' review is not 'something approaching merits review; it is merits review' (original emphasis). And in *Minister for Immigration and Citizenship v SZMDS*, Gummow ACJ and Kiefel J, although dissenting in the result of the case, explained that

> apprehensions respecting 'merits review' assume that there was jurisdiction to embark upon the determination of the merits. But the same degree of caution as to the scope of judicial review does not apply when the issue is whether the jurisdictional threshold has been crossed.[134]

248 The defendants submit that the *Malaysian Declaration Case*[135] should be distinguished. They say that the power in question here is not qualified by jurisdictional facts and is different from that in that case[136] where the Minister had to declare in writing that Malaysia satisfied a number of express requirements as to protection, human rights standards and effective procedures. I accept that there is much substance in this submission.

249 The principles which apply to a failure to take into account a relevant consideration are set out by the High Court in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd.*[137] They are also conveniently summarised by Edelman J in *The Pilbara Infrastructure Pty Ltd v Economic Regulation Authority*,[138] a case relied on by the plaintiffs. The ground of a failure to take into account a relevant consideration is only made out if a decision-maker fails to take into account a consideration that he or she is bound to take into account in making that decision. The factors that a decision-maker is bound to consider are determined by construction of the Act – here particularly pt 5.7 of the Act. The factors must be express or implied from the Act.

Statutory interpretation

250 The key submissions made by the plaintiffs concerning pt 5.7 of the Act, and s 478 in particular, are summarised as follows:

(a) Firstly the purposes of the Act and of s 478, and some or all of the requirements and responsibilities in s 482(1) and (3) and the entitlements in s 482(2), should be regarded as 'jurisdictional facts'. Without satisfaction of these jurisdictional facts, the power to establish a remand centre, youth residential centre or youth justice centre simply

134 Ibid [113], [115]–[116] (citations omitted).
135 (2011) 244 CLR 144.
136 Ibid.
137 (1986) 162 CLR 24, 39–41; see also *Sean Investments Pty Ltd v MacKellan* (1981) 38 ALR 363; *Kioa v West* (1985) 159 CLR 550.
138 [2014] WASC 346 [126]–[130].

does not arise.

(b) Secondly because the words 'for the purposes of this Act' are found at the commencement of s 478, and words such as 'for the care and welfare of persons ordered to be detained in youth justice centres', and similar words are used in s 478, it must be shown as a jurisdictional fact that the decision was made for the protection, care and welfare of the young persons concerned.

(c) Thirdly if they are not 'jurisdictional facts', the purposes of the Act and of s 478, the statutory duties imposed on the Secretary under s 482(1) and (3), and the entitlements granted to detained young persons under s 482(2) are relevant considerations which must be taken into account when exercising a power in s 478.

251 The defendants by contrast submitted that the statutory duties and responsibilities of the Secretary under s 482(1) and (3), and the entitlements of detained young persons found in s 482(2), are relevant considerations, but it is for the decision-maker under s 478 to decide whether they will be taken into account at all, and if so, what weight will be given to them.

252 It is true that in most situations, it is a matter for the decision-maker as to what considerations will be taken into account and what weight will be ascribed to them. However ultimately, it is a matter of the construction of the enabling power and the relevant Act.

253 Courts are frequently concerned with what is sometimes described as the modern approach to statutory interpretation. This is described in *CIC Insurance Ltd v Bankstown Football Club Ltd*,[139] where Brennan CJ, Dawson, Toohey and Gummow JJ said:

> the modern approach to statutory interpretation (a) insists that the context by considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses 'context' in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as [reference to reports of law reform bodies], one may discern the statute was intended to remedy: … Instances of general words in a statute being so construed by their context are numerous. In particular, as McHugh JA pointed out in *Isherwood v Butler Pollnow Pty Ltd* … if the apparently plain words of a provision are read in the light of the mischief which the statute was designed to overcome and of the objects of the legislation, they may wear a very different appearance. Further, inconvenience or improbability of result may assist the court in preferring to the literal meaning an alternative construction which, by the steps identified above, is reasonably open and more closely conforms to the legislative intent…[140]

254 In *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (*Northern*

139 (1997) 187 CLR 384.
140 Ibid 408 (citations omitted).

Territory),[141] Hayne, Heydon, Crennan and Kiefel JJ said: GARDE J

> This Court has stated on many occasions that the task of statutory interpretation must begin with a consideration of the text itself … Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text … The language which has actually been employed in the text of legislation is the surest guide to legislative intention … The meaning of the text may require consideration of the context, which include the general purpose and policy of a provision … in particular the mischief … it is seeking to remedy.[142]

255 There are a number of significant features about the powers conferred by s 478. First, these powers exist only 'for the purposes of the Act'. These words import the main purposes of the Act as found in s 1 of the Act. The main purposes in s 1 are the only purposes for which the powers in s 478 can be exercised.

256 The limitation by Parliament of the use of the powers in s 478 for the 'purposes of the Act' is one of the limitations imposed on the exercise of the powers in s 478. However, the power to establish a facility listed in s 478 is again limited by reference to the specific purposes described by Parliament in (a)–(d). Thus, a 'remand centre' can only be established under s 478(1)(a) for the purpose of 'the detention of children awaiting trial of the hearing of a charge or awaiting sentence or in transit to or from a youth residential centre or youth justice centre'. Likewise, a youth residential centre is 'for the care and welfare of children ordered under this Act … to be placed in a youth residential centre' and 'which provide special direction, support, educational opportunities and supervision'. A youth residential centre may not be established unless 'special direction, support, educational opportunities and supervision' are also provided.

257 Significantly, 'a youth justice centre' is required to be established 'for the care and welfare of persons ordered to be detained in youth justice centres under the Act'. A particular facility could not be a youth justice centre unless provision is made for the care and welfare of persons ordered to be detained in that facility. The form of care, custody and treatment to be provided is given expression in s 482.

258 Part 5.7 is concerned with the establishment of corrective services for children. Section 478 is found within pt 5.7, and in the immediate context of ss 481 and 482. There are only five sections in the entire Part. These provisions describe and define the services, care, custody and treatment to be provided in the centres and units that can be established under s 478(a)–(d). It is plain that decisions made under s 478 profoundly affect the practical content of the entitlements to be provided under s 482(2), as well as the discharge of the duties of the Secretary under s 482(1). It would be a sensible and beneficial construction if in the exercise of power under s 478, consideration also had to be given to what has to be done under s 482. It would give effect

141 (2009) 239 CLR 27.
142 Ibid 46-7 [47].

to main purpose (b) of the Act and the intent underlying s 478.

259 The nature and location of a remand centre, youth residential centre, or youth justice centre are of critical importance at least in terms of:

(1) the capacity to cater for the developmental needs of a detained young person (s 482(2)(a));

(2) visits to a detained young person by parents, relatives, legal practitioners, persons acting on behalf of legal practitioners and others (s 482(2)(b)); and

(3) the ability to make reasonable efforts to meet the medical, religious, and cultural needs of a detained young person (s 482(2)(c)).

260 This is well-illustrated by considering the likely impacts on a young person's entitlements of locating a remand centre or a youth justice centre on an offshore island or in a remote location of Victoria.

261 It would have been helpful to the decision-maker if it had been known, for example, if:

(a) the cells were fitted with porcelain that permitted self-harm;

(b) there were adequate fire systems;

(c) there were any climbing risks;

(d) the facilities were sufficient to gain registration as a school;

(e) the common area was fit for purpose;

(f) the Visit Centre was of sufficient size; and

(g) public transport was available.

262 The nature and location of a centre established under s 478(a)-(c) is also of great significance in terms of the performance of the Secretary's duties under s 482 including:

(1) the form of care, custody or treatment considered to be in the best interests of each detained person (s 482(1)(a));

(2) how persons on remand or serving a period of detention are detained (s 482(1)(b));

(3) the separation of persons on remand from those who are serving a period of detention (s 482(1)(c)); and

(4) the separation of persons who are held on remand and under the age of 15 years from those held on remand who are of or above the age of 15 years (s 482(1)(d)).

263 I have given consideration to the effect of the duties in s 482(1) and the entitlements in s 482(2) on the powers in s 478. Despite the submissions of the plaintiffs that the duties, or at least the entitlements, are jurisdictional facts which must be satisfied before the powers contained in s 478 can be exercised, I am of the view that the existence of the duties imposed on the Secretary under s 482(1) and the entitlements granted to detainees under s 482(2) are relevant considerations which must be taken into account before a s 478 decision can be made, rather than jurisdictional facts. I also accept that the purposes of the Act, and the specific purpose of the facilities in s 478(a)–(d), must be met. They are also relevant considerations in decision-making that cannot be ignored. I reject the defendants' construction that would permit the decision-maker to give no attention to the Secretary's duties and the detainees' entitlements when a power under s 478 is exercised despite the purposes of the Act and the references in s 478 to care and welfare of detained persons and the like. GARDE J

264 While it is true that the Secretary's duties will have to be discharged, and the entitlements honoured from the commencement of the use of a facility established under s 478, the interpretation that I have adopted will ensure that they are considered when the power under s 478 is exercised, and cannot be completely overlooked or disregarded.

265 Reading pt 5.7 of the Act as a whole and considering its purposes, I conclude that the powers contained in s 478 are not unfettered but are subject to a number of limitations:

(1) The powers in s 478 can only be used for the purposes of the Act. These are the main purposes set out in s 1 of the Act. These purposes, as relevant considerations, must be taken into account by the decision-maker.

(2) The individual powers set out in s 478(a)–(d) can only be used for the purposes set out in those powers and for no other purposes. Again, the respective specific purposes must be taken into account by the decision-maker.

(3) The exercise of the power in s 478 must take into consideration as a relevant consideration that the Secretary is obliged to conduct the facility in accordance with s 482(1)(a)–(d) from establishment.

(4) The exercise of the power in s 478 must take into consideration as a relevant consideration that young persons at the facility will have the entitlements set out in s 482(2), particularly (a)–(c), from establishment.

266 There are a number of additional reasons why the exercise of the power in s 478 requires the consideration of matters by the Minister and Governor in Council relating to the protection, care and welfare of children, including the duties, responsibilities and entitlements found in s 482.

267 First, as I have noted, s 35(1) of the *Interpretation of Legislation Act 1984* directs that an interpretation that would promote the purpose or object underlying the Act is to be preferred to a construction that would not promote that purpose. Plainly, the interpretation supported by the plaintiffs, and the construction that I have adopted, would better promote the protection of children (s 1(b)) than the construction preferred by the defendants. This consideration is strengthened by the use of the expression 'For the purposes of the Act' at the start of s 478.

268 Secondly, it would be a bizarre result if the exercise of the power in s 478 is entirely unfettered by the duties, responsibilities and entitlements set out in s 482, but that the instant a power in s 478 is exercised, those obligations spring into existence on a continuing basis, and have to be performed, even if not considered at the time when the decision to establish the new centre under s 478 was made.

269 Thirdly, adopting a contextual approach to construction, it is sensible if the five sections in pt 5.7 of the Act are read together to achieve a practical and workable outcome.

270 Fourthly, s 478 adopts the purposes of the Act and refers to the care and welfare of detained young persons or like expressions in (b) and (c). It would be strange if this were considered to be separate from ss 481 and 482 which give definition to the care and welfare of detained young persons. The 'special direction, support, educational opportunities and supervision' and 'the care and welfare of persons' referred to in s 478(b) and (c) includes that given by s 482. Nothing is more fundamental under these provisions than that consideration be given to what must be done under s 482.

Do the Orders in Council comply with the requirements of pt 5.7 of the Act?

271 Having identified the requirements in the Act for the exercise of the powers contained in s 478(a) and (c), I now turn to the question whether they were met by the defendants when the Orders in Council were made.

272 In the absence of any affidavit from the Minister or any other person as to what the Minister considered, it is necessary to review the Briefing Paper, the papers submitted to the Governor in Council including the Orders in Council, and the media statements made by the Minister which are in evidence and not disputed.

273 The Briefing Paper does refer to the powers contained in s 478(a) and (c). Paragraph 6 states that 'the Barwon site would be staffed by youth justice staff and youth health and education services, and other programs would continue to be delivered'. Paragraph 12 refers to the need to physically separate young people serving sentences and on remand as required by the Act. This shows an awareness of the duty of the Secretary under s 482(1)(c). However, it is not possible to identify or discern any other references to the matters relevant to the making of a decision under s 478 of the Act. There

GARDE J

is no consideration of the general purposes of the Act, the purposes of each facility, or the Secretary's duties and responsibility under s 482(1) and (3). There is no reference to the entitlements of detained young persons. In short, there is nothing about the protection, care and welfare of detained persons other than a passing reference in the talking points to the fact that the gazettal of the cells at Barwon Prison as youth justice facility 'will enable youth justice detainees to be safely accommodated in them' while the Parkville Youth Justice Precinct undergoes repairs.

274 The Ministerial talking points and media statements do not add anything to the position or identify relevant considerations as taken into account.

275 The decision-making processes leading to the Orders in Council did not involve any evaluation of the impacts on young persons who would be transferred to the Grevillea unit. There is no evidence of consideration of:

(a) the impact on the young persons of detention in a maximum security prison building;

(b) the effect on the young persons' rehabilitation, safety, dignity, care, custody or treatment or on their mental or psychological well-being;

(c) the best interests of the young persons and their development needs in the broad sense that this term is used in the Act;

(d) the provision of supporting services to young persons such as medical care, or the provision of a school; and

(e) the impact on families, visits, contact with the community and support by legal advisors and other professional persons.

276 As at 17 November 2016, and at the time of the Minister's recommendation and the making of the Orders in Council, the Grevillea unit was still under the control of Corrections Victoria as a high security unit for adult male prisoners within Barwon Prison. The Minister failed to consider the protection, care and welfare of young persons transferred to a remand centre or youth justice centre, or the nature or suitability of the Grevillea unit in the context of the Secretary's duties, and the entitlements of detained young persons while at the Grevillea unit. This was in part a consequence of the lack of access to the Grevillea unit by Departmental officers while Corrections Victoria had charge and control of it.

277 There is no evidence that any report as to the suitability of the Grevillea unit for the purposes of the Act or for the protection, care or welfare of young persons was ever provided to the Minister. None was tendered in evidence. The Minister did not visit the Grevillea unit before the Orders in Council were made. Nor did anyone on her behalf. Essentially the Department and the Minister were flying blind as to the real situation and suitability of the Grevillea unit when the Orders in Council were made. According to the

evidence, the Grevillea unit was taken over effectively site unseen without report to the Minister as to its suitability for use or acceptability prior to the time that Orders in Council were made.[143]

278 For these reasons, I conclude that the following considerations were relevant, were required to be taken into account, and were not taken into account by the Minister and Governor in Council at or before the time that the Orders in Council were made relating to the Grevillea unit:

(1) the purposes of the Act;

(2) the specific purposes of a remand centre and a youth justice centre;

(3) the duties of the Secretary under s 482(1) and what this would entail in the new location;

(4) the entitlements of detained young persons under s 482(2), and how they would be met in the new location; and

(5) the Secretary's responsibility under s 482(3).

279 These omissions had serious consequences. When the Grevillea unit was occupied, the Department was quite unprepared to meet the demands on it, to comply with the Secretary's duties, or provide young persons with their entitlements. It found itself unable on the occupation of the facility to cater for the developmental needs of young persons, receive visits or provide for medical or religious needs. It did not provide information to young persons who had been relocated to Grevillea. No attention was paid to the form of protection, care, custody or treatment that was in the best interests of the young persons transferred to the Grevillea unit.

280 I conclude for the reasons that I have given that the Minister was obliged to take into account the relevant considerations that I have listed above as they related to the establishment of a remand centre and a youth justice centre at the Grevillea unit, but did not do so at or before the time the Orders in Council were made.

Were the Orders in Council establishing a remand centre and a youth justice centre made for improper or extraneous purposes?

281 A further main submission was pressed by the plaintiffs as to why the Orders in Council were invalid. The point can shortly be addressed.

282 It has long been established that where purpose is made an express condition of the exercise of power conferred under legislation, the power must be

143 While uncertain as to precisely when the first departmental visit to the Grevillea unit occurred, the thrust of Mr Lanyon's evidence is clear. It was only after gazettal that access was gained to the Grevillea unit. Some of his staff went down to the Grevillea unit first. He went with staff subsequently. Work occurred over the weekend for the young people who came in on Monday, 21 November, see Transcript 125.18–31. It was only when Mr Lanyon visited himself that he became aware of the location of the Visit Centre, Transcript 125.15–17.

exercised for the purpose for which it was conferred. If the purpose is not pursued, the power is not exercisable. In *Arthur Yates and Company Pty Ltd v Vegetable Seeds Committee*,[144] Latham CJ said: GARDE J

> If a power is conferred in terms which require it to be used only for a particular purpose, then the use of that power for any other purpose cannot be justified.[145]

283 In *R v Toohey; Ex parte Northern Land Council*,[146] the High Court considered the purposes for which statutory power could be exercised. Gibbs CJ stated:

> the principle, which is clearly settled, at least in the case of authorities subordinate to the Crown, is that a statutory power may be exercised only for the purposes for which it is conferred.[147]

284 In the same case, Stephen J, with whom Mason J agreed, held that it was well established that both the exercise and non-exercise by Ministers of the Crown of discretionary powers vested in them are subject to judicial review. The exercise of discretion must be to promote Parliament's intention, and be uninfluenced 'by any ulterior motives'.[148] It made no difference in law that the relevant power was one exercised not by a Minister of the Crown but by the representative of the Crown upon the advice of Ministers.[149]

285 The plaintiffs submit that because the Orders in Council were each made for the express purpose of 'emergency accommodation', they were made for an improper or extraneous purpose.

286 As I have said, each of the powers granted by s 478(a)–(d) is conditional on the pursuit of specified purposes. In the case of 'remand centres' under s 478(a), the statutory purpose is 'the detention of children awaiting trial of the hearing of a charge'. In the case of s 478(c), the statutory purpose is 'for the care and welfare of persons ordered to be detained in youth justice centres under this Act'. Nowhere is the purpose of 'emergency accommodation' found in s 478, or anywhere else in pt 5.7 or the Act.

287 The plaintiffs submit that the words in the Orders in Council 'for emergency accommodation' cannot as a matter of law and should not be ignored as they make plain what the Governor in Council thought it was doing and what it was seeking to achieve. As a matter of law, the Governor in Council could only establish a remand centre or a youth justice centre for the express limited purpose for which each power was given.

288 The defendants contend that the inclusion of the words 'for emergency accommodation' was nothing more than descriptive of the circumstances in which the power was exercised. The words are surplusage and have no

---

144 (1945) 72 CLR 37; see also *Thompson v Randwick Municipal Council* (1950) 81 CLR 87.
145 *Arthur Yates and Company Pty Ltd v Vegetable Seeds Committee* (1945) 72 CLR 37, 67–68.
146 (1981) 151 CLR 170.
147 Ibid 186. Gibbs CJ went on to cite *Brownells Ltd v Ironmongers' Wages Board* (1950) 81 CLR 108, 120.
148 Ibid 202–203.
149 Ibid 204.

legal significance.

289 I am of the opinion that the plaintiffs' submission is correct. The purpose of 'emergency accommodation' is not one that is authorised for a remand centre by s 478(a) nor for a youth justice centre by s 478(c). It is simply not known to the Act.

290 The purpose of 'emergency accommodation' is extraneous to the purpose for which the powers contained in s 478(a) and (c) were granted. Clearly, 'emergency accommodation' is a substantial purpose of the exercise of power. Indeed it is the only purpose stated in the Orders in Council. The powers were exercised solely to give effect to the extraneous purpose. The use of the expression 'emergency accommodation' could be sought to be supported as one component of the purpose of 'care and welfare'. However, the plaintiffs submitted, this does not overcome the problem that the purpose that s 478(c) allows is not 'emergency accommodation' but 'care and welfare of persons ordered to be detained in youth justice centres'. The purpose of 'emergency accommodation' is entirely different from the sole purpose for which a remand centre may be established.

291 Nor can I accept the argument that the term is merely descriptive of a youth justice centre or even a remand centre. Both involve much more than 'emergency accommodation'. Rather than descriptive, the concept of 'emergency accommodation' is inconsistent with what Parliament intended in s 478(a) or s 478(c), and by s 482(1) and (2). The expression makes no reference to, and in many respects excludes the entitlements intended for detainees in s 482(2) and the duties and responsibilities of the Secretary under s 482(1) and (3). Given the statutory duties and responsibilities imposed on the Secretary, much more is expected of a remand centre or a youth justice centre than just 'emergency accommodation'. The term 'emergency accommodation' reflects a failure to anticipate that what was required to be done. This was much more comprehensive than accommodation on an emergency basis.

292 Apart from the fact that both provide a form of accommodation, a remand centre and emergency accommodation are entirely dissimilar in common understanding. One is a permanent and highly regulated custodial institution operating under statute, the other is a voluntary, usually temporary, home or camp ordinarily managed by relief workers with unrestricted access. The two expressions have only the loosest association. In reality, the Grevillea unit was a high security block containing cells for adult male prisoners wholly enclosed within a high security prison.

293 The expression 'emergency accommodation' is not temporal in the sense of imposing a start date or an end date. Nor is it surplusage as it addresses the purpose of the new facility. The use of the words indicates that what was intended differs from the statutory purposes found in s 478(a) or (c).

294 It was not submitted by the defendants that the words 'for emergency

accommodation' are severable and should be severed from the Orders in Council. This would leave the reference to remand centre and youth justice centre without any stated purpose. The words are integral to the Orders in Council clearly setting out the intended purpose of the new facility. They are not severable and should not be severed. The only conclusion open is that the purpose stated is an improper or extraneous purpose to the purposes respectively required by the Act for a remand centre or a youth justice centre. GARDE J

Findings as to the Orders in Council

295 I find that the Orders in Council are invalid and of no effect and fail to take into account relevant considerations that had to be taken into account in the making of a decision to establish a remand centre or youth justice centre at the Grevillea unit. They were made for an improper or extraneous purpose to that required for the exercise of the powers in s 478(a) or s 478(c) namely for the purpose of emergency accommodation.

Other claims and submissions

296 I now turn to address a number of claims made in the amended originating motion or in submissions put by the parties.

297 Those claims or submissions are:

(a) the claim for the issue of a writ of habeas corpus;

(b) the claim for a writ, or order in the nature of certiorari to quash the decision of the Governor in Council;

(c) whether the Secretary was under a statutory duty to ensure that young persons who were detainees attend school;

(d) whether the Working With Children requirements are met;

(e) whether there is an engaged human right to protect families under s 17(1) of the Charter; and

(f) whether the decision of the Youth Parole Board was circumvented.

Habeas corpus

298 The plaintiffs seek a writ of habeas corpus or an order directing the Secretary to release them and all of the other young people detained at the Grevillea unit. However no argument or case was made that the plaintiffs were unlawfully detained so as to be entitled to be released into the community.

299 I accept the defendants' submission that the writ of habeas corpus should not issue in these circumstances.[150] The issue here is where the plaintiffs can be detained and not whether they should be detained. That is for the

[150] See *Bennett v Superintendent, Rimutaka Prison* [2002] 1 NZLR 616, 633; *Day v The Queen* (1984) 153 CLR 475, 485.

Children's Court on another day. There are remedies by way of judicial review which are available to redress the plaintiffs' claims if they are successful.

Use of orders in the nature of certiorari in relation to Orders in Council

300 In *FAI Insurances Ltd v Winneke*,[151] Gibbs CJ referred to the authorities cited in *R v Toohey*; *Ex parte Northern Land Council*[152] as indicating that the writs of certiorari and mandamus were not available against the Crown in the absence of express statutory provision.[153] Those authorities are *R v Governor of South Australia*,[154] *Horwitz v Connor*[155] and *Banks v Transport Regulation Board*.[156]

301 In accordance with the reservation expressed by Gibbs CJ, it is desirable to avoid the use of the writ of certiorari or an order in the nature of certiorari in relation to the Orders in Council. It is not necessary to do so as other remedies are available.

Secretary's duty to ensure young person detainees attend school

302 The plaintiffs contend that the Secretary is a parent of the young persons under detention and is obliged to enrol the young persons in the Grevillea unit at school under ss 2.1.1 and 2.1.2 of the *Education and Training Reform Act 2006* (**Education Act**). This states:

> It is the duty of the parent of a child of not less than 6 nor more than 17 years of age—
>
> (a) to enrol the child at a registered school and to ensure the child attends the school at all times when the school is open for the child's instruction; or
>
> (b) to register the child for home schooling in accordance with the regulations and to ensure that the child receives instruction in accordance with the registration.
>
> A parent of a child of compulsory school age must not without a reasonable excuse fail to comply with the duty set out in section 2.1.1.

303 The word 'parent' is defined in s 1.1.3 of the Education Act to mean:

> 'parent', in relation to a child, includes a guardian and every person who has parental responsibility for the child including parental responsibility under the Family Law Act of the Commonwealth and any person with whom a child normally or regularly resides.

304 I accept the defendants' submission that neither the Minister or the Secretary are parents of the detained young adults as defined and used in ss 1.1.3, 2.1.1 and 2.1.2 of the Education Act. These provisions have no application here.

---

151 (1982) 151 CLR 342.
152 (1981) 151 CLR 170, 186.
153 (1982) 151 CLR 342 [14].
154 (1907) 4 CLR 1497, 1512.
155 (1908) 6 CLR 38, 40.
156 (1968) 119 CLR 222, 241.

Working with children GARDE J

305 Section 35 of the *Working with Children Act 2005* makes it an offence for a worker without a current assessment notice under that Act to undertake child-related work. Child-related work is defined in s 9 of that Act to mean:

> (1) For the purposes of this Act, child-related work is work—
>
> (a) at or for a service, body or place, or that involves an activity, specified in subsection (3); and
>
> (b) that usually involves direct contact with a child and that contact is not directly supervised by another person.
>
> (1A) For the purposes of this Act, work is not child-related work by reason only of occasional direct contact with children that is incidental to the work.
>
> (2) For the purposes of this Act, direct supervision of a person's contact with a child requires immediate and personal supervision but does not require constant physical presence.

306 I am not satisfied on the evidence before me that Corrections officers have engaged in work going beyond occasional direct contact with children in the course of their employment at Barwon Prison. I am not satisfied that they have engaged in child-related work. I have no evidence as to whether or not what they did was supervised by Departmental personnel. I also note Mr Lanyon's evidence that 90 Corrections officers at Barwon Prison made applications for Working with Children checks.

Protection of the family unit

307 Section 17(1) of the Charter provides that 'Families are the fundamental group unit of society and are entitled to be protected by society and the State'. The word 'family' is not defined in the Charter. I accept that it should be construed broadly.

308 While I accept that it will be less convenient for many families to visit detained young persons at the Grevillea unit of Barwon Prison, I am not satisfied on the evidence that the human right of family protection is engaged. The evidence is also that taxi vouchers are available to assist in visits at least in some circumstances.

Circumventing the decisions of the Youth Parole Board

309 The plaintiffs claim that the Orders in Council and the transfer decisions were intended to circumvent the decisions of the Youth Parole Board. Under s 467(1) of the Act, the Youth Parole Board has the power to direct the transfer of a young person aged 16 years or more sentenced as a child by the Children's Court or any other court detained in a youth justice centre to a prison to serve the unexpired portion of the period of his detention as imprisonment. Section 467(2) sets out the criteria to which the Youth Parole Board is to have regard. As I have said, on 16 November 2016, the Youth Parole Board refused to approve the transfer of seven young persons who

had been sentenced.[157]

310 I reject the plaintiffs' submission that the transfer of some of them to the Grevillea unit was an attempt to circumvent the Youth Parole Board's decision. They were not subject to the Youth Parole Board's jurisdiction as they had not been sentenced. Different procedures and approvals applied to them under the Act. It is paradoxical that sentenced young persons cannot be transferred to the Grevillea unit because the Youth Parole Board refuses to allow it, but young persons on remand and not sentenced can be transferred to the Grevillea unit. This is as a consequence of the different procedures and approvals that apply under the Act to young persons on remand. In the event, I have come to the conclusion that the Orders in Council are invalid and that the transfers of the plaintiffs who are at Grevillea are also invalid.

The transfer decisions

311 All of the decisions transferring plaintiffs to the Grevillea unit were made by delegates of the Secretary:

(a) the decision to transfer Brian Ure was made on 24 November 2016, by Matthew Belleville, Acting General Manager Parkville Youth Justice Centre, by transfer warrant 0025.[158]

(b) the decision to transfer Antony Kelly and Nicholas Brown was made on 25 November 2016, by Monica Tulloch, Acting General Manager Malmsbury Youth Justice Centre, by transfer warrant 0801.[159]

(c) the decision to transfer Adam Albert and Matthew Symon was made on 25 November 2016 by Monica Tulloch by transfer warrant 0765. They were not transferred on that day.

(d) the decision to transfer Adam Albert, Matthew Symon, John Brereton and Benjamin Harris was made on 26 November 2016 by Ian Lanyon, by transfer warrant 0027.[160]

(e) the decision to transfer Peter Palmer was made on 3 December 2016 by Ian Lanyon, by transfer warrant 0032.[161]

312 John Brereton was released on bail prior to the commencement of the trial. Sascha Aleksov was subsequently transferred to the Grevillea unit. He was joined as a plaintiff during the trial for the purpose of the determination of the questions in the proceeding as they affect the validity of the Orders in Council.

---

157 Above [40].
158 Affidavit of Matthew James Belleville affirmed 9 December 2016 [43]; Exhibit MJB-5.
159 Affidavit of Monica Wendy Tulloch sworn 9 December 2016 [51]; Exhibit MWT-9.
160 Affidavit of Ian Lanyon affirmed 9 December 2016 [117]; Exhibit IL-7.
161 Affidavit of Ian Lanyon affirmed 9 December 2016 [126]; Exhibit IL-9.

Procedural fairness GARDE J

313 The plaintiffs challenged the transfer decisions on the basis of a failure by the defendants to provide procedural fairness. The defendants did not suggest that they had provided procedural fairness to the plaintiffs transferred to the Grevillea unit. Rather they submitted that there was no obligation to provide procedural fairness in making a transfer decision.

314 It is the Secretary who has the legal custody of young persons in detention. Section 483(1) of the Act provides:

> A person who is detained in a remand centre, youth residential centre or youth justice centre is deemed to be in the legal custody of the Secretary while so detained.

315 Section 484 of the Act provides for the issue of warrants by the Secretary for the removal of a person from one centre to another. It provides:

> (1) The Secretary may by warrant under his or her hand cause the removal of a person—
>
> (a) from any remand centre to any other remand centre or to a youth residential centre or youth justice centre; or
>
> (b) from a youth residential centre to any other youth residential centre or to a remand centre; or
>
> (c) from a youth justice centre to any other youth justice centre or to a remand centre.
>
> (2) On being removed under subsection (1) a person must be kept at the remand centre, youth residential centre or youth justice centre for the residue of the period of his or her detention in custody or until removed by legal authority.
>
> (3) A person while being removed from or to a remand centre, youth residential centre or youth justice centre is deemed to be in the legal custody of the officer having the custody of the person and acting under the warrant.
>
> (4) The officer acting under the warrant must in due course deliver or return the person into the custody of the officer in charge of the remand centre, youth residential centre or youth justice centre in accordance with the terms of the warrant.
>
> (5) A police officer may, if requested to do so by the Secretary, assist the officer referred to in subsections (3) and (4) in the discharge of his or her duties under those subsections and, in that case, the person being removed is deemed to be in the legal custody of the police officer.

316 Sections 483 and 484 are found in pt 5.8 of the Act.

317 The issue of procedural fairness was recently considered in *Moran v Secretary to the Department of Justice and Regulation*[162] in the context of adult prisoners.

318 In that decision, McDonald J said:

> In *Kioa v West*, Mason J stated that what is appropriate in terms of procedural fairness depends on the circumstances of the case and will include, inter alia, the

[162] (2015) 48 VR 119.

nature of inquiry, subject matter and the rules under which the decision maker is acting:

> In this respect the expression 'procedural fairness' more aptly conveys the notion of a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case. The statutory power must be exercised fairly, ie, in accordance with procedures that are fair to the individual considered in the light of the statutory requirements, the interests of the individual and the interests and purposes, whether public or private, which the statute seeks to advance or protect or permits to be taken into account as legitimate considerations.

The nature of the power governing the transfer decision was such that Ms Moran did not have a right nor a legitimate expectation to reside in the Margaret Unit. Due regard must be had to this when considering the existence or parameters of any obligation to accord Ms Moran procedural fairness in respect of the transfer decision.

...

In considering the existence or scope of any obligation of procedural fairness, the absence of any express right under the Act for a prisoner to have accommodation in a particular section of a prison is significant. In *Kelleher v Commissioner, Department of Corrective Services* McInerney J cited with approval the observations of White J in Bromley v Dawes:

> The presumption in favour of the citizen does not apply in favour of the prisoner, as the cases show. He is deprived of all of a citizen's rights except those which are preserved by the Prisons Act. There must be clear words, apt words, which preserve those rights.

McInerney J concluded that where a statute is silent, a prisoner's right to seek judicial review has generally been given a restrictive interpretation. Neither party submitted that Ms Moran had a statutory or common law right to a particular standard of accommodation. The absence of such right points strongly to the conclusion that a decision to move a prisoner within a prison is of an administrative/managerial character, not subject to a right of judicial review and not subject to obligations to afford procedural fairness. I agree with the observations of Nettle JA (as His Honour then was) in *Anderson v Pavic* that it is:

> ... unlikely that Parliament should have intended that the courts sit in judgment upon questions of fact routinely decided by prison authorities in the course of management and administration of the prison for which they are responsible.[163]

319 In my opinion, the same position applies in relation to transfer decisions relating to young persons held in detention. There is no right to procedural fairness. There is nothing in pt 5.8 of the Act that suggests that any different rules apply to transfer decisions by warrant in relation to young persons detained in remand centres or youth justice centres.

163 Ibid 125-6 [23]–[24], 126-7 [26] (citations omitted).

Remaining challenges to the transfer decisions GARDE J

320 Given the conclusions that I have arrived at as to the validity of the Orders in Council, there is no utility in considering the remaining challenges to the transfer decisions made by delegates of the Secretary over the period from 24 November to 3 December 2016. I am of this opinion for three reasons:

(a) First, the conclusions that I have reached will necessitate the removal of all plaintiffs at the Grevillea unit to other remand centres established under s 478(a) of the Act.

(b) Second, the challenges to the transfer decisions are largely based on what are said to be contraventions of s 38(1) of the Charter. Having regard to the views expressed in *Bare*[164] (although not finally settled), success in these challenges may not achieve the invalidation of the transfer decisions which is their purpose.

(c) Third, children on remand for sentencing can only be held on remand for a period not exceeding 21 days before returning to the Children's Court.[165] There is a high turnover in a young persons' remand centre, in accordance with the orders of the Children's Court.

Conclusions

321 I have come to the following conclusions in relation to the issues in this proceeding:

(1) the recommendation by the Minister to make the Orders in Council, and the Orders in Council themselves were made contrary to s 38(1) of the Charter in that proper consideration was not given to the human rights of the plaintiffs under ss 10(b), 17(2) and 22(1) of the Charter;

(2) when the Orders in Council were made, the Minister and the Governor in Council did not take into account relevant considerations relating to the establishment of a remand centre or youth justice centre at Barwon Prison that were required to be taken into account;

(3) the Orders in Council were made for an improper or extraneous purpose namely that the sole purpose of the new remand centre and youth justice centre was for 'emergency accommodation';

(4) the Orders in Council are therefore invalid and of no effect;

(5) as a consequence, the transfer decisions are invalid and of no effect; and

(6) the plaintiffs presently detained at the Grevillea unit are entitled to

164 (2015) 48 VR 129.
165 *Children, Youth and Families Act 2005* s 414(2), (4).

orders of the Court that the Secretary transfer them to a remand centre lawfully established under the Act.

SCHEDULE

Expectations of behaviour while at the Grevillea Youth Justice Centre (YJC) at Barwon Prison

The expectations of your behaviour here at Grevillea YJC are the same as at Parkville and Malmsbury.

DHHS Grevillea staff will engage with you in a respectful and professional manner, and will expect you to respond by complying with their directions and interacting with them and other clients in a positive and respectful way.

Threats to staff or other clients, and abusive behaviour will not be tolerated. This behaviour will be tightly managed by staff and will lead to negative consequences.

Any violent, dangerous or destructive behaviour, including property damage that is unable to be managed by DHHS Grevillea staff, will result in intervention by SESG.

Powers under their legislation allow SESG to respond as necessary with dogs, OC spray, tear gas and firearms.

Escape of [sic] attempts to escape

Grevillea YJC is based in a high security prison.

If you attempt to escape or escape you will be apprehended by SESG using dogs, OC spray, tear gas and firearms.

You will face two charges which both carry terms of imprisonment:

- To attempt or escape from a youth justice centre
- To attempt or enter a high security prison.

Behaviour Contract

I have had the expectations of behaviour while at the Grevillea YJC of Barwon Prison explained to me.

I understand the consequences of not complying with these explanations may include intervention by SESG.

Client Name:

Date of Birth:

Client Signature: GARDE J

Staff Member Full Name:

Staff Member signature:

Application granted.

Solicitors for the plaintiff: *Fitzroy Legal Service and the Human Rights Law Centre.*
Solicitor for the defendants: *Victorian Government Solicitor.*
Solicitor for the intervener: Victorian Equal Opportunity and Human Rights Commission.

L T BROWN
BARRISTER-AT-LAW

[The Minister appealed: see (2016) 51 VR 597, following. Ed. VR]