SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: BS2054/25

Applicants	**BOBELDYK AND BOBELDYK**
	AND
Respondent	**MORETON BAY CITY COUNCIL**

REGISTRY: Brisbane
NUMBER: BS2741/25

Applicants	**TIPLER AND ORS**
	AND
Respondent	**MORETON BAY CITY COUNCIL**

OUTLINE OF SUBMISSIONS
QUEENSLAND HUMAN RIGHTS COMMISSION (INTERVENING)

Queensland Human Rights Commission
Level 4, 400 George Street
Brisbane Qld 4000
07 3021 9186
legal@qhrc.qld.gov.au

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A. The Proceedings

1. The proceedings concern two applications for judicial review in which the applicants challenge decisions and actions of the respondent (**the Council**) taken under the *Alteration of Public Land Local Law 2023* (**Alteration Law**) and the *Camping on Local Land Local Law 2023* (**Camping Law**), (collectively, the **Challenged Decisions and Conduct**). The applicants also argue the Challenged Decisions and Conduct contravene sections 58(1)(a) and 58(1)(b) of the *Human Rights Act 2019* (**HRA**), leading to the Commission's intervention.

2. The applicants identify two classes of decisions under challenge. The first class are decisions by authorised persons to issue 'compliance notices' under section 9 of the Alteration Law and section 13 of the Camping Law (**Notice Decisions**). The second class are decisions or conduct, 'to seize and dispose of the chattels belonging to the Applicants' that were present on local land (**Clearance Conduct/Decisions**),[1] being the exercise of an authorised person's power to seize and impound property,[2] with the incidental power to dispose of seized property in certain circumstances.[3]

B. Brief Background

3. At the relevant time, the applicants were homeless and living on Council controlled land. Use of the land was relevantly regulated by the Alteration Law and the Camping Law.

4. The trigger for the events leading to these proceedings was the Council's decision to repeal the 'Persons Experiencing Homelessness (**PEH**) Camping Framework', and swift moves to enforce Local Laws *sans* the PEH Camping Framework. This process was designed to remove people experiencing homelessness from living on Council controlled land.

5. Under the Camping Law, it is an offence to camp on public land unless an exception applies, which included 'the camping is PEH Camping' (s 13(1)(i)).[4] PEH Camping 'means camping assessed as camping under the PEH Camping Framework'. Section 47 of the Camping Law provides that 'the local government may establish a framework for assessing whether camping is PEH camping'. It seems the Camping Law operates such that, absent a framework under section 47 existing to assess what is 'PEH camping', the exclusion of 'PEH camping' in section 13(1)(i) becomes ineffective.

[1] The Applicant identifies this class of decision or conduct as 'Bulldozing Decision and Conduct'. Given the factual dispute about the presence and use of a 'bulldozer' the Commission adopts a neutral definition.

[2] Alteration Law, s 23; Camping Law, s 25.

[3] Alteration Law, s 24. Camping Law, s 26.

[4] 'PEH' means 'persons experiencing homelessness, see Camping Law, Schedule 1.

6. On 8 November 2023, the Council had established a 'PEH Camping Framework'.[5] On 26 February 2025 the Council repealed the PEH Camping Framework, with effect from 12 March 2025.[6]

7. Leading into the repeal, the Council devised a 'two-stage approach to the Council's decision to repeal the PEH Framework'.[7] Stage 2 of the approach involved 'enforcing compliance' with the Camping Law, commencing the day after the repeal took effect. It is after this point that authorised persons for the Council exercised powers under the Alteration Law and the Camping Law that constitute the Challenged Decisions and Conduct. 'Stage 2' was being carried out by the Council, through 'Rangers' from 13 March 2025 until 15 August 2025, following an injunction ordered by Smith J pending the outcome of these proceedings.

8. The Challenged Decisions and Conduct comprise multiple decisions taken against multiple applicants. For the Clearance Conduct/Decisions there is dispute about the level of consent involved in disposing of items, as well as what items were disposed of.

C. The Commission's Intervention

9. The Queensland Human Rights Commission (**Commission**) intervenes in each of these proceedings pursuant to s 51 of the HRA.

10. In summary, the Commission:

    a. supports the applicants' position that the obligations under HRA s 58(1) attach to the relevant exercise of powers by 'authorised persons' under the Local Laws, such that each Challenged Decision and Conduct must be considered for its compliance with s 58(1);

    b. in the context of a. above, confirms (contrary to a view expressed in the Council's material) that the relevant exercise of powers under the Local Laws by authorised persons readily lend themselves to the obligations under s 58(1);

    c. supports the applicants' position that, on the Council's material, there appears to be a contravention of s 58(1)(b) for each of the Challenged Decisions and Conduct, as there is no evidence that the authorised persons gave 'proper consideration to a human right relevant to the decision';

    d. supports the applicants' position as to the human rights that are engaged by the relevant decisions and actions of the respondent, and submits that the right to equality (HRA s 15) may also be engaged;

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[5] [Redacted], [5], Court Doc. 5, (Filed on the interlocutory application).
[6] [Redacted], Court Doc. 51.
[7] [Redacted], Court Doc. 51.

e. seeks to identify the scope of relevant human rights, supported by an overview of relevant domestic, comparative, and international law,[8] and how, with regard to comparative jurisprudence, the rights may be engaged and limited in the context of eviction, homelessness and/or imposition of penalties for life-sustaining activities;

f. outlines factors that have been held relevant to either a finding that an interference with rights in this context was 'arbitrary', and/or that state action was incompatible with human rights.

11. Some key themes emerge from domestic, comparative, and international jurisprudence. While eviction of individuals from public land may in some cases be justifiable, a range of international and domestic courts and human rights bodies (discussed below) have emphasised:

a. the potentially severe impacts on a person's dignity, security, and physical and psychological integrity arising from eviction, exposure to rough sleeping, and/or penalising life-sustaining activities such as occupation of public land when no alternative exists;

b. the need for an individual's circumstances to be taken into account on a case-by-case basis to ensure that otherwise lawful action is not arbitrary in the circumstances and does not give rise to the real risk of cruel, inhuman or degrading treatment;

c. the difficulty in justifying evictions from public land without urgent pressing need where suitable, alternative accommodation is not available.

D. Section 58(1)(b): the 'Procedural Limb'

General Principles

12. Section 58(1)(b) of the HRA, 'the procedural limb', makes it unlawful for a public entity, in making a decision, to fail to give proper consideration to a human right relevant to the decision. The procedural limb is additional or supplementary to any obligation imposed under the primary legislation governing the operations of the public authority.[9]

13. What is required for a public entity to give 'proper consideration' to a person's human rights was recently stated by the Court of Appeal in ***Mizner*** *v State of Queensland (Corrective Services)*.[10] His Honour, Crowley J observed (Bond JA and Gotterson AJA agreeing):

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[8] In accordance with HRA s 48(3), noting observations in *Owen-D'Arcy v Chief Executive, Queensland Corrective Services* (2021) 9 QR 250, [113]-[117] (Martin J) and ***Austin BMI Pty Ltd*** *v Deputy Premier (No 1)* (2023) 16 QR 377 [306] (Freeburn J).

[9] ***Bare*** *v Independent Broad-based Anti-Corruption Commission* (2015) 326 ALR 198, [323] and [326] (Tate JA); *HJ v IBAC* [2021] 64 VR 270 (Beach, Kyrou and Kaye JA), [154]; ***Thompson*** *v Minogue* (2021) 67 VR 301, [80] (Kyrou, McLeish JA and Niall JA).

[10] [2025] QCA 169 (Crowley J, Bond JA and Gotterson AJA)

> [268] The use of the adjective "proper" in s 58(1)(b) requires a standard of consideration higher than that generally applicable at common law for taking into account relevant considerations. It is an exercise that must be approached in a common sense and practical manner. As s 58(5) of the HRA makes plain, it includes, but is not limited to, identifying the relevant human rights that may be affected by the decision in question and considering whether the decision would be compatible with human rights. It involves understanding, in general terms, which of the rights of the person affected by the decision may be relevant and whether, and if so how, those rights will be interfered with by the decision that is made. It will be sufficient in most circumstances that there is some evidence that shows the decision-maker seriously turned his or her mind to the possible impact of the decision on a person's human rights and the implications thereof for the affected person, and that countervailing interests or obligations were identified. Compliance with s 58(1)(b) of the HRA need not involve a sophisticated legal exercise.
>
> (citations omitted)

14. It is primarily a question of fact whether, in a given case, a decision-maker has given proper consideration to relevant rights, as required by the 'procedural limb'.[11] There is no place for deference to the decision-maker's views determining whether a decision-maker has given proper consideration to human rights.[12] The public entity has the evidential onus of satisfying the Court that the procedural limb has been complied with.[13]

Procedural Limb: the Notices Decisions

15. The Commission's position is that, for each of the Notices Decisions, the decision-makers have contravened the procedural limb because:

    a. the obligation under s 58(1)(b) was imposed on each of the authorised persons who decided to issue the compliance notices (see discussion [21]-[34]); and

    b. there appears to be no evidence that each of the authorised persons gave proper consideration to the respective applicants' human rights at the time of issuing each Notices Decision where, on the Council's material:

        i. the identity of the authorised persons who issued the compliance notices is largely unknown;[14]

[11] *Owen-D'Arcy*, [140] citing *Minogue* at [49] (Richard J).
[12] *Owen-D'Arcy,* [140], citing *Minogue* at [50] (Richard J).
[13] ***Certain Children*** *v Minister for Families and Children* (2016) 51 VR 579, [93]-[99] (Garde J).
[14] Compliance notices are not issued with the names of authorised persons, just reference numbers. Further, the Council's affidavits simply refer to unidentified 'Council rangers' issuing compliance notices; see [Redacted], Court Doc. 7.

ii. the ‘decision notices’ that must accompany the ‘compliance notices’ and state the reasons for issuing the notice[15] do not make any reference to an applicants’ human rights; and

iii. there are no affidavits from each of the authorised officers providing evidence that they did consider an applicants’ human rights at the time of issuing the compliance notice.

16. Notably, in BS2054/25, the Council has filed as part of its material[16] a memorandum drafted by Mr Shane Mansfield to Tim Ditchburn addressing the applicants’ internal review applications against certain Notices Decisions. As part of the applicants’ internal review application they raised a failure to consider the applicants’ human rights. Mr Mansfield’s memorandum states, under the heading ‘Human Rights Assessment’:[17]

> In the context of compliance and enforcement action, it will not always be practicable to undertake case by case human rights assessments. For example, officers will not be privy to all the personal circumstances of an individual. What the authorised person would have been aware of is that the [redacted] and [redacted] were experiencing homelessness and were living on public land. Those factors and the human rights relevant to those factors, were generally considered by Council in determining its approach to responding to PEH camping and storing items on public land.

17. Mr Mansfield suggests, firstly, that ‘generally considered’ human rights impacts for the Council’s decision to repeal the PEH Camping Framework applies to the Challenged Decisions and Conduct, and secondly, that the authorised persons were relieved of the obligations under s 58(1) given ‘practical’ difficulties. Neither suggestion is correct.

18. The Council’s material also suggests, by the ‘Phase 2’ enforcement approach of the post-PEH Framework Local Laws,[18] a blanket pre-determined and directed enforcement of local laws against homeless people camping on public land. This includes ‘pre-prepared’ compliance notices for issuing, predetermined timeframes for compliance (generally 15 business days), and select matters that will inform a greater timeframe – but only after consultation with ‘the Coordinator or Team Leader’.[19]

19. The obligation to properly consider human rights was directly imposed on the ‘authorised persons’ who are making the decisions – at the time they made the respective decisions,[20] having regard to the individual circumstances of the case.[21] This is consistent with a proper construction of both the HRA and the Alteration Law/Camping Law in that:

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[15] Alteration Law, s 19(6), Schedule 1; Camping Law, s 22(6), Schedule 1.
[16] Respondent’s Bundle of Relevant Documents, at 111-113.
[17] Ibid, 113.
[18] [Redacted], [4]-[6], Court Doc. 51.
[19] [Redacted], Exhibits SM-1 and SM-2, 1-3, Court Doc. 51.
[20] *Certain Children* [190]-[191] (Garde J).
[21] *Bare,* [321] (Tate JA) citing *Burgess v Director of Housing* [2014] VSC 648 (Macaulay J).

a. the obligations under s 58(1) HRA are intended to apply to different levels and kinds of public decision making, and therefore, various levels of decision makers; and

b. by design, the Alteration Law and Camping Law relevantly vest decision making in 'authorised persons' exercising discretions that 'do not compel a particular result'[22] and lend themselves to obligations under s 58(1).

20. The two matters are considered in turn.

Why the obligations under s 58(1) of the HRA attach to the decisions and actions of the 'authorised persons'

21. *Firstly*, the HRA imposes the obligations in s 58(1)(b) on 'public entities' as defined (HRA s 9). Section 9 provides that *each* of the listed entities is a 'public entity' for the purpose of the HRA, and separately refers to both corporate entities *and* individuals. Specifically, a public entity is 'a local government, a councillor of a local government <u>or a local government employee</u>'. The HRA directly contemplates the obligations vesting in individuals.[23]

22. *Secondly*, it is well established that the requirement to give proper consideration to human rights in public decision making is intended to apply across all aspects of public decision making and actions. As observed by Emerton J in ***Castles*** *v Secretary to the Department of Justice*, when discussing the purpose and scope of the obligation under the Victorian *Charter of Human Rights and Responsibilities 2006* (**Charter**) equivalent of s 58(1)(b):[24]

> [185] The requirement in s 38(1) to give proper consideration to human rights must be read in the context of the Charter as a whole, and its purposes. The Charter is intended to apply to the plethora of decisions made by public authorities of all kinds. The consideration of human rights is intended to become part of decision-making processes at all levels of government. It is therefore intended to become a 'common or garden' activity for persons working in the public sector, both senior and junior. In these circumstances, proper consideration of human rights should not be a sophisticated legal exercise.

23. In ***Thompson*** *v Minogue*,[25] when interpreting what 'proper consideration' required under the *Charter* the Victorian Court of Appeal observed:[26]

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[22] *SQH v Scott* (2022) 10 QR 215, [143] (Williams J).
[23] However, as a 'public entity' itself, the acts or decisions of the Council's officers can be considered the decisions or acts of the Council for the purpose of HRA s 58, see ***Kerrison*** *v Melbourne City Council* (2014) 228 FCR 87 [145].
[24] [2010] 28 VR 141.
[25] (2021) 67 VR 301.
[26] *Thompson*, (Kyrou, McLeish JA and Niall JA). The *HJ Test* referred to in this judgment means the elements of proper consideration set out by the Victorian Court of Appeal in *HJ v Independent Broad-Based Anti-*

> [87] …As explained in *Castles*, a sophisticated legal exercise is not required because the procedural limb applies generally to decision-making by Victorian public authorities. That decision-making includes decisions of a repetitive or routine nature by junior officers and decisions that must be made in circumstances of urgency…
>
> …
>
> [91] Whether the requirements of the procedural limb are satisfied in a particular case is to be decided objectively by the court by applying the four limbs of the *HJ* test to the circumstances of the case. Some flexibility is appropriate in the application of the procedural limb to accommodate the vast variety of public decisions — and public authorities — that are subject to it.

24. The reach of the obligation within all aspects of public decision-making is consistent with the method of construction that provisions of the HRA 'should be construed as widely as their terms permit'[27] and is consistent with the model of the HRA which is 'intended to have a normative effect on the conduct of public authorities'[28] to 'change behaviour',[29] as reflected by the objects of the HRA.[30] The nature, type and level of decision informs the assessment of whether a public entity has given 'proper consideration' to human rights in the circumstances in which the decision was made; it does not determine the application of s 58(1)(b). Thus, here, not being able to gain knowledge of an individual's 'personal circumstances'[31] at the time of making the Notices Decisions would simply be relevant to determining the 'flexibility' of whether there has been 'proper consideration'. There is no basis under s 58 to completely exclude the obligation for perceived 'practical difficulties' on the Council's part – particularly where no deference is afforded to the decision-maker.[32]

Why the exercise of powers under the Local Laws lend themselves to s 58(1) obligations

25. The authority to issue a compliance notice is specifically vested in an 'authorised person'. An 'authorised person' is defined as: 'a person (a) appointed by the chief executive officer as an authorised person under section 202 of the *Local Government Act 2009*, and (b) whose instrument of appointment provides that they are an authorised person for this Local Law, or a provision of this Local Law'.[33]

Corruption Commission (2021) 64 VR 270 [155], drawing upon Tate JA's statement in *Bare v Independent Broad-Based Anti-Corruption Commission* (2015) 48 VR 129 [288]-[289].

[27] *Owen-D'Arcy,* [118] (Martin J).

[28] *Thompson*, [91]; *Bare* (2015) 48 VR 129, [235], [299]; *Castles*, [185]-[186]; applied ***Austin BMI Pty Ltd*** *v Deputy Premier (No 1)* (2023) 16 QR 377, [368] (Freeburn J).

[29] *Austin BMI Pty Ltd*, [368] (Freeburn J).

[30] HRA s 3(b) 'to help build a culture in the Queensland public sector that respects and promotes human rights, s 3(c) 'to help promote a dialogue about the nature, meaning and scope of human rights'.

[31] To be contrasted with not reasonably attempting to gain knowledge. For example, by questioning applicants.

[32] *Owen-D'Arcy,* [140], citing ***Minogue*** *v Thompson* [2021] VSC 56, at [50] (Richard J).

[33] Alteration Law, Schedule 1; Camping Law, Schedule 1.

26. Notably, the Alteration Law and the Camping Law provide a range of enforcement mechanisms[34] which distinguish between those vesting in an 'authorised person' or 'the local government'.[35] Vesting certain enforcement powers in particular individuals who require written appointment to exercise those powers is therefore deliberate and significant.

27. Next, the exercise of the power to issue a compliance notice is discretionary. An authorised person 'may' issue a compliance notice[36] and the provision itself, conscious of the distinction, distinguishes between that which 'may' be done and 'must' be done. Contextually, the power must be discretionary given an authorised person has a number of concurrent enforcement options available to them under the local laws.[37]

28. Further, by its terms, an authorised person's power to issue compliance notices requires the decision-maker to personally turn their minds to the circumstances presented to them and determine (1) if the discretion is enlivened, (2) how the person receiving the notice is to stop the contravention and (3) the ' reasonable' date and time by which compliance with the notice is to be achieved – having regard to factors outlined in the Local Laws.

29. As to the first mental evaluation, to issue a compliance notice, there must first be a 'contravention of the Local Law'.[38] It follows that the 'authorised person' must satisfy themselves that the Local Law has been contravened before they can issue a compliance notice.[39] Where, as here, the 'authorised person' issued a compliance notice for a contravention of sections 9 (Alteration Law) and 13 (Camping Law) – it necessarily required the authorised person to be satisfied that none of the exceptions to the contravention applied.[40] This necessary inquiry is reflected by the compliance notice needing to identify 'the particular provision of this Local Law the authorised person believes is being, or has been contravened'[41] and 'briefly, how the provision of this Local Law is being, or has been, contravened'.[42]

30. As to the second element, when issuing a compliance notice, the authorised person must turn their mind to, and outline in the compliance notice: the reasonable steps necessary to remedy the contravention, or avoid further contravention;[43] the date and time by which

[34] Alteration Law, ss 18-24 – compare s 22; Camping Law, 21-26 – compare s 24.
[35] Defined as 'Moreton Bay Regional Council', see Alteration Law, Schedule 1; Camping Law, Schedule 1.
[36] *Acts Interpretation Act 1954*, s 32C(1); compare *SQH v Scott* (2022) 10 QR 215, [139]-[140] approach to s 194 of the *Crime and Corruption Act 2001*.
[37] Alteration Law, Part 2, Division 3; Camping Law, Part 2, Division 3.
[38] '(1) This section applies if a person contravenes this Local Law': s 19(1), Alteration Act, s 22(1).
[39] Reflected in the requirement that the compliance notice 'must' state (a) the particular provision of this Local Law the authorised person *believes* is being contravened; and (b) briefly, how the provision of this Local Law is being, or has been, contravened: Alteration Law, s 19(4), Camping Law, 22(4).
[40] Alteration Law, s 9(1)(a)-i); Camping Law, s 13(1)(a)-(i).
[41] Alteration Law, s 19(4)(a); Camping Law, s 22(4)(b).
[42] Alteration Law, s 19(4)(b); Camping Law, s 22(4)(b).
[43] Alteration Law, s 19(4)(d) and (3); Camping Law, s 22(4)(d) and (3).

the person must stop or remedy the contravention;[44] what date and time is 'reasonable' having regard to the action required to stop or remedy the contravention.[45]

31. Critically, in determining what date and time is 'reasonable' having regard to the action required to stop or remedy the contravention, the authorised person must engage in a balancing exercise:[46]

> (5) The date and time under subsection (4)(c) must be reasonable having regard to-
>
> (a) the action required to stop or remedy the contravention; and
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> (b) the risk to public health and safety, the risk of impacts on fitness for use of public land, the risk of damage to property or loss of amenity and the risk of environmental harm posed by the contravention; and
>
> (c) how long the person has been aware of the contravention.

32. Issuing a compliance notice also requires issuing a 'decision notice'[47] which not only serves the function of providing the authorised person's reasons for issuing the compliance notice,[48] but also permits an internal review of the decision which may result in confirming, amending or substituting the decision.[49]

33. Evidently, the 'authorised officer' is required to independently turn their mind to a number of matters when deciding to issue a compliance notice based on the particular circumstances facing them. Engaging in this decision-making process engages s 58(1) when doing so. It is not sufficient that a human rights assessment was 'generally' undertaken at another time, by different agents of the Council, for a different decision. The exercise of the powers is circumstance specific and temporally connected to the circumstances facing the authorised person at the time of exercising the power.

34. For completeness, the exercise of this power is clearly one to which s 58(1) attaches and is not excluded by s 58(2). As identified above, the authorised person has a discretion, and undertakes an evaluative exercise to (1) decide whether to issue a compliance notice or not (2) decide the appropriate method and action by which a person is to achieve compliance under the notice and (3) decide a timeframe for compliance that is 'reasonable', having regard to specified matters that must be weighed. In determining each of these matters there is 'more than one course reasonably open'.[50] The decision to issue a compliance notice, and its terms, 'does not compel a particular result'; s 58(2),

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[44] Alteration Law, s 19(4)(c); Camping Law, 22(4)(c).
[45] Alteration Law, s 19(4)(c) and (5); Camping Law, s 22(c) and (5).
[46] Alteration Law, s 19(5); Camping Law, s 22(5).
[47] Alteration Law, s 19(6); Camping Law, s 22(6).
[48] See definition of 'decision notice' in Schedule 1, Alteration Law and Camping Law.
[49] Alteration Law, ss 44-45; Camping Law, ss 44-45.
[50] *Patrick's Case*, [230], [359] (Bell J).

construed narrowly as it is,[51] does not apply.[52] This interpretation is also supported by s 48(1) of the HRA.[53]

Procedural Limb: the Clearance Conduct/Decisions

35. The Commission adopts the same position for the Clearance Conduct/Decisions as the Notices Decision; the authorised persons who exercised the powers to seize and dispose of the Applicant's belongings pursuant to powers under the Local Law attracted obligations under s 58(1)(b), and the Council's material does not establish each of the authorised persons properly considered the applicants' human rights when taking the action.

36. In this respect, it is noted that there are affidavits from Council rangers who engaged in the conduct.[54] The affidavits nowhere provide that the Council rangers engaged with section 58(1)(b) during the course of the events.

37. Again, the power to seize and impound is a discretionary power[55] vested in an authorised person (as opposed to 'the local government') if one of the preconditions arise. The authorised officer also has a discretion to determine which items they may choose to impound.

38. The power to dispose of seized and impounded items is separately provided for.[56] Again, an authorised officer has a discretion to dispose of an impounded item if it is 'perishable or of negligible commercial value'. A decision whether to dispose of an impounded item is a discretionary decision that requires engagement with s 58(1)(b). A clear example[57] arises in these proceedings where a family member's ashes may (with the greatest respect) meet the legal meaning of 'negligible commercial value' so as to enliven the discretion; but the exercise of discretion to dispose of the ashes raises human rights considerations.

39. For the above reasons, the Council appears to have contravened HRA s 58(1)(b) for each of the Challenged Decisions and Conduct.

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[51] *Bare*, [227], [324]-[326].
[52] *SQH v Scott* (2022) 10 QR 215, [142]-[144] (Williams J).
[53] Noting similar submissions about the interpretation of the Local Laws by the Applicant at AoS, [60].
[54] See [Redacted].
[55] Alteration Law, s 23, Camping Law, s 25; 'An authorised officer *may* seize…': … It would be open to the authorised person to take other action, for example, issue a further compliance notice that provided different ways to remedy the contravention and impose different timeframes.
[56] Alteration Law, s 23(1); Camping Law, s 25(1).
[57] Accepting that the matter is contested.

E. Section 58(1)(a): the 'Substantive Limb'

40. The Council, and its agents, are obliged by HRA s 58(1)(a) to 'act and make decisions compatibly with human rights'. What will be 'compatible with human rights' is informed by ss 8 and 13 of the HRA (see AOS [85]-[87]).

41. The legislative scheme established in ss 8 and 13 means that the human rights implications of actions and decisions may be considered in three stages: **(1)** engagement, **(2)** limitation and **(3)** justification. A three-stage inquiry is particularly helpful where relevant rights have internal limitations, such as the rights to privacy (HRA s 25) and property (HRA s 24), or clearly circumscribed scope, such as protection from torture and cruel, inhuman or degrading treatment or punishment (HRA s 17(a) and (b)).

42. The Commission adopts the three stages of 'Engagement', 'Limitation' and 'Justification' Freeburn J described in *Austin BMI Pty Ltd*.[58]

F. Onus and Standard of Proof

43. A person alleging a contravention of their rights has the onus of establishing that their human rights have been limited.[59] The evidence required to discharge the onus depends on a number of factors, including the nature and scope of the human right that is said to be limited and the nature and availability of information that may inform that question.[60]

44. Where a right contains internal limitations – such as the right to privacy, which protects from unlawful or 'arbitrary' interferences with privacy – the person alleging the limit on the right bears the onus of showing that the internal limitation is met.[61] In the case of a human right with internal limitations that are informed by matters that are solely in the knowledge of a public authority, a person alleging that his or her human right has been limited may be able to discharge the onus by pointing to objective circumstances which, in the absence of information from the public authority, are capable of giving rise to an inference of limitation.[62]

45. If they are able to discharge that onus, the respondent then has the onus of showing that the limit was justified under HRA s 13.[63] The standard of justification is stringent. The evidence required to prove that a limit on a human right is justified, having regard to the matters set out in s 13(2) should be 'cogent and persuasive'.[64]

46. Any consideration of proportionality of the limit – whether as a matter of principle incorporated within the notion of arbitrariness in an internal limitations clause, or as

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[58] At [306]. Applied ***BZN** v Chief Executive, the Department of Children, Youth Justice and Multicultural Affairs* [2023] QSC 266 [238] (Crowley J). See also *Owen-D'Arcy* [132] (Martin J).
[59] *Austin BMI Pty Ltd* [307] (Freeburn J).
[60] *Thompson* [47]; ***Johnston** v Carroll* (2024) 329 IR 365 [367] (Martin SJA).
[61] *Austin BMI Pty Ltd* [307] (Freeburn J); *Johnston* [367] (Martin SJA).
[62] *Johnston* [367] (Martin SJA), adopting the approach of the Victorian Court of Appeal in *Thompson* [47], [57].
[63] *Austin BMI Pty Ltd* [307] (Freeburn J).
[64] *Owen-D'Arcy* [133] (Martin J).

made more structured within the HRA in the general limitations clause contained in s 13 – will encompass overlapping considerations.[65] Whether at a lesser civil standard with respect to proof of a limitation or at the more exacting standard of justification of the limit – the considerations, the ultimate weight to be afforded to them, and the evidence – will overlap, and in some cases, completely so.

G. Engagement and Limitation of Relevant Human Rights

Section 25(a) – right to privacy, family and home

(i) Nature and scope

47. Section 25(a) of the HRA recognises the right not to have one's privacy, family, home or correspondence unlawfully or arbitrarily interfered with. It is based on Article 17(1) of the International Covenant on Civil and Political Rights (**ICCPR**),[66] and is similar to Article 8 of the European Convention on Human Rights (**ECHR**), which requires respect for 'private and family life, home and correspondence'.[67]

48. As Bell J emphasised in *Sudi*, concerning the Charter and the eviction of a public housing tenant:[68]

> [29] The rights to privacy, family, home and correspondence in section 13(a) are of fundamental importance to the scheme of the Charter. Their purpose is to protect and enhance the liberty of the person – the existence, autonomy, security and wellbeing of every individual in their own private sphere. The rights ensure people can develop individually, socially and spiritually in that sphere, which provides the civil foundation for their effective participation in democratic society.

Privacy

49. The scope of 'privacy' is broad and extends to a person's private life generally; it protects the individual against interference with their physical and mental integrity.[69] As articulated by Bell J in the Victorian case of ***Re Kracke*** *v Mental Health Review Board*:[70]

> [619] The purpose of the right to privacy is to protect people from unjustified interference with their personal and social individuality and identity. It protects the individual's interest in the freedom of their personal and social sphere in the broad sense. This encompasses their right to individual identity (including sexual identity) and personal

[65] *Thompson* [58].
[66] Explanatory Note, *Human Rights Bill 2018* (Qld) 22.
[67] *Director of Housing v* ***Sudi*** (2010) 33 VAR 139 [28]; *Johnston* [358] (Martin SJA). ECHR art 8(2) provides 'There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.'
[68] *Sudi* [29], referring to Manfred Nowak, *UN Covenant on Civil and Political Rights: ICCPR Commentary* (2nd revised ed, 2005) 377 ff.
[69] *BZN* [244] (Crowley J); *Johnston* [359] (Martin SJA); Explanatory Note, *Human Rights Bill 2018* (Qld) 22.
[70] ***Re Kracke*** *v Mental Health Review Board* (2009) 29 VAR 1.

> development, to establish and develop meaningful social relations and to physical and psychological integrity, including personal security and mental stability.
>
> [620] The fundamental values which the right to privacy expresses are the physical and psychological integrity, the individual and social identity and the autonomy and inherent dignity of the person.

50. In *BZN*, Crowley J accepted that an investigation and assessment into allegations of misconduct, that compromised a worker's mental health, engaged the right to privacy.[71]

51. Case law and commentary of the United Nations Human Rights Committee (**UNHRC)** and European Court of Human Rights (**ECtHR**) has considered the right to 'privacy' or 'private life' to be engaged by eviction of people from encampments.[72]

52. The ECtHR has also considered the right to private life to be engaged by criminalisation of life sustaining activities, such as begging.[73]

Family

53. The HRA does not define 'family', but the Explanatory Note emphasises that the concept of 'family' in HRA s 26 should be given a broad interpretation, 'extending to different cultural understandings of family and small family units with or without children'.[74]

54. In *Sudi*, Bell J found that the right to protection from unlawful and arbitrary interference with family was engaged by the Department of Housing applying for a possession order to evict a man and his three year old son from public housing.[75] Similarly, in *Canberra Fathers and Children Services Inc v Watson (Residential Tenancies)* the ACT Civil and Administrative Tribunal found that a decision by a provider of crisis accommodation to evict a father and his three sons engaged the equivalent right in s 12 of the *Human Rights Act 2004* (ACT).[76]

Home

55. 'Home' is similarly not defined in the HRA. Justice Bell in *Sudi* said:[77]

> [32] In human rights, identifying a person's 'home' is approached in a common-sense and pragmatic way. It depends on the person showing 'sufficient and continuous links

[71] *BZN* [243]-[244] (engaged), [248] (not limited).

[72] Human Rights Committee, *Concluding Observations on the initial report of Haiti,* UN Doc CCPR/C/HTI/CO/1 (27 October 2014) [18]; Human Rights Committee, *Concluding Observations on United States of America*, UN Doc CCPR/C/USA/CO/4 (23 April 2014) [19]; European Court of Human Rights (2020) *Hirtu v France*, Information Note on the Court's case-law 240 (May 2020).

[73] ***Lacatus*** *v Switzerland* (2021) (European Court of Human Rights, Third Section, App No 14065/15, 19 January 2021).

[74] Explanatory Note, *Human Rights Bill 2018* (Qld) 22. See also *Sudi* [33].

[75] *Sudi* [111]-[112] (Bell J).

[76] ***Canberra Fathers*** *and Children Services Inc v Watson (Residential Tenancies)* [2010] ACAT 74 [35] (Senior Member Lennard).

[77] *Sudi* [38]. See also ***Faulkner*** *v Ireland* (2022) (European Court of Human Rights, Fifth Section, Apps Nos 30391/18 and 30416/18, 31 March 2022) [91].

with a place in order to establish that it is his home'. Manfred Nowak, speaking of article 17(1) of the ICCPR, says 'the home symbolises a place of refuge where one can develop and enjoy domestic peace, harmony and warmth without fear of disturbance.' If someone's links with the place where they live are 'close enough and continuous enough', that is their home. The general approach is 'to apply a simple, factual and untechnical test, taking full account of the factual circumstances but with very little of legal niceties.' The concept of 'home' in human rights is autonomous and is not based on 'domestic notions of title, legal and equitable rights, and interests' In short, it is a question of fact, not law.

56. In *Mizner* the identification of a prisoner's cell as his 'home' for the purposes of s 25 was not questioned.[78] In *Patrick's Case*, Bell J found that the house owned, and previously lived in, by a person involuntarily detained in a psychiatric hospital was his 'home', even though he had not lived in it for two years and was unlikely to return to the community in the near future.[79]

57. The UNHRC stated in its General Comment on ICCPR Article 17 that 'home' is 'to be understood to indicate the place where a person resides or carries out [their] usual occupation'.[80] It has emphasised in a number of cases that a structure may be a 'home' even if the occupiers are not the lawful owners of the land on which it sits.[81]

58. The ECtHR does not attach importance to the 'technical aspects of the dwellings in question' – caravans, cabins, bungalows, makeshift houses or apartment rooms can be a 'home' for the purposes of ECHR Article 8.[82] A home may be on land that is unlawfully occupied.[83] However, the case of *Hirtu v France* considered that the applicants, whose caravans had been stationed on a site for six months, did not have a sufficient and continuous enough link to the place for it to amount to a 'home' ('*domicile*' in French). The Court nevertheless found that clearance of the encampment engaged the right to private life and family.[84]

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[78] See *Mizner v State of Queensland & anors* [2024] QCAT 467 [89]-[93]; undisturbed on appeal, *Mizner* [199]-[217] (Crowley J, Bond JA and Gotterson AJA agreeing).

[79] *PJB v Melbourne Health* (2011) 39 VR 373 (***Patrick's Case***) [58].

[80] Human Rights Committee, *CCPR* ***General Comment No 16****: Article 17 (Right to Privacy) The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation*, 32nd sess, (8 April 1988) [5].

[81] See, eg, *Human Rights Committee, Views: Communication No. 2073/2011, 106th sess, UN Doc CCPR/C/106/D/2073/2011 (27 November 2012) ('****Naidenova v Bulgaria****')* [14.2]. See also ***McCann v United Kingdom*** (2008) (European Court of Human Rights, Fourth Section, Application No 19009/04, 13 May 2008) [46].

[82] ***Ayala Flores v Italy*** (2025) (European Court of Human Rights, First Section, Application No 16803/21, 23 October 2025*)* [85].

[83] *Faulkner* [91].

[84] ***Hirtu v France*** (2020) (European Court of Human Rights, Fifth Section, App No 24720/13, 14 May 2020). Note that this judgment is only available in French, although the Court has produced an official summary in English, available in European Court of Human Rights, *Hirtu v France,* Information Note on the Court's case-law 240 (May 2020*)*. Given the potential relevance of this case, the Commission nevertheless refers to it out of prudence.

59. The United Nations Special Rapporteur on extreme poverty and human rights and the Special Rapporteur on adequate housing have emphasised that 'for persons in street situation their protected 'home' and private space may be a caravan, vehicle, makeshift shelter, tent, or their sleeping bag'.[85] The Commission submits that the result in *Hirtu* ought not to be read as a gloss restricting the meaning of 'home' for those in street situations; the facts of each case must be considered, having regard to the beneficial nature of the HRA and the broad reading to be given to its protections.[86]

Internal limitations

60. Rights to privacy, family and home protected by HRA s 25(a) will only be limited where interference is 'unlawful' or 'arbitrary'.

61. An unlawful interference is 'one which infringes an applicable law'.[87] In relation to arbitrariness, Crowley J observed in *BZN*:[88]

> The notion of arbitrary interference extends to those interferences which may be lawful, but are unreasonable, unnecessary and disproportionate. Arbitrariness is concerned with capriciousness, unpredictability, injustice and unreasonableness – in the sense of not being proportionate to the legitimate aim sought.

62. A consideration of whether a requirement is not arbitrary – because it is proportionate – does not involve the same analysis necessary under HRA s 13. It is, instead, a broad and general assessment of whether any interference extends beyond what is reasonably necessary to achieve the purpose being pursued.[89] In *Waratah Coal (No 6)* (in the context of discussion of the right to life) Kingham P considered that coming to a view about what is 'reasonably necessary involves a value judgment about the relative costs and benefits'.[90]

63. In its General Comment on the right to privacy the UNHRC emphasised the concept of arbitrariness captures indiscriminate and blanket exercises of lawful power, that fail to engage with individual circumstances:

> [t]he concept of arbitrariness is intended to guarantee that **even interference provided for by law** should be in accordance with the provisions, aims and objectives of the

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[85] Human Rights Council, ***Breaking the Cycle**: Ending the Criminalization of Homelessness and Poverty*, UN Doc A/HRC/56/61/Add.3 (26 June 2024) [10(g)].

[86] See by analogy the Canadian case of ***Vandenberg** v Vancouver Fire and Rescue Services* (2023) BCSC 2104 (Supreme Court of British Columbia), where Matthews J characterised an order requiring people experiencing homelessness to remove tarps, tents and other structures as an eviction order, noting the evidence that 'the tents, tarps, structures over which tarps are draped, cots and foldable chairs are what unhoused persons…use as their homes' (at [119]).

[87] *Johnston* [360]–[362] (Martin SJA); *Thompson* [49].

[88] *BZN* [230]. This approach was affirmed by the Court of Appeal in *Mizner* [211] (Crowley J, Bond JA and Gotterson AJA agreeing).

[89] *Johnston* [363] (Martin SJA). See *Thompson* [56], quoted with approval in *Mizner* [214] (Crowley J, Bond JA and Gotterson AJA agreeing).

[90] *Waratah Coal Pty Ltd v Youth Verdict Ltd (No 6)* [2022] QLC 21 (***Waratah Coal (No 6)***) [1485].

> Covenant and **should be, in any event, reasonable in the particular circumstances**.
>
> …
>
> Even with regard to interferences that conform to the Covenant, relevant legislation must specify in detail the precise circumstances in which such interferences may be permitted. A decision to make use of such authorized interference must be made only by the authority designated under the law, **and on a case-by-case basis**.[91]
>
> (emphasis added)

(ii) Engagement

64. On the basis of the analysis above, the Commission submits that the Challenged Decisions and Conduct engaged the applicants' rights not to have their privacy and home unlawfully or arbitrarily interfered with (HRA s 25(a)).

65. The Commission also submits that the Challenged Decisions and Conduct as they related to [Redacted] engaged the right not to have the person's family unlawfully or arbitrarily interfered with (HRA s 25(a)).

(iii) Limitation

66. If the Court finds that the Challenged Decisions and Conduct were unlawful the right will be limited. Any such limit could not be justified under HRA s 13 as it would not be 'under law'.[92]

67. If the applicants can establish the inference that the Challenged Decisions and Conduct interfered with their right to privacy, family or home in a way that was arbitrary, the onus will shift to the respondent to justify that limitation in accordance with HRA s 13. The Commission sets out below factors that have been found in relevant cases to indicate arbitrariness, or (in the case of ECtHR caselaw) a lack of proportionality in the broad sense. These factors are relevant both to whether the right is limited and, if so, whether the limitation can be justified under HRA s 13.

68. As the Victorian Court of Appeal observed in *Thompson*:

> [58] …if the person who invokes [the privacy] right establishes that a public authority has arbitrarily interfered with his or her privacy, it would, ordinarily, be very difficult for the public authority to meet the justification requirement. That is because some or all of the facts and matters that inform the justification requirement will have already been considered on the question whether the interference is arbitrary.[93]

69. In this respect the Commission notes that the analysis is done in one stage by the ECtHR and the UNHRC, so a finding of 'arbitrary' or 'disproportionate' interference with the

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[91] Human Rights Committee, *CCPR **General Comment No 16**: Article 17 (Right to Privacy) The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation,* 32nd sess, (8 April 1988) [4], [8].
[92] ***Certain Children (No. 2)*** (2017) 52 VR 441 [201]-[202] (John Dixon J).
[93] *Thompson* [58].

rights by those bodies indicates that the decisions or actions were *not* compatible with human rights.[94]

Factors that may support findings of arbitrariness (and incompatibility)

70. Factors relevant to an assessment of arbitrariness have been held to include: **(1)** whether there are carefully documented protocols and procedures with a clear and rational purpose;[95] **(2)** the extent and seriousness of the interference and its consequences for the individual;[96] **(3)** whether less restrictive measures could be used in the circumstances of the case;[97] **(4)** where otherwise sound policies were inflexibly applied without consideration of whether they were proportionate in the circumstances;[98] **(5)** whether the individual was a person with disabilities.[99]

71. Interference with privacy, family and/or home has been found to be arbitrary in cases from Victoria and the ACT concerning housing and eviction. Factors that have been considered, in various combinations, as relevant to the question of arbitrariness in those cases include:

   a. Whether, prior to serving the notice to vacate, the landlord or another body had considered the reasonableness of that decision, or implementation of the particular policy, in the circumstances of the individual case.[100]

   b. Whether the landlord had engaged with the tenant in an effort to avoid having to apply for possession, including by referring them to external organisations, and had considered all other avenues had been exhausted.[101]

   c. Whether a likely effect of the eviction is that the person will become homeless.[102]

   d. Whether the person subject to the eviction notice had unreasonably failed to comply with a reasonable policy or request from the landlord,[103] or had engaged in objectionable behaviour.[104]

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[94] See the discussion of Bell J in *Re Kracke* [105]; the ECHR and ICCPR-protected rights have internal limits only and are not subject to a general justification clause like HRA s 13.
[95] *Thompson* [227], [318].
[96] *Thompson* [318]; *Attorney-General for the State of Queensland v* ***Grant (No 2)*** (2022) 12 QR 357 [112]-[113] (Applegarth J) (concerning arbitrary deprivation of liberty).
[97] *Patrick's Case* [217] (Bell J); *Thompson* [318].
[98] *Grant (No 2)* [112]-[113] (Applegarth J) (concerning arbitrary deprivation of liberty).
[99] *Grant (No 2)* [112]-[113] (Applegarth J) (concerning arbitrary deprivation of liberty).
[100] ***Homeground Services*** *v Mohamed (Residential Tenancies)* [2009] VCAT 1131 [19]; ***Vanilla Rentals*** *v Tenant* [58] (considering whether deprivation of property was arbitrary).
[101] *Director of Housing v* ***Ronan*** *(Residential Tenancies)* [2013] VCAT 2050 [24], quoted with approval in *Department of Housing and Public Works v Tenant* [2020] QCAT 144 [194].
[102] *Homeground Services* [18]. *Canberra Fathers* [55].
[103] *Homeground Services* [17].
[104] *Ronan* [24]; *Department of Housing and Public Works v Tenant* [2020] QCAT 144 [192]-[195].

e. The age of the person subject to eviction.[105]

f. Whether the decision was based on clear pre-existing rules or a transparent, predictable and foreseeable procedure.[106]

g. Proportionality of the action in view of the importance of protecting the human rights of those members of society who are in a vulnerable position or at risk of harm.[107]

72. Similar factors relevant to compatibility are apparent in decisions of the UNHRC and the ECtHR concerning eviction and criminalisation of life-sustaining activities. These cases have considered whether interferences with rights to privacy, family and home are incompatible with human rights – either because they amount to an 'arbitrary interference' with the right (ICCPR Art 17(1)) or because they cannot be shown to be 'necessary in a democratic society' (ECHR Art 8(2)).

73. In *Naidenova v Bulgaria*, the UNHRC considered the eviction of Roma families from housing constructed without formal permission on municipal property that the community had occupied for approximately 70 years. The Committee held that the author and her children had been subject to arbitrary interference with their rights under article 17 of the Covenant. This was because the state – which had not identified any urgent need for its actions – had carried out the forced eviction despite previously tolerating the occupation of the land without the benefit of any legal proceedings, and without taking due account of the consequences, such as the risk of leaving the author and her children homeless in a situation where adequate alternative housing would not have been immediately available to them.[108]

74. The ECtHR considers that states have a 'margin of appreciation' in the area of social or economic policies,[109] however that margin will be narrower for ECHR Article 8 rights, which are 'of central importance to the individual's identity, self-determination, physical and moral integrity, maintenance of relationships with others and a settled and secure place in the community'.[110] In such cases, procedural safeguards available to the affected individual are particularly important.[111] The ECtHR considers that, since the loss of a person's home is a most extreme form of interference with the right to respect for one's home, any person at risk of an interference of this magnitude should in principle be able

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105 *Homeground Services* [18].
106 *Canberra Fathers* [73]; *Vanilla Rentals* [58]-[59] (considering whether deprivation of property was arbitrary).
107 *Canberra Fathers* [72].
108 *Naidenova v Bulgaria* [14.6]-[14.7]. See also Human Rights Committee, *Views: Communication No 2171/2012*, 120th sess, UN Doc CCPR/C/120/D/2171/2012 (30 August 2017) ('***Gatilov v Russian Federation***').
109 As to the inapplicability of the concept of a 'margin of appreciation' in the domestic context, see *Patrick's Case* [320]-[328] (Bell J).
110 *Faulkner* [95].
111 See also European Court of Human Rights, *Hirtu v France,* Information Note on the Court's case-law 240 (May 2020).

to have the proportionality and reasonableness of the measure determined by an independent tribunal before enforcement, even where their occupation is, under domestic law, unlawful.[112]

75. Factors that the ECtHR has considered important in weighing whether an eviction from public land is proportionate and therefore permitted by Article 8 include: the procedural safeguards available to the individual, whether the home was lawfully established, whether alternative accommodation is available and if so, how suitable it is, and whether any particular vulnerabilities of the applicant have been taken into account, such that their special needs have been given special consideration both in the regulatory planning framework, and in reaching decisions in particular cases.[113] If the applicant is from an underprivileged group, this will be 'a weighty factor in considering approaches to dealing with their unlawful settlement, and, if their removal is necessary, in deciding on its timing, modalities and, if possible, arrangements for alternative shelter'.[114] Short periods between decisions to issue notices, the issuing of notices and enforcement of the notices have also been a factor pointing to disproportionality.[115]

76. The particular vulnerability of an individual is also an important factor in deciding whether enforcement of penalties for carrying out life-sustaining activities is proportionate and permitted by ECHR Article 8. In *Lacatus v Switzerland* the Court found that Article 8 rights to private life were violated by the imposition of criminal penalties on a young, destitute woman, for begging. The Court noted that 'a person's dignity is severely compromised if he or she does not have sufficient means of subsistence …. By the act of begging, the person concerned is adopting a particular way of life with the aim of rising above an inhumane and precarious situation'.[116] The Court found that the penalty imposed on the applicant (a fine, converted to five days imprisonment for non-payment):[117]

> …was proportionate neither to the aim of combating organised crime nor to that of protecting the rights of passers-by, residents and shopkeepers. In the present case, it considers that the measure pursuant to which the applicant, an extremely vulnerable person, was punished for her actions in a situation in which, to all appearances, she had lacked any other means of subsistence and had thus had no choice but to beg in order to survive, diminished her human dignity and impaired the very essence of the rights protected by Article 8 of the Convention.

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[112] ***Yordanova and Others v Bulgaria*** (European Court of Human Rights, Fourth Section, Application No 25446/06, 24 April 2012) [118]. European Court of Human Rights, *Hirtu v France,* Information Note on the Court's case-law 240 (May 2020).

[113] *Faulkner* [97].

[114] *Yordanova and Others v Bulgaria* [133].

[115] See, eg, *Hirtu v France*, where a notice was issued on 29 March, served on 2 April and enforced on 12 April: European Court of Human Rights, *Hirtu v France,* Information Note on the Court's case-law 240 (May 2020).

[116] *Lacatus* [56], [107]. See discussion of a similar concept in the context of the right to liberty protected under the Canadian Charter in *The Regional Municipality of* ***Waterloo*** *v Persons Unknown and to be Ascertained* (2023) 164 OR (3d) 177 (Ontario Superior Court of Justice) [101] (Valente J).

[117] *Lacatus* [115].

Application on the evidence

77. If the applicants establish that the interference was not in accordance with law the right to privacy and home will have been limited.

78. Similarly, the right will have been limited if the interference was arbitrary. Noting that many of these allegations are disputed, circumstances alleged by the applicants and otherwise indicated on the evidence that may, if proved, support an inference of arbitrary interference with the rights to privacy, family, and home include:

   a. *Conduct and expectations of the applicants*: The encampments were previously lawful and tolerated by the Council.[118]

   b. *Length of time living on the site*: Applicants had been living on the relevant sites for periods of between four years and six months at the time of the Challenged Decisions and Conduct.[119]

   c. *Short time frames*: While noting that some applicants had previously received compliance notices that had not been enforced, applicants were given very short time-frames to comply with the challenged compliance notices, ranging from one hour to 15 days,[120] and only a short period elapsed between issuance of compliance notices and the clearance of the camps.[121] One applicant asserts that he did not receive any notice.[122]

   d. *No suitable alternative accommodation available*: The applicants say they did not have any, or any suitable, alternative accommodation at the time the Council made the Notice Decisions and carried out clearance of the camps.[123]

   e. *Whether there was inflexible imposition of a blanket policy in relation to persons experiencing homelessness and a failure to consider of proportionality or reasonableness in the individual case*: Whether, when making the Challenged Decisions and Conduct the Council took individual circumstances into account to determine if enforcement action was reasonable in the circumstances, and, if so, to inform the timing and modality of enforcement action.[124]

   f. *Lack of transparent procedures*: Detailed operating procedures about how enforcement of the compliance notices would be carried out, such as those applicable

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118 See above [6]-[7].
119 [Redacted],
120 [Redacted],
121 [Redacted],
122 [Redacted],
123 [Redacted],
124 [Redacted],

to the Clearance Conduct/Decisions, were not transparent or explained to the applicants, even when specifically requested.[125]

g. *Lack of procedural fairness*: The clearance of the camps went ahead without the Council having responded to requests for information and clarification about how enforcement would take place from the legal representatives of some of the applicants.[126]

h. *Lack of notice of enforcement*: Applicants were not given notice of when the camps would be cleared or other enforcement action, leading to ongoing anxiety in anticipation,[127] confusion and distress at the time of enforcement,[128] and/or belongings being destroyed in applicants' absence.[129]

i. *Vulnerabilities of the applicants*: A number of the applicants had impairments or other personal characteristics that made it difficult for them to comply with the Notice Decisions,[130] and could have been exacerbated by the Challenged Decisions and Conduct.

j. *Circumstances of the clearances*: Clearance of the camp on 24 April 2025 was carried out while it was raining and shortly before a long weekend when homelessness and other community services were less likely to be operating.[131]

k. *Impounding and destruction of property, including that necessary for life:* The Clearance Conduct/Decisions resulted in destruction or impounding of belongings of important practical and personal value: for example, impounding of beds, tarpaulins, and a tents,[132] and is alleged to have included destruction of a mattress, toilet, shower, air-conditioning unit, sheets, communications equipment, other items of significant financial value, and items of important personal value, including their daughter's ashes.[133] Some applicants allege that all of their belongings were destroyed.[134]

l. *Not reasonably necessary to achieve the purpose*: As the applicants say they had no alternative accommodation options, the Challenged Decisions and Conduct were not likely to achieve their purposes, with applicants remaining on the site or moving to a nearby Council site.[135]

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125 [Redacted],
126 [Redacted],
127 [Redacted],
128 [Redacted],
129 [Redacted],
130 [Redacted],
131 [Redacted],
132 [Redacted],
133 [Redacted],
134 [Redacted],
135 [Redacted].

m. *Disproportionality of the interference with the purposes*: The Challenged Decisions and Conduct resulted in interference of the most serious kind in the applicants' privacy, home and dignity, in circumstances where the aims pursued do not appear to have been urgent.

Section 17(b) – Protection from cruel, inhuman or degrading treatment

(i) Nature and scope

79. Together with the prohibition on torture in HRA s 17(a), s 17(b) is modelled on ICCPR Article 7.[136] It reflects obligations contained in Articles 2 and 16 of the *Convention Against Torture* (**CAT**) and is largely consistent with ECHR Art 3.[137] In its General Comment No 20, the UNHRC states that the aim of Article 7 is 'to protect both the dignity and the physical and mental integrity of the individual'.[138]

80. Whilst torture is defined in CAT Article 1,[139] other acts which might amount to cruel, inhuman or degrading treatment are not. This is because defining particular acts or making sharp distinctions was eschewed in favour of 'distinctions (that) depend on the nature, purpose and severity of the treatment applied'.[140] Nevertheless, it is not only acts that cause physical pain that are encompassed, but also those which cause mental suffering.[141]

Cruel, inhuman or degrading treatment

81. Justice Bell in *Re Kracke,* and Garde J in *Certain Children,* considering the Charter equivalent to s 17(b), drew the following principles from international authorities:[142]

a. the three concepts of cruel, inhuman or degrading treatment are 'employed disjunctively', and are 'not a collocation'. 'There is a right not to be treated or punished in any of the three ways.';

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[136] Explanatory Note, *Human Rights Bill 2018* (Qld) 19.

[137] Noting that Art 3 refers to 'torture or inhuman or degrading treatment or punishment', and that the ECHR does not include a separate provision requiring humane treatment when deprived of liberty such as that contained in Art 10 *ICCPR* and s 30 *HRA.*

[138] UN Human Rights Committee, '***General Comment 20****: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment*, UNDOC HRI/GEN/1/Rev.9 (Vol. I) (10 March 1992) [2]; see *Re Kracke* [550].

[139] Defined as the intentional infliction of severe pain or suffering for a specific purpose, excluding pain or suffering inherent or incidental to lawful sanctions.

[140] *General Comment 20* [4].

[141] *General Comment 20* [5]. See Explanatory Note, *Human Rights Bill 2018* (Qld) 19.

[142] *Re Kracke* [555]-[568]; ***Certain Children*** [162]-[167]. See also, in the context of the *Human Rights Act 2004* (ACT), the summary of relevant principles by McWilliam AsJ in *Islam v Director-General, Justice and Community Safety Directorate* (2021) ACTSC 33 [80]-[96]. A slightly different, less accurate summation of the authorities was adopted by John Dixon J in *Certain Children (No. 2)* [250] and *Owen-D'Arcy* in turn, at [186]. For a more recent summary of the relevant principles as developed by the European Court of Human Rights see *Ukraine v Russia* (2024) (European Court of Human Rights, Grand Chamber, Apps Nos 20958/14 and 38332/18, 25 June 2024) [985].

b. the ECtHR has held that ill-treatment must attain a 'minimum level of severity' to be encompassed, but less than that involved in torture;

c. further, 'the assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc.';

d. *inhuman treatment* must reach a minimum level of severity manifesting in bodily injury or intense physical or mental suffering;

e. treatment may be considered *degrading* 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';

f. the absence of a purpose to harm, humiliate or debase a person does not rule out a violation but it is a factor to take into account.

82. In *SZTAL*[143] the High Court explained that 'cruel or inhuman' treatment as prohibited under ICCPR Article 7 does not require that that the requisite degree of suffering be intentionally inflicted. Similarly, 'degrading treatment' does not require that humiliation of the requisite degree be intentionally caused.[144]

83. The ECtHR has repeatedly held that, for treatment to be degrading, 'it may suffice that the victim is humiliated in his or her own eyes, even if not in the eyes of others'.[145] It has emphasised that 'there is a particularly strong link between the concepts of 'degrading treatment or punishment…and respect for 'dignity'', with the general purpose of the prohibition being 'to prevent particularly serious interferences with human dignity'.[146]

Absolute prohibition means no possible justification under HRA s 13

84. The text of ICCPR Article 7 provides for no limitation to the operation of the prohibition. The UNHRC's *General Comment 20* states that no derogation from the right is allowed because 'no justification or extenuating circumstances may be invoked to excuse a

[143] ***SZTAL*** *v Minister for Immigration and Border Protection* (2017) 262 CLR 362 [4] (Kiefel CJ, Nettle and Gordon JJ), [54] (Gageler J), [78]-[79] (Edelman J).
[144] *SZTAL* [5] (Kiefel CJ, Nettle and Gordon JJ), [54] (Gageler J), [78]-[79] (Edelman J).
[145] ***MSS*** *v Belgium and Greece* (2011) App No 30696/09, Grand Chamber, 21 January 2011 [220]; ***Bouyid v Belgium*** (2015) (European Court of Human Rights, Grand Chamber, Application No 23380/09, 28 September 2015) [87].
[146] *Bouyid v Belgium* [89].

violation'.[147] This reflects a principle of customary international law,[148] that is recognised by the Australian government.[149]

85. As explained by Lord Hope of Craighead, concerning ECHR Article 3:

> Where the inhuman or degrading treatment or punishment results from acts or omissions for which the state is directly responsible there is no escape from the negative obligation on states to refrain from such conduct, which is absolute…[P]roportionality…has no part to play when conduct for which [the State] is directly responsible results in inhuman or degrading treatment or punishment.[150]

86. For this reason, unlike most other rights protected by the HRA, if treatment inflicted by the state comes within the scope of 'cruel, inhuman or degrading treatment' (that is, the right in HRA s 17(b) is 'limited'), in light of the nature of the human right (HRA s 13(2)(a)), there are no circumstances in which that limitation could be 'demonstrably justified in a free and democratic society based on human dignity, equality and freedom' under HRA s 13.[151] In practice, the justification analysis under HRA s 13 therefore has no further role to play.[152]

(ii) Engagement

87. The United Nations Special Rapporteur on the right to adequate housing has stated that:

> Removing homeless people from public space by force without providing sufficient short and long term accommodation and subjecting them to fines or imprisonment may also

[147] *General Comment 20* [3].

[148] UN Human Rights Council, *Resolution 55/12: Torture and other cruel, inhuman or degrading treatment or punishment: effective national legislative, administrative, judicial or other measures to prevent acts of torture*, A/HRC/RES/55/12 (3 April 2024), preamble.

[149] Parliamentary Joint Committee on Human Rights (Cth) (2015) *Guide to Human Rights* (June 2015) 7.

[150] *R (on the application of* ***Limbuela****, Tesema and Adam) v Secretary of State for the Home Department* [2006] 1 AC 396 [53], [55]. See also ***Khlaifia and Ors v Italy*** (2016) (European Court of Human Rights, Grand Chamber, Application No 16483/12,15 December 2016) [158].

[151] See Queensland Department of Justice and Attorney-General response in Legal Affairs and Community Safety Committee, Parliament of Queensland, *Human Rights Bill 2018* (Report No. 26, February 2019) 19. Made explicit in the Explanatory Statement to the ACT *Human Rights Bill 2003* about the cognate provision in *Human Rights Act 2004* (ACT), s 28 (at 4).See also *R v Bissonnette* [2022] 1 SCR 597 [121] in relation to the analogous, but not identical, prohibition of cruel and unusual punishment in the Canadian Charter ('it is hard to imagine how a punishment that is cruel and unusual by nature could be justified in a free and democratic society').

[152] Where in the few cases where the Court has found that treatment did meet the threshold to engage this right, no further specific analysis was undertaken as to whether the limitation could be justified under the equivalent of HRA s 13: see, eg, *Davies v State of Victoria* [2012] VSC 343 [56]; *Cruse v State of Victoria* [2019] VSC 574 [219]. In *Certain Children*, Garde J found that s 10(b) was engaged, and was or may have been limited (along with the right to humane treatment) [169], [178], and that proper consideration had not been given to the right [321]. While he considered the equivalent of HRA s 13 in general terms (at [215]-[223]), there was no specific analysis of whether a limitation of s 10(b) could ever be justified. In *Certain Children (No 2)* Dixon J held that s 10(b) was not engaged. For a recent decision of the ACT Supreme Court where conduct was held to amount to degrading treatment see *Williams v Director-General of the Justice and Community Safety Directorate* [2025] ACTSC 396 [351]. Cf. *Department of Housing and Public Works v Tenant* [2020] QCAT 144 [167], where Adjudicator Walsh found that the right could be engaged, but could be 'reasonably limited' in the circumstances.

> constitute cruel, inhuman or degrading treatment in contravention of article 7 of the International Covenant on Civil and Political Rights.[153]

88. International and comparative case law indicates that the right to protection from cruel, inhuman or degrading treatment could be engaged in two ways in the circumstances the subject of these proceedings:

    a. by exacerbating the already precarious living conditions of people experiencing homelessness; and/or

    b. by the process of eviction and destruction of belongings.

(iii) Limitation

Action that exacerbates already precarious living conditions can amount to inhuman or degrading treatment

89. Cases decided by the UK House of Lords, ECtHR, and UNHRC confirm that deliberate state action that (1) exposes a person to, (2) prolongs, and/or (3) exacerbates rough sleeping and destitution may amount to cruel, inhuman or degrading treatment. Therefore, deliberate state action that exposes people experiencing homelessness to even more severe mental and physical suffering and/or humiliation or debasement may also reach this threshold. Whether it does so depends on the individual circumstances of the case.

90. In the case of *Limbuela* the UK House of Lords found that a state policy that denied assistance to asylum seekers who did not seek asylum promptly on arrival could give rise to responsibility for inhuman and degrading treatment in violation of ECHR Article 3. In reaching this conclusion, Lord Bingham of Cornhill stated:[154]

> Treatment is inhuman or degrading if, to a seriously detrimental extent, it denies the most basic needs of any human being. As in all article 3 cases, the treatment, to be proscribed, must achieve a minimum standard of severity, and I would accept that in a context such as this, not involving the deliberate infliction of pain or suffering, the threshold is a high one. A general public duty to house the homeless or provide for the destitute cannot be spelled out of article 3. But I have no doubt that the threshold may be crossed if a late applicant with no means and no alternative sources of support, unable to support himself, is, by the deliberate action of the state, denied shelter, food or the most basic necessities of life.

[153] Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, Open letter of Special Rapporteur to Hungary (OL HUN 4/2018, 20 June 2018). See also Human Rights Committee, Concluding Observations on United States of America, 110th sess, UN Doc CCPR/C/USA/CO/4, (23 April 2014) [19].

[154] *Limbuela* [7].

91. Lord Bingham noted that whether or not the threshold of a violation would be reached depended on individual circumstances. In his view, it would be reached:[155]

> …when it appears on a fair and objective assessment of all relevant facts and circumstances that an individual applicant faces an imminent prospect of serious suffering caused or materially aggravated by denial of shelter, food or the most basic necessities of life. Many factors may affect that judgment, including age, gender, mental and physical health and condition, any facilities or sources of support available to the applicant, the weather and time of year and the period for which the applicant has already suffered or is likely to continue to suffer privation.
>
> It is not in my opinion possible to formulate any simple test applicable in all cases. But if there were persuasive evidence that a late applicant was obliged to sleep in the street, save perhaps for a short and foreseeably finite period, or was seriously hungry, or unable to satisfy the most basic requirements of hygiene, the threshold would, in the ordinary way, be crossed.

92. As Lord Bingham emphasised, this does not mean that state authorities are responsible for inhuman or degrading treatment of all people experiencing homelessness and destitution. However, where a public entity deliberately takes action or a policy position against an individual that *causes or materially aggravates serious suffering* through denial of shelter, food or the basic necessities of life, it may amount to inhuman or degrading treatment. In line with the general principles outlined above, whether the minimum level of severity is reached must be assessed in light of all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the individual affected.

93. This is consistent with case law of the ECtHR, which found a state responsible for degrading treatment where its authorities' administrative delays meant that five single, adult asylum seekers were forced to sleep on the streets for several months – either under bridges or in tents, 'with no resources or access to sanitary facilities, lacking any means of providing for their essential needs and in constant fear of being attacked and robbed'.[156] The Court found:[157]

> …this state of affairs undoubtedly aroused in them feelings of fear, anguish or inferiority capable of inducing despair. The Court is of the view that the level of severity required for the purposes of Article 3 of the Convention was met by such

[155] *Limbuela* [8]-[9]. See also Lord Hope of Craighead [59]-[60]; Baroness Hale [78]. Both Lord Bingham and Lord Hope went on to distinguish the case from *O'Rourke v United Kingdom* (2001) (European Court of Human Rights, Third Section, App No 39022/97, 26 June 2001) where a violation was not found, but in that case the claimant was evicted from temporary accommodation because of his behaviour, and had been offered and refused alternative accommodation.

[156] ***NH and Others v France*** (2020) (European Court of Human Rights, Fifth Section, Apps Nos 28820/13, 75547/13 and 13114/15, 2 July 2020) [184]. Although in theory they could access emergency shelter, places 'were in very short supply' and attempting to access it 'was almost always a futile endeavour' [174].

[157] *NH and Others v France* [184]. See also ***Moldovan and Others v Romania (No. 2)*** (European Court of Human Rights, Former Second Section, Apps Nos 41138/98 and 64320/01, 12 July 2005) [110].

> living conditions, together with the appropriate lack of response from the French authorities ….

94. It is similarly consistent with decisions of the UNHRC and ECtHR in deportation cases where the deported individual is likely to be forced to live on the streets.[158] Whether there is a real risk of the resulting conditions being cruel, inhuman or degrading is informed by the general conditions of the country of deportation and the individual circumstances of the person in question. This is because those individual circumstances 'include factors that increase the vulnerability of such persons and that could transform a situation that is tolerable for most into an intolerable one for others'.[159]

Circumstances of eviction

95. The way in which an eviction is carried out by or with the acquiescence of state authorities can also give rise to torture or cruel, inhuman or degrading treatment.[160] For example, in *Aouali & Ors v Algeria*, the UNHRC found a separate violation of Article 7 of the ICCPR (torture or cruel, inhuman or degrading treatment) where state authorities had, without a warrant, destroyed the family farm of a victim of enforced disappearance and demolished their home, with the family watching 'powerless as the house they had lived in for more than 17 years was demolished and their furniture and personal effects destroyed by bulldozers'.[161]

96. According to the UN Special Rapporteurs with mandates on housing and extreme poverty, cruel, inhuman or degrading treatment may result in particular:

> when a person is repeatedly evicted or incarcerated; when arrests or move-on orders result in a persistent state of fear or sleep deprivation; when personal belongings or merchandise are confiscated or destroyed; or when evictions from street encampments or squatted buildings are carried out without the provision of any adequate housing alternative.[162]

97. Also, given the allegation about the disposal of family ashes, the UN Special Rapporteur on extrajudicial executions has stated that 'the prohibition against torture and il-treatment requires ensuring that the remains of a deceased person are treated with dignity and

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[158] Noting that 'cruel' treatment is not one of the prohibited forms of treatment under the ECHR, but is prohibited under the ICCPR and CAT. See, eg, *Human Rights Committee, Views: Communication No 2360/2014, 114th sess, UN Doc CCPR/C/114/D/2360/2014 (25 September 2015) ('**Jasin v Denmark**'*); Human Rights Committee, *Views: Communication No 2575/2015*, 123rd sess, UN Doc CCPR/C/123/D/2527/2015 (3 May 2019) *('**Araya v Denmark**');MSS* [263]-[264], [366]-[368].

[159] *Araya v Denmark* [9.7].

[160] See, eg, Human Rights Committee, *Views: Communication No 3066/2017*, 139th sess, UN Doc CCPR/C/139/D/3066/2017 (5 March 2024) *('**Ramirez v Venezuela**')* [6.5]; Committee against Torture, *Decision: Communication No 261/2005*, 42nd sess, UN Doc CAT/C/42/D/261/2005 (25 May 2009) *('Osmani v Serbia').*

[161] Human Rights Committee, *Views: Communication No 1884/2009,* 109th sess, UN Doc CCPR/C/109/D/1884/2009 (27 November 2013) (*'Aouali & Ors v Algeria'*) [7.7]-[7.8]. In that case the Committee inferred an intention to punish and intimidate, but, as is common for the Committee, did not specify whether it considered the treatment reached the threshold of torture.

[162] *Breaking the Cycle* [10].

protected, to prevent the infliction of severe harm and suffering on the relatives of the deceased'.[163]

Application on the evidence

98. Noting many of these allegations are disputed – circumstances alleged by the applicants or otherwise indicated in the evidence that, <u>if proved</u>, may be relevant to determining whether treatment amounted to, or had the risk of resulting in, cruel, inhuman and/or degrading treatment in individual cases include:

a. The vulnerability of individuals due to age, length of time they have experienced homelessness,[164] poverty, mental illness,[165] past experience of violence and trauma,[166] addiction,[167] and risk of exacerbating already precarious living conditions because of lack of alternative shelter is relevant to assessment of severity and risk of ill-treatment;

b. Evidence of significant distress caused by short time frames for compliance;[168]

c. Allegations of official indifference to the applicants' difficulties, including impact on their health;[169]

d. Evidence that lack of notice concerning timing of enforcement led to anxiety over a number of weeks[170] and stress, confusion and panic during enforcement action;[171]

e. Evidence as to anxiety about what would happen next when Applicants had nowhere else to go;[172]

f. Circumstances of clearance, such as it being carried out in the rain and being left without shelter;[173]

g. Evidence of anguish and distress during the events, including from witnessing destruction of belongings;[174]

h. Evidence of anguish and distress from destruction of items of significant practical and personal value, including ashes of the daughter of two of the applicants,[175]

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[163] Special Rapporteur on extrajudicial, summary or arbitrary executions, *Protection of the dead,* UN Doc A/HRC/56/56, 25 April 2024 [10].
[164] [Redacted]. (22 years, since he was 17 years old).
[165] [Redacted].
[166] [Redacted].
[167] [Redacted].
[168] [Redacted].
[169] [Redacted].
[170] [Redacted].
[171] [Redacted].
[172] [Redacted].
[173] [Redacted].
[174] [Redacted].
[175] [Redacted].

photographs,[176] and jewellery that had belonged to another applicant's recently deceased mother.[177] Two applicants allege that all of their belongings were destroyed;[178]

i. Evidence of ongoing mental suffering,[179] including when remembering or reliving the events;[180]

j. Evidence of physical injury;[181]

k. Evidence of worsened living conditions due to deprivation of belongings;[182]

l. Experiences of fear, shame, degradation, humiliation, denial of dignity and powerlessness.[183]

Section 16 – Right to life

(i) Nature and scope

99. Section 16 of the HRA provides that every person has the right to life and the right not to be arbitrarily deprived of life. This right is drawn from Article 6(1) of the ICCPR and confers both positive and negative obligations.[184]

100. In *Waratah Coal (No. 6)* Kingham P observed that the right to life 'can be violated by a life-threatening situation even if there is no loss of life'.[185] The negative obligation is to refrain from conduct that causes an arbitrary deprivation of life.[186] The UNHRC has explained that a deprivation of life involves[187]

> intentional or otherwise foreseeable and preventable life terminating harm or injury, caused by act or omission. It goes beyond injury to bodily or mental integrity or a threat thereto.

101. Not every action that results in death will be arbitrary.[188] In this context, as for other rights, it has been accepted that 'arbitrary' means 'capricious, or resulting from conduct, which is unpredictable, unjust or unreasonable in the sense of not being proportionate to the legitimate aim sought'.[189] The UNHRC has noted that 'the deprivation of life of

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176 [Redacted].
177 [Redacted].
178 [Redacted].
179 [Redacted].
180 [Redacted].
181 [Redacted].
182 [Redacted].
183 [Redacted].
184 *Waratah Coal (No 6)* [1452] (Kingham P); Explanatory Note, *Human Rights Bill (2018)* 19.
185 *Waratah Coal (No 6)* [1468] (Kingham P). See also General Comment No 36 [7].
186 *Waratah Coal (No 6)* [1454] (Kingham P).
187 Human Rights Committee, ***General Comment No 36*** *(2018) on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life*, UN Doc CCPR/C/GC/36 (30 October 2018) [6].
188 Explanatory Note, *Human Rights Bill 2018* (Qld) 19.
189 *Waratah Coal (No 6)* [1482] (Kingham P). See also *General Comment No 36* [12].

individuals through acts or omissions that violate provisions of the Covenant other than art 6 is, as a rule, arbitrary in nature'.[190]

102. According to the UNHRC, the positive duty to protect life also implies that states should 'take appropriate measures to address the general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity'.[191] Homelessness is one of the general conditions it specifically identifies as falling within this category.[192]

(ii) Engagement

103. There has been very limited judicial consideration of the right to life in Australia. However, a line of cases in Canada has found that the ability to provide adequate shelter for oneself is a necessity of life that falls within the right to life protected by section 7 of the *Canadian Charter*.[193] This section of the Canadian Charter provides that:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

104. Noting, of course, the difference in Queensland and Canadian climates, Canadian jurisprudence recognises that 'the ability to provide adequate shelter for oneself is a necessity of life that falls within the right to life protected by s 7 of the Charter'.[194] In *Vandenberg*, Matthews J held that in the absence of accessible indoor housing, state conduct that interfered with the plaintiff's ability 'to protect herself from the elements with her tent in which she uses blankets and her fan to keep her warm or cool as the need arises, affects her life interests'.[195]

105. Courts in Canada have consistently found that enforcement of restrictions on shelter in public places, where there are insufficient shelter beds available, engages and can limit the rights to 'liberty and security of the person' also protected by section 7 of the Canadian Charter. The Commission will not expand on these aspects further, subject to the observation that the characterisation of those rights in the Canadian context shares significant similarities with the scope of the right to protection from arbitrary interferences with privacy as understood under the HRA.[196]

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190 *General Comment No 36* [17].
191 *General Comment No 36* [26]. See also Explanatory Note, *Human Rights Bill (2018*) 19.
192 *General Comment No 36* [26].
193 See, most recently *The Regional Municipality of **Waterloo** v Persons Unknown and to be Ascertained* (2023) 164 OR (3d) 177 (Ontario Superior Court of Justice) [96] (Valente J). The judgment provides a good summary of the line of cases from British Columbia and Ontario courts at [81]-[91].
194 *Vandenberg* [143] (Matthews J), and citations therein. See also *Waterloo* [96]-[97] (Valente J).
195 *Vandenberg* [144] (Matthews J).
196 See, eg, *Waterloo* [98]-[104] (Valente J). Liberty is concerned with personal autonomy and the right to make fundamental personal decisions without interference from the state (at [98]). Security of the person includes protection of both physical and psychological integrity (at [102]).

(iii) Limitation

106. The same line of Canadian cases has repeatedly found that restrictions on erecting shelters in public places necessary to protect homeless individuals from risk of serious harm, when there are inadequate accessible shelter beds in the region, interfere with the protected right to life (as well as Canadian Charter right concepts of liberty and security of the person).[197] Such limits will violate the Canadian Charter right where they are not in accordance with principles of fundamental justice – a concept that includes consideration of whether the limitation is arbitrary, overbroad or grossly disproportionate.[198]

107. In *Waterloo*, Justice Valente considered the argument that people experiencing homelessness had chosen to live in the encampment at issue, so had no claim to a breach of their Canadian Charter rights. He accepted that some of the residents of the encampment had chosen to live there 'because they feel relatively safe and have a sense of community there rather than attempting to access a shelter that may not meet their needs'. However, this did not negate a finding of violation of Canadian Charter rights. In his view:[199]

> the overriding context in the matter…is not one of freedom in the exercise of autonomous choice. … [I]t is a context characterized by poverty, drug addiction, disability, and insufficient shelter alternatives.
>
> The question is not whether the Encampment's residents' circumstances are self-made, but rather, whether enforcement of the By-Law will make the residents' already dire predicament worse.

108. Canadian courts have repeatedly found that – given the limitation on Canadian Charter section 7 rights – enforcement of a complete ban on erection of shelters is not in accordance with fundamental principles of justice where there are insufficient shelter beds available.[200]

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[197] *Waterloo* [97] (Valente J); *Vandenberg* [144] (Matthews J). Contrast ***Church of St Stephen-in-the-Fields*** *v Toronto* (2023) ONSC 6566 (Ontario Superior Court of Justice) (Koehnen J), considering the balance of convenience in an application for an interlocutory injunction, where all residents of the encampment had been offered accommodation in hotel shelters for an indefinite period of time, and there was only a very minimal overall shortfall in shelter beds in the region (3%).

[198] *Vandenberg* [151] (Matthews J). If there is a violation that is not in accordance with the principles of fundamental justice the Court will then consider whether it can be justified under section 1 of the Charter as reasonable and demonstrably justified in a free and democratic society – similarly to the process required under HRA s 13. However, it is difficult to justify a section 7 violation, because 'the rights protected are fundamental and not easily overridden by competing social interests'. Justification is usually only possible in cases arising out of exceptional circumstances, such as disasters, war or epidemics: *Waterloo* [129] (Valente J).

[199] *Waterloo* [106]-[107] (Valente J).

[200] See a summary of the case law in British Columbia and Ontario in *Waterloo* [81]-[91] (Valente J). See further *Waterloo* [108]-[119]; *The Corporation of the City of* ***Kingston*** *v Doe* (2023) 541 CRR (2d) 255 (Ontario Superior Court of Justice) [68] (Carter J).

109. Courts have held that it is compatible with section 7 for municipalities to create regulations to direct camping to appropriate locations[201] and have taken different views on whether restrictions on erection of shelters can justifiably be enforced during daylight hours. For example in *Shantz*, the British Columbia Superior Court held that such limitations could be imposed on people camping in a public park to balance the needs of those experiencing homelessness with the rights of the region's other residents.[202] On the other hand in *Waterloo*, the Ontario Superior Court found that the right to shelter was not limited to overnight hours, particularly where the site concerned was a vacant lot to be used by the region as a temporary parking lot and reserved for potential future construction.[203] In another case the Ontario Superior Court found that daytime restrictions could violate section 7 when encampment residents had nowhere else to go.[204] The case law in this area is still developing, with cases currently pending or subject to appeal.[205] In *Roy v Vancouver*, which is yet to be heard in the Supreme Court of British Columbia, plaintiffs have claimed that restrictions on daytime shelter violate the right not to be subjected to cruel and unusual treatment or punishment (Article 12), and the right to equality (Article 15), in addition to Article 7 of the Canadian Charter.[206]

Application to the evidence

110. Noting many of these allegations are disputed, circumstances alleged by the applicants or otherwise indicated in the evidence that, <u>if proved</u>, may be relevant to determining whether the right to life or right not to be arbitrarily deprived of life were limited include:

a. Evidence as to vulnerability of the applicants, including because of age, mental illness, experience of domestic violence, and addiction;[207]

b. Evidence as to physical health impacts of the enforcement action;[208]

c. Evidence as to applicants lacking shelter and/or being exposed to the elements as a result of the enforcement action;[209]

d. Evidence as to the lack of suitable alternative shelter options;[210]

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[201] ***Victoria (City)*** *v Adams* (2009*)* 313 DLR (4th) 29 (Court of Appeal for British Columbia) [96] (Levine, Neilson, Groberman JJ).
[202] *Abbotsford (City) v* ***Shantz*** (2015) 392 DLR (4th) 106 [198] (Hinkson CJ). See also *Victoria (City)*; ***Heegsma*** *v. Hamilton (City)* 2024 ONSC 7154 (Ontario Superior Court of Justice) (Ramsay J), on appeal, and likely to be heard January or February 2026 as indicated in these directions: *Heegsma v. Hamilton (City),* 2025 ONCA 588 [16] (Court of Appeal for Ontario).
[203] *Waterloo* [105] (Valente J).
[204] *Kingston* [113] (Carter J).
[205] For example *Heegsma*, see above.
[206] Notice of Civil Claim available at: [2025-01-29-Notice-of-Civil-Claim-BCCLA-v-City-of-Vancouver.pdf]()
[207] See above [78], [98].
[208] See above [98].
[209] See above [98].
[210] See above [78].

e. Evidence as to mental health impacts of the events, including exacerbating existing mental health conditions;[211]

f. Factors outlined above at [78] as to lack of individual consideration of circumstances, notice, and transparency of process.

Section 24(2) – Right not to be arbitrarily deprived of property

(i) Nature and scope

111. The right not to be arbitrarily deprived of property is modelled on article 17(2) of the *Universal Declaration of Human Rights*.[212] In *Austin BMI Pty Ltd*, Freeburn J observed that:

> [331] …the values underlying the right to property in the Human Rights Act are the need to ensure that human beings can supply themselves with food and otherwise support themselves. The right is thought to be a strategic human right, a right that protects other rights but also valuable in itself as a component of human dignity.

112. The interference prohibited by HRA s 24(2), namely, 'deprivation' should also be given a broad and practical meaning.[213] The Queensland Civil Administrative Tribunal, referring to Victorian and international authority, has said deprivation of property is not limited to taking a person's title to their property, but included preventing a person from exercising their property rights in a way that is 'practical and effective' – a de facto expropriation is sufficient.[214]

113. As for the rights to privacy and life, 'arbitrary' in this context also refers to deprivation that is 'capricious or has resulted from conduct which is unpredictable, unjust or unreasonable in the sense of not being proportionate to the legitimate aim sought'.[215] International cases have held that to avoid being a disproportionate or arbitrary taking, the action must achieve a 'fair balance' between the general interests and the individual's rights and must not impose an excessive burden on the individual.[216]

(ii) Engagement

114. On the principles outlined above, the Commission submits that the right protected by HRA s 24(2) was clearly engaged by both destruction and impounding of the applicants' belongings.

[211] See above [98].
[212] Explanatory Note, *Human Rights Bill 2018* (Qld) 21-22.
[213] *PJB v Melbourne Health* (2011) 39 VR 373 (*Patrick's Case*) [87] (Bell J).
[214] *Burleigh Town Village Pty Ltd (3)* [2022] QCAT 285 [138]-[144] (Member Roney QC).
[215] *Waratah Coal (No 6)* [1629] (Kingham P); *Austin BMI Pty Ltd* [333] (Freeburn J).
[216] *James v United Kingdom* (1986) 98 Eur Court HR (ser A) [50]; *Sporrong v Sweden* (1982) 88 Eur Court HR (ser A) [73] (concerning ECHR Article 1 of Protocol No 1 (protecting peaceful enjoyment of possessions).

(iii) Limitation

115. The Commission submits that if property was either impounded or destroyed contrary to law (as submitted by the applicants) this would amount to an 'arbitrary' deprivation of property, in that it would be unpredictable and unjust.

116. Even if lawful, however, other factors may indicate that the deprivation of property was arbitrary in the circumstances because it was unjust or unreasonable in the sense of not being proportionate to the legitimate aim sought. By analogy to arbitrariness in the context of interferences with privacy (outlined above at [70]-[75]), this could be indicated by deprivation of property without sufficient notice, deprivation without taking individual circumstances into account, or deprivation of property that was necessary for life-sustaining activities.

117. At AOS [91] the applicants accept that if the Court determines that the applicants did consent to the removal and disposal of their belongings this will have been compatible with human rights. In this respect, the Commission notes the discussion of the concept of 'full, free and informed' consent by Martin SJA in *Johnston* at [311]-[332], and submits that the question of whether any apparent consent was 'full, free, and informed' may also be relevant to whether deprivation of property was arbitrary.

Application to the evidence

118. Many of the same factors outlined at [78] are relevant to an assessment of whether deprivation of property by the Clearance Conduct/Decisions was arbitrary. These include:

a. Whether the deprivation was done lawfully.

b. That storing of belongings on the site had previously been lawful and tolerated by the Council.

c. Whether there was a consideration of individual circumstances in making the Challenged Decisions and Conduct.

d. Lack of transparency about process, and apparent failure to respond to questions about process from some of the applicants' legal representatives.

e. Short time limits for compliance, and lack of notice about when enforcement action would be carried out.

f. Whether applicants had anywhere else to store their belongings.

g. Alleged deprivation, including destruction, of items necessary for survival and dignity.

h. Alleged destruction of items of significant personal value.

i. In the case of some applicants, alleged destruction of all of their belongings in their absence.

j. Whether less restrictive measures were possible to achieve the objectives, when it appears there was no pressing need to proceed.

Section 26(1) – Protection of the family

119. The Commission adopts the submissions of the applicants (AOS [122]-[124]) on the scope and engagement of this right. It notes further that, while the right protected in HRA s 25(a) is a right to be free from unlawful or arbitrary interference with the family, the right in s 26(1) is, as explained in the Explanatory Note, 'stronger than non-interference and extend[s] to the guarantee of institutional protection of the family'.[217]

120. In *Commissioner for Housing v Y* the ACT Supreme Court referred to the entitlement of the family unit to protection and stated that 'those rights require that the rights of a family... to secure and appropriate housing be recognised and that territory laws be so interpreted so as to preserve and advance those rights where possible'.[218]

Section 15 – Right to equality

121. Finally, the Commission submits that equality rights protected by HRA s 15 are also engaged on the facts alleged, noting that this is not a right referred to by the applicants.

122. Of relevance for present purposes, HRA s 15(2) provides the right to the equal enjoyment of human rights 'without discrimination,'[219] reinforcing the protection of the other human rights contained in the HRA.

123. Sections 15(3) and (4) contain autonomous rights which act independently from the other rights in the HRA; with two elements, described as 'distinct but overlapping'.[220] The first part of s 15(3) requires *formal* equality before the law; it proscribes arbitrary or discriminatory enforcement of the law. The second part of s 15(3), together with s 15(4), requires *substantive* equality in the content and operation of the law. There is both a negative and positive property to this injunction; a prohibition on discriminatory laws and a requirement for laws to afford equal and effective protection against discrimination– even if this means differential treatment of persons whose situations are different.[221]

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[217] Explanatory Note, *Human Rights Bill 2018* (Qld) 22.
[218] *Commissioner for Housing v Y* [2007] ACTSC 84 [48] (Higgins CJ). Contrast *Director of Housing v Ronan (Residential Tenancies)* [2013] VCAT 2050 [30] (Member K Kirmos), where the Tribunal found that the Victorian equivalents of HRA s 26(1) and 26(2) were not engaged.
[219] ***Re Lifestyle Communities Ltd (No 3)*** (2009) 31 VAR 286 [120], [280] (Bell J).
[220] *Re Lifestyle Communities Ltd (No 3)* [126], [284] (Bell J).
[221] *Re Lifestyle Communities Ltd (No 3)*[137]-[141], [143], [145], [283]-[288] (Bell J); *Thlimmenos v Greece* [2000] ECHR 162 at [44].

124. There is currently conflicting Supreme Court authority as to whether discrimination under the HRA is limited to attributes protected by the *Anti-Discrimination Act 1991* (Qld) or may cover analogous grounds.[222] However, even on the narrower view, the evidence indicates that a number of the applicants had the protected attribute of ‘impairment’.[223]

125. Given the uniform application of the decisions, indirect discrimination is the most relevant concept for consideration here. It arises where there is a feature to a uniform law or policy that results in a discriminatory impact or differential treatment on a prohibited ground.[224]

H. Justification of Limitations

126. The respondent must demonstrate that any limitations to the above rights are reasonable and justified within the meaning of HRA s 13. Section 13(1) provides the overarching test for assessing if a human right may be limited: any such limitation may only be subject under law only to reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom. Section 13(2) then provides a list of non-exhaustive factors to be considered. Section 13, in effect, embodies a proportionality test.[225]

127. In ***Re an Application*** *Under the Major Crimes (Investigative Powers) Act 2004*,[226] the Victorian Supreme Court considered the cognate provision of the Victorian Charter. In determining what could be ‘demonstrably justified in a free and democratic society based on human dignity, equality and freedom’, Warren CJ was assisted by the approach of the Canadian Supreme Court to s 1 of the Canadian Charter in *R v Oakes*.[227] Quoting from the judgment of Dickson CJ in that case:

> The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the Charter and the ultimate standard against which a

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[222] *Johnston* [294]-[298] (Martin SJA); cf *Austin BMI Pty Ltd* [316]-[320] (Freeburn J).
[223] Nicholas McKinlay (8 October 2025) [5]. Trent Lugge (7 October 2025) [9]. Stacey Richardson (7 October 2025) [7]. Nicholas Carbone (15 October 2025) [5].
[224] See e.g. *Ngarona v Attorney-General* [2017] NZCA 351 at [115]-[119].
[225]*Owen-D’Arcy* [104]-[105] (Martin J). *Re Kracke* [133]-[134] (Bell J), *Re Lifestyle Communities Ltd (No 3)* [322]-[334], *Re an Application* at [148], *Momcilovic* VCA at [147].
[226] (2009) 24 VR 415.
[227] ***R v Oakes*** [1986] 1 SCR 103. The approach formulated in *R v Oakes* was also cited by the Victorian Court of Appeal in *R v Momcilovic* (2010) 25 VR 436, 476 [147] (Maxwell P, Ashley and Neave JJA) and in the High Court by French CJ, *Momcilovic v R* (2011) 245 CLR 1 at [26] (French CJ).

limit on a right or freedom must be shown, despite its effect, to be reasonable and demonstrably justified.[228]

128. Her Honour noted that the notion of proportionality is a key principle of the (Victorian) Charter, which reflects human rights jurisprudence of most comparable jurisdictions, and invoked the test for proportionality articulated in *R v Oakes*: [229]

> 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 consideration. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in the 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".

129. *R v Oakes*[230] has been influential in other cases in Victoria[231] and in New Zealand,[232] and has been referred to in a number of Queensland cases considering HRA s 13.[233]

Observations on HRA s 13 factors

130. Noting that the respondent, who bears the onus, has not yet set out its position as to justification, the Commission confines itself to the following brief observations relevant to the justification inquiry.[234]

(a) The nature of the human right

(f) The importance of preserving the human right, taking into account the nature and extent of the limitation on the human right.

131. The rights identified above as engaged and potentially limited in these proceedings include some of the most fundamental rights recognised in international human rights law and by the common law, specifically:

a. The rights to freedom from unlawful or arbitrary interference with privacy, family and home are fundamental because they protect the 'existence, autonomy, security

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[228] *R v Oakes* [64], quoted in *Re an Application* [145]. This passage was quoted by Martin SJA in *Owen-D'Arcy* [107].
[229] *R v Oakes* 43 quoted in *Re an Application* [148] (emphasis added).
[230] *R v Oakes* [1986] 1 SCR 103 [43], [61]-[64], [69]-[71].
[231] *R v Momcilovic* [2010] 25 VR 436 [147] (***'Momcilovic VCA'***), *Certain Children* [208] (Garde J), *Certain Children (No 2)* [205] (John Dixon J).
[232] *R v Hansen* [2007] 3 NZLR 1 [42], [64], [103]-[104], [203]-[204].
[233] *Owen-D'Arcy* [107] (Martin J); *Waratah Coal (No 5)* [2022] QLC 4 [24] (Kingham P).
[234] In light of the process of proportionality analysis described by by Bell J in *Re Lifestyle Communities Ltd (No 3)* [327]-[334] (in relation to the similar factors set out in the cognate provision of the *Victorian Charter*).

and wellbeing of every individual in their own private sphere' and provide the foundation for individuals' 'effective participation in democratic society'.[235]

b. As outlined above at [84]-[86], the prohibition of cruel, inhuman or degrading treatment is recognised both in customary international law and under Australia's treaty obligations to be absolute.

c. The right to life has been described by the UNHRC as the 'supreme right', 'precious for its own sake' and a fundamental right required for the enjoyment of all other rights.[236] While the right to life is not considered to be absolute (ie, it can be limited in certain strictly defined circumstances), it is non-derogable, such that governments cannot limit or suspend it in times of emergency.[237] Unlawful or arbitrary deprivation of life is, however, never permitted.

d. The right not to be arbitrarily deprived of property is also closely tied to the concept of dignity. As Kingham P noted in *Waratah Coal (No 6)*, 'property has a foundational role in Australian legal history' and is a fundamental common law right.[238]

e. Equality and non-discrimination are fundamental rights and values that are cornerstones of both democracy and international human rights,[239] as recognised in the text of HRA s 13(1).

132. The effect of the Challenged Decisions and Conduct was to effectively 'evict' the applicants from their homes, albeit on Council land, in circumstances where they had been left to live there for a period of between four years and six months.[240] The eviction involved impounding and/or disposing of property the applicants could not take with them upon the eviction. To the extent the rights engaged are capable of limitation – the limitation placed on them in the circumstances was very serious.[241]

133. If the Court accepts that human rights have been limited because of an 'arbitrary' interference with the right to privacy, family and/or home, or arbitrary deprivation of property, it will ordinarily be very difficult to establish that the limitation was justified.[242]

134. In addition, if the Court finds that any of events constituted cruel, inhuman or degrading treatment – which is absolutely prohibited under customary international law and treaty

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[235] *Sudi* [29]; see above [48]. See also, in the common law context, *Roy v O'Neill* (2020) 95 ALJR 64, [31] per Bell and Gageler JJ, citing (*inter alia*) the King's Bench in *Seymane's Case* (1604) 5 CO Rep 91a, 91b, cited by Kingham P in *Waratah Coal (No 6)* [1631]. As Kingham P noted, 'Bell and Gageler JJ were in dissent as to the outcome, but those foundational principles were not in dispute'.
[236] General Comment No. 36 [2].
[237] General Comment No. 36 [2], [10].
[238] *Waratah Coal (No 6)* [1618] (Kingham P), citing *Patrick's Case* [94]-[95] (Bell J).
[239] *Re Lifestyle Communities Ltd (No 3)* [1]-[2] (Bell J).
[240] See above [78].
[241] See, eg, *Sudi* [94] (Bell J); *Yordanova v Bulgaria* [118].
[242] *Thompson* [58].

– this could never be justified in a democratic society based on human dignity, equality and freedom.

(b) The nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom.

(c) The relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose

135. The purposes of the Alteration Law and the Camping Law are expressed as protecting the fitness for use and amenity of public land, the environment, public health and safety, properties near public land and government infrastructure.[243] These purposes are legitimate aims in a democratic society. The apparent purpose of the Council taking the enforcement action the subject of the Challenged Decisions and Conduct was to give effect to the purpose for repealing the PEH Framework, being concerns relating to public health and safety, and loss of amenity of public land, presented by persons experiencing homelessness living there.[244]

(d) Whether there are any less restrictive and reasonably available ways to achieve the purpose

136. In *Thompson*, the Court observed the 'tension' between the onus placed on the public entity, and the 'stringent' standard for assessing justification, as against 'the need to avoid imposing an onus upon a public authority to prove a negative' in circumstances where the public authority is contending that there are no less restrictive means reasonably available: 'How this tension is resolved will depend upon the circumstances of the case'.[245] The evidential means by which both parties approach this element of justification is discussed at [75]-[78]. In *Owen-D'Arcy*, Martin J emphasised that it 'is not for the applicant to provide solutions; it is for the respondent to explain why there is no reasonable alternative'.[246]

137. Neither party's evidence identifies to any extent how long it would take to be placed in housing, or the alternative types of housing options available that would result in the applicants no longer needing to reside on Council land. The height of the evidence is that the applicants were not given any suitable offers for community housing at the time of the Challenged Decisions and Conduct, but would have taken offers were they afforded. The Council's material contemplates that the offer of housing was relevant to the

[243] *Alteration of Public Land Local Law 2023*, s 2; *Camping on Public Land Local Law 2023*, s 2.
[244] [Redacted].
[245] *Thompson* [75]-[76].
[246] *Owen-D'Arcy* [249] (Martin J).

enforcement action (in that an offer of future housing was a factor allowing extended time for compliance).[247]

138. The Council's evidence also suggests the action was taken for concerns about public health and safety and amenity of public land,[248] but it is unclear if the speed and nature of the enforcement action[249] was proportionate to meet the identified risk (appreciating the Council's submissions are to come).

139. In terms of the Clearance Conduct/Decisions, regard must also be had to *what* was disposed of, and how much of the applicants' property seized or disposed of was necessary to achieve the purpose of that conduct (noting factual disputes about this conduct, including what was disposed of and whether there was consent, must first be determined). Put simply, the less of the applicants' property seized and disposed of, the less restrictive the conduct would be.

140. In addition to delaying enforcement until suitable alternative accommodation was available, international guidance and case law points to other potentially less restrictive ways the Council might have achieved the purposes.[250] These could include limiting immediate enforcement to particular locations, with notice, so that those affected could move sites,[251] conducting the process in a participatory way, giving those directly affected the opportunity to be heard,[252] development of a risk assessment tool,[253] ameliorating health and safety issues by laying of baits and traps for rodents,[254] providing a secure area for storage of belongings (as opposed to 'impoundment'), or assistance with transport of belongings, providing notice of when enforcement action would be taken, providing detailed information to lawyers acting for those affected as to process,[255] not carrying out enforcement action in the rain,[256] or shortly before a weekend, and – when enforcing – allowing for sorting and removal of belongings over a longer period, and in relation to fewer people at one time, to facilitate individualised approaches and assistance in salvaging as many belongings as possible.[257]

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[247] For example, the timeframe to be provided in compliance notices could be extended from 15 business days where a person experiencing homelessness 'are relocating to a specific location on a date that is reasonably (up to 28 days) to a location that is not a public place in the CMB', or 'the PEH has housing confirmed for their occupation on a specific date that is reasonable for the future (up to 28 days)'; see [Redacted].
[248] [Redacted], [25]-[29].
[249] Summarised in AoS at [17]-[32].
[250] These are examples only, and the Commission should not be taken as suggesting that, had these measures been taken, the actions would *prima facie* be compatible with human rights. For an example of a case where reference was made to less restrictive alternatives from other jurisdictions see *Owen-D'Arcy* [250] (Martin J).
[251] *Victoria (City)* [96] (Levine, Neilson, Groberman JJ).
[252] Office of the High Commissioner for Human Rights and UN-Habitat (2014) ***Forced Evictions***, Fact Sheet No. 25/Rev.1, 34; *Waterloo* [45] (Valente J). As to the features such a process could have see ***Bamberger v*** *Vancouver (Board of Parks and Recreation)* (2022) BCSC 49 (Supreme Court of British Columbia) [66]-[73] (Kirchner J).
[253] See *Waterloo* [37]-[46] (Valente J); *Heegsma* [8] (Ramsay J).
[254] *Waterloo* [49] (Valente J).
[255] See, eg, *Bamberger* [71] (Kirchner J).
[256] *Forced eviction*s, 34.
[257] *Forced eviction*s, 34.

(e) The importance of the purpose of the limitation.

141. This is a matter for the Council to establish, bearing the onus. The Commission therefore does not seek to pre-empt the Council's case. However, the Council's material suggests reliance on public health and safety in the use of public land; which may engage the rights of those in the community, the right to freedom of movement (HRA s 19), and potentially the rights of nearby land-owners and occupiers, such as the rights to privacy and home and the right to property.

142. The importance of the purpose will depend on the Council establishing the extent and veracity of its concerns about the impact the applicants' occupation of Council land was having on the public health and safety and amenity of public land in the individual case.[258]

(g) The balance between the importance of the purpose of the limitation and the importance of preserving the human right, taking into account the nature and extent of the limitation on the human right

143. The limitation imposed by the Council's enforcement action (encompassed in the Challenged Decisions and Conduct) must have regard to whether the speed and action employed was required to meet the purpose for which it was employed – as against the burden it placed on the applicants' human rights.

144. If the purpose was for ensuring community health and safety and amenity of local land, the Court must consider whether, to achieve that purpose, the balance was struck. Having regard to:

a. if the purpose was to remedy health and safety and loss of amenity, the level of risk and level/impact of loss of amenity to local land that existed in the individual case;

b. the limitation imposed on the applicants' human rights being significant, noting the observation in *Faulkner* that the that the loss of one's home 'is the most extreme form of interference with the right under [ECHR] Article 8',[259] and the absence of alternative accommodation makes the interference 'more severe';[260]

c. relatedly, the psychological and physical risks the action presented to the applicants by the conduct;

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[258] For examples of specific impacts of encampments being evaluated in the Canadian context, see, eg, *Waterloo* [40]-[50] (Valente J); *Vandenberg* [167]-[195] (Matthews J); *Church of St Stephen-in-the-Fields* [36]-[47] (Koehnen J) (considering the balance of convenience for an interlocutory injunction). For examples of consideration of the importance of the purpose in relation to specific publicly-owned sites by the ECtHR see, eg, *Faulkner* [109]; *Yordanova* [127]; and in relation to protecting rights of passers-by, residents and shopkeepers, *Lacatus* [113].

[259] At [95 (iv)].

[260] At [96].

d. the timeframe, pre-enforcement, over which the applicants were lawfully permitted to reside on the local land and the protection of the PEH Framework, or otherwise not subject to Council enforcement;

e. whether the Council can establish the purpose of the enforcement action needed to be carried out in the timeframe and manner it was, to achieve the purpose.

145. The Commission respectfully submits that, in carrying out this global assessment, the Court may be assisted by how Courts have approached this balancing in international and comparative cases sharing various factual similarities with the present proceedings, read with 'discrimination and care' in light of their different legal and constitutional settings.[261] Cases referred to above that may provide particular assistance in this regard include *Waterloo*,[262] *Faulkner,*[263] *Lacatus,*[264] and *Yordanova*.[265]

Lachlan Grant
Counsel for the Commission
17 November 2025

[261] See *Johnston* [197] (Martin SJA), citing *Momcilovic v The Queen* (2011) 245 CLR 1 [18] (French CJ).
[262] At [108]-[130] (Valente J) (in considering whether enforcement of a by-law was compatible with the Canadian Charter, addressing whether violations (limitations) were in accordance with fundamental principles of justice (which includes consideration of arbitrariness), and whether they could nevertheless be justified under s 1 of the Canadian Charter). Contrast *Church of St-Stephen-in-the-Fields*, which concerned an injunction rather than a direct consideration of unconstitutionality, but was distinguished from *Waterloo*, including because (i) shelter spaces had been offered to those affected, (ii) the judge in *Waterloo* had assessed the risks associated with the camp as medium to low, as opposed to high risk of fire assessed in the instant case (see [38]-[49]), and (iii) there was significantly less shortfall in emergency accommodation in the region than in *Waterloo* (at [52]-[62]).
[263] At [108]-[115], and in light of the Court's findings at [99]-[107] that the proportionality of the interference had been examined by domestic judicial authorities.
[264] At [99]-[117].
[265] At [117]-[144].