SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
No. B.S. 9292/23

Applicant:	**RODNEY GEORGE ANDERSON**
	AND
Respondent:	**PRESIDENT OF THE PAROLE BOARD QUEENSLAND**

Submissions on behalf of the Queensland Human Rights Commission

Introduction

1. The Queensland Human Rights **Commission** intervenes in this proceeding under s 51 of the *Human Rights Act 2019* (Qld) (**HR Act**).
2. By way of overview, the Commission submits ***first,*** that jurisdiction under s 59 *HR Act* is enlivened by Ground 1 of the amended application. Ground 1 challenges on grounds *"other than because of"* s 58*,* the lawfulness of the respondent's decision. It asserts that s 175I(4) of the *Corrective Services Act 2006* (Qld) (**CS Act**), properly construed, required the respondent to consider and weigh the applicant's personal rights and interests in the setting of the term of the restricted prisoner declaration. In the Commission's submission, this ground is not only properly brought but also undoubtedly correct.
3. ***Second,*** with respect to Ground 2(b), s 58(1)(b) *HR Act* obliged the respondent, in setting the term of the declaration, to properly consider the applicant's human rights protected under the *HR Act* that were *engaged* by the decision*,* namely, his right to liberty and security, and to protection from arbitrary detention (s 29(1) and (2)), his right to humane treatment whilst deprived of liberty (s 30(1)), his right to protection from cruel, inhuman or degrading treatment (s 17(b)) and his right not to be discriminated against in his access to health services (s 37(1)). No such consideration was undertaken.
4. ***Third,*** regarding Ground 2(a), s 58(1)(a) *HR Act* obliged the respondent, in setting the term of the declaration, to act compatibly with the applicant's human rights by either not limiting, or if limiting, only placing reasonable and demonstrably justifiable limits upon, those rights, as necessary for public protection. The Commission submits that the duration of 8 ½ years for the declaration is incompatible with the applicant's rights in s 29(2), 30(1) and 37(1) *HR Act* in summary because it prevents regular review of the applicant's suitability for parole, particularly in circumstances of the applicant's advanced age, declining physical health and the absence of psychological or psychiatric treatment available to him in prison to better his prospects of rehabilitation.
5. ***Fourth,*** success on either Ground 2(a) or (b) permits the court to fashion an appropriate remedy, including setting aside the decision and/or declaratory relief.

Queensland Human Rights Commission
Level 20/53 Albert St
Brisbane Q 4000

Jurisdiction under s 59 *HR Act*

6. Section 59 *HR Act* permits a person who *"may seek any relief or remedy… on the ground that the act or decision was, other than because of section 58, unlawful"* (s 59(1)) to seek the relief or remedy on the ground of a breach of s 58 (s 59(2)).

7. Whilst it remains undetermined at the appellate level in Victoria[1] whether the equivalent provision under the ***Charter*** *of Human Rights and Responsibilities Act 2006* (Vic) requires that a non-*Charter* ground be in fact brought, or merely that a person could bring such a ground, the better view is, consistent with its legislative intent,[2] that the provision is *"both conditional and supplementary"*;[3] it has a 'piggy-back' effect upon an existing cause of action actually brought on grounds of unlawfulness extraneous to s 58 *HR Act*.[4]

8. However, as the provision expressly contemplates, the ground brought under an existing legal avenue need not be successful. It need not reach any threshold level of arguability. Rather, the non-s 58 ground need only be genuinely raised and not incapable, on its face, of legal argument.[5] Further, invoking human rights jurisdiction to obtain relief that is genuinely sought will not be improper, so long as the ground which founds it is not unnecessary or unconnected to the real dispute.[6] Here, there is no basis to find that Ground 1 was brought improperly.

9. The applicant contends in Ground 1 that satisfaction *"in the public interest"* in s 175I *CS Act* required the respondent to consider *"the impact of deterioration in the applicant's comorbidities and/or engagement with suitable and sustained psychological treatments on the appropriateness of the declaration period."*[7] The respondent submits that the use of this phrase in s 175I *CS Act* does not denote a discretion that permits of more than one result or permits reference to considerations personal to the individual, outside those stipulated in s 175H(2).[8] Further, that the matters raised by the applicant as relevant to the public interest are not recognised or protected outside of s 30 *HR Act* and therefore may not be relied upon as the existing legal ground for review.[9]

10. The misapplication of a statutory test is of course an error of law able to be brought on judicial review; so too, clearly, is the question of what might be contemplated by the phrase *"in the public interest"* in a particular statutory setting.[10] Quite separate from whether the applicant will be successful in so contending, Ground 1 enlivens s 59 *HR Act.*

The evidence

11. The clear impact of the decision under review on the applicant is his continued detention, without the possibility of consideration for release on parole for 8½ years.

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[1] ***Bare*** *v IBAC* (2015) 48 VR 129, 258-9 [394]-[396].
[2] Explanatory Notes, *Human Rights Bill 2018,* p7-8.
[3] *Director of Housing v* ***Sudi*** (2011) 33 VR 559, 580 [96].
[4] *SQH v* ***Scott*** (2022) 10 QR 215, 251 [83].
[5] *Citta Hobart Pty Ltd v Cawthorn* (2022) 400 ALR 1 at 10-12 [35]-[38], [41]-[43], [45]; 18-19 [67]; ***Kheir*** *v Robertson* [2019] VSC 422 [100]-[101].
[6] *Tucker v McKee* [2022] FCAFC 98 at [70]; *Kheir* at [99].
[7] CD 48, Amended application filed 29/8/24.
[8] Respondent's submissions (**RS**) at [101]-[105].
[9] RS at [44].
[10] E.g. ***Fox Coal*** *Pty Ltd & Anor v Stewart* [2023] QSC 197.

12. The evidence indicates, as to the applicant's physical and mental health conditions:
    (a) [Redacted]
    (b) [Redacted]
    (c) [Redacted]
    (d) [Redacted]
    (e) [Redacted]
    (f) [Redacted]
    (g) [Redacted]
    (h) [Redacted]
    (i) [Redacted]
    (j) [Redacted]
    (k) [Redacted]
    (l) [Redacted].
13. Regarding the applicant's treatment needs:
    (a) [Redacted]
    (b) [Redacted]
    (c) [Redacted]
    (d) [Redacted]
    (e) [Redacted]
    (f) [Redacted]
    (g) [Redacted]
    (h) [Redacted]
14. The respondent's decision had regard to the prisoner's submission that he would be willing to address mental health issues with a psychiatrist, noted he was unable to comment on whether QCS could provide such assistance in custody, but regardless, had regard to Dr Arthur's opinion that that the applicant's risk and personality profile was such that therapeutic programs or interventions *"may not mitigate the risk he poses to the public".*[11]

[11] CD 4, Ex MB-1, Reasons, p12.

Ground 1 – What is relevant to "*the public interest"* in s 175I *CS Act*

15. It is well-established that the expression *"in the public interest"* imports a broad discretionary value judgment, confined only in so far as the subject matter, scope and purpose of the provision, within the scheme of the Act, excludes particular factors as irrelevant.[12]

16. The requirement to reach a state of satisfaction about where the public interest lies[13] and the listing of non-exhaustive criteria[14] do not disturb this characterisation of the task. Furthermore, the concept *"naturally implies a weighing up for factors for and against to determine where the public interest lies."*[15] That much *"will usually be obvious".*[16]

17. By its breadth and flexibility, a requirement in a statute to determine the public interest is designed to permit a decision-maker to take into account *"all matters that arose as relevant in the circumstances of each individual case".* [17] This falls too from the requirements of legality, taking form and shape from the terms, scope and policy of the legislation and fundamental values anchored in the common law affected by it, which implicitly require that representations by individuals affected by the decision be given due regard and active consideration. In particular, decisions with *"devastating consequences"* call for *"genuine consideration"* and *"honest confrontation"* of the human consequences upon the people affected.[18]

18. The public interest would also inhere in the respondent observing human rights, including the humane treatment of prisoners.[19]

19. In s 3(2), the *CS Act* recognises, consistently with the common law,[20] and quite apart from the *HR Act,* the starting point that prisoners hold such civil rights and interests as are not expressly or implicitly diminished by virtue of their imprisonment.

20. Section 3(1) *CS Act* also states the Act's purpose as involving the *"humane"* treatment of prisoners, and in s 3(3), recognises the need to respect prisoners' *"dignity"* and account for their *"special needs"* which may arise, relevantly, due to age or disability. Again, this is consistent with the common law's respect for the unique dignity of each person, as acknowledged in *Marion's Case;*[21] *"Human dignity is a value common to our municipal law and to international instruments relating to human rights."*

21. Whilst not operating as a precondition to the exercise of powers under the *CS Act*,[22] s 3 serves to enable, rather than restrict, consideration of an individual's rights and interests for the purpose of the exercise of powers under the Act.

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[12] *O'Sullivan v Farrer* (1989) 168 CLR 210, 216-7.
[13] *Harburg Investments Pty Ltd v Mackenrosh.* [2005] 2 Qd R 433, [3].
[14] ***Accused A*** *v Callinan* [2009] 2 Qd R 119, [47]-[48]; *Fox Coal* at [32]-[34].
[15] *Fox Coal* at [35], *Accused A* at [49]-[51]; *McKinnon v Secretary, Department of Treasury* (2006) 228 CLR 243, [55].
[16] *Cunneen v ICAC* [2014] NSWCA 421 at [103].
[17] *Bare,* 230 [312].
[18] *Plaintiff M1/2021 v Minister for Home Affairs* (2022) 275 CLR 582, [22]-[27] and [43], [47]; *Hands v Minister for Immigration and Border Protection* (2018) 364 ALR 423, [3]; *Minister for Home Affairs v Omar* (2019) 262 FCR 589, [36]-[37]; *Minister for Immigration and Border Protection v SZVFW* (2018) 357 ALR 408, 423 [59].
[19] ***Helu*** *v Immigration and Protection Tribunal* [2015] NZSC 24 at [74] and [207].
[20] *Raymond v Honey* [1983] AC 1, 10; ***Hamzy*** *v Commissioner of Corrective Services NSW* (2022) 107 NSWLR 544, [167]-[170] (Leeming JA).
[21] *Secretary, Department of Health and Community Services v JWB and SMB (****Marion's Case****)* (1992) 175 CLR 218, 266. See also *South West Africa Case (2nd Phase)* [1966] ICJR 6, 297 (Judge Tanaka).
[22] *Garland v Chief Executive, Queensland Corrective Services* [2006] QCA 568 at [21].

22. The concept of "human dignity" at common law often underpins more specific rights such as: the right to liberty and security;[23] rights to privacy and autonomy;[24] protection from discrimination;[25] protection from compelled confessions;[26] and procedural fairness.[27] The concept has expressly underpinned prisoner's rights of access to lawyers;[28] and been used to describe the duty held by prison authorities towards the prisoners under their control,[29] including by the provision of appropriate health care.[30]

23. Such rights, interests and freedoms of an individual have been held to form part of the public interest, where relevant to a decision, even in the absence of a human rights statute.[31] There is also, it is submitted, a public interest that is advanced when parole authorities respect prisoners' rights by treating them with human dignity. Where the competing value to be weighed is community protection, the public interest also requires consideration of the impact of the decision on the prisoner's rehabilitation, because *"(r)ehabilitation, if it can be achieved, is likely to be the most durable guarantor of community protection and is clearly in the public interest."*[32]

24. In such circumstances, for human rights to be incorporated into the meaning of public interest *"is not to substitute a human rights test* (or to improperly seek to apply s 58) *for a public interest test; rather, it is properly to acknowledge that the broad category of public interest considerations can extend to human rights when human rights are … engaged".*[33]

25. The Commission contends that s 175I(4) *CS Act* required that the applicant's personal rights and interests – including those raised by him in this application as well as his interests in having his suitability for parole genuinely considered sooner – are necessarily to be weighed in determining the public interest in setting the term of any declaration.

26. It is unnecessary to have recourse to the principle of legality, or the requirement to interpret s 175I compatibly with human rights, to conclude that matters personal to the applicant, including the humane treatment of him by prison authorities, were relevant to the decision, and by failing to consider them, the respondent erred.

Ground 2 – Relevant human rights

27. Human rights may be:[34]

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[23] *Marion's case* (persons with impairments); ***Munda*** *v State of Western Australia* (2013) 249 CLR 600, [54]-[55] (victims of crime).
[24] *Farm Transparency International Ltd v New South Wales* (2022) 277 CLR 537, [231], [234], [237]; *Clubb v Edwards* (2019) 267 CLR 171, [49]-[51].
[25] *Munda,* [53].
[26] *R v Leach* [2019] 1 Qd R 459, [221].
[27] *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123, 137 [40], 147-148 [82].
[28] *Hamzy*.
[29] *R v* ***Lian*** [2023] SASCA 122 at [77]; *CRU by next friend CRU2 v Chief Executive Officer of the Department of Justice* [2023] WASC 257 at [8].
[30] *R v Achurch* (2011) 216 A Crim R 152, [135]; *Lian* at [57], [74], [158]-[159], [165].
[31] ***Bare***, 305-306 [553]-[554]; ***Hogan v Hinch*** (2011) 243 CLR 506, 538-9 [32]; 549-550 [69]-[71].
[32] *Hogan v Hinch*, 538-9 [32].
[33] *Bare,* 232 [317].
[34] ***Innes*** *v Electoral Commission of Queensland (No 2)* (2020) 5 QR 623 at [222]-[224] at [291]-[292]; ***Owen-D'Arcy*** *v Chief Executive, Queensland Corrective Services* (2021) 9 QR 250, 294-7 [118]-[120], [130]; ***Austin BMI*** *Pty Ltd v Deputy Premier* [2023] QSC 95, [306]; *PJB v Melbourne Health (****Patrick's case****)* (2011) 39 VR 373, 384 [36];

(a) ***engaged*** by a decision if the right is relevant to or apparently limited by the decision. This may include the rights of an identified individual or the potential effect on the rights of a class of unidentified persons.

(b) ***limited*** if the act or decision *"places limitations or restrictions on or interferes with"* a human right. This involves considering whether the impact comes within the scope of the right. In ascertaining the scope of each right, human rights protected by the *HR Act* are to be construed in the *"broadest possible way"* by reference to their fundamental values and interests and absent any limitation. This is consistent with a beneficial approach to construction of the *HR Act*. Recourse to international jurisprudence on the scope of protected rights is explicitly permitted.

(c) ***subject only to reasonable and demonstrably justified limits:*** if the limit satisfies the proportionality test in s 13 *HR Act,* a decision will nevertheless be compatible with human rights: s 8. At this stage, the overall protection of the right is narrowed to *"mitigate any damage to society that may arise from upholding an individual's right"* by application of the reasoning process in s 13.

28. In the Commission's submission, the following human rights of the applicant were relevant to, and thereby engaged by, the decision under review, namely, the term of the restricted prisoner declaration (8½ years) imposed on the applicant for the reasons expressed by the respondent:[35]

(a) the right to liberty and security (s 29(1) and (2));

(b) the right to humane treatment when deprived of liberty (section 30(1));

(c) the right to protection from cruel, inhuman or degrading treatment (s 17(b)); and

(d) the right of access to health services without discrimination (s 37(1)).

Section 29 HR Act

29. The right to liberty and security in s 29(1) and (2) *HR Act* is modelled on Art 9 of the *International Covenant on Civil and Political Rights* (**ICCPR**). Art 5 of the *European Convention on Human Rights* (**ECHR**) also contains a protection in the same form as s 29(1). The right to liberty concerns *"the fact of detention or deprivation"* rather than the conditions or treatment of persons detained.[36]

30. It is recognised that the applicant is subject to a term of life imprisonment, with parole eligibility set by s 181 *CS Act.* As such, he has no *entitlement* at law to liberty (release on parole). Further, restrictions placed by the legislature upon his chances of being granted parole, falling short of complete abrogation, are unlikely to be considered at law to be punitive so as to render them Constitutionally invalid.[37]

DPP (Vic) v Kaba (2014) 44 VR 526, 556 [105]; ***Re Kracke*** *and Mental Health Review Board* (2009) 29 VAR 1, 29 [79].

[35] In particular, it is noted by the Commission that the reasons expressed by the respondent were primarily concerned with the application of s 175H(2)(b). Accordingly, whilst the spectre of double punishment, in breach of s 34 *HR Act* may arise upon the making of a restricted prisoner declaration, it is not submitted to be engaged in the setting of the term for the declaration in this case.

[36] *Owen-D'Arcy,* 311 [197].

[37] *Crump* (2012) 247 CLR 1, 12 [14], 20 [37]; *Knight* (2017) 261 CLR 306, 323 [28]; *Minogue* (2018) 92 ALJR 558, 674 [17]; *Minogue v Victoria* (2019) 268 CLR 1, [17]-[21].

31. Nevertheless, the right to liberty protected in s 29 encompasses protection from *"arbitrary"* detention, recognising that detention permitted under law may nevertheless be arbitrary.[38] Arbitrariness in this context means *"capricious, or has resulted from conduct which is unpredictable, unjust or unreasonable in the sense of not being proportionate to the legitimate aim sought".*[39]

32. It has been recognised both internationally and domestically that the existence of procedural safeguards, including regular reviews to consider release following the completion of the punitive component of the sentence, is an important protection against an initially lawful and reasonable period of detention becoming arbitrary.[40]

33. Thus, in a series of decisions,[41] the European Court of Human Rights (**ECtHR**) has concluded that whilst a mandatory life sentence is not incompatible with Article 3 (protection from torture, cruel and inhuman punishment) or Article 5 (right to liberty), to ensure such a term does not become arbitrary:

    (a) there must be continuing regular public safety assessments (by e.g. the parole board), because factors such as risk of re-offence, dangerousness and mental instability change over time;

    (b) the timeframe for such reviews should incorporate a sufficient measure of flexibility reflecting the realities of prisoners' circumstances, and a guiding principle would be *"significantly less than 2 year intervals";*

    (c) guidance ought to be provided by parole authorities on further steps urged to demonstrate rehabilitation and enhance future prospects of release; and

    (d) the State must offer programs of treatment and rehabilitation. The failure to do so or a delay in doing so may itself make continued detention arbitrary.

Sections 17(b) and 30 HR Act

34. Together with the prohibition on torture in s 17(a), s 17(b) is modelled on Art 7 of the *ICCPR*. It reflects obligations contained in Art 2 and 16 of the *Convention Against Torture* (**CAT**) and is largely consistent with Art 3 *ECHR*.[42] Whilst torture is defined in Art 1 *CAT,*[43] 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

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[38] UN Human Rights Council, ***General Comment No 35****: Article 9: Liberty and Security of person,* UNDOC CCPR/C/GC/35, [12]; *Zenati v Commissioner of Police of the Metropolis* [2015] EWCA Civ 80 at [51]-[54].
[39] ***Thompson v Minogue*** (2021) 67 VR 301, 318 [55]; *Attorney-General for the State of Queensland v* ***Grant*** *(No 2)* (2022) 12 QR 357, [111]; *Johnston v Carroll,* [363].
[40] *General Comment No. 35*, [12]. *Re Kracke,* [187], [748]-[784].
[41] *Thyne, Wilson and Gunnell v United Kingdom* (Application nos 11787/85; 11978/86; 12009/86), par 25; *Oldham v United Kingdom* (Application no 36273/97), par 31, 37*; Hirst v United Kingdom* (Application no 40787/98) para 38; ***Vinter*** *and Others v United Kingdom* Applications Nos 66069/09, 130/10 and 3896/10 at [111], [119]; See also *Miller and Another v New Zealand Parole Board and Another* [2010] NZCA 600 and *Hall and Another v Parole Board of England and Wales* [2015] EWHC 252; ***Murray*** *v The Netherlands* (2016) GC 10511/10 at [101].
[42] 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 *HR Act.*
[43] Defined as the intentional infliction of severe pain or suffering for a specific purpose, excluding pain or suffering inherent or incidental to lawful sanctions.

"distinctions (that) depend on the nature, purpose and severity of the treatment applied."[44] Nevertheless, the United Nations *General Comment No. 20* makes clear that it is not only acts that cause physical pain that are encompassed, but also those which cause mental suffering.[45]

35. 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:[46]

    (a) the three concepts of cruel, inhuman or degrading treatment are *"employed disjunctively",* and are *"not a collocation";*

    (b) 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) for degrading treatment, the purpose behind it (to humiliate or debase) and effect of conduct will be important to in assessing its severity. It might involve "*treatment such as to arouse feelings of fear, anguish and inferiority capable of humiliating or debasing the victim and possibly breaking their physical or moral resistance or driving the victim to act against his will or conscience";* and

    (e) 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.

36. The text of Art 7 *ICCPR* provides for no limitation to the operation of the prohibition. *General Comment 20* states that no derogation from the right is allowed because "no justification or extenuating circumstances may be invoked to excuse a violation."[47]

37. Section 30 is modelled on Article 10(1) *ICCPR.* It places a positive obligation on the State to ensure that persons detained do not suffer hardship or constraint more than that which is a consequence of the imprisonment itself.[48] Other than the inevitable consequence of imprisonment, and its impact upon liberty, respect for the dignity of prisoners must be otherwise guaranteed under the same conditions as for free persons.[49]

38. The Guiding Principles for Corrections in Australia[50] whilst not prescriptive, include a statement of intent endorsed by state and federal correctional authorities. These emphasise that prisoners are to be managed and contained in a "*safe and humane"* manner where *"prisoner placement promotes individual rehabilitation and supports wellbeing."*[51]

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[44] 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), [4].
[45] Ibid, [5].
[46] *Re Kracke*, 119-121 [555]-[568]; ***Certain Children*** (2016) 51 VR 473, 500-502 [162]-[167]. A slightly different, less accurate summation of the authorities was adopted by John Dixon J in ***Certain Children (No. 2)*** (2017) 52 VR 441, 519 [250] and *Owen-D'Arcy* in turn, at 310 [186].
[47] *General Comment 20*, [3].
[48] ***Castles*** *v Secretary of the Department of Justice* (2010) 28 VR 141, [108].
[49] UN Human Rights Committee, ***General Comment 21****: Article 10 (Humane Treatment of persons deprived of their liberty)*, UN Doc HRI/GEN/1/Rev.9 (Vol. I) (10 April 1992) [3].
[50] Corrective Services Administrators' Council, *Guiding Principles for Corrections in Australia* (Revised 2018) 4.
[51] Ibid 11, 23.

39. Section 30 *HR Act* is intended to establish a *"minimum standard"* of treatment for incarcerated persons,[52] consistent with the United Nations resolutions concerning basic principles for the treatment of prisoners[53] *"reflecting a general shift in social views regarding acceptable treatment or punishment"*.[54]

40. Accordingly, the Mandela Rules[55] set out *"what is generally accepted as being good principles and practice in the treatment of prisoners and prison management".*[56] United Nations treaty bodies regularly reference these standards when determining whether or not a State has acted compatibly with its human rights obligations[57] and the United Nations Human Rights Committee has repeatedly emphasised that treatment in accordance with these standards is necessary to comply with the obligation of humane treatment of detained persons under Art 10(1) *ICCPR*.[58] The Mandela Rules relevantly provide:

    (a) All prisoners be treated with "the respect due to their inherent dignity and value as human beings" (Rule 1).

    (b) Torture and cruel, inhuman or degrading treatment or punishment are prohibited, for which in no circumstances may there be invoked any justification (Rule 1).

    (c) State responsibility for provision of health care for prisoners – who should enjoy the same standards of health care available in the community, and necessary health care services free of charge without discrimination on the grounds of legal status (Rule 24(1)).

    (d) Every prison should have a health care service tasked with evaluating promoting protecting and improving the physical and mental health of prisoners, paying attention to those with special health care needs or health issues that hamper their rehabilitation (Rule 25(1)).

    (e) The health care service shall consist of interdisciplinary team with sufficient qualified personnel acting in full clinical independence and shall encompass sufficient expertise in psychology and psychiatry (Rule 25(2)).

    (f) The purpose of imprisonment is to protect society against crime; and this can only be achieved if the term is used, so far as possible, to ensure rehabilitation (Rule 58).

    (g) Therefore, institutions should utilise all remedial, educational, moral, spiritual and other forces and forms of assistance where appropriate and available to apply to individual treatment needs of prisoners (Rule 59).

41. The ECtHR has stated that every prisoner must be detained in conditions compatible with respect for his human dignity, and not be subject to *"distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention",* which includes

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[52] Explanatory Notes, *Human Rights Bill 2018*, 25.
[53] 68th Plenary meeting of the General Assembly, 14 December 1990.
[54] *Corporation of the Canadian Civil Liberties Association v Canada* (2019) 144 OR (3d) 641, 651 [29] quoted in *Owen-D'Arcy,* [174].
[55] *United Nations Standard Minimum Rules for the Treatment of Prisoners*, UN Doc A/RES/70/175 (17 December 2015) (*Nelson* ***Mandela Rules***).
[56] *Mandela Rules*, Preliminary Observation 1.
[57] See, eg, Committee on the Rights of Persons with Disabilities, *Views: Communication No 84/2020*, 30th sess, UN Doc CRPD/C/30/D/84/2020 (19 March 2024) [13.7] ('al *Hawali Alghamdi v Saudi Arabia*'); Committee on the Elimination of Discrimination Against Women, *Views: Communication No 157/2020*, 87th sess, UN Doc CEDAW/C/87/D/157/2020 (12 February 2024) [7.4], [7.6] ('*ED and MD v Belarus*').
[58] Human Rights Committee, *Views: Communication No 3261/2018*, 139th sess, UN Doc CCPR/C/139/D/3261/2018 (23 October 2023) [7.9] and references cited.

adequate securing of health and wellbeing.[59] Accordingly, Emerton J in *Castles* found access to health care to be a fundamental aspect of the right to dignity.[60]

42. Whilst both rights in ss 17 and 30 concern treatment *"to some degree deserving of the epithet 'inhuman'"* they are distinct, although overlapping rights, and not simply different points on a continuum.[61] Section 30 then is "*the starting point"* for consideration of detainee rights, acknowledging the particular vulnerability of persons in detention.[62] Whether or not the entitlement has been denied is a question of fact and degree in all the circumstances.[63]

43. As reflected in the statement of compatibility accompanying the *Police Powers and Responsibilities and Other Amendments Bill 2021* which brought in the restricted prisoner regime[64] cases from the ECtHR establish that life sentences with no real prospect of parole or review will amount to inhuman treatment.[65] The statement suggests that by merely delaying the prospect of parole, this regime does not have that effect. The Commission does not agree, but the question need not be resolved at the abstract level given the following principles relevant to the specific features in this case.

44. Where imprisonment past the period of punishment set by the sentencing court is justified on the basis of risk to the public, the right protected in Art 3 ECHR places a positive obligation upon prison authorities to secure prison regimes to life prisoners which are compatible with the aim of rehabilitation and will enable *"a real opportunity to rehabilitate… realistically enabled, to the extent possible within the constraints of the prison context, to make such progress towards rehabilitation that it offers him or her the hope of one day being eligible for parole…"*.[66] It may be noted that the accepted purpose of parole itself generally is rehabilitative, which will be, because of its protective features, a benefit to both offender and community.[67]

45. Further, with respect to prisoners with mental health problems, Article 3 of the Convention requires states to ensure that their health and wellbeing is adequately secured by providing any requisite medical assistance. For those who have behavioural or personality disorders that impact upon risk of reoffending, in order for a State to comply with its obligations under Article 3, an assessment of prisoner needs must be made, which should address the likely chances of success of any particular kind of rehabilitation, taking into account the prisoner's individual situation and personality. If there is a treatment identified that *"may"* help, it should be facilitated to the extent possible in the prison context.[68]

46. Finally, it is well established in sentencing decisions that offenders who suffer from advanced age, physical or mental illness or disability will often have a far more difficult

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[59] *Castles,* 166 [96]-[97], referring to *Ilascu v Moldova* Application No 48787/99, 8 July 2004 at [428] and *Istratii v Moldova* [2005] ECHR 8721/05, 8705/05 and 8742/05 at [47]. See to similar effect *Eastman v CEO, Department of Justice and Community Safety* (2010) 4 ACTLR 161 [86]; ***Islam*** *v Director-General, Justice and Community Safety Directorate* [2024] ACTCA 22 [63].
[60] *Castles* 169 [108].
[61] *Owen-D'Arcy,* 308 [179]-[180], citing *Taunoa v Attorney-General (NZ)* [2008] 1 NZLR 429, 447 [5] and 498 [163] and *Castles,* 167 [99].
[62] *Castles,* 166 [93].
[63] *Islam v Director-General of the Justice and Community Safety Directorate* [2015] ACTSC 20, [87].
[64] Statement of Compatibility *Police Powers and Responsibilities and Other Amendments Bill 2021,* p21.
[65] *Vinter; Murray* at [99]-[100].
[66] *Murray* at [101]-[105], citing from *Vinter.*
[67] *R v Shrestha* (1991) 173 CLR 48, [20].
[68] *Murray* [106]-[112], [123].

time than other prisoners.[69] The ECtHR decisions recognise that unless the State protects the wellbeing of elderly prisoners with health problems subject to lengthy sentences, this too may give rise to problems of non-compliance with Article 3 (prohibition on torture).[70]

Section 37 HR Act

47. Section 37(1) relevantly provides the right to access health services without discrimination. Consistent with the Explanatory Notes,[71] the right has been drafted more narrowly than the international right to health[72] and the right to access health services contained in the South African Constitution.[73] There is no such right contained in the *Charter* or other Australian or New Zealand human rights instruments.

48. The right focuses on non-discrimination in one's access to health services. Given its wording, and consistent with the authorities discussed above regarding s 30, s 37 would cover discrimination in physical access, availability, acceptability and quality of health services for prisoners viz. those available for those in the community.[74] Meeting this requirement cannot be dependent upon the material resources available.[75]

Ground 2(b) – Proper consideration of human rights

49. The respondent has, with respect correctly,[76] not sought to rely upon s 58(2) *HR Act* as ousting the obligation in s 58(1). Accordingly, whilst the applicant's human rights were already relevant as part of the public interest in determining the term of any restricted prisoner declaration, s 58(1) provides more structure as to how to go about considering and weighing them.[77]

50. Victorian jurisprudence on the *Charter* equivalent to s 58(1) emphasises the importance of the provision as the manifestation of Parliament's intention that the *Charter* have a normative effect on administrative practice. The same is true of s 58(1) *HR Act*.

51. This gives strength to the procedural requirement to 'give proper consideration' in s 58(1)(b), which demands a *"higher standard of consideration than that generally applicable at common law to taking into account a relevant consideration. What is required is a weighing up, or balancing, of human rights against countervailing public and private interests."*[78]

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[69] *Lian* at [59], [70], [147].
[70] *Farbtuhs v Latvia* [2004] 4672/02, 84 yr old paraplegic, disabled to point of being unable to attend daily tasks; authorities under a higher duty to ensure conditions of detention consistent with needs arising from infirmity. By delaying his release for more than 1 year after governor applied for his release, Latvia failed to treat him consistently with Article 3. See also *Rozhkov v Russa, App No. 64140/00* at [104], [106].
[71] Explanatory Notes, *Human Rights Bill 2018 (Qld),* p 28.
[72] Article 12(1) *International Convention of Economic, Social and Cultural Rights* contains a right to enjoy the 'highest attainable standard of physical and mental health conducive to living a life of dignity'. This encompasses availability of services, accessibility, acceptability (ethically and culturally) and quality: ***General Comment No. 14 (2000) The Right to the highest Attainable Standard of Health,*** UN Committee on Economic, Social and Cultural Rights, 2000, par 12.
[73] *Constitution of the Republic of South Africa Act 1996*, s 27(1)(a) 'right to have access to health care services'.
[74] Noting these form part of the four interrelated elements encompassed by the international right: *General Comment No. 14*; *Castles* at [108].
[75] *General Comment 21* [4]. See *Certain Children* (No 1) [172]-[173]; *Islam* [60].
[76] That is because more than one course of action, in setting the term of the declaration, is open: *Scott* at 260 [140], 261 [143]-[144].
[77] *Scott* at 257 [120]-[121].
[78] *Bare,* 260 [235]. See also to similar effect at [273] [275]-[276], 280 [299] and *Sudi* at [271].

52. Section 58(5) of the HR Act provides an inexhaustive list of what proper consideration entails:[79]

    (a) identifying the human rights that may be affected by the decision; and

    (b) considering whether the decision would be compatible with human rights.

53. Accordingly, in *Owen-D'Arcy*, Martin SJA concluded that proper consideration included, but was not limited to, what is set out in s 58(5) which requires correctly identifying <u>all</u> rights that may be affected by a decision.[80]

54. Justice Martin also referred to with approval the test first described by Emerton J in *Castles,* and paraphrased by Tate JA in *Bare v IBAC* as follows:[81]

> ... for a decision-maker to give 'proper' consideration to a relevant human right, he or she must: (1) understand 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; (2) seriously turn 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; (3) identify the countervailing interests or obligations; and (4) balance competing private and public interests as part of the exercise of justification.

55. Nothing in the reasons given identifies, let alone seeks to weigh, the rights discussed above. In the Commission's submission, each of the rights discussed above were engaged by the decision and required proper consideration and weighing against the other relevant factors in determining where the public interest lay in setting the term of the declaration made.

Ground 2(a) – Compatibility

<u>Legal principles</u>

56. An applicant for human rights relief need only establish a *prima facie* limit before the burden shifts to the respondent to justify the limits by reference to s 13 *HR Act*.[82]

57. 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.[83]

58. The Explanatory Notes to the *HR Act* indicate that the factors in s 13(2) were intended as a guide only, which 'generally align' with the principle of proportionality observed in other jurisdictions.[84] A 'pressing and substantial' public or social concern is more likely to be capable of justifying a limit placed upon human rights. The more important the right, and the greater the incursion, the more important the purpose will need to be.[85]

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[79] *Owen-D'Arcy* at [134].
[80] At [136]
[81] *Owen-D'Arcy* at [135]-[138]; *Bare* at 223 [288] and *Castles* at 184 [185]-[186].
[82] *Certain Children (No 2)* at [203]; *Owen-D'Arcy* at [128]-[132]; *Johnston v Carroll* [70]-[71].
[83] *Johnston v Carroll* 454 [436].
[84] *Re Kracke* at [133]-[134], *Re Lifestyle Communities Ltd (No 3)* [2009] VCAT 1869 at [322]-[334],.
[85] Explanatory Notes, p16-18.

59. The burden on public entities has been described as a *"heavy one"*[86] requiring *"a degree of probability commensurate with the occasion, and must be strictly imposed in circumstances where the individual concerned is particularly vulnerable"*.[87]

60. Further, in undertaking a review of whether the decision complied with s 58(1)(a), the judicial task involves a greater level of intensity than is ordinarily encompassed under traditional judicial review grounds. In the seminal decision *R v Home Secretary, Ex parte Daly*, Lord Steyn described the task in a way that has been picked up in cases in Victoria and Queensland since:[88]

> ... The starting point is that there is an overlap between the traditional grounds of review and the approach of proportionality ... But the intensity of review is somewhat greater under the proportionality approach ... I would mention three concrete differences without suggesting that my statement is exhaustive. First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations. Thirdly...the intensity of the review...is guaranteed by the twin requirements that the limitation of the right was necessary in a democratic society, in the sense of meeting a pressing social need, and the question whether the interference was really proportionate to the legitimate aim being pursued.

61. The following principles can be drawn from *Patrick's case*[89] and *Certain Children* and *Certain Children (No. 2)*,[90] each adopted in *Johnston v Carroll*:[91]

    (a) The determination of human rights unlawfulness requires 'an assessment that is closer to merits review than is usual in judicial review', going further into the facts and reasons than is usually the case. Precisely what intensity is required will vary from case to case.

    (b) Nevertheless, it does not become a merits review. The court's role is supervisory and not substitutionary,

    (c) The Court must make the evaluation by reference to the circumstances prevailing at the relevant time; but in doing so, decides the question on the basis of the evidence that is before it, which was not necessarily before the public authority.

    (d) The Court may give some deference to the decision-maker's expertise and experience, and transparent reasoning.

    (e) Ultimately, however, the Court must decide for itself whether the decision is incompatible with human rights.

Limits

62. The applicant has only sought to show a limit upon his right under **s 30(1) *HR Act*** to humane treatment in custody. When the scope of this right is considered, the Commission

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[86] *Owen-D'Arcy* [250].
[87] *Johnston v Carroll* [73] citing *Certain Children (No 2*) at [203]
[88] *R v Home Secretary, ex parte Daly* [2001] 2 AC 532, 546-548; see *Johnston v Carroll* at 452 [433].
[89] *PJB v Melbourne Health* (2011) 39 VR 37
[90] *Certain Children* at [212]-[213]; *Certain Children (No. 2)* at [208]-[212], [216]-[218].
[91] *Johnston v Carroll,* 451-453 [430]-[436].

submits that the applicant's right to humane treatment *was* limited by the setting of the term of the declaration at 8 ½ years in that:

(a) he has essentially been treated as irredeemable, in light of the very advanced age he will be when the declaration expires, and in circumstances where the kind of intensive psychological treatment that may be necessary to treat his personality disorder, emotional dysregulation and pyromania has not been available to him, and will not be made so, whilst in custody;

(b) his advanced age, and deteriorating physical and mental facilities will mean his time in custody will be far more onerous than for able-bodied younger persons; and

(c) this will occur in circumstances where his primary carer is a fellow prisoner, upon whom he relies for basic hygiene and care, and has no access to medical staff overnight.

63. Indeed, if the applicant's health issues reached the point where he could not be adequately cared for in the prison environment, ECtHR jurisprudence indicates that continued incarceration would not only limit his right to humane treatment under s 30(1), but could rise to the level of cruel, inhuman or degrading treatment – which could never be demonstrably justified in a democratic society. Under the restricted prisoner regime established in the *CS Act,* an application for exceptional circumstances parole is likely to require his condition to have deteriorated to a point beyond that threshold.[92]

64. Commensurate with the limitation to his right to humane treatment, the circumstances of the applicant's inability to access intensive psychological treatment to deal with his personality disorder, emotional dysregulation and pyromania, occurs because he is in prison. Accordingly, this limits his right of non-discriminatory access to health care (**s 37(1) *HR Act***).

65. The Commission additionally submits that the applicant's right to freedom from arbitrary detention (**s 29(2) *HR Act***) is limited. That is, that on the objective material, in the absence of information from the respondent, the setting of 8½ years before review is *"capable of giving rise to an inference of arbitrariness"* that the term imposed interferes with his liberty *"beyond what is reasonably necessary to achieve the statutory or other lawful purpose."*[93]

66. The factors that are capable of leading to that inference are: there are no eligible persons who have been identified as being potentially affected by a shorter period, the medical evidence gives rise to the possibility that his health conditions will deteriorate to the point where he presents no real risk and/or the prison facilities will be ill-suited to his care in the meantime; and there was no justification given for the period of time adopted.

Justification analysis

67. Section 13 *HR Act* directs attention to whether any limit placed upon a right is reasonable and demonstrably justified, in a *"free and democratic society, based on human dignity, equality and freedom",* taking into account the following matters.

Nature of human rights and extent of limitation:

68. With respect to **s 30(1),** treating all persons deprived of their liberty with humanity and with respect for their dignity is recognised as 'a fundamental and universally applicable

[92] *CS Act*, s 176A.
[93] *Thompson v Minogue,* [47], [55]-[57].

rule'.[94] Access to adequate and equal health care, protected in s **37(1)** forms an essential part of the need to afford human dignity to prisoners.

69. Further, the right to liberty, of which the protection from arbitrary detention forms an important part (s **29(2)**) is one of the most important rights protected not only under the *HR Act,* but also at common law. Its *"fundamental value … is freedom, which is a prerequisite for individual and social actuation and for equal and effective participation in democracy."*[95]

70. The interference with each of these rights is deep because of the length of the declaration. The applicant will be prevented from seeking release until 2031.

71. Although the evidence indicates that the applicant's healthcare needs are currently manageable in a custodial setting, his serious healthcare issues mean that this question may need to be revisited in the short to medium term – something that is precluded by the declaration. In addition, the length of the declaration puts the applicant in a position where there is no incentive for prison authorities to address the lack of provision of any, let alone adequate, mental health treatment or other criminogenic-focussed programs. This too is a deep limitation on his right to humane treatment, particularly where the sentencing judge specifically recommended this in 1997.

Purpose of the limit:

72. The purpose of the restricted prisoner regime, as expressed in the Explanatory Note for the Bill introducing it, is *"to protect the community and reduce the re-traumatisation of victims' families, while ensuring public confidence in the parole system"*. [96] The respondent's reasons reflected these aims.[97]

73. Protection of the community is an important aim, and protects others' human rights to life, liberty and security: ss 16, 29(1) *HR Act.* The protection of victims' families from re-traumatisation can also be of importance in the abstract, but was of less significance here where none have been identified and engaged in the applicant's case. Finally, whilst confidence in the parole system is somewhat important, it does not reach the level of importance attached to confidence in the courts and does not translate to the need for positive media reporting. The most important purpose to the limit upon all the applicant's rights is to ensure community safety.

Relationship with purpose:

74. The continued imprisonment of the applicant for 8½ years achieves the purpose of preventing him from committing further violent offences. No other purpose would seem to be assisted by the declaration given that no eligible person was identified.

Less restrictive ways:

75. In light of the particular circumstances of the applicant, including the real potential of a significant decline in his health and cognitive functioning, a less restrictive alternative was to impose a declaration for a shorter period within the range allowed by the legislation.

76. This would enable reconsideration of the extent of hardship imposed on the applicant by the custodial environment in light of his health issues and any future decline in his

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[94] *General Comment No. 21* [4], *Certain Children* [172]-[173]; *Islam* [60].
[95] *Re Kracke,* [665], cited with approval in *Johnston v Carroll,* 442 [377]-[378].
[96] Explanatory Notes, *Police Powers and Responsibilities and Other Legislation Amendment Bill 2021,* p7.
[97] CD 4, Ex MB-1, Reasons, p13-14.

functioning, the risk to the public posed by the applicant in light of those health issues, and the effects of any treatment received for mental health issues. The respondent's reasons and notice of preliminary view do not give any indication of why the period was set, or how it was considered to be in the public interest.

77. Given the primary purpose of the declaration was protection of the community, and the absence of eligible people, another less restrictive way to achieve the purpose of protection of the community was to decide not to impose the declaration and permit his application for parole to be determined on the basis of whether he presents an unacceptable risk, subject to the legislative presumption.[98]

Balance:

78. Given the fundamental nature of the rights to humane treatment and freedom from arbitrary detention, and the serious interference with the applicant's rights over a long period of time, including the real prospect that the limitation of the applicant's rights will become even more significant over that period, the respondent has a heavy burden to show that an appropriate balance has been struck between the purpose of the limitation and the importance of preserving the human right. See *Owen-D'Arcy,* quoting with approval the adoption by the ECtHR in *Razvyakzin v Russia* of the following statement:[99]

> … any further restriction of a prisoner's rights must be linked to the actual or potential harm the prisoner has caused or will cause by his or her actions … Given that solitary confinement is a serious restriction of a prisoner's rights which involves inherent risks to the prisoner, the level of actual or potential harm must be at least equally serious and uniquely capable of being addressed by this means. … The longer the measure is continued, the stronger must be the reason for it and the more must be done to ensure that it achieves its purpose.

79. Protection of the community is a vital and legitimate purpose. However, this purpose is achieved through the ordinary parole system. Protecting the security of the person of victims' families is also an important purpose, however where none have registered as eligible persons under the Act, the possibility of harm to victims by repeated parole applications is lessened. The purpose of community safety would also be met by a shorter period for the declaration, or the general parole discretion.

80. When balanced against the deep (and likely increasingly severe) limitation of the applicant's rights to humane treatment, freedom from arbitrary detention and equal access to health services, in light of the reasonable alternatives available, a declaration of 8½ years' duration is not reasonable or demonstrably justified in a democratic society based on human dignity, equality and freedom.

Remedy

81. Despite a breach of s 58(1) *HR Act* not amounting to jurisdictional error (given s 58(6)(a)), this does not prevent the Court from making any order available to it under the *Judicial Review Act 1991,* including, setting aside the decision, ordering an injunction, or giving

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[98] *CS Act,* s 193AA.

[99] *Owen-D'Arcy* [253]-[258], citing *Razvyazkin v Russia* [2012] ECHR 1364, quoting *21st General Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*.

such declaratory relief as it sees fit.[100] A declaration can be suitably vindicative of human rights and promote the rule of law.[101]

P Morreau KC
Counsel for the QHRC

11 March 2025

[100] *Goode v Common Equity Housing* [2014] VSC 585, [39]; *Bare* at [329], [377], [461]-[463] and [569]; *Certain Children (No. 2),* 598 [549]*; Haigh v Ryan* [2018] VSC 474.
[101] *Johnston & Ors v Carroll & Ors* [2024] QSC 6 at [55], citing *Owen-D'Arcy*, [288].