SUPREME COURT OF QUEENSLAND

REGISTRY: Brisbane
NUMBER: 9472/20

Applicant:	MICHAEL STEPHEN OWEN-D'ARCY
	and
First Respondent:	CHIEF EXECUTIVE, QUEENSLAND CORRECTIVE SERVICES
	and
First Intervener:	ATTORNEY-GENERAL (QUEENSLAND)
	and
Second Intervener:	QUEENSLAND HUMAN RIGHTS COMMISSION

OUTLINE OF SUBMISSIONS
FOR THE QUEENSLAND HUMAN RIGHTS COMMISSION (INTERVENING)

Background

Intervention

1. The Queensland Human Rights Commission ('QHRC') intervenes in these proceedings pursuant to s 51 of the *Human Rights Act 2019* ('the HR Act'). In doing so, the QHRC confines its intervention to the application and effect of the HR Act upon the decisions.

Legislative framework

2. The *Corrective Services Act 2006* ('the CS Act') governs the making of maximum security orders ('MSO') and no association directions ('NAD').

3. The CS Act has as its purpose "community safety and crime prevention through *humane containment, supervision and rehabilitation of offences"*: s 3(1). The CS Act also expressly recognises, relevantly:

Queensland Human Rights Commission
Level 20, 53 Albert Street
Brisbane Q 4000
07 3021 9138
Sean.Costello@qhrc.qld.gov.au

(a) Every person has basic human entitlements which, other than those necessarily diminished by imprisonment, should be safeguarded: s 3(2); and

(b) The need to respect an offender's *"dignity":* s 3(3)(a).

4. Pursuant to s 60(3) of the CS Act, the power to make a MSO for up to 6 months' duration is conditioned on:

(a) The prisoner having a maximum security classification; and

(b) The chief executive reasonably believing there is, relevantly, *"a high risk"* of the prisoner killing or seriously injuring other persons with whom the prisoner may come into contact.

5. A consecutive MSO is permitted: s 61(1), conditioned on the prisoner being notified and having the opportunity to make submissions: s 61(3) CS Act.

6. A MSO must include, if practicable, directions about the extent to which, relevantly, the prisoner is to be separated from other prisoners: s 62(1)(a). The NAD was made pursuant to this provision.

7. A MSO permits a prisoner to be accommodated in a maximum security unit ('MSU'): s 60(1).

8. Under the "MSO Management" Sentence Management Guidelines,[1] accommodation in a MSU is to occur *"as considered necessary to manage the prisoner's individual risks and in consideration of relevant human rights."*[2] The placement is made to provide a secure environment for the safe management of a prisoner *"in accordance with the assessed risk"* to staff, other prisoners, the community etc., and *"to provide enhanced behaviour management and encourage behaviour modification."*[3]

Custodial policy

9. The *Guiding Principles for Corrections in Australia*[4] is not prescriptive, but rather, 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."*[5] Relevantly the Guiding Principles state:[6]

> *Prisoners placed in segregation/separation and/ or placed in a management or high security unit are managed under the least restrictive conditions consistent with the*

[1] Queensland Corrective Services Sentence Management Guideline "MSO Management", v2 17/12/2019.
[2] Ibid, p 5.
[3] Ibid, p 7.
[4] Introduction to *Guiding Principles for Corrections in Australia*, 2018, p 4.
[5] Ibid, p11, 23.
[6] Ibid, p18.

reason for their separation and to the extent necessary to minimise the associated risk.

10. The United Nations *Standard Minimum Rules for the Treatment of Prisoners* ('the Mandela Rules')[7] are not binding but are also influential in Australia and elsewhere. They relevantly provide that:

    (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) Discipline and order shall be maintained *"with no more restriction than is necessary to ensure safe custody, the secure operation of the prison and a well ordered community life"* (Rule 36);

    (d) *"Indefinite"* or *"prolonged"* solitary confinement is prohibited (Rule 43(1)). Solitary confinement is defined as confinement for 22 hours or more a day without meaningful human contact and prolonged means more than 15 consecutive days (Rule 44); and

    (e) Solitary confinement to be used only in exceptional cases as a last resort for as short a time as possible and subject to independent review (Rule 45(1)).

Relevant human rights

11. In terms of the effect upon the applicant of the decisions under review, there are four human rights listed in the HR Act which are potentially engaged:

    (a) The protection against cruel, inhuman or degrading treatment – s 17(b);

    (b) The right to humane treatment when deprived of liberty – s 30(1);

    (c) The right to liberty and security – s 29(1); and

    (d) The right to freedom of association – s 22(2).

12. In relation to others detained with the applicant and prison staff, their rights to liberty and security (s 29) and right to life (s 16) must also be considered.

13. In Victoria under the *Charter of Human Rights and Responsibilities Act 2006 (Vic)* ('the *Charter*'), rights are construed in the 'broadest possible way'[8] when considering their operation and any potential limitation. A similar approach is consonant with the HR Act.

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[7] United Nations *Standard Minimum Rules for the Treatment of Prisoners* ('the Mandela Rules') General Assembly resolution 70/175, adopted on 17 December 2015, UN doc A/Res/70/175.

[8] *DAS v Victorian Equal Opportunity and Human Rights Commission* (2009) 24 VR 415, 434 [80]; *De Bruyn v Victorian Institute of Forensic Mental Health* [2016] VSC 111, [102], [126]; *Certain Children v Minister for Families and Children* [2016] VSC 796 at [143], *Certain Children v Minister for Families and Children & Ors (No 2)* (2017) 52 VR 441 at [179].

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

14. Section 17(b) of the HR Act prohibits *"cruel, inhuman or degrading"* treatment of anyone, whether in prison or not. Together with the prohibition of torture in s 17(a), this is based upon Article 7 of the *International Covenant on Civil and Political Rights* (ICCPR).

15. Whilst torture is defined in Art 1 of the *Convention against Torture* (CAT),[9] other acts which might amount to cruel, inhuman or degrading treatment are not. 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."*[10]

16. However, General Comment No. 20 makes clear that it is not only acts that cause physical pain that are included, but also those which cause mental suffering.[11] It also notes that *"prolonged solitary confinement… may amount to acts prohibited."*[12]

17. The text of Art 7 ICCPR provides for no limitation to the operation of the prohibition. General Comment No. 20 to Art 7 states that no derogation from the right is allowed because *"no justification or extenuating circumstances may be invoked to excuse a violation."*[13]

Section 30(1) – treatment with humanity and respect

18. Section 30(1) HR Act requires that all persons deprived of liberty be treated *"with humanity and with respect for the inherent dignity of the human person."* This right, based on Article 10(1) ICCPR, places a positive obligation on the State to ensure that persons detained by it do not suffer any hardship or constraint more than that which is a consequence of the imprisonment itself. Respect for the dignity of such persons must be guaranteed under the same conditions as for free persons.[14]

19. This principle is adopted in the Explanatory Notes to s 30(1) and was called *"the starting point"* for consideration of prisoners' rights, by Emerton J in *Castles v Secretary of the Department of Justice*.[15] The Explanatory Notes also refer to this right as providing *"certain minimum standards of treatment"* for incarcerated persons.[16]

20. In *Callanan v Attendee Z,*[17] decided before the HR Act was enacted, Applegarth J was dealing with a contempt sentence where the defendant was to be placed in solitary confinement for the duration. His Honour accepted the psychological harms caused by

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[9] Defined as the intentional infliction of severe pain or suffering for a specific purpose, excluding pain or suffering inherent or incidental to lawful sanctions.
[10] 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].
[11] Ibid, [5].
[12] Ibid, [6].
[13] Ibid, [3].
[14] UN Human Rights Committee, '*General Comment 21: Article 10 (Humane Treatment of persons deprived of their liberty)*, UNDOC HRI/GEN/1/Rev.9 (Vol. I) (10 April 1992), [3].
[15] *Castles v Secretary of the Department of Justice* (2010) 28 VR 141; [2010] VSC 310 at [108].
[16] Explanatory Notes, *Human Rights Bill 2018*, p25.
[17] *Callanan v Attendee Z* [2014] 2 Qd R 11.

lengthy periods in solitary confinement were *"well established"* in research and literature.[18] His Honour quoted from the Human Rights Committee's decision in *Concluding Remarks on Denmark*[19] where it was stated that because of the harsh consequences of solitary confinement these measures will be justifiable *"only in case of urgent need"* as its use other than *"in exceptional circumstances"* and *"for limited periods"* was inconsistent with the standards set out in Art 10(1) ICCPR.

Overlap

21. Because the acts which might infringe on these rights are not defined, there is a clear potential for overlap. In respect of prolonged solitary confinement in particular, it has been considered in the context of both rights.

22. Nevertheless, it is also clear that the treatment prohibited in s 17(b) is of a more serious kind than the minimum standard encompassed by s 30(1). Thus, it is convenient to refer to the treatment prohibited in s 17(b) as a higher threshold than that in s 30(1).

23. The New Zealand Court of Appeal decision in *Taunoa v Attorney-General*,[20] dealing with both rights[21] and the difference between the two in the prison environment has been influential in Victoria.[22]

24. There, separate confinement of prisoners under a behaviour management regime was introduced after prisoner protests. Prisoners were subject to significant restrictions which were only progressively lifted based on behaviour. The 'cumulative conditions' of those subject to the greatest restrictions were found in the court below[23] to breach the lower threshold right of humane treatment. These included spending 22-23 hours confined to cells, limited contact with other prisoners, limited access to natural light and no ability to exercise in the yard. The primary argument on appeal was whether this conduct also breached the higher threshold of the equivalent to s 17(b).

25. Consistent with her review of comparative approaches, Elias CJ held that prolonged solitary confinement, even if lawful under the regulatory regime in place, may breach the higher threshold depending upon the conditions, the length of time and purpose for it.[24] In dissent, her Honour found that the treatment in *Taunoa* did breach that standard as *"collectively treatment that fell well below standards that befits a human being including one who is in prison and who has behaved badly in prison."*[25]

26. Her Honour's approach to the overlap between the two rights was summarised in *Castles v Secretary of the Department of Justice*:[26]

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[18] Ibid, [33]-[37].
[19] UN Doc CCPR/CO/70/DNK, 3 [12].
[20] *Taunoa v Attorney-General* [2008] 1 NZLR 429.
[21] Sections 9 and 23(5) of the *Bill of Rights Act 1990* (NZ).
[22] *Castles v Secretary of the Department of Justice* at [99]; *Certain Children (No 2)* at [244]-[245].
[23] *Taunoa v Attorney-General* (2004) 7 HRNZ 379.
[24] *Taunoa* CA (supra) at [39], [84-[86], [90].
[25] Ibid.
[26] *Castles* (supra) at footnote 38 to [99], referring to *Taunoa* CA at [5], [7], [69], [74]-[80], [91]-[92], [153].

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

27. Blanchard J[27] preferred a graduated assessment of treatment with *"degrees of reprehensibility"* for conduct which is all *"to some degree deserving of the epithet 'inhuman'".* Quoting from Professor Nowak:

> *... inhuman treatment within the meaning of Art 10 evidences a lower intensity of disregard for human dignity than that within the meaning of Art 7... a certain classification as to the kind and purpose of treatment can be seen, especially as regards the intensity of the suffering imposed; this runs from 'mere' degrading treatment or punishment, to that which is inhuman or cruel, up to torture as the most reprehensible form.* [28]

28. His Honour considered the higher threshold reached by conduct *"utterly condemned as outrageous and unacceptable"*. Conduct that was otherwise *"unacceptable"* fell within the requirement for humane treatment.[29]

29. Regarding isolation, his Honour said that not all instances will amount to cruel or inhuman treatment. In such cases, regard will be had to *"the particular conditions, the stringency of the measure, its duration, the objective pursued and its effect on the person concerned."*[30] Blanchard J found a breach in *Taunoa* of the equivalent to s 30 HR Act but not of s 17(b).[31]

30. Both Blanchard and Tipping JJ[32] remarked on the need, in assessing the level of unacceptability of the treatment, to reflect contemporary values held in New Zealand.[33]

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[27] With whom McGrath J agreed. Tipping J wrote a concurring judgment in essentially the same terms as Blanchard J, but noted the "elusive and inconsistent" approaches to the issue taken globally: see *Taunoa* CA at [278], [280], [289], [294]-[295].
[28] *Taunoa* CA at [163], [170], quoting Nowak, *UN Covenant on Civil and Political Rights* (2nd rev ed, 2005), 245.
[29] *Taunoa* CA at [170]-[171].
[30] *Taunoa* CA at [156], [158], [187].
[31] As did Tipping, McGrath and Henry JJ.
[32] With whom McGrath and Henry JJ agreed.
[33] *Taunoa* CA at [146] and [279.]

31. A similar approach to Blanchard J was taken by Garde J in *Certain Children v Minister for Families and Children.*[34] His Honour adopted an approach that would see *"grossly disproportionate"* confinement as meeting the higher threshold. Relevant factors noted were:

- the duration of the treatment,
- its physical or mental effects, and
- the sex, age and state of health of the alleged victim. Children should be accorded treatment appropriate to their age.

Section 29 – Right to liberty

32. The applicant submits that his right to liberty is also limited by the actions and decisions of the respondent.

33. The QHRC submits that the conditions of someone's deprivation of liberty are best assessed against the protection in s 30 or where appropriate, s 17. However, this does not necessarily mean subjecting someone to further restrictions on their liberty will not engage s 29. Whether this protection arises essentially turns on whether those deprived of liberty retain a 'residual right to liberty'. Victorian case law on this point seems to follow the approach of the United Kingdom courts that no such residual right occurs.[35] Nonetheless, as cited by the applicant, some residual right for prisoners may exist under Canadian law. European Court of Human Rights authorities suggest this depends on the circumstances.

34. In considering the right to liberty and security of the person in Article 9 of the ICCPR, the UN Human Rights Committee has observed that in order for detention not to be arbitrary (on the grounds of mental health), '*States parties must offer to institutionalized persons programmes of treatment and rehabilitation that serve the purposes that are asserted to justify the detention.*'[36]

Section 22(2) – Freedom of association

35. Section 22(2) provides that every person has the right to freedom of association with others. This right is based on Article 22 of ICCPR and is also protected under Article 11 of the *European Convention on Human Rights*.

36. In addition to the protections against solitary confinement, Rule 88 of the Mandela Rules states in relation to prisoners under sentence:

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[34] *Certain Children v Minister for Families and Children* [2016] VSC 796 at [162]-[167].
[35] E.g. *Gesah v Ross & Ors* [2013] VSC 165 at [50], *Regina v Ashworth Hospital Authority (now Mersey Care National Health Service Trust) (Appellants) ex parte Munjaz (FC) (respondent)* [2005] UKHL 58, *Munjaz v United Kingdom* (Application no. 2913/06) [65] – [67].
[36] United Nations Human Rights Committee, '*General Comment 35: Right to Liberty and Security',* UN DOC CCPR/C/GC/35, [19].

The treatment of prisoners should emphasize not their exclusion from the community but their continuing part in it.

37. Nonetheless, cases involving the segregation of those in detention have generally been assessed against protections specific to those deprived of liberty, rather than the freedom of association.[37] Freedom of association, like many rights, is necessarily compromised by the fact the person has been deprived of his or her liberty.[38]

Limits on relevant human rights

38. The conditions under which the applicant has been placed in solitary confinement for seven years now, without meaningful human contact and in the absence of a clear plan for reintegration into 'normal' prison life, clearly engage his right to humane treatment when deprived of liberty under s 30(1).

39. Decisions in other jurisdictions on whether segregation amounts to cruel or inhuman treatment within the meaning of s 17(b) vary according to the combination of features. The QHRC submits that primarily due to the length of time involved, the lack of personal contact, and the absence of any clear path to release, this right is also engaged.

40. The respondent must demonstrate that the limitations to these rights are reasonable and justified within the meaning of s 13.

Decision-making under s 58(1)

Overview

41. The respondent is a public entity[39] such that the decision-maker was required to comply with s 58(1) HR Act. Section 58(1)(a) makes unlawful an act or decision made in a way that is not compatible with human rights. Section 58(1)(b) requires, as a condition of lawfulness, that "proper consideration" be given to a human right relevant to the decision.

42. Both limbs must be satisfied.[40] The QHRC commends the approach of John Dixon J in *Certain Children v Minister for Families and Children & Ors (No 2)* to assessing compliance with s 58(1):[41]

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

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

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[37] E.g. *Rohde v Denmark* Application no. 69332/01 (21 July 2005) ECHR, *Bollan v The United Kingdom* Application no. 4217/98 (4 May 2000).
[38] *Castles* at 169 [109], *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, 537 [5].
[39] Section 9 HR Act.
[40] *Certain Children (No 2)* at [225]-[226].
[41] *Certain Children v Minister for Families and Children & Ors (No 2)* (2017) 52 VR 441 at [174], *Minogue v Dougherty* [2017] VSC 724 at [74].

(c) if so, is that limit under law reasonable and is it demonstrably justified having regard to the matters set out in [s 13(2) of the HR Act]? (the proportionality or justification question);

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

(e) was the act or decision made under an Act or instrument that gave the public authority no discretion in relation to the act or decision [s 58(2)], or does the Act confer a discretion that cannot be interpreted under [s 48 HR Act] in a way that is consistent with the protected right (the inevitable infringement question).

Proper Consideration – s 58(1)(b)

43. Section 58(5) of the HR Act provides an unexhaustive list of what proper consideration might entail:

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

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

44. Victorian jurisprudence on s 38(1) of the *Charter* emphasises that the provision is the manifestation of Parliament's intention that the *Charter* have a normative effect on administrative practice. The same is true of s 58(1) of the HR Act. This gives strength to the procedural requirement to 'give proper consideration':[42]

> *The 'proper' consideration to be given to human rights by those engaged in public administration demands a higher standard of consideration than that generally applicable at common law to the taking into account of relevant consideration. What is required is a weighing up, or balancing, of human rights against countervailing public and private interests. To treat the obligation to give proper consideration to human rights as an obligation of some stringency is consistent with the model of the Charter as intended to have a normative effect on the conduct of public authorities.*

45. Accordingly, proper consideration under s 38(1) involves:[43]

> *Understanding in general terms which of the rights of the person affected by the decision may be relevant and whether, and if so how, those rights will be interfered with by the decision that is made. As part of the exercise of justification, proper consideration will involve balancing competing private and public interests. There is no formula for such an exercise, and it should not be scrutinised over-zealously by the courts.*
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> *While I accept that the requirement in s 38(1) to give proper consideration to a relevant human right requires a decision-maker to do more than merely invoke the Charter like*

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[42] *Bare v Independent Broad-Based Anti-Corruption Commission* (2009) 24 VR 415 at 260 [235]. See also to similar effect at [273] [275]-[276], 280 [299] and *Director of Housing v Sudi* (2011) 33 VR 559, [2011] VSCA 226 at [271].

[43] *Castles* at [185]-[186], [221]; *Bare v ICAC* (ibid) at [217]-[221], [275]-[277], [285], [288]-[289], [291], [298].

a mantra, it will be sufficient in most circumstances that there is some evidence that shows the decision-maker seriously turned his or her mind to the possible impact of the decision on a person's human rights and the implications thereof for the affected person, and that the countervailing interests or obligations were identified.

46. Proper consideration cannot be discharged after the decision has been made.[44]

47. In a passage particularly apposite here, Garde J in *Certain Children* stated:[45]

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

Contentions

48. The statement of reasons provided on 5 August 2020 identify the most relevant rights limited by the MSO decision and purports to balance these against other relevant considerations including the rights of other prisoners and prison staff.

49. However, the reasons do not demonstrate an understanding of the nature or scope of the rights at all, or give them any particular weight in the balancing process.

50. Further, as identified by the applicant in relation to the No Association Direction, these reasons do not consider rights other than the right to peaceful assembly and freedom of association in s 22 of the HR Act. The right to humane treatment under s 30(1), at least, was also relevant to the NAD.

51. The identification of rights is one part of engaging in proper consideration. However, it is not the complete task. Rather, a genuine engagement with the relevant rights, including their breadth, consideration of less restrictive options, and balancing of them as against others' human rights or other public interests is required.

52. The QHRC submits that it is open to find that there has not been proper consideration of the applicant's human rights in respect of either decision.

Compatibility with human rights – s 58(1)(a)

53. The duty in section 58(1)(a) of the HR Act is to be assessed by:

(a) Establishing that a public entity has acted or made a decision;

(b) That action or decision limits one or more human rights (a prima facie incompatibility) (see section 8(a)); and

[44] *Certain Children* at [190]-[191].
[45] *Certain Children* at [193]-[194].

(c) Whether the limit upon the human right is only to the extent that is reasonable and demonstrably justifiable (section 8(b) and 13).

54. In *Certain Children v Minister for Families and Children (No 2)* John Dixon J suggested a two-step process for assessing incompatibility:[46]

(a) The plaintiff/applicant for human rights relief need only establish prima facie incompatibility, before the burden would shift to the defendant public entity to justify the limitations caused by their action/decision.

(b) The burden on the public entity to justify limitations is high, requiring a degree of probability commensurate with the occasion, and must be strictly imposed in circumstances where the individual concerned is particularly vulnerable.

55. A similar approach is contended to be appropriate here.

Reasonable and justifiable limits

56. 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:

(a) the nature of the human right;

(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;

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

(e) the importance of the purpose of the limitation;

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

(g) the balance between the matters mentioned in paragraphs (e) and (f).

57. In so providing, the HR Act recognises that human rights are not absolute; they may be subject to reasonable limits which are justified in a free and democratic society. This may occur in the context of competing rights and interests held by others or countervailing matters of public policy, where these are of significance. The HR Act also expressly

[46] *Certain Children (No 2)* at [203].

invokes proportionality analysis, a principle that has hitherto only featured in a constitutional context in Australia.[47]

58. Section 13 is modelled on section 7 of the *Charter*. In *Re an Application Under the Major Crimes (Investigative Powers) Act 2004*,[48] the Victorian Supreme Court invoked the approach of the Canadian Supreme Court to s 1 of its *Charter of Rights* in *R v Oakes*[49]where it was stated:[50]

> *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".*

59. After referring to *Oakes*, Warren CJ went on to state:[51]

> *The onus of "demonstrably justifying" the limitation in accordance with s 7 resides with the party seeking to uphold the limitation.* ***In light of what must be justified, the standard of proof is high****. It requires a "degree of probability which is commensurate with the occasion". King J observed in Williams that the issue for the court is to balance the competing interests of society, including the public interest, and to determine what is required for the accused to receive a fair hearing. It follows that the evidence required to prove the elements contained in s 7 should be "****cogent and persuasive and make clear to the Court the consequences of imposing or not imposing the limit****"…*
>
> *The court is directed by s 7(2) to consider the importance of the purpose of the limitation and the measures adopted to achieve the objective in question. It seems a matter of logic that* ***the measures adopted in limitation of the right must be of sufficient importance*** *to the uphold a free and democratic society to justify limiting a human right guaranteed by the Charter. It is clear* ***the 'more severe the deleterious effects of a measure, the more important the objective must be*** *if the measure is to be reasonable and demonstrably justified in a free and democratic society'.*

60. In the UK under the *Human Rights Act 1998* (UK), without a statutory requirement to consider proportionality, a series of questions similar to those required by *R v Oakes* have

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[47] *McCloy v New South Wales* (2015) 257 CLR 178 at 194-195 [2]-[3], 215 [72], 217-219 [75]-[89].
[48] *Re Application Under the Major Crimes (Investigative Powers) Act 2004* (2009) 24 VR 415, [2009] VSC 381.
[49] [1986] 1 SCR 103. The approach formulated in *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).
[50] *Re an Application* at 449 [148].
[51] *Re an Application* at 449 [147] and [150].

now been adopted,[52] although the requirement that the analysis strike a fair balance between the interests involved overall has also been emphasised.[53]

61. The Constitutional Court of South Africa favours a more 'nuanced and context-sensitive form of balancing'[54] exercise, emphasising that the question is one of degree to be assessed in the legislative and social setting of the measure under consideration. The more substantial the inroad into fundamental rights, the more persuasive the grounds of justification must be.[55]

62. 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.[56] 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.[57]

63. Whilst the *Oakes* approach has found favour in various contexts and remains instructive, the factors contained in s 13 are taken from the South African Constitution, which makes that jurisdiction also a relevant comparator.[58]

Contentions

64. The QHRC submits that this matter involves a balancing of the rights of the applicant against the rights and safety of other prisoners and staff of the Brisbane Correctional Centre. This is particularly so given the respondent's offending behaviour and particularly violent conduct while in prison.

The nature of the human right
The importance of preserving the human right, taking into account the nature and extent of the limitation on the human right;

65. Rights to humane treatment and protection from cruel, inhuman or degrading treatment are important rights going to the core of protecting the human dignity of persons vulnerable to the exercise of power by the state.

66. There is a significant degree of intrusion of these rights.

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.
The importance of the purpose of the limitation.

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[52] *R v Home Secretary, ex parte Daly* [2001] 2 AC 532 at [27].
[53] *Huang v Secretary of State for the Home Department; Kashmiri v Same* [2007] 2 AC 176 at [19].
[54] *Christian Education South Africa v Minister of Education* CCT 4/00 (CC Sth. Afr.) at [30].
[55] *S v Manamela & Anor (Director-General of Justice Intervening)* 2000 (5) BCLR 491 (CC) at [22]-[23]; *S v Bhulwana, S v Gwadiso* [1995] ZACC 11; 1966 (1) SA 388 (CC) at [18].
[56] *Kracke v Mental Health Review Board* (2009) 29 VAR 1 at [133]-[134], *Re Lifestyle Communities Ltd (No 3)* [2009] VCAT 1869 at [322]-[334], *Re Application* at [148], *Momcilovic* VCA at [147].
[57] Explanatory Notes, p16-18.
[58] *Momcilovic* HC at [552]-[553] (Crennan and Kiefel JJ).

67. As the applicant has identified, the safety and protection of prison staff and other prisoners, as well as maintaining the general security of the facility are important and substantial objectives.

68. It is consistent with a free and democratic society based on human dignity, equality and freedom to act proactively to protect others, but where to do so infringes on an individual's rights to humane treatment and involves severe restrictions on the person's liberty, it is only consistent if the assessed risk is high and no other less restrictive reasonably available option to meet the safety concerns.[59]

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

69. The limitation does help to achieve its purpose.

Whether there are any less restrictive and reasonably available ways to achieve the purpose;

70. The applicant has apparently not engaged in violent behaviour since mid-2014 and has been assessed as acting appropriately by prison authorities. He has been separated from other people in that time. As noted by the decision-maker, he has also not been given the opportunity to demonstrate rehabilitation outside the strictures of the MSU. No graduated re-integration has been attempted since 2014.

71. A less restrictive reasonably available approach to achieving safety in the prison would be a decision that permits gradual re-integration and supervised interaction with other prisoners.

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

72. Both the purpose of the limitation and the importance of preserving the relevant human rights are significant, as is the extent of the limitation.

73. Overall, the QHRC submits that in light the failure to provide for opportunities for re-integration and rehabilitation, or for association in supervised conditions, and the fact that this MSO and NAD are made after 7 years of similar orders, the decisions are not reasonable and justifiable within the meaning of s 13 of the HR Act.

Supreme Court review under s 59(2)

Operation of s 59(2)

74. Sub-sections 59(1) and (2) permit a person who has a cause of action available to them for relief on the grounds of the unlawfulness of an act or decision to seek the same remedy on the ground of unlawfulness under s 58(1).

[59] *RJE v Secretary to the Department of Justice* [2008] VSCA 265 at [113]-[119]; *Secretary to the Department of Justice and Regulation v Fletcher (No 4)* [2017] VSC 32 at [71]-[76].

75. In the present case, this applicant has pleaded other grounds. Section 59(2) therefore permits review on the grounds of unlawfulness arising under s 58(1).

Review of compatibility

76. In undertaking a review of whether the decision complied with s 58(1)(a), the judicial task involves a more significant level of intensity than is ordinarily encompassed under traditional judicial review grounds.

77. *R v Home Secretary, Ex parte Daly,* Lord Steyn described the task as follows:[60]

> *... 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.*
>
> *The differences in approach between the traditional grounds of review and the proportionality approach may therefore sometimes yield different results. It is therefore important that cases involving convention rights must be analysed in the correct way. This does not mean that there has been a shift to merits review ... And Laws LJ rightly emphasised in Mahmood,* ***'that the intensity of review in a public law case will depend on the subject matter in hand'****. That is so even in cases involving Convention rights. In law context is everything.*

78. In *Certain Children* and *Certain Children (No. 2)* Garde and John Dixon JJ adopted this approach. These cases indicate:[61]

- 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.

- There is a 'limited' degree of deference to the decision maker (on fact-finding, discretionary considerations and balancing) reflecting the different institutional functions of the court and the executive decision-maker.[62] In conducting the review, the court is engaging in its supervisory jurisdiction. The degree of weight given to the

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[60] *R v Home Secretary, ex parte Daly* [2001] 2 AC 532, 546-548.
[61] *Certain Children* at [212]-[213]; *Certain Children (No. 2)* at [208]-[212], [216]-[218].
[62] This is consistent with what was said in *McCloy* at 220 [91]-[92]. See also per Gageler J at 235 [142], 238-239 [151]-[156] and Nettle J at 269-270 [254]-[255].

original decision-maker's views will vary in accordance with the context, any relevant expertise and experience, and the extent to which the decision is supported and justified by transparent reasoning.

- Proportionality, however (under s 13), must be judged objectively by the court.

79. In *Doré v Barreau Du Québec*,[63] the Supreme Court of Canada established the "reasonableness" ground of administrative review to assess the application of *Charter* values in the exercise of discretion.[64] The role of the court on review was described in the following way:

> *[57] On judicial review, the question becomes whether, in assessing the impact of the relevant Charter protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the Charter protections at play. As LeBel J. noted in Multani, when a court is faced with reviewing an administrative decision that implicates Charter rights, "[t]he issue becomes one of proportionality" (para. 155), and calls for integrating the spirit of s. 1 into judicial review. Though this judicial review is conducted within the administrative framework, there is nonetheless conceptual harmony between a reasonableness review and the Oakes framework, since both contemplate giving a "margin of appreciation", or deference, to administrative and legislative bodies in balancing Charter values against broader objectives.*

Effect of unlawfulness

80. In Victoria, the weight of authority is that a breach of s 38(1) of the *Charter* [s 58(1) HR Act] does not of itself render the decision invalid.[65] This is consistent with what has been expressed in s 58(6)(a) in the HR Act.

81. Nevertheless, that does not preclude the court's discretion to grant declaratory and if necessary injunctive relief.[66]

82. A breach of s 58(1) will still ground relief under the *Judicial Review Act 1991* and at common law.

P Morreau
Counsel for the QHRC (intervening)
10 October 2020

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[63] [2012] 1 SCR 395.
[64] Ibid, at [55]-[56].
[65] *Bare v Independent Broad-based Anti-corruption Commission*, *Certain Childre*n, *Certain Children (No. 2).*
[66] *Certain Children (No 2)* at [556], citing *Bare v IBAC* at [152], [388] and [624].