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

SUPPLEMENTARY SUBMISSIONS FOR THE QUEENSLAND HUMAN RIGHTS COMMISSION (INTERVENING)

Introduction

1. Since argument was heard in the present case, certain decisions elsewhere have been identified as relevant to the *Human Rights Act 2019* (Qld) ('HRA') grounds. Essentially:

   (a) *Islam v Director-General, Justice and Community Safety Directorate*[1] ('*Islam v D-G'*) and *Francis v Ontario*[2] considered the ACT and Canadian counterparts, respectively, to s 17(b) HRA; and

[1] *Islam v Director-General, Justice and Community Safety Directorate* [2021] ACTSC 33 ('*Islam v D-G*').
[2] *Francis v Ontario* [2021] ONCA 197.

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(b) *Minogue v Thompson*[3] dealt with the requirements of proper consideration and compatibility under the Victorian equivalent to s 58(1) of the HR Act.

2. These submissions are made in accordance with the Court's direction inviting further submissions in relation to these cases.

Section 17(b) HRA

3. The Canadian cases, particularly, *Corporation of the Canadian Civil Liberties Association v Canada (Attorney-General)*[4] ('CCCL') in respect of the federal system and *Francis v Ontario* dealing with the provincial system, have determined that legislative provisions allowing for administrative segregation of *any* prisoner in a corrective facility for *longer than 15 days* are invalid for breaching s 12 of the *Canadian Charter of Rights and Freedoms* ('the Canadian Charter'). These cases therefore highlight the duration of the segregation as a factor of significance. Even though conditions are relevant, the fact of social isolation through segregation of itself can, and does, cause serious harm regardless of the individual's subjective level of vulnerability.

4. Section 12 of the Canadian Charter prohibits 'cruel and unusual treatment or punishment' and has been interpreted to address the same high threshold of conduct as that encompassed in Article 7 of the *International Covenant on Civil and Political Rights* ('ICCPR') and Article 3 of the *European Convention.*[5] Section 17(b) of the HRA, together with s 17(a), are based on Article 7 of the ICCPR. Unlike the rights as contained in the ICCPR and the European Convention however, and like those in Australian and New Zealand human rights statutes, s 12 of the Canadian Charter may be subject to reasonable limits, under s 1.

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[3] *Minogue v Thompson* [2021] VSC 56.
[4] *Corporation of the Canadian Civil Liberties Association v Canada (Attorney-General)* (2019) 144 OR (3d) 641 (*'CCCL'*) at [4]-[5].
[5] *CCCL* at [58]-[59]; *Francis v Ontario* at [20]; *Certain Children v Minister for Families and Children* [2016] VSC 796 at [162]-[167]; and *Certain Children v Minister for Families and Children (No. 2)* (2017) 52 VR 441 at 519 [250].

5. In both *CCCL*[6] and *Francis v Ontario*[7] expert evidence was led at first instance that indicated that the Mandela Rules – prohibiting solitary confinement for longer than 15 days – represented international consensus achieved in 2015 about the harms of extended solitary conditions. The harm is both foreseeable and to be expected. It is potentially permanent. A minimum level of harm occurs *'without exception'* after the 15-day period. In coming to that conclusion, the court in *CCCL* rejected an argument that the less severe conditions of the regime meant that it did not amount to solitary confinement as defined in the Mandela Rules.[8] In *Francis v Ontario,* the breaches of s 12 as against the particular applicant were not contested, given *CCCL,* but Ontario resisted the class-wide claims. However, that argument was rejected, given the evidence of likely harm to all prisoners once prolonged confinement (longer than 15 days) occurred.[9]

6. It may be submitted by other parties that the absence of expert evidence in this case serves as a point of distinction from the Canadian authorities. However, it is clear that the evidence from Canada, like that reviewed by Applegarth J (prior to 2015) in *Callanan v Attendee Z*[10] is well-established and *ad idem* about the harmful impacts of solitary confinement, and particularly, prolonged solitary confinement (meaning longer than 15 days). Professor Mendez, whose evidence featured in *CCCL* and was replicated in *Francis,* was the Special Rapporteur whose report led to the adoption in 2015 of the 15 day maximum period. His opinions – as a most eminent expert in this field – have been adopted at the international level and reflected in the Mandela Rules. In the context here, of very lengthy detention (a 6 month MSO after 7 years of consecutive orders), this Court can accept the expert evidence that is now universally acknowledged.

7. *Islam v D-G* dealt with a situation where segregation for short periods (3-7 days) was imposed for alleged behavioural breaches. McWilliam AsJ reviewed a number of the authorities that have already been referred to the Court in this matter, and adopted the

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[6] *CCCL* at [27]-[28], and [72]-[77].
[7] *Francis v Ontario* at [16].
[8] *CCCL* at [25].
[9] *Francis v Ontario* at [21], see also at [18] and [45].
[10] *Callanan v Attendee Z* [2014] 2 Qd R 11.

approach taken in the *Certain Children* decisions.[11] However, because *Islam v D-G* dealt with such short periods of confinement, it will not be of much further assistance here.

8. Importantly, in *CCCL,* the court held that societal views on what is acceptable treatment or punishment had evolved to the level that prolonged solitary confinement was no longer tolerable.[12] Accordingly, the level of harm, and its broad application, were such that justification under s 1 was not able to be shown.[13] This is consistent with the approach of the Supreme Court of New Zealand in *Taunoa v Attorney-General.*[14] *Taunoa* dealt with shorter periods of time than here[15] but the various judgments emphasised that cases elsewhere may be helpful but are not binding. Each case requires an assessment of fact and degree, and what amounts to inhuman treatment will be determined on a national basis and may evolve over time.[16] What *CCCL* and *Francis v Ontario* highlight is the international consensus reached in 2015 about the harmful effects of more than 15 days in solitary conditions.

Review of compliance with s 58(1) HRA

9. The approach taken by Richards J in *Minogue v Thompson* to the procedural limb of s 58(1), viz. s 58(1)(b), was to emphasise the stringent nature of the enquiry, requiring genuine engagement with the rights.[17] In reviewing a decision for compliance with this limb, his Honour indicated that there was no room for deference to the decision-maker. Whilst well-reasoned consideration of rights may suggest more weight can be given to the balance struck by a decision-maker in the ultimate result, the reverse does not apply.[18]

10. As to the substantive limb, Richards J adopted a similar approach to the Court's task on review as was applied in the *Certain Children* decisions. It was 'necessarily more intense'

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[11] *Islam v D-G* at [85]-[97].
[12] *CCCL* at [29], [101].
[13] *CCCL* at [124]-[126]; *Francis v Ontario* at [19].
[14] *Taunoa v Attorney-General* [2008] 1 NZLR 429.
[15] Two separate lengths: 8 months and 24 months for Mr Taunoa, 12 months for Mr Robinson, 3 months for Mr Kidman and 6 ½ weeks for Mr Gunbie: see *Taunoa* (ibid) at 447 [4].
[16] *Taunoa* per Elias CJ at 476 [93]-[94] and the authorities cited there; Blanchard J at 500-501 [172], [176]-[180]; Tipping J at [279].
[17] *Minogue v Thompson* at [46].
[18] Ibid, at [49]-[50].

than traditional review because it requires an objective assessment of the fact-finding that was undertaken and an evaluation on review of the balance struck between the competing considerations. His Honour noted that the burden is on the respondent, the standard is 'stringent' and justification shown only on the basis of 'cogent and persuasive' evidence.[19]

P Morreau
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14 April 2021

[19] *Minogue v Thompson* at [80]-[82].