

THE RIGHTS OF PRISONERS UNDER THE *VICTORIAN CHARTER*: A CRITICAL ANALYSIS OF THE JURISPRUDENCE ON THE TREATMENT OF PRISONERS AND CONDITIONS OF DETENTION

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I INTRODUCTION

The *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('*Charter*') fully came into force on 1 January 2008. The *Charter* provides statutory protection for civil and political rights, and imposes obligations in relation to rights-compatible statutory interpretation (section 32) and public decision-making compatible with rights (section 38). These are novel enforcement mechanisms within the Victorian legal system.¹

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Please note the *United Nations Standard Minimum Rules for the Treatment of Prisoners* (1955) were revised in 2015. The revised rules, to be known as the 'Mandela Rules', were recently adopted by the United Nations General Assembly (General Assembly, *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Mandela Rules)* UN Doc E/CN.15/2015/L.6/Rev.1 (21 May 2015).

1 Prior to the *Charter*, there was no comprehensive document identifying and protecting rights, and no mechanisms ensuring laws were interpreted consistently with human rights and imposing human rights obligations on public authorities. Rather, rights were protected and enforced by a patchwork of statutory provisions (including anti-discrimination laws), the development and operation of the common law, statutory interpretation techniques developed by the judiciary (including the principle of legality), limits imposed under federal constitutional law, and through the interaction of underlying constitutional principles (eg, parliamentary sovereignty and responsible government). See Julie Debeljak, 'Does Australia Need a Bill of Rights?' in Paula Gerber and Melissa Castan (eds), *Contemporary Perspectives on Human Rights Law in Australia* (Lawbook, 2013) 37, 38–51.

Statutorily protected rights, coupled with enforcement mechanisms, provide a new avenue for the protection of rights in Victoria. However, there has been a distinct under-utilisation of the *Charter* in the courts. Indeed, in co-editing a journal volume on the development of Victorian rights jurisprudence, Warren CJ and Tate JA lamented that '[d]espite the encouragement of courts, and the support of individual judges, we continue to see reluctance on the part of practitioners to raise arguments under the *Charter*'.² Their Honours anticipated that the journal articles would 'assist practitioners to identify relevant issues and to ask the right questions about a case', and allow them to present the Court 'with cogent submissions on the *Charter*'s operation and effect on statutory interpretation'.³ The blame for the under-utilisation of the *Charter*, however, does not lie solely with legal practitioners. There are examples of judicial avoidance and minimisation of *Charter*-based arguments and findings, as well as judicial misunderstanding of the relevant *Charter* issues.

This article explores *Charter* jurisprudence in Victoria through a case study on the rights of prisoners.⁴ Prisoners have much to gain from the *Charter*, but surprisingly this is not borne out in the jurisprudence. There have been only two successful prisoner's rights cases in the Victorian public prisons system in the past 30 years,⁵ and the *Charter* 'has generated far less litigation concerning prisoners'⁶ than comparative jurisdictions with rights instruments.

2 Chief Justice Marilyn Warren and Justice Pamela Tate, 'Editorial' (2014) 2 *Judicial College of Victoria Online Journal* 2, 3.

3 Ibid. More broadly, their Honours expressed hope that the articles would 'assist practitioners to develop their skills and expertise in *Charter* jurisprudence': *ibid.*

4 The choice of case study stems from an Australian Research Council Linkage Project entitled 'Applying Human Rights Legislation in Closed Environments: A Strategic Framework for Managing Compliance' (2009–12). Associate Professor Bronwyn Naylor, Dr Inez Dusseuyer and myself (as chief investigators) and Anita Mackay (as researcher) have been considering the impact of the *Charter* on the rights of people in closed environments. Emeritus Professor Arie Freiberg and Professor Stuart Thomas have also been involved as chief investigators. The chief investigators have been supported by a team of collaborating organisations: the Commonwealth Ombudsman, the Victorian Ombudsman, the Victorian Equal Opportunity and Human Rights Commission ('VEOHRC'), the Office of the Public Advocate (SA), the Office of the Inspector of Custodial Services (WA), and the now defunct Office of Police Integrity (Vic). This research has mainly focused on the response to the *Charter* of the government, a range of closed environments, and people detained in the closed environments. However, another aspect has been enforcement of the *Charter* through the courts, which is the focus this article. A 'closed environment' may be defined as 'any place where persons are or may be deprived of their liberty by means of placement in a public or private setting in which a person is not permitted to leave at will by order of any judicial, administrative or other order'. The definition of 'closed environment' given here was employed in the ARC project and based on the definition of places where people are deprived of liberty in art 4 of the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 18 December 2002, 2375 UNTS 237 (entered into force 22 June 2006). The closed environments considered in Victoria include prisons, police cells, forensic psychiatric institutions, and closed mental health and disability facilities – all facilities linked to the collaborating organisations, which have an external monitoring role in relation to closed environments.

5 See Knight, 'Defendant's Submissions', Submission in *A-G (Vic) v Knight*, S CI 2003 9420 and S CI 2014 4677, 14 October 2014, 4 [12], citing *Castles v Secretary, Department of Justice* (2010) 28 VR 141 ('*Castles*') and *Knight v Secretary, Department of Justice* [2012] VSC 613.

6 Matthew Groves, 'Prisoners and the Victorian Charter' (2010) 34 *Criminal Law Journal* 217, 217.

This article begins by exploring the impediments to rights realisation in prisons, highlighting the rights vulnerabilities of persons held in closed environments.⁷ The article then critically examines the *Charter*-based jurisprudence concerning prisoners, concentrating on the conditions of detention or treatment of prisoners.⁸ There is no single focus to the *Charter*-based challenges within prisons. The article will consider cases concerning:⁹ first, section 47(1) rights under the *Corrections Act 1986* (Vic) ('*Corrections Act*'); secondly, the place of detention; and thirdly, the conditions of detention and sentencing.¹⁰ Analysis will focus on how the *Charter* was or was not used, and how *Charter* arguments could be used and/or used more effectively in future litigation based on comparative jurisprudence.

The article concludes by identifying challenges facing *Charter* litigation. To date, 'rights-successful' decisions have occurred in the *shadow* of the *Charter*, rather than directly *under* the *Charter* – that is, the jurisprudence is '*Charter-inspired*' rather than '*Charter-based*'. To better protect rights,¹¹ the *Charter* must become a source of *reliance* in litigation and jurisprudence, not merely a source of *inspiration*. Clarification of the operation of the limitation/proportionality test (section 7(2)) and the statutory interpretation mechanism (section 32(1)), and their interaction, will be vital to moving from *Charter-inspired* to *Charter-reliant* decision-making.

7 See above n 4.

8 The question is not the legitimacy of the detention (ie, the right to liberty). Rather, the question is the rights-compatibility of the conditions of detention and the treatment of detainees whose detention is assumed to be lawful.

9 There are two additional categories of jurisprudence that have emerged – cases concerning freedom of information and access to courts, and cases concerning prison management – but word restrictions do not allow full analysis of these. In relation to freedom of information and access to courts, see *Horrocks v Department of Justice* [2012] VCAT 241 (Unreported, Judge Ginnane V-P, 2 March 2012); *Lonigro v Victoria Police FOI Division* [2013] VCAT 1003 (Unreported, Member Dea, 14 June 2013); *Rogers v Chief Commissioner of Police* [2009] VCAT 2526 (Unreported, Senior Member Davis, 26 November 2009). In *Horrocks v Department of Justice* and *Rogers v Chief Commissioner of Police*, the place of the *Charter* was recognised, and rights-based arguments were thoroughly explored and considered. Although there is some scope for critique, especially in *Rogers v Commissioner of Police*, VCAT decision-makers appear quite comfortable with *Charter* arguments. In relation to prison management, see *Rich v Secretary, Department of Justice* [2010] VSC 390, [45] (Bell J) ('*Rich*'); *Knight v A-G (Vic)* [2010] VSC 99; *Knight v Wise* [2014] VSC 76; *Brazel v Westin* [2013] VSC 527. This series of cases relating to prisoner access to the courts is mixed. Although some cases highlight the importance of the right to fair trial and equality before the law (see, eg, *Rich* [2010] VSC 390; *Knight v Wise* [2014] VSC 76), no decisions in fact interfered with the management practices within the prison system. See also Lisa Harrison, 'Prisoners and their Access to the Internet in the Pursuit of Education' (2014) 39 *Alternative Law Journal* 159.

10 A fourth category of cases concerning the conditions of detention and bail provides another interesting case study, but words do not permit a thorough examination. This fourth category will be briefly explored within the third category of cases concerning the conditions of detention and sentencing.

11 One goal of the *Charter* is to better protect rights in Victoria: Office of the Attorney-General (Vic), 'Victoria Leads the Way on Human Rights' (Media Release, 20 December 2005).

II SECURING RIGHTS IN PRISONS

Closed environments,¹² such as prisons, have features that increase the risks of rights violations. Those detained in prison are particularly vulnerable to abuse per se – they are detained in a security-focused environment,¹³ where a significant power imbalance exists between prisoners and those in their charge, and which creates a ‘total institution’.¹⁴ These features are amplified in the current prison climate, which is characterised by unsustainable growth in the prison population;¹⁵ the associated overcrowding of

12 See above n 4.

13 See Bronwyn Naylor, ‘Human Rights and Respect in Prisons: The Prisoners’ Perspective’ in Bronwyn Naylor, Julie Debeljak and Anita Mackay (eds), *Human Rights in Closed Environments* (Federation Press, 2014) 84, 85. Security concerns are cast widely, and often outweigh the protection of individual rights: Bronwyn Naylor, ‘Protecting the Human Rights of Prisoners in Australia’ in Paula Gerber and Melissa Castan (eds), *Contemporary Perspectives on Human Rights Law in Australia* (Lawbook, 2013) 395. See below nn 109, 305–6.

14 When people are in prison for long periods, the closed environment creates what Erving Goffman identified as a ‘total institution’: Erving Goffman, *Asylums: Essays on the Social Situation of Mental Patients and Other Inmates* (Aldine Publishing, 1962) 6. Within total institutions, ‘all aspects of life are conducted in the same place and under the same single authority’, such that detainees lose their autonomy and power to make decisions regarding day-to-day activities, which potentially compromises rights: at 5–6. For example, prisoners cannot freely exercise their cultural and religious practices, or maintain family and kinship connections: *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 27 (‘ICCPR’); *Charter* s 19; *Human Rights Act 2004* (ACT) s 27. Moreover, ‘each phase of ... daily activity is carried on in the immediate company of a large batch of others, all of whom are treated alike and required to do the same thing together’: Goffman, above n 14, 6. This has implications for specific rights (eg, privacy rights under ICCPR art 17, *Charter* s 13 and *Human Rights Act 2004* (ACT) s 12), and challenges the usual expectation of individualised decision-making as a means of upholding rights. Further, ‘the whole sequence of activities [is] imposed from above by a system of explicit formal rulings and a body of officials’: Goffman, above n 14, 6. The rules themselves potentially compromise rights (eg, violation of expression, privacy and correspondence rights occur due to constraints on communication with lawyers and family members), and the system itself reinforces the power imbalance between those deprived of their liberty and those in their charge.

15 From 2010 to 2014, the prison population in Victoria has grown from 4500 to 6100 prisoners, with a five-year growth rate of 40 per cent and the population growing 9 per cent and 14 per cent under the premiership of Denis Napthine: Peter Martin and Jane Lee, ‘Jail Figures Jump 40% in Two Years’, *The Age* (Melbourne), 12 December 2014, 2. For a longer-term perspective on Victorian prison rates, see the Victorian Sentencing Advisory Council report that found ‘Victoria’s imprisonment rate has risen from 94.2 prisoners per 100 000 adults in 2002 to 111.7 prisoners per 100 000 adults in 2012, with 47.4% of that increase occurring within the last four years’: Sentencing Advisory Council (Vic), *Victoria’s Prison Population 2002 to 2012* (Report, May 2013) 1. The increases are predicted to continue: Victorian Auditor-General, *Prison Capacity Planning* (Report, November 2012) xi.

facilities¹⁶ and impact on the treatment of detainees;¹⁷ the diverse needs of prisoners, including their physical and mental health needs;¹⁸ and the

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- 16 The Victorian Auditor-General considers ‘a 95 percent utilisation rate to be the “nationally- accepted limits for the same and efficient operation of the prison system”’, with the Productivity Commission reporting that Australian prisons were operating at 101 per cent of capacity nationally throughout 2010–11, and the Victorian Minister for Corrections admitting ‘[w]e have a significant problem with overcrowding in our prisons’: Naylor, ‘Human Rights and Respect in Prisons’, above n 13, 95–6, quoting Jesuit Social Services, Submission No 6 to Victorian Sentencing Advisory Council, *Baseline Sentencing*, October 2011, 10. The Victorian Ombudsman has observed that ‘[t]here is a crisis in overcrowded prison and police cells caused by inadequate beds in the Victorian prison system’: Victorian Ombudsman, *Investigation into Deaths and Harms in Custody* (Report, March 2014) 10 [8]. This has led to the use of shipping containers to accommodate people in Victoria: Jane Lee, ‘Prisoners Moved into Shipping Containers’, *The Age* (online), 6 January 2014 <<http://www.theage.com.au/victoria/prisoners-moved-into-shipping-containers-20140106-30d23.html>>. See generally Elizabeth Grant, ‘“Pack”em, Rack”em and Stack”em”: The Appropriateness of the Use and Reuse of Shipping Containers for Prison Accommodation’ (2013) 13(2) *Australasian Journal of Construction Economics and Building* 35.
- 17 The impacts of overcrowding include ‘[t]he loss of privacy in a crowded environment [which] leads to “psychological suffering and a loss of personal integrity”; it leads to restrictions on movement, on time out of the cell and on access to educational and work facilities ... and it reduces the safety of the facility’, as well as increasing ‘competition for prison services and resources such as [the] medical centre, gym, kitchen and phones’: Naylor, ‘Human Rights and Respect in Prisons’, above n 13, 96, quoting Jonny Steinberg, ‘Prison Overcrowding and the Constitutional Right to Adequate Accommodation in South Africa’ (Paper, Centre for the Study of Violence and Reconciliation, January 2005). Significantly, overcrowding can lead to increased exposure to the risk of violence and intimidation as people are required to share cells: Victorian Ombudsman, *Investigation into Deaths and Harms*, above n 16, 10 [12]. Overcrowding has also led to a shortage of places in rehabilitation programs: Victorian Ombudsman, *Investigation into the Rehabilitation and Reintegration of Prisoners in Victoria* (Discussion Paper, October 2014) 18 [107]. Such programs are often a requirement for parole, and the parole statistics indicate a substantial decrease in the number of people being granted parole: at 17 [96]–[97]. A reduction in the number of people being granted parole is contributing to the overcrowding in the prison system: at 17 [98]–[99].
- 18 Prisoners in Australia have poor health overall:
 Prisoners have significant health issues, with high rates of mental health problems, communicable diseases, alcohol misuse, smoking and illicit drug use. 38% of prison entrants have ever been told they have a mental illness, 32% have a chronic condition. 84% are current smokers, but almost half of them would like to quit.
 Australian Institute of Health and Welfare, *The Health of Australia’s Prisoners 2012* (Report, Cat No PHE 170, 2013) 195.
 In Victorian prisons, the Ombudsman has identified that ‘[a]s at 30 June 2013, 55 per cent of the Victorian prison population had an identified suicide/self-harm risk score. In addition, 42 per cent of the prison population had an identified psychiatric risk rating, indicating mental health concerns’: Victorian Ombudsman, *Investigation into Deaths and Harms*, above n 16, 56 [225]. Overcrowding has resulted in pressure on health services in prisons: at 122 [559]. Another factor that may increase pressure on prison health services is that the prison population is ageing at a faster rate than the general population: Susan Baidawi et al, ‘Older Prisoners – A Challenge for Australian Corrections’ (Trends and Issues in Crime and Criminal Justice Paper No 426, Australian Institute of Criminology, August 2011) 2.

management of matters ranging from drug and alcohol abuse to acquired brain injury.¹⁹

These features of prison undermine the residuum principle,²⁰ which provides that '[p]risoners are in prison *as* punishment not *for* punishment',²¹ and legally retain all rights other than the right to liberty.²² This principle is reflected in numerous *Charter* rights, such as the section 10 right to be free from torture and cruel, inhuman and degrading treatment, and the section 22 right to be treated with humanity and dignity when deprived of liberty. Whenever the loss of liberty restricts prisoner's rights, the *Charter* requires an assessment of the reasonableness and justification of the restriction under section 7(2).²³ On occasion, the balance will fall in favour of a prisoner. Where the balance is against the prisoner, the reasons for that decision must be fully articulated against the standards of reasonableness and justifiability, providing transparency of and accountability for decision-making.

19 National data shows that 70 per cent of imprisoned people have used illicit drugs in the 12 months prior to their incarceration, 47 per cent of males were found to be at risk of a high level of alcohol-related harm in the past 12 months, and a further 28 per cent were at low-risk: Australian Institute of Health and Welfare, above n 18, 74, 94. A Victorian study found that the prevalence of acquired brain injury in the Victorian prison population was 42 per cent for males and 33 per cent for females: Arbias and La Trobe University, *Acquired Brain Injury Screening, Identification & Validation in the Victorian Correctional System* (Report, 2010) 8. The Victorian Ombudsman has recently recommended improvements to the screening processes for identification of acquired brain injury because without this there are increased risks to the prisoner: Victorian Ombudsman, *Investigation into Deaths and Harms*, above n 16, 109–10.

20 For a discussion of the history of the treatment of prisons, from the 'civilly dead' doctrine to the more 'welfare'-oriented 'residuum' principle, see Naylor, 'Protecting the Human Rights of Prisoners', above n 13, 395–7.

21 *Rich* [2010] VSC 390, [45] (Bell J) (emphasis added).

22 The common law statement of this principle is found in *Raymond v Honey* [1983] 1 AC 1, 10G (Lord Wilberforce): Naylor, 'Protecting the Human Rights of Prisoners', above n 13, 396 n 6. Internationally, Principle 5 of the United Nations' *Basic Principles for the Treatment of Prisoners* states:

Except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the *Universal Declaration of Human Rights*, and, where the State concerned is a party, the *International Covenant on Economic, Social and Cultural Rights*, and the *International Covenant on Civil and Political Rights* and the *Optional Protocol* thereto, as well as such other rights as are set out in other United Nations covenants.

Basic Principles for the Treatment of Prisoners, GA Res 45/111, UN GAOR, 3rd Comm, 45th sess, 68th plen mtg, Agenda Item 100, Supp No 49, UN Doc A/Res/45/111 (14 December 1990) annex para 5.

Principle 9 states that '[p]risoners shall have access to the health services available in the country without discrimination on the grounds of their legal situation'. Justice Emerton refers to these in *Castles* (2010) 28 VR 141, 168 [103].

23 Section 7(2) of the *Charter* states:

A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including –

- (a) the nature of the right; and
- (b) the importance of the purpose of the limitation; and
- (c) the nature and extent of the limitation; and
- (d) the relationship between the limitation and its purpose; and
- (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

The challenge is to overcome the tensions between the residuum principle, and the detention of prisoners in a ‘total institution’²⁴ with design features that undermine rights.²⁵ With these risk features and tensions in mind, we examine the *Charter* jurisprudence on prisoner’s rights. Despite the risk features and tensions, consistent and effective engagement with the *Charter* has failed to materialise.

III SECTION 47(1) OF THE *CORRECTIONS ACT*

Section 47(1) of the *Corrections Act* lists the statutory rights of prisoners. It includes the right to open-air exercise, adequate food and clothing, take part in educational programmes, make complaints about prison management, and send letters to and receive letters from various public officials without those letters being opened by prison staff,²⁶ as well as religious rights and visiting rights.²⁷

There is, however, no statutory remedy for breach of section 47(1).²⁸ This may explain why section 47(1) had not been successfully enforced in legal proceedings prior to the *Charter*.²⁹ After the enactment of the *Charter*, section 47(1) has been successfully invoked, but the *Charter* was *not* instrumental in this success.³⁰ Critiquing the jurisprudence highlights strategies for more effective use of the *Charter*.³¹

24 See above n 14.

25 The importance of human rights in prisons cannot be underestimated. The intensity of living in a coercive environment, the often poor and crowded living conditions, the loss of autonomy, and the heightened emotions over seemingly minor issues, can lead to distress, anger, or even to violence. Naylor, ‘Human Rights and Respect in Prisons’, above n 13, 122.

26 See *Knight v Shuard* [2014] VSC 475. Knight challenged a decision by the Prison Manager to intercept his letters under ss 47(1)(n) and 47D(1) of the *Corrections Act 1986* (Vic). Knight argued that a prison policy involving a blanket prohibition on prisoners communicating with the media infringed his *Charter* rights – in particular, his s 13(a) right not to have his correspondence unlawfully or arbitrarily interfered with, his s 15 right to freedom of expression, and his s 18(1) right to take part in public life. Justice Rush held that the Prison Manager ‘correctly exercised his power pursuant to the Act’ and ‘did not take into account any prison policy, such that the implications of those policies on the rights of the applicant pursuant to the *Charter* are irrelevant on the facts’: *Knight v Shuard* [2014] VSC 475, [43].

27 These rights are ‘additional to, and do not affect any other rights which a prisoner has under an Act other than this Act or at common law’: *Corrections Act* s 47(2).

28 Groves, above n 6, 218.

29 See Naylor, ‘Protecting the Human Rights of Prisoners’, above n 13, 404; Groves, above n 6, 218. Rights under s 47 were raised in *Minogue v Williams* (2000) 60 ALD 366, but that aspect was not decided in the Federal Court. They were also raised without much impact in cases where prisoners claimed a right to access computers to assist with their preparation for legal proceedings: eg, *Rich v Secretary, Department of Justice* [2007] VSC 405; *Knight v Anderson* (2007) 16 VR 532. See Groves, above n 6, 218 n 6.

30 See below nn 38, 93.

31 For a discussion of the challenges to enforcing s 47(1), see Bronwyn Naylor, Julie Debeljak, and Anita Mackay, ‘A Strategic Framework for Implementing Human Rights in Closed Environments: A Human Rights Regulatory Framework and its Implementation’ (2015) forthcoming *Monash University Law Review*.

A Castles: Narrow Charter Enforcement

Castles was a female prisoner who wished to resume in-vitro fertilisation ('IVF') treatment at Melbourne IVF Clinic, which she began prior to her imprisonment. Castles' infertility was age-related – she was 45-years old when she applied for treatment, and would be ineligible for treatment by age 46. She would not be released from prison before turning 46,³² and so needed to resume treatment during her period of imprisonment.

Castles represents the prisoner's 'rights-success' under the *Charter* to date – yet, the *Charter* was not relied on, *Charter* rights were interpreted narrowly, and section 7(2) limitations analysis was avoided. As 'rights-successes' go, *Castles* is a close-call.³³

1 The Decision

Justice Emerton upheld Castles' application under section 47(1)(f) of the *Corrections Act*, which provides that all prisoners have a 'right to have access to reasonable medical care and treatment necessary for the preservation of health'.³⁴ Her Honour held that section 47(1) 'confers on Ms Castles the right to continue to undergo IVF treatment for her infertility',³⁵ although not necessarily at the clinic of Castles' choice,³⁶ and only on a visit-by-visit basis.³⁷ Importantly, Emerton J based her decision on an ordinary interpretation of section 47(1)(f), with the *Charter* only 'serv[ing] to confirm the interpretation that had been arrived at in any event'.³⁸

32 Castles was convicted of social security fraud on 20 November 2009 and sentenced to three years' imprisonment, to be released on her own recognisance after 18 months: *Castles* (2010) 28 VR 141, 146 [6] (Emerton J).

33 'Successful' is in inverted commas because technically the resolution of the case did not rely on the *Charter*: see below nn 35–8, 93 and accompanying text.

34 The treatment was considered both 'reasonable' and 'necessary' under s 47(1)(f) 'given the commitment to the treatment that Ms Castles has already demonstrated, her willingness to pay for further treatment, her age and the fact that she will become ineligible for further treatment before she is released from prison': *Castles* (2010) 28 VR 141, 145 [3].

35 Ibid 145 [3].

36 Ibid 177 [147].

37 Castles had requested a general permit to leave the prison when necessary. Castles needed to attend Melbourne IVF Clinic three to four times per cycle, on dates which could not be predicted in advance: ibid 147 [12], 152 [32]–[33]. 'This require[d] her to travel to Melbourne on up to 24 occasions on unspecified dates over a six month period' such that she sought 'a permit authorising her to be absent from Tarrengower on an unspecified number of occasions at unspecified times over this period': at 179 [157]. Castles was not granted a permit to leave the prison to attend IVF treatment 'as is required over a number of months': at 145 [3]. Rather, she was 'eligible for permits on a visit by visit basis', subject to the satisfaction of the Secretary that the safety and welfare of Castles and the public had been considered, and that adequate and suitable transport was available: at 145–6 [3].

38 Ibid 146 [4].

2 The Rights

Castles relied on section 38(1) of the *Charter* – the prison was a public authority,³⁹ and section 38(1) made it unlawful for a public authority to act incompatibly with rights.

(a) Unsuccessful arguments

Castles' arguments based on the rights to found a family and privacy were unsuccessful.⁴⁰ Regarding the former, section 17(1) of the *Charter* states that '[f]amilies are the fundamental group unit of society and are entitled to be protected by society and the State'. Unlike article 23 of the *ICCPR*,⁴¹ section 17 does *not* additionally confer '[t]he right of men and women of marriageable age to marry and to found a family'. Although the Human Rights Consultation Committee ('HRCC')⁴² considered the right to found a family to be an essential right, it did not recommend its inclusion in the *Charter* because inclusion would pre-empt the Victorian Law Reform Commission ('VLRC') reference on assisted reproduction and adoption.⁴³ Justice Emerton noted the right was not included in the *Charter*,⁴⁴ with the Explanatory Memorandum stating '[i]t is not Parliament's intention to create a right to found a family in the *Charter*'.⁴⁵

39 *Charter* ss 3(1) (definition of 'public authority'), 4.

40 Castles also claimed a violation of her right to equality under s 8(2) of the *Charter*, given that other prisoners are entitled to conjugal visits, prisoners give birth in prison and prisoners are permitted to care for their children in prisons. Castles argued that 'denying a person who is infertile the opportunity to conceive when other female prisoners in the same or similar circumstances have that opportunity is less favourable treatment': *Castles* (2010) 28 VR 141, 155 [84]. Justice Emerton dismissed this argument, finding that '[r]esidential visits are not made available to facilitate procreation, but to enable existing family relationships to be maintained': at 165 [89]. Justice Emerton thus held that the evidence did not persuade her that an infertile prisoner wishing to become pregnant had received less favourable treatment than a fertile prisoner who wishes to become pregnant: at 165 [90].

41 *ICCPR* art 23(1) states that '[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State', and art 23(2) confers '[t]he right of men and women of marriageable age to marry and to found a family'. The full *ICCPR* right was not enacted in the *Charter*.

42 In 2005, the Victorian Government established the HRCC to undertake the community consultation about how best to protect rights in Victoria. The Chair of the HRCC, George Williams, recognised that the HRCC was designed to 'operate independently of the Attorney-General and of government', but noted that 'upon [the HRCC's] appointment', the *Statement of Intent* was released which 'set out the Government's preferred position on any human rights model for the state': George Williams, 'The Victorian *Charter of Human Rights and Responsibilities: Origins and Scope*' (2006) 30 *Melbourne University Law Review* 880, 886–7. See Department of Justice (Vic), *Human Rights in Victoria: Statement of Intent* (Statement, May 2005).

43 Rather than interfere with the VLRC process, the HRCC recommended that inclusion of the right be considered in the four-year review: *Castles* (2010) 28 VR 141, 156–7 [50] (Emerton J).

44 *Ibid* 157 [51].

45 *Ibid* 157 [52], citing Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 14 (emphasis altered). Prior to this, the Explanatory Memorandum notes: 'Sub-clause (1) provides that families are the fundamental group unit of society and are entitled to be protected by society and the State. This provision is modelled on article 23(1) of the *Covenant*'.

Given the limited protection under section 17,⁴⁶ argument turned to whether a right to found a family could be found within the section 13(a) right to privacy and family. In *Evans v United Kingdom*, the European Court of Human Rights ('ECtHR') held 'that respect for "private life" incorporates respect for decisions to become and not to become a parent'.⁴⁷ Although Emerton J recognised the relevance of comparative jurisprudence,⁴⁸ it did not sway her Honour, holding that '[t]o construe s 13(a) ... as incorporating a right to become a parent ... would be inconsistent with Parliament's stated intention'.⁴⁹ According to her Honour, the Explanatory Memorandum 'provides sufficient basis ... not [to] construe the rights that have been specifically selected for protection ... as including a right to found a family'.⁵⁰ Therefore, a *Charter* right 'which might otherwise have encompassed rights to ART ... should be construed as not encompassing such rights',⁵¹ closing the door on *indirect* recognition of a right that was *not directly* recognised.

By contrast, there are numerous examples of *indirect* recognition of rights that are *not directly* recognised in international jurisprudence.⁵² Such decisions are explicable by the 'living tree' characterisation of rights instruments.⁵³ The *Charter* was new when *Castles* was decided, and the express exclusion of direct protection was clearly articulated and democratically sanctioned by Parliament. Whether greater flexibility regarding the *indirect* recognition of rights will permeate the jurisprudence as the *Charter* ages remains to be seen.

Regarding the stand-alone section 13(a) privacy and family argument, *Castles* relied on *Dickson v United Kingdom*,⁵⁴ which considered a corrections policy that restricted access to IVF treatment. The ECtHR held 'that a refusal to provide artificial insemination facilities concerned the private and family lives of the applicants, which incorporated the right to respect for their decision to become

46 There was some argument about whether the HRCC's exclusion of the right to found a family was based on avoiding the limitations to that right in the *ICCPR* (ie the *ICCPR* right links the right to marry with the right to found a family, and the HRCC did not want to pre-empt the VLRC's conclusion about whether the right to found a family should be free-standing or linked/limited as per the *ICCPR*), and whether the remaining general corpus of international human rights law could assist: *Castles* (2010) 28 VR 141, 158 [58], 158–9 [60] (Emerton J).

47 Ibid 161 [69] (Emerton J), citing *Evans v United Kingdom* (2008) 46 EHRR 34.

48 *Castles* (2010) 28 VR 141, 161 [71].

49 Ibid 159 [62]. In particular, her Honour noted that the Explanatory Memorandum explicitly states the right was excluded and, although the statement was made 'in the context of s 17', 'it was expressed to apply to the *Charter* as a whole': at 159 [62].

50 Ibid 161 [72] (emphasis added).

51 Ibid.

52 See, eg, Human Rights Committee, *Views: Communication No 488/1992*, 50th sess, UN Doc CCPR/C/50/D/488/1992 (4 April 1994) ('*Toonen v Australia*'); Human Rights Committee, *Communication No 182/1984*, 29th sess, UN Doc CCPR/C/OP/2 (28 September 1984) 209 ('*Zwann-de Vries v Netherlands*').

53 That is, rights instruments must be flexible enough to respond to changing societal needs and conditions, and must be allowed 'to grow like "a living tree"': David M Beatty, *Talking Heads and the Supremes: The Canadian Production of Constitutional Review* (Carswell, 1990) 15, citing *Hunter v Southam Inc* [1984] 2 SCR 145, 153 (Dickson J).

54 [2007] V Eur Court HR 99.

genetic parents'.⁵⁵ The corrections policy 'set the threshold so high against' the prisoner and his wife 'that it did not allow a balancing of the competing individual and public interests and a proportionality test by the Secretary',⁵⁶ and thus violated the article 8 right to privacy and family life⁵⁷ under the *European Convention on Human Rights* ('ECHR').⁵⁸ Justice Emerton understood Castles' submission as confirmation that Castles was asserting a right to found a family by seeking to become a genetic parent, and that 'the privacy right should not be construed so as to encompass such a right'.⁵⁹

This confirms Justice Emerton's disinclination to allow *indirect* protection of a right that was *directly* excluded. There is, however, one difficulty. The ECtHR developed the parenting aspects of the right to a private and family life under article 8 of the *ECHR*, while the *ECHR* contains an explicit right to found a family under article 12.⁶⁰ Indeed, in *Dickson v United Kingdom*, the ECtHR resolved the issue under article 8 and held that it was unnecessary to examine the article 12 complaint.⁶¹ To protect parenting rights under article 8 was *not* considered an improper *indirect* protection of a claim that could be protected *directly* under article 12 by the ECtHR. Justice Emerton does not explain why *indirect* protection under an instrument that *could* provide direct protection, is any different to *indirect* protection under an instrument that *would* have provided direct protection but for the timing of the VLRC reference.⁶²

Were Castles' right to privacy considered engaged, Emerton J would have had to balance Castles' right to become a genetic parent against competing public interests under section 7(2) of the *Charter*. Public interest factors in *Dickson v United Kingdom* included: 'losing the opportunity to beget children was an inevitable and necessary consequence of imprisonment'; 'public confidence in the prison system would be undermined if the punitive and deterrent elements of a sentence [were] circumvented by allowing prisoners ... to conceive children'; and the absence of the imprisoned parent 'would have a negative impact on any child conceived and ... society as a whole'.⁶³ These factors were

55 *Castles* (2010) 28 VR 141, 163 [79] (Emerton J), citing *Dickson v United Kingdom* [2007] V Eur Court HR 99, 124 [66].

56 *Castles* (2010) 28 VR 141, 163 [79] (Emerton J), quoting *Dickson v United Kingdom* [2007] V Eur Court HR 99, 129 [82].

57 *Dickson v United Kingdom* [2007] V Eur Court HR 99, 130 [85].

58 *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953) art 8.

59 *Castles* (2010) 28 VR 141, 164 [81].

60 *ECHR* art 12 states: 'Men and women of marriageable age have the right to marry and to found a family'.

61 *Dickson v United Kingdom* [2007] V Eur Court HR 99, 130 [86].

62 Moreover, as Groves notes, while Emerton J rejected an expansive reading of the right to privacy where the Victorian Parliament explicitly rejected the inclusion of a right, this leaves open the possibility of expansive interpretations of rights where issues have not been considered and rejected by the Parliament: Groves, above n 6, 219.

63 *Dickson v United Kingdom* [2007] V Eur Court HR 99, 126–7 [74]–[76].

identified, analysed, and rejected by the ECtHR.⁶⁴ By contrast, the relevant public authorities did not have to articulate and justify the public interest being served in Castles' situation.

(b) *Successful argument*

The 'successful'⁶⁵ argument pertained to the section 22 right of persons deprived of their liberty to be treated with humanity and respect for their inherent dignity. Justice Emerton accepted that the section 10 prohibition on cruel, inhuman and degrading treatment 'prohibits "bad conduct" towards any person'; whereas 's 22 mandates "good conduct" towards people who are detained'.⁶⁶ Her Honour referred to the Human Rights Committee's ('HRC')⁶⁷ opinion that the right to humane treatment 'imposes a positive obligation towards persons who are particularly vulnerable because of their status as persons deprived of liberty'.⁶⁸ Justice Emerton referred to the *Standard Guidelines for Corrections in Australia (Revised 2004)* ('*National Guidelines*')⁶⁹ which are based on the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, *Standard Minimum Rules for the Treatment of Prisoners*, UN Doc A/CONF6/C1/L1 (14 February 1955) and endorsed by the Victorian Department of Justice.⁷⁰

To give content to section 22 in the context of access to medical treatment, Emerton J held it was 'necessary to go no further than' the *National Guidelines*

64 The inability to beget a child was not considered an 'inevitable' consequence of imprisonment; 'there [was] no place under the *Convention* system ... for automatic forfeiture of rights by prisoners based purely on what might offend public opinion'; and although the welfare of children was a legitimate concern, 'that cannot go so far as to prevent parents who so wish from attempting to conceive a child in circumstances like those of the present case, especially as the second applicant was at liberty and could have taken care of any child conceived until such time as her husband was released': *ibid*.

65 For an explanation of 'successful', see above n 33.

66 *Castles* (2010) 28 VR 141, 167 [99].

67 The HRC is established under *ICCPR* pt IV.

68 *Castles* (2010) 28 VR 141, 167 [100], citing HRC, *General Comment 21: Article 10 (Humane Treatment of Persons Deprived of Their Liberty)*, 44th sess (13 March 1993). Justice Emerton is referred by the VEOHRC to Principles 5 and 9 of the *United Nations Basic Principles for the Treatment of Prisoners*: see above n 22.

69 The *National Guidelines* provide, *inter alia*, 'that every prisoner is to have access to "evidence based" health services provided by a competent, registered health professional who will provide a standard of health services comparable to that of the general community'; 'that every prisoner is to have access to the services of specialist medical practitioners'; referrals 'should take account of community standards of health care'; that prisoners can 'receive treatment from private health professionals'; and where treatment precedes imprisonment, 'that prisoner should be permitted to maintain contact, on the approval of the prison health service, with the medical service that was treating the prisoner': *Castles* (2010) 28 VR 141, 169 [107] (Emerton J), citing *National Guidelines* paras 2.26, 2.27, 2.33, 2.35. The *National Guidelines* are 'explicitly only a "statement of national intent" and not "laws to be enforced"': Naylor, 'Human Rights and Respect in Prisons', above n 13, 91. Naylor recognises the importance of the *National Guidelines* 'in establishing concrete, if minimum, requirements and to guide policy and practice, but they are of little relevance to individual prisoners, providing no remedy for non-compliance': Naylor, 'Protecting the Human Rights of Prisoners', above n 13, 403.

70 *Castles* (2010) 28 VR 141, 168 [107].

and section 47 of the *Corrections Act*.⁷¹ Her Honour held that: ‘the starting point should be that prisoners not be subjected to hardship or constraint other than the hardship or constraint that results from the deprivation of liberty’; ‘access to health care is a fundamental aspect of the right to dignity’; and ‘the health of a prisoner is as important as the health of any other person’.⁷² However, although prisoners do not forfeit their rights, Emerton J recognised that a prisoner’s enjoyment of rights ‘will necessarily be compromised’,⁷³ “‘curtailed”, “attenuated” and “qualified”” by their deprivation of liberty.⁷⁴ Consequently, her Honour held that section 22 ‘does not encompass the right to any and all medical treatment that is available in the community’; but that the *more limited right* to medical treatment must guarantee ‘that the health of prisoners is protected and accorded no less importance than the health of other members of the community’.⁷⁵ According to Emerton J, section 47(1)(f) satisfies these requirements of the section 22 *Charter* right.

This analysis conflates two distinct questions: what is the scope of the section 22 right; and, if section 22 of the *Charter* is restricted by section 47(1) of the *Corrections Act*, is this reasonable and justifiable under the limitations provision in section 7(2) of the *Charter*?⁷⁶ Justice Emerton reads down the scope of section 22 of the *Charter* in order to accommodate the consequent compromises arising from the deprivation of liberty.⁷⁷ However, in comparative jurisdictions, rights are interpreted generously, and restrictions to rights are accommodated under limitations provisions. For example, the Supreme Court of Canada pursues broad, purposive interpretations of rights,⁷⁸ given that section 1⁷⁹

71 Ibid 169 [108].

72 Ibid. The same view has been expressed by the HRC: HRC, *General Comment 21: Article 10 (Humane treatment of persons deprived of their liberty)*, 13 March 1993 [3]; Human Rights Committee, *Views: Communication No 1818/2008*, 100th sess, UN Doc CCPR/C/100/D/1818/2008 (2 November 2010) 10 [6.8] (*McCallum v South Africa*).

73 *Castles* (2010) 28 VR 141, 169 [109]. At 170 [11], Emerton J quoted Lord Bingham in *R (Daly) v Secretary for the Home Department* [2001] 2 AC 532, 537 [5]: ‘Some rights, perhaps in an attenuated or qualified form, survive the making of [a custodial] order’.

74 *Castles* (2010) 28 VR 141, 170 [111] (Emerton J).

75 Ibid 170 [113].

76 See above n 23.

77 This is exactly what the VEOHRC sought to avoid when it submitted that ‘once a person is imprisoned, it becomes necessary for the authorities to justify any limitation on a prisoner’s right, other than the right to liberty’: *Castles* (2010) 28 VR 141, 167 [102].

78 *Canada Act 1982* (UK) c 11, sch B pt I (*‘Canadian Charter of Rights and Freedoms’*).

79 Section 1 of the *Canadian Charter of Rights and Freedoms* ‘guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society’. Section 7(2) of the Victorian *Charter* is highly derivative from s 1 of the *Canadian Charter of Rights and Freedoms*. The Explanatory Memorandum to the Victorian *Charter* notes that the limitations clause is based on the *New Zealand Bill of Rights Act 1990* (NZ): Explanatory Memorandum, *Charter of Human Rights and Responsibilities Bill 2006* (Vic) 9. However, it is more honest to acknowledge the influence of the *Canadian Charter of Rights and Freedoms*, which predates the New Zealand legislation by eight years and upon which the New Zealand legislation was based. There is a glaring resistance to acknowledge any influence of the *Canadian Charter of Rights and Freedoms*. One can only assume this is because of its constitutional status.

allows reasonable limits to be placed on rights.⁸⁰ In Canada, restrictions on rights are *not* incorporated into the definition of the rights themselves, because section 1 provides the mechanism for justifying limits to rights.⁸¹ This translates to recognising that section 22 dictates that prisoners have the *same right* to access to medical treatment as the rest of the community, *but* that it is reasonable and justifiable under section 7(2) to limit this right because of security, good order and the like. Instead, Emerton J read down the scope of section 22, and avoided the limitations/proportionality exercise that provides transparency and accountability for rights-limiting decisions.⁸² Deliberation on the types of factors considered in *Dickson*⁸³ may have produced a more favourable outcome for Castles.

The then recent Victorian Court of Appeal ('VCA') decision in *R v Momcilovic* ('VCA *Momcilovic*')⁸⁴ may have influenced Justice Emerton's reasoning. In *VCA Momcilovic*, the VCA unanimously held that section 32(1) of the *Charter* 'does not create a "special" rule of interpretation, but rather forms part of the body of interpretive rules to be applied at the outset, in ascertaining the meaning of the provision in question'.⁸⁵ To meet the section 32(1) obligation, a court must explore 'all "possible" interpretations of the provision(s) in question, and [adopt] that interpretation which least infringes *Charter* rights',⁸⁶ with the

80 This was first outlined in the case of *Hunter v Southam Inc* [1984] 2 SCR 145, but the most often-quoted case on the point is *R v Big M Drug Mart Ltd* [1985] 1 SCR 295. Appeals to limit rights at the definitional stage have been rejected, although, at different times, definitional limits have arguably influenced some judges' interpretations of *Charter* rights: see David Beatty, *Talking Heads and the Supremes*, above n 53, 78–84; David Beatty, 'The Canadian *Charter of Rights*: Lessons and Laments' in Gavin W Anderson (ed), *Rights & Democracy: Essays in UK–Canadian Constitutionalism* (Blackstone Press, 1999) 3, 14–19. Many commentators argue in favour of imposing some definitional criteria: see Robert J Sharpe, 'A Comment on David Beatty's "A Conservative's Court: The Politicization of Law"' (1991) 41 *University of Toronto Law Journal* 469, 477–9; Rainer Knopff and F L Morton, *Charter Politics* (Nelson Canada, 1992) 152; Jeremy Webber, 'Tales of the Unexpected: Intended and Unintended Consequences of the Canadian *Charter of Rights and Freedoms*' (1993) 5 *Canterbury Law Review* 207, 232–3.

81 This approach is also used in New Zealand: see Andrew Butler and Petra Butler, *The New Zealand Bill of Rights: A Commentary* (LexisNexis 2005) 120–2, 155–6; Paul Rishworth et al, *The New Zealand Bill of Rights* (Oxford University Press, 2003) 172–4. It is likewise used in South Africa: see Iain Currie and Johan de Waal, *The Bill of Rights Handbook* (Juta, 5th ed, 2005) 150–53, 164–8. One may also recall the words of Lord Wilberforce in *Minister for Home Affairs v Fisher* [1980] AC 319, 328–9 when describing the approach to interpreting rights and fundamental freedoms: 'These antecedents ... call for a generous interpretation avoiding what has been called "the austerity of tabulated legalism," suitable to give to individuals the full measure of the fundamental rights and freedoms referred to'; before concluding that [i]t is thus to "have effect for the purpose of affording protection to the aforesaid rights and freedoms" subject only to such limitations contained in it 'being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice... the public interest.'

82 There is a difference between limiting the definition of rights such that a particular governmental action is consistent with human rights, and finding a human right to be violated although justified.

83 See above n 63.

84 (2010) 25 VR 436.

85 Ibid 446 [35].

86 Ibid 464 [103] (The Court).

concept of ‘possible’ being bounded by the ‘framework of interpretative rules’.⁸⁷ The VCA then outlined a methodology for assessing whether a provision infringes a *Charter* right:

Step 1: Ascertain the meaning of the relevant provision by applying s 32(1) of the *Charter* in conjunction with common law principles of statutory interpretation and the *Interpretation of Legislation Act 1984*.

Step 2: Consider whether, so interpreted, the relevant provision breaches a human right protected by the *Charter*.

Step 3: If so, apply s 7(2) of the *Charter* to determine whether the limit imposed on the right is justified.⁸⁸

Of importance, the VCA held that section 7(2) is not relevant to interpretation⁸⁹ or assessing rights-compatibility,⁹⁰ but is a step preparatory to ‘enforcement’ via section 36(2) declarations of inconsistent interpretation.

The VCA *Momcilovic* methodology may have influenced Justice Emerton’s conflation of the scope and limitations questions into one, subject to two considerations. First, there is no reference to VCA *Momcilovic* in this part of her Honour’s reasons.⁹¹ Secondly, VCA *Momcilovic* does not sanction consideration of section 7(2) limitations at the interpretation stage, yet Emerton J did just this

87 The ‘framework of interpretive rules’ includes *Charter* s 32(1), *Interpretation of Legislation Act 1984* (Vic) s 35(a), and the common law rules of statutory interpretation, particularly the presumption against a parliamentary intention to interfere with or infringe rights (or, the principle of legality): *ibid*.

88 VCA *Momcilovic* (2010) 25 VR 436, 446 [35] (The Court).

89 The VCA refers to Chief Justice Elias’s dissent in *R v Hansen* [2007] 3 NZLR 1, where her Honour relies on the *Canadian Charter of Rights and Freedoms* to highlight that the limitations question is a ‘*distinct and later enquiry*’ to interpretation: VCA *Momcilovic* (2010) 25 VR 436, 466 [109] (emphasis added). Referring to the *Canadian Charter of Rights and Freedoms*, Elias CJ states:

The first question is the interpretation of the right. *In ascertaining the meaning of the right, the criteria for justification are not relevant.* The meaning of the right is ascertained from the “cardinal values” it embodies. Collapsing the interpretation of the right and the s 1 justification is insufficiently protective of the right.

R v Hansen [2007] 3 NZLR 1, 15 [22], quoted in VCA *Momcilovic* (2010) 25 VR 436, 466 [109] (The Court) (emphasis added).

The VCA’s reliance on this passage lies in its misunderstanding of what Elias CJ is discussing. Her Honour is discussing the ‘meaning of the right’, not the meaning of the challenged *legislation*. A discussion about the meaning of a right and its interaction with a limitations provision has been confused with a discussion about the meaning of *Charter* s 32(1) and its interaction with a limitations provision. The Canadian discussion about two ‘rights questions’ cannot be relied upon by the VCA in a discussion about the interaction between one ‘rights question’ (ie, s 7(2)) and one ‘*Charter* enforcement question’ (ie, s 32(1)). Chief Justice French similarly mistakenly relies on Elias CJ: *Momcilovic v The Queen* (2011) 245 CLR 1, 43 [33] (‘*HCA Momcilovic*’).

90 The VCA’s conclusion misunderstands the nature of limitations. It is widely acknowledged, and explicitly mentioned in Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 9, that not all rights are absolute; and that rights must be balanced against each other, and other communal values and needs: see generally Julie Debeljak, ‘Balancing Rights in a Democracy: The Problems with Limitations and Overrides of Rights under the Victorian *Charter of Human Rights and Responsibilities Act 2006*’ (2008) 32 *Melbourne University Law Review* 422. Justifiable limits on rights are not problematic, whereas unjustifiable limits on rights are problematic. Constitutional and statutory rights instruments develop mechanisms to address the latter – whether via a judicial invalidation mechanism, or judicial interpretation or declaration mechanisms, respectively.

91 *Castles* (2010) 28 VR 141 166–70 [93]–[113].

when reducing the scope of the section 22 rights. *VCA Momcilovic* has been undermined by the High Court of Australia in *HCA Momcilovic*,⁹² at least in relation to limitations analysis, and will be discussed below.

3 Requirement of section 47(1)

Having ensured that the ordinary interpretation of section 47(1) was consistent with section 22, Emerton J then considered the requirements of ‘necessity’ and ‘reasonableness’ under section 47(1).

Her Honour’s view that Castles’ IVF treatment was ‘*necessary*’ for the preservation of her reproductive health within section 47(1)(f) was ‘reinforced’⁹³ by, inter alia, the section 32(1) interpretative obligation of the *Charter*. Section 47(1)(f) of the *Corrections Act* had to be ‘construed consistently with the requirement that prisoners be treated with humanity and with respect for their human dignity’.⁹⁴ Humanity and dignity required ‘the provision of facilities, goods, services and conditions necessary for the realisation of the standard of health enjoyed by other members of the community’, and an interpretation of section 47(1)(f) consistent with these requirements was ‘open under the *existing rules of statutory interpretation* and afford[ed] proper protection against interfering with Ms Castles’ fundamental human rights’.⁹⁵

Consideration of whether treatment was ‘*reasonable*’ involved various factors,⁹⁶ including a clinical assessment, ‘the cost of the treatment and the magnitude of any disruption to the prison system’.⁹⁷ For Castles, a significant factor against reasonableness – both in terms of logistics⁹⁸ and opportunity costs⁹⁹ – was the request to travel from Tarrengower Women’s prison in Castlemaine to Melbourne¹⁰⁰ to receive the treatment, when treatment was available closer to the prison.

On this construction of section 47(1)(f), Emerton J held that ‘IVF treatment is both *reasonable* and *necessary* for the preservation of Ms Castles’ health’, but

92 (2011) 245 CLR 1. For an exploration of *VCA Momcilovic* (2010) 25 VR 436 and *HCA Momcilovic* (2011) 245 CLR 1, see Julie Debeljak, ‘Who Is Sovereign Now? The *Momcilovic* Court Hands Back Power over Human Rights That Parliament Intended It To Have’ (2011) 2(1) *Public Law Review* 15; Julie Debeljak, ‘Proportionality, Rights-Consistent Interpretation and Declarations under the Victorian *Charter of Human Rights and Responsibilities*: The *Momcilovic* Litigation and Beyond’ (2014) 40 *Monash University Law Review* 340.

93 *Castles* (2010) 28 VR 141, 173 [125] (Emerton J).

94 *Ibid* 173 [127] (emphasis added).

95 *Ibid* (emphasis added).

96 For Castles, the factors in favour of reasonableness included that: it was a continuation of treatment; it was Castles’ last chance to undertake the treatment; Castles would pay for the treatment; and, being a short-term prisoner, any resultant pregnancy would not place a burden on the prison: *ibid* 175 [139] (Emerton J).

97 *Ibid* 174 [133] (Emerton J). Treatment that is found to be necessary ‘is likely also to be reasonable’: at 175 [138] (Emerton J).

98 ‘[R]easonableness ... may be assessed having regard to the availability of the same treatment at alternative locations closer to the prison in the light of the undoubted logistical problems involved in transporting prisoners large distances to receive treatment’: *ibid* 175 [140] (Emerton J).

99 *Ibid* 175 [142] (Emerton J).

100 Castlemaine is a city in regional Victoria, approximately 123 kilometres from Melbourne.

that ‘this does not necessarily entail the right to receive such treatment ... at the Melbourne IVF Clinic’.¹⁰¹ Section 47(1)(f) would be satisfied if the Secretary, in consultation with Castles, investigated whether treatment was available closer to the prison and approved treatment at the alternative clinic.¹⁰² Justice Emerton opined:

Even in a human rights context, where the proportionality assessment is a key part of the court’s role and involves it engaging in ‘a high standard of review’ ... the court cannot enter into the process of fine-tuning arrangements that would satisfy the requirements of the *Corrections Act*, meet the health needs of Ms Castles and overcome the practical difficulties created by competing demands for resources within the corrections system.¹⁰³

4 *Permission to Leave the Prison*

Having established the section 47(1)(f) right, permission to leave the prison was considered. Section 57A of the *Corrections Act* allows the Secretary to issue permits to leave the prison for health purposes, but section 57D requires the Secretary to be satisfied that the safety and welfare of the prisoner and the public is assured, and that suitable escorts and transport are arranged.¹⁰⁴

According to Emerton J, section 57D dictated that permits may only be issued for a specified permit or a small group of permits close in time,¹⁰⁵ and that the right under section 47(1)(f) of the *Corrections Act* ‘weigh[ed] heavily in favour of the grant of a permit on a visit by visit basis’.¹⁰⁶ This fell short of Castles’ request for a permit for an unspecified number of absences at unspecified times over a particular period. Her Honour held that ‘[p]ermits cannot be issued, or guaranteed to be issued, months, weeks or even days in advance’, and they will ‘only be issued a short time before they are needed’ and ‘may be refused if circumstances so dictate’.¹⁰⁷ Accordingly, a justifiable limit on Castles’ section 47(1)(f) right may be security concerns or lack of transport, the latter reinforcing that treatment closer to the prison would ‘facilitate the provision of transport and escorts, and make the difficult job of reconciling the competing resourcing demands within the prison easier’.¹⁰⁸

101 *Castles* (2010) 28 VR 141[2010] VSC 310, 177 [147] (emphasis added).

102 *Ibid.*

103 *Ibid* 176 [145] (citations omitted). See below n 111 for Naylor’s comments.

104 *Castles* (2010) 28 VR 141, 180 [158] (Emerton J).

105 *Ibid* 180 [161].

106 *Ibid* 180 [162]. Justice Emerton did, however, hold that in circumstances where s 47(1)(f) is relevant, a s 57A permit ‘should usually flow from the former where the prisoner is a low security prisoner without any history of management problems such as Ms Castles’.

107 *Ibid* 182 [172]. One consideration here is the ‘prison security practice’ to issue permits only one or two days in advance, it being ‘considered unsafe for prisoners to know when they will be leaving the prison, as they may become an escape risk or have pressure applied to them by other prisoners to act as couriers or intermediaries for illegal purposes’: at 181 [164].

108 *Ibid* 182–3 [174] (Emerton J).

5 *Benefits of Proportionality Analysis and Charter-Based Decision-Making*

This resolution demonstrates the importance of proper proportionality analysis and the benefit of *Charter-based*, rather than *Charter-inspired*, decision-making.

Regarding the former, *Castles* highlights the multitude of competing interests in prison. There are competing interests of: individual prisoners; individual prisoners and other prisoners in the same prison; individual prisoners and the general prison population; and individual prisoners and the wider community.¹⁰⁹ Regarding balancing these interests, Groves concludes ‘the perpetual prison problems stemming from the limited resources provided to prison officials and the many competing demands placed on those resources remain unchanged in the new era of human rights’.¹¹⁰ However, had Emerton J *not* resolved the limitations/proportionality issue within the definitional issue – that is, addressed the limitation of rights when defining the scope of the right, rather than under section 7(2) – the outcome may have been different.

First, section 22 creates a positive right and, if interpreted broadly and purposively, the obligations on the public authority may have been more considerable, including priority being given to IVF treatment amid all other competing demands when allocating scarce resources. Secondly, if limitations to section 22 had to be justified under section 7(2), the reasonableness test under section 47(1) of the *Corrections Act* and permission under section 57D of the *Corrections Act* to leave would be filtered through proportionality under section 7(2) of the *Charter*, potentially producing a more favourable outcome. The major factors in assessing both issues were security/logistical issues and the opportunity cost of providing IVF treatment at Castles’ preferred provider. A correct rights-limits analysis would have balanced these against the nature of the rights at stake.¹¹¹ The HRC has stated that section 22 rights are ‘fundamental and universally applicable’ in nature, and that ‘the application of this rule, as a minimum, cannot be dependent on the material resources available in the State party’.¹¹² Logistics, security and resources are *not* an excuse for undermining rights of this magnitude.

Regarding the latter, because *Castles* was a *Charter-inspired* decision, Emerton J was able to defer to the judgment of corrections management, and rely on security and resource allocation issues.¹¹³ If *Castles* was a *Charter-based* decision, security-logistical issues and the lack of resources would *not* have

109 Andrew Lu and Andrew Murn, ‘Prisoner Access to Healthcare – A Rights-Based Approach?’ (2010) 18 *Health Law Bulletin* 110.

110 Groves, above n 6, 220.

111 *Charter* s 7(2)(a).

112 See HRC, *General Comment 21: Article 10 (Humane treatment of persons deprived of their liberty)*, 13 March 1993, [4]; Human Rights Committee, *Views: Communication No 1761/2008*, 101st sess, UN Doc CCPR/C/101/D/1761/2008 (27 April 2011) 14 [7.9] (*‘Giri v Nepal’*). See below n 114–16.

113 ‘In reality, the Court returned the matter to corrections management, demonstrating the deference to management, and to security considerations ... as well as the traditional reluctance to require the allocation of resources’: Naylor, ‘Protecting the Human Rights of Prisoners’, above n 13, 406.

justified a violation of rights. The HRC has made this clear;¹¹⁴ the ACT Human Rights Commission observed that ‘inhumane treatment cannot be justified on the grounds of lack of resources or financial difficulties’;¹¹⁵ and the ECtHR held that a State must ‘organise its penitentiary system ... to ensure respect for the dignity of detainees, regardless of financial or logistical difficulties’.¹¹⁶

The impact of *VCA Momcilovic* on Justice Emerton’s conclusions should also be considered. Her Honour made explicit reference to *VCA Momcilovic* when construing the necessity aspect of section 47(1). Her Honour’s view that IVF treatment was ‘necessary’ was ‘reinforced’ by section 32(1) of the *Charter* ‘in the sense explained’ in *VCA Momcilovic*.¹¹⁷ Again, *VCA Momcilovic* may explain why Emerton J conflated the issue of scope with the issue of limits. Whether the *VCA Momcilovic* method is still good law post-*HCA Momcilovic* will be discussed below.

For current purposes, Justice Emerton’s reasoning highlights difficulties in applying the *VCA Momcilovic* method. The section 7(2) test of reasonableness and justifiability, and the relevant factors that shape the proportionality analysis, are not meant to be considered when interpreting section 47(1) under step one of the *VCA Momcilovic* method.¹¹⁸ However, coming to an ‘interpretation which least infringes *Charter* rights’¹¹⁹ involves an assessment of the interpretative options available, an acknowledgement of ‘how much’ each interpretative option

114 See above n 112 and accompanying text.

115 Naylor, ‘Protecting the Human Rights of Prisoners’, above n 13, 411, quoting Human Rights Commission (ACT), *Human Rights Audit on the Operation of ACT Correctional Facilities under Correction Legislation* (Publication No 07/1042, July 2007) 26.

116 Naylor, ‘Protecting the Human Rights of Prisoners’, above n 13, 411, quoting *Gusev v Russia* (European Court of Human Rights, Chamber, Application No 67542/01, 15 May 2008) [58]. See also *Dybeku v Albania* (European Court of Human Rights, Chamber, Application No 41153/06, 18 December 2007) [50]; *Aliiev v Ukraine* (European Court of Human Rights, Chamber, Application No 41220/98 (29 April 2003) [151].

117 *Castles* (2010) 28 VR 141, 173 [127], citing *VCA Momcilovic* (2010) 25 VR 430, 464–5 [103] (The Court), which relevantly states:

Compliance with the s 32(1) obligation means exploring all ‘possible’ interpretations of the provision(s) in question, and adopting that interpretation which least infringes *Charter* rights. What is ‘possible’ is determined by the existing framework of interpretive rules, including of course the presumption against interference with rights.

118 Recall that *Charter* s 7(2) is only relevant to the exercise of the discretion to issue a declaration of inconsistent interpretation.

119 *VCA Momcilovic* (2010) 25 VR 436, 464 [103] (The Court).

limits rights, and a reckoning of which ‘least’ limits rights.¹²⁰ Limits analysis must occur under step one, but it is not structured or tempered by the legislatively sanctioned section 7(2) tests and factors, which is supposedly relevant at step three. The section 7(2) factors ensure the consistent application of limitations, and provide transparency and accountability for rights-limiting decisions, which the *VCA Momcilovic* method tends to undermine and mask respectively.

Castles represents the pinnacle for prisoners’ *Charter* jurisprudence to date, despite the rights-weaknesses of the decision: the *Charter* merely ‘confirmed’ and ‘reinforced’ the ordinary interpretation of section 47(1)(f) of the *Corrections Act*;¹²¹ the rights were interpreted narrowly; and the limitations inherent in the loss of liberty were accommodated by reducing the scope of the right in section 22 of the *Charter* rather than via section 7(2) analysis.

B Weaven: Charter Under-enforcement

Cursory examination of *Corrections Act* section 47(1) was afforded in *Weaven v Secretary, Department of Justice* (‘*Weaven*’),¹²² which concerned the right to food that is adequate to maintain health, and access to reasonable medical care and treatment.¹²³ Justice Macaulay considered the factual claims, and concluded that presently the Secretary was *not* failing to discharge her section 47(1) duties to Weaven.¹²⁴ In a judgment of 39 paragraphs, Macaulay J dedicated one paragraph to the *Charter*, stating:

In case it is doubted, I have considered the impact, if any, of the human right of humane treatment for persons deprived of liberty [under the *Charter*]. The

120 From a doctrinal perspective, it is impossible to identify an interpretation that ‘least infringes’ a *Charter* right without first, considering the scope of the rights and the legislation, and establishing whether the legislation limits a right; and secondly, considering whether the limitation is reasonable and demonstrably justified. I.e., answering step one includes full consideration of steps two and three of the *VCA Momcilovic* method. How can an interpretation that ‘least infringes’ a *Charter* right be identified without any discussion of the scope of the rights said to be ‘breached’ (*VCA Momcilovic* method step two)? Moreover, how can an interpretation that ‘least infringes’ a *Charter* right be identified without undertaking some form of limitations analysis like s 7(2), particularly the less restrictive legislative means assessment under s 7(2)(e) (*VCA Momcilovic* method step three)? The entirety of the *VCA Momcilovic* method is in truth contained in step one, with steps two and three becoming superfluous. See Debeljak, ‘Proportionality, Interpretation and Declarations’, above n 92, 370 n 181. For a similar analysis regarding the *New Zealand Bill of Rights Act 1990* (NZ) (‘*NZBORA*’), see Paul Rishworth, ‘Human Rights’ [2012] *New Zealand Law Review* 321, 333.

121 See above nn 38, 93.

122 [2012] VSC 582. This is in contrast to a recent decision under the *Corrections Act 1997* (Tas), where the Tasmanian Supreme Court found a breach of ss 4 and 29 of the *Corrections Act 1999* (Tas) and the common law duty of care because, inter alia, the applicant was held in solitary confinement for 23 hours per day: see *Pickett v Tasmania* (Unreported, Supreme Court of Tasmania, Wood J, 20 April 2011).

123 Weaven had a yeast intolerance which he claimed was not accounted for in his diet. He also claimed that a pre-existing work-related wrist injury was re-injured when he was handcuffed for the offence for which he was incarcerated, and his medical treatment had been inadequate and untimely: see *Weaven* [2012] VSC 582, [17]–[20] (Macaulay J).

124 Ibid [36]. Weaven also claimed that the Secretary in the past had not met the obligations under s 47(1). However, Macaulay J did ‘not attempt to resolve the question of whether there has been any past failure to properly discharge that duty; it is somewhat more difficult to resolve confidently’: at [38].

interpretation of the rights in s 47 of the *Corrections Act*, compatibly with that human right, does not alter my analysis in the particular circumstances of this case.¹²⁵

Some analysis of the scope and content of the right under section 22 of the *Charter*, and its compatibility with the rights under section 47(1) of the *Corrections Act*, would have been instructive. A discussion of why section 22 of the *Charter* did not alter the limitations analysis in the particular case would have been illuminating. Without both, despite statements to the contrary, one is indeed left ‘doubting’. It is impossible to divine why the *Charter* was cursorily dismissed, particularly given its thorough consideration in *Castles. Weaven* post-dates the *Momcilovic* decisions:¹²⁶ the uncertainty surrounding *Charter* enforcement mechanisms resulting from these decisions may explain why judges are avoiding in-depth analysis.

IV REVIEW OF THE PLACE OF DETENTION

Decisions about the placement of prisoners arise in many contexts, including when prisoners are held on remand and unconvicted; when they require secure detention but are found not guilty due to mental impairment; when they are allocated based on security ratings; and when they are segregated for security reasons or punishment. *Charter* rights are relevant to decisions about placement. However, the *Charter* has had little impact on such decisions. *Re Major Review of Derek Ernest Percy Pursuant to the Crimes (Mental Impairment and Unfitness To Be Tried) Act 1997* (‘Percy Review’)¹²⁷ provides a case study. There are numerous rights-based arguments that *should* have attracted *Charter* analysis but did not. Courts and practitioners should consult comparative jurisprudence to identify the most pertinent rights in issue and seek guidance on balancing competing interests with those rights under the *Charter*.

A Percy Review: Charter Mis-enforcement

1 The Background

In 1970, Percy was found not guilty of murdering a 12-year-old girl on the grounds of insanity, and detained at the Governor’s pleasure. This detention continued until 1998, when the *Crimes (Mental Impairment and Unfitness To Be Tried) Act 1997* (Vic) (‘*CMiUTA*’) came into effect, under which Percy was deemed to be subject to a custodial supervision order.¹²⁸ Percy was a suspect in

125 Ibid [35] (citations omitted).

126 The judgment in *Weaven* was delivered on 30 November 2012, which post-dates both *VCA Momcilovic* (2010) 25 VR 436 (17 March 2010) and *HCA Momcilovic* (2011) 245 CLR 1 (8 September 2011).

127 [2010] VSC 179.

128 Ibid [2] (Coghlan J).

other child murders throughout the 1960s and 1970s, but refused to admit anything, and died in 2013 while still in detention under the *CMiUTA*.¹²⁹

Under section 35(1) of the *CMiUTA*, major reviews of custodial supervision orders occur every five years after the expiry of the nominal term of the order.¹³⁰ Under section 35(3), the court must vary a custodial supervision order to a non-custodial supervision order ‘unless satisfied on the evidence available that the safety of the person subject to the order or members of the public will be seriously endangered as a result of the release of the person on a non-custodial supervision order’; and ‘if so satisfied’, the court ‘must confirm the order or vary the place of custody’. The issue was not that a non-custodial supervision order was suitable, but that Percy’s custody should be *varied* from Corrections Victoria to the Victorian Institute of Forensic Mental Health (‘Forensicare’).

This was Percy’s third review.¹³¹ Between his second and third reviews, Percy made some efforts at rehabilitation. Percy was transferred to Ararat Prison to facilitate ‘individual-based treatment’ under the Sex Offender Programme. He completed 25 sessions from May 2004 to January 2005, with the sessions described as ‘reasonably positive’ and ‘the reviewee was making some progress’.¹³² Treatment ceased in early 2005 when he was transferred to Port Phillip Prison, and then to Barwon Prison in December 2005,¹³³ because of investigations into unsolved murders.¹³⁴ In February 2006, Percy was visited by a psychologist, but he declined treatment ‘on the basis that the other criminal matters had not been resolved, that his placement was uncertain and [the original psychologist], with whom he had built a rapport, had left the Department’.¹³⁵

Expert forensic opinion highlighted that Percy was ‘the sole person in Victoria who was found Not Guilty by Reason of Insanity ... to be held in custody in prison’.¹³⁶ It was acknowledged that ‘not very much is known clinically about the reviewee, notwithstanding that he has been in custody in excess of 40 years’.¹³⁷ It was conceded that Percy did ‘not require the facilities of the Thomas Embling Hospital for any conventional psychiatric treatment for

129 ‘Child Killer Derek Percy Dies after Cancer Battle’, *The Age* (online), 24 July 2013 <<http://www.theage.com.au/victoria/child-killer-derek-percy-dies-after-cancer-battle-20130723-2qi3t.html>>; Mark Dunn, ‘Child Killer Derek Ernst Percy’s Death Brings No Comfort for Suspected Victim Linda Stilwell’s Mother Jean Priest’, *Herald Sun* (online), 24 July 2013 <<http://www.heraldsun.com.au/news/law-order/child-killer-derek-ernest-percy8217s-death-brings-no-comfort-for-suspected-victim-linda-stilwell8217s-mother-jean-priest/story-fni0ffnk-1226684241235>>.

130 I wish to thank an anonymous reviewer for clarifying this point.

131 The first review occurred in 1998 and the second in 2004. In 2004, the custodial order was confirmed and a transfer for Thomas Embling Hospital was declined: *Percy Review* [2010] VSC 179, [3]–[6] (Coghlan J).

132 *Ibid* [8] (Coghlan J).

133 *Ibid* [8]–[9] (Coghlan J).

134 The transfers were necessary because Percy was a person of interest in investigations into unresolved murders, and had to be available for interviews with the Victorian Homicide Squad and appear at two inquests. The inquests were in NSW and Victoria.

135 *Percy Review* [2010] VSC 179, [10] (Coghlan J).

136 *Ibid* [21] (Coghlan J).

137 *Ibid* [19] (Coghlan J).

mental illness', but that Forensicare had 'the resources and capacity to provide Mr Percy with the level of treatment required to address the matters pertaining to his sexual offending'.¹³⁸ Percy supported the transfer 'if it [was] permanent'.¹³⁹ Expert opinion recommended 'an ongoing period of treatment' ideally occurring 'in a therapeutic environment as that offered by the Thomas Embling Hospital or Marngoneat Prison'.¹⁴⁰

2 Section 22(2) Segregated Detention

Justice Coghlan recognised that section 32(1) of the *Charter* applied and sought to 'interpret' the *CMiUTA* 'in a way compatible with human rights'.¹⁴¹ There was no reference to *VCA Momcilovic*, which was delivered two-weeks before this judgment.¹⁴²

Percy claimed that his detention in a maximum-security prison for over 40 years violated section 22(2), which provides that '[a]n accused person who is detained or a person detained without charge must be segregated from persons who have been convicted of offences, except where reasonably necessary';¹⁴³ and that the public authorities¹⁴⁴ had not proven that there was not a less restrictive alternative for the protection of the community than imprisonment under section 7(2)(e).¹⁴⁵ Section 22(2) falls within the broader right to be treated with humanity and dignity when deprived of liberty.

The Attorney-General submitted that *Charter* rights and limitations had been accommodated under section 39 of the *CMiUTA*, which provides '[i]n deciding whether to make, vary or revoke a supervision order ... the court must apply the principle that restrictions on a person's freedom and personal autonomy should be kept to the minimum consistent with the safety of the community'.¹⁴⁶ Without any analysis or reasoning, Coghlan J stated: 'I am persuaded by that argument. I will act in accordance with s 39. In doing so I recognise the human rights of the reviewee and have regard to them'.¹⁴⁷ His Honour continued: 'On the other hand, even if it were accepted that ... s 35(1)(b) ... did impugn ... s 22 of the *Charter*,

138 Ibid [21] (Coghlan J).

139 Ibid.

140 Ibid.

141 Ibid [24].

142 *VCA Momcilovic* (2010) 25 VR 436 was delivered 17 March 2010 and *Percy Review* [2010] VSC 179 was delivered on 31 March 2010.

143 Quoted in *Percy Review* [2010] VSC 179, [28]. Justice Coghlan noted that Percy claimed s 22(2) directly applied to his situation, whereas his Honour noted that 'it is argued on his behalf that by analogy' it applies: at [30].

144 In this case, the Department of Human Services, the Office of Corrections and the Department of Justice: *ibid* [25] (Coghlan J).

145 Ibid.

146 Emphasis added.

147 *Percy Review* [2010] VSC 179, [34].

in carrying out the balancing exercise required by s 7 of the *Charter* the presence of s 39 in the Act leads me to the same conclusion'.¹⁴⁸

3 *Absence of Reasoning*

This assessment of the law may be based on rational reasoning, but it is absent from the judgment. There was no discussion about the general scope of section 22(2) of the *Charter*, what it specifically requires, and whether Percy's treatment by prison authorities was compatible with section 22(2) under section 38 of the *Charter*. Similarly, there was no discussion about whether the *CMiUTA* violates section 22(2) of the *Charter* and, if so, whether the *CMiUTA* satisfies the reasonable and justifiable tests in section 7(2) of the *Charter*.

Moreover, minimum impairment under section 39 of the *CMiUTA* addressed only one aspect of section 7(2) (being s 7(2)(e)), which also required analysis of the importance of the right (section 7(2)(a)), the purpose of the limitation (section 7(2)(b)), the nature and extent of the limitation (section 7(2)(c)), and the relationship between the limit and its purpose (section 7(2)(d)). All five factors are relevant when properly assessing section 39 of the *CMiUTA* against the overarching section 7(2) considerations of reasonableness and justification. Let us explore how section 7(2) might have influenced the decision.

First, section 7(2)(a) of the *Charter* focuses on different issues to section 39 of the *CMiUTA*. Section 7(2)(a) requires an examination of the importance of the right, which requires consideration of the section 22 right to humane treatment in detention – in particular, segregating convicted detainees from unconvicted detainees. These are different to considerations of personal freedom and autonomy under section 39 of the *CMiUTA*. Moreover, failure to identify the correct right at risk skews the limitations analysis. The overarching balancing exercise under section 7(2) requires an assessment of the reasonableness (that is, a legitimate legislative objective) and justifiability (that is, proportionality between the harm done to the right in pursuit of the legitimate legislative objective, compared to the importance, nature and extent of the limitation) of the limit, with sub-paragraphs (a)–(e) informing this overarching test. In the *Percy Review*, this analysis was nonsensical because the correct right was not identified and not part of the balancing matrix. The question was not about balancing autonomy and freedom against the limitation, but rather balancing humane treatment by way of segregated detention against the limitation.

Secondly, one must then query the section 7(2)(e) assessment. The variation of the custodial order should have centred on the humanity of not segregating the convicted from those not convicted while in detention, not on freedom and personal autonomy. This case was not about whether a custodial or non-custodial

148 Ibid [35]. Note that it appears Justice Coghlan's reference to s 35(1)(b) is a mistake. Section 35(1)(b) states that '[t]he court that made a supervision order must undertake a major review of the order ... at intervals not exceeding 5 years for the duration of the order'. It seems that his Honour was referring to s 35(3)(a)(ii), which refers to confirming the order and varying the place of custody if 'satisfied on the evidence available that the safety of the person subject to the order or members of the public will be seriously endangered as a result of the release of the person on a non-custodial supervision order'.

order was preferred, which would impact on freedom and autonomy; but rather the place of detention under a custodial order, which impacts on humane treatment in detention, including the right of those not convicted to be segregated from those convicted. Reference to section 39 did not address the crux of the issue.

Thirdly, no consideration was given to the purpose of the limitation (section 7(2)(b)) as it impacted on section 22(2). Without identifying the purpose underlying the limitation, many aspects of section 7(2) analysis cannot proceed: it is impossible to balance the purpose underlying the right (section 7(2)(a)) against the importance of the purpose underlying the limitation to the right (section 7(2)(b)); an assessment of the rational connection between the legislative purpose and the legislative means chosen to pursue that purpose (section 7(2)(d)) cannot be made; a decision on whether ‘less restrictive means [are] reasonably available to achieve the purpose that the limitation seeks to achieve’ (section 7(2)(e)) is impossible; and the overarching proportionality assessment of reasonableness and justifiability cannot occur.

The purposes provision of the *CMiUTA* does not elucidate the purpose underlying section 39, relevantly providing in section 1(c) that the Act’s purpose is ‘to provide new procedures for dealing with people ... who are found not guilty because of mental impairment’. Section 39 is in part 6 of the *CMiUTA*, entitled ‘Principles on Which Court Is To Act, Reports and Certificates’, which does not illuminate anything. In the absence of other indicators, the purpose must be drawn from the provisions themselves. Section 39 indicates that a balance must be achieved between a person’s freedom and autonomy, and the safety of the community. Section 40 clarifies by requiring the court to have regard to:

- (a) the nature of the person’s mental impairment or other condition or disability; and
- (b) the relationship between the impairment, condition or disability and the offending conduct; and
- (c) whether the person is, or would if released be, likely to endanger themselves, another person, or other people generally because of his or her mental impairment; and
- (d) the need to protect people from such danger; and
- (e) whether there are adequate resources available for the treatment and support of the person in the community; and
- (f) any other matters the court thinks relevant.

The Explanatory Memorandum describes section 39 as setting out ‘the overriding principle’ that the court must apply when considering varying an order, and section 40 as setting out ‘the matters to which the court must have regard in deciding whether or not to ... vary ... an order’.¹⁴⁹ Overall, the purposes underlying sections 39 and 40 are strongly in favour of protecting individuals and the community from danger.

¹⁴⁹ Explanatory Memorandum, Crimes (Mental Impairment and Unfitness to be Tried) Bill 1997 (Vic) 14. There is nothing in the *CMiUTA* and the Explanatory Memorandum to suggest that these provisions do not apply equally to the variation of a condition of an order (as distinct to the variation of an order).

Exploring how this impacted on Justice Coghlan's analysis uncovers deficiencies. The section 40 factors clearly elaborate on section 39 and the underlying purpose of the limitation, yet the factors were not expressly considered by Coghlan J when assessing whether rights under section 22(2) of the *Charter* were justifiably violated. The underlying purposes expressed in sections 40(c) and (d) of the *CMiUTA* – whether Percy was a danger to another person and other people generally, and the need to protect others from such danger – were relevant factors to his place of detention. Whether these factors would have swayed the balancing process in favour of detaining Percy with those convicted of offences, or in favour of detaining him in a secure therapeutic environment, was never assessed. Moreover, the majority of factors in section 40 focused on switching to non-custodial supervision orders, rather than variations to placement under custodial supervision orders to secure more appropriate conditions of detention – the latter being the essence of Percy's review. With no clear direction in the legislation, Coghlan J had few restrictions on the matters that his Honour could have considered relevant under section 40(f) – particularly, factors that were germane to the place of custody, rather than the custodial versus non-custodial factors that dominate in section 40 (a)–(e). Further, if consideration were given to the relationship between the limit to Percy's humane treatment (detention in an unsuitable facility) and its purpose (protecting the safety of the community), a rational connection between the two might not have been found.

Fourthly, the nature and extent of the limitation on the right (section 7(2)(c)) were not assessed by Coghlan J. Nothing in sections 39 and 40 of the *CMiUTA* addresses the *placement* of a detainee if subject to a custodial supervision order. There was no consideration of the type of custodial setting, and how this impacted on the nature and extent of the limitation on Percy's rights under section 22(2) of the *Charter*. Detention in a prison *totally* undermined the right not to be segregated from convicted persons, but the nature and extent of this limitation was not considered.

4 Applying the *CMiUTA*

Returning to the application of sections 35(3) and 39 of the *CMiUTA*, Coghlan J confirmed the order and declined to vary the place of custody.¹⁵⁰ His Honour considered the section 40 factors, but found they did not support Percy's case.¹⁵¹ Instead, the matter was resolved under section 26(4) of the *CMiUTA*, which provides that the 'court must not make a supervision order committing a person to custody in a prison unless it is satisfied that there is no practicable alternative in the circumstances'. This provision addressed the crux of Percy's claim under section 22(2) of the *Charter*, yet it was not explored in terms of the *Charter*. When Coghlan J sought to 'interpret the provisions of the Act in a way compatible with human rights',¹⁵² why was section 26(4) of the *CMiUTA* not part

150 *Percy Review* [2010] VSC 179, [79].

151 *Ibid* [52]–[55].

152 *Ibid* [24]. See above n 141 and accompanying text.

of the analysis alongside sections 35, 39 and 40? Many of the difficulties with assessing the section 7(2) reasonableness and justification of violating section 22(2) of the *Charter* stem from the fact that sections 39 and 40 of the *CMiUTA* did not address the crux of the issue; and yet the provision that *did* address the place of custody was ignored in the statutory interpretation process.

Based on section 26(4), it was argued that if Percy had been found not guilty on the basis of mental impairment today, he would be admitted to Thomas Embling Hospital. Justice Coghlan recognised ‘that this is the practical reality, but it does not accord with the legal position in Victoria’,¹⁵³ although his Honour did ‘have regard to the proposition that ... a person in like position to the reviewee would be detained in a hospital’.¹⁵⁴ Justice Coghlan also recognised that the fact that Percy is the only person found not guilty due to mental impairment being detained in prison was ‘an important consideration’,¹⁵⁵ but not determinative. If the link between section 26(4) of the *CMiUTA* and section 22(2) of the *Charter* were made, more weight could have been given to these two factors. Indeed, section 22(2) required segregation of the convicted from the non-convicted, and section 26(4) supported this.

Justice Coghlan balanced the advantages¹⁵⁶ and disadvantages¹⁵⁷ of the competing places of detention. On balance, Coghlan J was ‘not satisfied that ... detention of the reviewee in Thomas Embling Hospital would be less restrictive than being held in a prison’,¹⁵⁸ based on Percy not being detained in maximum security in prison. Nor was his Honour ‘satisfied that ... the quality of the treatment to be provided at Thomas Embling Hospital would be more advantageous to the reviewee than that ... available in the prison system, particularly at Marngoneet’.¹⁵⁹

Justice Coghlan’s application of the law as per his Honour’s interpretation was balanced, as evidenced by such comments as ‘what in the long [term] be in the best interests of the reviewee and ultimately the community’.¹⁶⁰ However, had

153 *Percy Review* [2010] VSC 179, [57]. His Honour continued: ‘It follows that even though it is very unlikely, on the evidence, the possibility exists of a person who is the subject of a supervision order being detained in prison. I do not regard s 26(4) of the Act as otherwise relevant’: at [59].

154 *Ibid* [60].

155 *Ibid* [61]. Earlier, his Honour did not consider this factor ‘of itself justifying transfer’; rather it was one consideration, noting that ‘[t]hat argument existed at the time of the major reviews in 1998 and 2004, but did not carry the day’: at [46]. This comment fails to account for the significant change to the legal landscape introduced by the *Charter*.

156 Factors in favour of the transfer included: treatment in a therapeutic rather than penal setting (being ‘the most powerful argument’: *ibid* [67]); and Percy’s successful past participation in treatment and willingness to engage again: see generally at [65]–[77].

157 Factors against the transfer included: being held with psychiatric patients when Percy himself was not suffering from a psychiatric disorder; additional restrictions on Percy because of the movement of visitors in Thomas Embling Hospital; restrictions on Percy’s accommodation due to his security; the ‘potential for his presence at Thomas Embling Hospital to be disruptive’: *ibid* [73], considered under the s 40(1)(f) court power to take any other matter into account; and the unlikelihood that he could secure employment and have access to a computer: see generally [65]–[77].

158 *Ibid* [72].

159 *Ibid* [75].

160 *Ibid* [63].

deeper analysis of the *Charter* implications for the *CMJUTA* been undertaken, the questions being identified and explored, and the legal tests being applied, in the case would have been more favourable to Percy.¹⁶¹

B *R v White*: Pre-Charter Reliance

Placement issues also arose in *R v White*.¹⁶² White was found not guilty of murder on the grounds of mental impairment under the *CMJUTA* on 5 March 2007. Since his arrest in 2005, White had been held in custody. Despite the intention to detain White at the Thomas Embling Hospital, no bed would be available for 8–10 weeks, such that White continued to be detained in prison. Although this case pre-dates the judicial powers under the *Charter*, Bongiorno J held:

It is not appropriate for people who have been found not guilty on the ground of mental impairment to be imprisoned. He has no moral or legal culpability in respect of Mr Hatton's death. He is ill and should be treated as such. It is not insignificant that his continued incarceration in a prison would appear to be contrary to the spirit, if not the letter of the Charter ...¹⁶³

Ultimately Bongiorno J had no option but to remand White in prison because the resources of the State prevented more appropriate accommodation, but his Honour highlighted that '[t]his state of affairs is unsatisfactory and ought to be looked to by the executive as a matter of some urgency', noting that this 'is not the first time this situation has arisen'.¹⁶⁴

C Comparative Jurisprudence

Rights arguments regarding the place of detention have received much attention in comparative jurisdictions – including rights relating to the separation of those convicted from those not convicted, the proper placement of people found not guilty because of mental impairment, the proper treatment of prisoners with mental illness, and the use of segregation.¹⁶⁵ This jurisprudence ought to influence Victorian cases, such as the *Percy Review* and *R v White* –

161 Unlike *Castles* (2010) 28 VR 141, Coghlan J did not mention *VCA Momcilovic* (2010) 25 VR 436, which was delivered only two weeks prior to his Honour's judgment. Any difficulties with Justice Coghlan's reasoning thus cannot be attributed to the *VCA Momcilovic* methodology.

162 [2007] VSC 142.

163 *Ibid* [4].

164 *Ibid* [5]. For the HRC's view on this, see above nn 112, 114; for the ACT Human Rights Commissioner's view, see above 115; and for the ECtHR's view, see above n 116.

165 See Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (Oxford University Press, 3rd ed, 2013) 278–80 [9.131]–[9.135], 282–3 [9.141]–[9.144], 309–28 [9.200]–[9.249], especially 322–3 [9.232]–[9.236]; Richard Clayton and Hugh Tomlinson, *The Law of Human Rights* (Oxford University Press, 2nd ed, 2009) vol 1, ch 8, especially 504–12 [8.96]–[8.116], 616–23 [10.122]–[10.142], 644–6 [10.201]–[10.207], 667–9 [10.267]–[10.271]; Alex Conte and Richard Burchill, *Defining Civil and Political Rights: The Jurisprudence of the United Nations Human Rights Committee* (Ashgate, 2nd ed, 2009) 124–30.

section 32(2) of the *Charter* permits reference to comparative jurisprudence,¹⁶⁶ and such cases provide useful comparative guidance.¹⁶⁷

Although section 22(2) of the *Charter* reflects the full scope of article 10(2) of the *ICCPR*,¹⁶⁸ the HRC has not addressed the issue of persons not convicted because of unfitness to be tried.¹⁶⁹ Given this, analysis will start with comparative jurisprudence under the *ECHR*.

166 Section 32(2) of the *Charter* states: 'International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision'.

167 It must be acknowledged that *Charter* jurisprudence indicates that international, regional and comparative human rights jurisprudence should be approached with care, particularly given the different constitutional settings within which similar human rights instruments are applied: see *HCA Momcilovic* (2011) 245 CLR 1 37–8 [19]–[20] (French CJ), 90 [159] (Gummow J), 123 [280] (Hayne J relevantly concurring); *Bare v Independent Broad-based Anti-corruption Commission* [2015] VSCA 197, [182] (Warren CJ), [387], [446]–[447] (Tate JA), [631] (Santamaria JA). This certainly does not detract from the value and worth of seeking guidance from international, regional and comparative human rights jurisprudence. Rather, it emphasises caution in wholesale acceptance of such jurisprudence, and stringent analysis of its applicability to the *Charter*. As Warren CJ stated, 'the jurisprudence from these [constitutional] jurisdictions may be of assistance in determining *comparable principle*': *Re Application under the Major Crime (Investigative Powers) Act 2004* (2009) 24 VR 415, 438 [97]. As Tate JA stated, '[t]he High Court made it plain in *Momcilovic* that reasoning based upon a wholesale application of English law, without an appreciation of the differences in legal systems and constitutional settings, would be likely to mislead': *Bare v Independent Broad-based Anti-corruption Commission* [2015] VSCA 197, [446].

168 Article 10(2)(a) of the *ICCPR* states that '[a]ccused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons'. Section 22(2) states that '[a]n accused person who is detained or a person detained without charge must be segregated from persons who have been convicted of offences, except where reasonably necessary'. When ratifying the *ICCPR*, Australia lodged a reservation for art 10(2), essentially accepting segregation as an objective but agreeing to achieve this only progressively:

In relation to paragraph 2(a) the principle of segregation is accepted as an objective to be achieved progressively. In relation to paragraphs 2(b) and 3 (second sentence) the obligation to segregate is accepted only to the extent that such segregation is considered by the responsible authorities to be beneficial to the juveniles or adults concerned.

International Covenant on Civil and Political Rights, ratification by Australia 13 August 1980, 1197 UNTS 411 (with effect 13 November 1980).

169 The HRC has found individual violations of art 10(2): see, eg, Human Rights Committee, *Communication No 289/1988*, 44th sess, UN Doc CCPR/C/44/D/289/1988 (1992) [6.8] ('*Wolf v Panama*'); Human Rights Committee, *Views: Communication No 868/1999*, 79th sess, UN Doc CCPR/C/79/D/868/1999 (11 November 2003) 12 [7.3] ('*Wilson v Philippines*'). Both cases were straightforward scenarios of an unconvicted person being detained with convicted persons, with the HRC making routine findings of violations. The HRC has noted that 'segregation is required in order to emphasize their status as unconvicted persons who at the same time enjoy the right to be presumed innocent' under art 14(2): see above n 114, at [9]. Although the HRC has not addressed the issue of persons not convicted because of unfitness to be tried, its approach to art 10(2) is no-nonsense and straightforward. It is difficult to conceive of the *Percy Review* raising shades of doubt sufficient for the HRC to *not* find a violation of art 10(2) were similar facts to present. See also the South African case of *Zealand v Minister for Justice and Constitutional Development* [2008] 2 SACR 1. Relying on the presumption of innocence in s 35(3)(h) of the *Constitution of the Republic of South Africa 1996* (South Africa), and the right of the accused to be segregated from the convicted under art 10(2) of the *ICCPR*, the Constitutional Court of South Africa found that Zealand had been arbitrarily deprived of his freedom without just cause under s 12(1)(a) of the *Constitution of the Republic of South Africa 1996* (South Africa): see especially *Zealand v Minister for Justice and Constitutional Development* [2008] 2 SACR 1, [30], [32], [34] (Langa CJ).

1 ECHR

The *ECHR* does *not* contain a right for unconvicted persons to be segregated from convicted persons while in detention.¹⁷⁰ Under the *ECHR*, Percy's scenario would be argued under articles 3, 5 and 7. There is useful comparative jurisprudence relating to violations of article 3,¹⁷¹ both in relation to torture,¹⁷² and inhuman and degrading treatment.¹⁷³ However, our focus will be article 5(1)(e), which provides that no one shall be deprived of their liberty except for the 'lawful detention ... of persons of unsound mind'; and article 7(1), which provides that no 'heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed'. This comparative jurisprudence could have influenced the *Percy Review* and *R v White*, and ought to benefit future cases.

2 Preventative Detention

(a) Background to *Glien v Germany*

In 1997, Glien was convicted of sexually abusing children, sentenced to four years' imprisonment, and his preventative detention was ordered under the *Strafgesetzbuch* [Criminal Code] (Germany) ('*German Criminal Code*').¹⁷⁴ The applicant was diagnosed 'with a sexual deviation with paedophile and masochist elements which was not so severe as to be pathological', and accordingly 'had acted with full criminal responsibility'.¹⁷⁵

After serving his full sentence, Glien was held in preventative detention in a prison in October 2001, subject to regular reviews. The *German Criminal Code* in force at the time of Glien's offences and convictions only allowed preventative detention for 10 years.¹⁷⁶ In 1998, the *German Criminal Code* was amended such that if preventative detention for 10 years is reached, 'the court shall declare the measure terminated (only) if there is no danger that the detainee will, owing to

170 Moreover, the ECtHR has rejected an argument that the art 6(2) right to the presumption of innocence requires a special detention regime for unconvicted persons:

The Court recalls that the *Convention* contains no Article providing for separate treatment for convicted and accused persons in prisons. It cannot be said that Article 6 § 2 has been violated on the grounds adduced by the applicant.

There has accordingly been no violation of Article 6 § 2 of the *Convention*.

Peers v Greece [2001] III Eur Court HR 275, 298 [78].

171 Article 3 of the *ECHR* states: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'.

172 A violation of the art 3 prohibition of torture under the *ECHR* was argued in *Aerts v Belgium* [1998] V Eur Court HR 1939, with the majority of the ECtHR finding that no violation had occurred: at 1966 [67], and two dissenting Judges finding a violation of art 3: at 1971 [7] (Judges Pekkanen and Jambrek). See also *Claes v Belgium* (European Court of Human Rights, Chamber, Application No 43418/09, 10 April 2013), where the ECtHR found a violation of art 3.

173 See *G v France* (European Court of Human Rights, Chamber, Application No 27244/09, 23 May 2012).

174 Previously, in 1984, he was found guilty of sexually abusing children and disseminating pornography.

175 *Glien v Germany* (European Court of Human Rights, Chamber, Application No 7345/12, 28 November 2013) [8].

176 *Ibid* [14].

his criminal tendencies, commit serious offences resulting in considerable psychological or physical harm to the victims'.¹⁷⁷

(b) *Before the German Courts*

In separate proceedings, on 4 May 2011 the Federal Constitutional Court of Germany ('FCC') held that the 1998 retrospective prolongation and retrospective ordering of preventative detention was incompatible with *Grundgesetz für die Bundesrepublik Deutschland* [Basic Law of the Federal Republic of Germany] for being incompatible with the article 5 right to liberty of those preventatively detained.¹⁷⁸ The FCC held that any prolongation of detention beyond 10 years must be consistent with article 5(1)(e), with ECtHR jurisprudence indicating that detention as a mental health patient is only lawful 'if effected in a hospital, clinic or other appropriate institution'.¹⁷⁹

The FCC considered that preventative detention per se did not violate the article 7 ban on the retrospective application of the criminal law because it 'was a measure of correction and prevention' and 'not aimed at punishing criminal guilt'.¹⁸⁰ It was influenced by *M v Germany*.¹⁸¹ In *M v Germany*, the ECtHR highlighted the need for 'a difference between preventive detention and detention for serving a term of imprisonment';¹⁸² and 'an individualised and intensified offer of therapy and care' to detainees to avoid article 7 violations.¹⁸³ The FCC held that 'it was necessary to provide a high level of care by a team of multi-disciplinary staff and to offer the detainees an individualised therapy if the standard therapies available in the institution did not have prospects of success'.¹⁸⁴

The FCC ordered that the provisions be applied until new legislation was enacted,¹⁸⁵ subject to an interim review process for all retrospective detainees, which embodied a strict proportionality test.¹⁸⁶ Glien sought release under the

177 Ibid [37].

178 Ibid [42]–[43]. The provisions were also incompatible because 'they failed to comply with the constitutional protection of legitimate expectations guaranteed in a State governed by the rule of law, read in conjunction with the constitutional right to liberty': at [42].

179 Ibid [48].

180 Ibid [47].

181 [2009] VI Eur Court HR 169.

182 *Glien v Germany* (European Court of Human Rights, Chamber, Application No 7345/12, 28 November 2013) [46].

183 Ibid.

184 Ibid.

185 And until 31 May 2013: *ibid* [44].

186 Ibid [44]. Courts considering the cases of the retrospective detainees had to examine without delay whether the persons concerned, owing to specific circumstances relating to their person or their conduct, were highly likely to commit the most serious crimes of violence or sexual offences and if ... they suffered from a mental disorder within the meaning of ... the ... *Therapy Detention Act*.

If the pre-conditions were not met, the detainee had to be released; if the pre-conditions were met, assessment of release vis-a-vis detention was subject to a strict proportionality review; ie, 'proportionality was only respected where there was a danger of the person concerned committing serious crimes of violence or sexual offences if released'.

interim process,¹⁸⁷ and the Regional Court held that the ‘applicant’s continued preventive detention was ... proportionate’.¹⁸⁸

(c) *Before the ECtHR*¹⁸⁹

Before the ECtHR, Glien claimed that his preventative detention violated articles 5(1)(e) and 7(1) of the *ECHR*. For deprivation of liberty to be lawful under article 5(1)(e), ‘there must be some *relationship* between the *ground* of permitted deprivation of liberty relied on and the *place* and conditions of detention’,¹⁹⁰ such that detention of a person of unsound mind is lawful *only if* effected in a hospital, clinic or other appropriate institution.¹⁹¹ Glien’s case turned on whether detention in a prison was the appropriate placement.¹⁹²

The ECtHR noted that Glien was detained in a separate wing of the prison that was dedicated to persons in preventative detention and had not received any therapy since 2005: Glien undertook one year of treatment, which was discontinued because he ‘kept justifying his offences, denied any paedophile behaviour and lacked empathy’.¹⁹³ It also noted the differences between Glien’s treatment in preventative detention and his treatment in prison.¹⁹⁴ The ECtHR was, ‘however, not persuaded that the applicant ha[d] been offered the therapeutic environment appropriate for a person detained as a mental health patient’.¹⁹⁵ The fact that Glien’s conduct led to the discontinuance of the treatment

187 On 16 September 2011, the Regional Court found that the applicant’s 10 years of preventative detention would be reached on 26 October 2011: *ibid* [14].

188 *Ibid* [19]. In essence, both preconditions discussed at above n 184 were met: at [15]–[17]. In relation to the latter, although the applicant was *not* pathological, he did fall within the definition of ‘mental disorders’ for the purposes of the *Gesetz zur Therapie und Unterbringung psychisch gestörter Gewalttäter* [Act on Therapy and Detention of Mentally Disturbed Violent Offenders] (Germany) 22 December 2010, BGBl I, 2010, 2300 (*‘Therapy Detention Act’*): at [18], [50]. The term ‘mental disorders’ was defined by reference to art 5(1)(e) of the *ECHR*. It did not require diminished or exclude criminal responsibility; and was not limited to mental illnesses that were to be treated clinically but included dissocial personality disorders. The applicant’s appeal to the Court of Appeal was dismissed and the FCC declined to hear the applicant’s constitutional argument: at [20]–[21].

189 *Glien v Germany* (European Court of Human Rights, Chamber, Application No 7345/12, 28 November 2013).

190 *Ibid* [75] (emphasis added).

191 It was also noted that deprivation of liberty under art 5(1)(e) requires three conditions: (a) that a person is reliably shown to be of unsound mind; (b) that the mental disorder is ‘of a kind or degree warranting compulsory confinement’; and (c) that the disorder persists: *ibid* [72]. The Court noted at [73] that requirement (b) is satisfied

if it is found that the confinement of the person concerned is necessary as the person needs therapy, medication or other clinical treatment to cure or alleviate his condition, but also where the person needs control and supervision to prevent him, for example, causing harm to himself or other persons

192 The ECtHR did review the evidence and findings that the applicant was of unsound mind: *ibid* [78]–[89], but held that it did ‘not have to give a definitive answer to the question of the applicant’s classification’: at [90].

193 *Ibid* [17].

194 This included the equipment in his cell, more freedom of movement within the wing and courtyard, more leisure activities and less restricted telephone use: *ibid* [94].

195 *Ibid* [95].

does not exempt the domestic authorities from providing persons detained (solely) as mental health patients with a medical and therapeutic environment appropriate for their condition ... It can be reasonably assumed that such an environment would be more suited for *motivating* these persons to participate in treatment aimed at changing their condition.¹⁹⁶

The ECtHR highlighted that the authorities were not limited to a binary decision between preventative detention in prison or release, but rather had numerous alternatives for Glien's detention, including transfer to a psychiatric hospital under the *German Criminal Code* or civil detention under the *Therapy Detention Act*.¹⁹⁷ The ECtHR found that Glien's detention was not justified under section 5(1)(e) and that his right to liberty was violated.¹⁹⁸

(d) *Lessons for Percy's Review*

There are differences between the *Percy Review* and *Glien v Germany*. First, Percy was not found to be criminally responsible whereas Glien was. Secondly, Percy was willing to undertake treatment and had demonstrated progress during treatment, whereas Glien was not willing or cooperative with treatment. Both of these differences suggest that Percy was *more suited* to detention in a non-prison setting than Glien.

Although there was a change to the preventative detention regime for both, the third difference is that Percy's detention was indefinite and remained indefinite after the changes, whereas Glien's detention changed from a definite 10-year maximum to indefinite detention. This difference is inconsequential because the basis of the article 5(1)(e) violation was the *place* of detention, not its *duration*.¹⁹⁹

The fourth difference is the rights relied on. Percy relied on the right of the unconvicted to be segregated from those convicted under section 22(2) of the *Charter*. A more fruitful argument may have centred on section 21(1) which states '[e]very person has the right to liberty and security', and section 21(3) which states that '[a] person must not be deprived of his or her liberty except on grounds, and in accordance with procedures, established by law'. Sections 21(1) and (3) are equivalent to article 5(1) of the *ECHR* and its sub-paragraph (e) exception. Article 5(1) states the broad right to liberty like section 21(1), and the

196 Ibid [96] (emphasis added). The ECtHR did note that 'positive and extensive measures' had been taken to adapt the conditions of preventative detention to align more closely with the right to liberty: at [99], and that 'transitional periods' are needed to adapt and implement new laws and practices: at [101].

197 Ibid [104].

198 Ibid [106], [107]. The ECtHR also found a violation of art 7. The applicant's preventative detention was imposed following his criminal conviction, and the power to impose the preventative detention was only exercisable against persons who had, *inter alia*, been sentenced for at least three years' imprisonment. Moreover, the civil option of detention under the *Therapy Detention Act* – 'aimed at the medical and therapeutic treatment and reduction of the current dangerousness of persons suffering from a mental disorder, who previously manifested that they posed a high risk to the public by committing a serious criminal offence': at [122] – was not used. The ECtHR held that the applicant's preventative detention beyond the 10 years and into the 'transitional period' is a 'penalty' and thereby violates art 9(1).

199 This was relevant to the claim based on art 7 of the *ECHR*, but an art 7 claim would not be made in Percy's case because he had never been convicted of a crime and punished.

article 5(1) sub-paragraphs list the exceptions to the right to liberty like section 21(3). The *ECHR* lists the exceptional ‘grounds’ when liberty may be deprived, including where a person is of ‘unsound mind’, whereas the *Charter* leaves the ‘grounds’ open.²⁰⁰

ECtHR jurisprudence could have usefully influenced the interpretation of sections 35, 39 and 40, and section 26(4) of the *CMJTA*.²⁰¹ First, the ECtHR noted that alternative detention powers were available in *Glien v Germany* – particularly, the *German Criminal Code* allowed a court to transfer a person subject to preventative detention ‘to a psychiatric hospital ... if the person’s reintegration into society can be better promoted thereby’.²⁰² Percy was subject to preventative detention. The best custodial setting for the promotion of Percy’s reintegration into society was central to his case. On the evidence, it was conceded that Percy did not need conventional psychiatric treatment for a mental illness, just as Glien did not; but that Forensicare ‘ha[d] the resources and capacity to provide Mr Percy with the level of treatment required to address the matters pertaining to his sexual offending’,²⁰³ and the experts recommended ‘an ongoing period of treatment’ ideally occurring ‘in a therapeutic environment’.²⁰⁴ These section 21 rights considerations, and the section 26(4) directive that custody ought not to be in a prison unless there is no practicable alternative, support a variation of Percy’s placement.

Secondly, the ECtHR distinguishes between preventative detention and its aim for correction and prevention, and imprisonment which aims at punishing for criminal guilt. The ECtHR held that preventative detention should be characterised by an ‘individualised and intensified offer of therapy and care’.²⁰⁵ The FCC developed this, holding that ‘it was necessary to provide a high level of care by a team of multi-disciplinary staff and to offer the detainees an individualised therapy if the standard therapies available in the institution did not have prospects of success’.²⁰⁶ Percy was in custody for preventative detention, not punishment. Percy had been in prison for 40 years, with little sustained progress toward correction and prevention of his behaviours.²⁰⁷ The European and German jurisprudence support moving Percy from prison to a therapeutic setting, and this was reinforced under the *CMJTA*, particularly section 26(4).

200 This is a difference of form rather than substance, and should not preclude consideration of the ECtHR jurisprudence by Victorian courts: see above n 167.

201 Relevant jurisprudence has been developing in the ECtHR since *Ashingdane v United Kingdom* (1985) 93 Eur Court HR (ser A): see *Glien v Germany* (European Court of Human Rights, Chamber, Application No 7345/12, 28 November 2013).

202 *Glien v Germany* (European Court of Human Rights, Chamber, Application No 7345/12, 28 November 2013) [41].

203 *Percy Review* [2010] VSC 179, [21] (Coughlan J).

204 *Ibid.*

205 *Glien v Germany* (European Court of Human Rights, Chamber, Application No 7345/12, 28 November 2013) [46]. See above n 183 and accompanying text.

206 *Ibid.*

207 Indeed, it was acknowledged that ‘not very much is known clinically about the reviewee’: see above n 137 and accompanying text.

Thirdly, the ECtHR held that there ‘must be some relationship between the *ground* of permitted deprivation of liberty ... and the *place* ... of detention’,²⁰⁸ such that detention of a person of unsound mind is lawful *only if* effected in a hospital, clinic or other appropriate institution. Equivalently, if the grounds for and place of detention are *not* linked, the detention *cannot* be considered lawful under section 21(3) of the *Charter*. The immediate ground for continued custody was that Percy did not satisfy the test under section 35(3) of the *CMJUTA* regarding seriously endangering members of the public. Two lines of reasoning follow.

We can consider the application of the test per se, focusing on sections 39, 40 and 26(4). Whether one approaches Percy as having a mental impairment or other condition, it was agreed that a therapeutic environment was best given the nature of his condition (section 40(1)(a)). Moreover, considering the relationship between the mental impairment or condition and the offending conduct, Percy had been found not guilty because of insanity (section 40(1)(b)). This supports placement in a therapeutic rather than penal environment. Another factor concerns the adequacy of resources for treatment and support in a *non-custodial* environment (section 40(1)(e)), with a catch-all factor allowing consideration of any other matters the court thinks relevant (section 40(1)(f)). Reading sections 40(1)(e) and (f) together, consideration of the adequacy of resources for treatment and support within a *custodial* environment ought to be relevant, with the expert evidence supporting treatment in a *therapeutic* environment. Further, section 26(4) is an instantiation of the ECtHR principle: section 26(4) acknowledges that a supervision order for a person found to be mentally impaired or unfit to be tried must *not* occur in a prison setting because the ground of the deprivation of liberty and the place of custody are *not* rationally connected. These factors point to detention in a therapeutic environment.

Alternatively, we can focus on the *place* of custody, given that a custodial versus non-custodial order was not the crux of the review. If ECtHR-type scrutiny were applied to the relationship between the grounds for the permitted deprivation and the place of detention, greater weight would have been given to two key facts of the case. The first fact was that had Percy been found not guilty on the basis of mental impairment today, he would be admitted to Thomas Embling Hospital. The second fact was that Percy was the only person found not guilty by reason of mental impairment being detained in prison. It is arbitrary and thus unlawful under section 21(3) of the *Charter* to detach the *basis* for Percy’s detention (his mental impairment leading to unfitness for trial) from his *place* of detention (a non-therapeutic environment).

Fourthly, the ECtHR held that preventative detention in a separate prison wing was not ‘the therapeutic environment appropriate for a person detained as a mental health patient’,²⁰⁹ which undermines Percy’s placement at Marngoneat.

208 *Glenn v Germany* (European Court of Human Rights, Chamber, Application No 7345/12, 28 November 2013) [75] (emphasis added). See above n 190 and accompanying text.

209 *Ibid* [95]. See above n 195 and accompanying text.

Moreover, the ECtHR ‘assumed that [a therapeutic] environment would be more suited for *motivating* these persons to participate in treatment aimed at changing their condition’.²¹⁰ There was evidence that this was true for Percy – he was in favour of the transfer if it was permanent.

The ECtHR jurisprudence would have influenced the application of section 39 of the *CMJUTA*, particularly by allowing broader considerations under sections 40(1)(f) and 26(4). This was a lost opportunity to fully explore the rights implications of Percy’s continued detention in prison.

3 *Prison vs Mental Health Facilities*

Regarding *R v White*, there is comparative jurisprudence resolving placement issues, which should influence Victorian practice.

(a) *ECtHR: Aerts v Belgium*²¹¹

Aerts killed his ex-wife, and in November 1992 was held in detention pending trial. On 15 January 1993, a Belgian court²¹² imposed a detention order on Aerts under the *Loi du 1 juillet 1984 de défense sociale à l’égard des anormaux et des délinquants d’habitude* [Law of 1 July 1984 for the Protection of Society against Mental Defectives and Incurable Offenders] (Belgium) [European Court of Human Rights trans], after an assessment that Aerts ‘had been severely mentally disturbed, to the point where he was incapable of controlling his actions’.²¹³ Pending designation of a mental health institution by the Mental Health Board, Aerts was held in the psychiatric wing of a prison. On 22 March 1993, the Board designated a social care centre for Aerts, but there were no places for seven months, with his transfer occurring on 27 October 1993.²¹⁴

The ECtHR considered whether provisional detention in the prison psychiatric ward was lawful given the purpose of the detention. The ECtHR reiterated that detention for persons of unsound mind can only be lawful ‘if effected in a hospital, clinic or other appropriate institution’,²¹⁵ and that the prison psychiatric ward could not be regarded appropriate because Aerts did not receive ‘regular medical attention or a therapeutic environment’.²¹⁶ The ECtHR made reference to the Board’s opinion in August 1993 ‘that the situation was harmful to the applicant, who was not receiving the treatment required by the condition

210 Ibid [96] (emphasis added). See above n 196 and accompanying text.

211 [1998] V Eur Court HR 1939.

212 It was the Committals Chamber within the Belgian court system: at 1944 [8].

213 *Aerts v Belgium* [1998] V Eur Court HR 1939, 1961 [45].

214 Ibid 1962 [47].

215 Ibid 1962 [46].

216 Ibid 1962 [49].

that had given rise to his detention'.²¹⁷ The ECtHR found a violation of article 5(1).²¹⁸

(b) *ECtHR: Morsink v The Netherlands*²¹⁹

Morsink was convicted of assault and assault occasioning grievous bodily harm. In sentencing him, the court found that Morsink 'was able to understand the unlawful nature of his acts but that his mental faculties were so poorly developed that he could only be held responsible for these offences to a limited degree'.²²⁰ Accordingly, Morsink was sentenced to 15 months' imprisonment (for that which he was criminally responsible) and confinement in a custodial clinic (for that which he was not criminally responsible), referred to as a 'TBS order'.²²¹ The purpose of a TBS order is not punitive, but is to protect society from any risk posed by the detainee. Under TBS orders, a distinction is drawn between care and treatment: care is aimed at confining the detainee to a secure facility in order to protect society; while treatment is aimed at reducing the detainee's danger and preventing recidivism.²²² The legislation requires a person to be placed in a custodial clinic within six months of the TBS order.²²³

Morsink spent 15 months in 'pre-placement detention': after serving his prison sentence and before his TBS placement, he 'remain[ed] without treatment in a remand centre'.²²⁴ The relationship between the *purpose* of detention (treatment in a custodial clinic to reduce his danger and risk of recidivism) and the *place* of detention (remand without treatment) was argued to infringe

217 Ibid.

218 The European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment ('CPT') is established under the *European Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment*, opened for signature 26 November 1987, ETS No 126 (entered into force 1 February 1989 ('*ECPTIDTP*')), and is tasked with examining the treatment of persons deprived of their liberty, via visiting places of detention, with a view to strengthening the protection of detained persons from torture and inhuman and degrading treatment or punishment: *ECPTIDTP* art 1. The report of the CPT on Belgium noted that detaining persons designated as mental health detainees in psychiatric wards of prisons 'for lengthy periods ... carries an undeniable risk of causing their mental state to deteriorate': Report on Belgium, European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment, 14 October 1994, [190]. The CPT highlighted the inappropriateness of psychiatric wings of prisons for long term care: 'The psychiatric wing admits patients needing psychiatric observation and/or care, but it has neither the facilities nor the staff appropriate to a psychiatric hospital. The standard of care ... fell below the minimum acceptable from an ethical and humanitarian' viewpoint: at [191]. The CPT recommended that resolution of this issue should be a high priority.

219 *Morsink v Netherlands* (European Court of Human Rights, Chamber, Application No 48865/99, 11 May 2004).

220 Ibid [9].

221 Ibid [9], [53].

222 More particularly, treatment 'is aimed at helping persons subject to a TBS order to gain insight into and control over their disorders, to make them aware of their responsibilities and to adjust their behaviour accordingly so that they no longer pose a threat to society': *ibid* [32].

223 Three-month extensions were available 'if placement proves impossible': *ibid* [33].

224 Ibid [69].

article 5(1)(e).²²⁵ The ECtHR, ‘bearing in mind that the problem of a structural lack of capacity in custodial clinics had been identified by the ... authorities as early as 1986’, found a delay of 15 months not ‘acceptable’ and in violation of article 5(1).²²⁶

4 Lessons for *R v White*

White had to wait 8–10 weeks after the court ordered his transfer from prison to Thomas Embling Hospital, which is significantly shorter than Aerts and Morsink. However, White had been held in custody from his arrest in 2005 until being found not guilty by grounds of mental impairments on 5 March 2007. Moreover, in *R v White* and other public reports,²²⁷ the lack of infrastructure regarding detainees with mental health issues has been identified, with little change in capacity. Despite the *Charter* and influential comparative jurisprudence, the courts ‘continue ... to maintain a “hands off” approach to prison management and to the allocation of resources’.²²⁸

V CONDITIONS OF DETENTION AND SENTENCING

Conditions of detention have been successfully argued as a basis for reducing prison sentences. From a rights-based perspective, this makes sense – except

225 The ECtHR accepted that placement procedures may commence after the TBS order came into effect, holding that ‘it would be unrealistic and too rigid an approach to expect the authorities to ensure that a place is immediately available in the selected custodial clinic’: *ibid* [67]. Further, the ECtHR accepted ‘that, for reasons linked to the efficient management of public funds, a certain friction between available and required capacity in custodial clinics is inevitable and must be regarded as acceptable’.

226 *Ibid* [69].

227 The Victorian Ombudsman has raised the lack of availability of psychiatric services for mentally ill prisoners on multiple occasions, most recently noting that:

Despite having identified in my 2011 report to Parliament the grossly inadequate number of psychiatric beds for the treatment of prisoners with mental health conditions, and calling for an increase in the number of beds, there has been no increase. With overcrowding in the prison system the situation has worsened for prisoners with mental health issues. ...

Compounding this issue is the lack of mental health beds at the secure Thomas Embling Hospital. My investigation established that only the most acutely unwell prisoners are receiving treatment at the hospital.

Victorian Ombudsman, *Investigation into Deaths and Harms*, above n 16, 13 [31]–[32] (citations omitted).

The Victorian Institute of Mental Health, which operates the Thomas Embling Hospital, has also noted the shortfall in their annual report as follows: ‘The pace of increase in prison numbers has not been matched by a concomitant increase in capacity at Thomas Embling Hospital, where bed numbers remain at the level that was designed for a prison system 40% of its current size’: Victorian Institute of Forensic Mental Health, *2013–2014 Report of Operations* (2014) 3.

228 Naylor, ‘Protecting the Human Rights of Prisoners’, above n 13, 407. This is not consistent with the HRC’s view: see above nn 112, 114 and accompanying text.

remarkably, the *Charter* has *not* been relied on as the basis for reducing sentences, despite ample comparative jurisprudence in support.²²⁹

A Victorian Decisions

1 *Foster: Charter Non-enforcement*

In *Director of Public Prosecutions (Vic) v Foster* ('*Foster*'),²³⁰ five prisoners at Melbourne Remand Centre participated in a riot, resulting in some minor physical injuries to staff and property damage.²³¹ In sentencing remarks, Judge Gucciardo observed that four of the five prisoners had been in lockdown for significant periods of time. For example, Liszczak²³² had been in 23-hour lockdown, with one-hour to walk outside with officers while handcuffed, for 16 months. For the previous two months, Liszczak was in 22-hour lockdown, with run-outs twice a day, with some contact with prisoners.

Judge Gucciardo noted the consultant forensic psychologist's report addressed 'matters which give rise to serious concerns about such prolonged periods of what is, in effect, solitary confinement'.²³³ The judge also noted the confinement 'occurred during a developmentally very significant period of [his] life', such that it is 'likely to have a lasting impact on [his] view of [him]self and society'.²³⁴ His Honour concluded that the nature of Liszczak's incarceration must be taken into account.²³⁵ The conditions of detention necessitated a reduction in sentence,

reflecting the fact that those periods have not been spent in more conventional prison conditions but in situations which [the judge] consider[ed] of great deprivation for periods of time which are not only difficult to accept, but which could be potentially harmful, particularly to prisoners' mental health'.²³⁶

The judge also warned that an Ombudsman report:

should sound serious warning bells for those who administer Corrections about the prolonged use of such placement with its potential for exacerbating mental illness and the proclivity for a life of crime. ... [T]he worthy need and obligation to attempt to rehabilitate young people is damaged substantially by such long term

229 Comparative jurisprudence also indicates that a failure to acknowledge a breach of a *Charter* right by definition means the breach remains *unremedied*, despite the reduction in sentence, such that the victim has not received an effective remedy: *Mathew v Netherlands* (European Court of Human Rights, Chamber, Application No 24919/03, 29 September 2005). This is very relevant to *DPP (Vic) v Foster* (Unreported, County Court of Victoria, Judge Gucciardo, 17 February 2014) ('*Foster*') below.

230 (Unreported, County Court of Victoria, Judge Gucciardo, 17 February 2014).

231 The riot caused the Melbourne Remand Centre to remain in lockdown for several days while the perimeter systems were repaired, with the total cost of the incident response work, including additional staffing, and repair work, being in excess of \$320 000: *ibid* 3–4 [15].

232 His sentence expiring in May 2015: *ibid* 10 [46].

233 *Ibid* 12 [52].

234 *Ibid* 12 [53].

235 *Ie*, in that his Honour 'reduce[d] the length of the sentence because of the onerous conditions which, in [his] view, are substantially more burdensome than normal reclusion': *ibid* 12 [56].

236 *Ibid* 13 [59]. Media reports indicate that the five prisoners remained in solitary confinement even after Judge Gucciardo's decision: Simon Lauder, 'Prisoners Back in Solitary Confinement at Barwon Prison despite Criticism from Judge', *ABC News* (online), 7 March 2014 <<http://www.abc.net.au/news/2014-03-07/prisoners-back-in-solitary-despite-criticism-from-judge/5305336>>.

confinement. I can see it serving no worthy purpose except to punish and degrade, an intent which after a period of time borders on the cruel and inhumane.²³⁷

This decision *is not* remarkable for its concern about conditions of detention, or the reduction in sentence. Rather, it *is* remarkable because there was *no* mention of the *Charter*. The judge essentially recognised that the conditions of detention bordered on a violation of the section 10 right to be free from cruel, inhuman or degrading treatment or punishment and the section 22 right to humane treatment when deprived of liberty, yet there was no reference to the *Charter*. The HRC has long confirmed that ‘prolonged solitary confinement of the detained or imprisoned person may amount to acts prohibited by article 7’.²³⁸

2 *Collins v The Queen: Charter Non-enforcement*

Another example is *Collins v The Queen*.²³⁹ Collins was ‘locked in his cell, alone, for almost 23 hours per day, seven days per week’.²⁴⁰ He could see and speak to other prisoners for 30 minutes per day in the telephone centre, where he could talk to those he telephoned and four other prisoners in the day room, but he could not mingle with them.

Collins was held in these conditions because prisoners were speculating that he was a police informer. In November 2011, an incident resulted in Collins receiving a black eye. Collins claimed he slipped in the shower, but prison authorities assumed the injury was from a prisoner–prisoner assault. Collins was ‘unwilling or unable to identify the prisoners who [might] have threatened him’, so prison management were not ‘able to identify suitable prisoners that he could mix with’²⁴¹ – hence Collins’ placement in the management unit. These

237 *Foster* (Unreported, County Court of Victoria, Judge Gucciardo, 17 February 2014) 14 [62]. In so noting, Judge Gucciardo emphasised that he was ‘not passing judgment on correctional practises’ or ‘comment[ing] on the use of management units for long periods’: at 13 [59], 14 [62].

238 Human Rights Committee, *General Comment No 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)* (Replaces General Comment No 7), 44th sess, UN Doc HRI/GEN/1/Rev 9 (Vol I) (10 March 1992) 2 [6] (‘*General Comment No 20*’).

239 [2012] VSCA 163. The recent case of *R v Binse* [2014] VSC 253 is another example of a sentencing decision accounting for the conditions of detention in reducing a sentence, without any reference to the *Charter*. In response to the prosecutor’s submission that Binse was ‘the architect’ of his assessment as ‘a long term management prison’, Forrest J noted that ‘there is no rule which says that where a prisoner’s conduct results in them being placed in a restrictive prison environment that fact disentitles them to a sentencing benefit arising from that onerous custodial environment’: at [38]. His Honour found that Binse’s ‘likely future accommodation will be so restrictive and of such a length that it would be inhumane to deny [Binse] some sentencing benefit arising from these factors’, without any mention of the *Charter*: at [42]. His Honour was also ‘satisfied that there is a serious risk that future imprisonment in the restricted custodial environment ... will have a significant adverse effect on [Binse’s] mental health’: at [43]. His Honour held that the custodial setting and the mental health implications combined to justify a mitigation of punishment: at [2014] VSC 253, [44].

240 *Collins v The Queen* [2012] VSCA 163, [4] (Warren CJ and Redlich JA).

241 *Ibid* [76] (Hansen JA).

conditions were likely to continue indefinitely.²⁴² Collins requested ‘the harshness of [his] prison conditions ... be taken into account in assessing the appropriateness of the non-parole period’ of his sentence.²⁴³

Justice Hansen observed that Collins is ‘serving his sentence in circumstances of significant confinement which ... do not seem justly sustainable over time’.²⁴⁴ His Honour held that, at present,

there appears [to be] justification for the prison authorities’ view that [Collins] may be at risk if he mixes with other prisoners. That is particularly so given that the safe mixing of prisoners is a matter which depends largely on the appellant’s cooperation, which has not been forthcoming.²⁴⁵

However, his Honour was ‘not persuaded that the hardship inherent in the appellant’s present arrangements’²⁴⁶ resulted in a manifestly excessive sentence or warranted appellant intervention.

Chief Justice Warren and Redlich JA agreed with Justice of Appeal Hansen’s reasoning and decision, and offered additional observations on Collins’ conditions of detention, which their Honours described as ‘very difficult’.²⁴⁷ Their Honours acknowledged that ‘corrections authorities cannot be criticised for taking precautions to protect vulnerable prisoners’,²⁴⁸ and that Collins ‘is to some extent responsible for his predicament’.²⁴⁹ Their Honours noted that

the Court asked the appellant’s counsel whether he was making any submissions based on the *Charter* ... Counsel expressly disavowed any reliance on the *Charter*. It is therefore unnecessary to consider whether the *Charter* has any effect on the legality of the continued detention of the appellant in the present conditions.²⁵⁰

The basis for the decision of Collins and his counsel not to pursue the *Charter* is not known. However, Collins had an arguable *Charter* case, which the bench recognised and sought to prompt. Indeed, rights jurisprudence is relevant to both *Collins v The Queen* and *Foster*. Both cases represent missed opportunities to avail prisoners of the benefit of rights jurisprudence, as

242 Mr Money, Director of the Sentence Management Branch of Corrections Victoria, gave evidence that the ‘basic principle of prisoner placement is to place the prisoner in the least restrictive environment, having regard to the prisoner’s sentence, the prisoner’s interaction with other prisoners, and the other factors described in regulation 26 of the *Corrections Regulations 2009*’: *ibid* [6].

243 *Ibid* [75] (Hansen J).

244 *Ibid* [77].

245 *Ibid*. ‘In these circumstances, it seems that little can be done at present to integrate the appellant with other prisoners, and particularly bearing in mind that the authorities ... bear the legal responsibility for the safety and welfare of the appellant’.

246 *Ibid* [77].

247 *Ibid* [4].

248 *Ibid* [8].

249 *Ibid* [9]. ‘But observing a code of a silence [sic] is to be expected from a career criminal like the appellant. The prison system ought to be able to adequately cope with such persons’.

250 *Ibid* [12] (emphasis altered).

illustrated below.²⁵¹ Moreover, both cases were decided after *VCA Momcilovic* and *HCA Momcilovic*, with the uncertain state of the law potentially having a chilling effect on *Charter* arguments.

B Comparative Jurisprudence

1 ICCPR

In *Brough v Australia*,²⁵² the HRC found that Australia violated article 10 of the ICCPR²⁵³ because of the conditions of imprisonment of a 16-year-old Aboriginal boy with a mild intellectual disability. Brough was transferred from a juvenile prison to an adult prison after participating in a riot at the juvenile prison. At the adult prison, Brough was segregated from other prisoners.²⁵⁴ After a psychological assessment, Brough was placed in a ‘safe cell’²⁵⁵ within the segregation area. At times, Brough was subjected to 72 hours’ confinement with lights on day and night, and periods where his clothes, blankets and pillow were removed from his cell, mainly for the purpose of ensuring his safety.²⁵⁶ The HRC concluded:

Even assuming that the author’s confinement to a safe or dry cell was intended to maintain prison order or to protect him from further self-harm ... the Committee considers that the measure [was] incompatible with the requirements of article 10. [Article 10(3) read with article 24(1) of the ICCPR require the] State party ... to

251 In *Warwick v The Queen* [2014] VSCA 114, it was argued that serving a sentence in solitary confinement for a long period was ‘fresh evidence’ supporting an appeal against sentence. Leave to appeal against sentence was not granted because the trial judge was fully aware of the conditions of imprisonment when sentencing: at [7], and there had been no ‘relevant change in position from the position as it was described and understood by the trial judge at the time of sentence’: at [10]. There was no reference to the *Charter* in *Warwick v The Queen*. In *Spjodic v The Queen* (2014) 68 MVR 269, the Court of Appeal refused leave to appeal against a sentence based on ‘fresh evidence’ pertaining to the applicant’s medical condition. In essence, the Court of Appeal held that the applicant received a lenient sentence (‘[h]e may well consider himself to be fortunate to have been dealt with as benevolently as he was’: at [35]), and the fresh evidence did not ‘suggest that the applicant’s condition is potentially life threatening’ or that ‘he is being denied urgent medical attention, or treatment, as a result of his continued incarceration’: at [36]. Again, there was no mention of the *Charter*.

252 Human Rights Committee, *Views: Communication No 1184/2003*, 86th sess, UN Doc CCPR/C/86/D/1184/2003 (27 April 2006).

253 The HRC has expressed particular concern ‘about the wide use of solitary confinement for incarcerated persons following conviction, and especially for those detained prior to trial and conviction’: Human Rights Committee, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant — Concluding Observations of the Human Rights Committee: Denmark*, 70th sess, UN Doc CCPR/CO/70/DNK (15 November 2000) 3 [12] (‘*Concluding Remarks on Denmark*’), quoted in Joseph and Castan, above n 165, 318–19 [9.220]. The Committee found that ‘solitary confinement is a harsh penalty with serious psychological consequences and is justifiable only in case of urgent need; the use of solitary confinement other than in exceptional circumstances and for limited periods is inconsistent with article 10, paragraph 1’.

254 Brough was segregated ‘on the ground that his association with other inmates constituted a threat to the personal safety of inmates and to the security’ of the Correctional Centre: *Brough v Australia*, UN Doc CCPR/CO/70/DNK, 4 [2.4]. Note that Brough’s art 10(3) claim was found to be inadmissible because, although Brough was detained in an adult facility, he was segregated from adult prisoners within the facility: at [8.3(b)].

255 ‘Safe cells’ are for prisoners at risk of self-harm: see *ibid* 5 [2.5].

256 *Ibid* 5–6 [2.6]–[2.14].

accord the author treatment appropriate to his age and legal status. In the circumstances, the author's extended confinement to an isolated cell without any possibility of communication, combined with his exposure to artificial light for prolonged periods and the removal of his clothes and blanket, was not commensurate with his status as a juvenile person in a particularly vulnerable position because of his disability and his status as an Aboriginal. As a consequence, the hardship of the imprisonment was manifestly incompatible with his condition, as demonstrated by his inclination to inflict self-harm and his suicide attempt.²⁵⁷

The HRC found violations of article 10(1) which requires all persons deprived of their liberty to be treated with humanity and respect for their inherent dignity, and article 10(3) which requires juvenile offenders to 'be accorded treatment appropriate to their age and legal status'.

There are differences between *Brough v Australia* on the one hand, and *Collins v The Queen* and *Foster* on the other, but there are similarities which would have strengthened rights-based arguments in the latter cases. Regarding *Collins v The Queen*, the fact that segregation was intended to protect the prisoner and maintain order *alone* did not justify the inhuman treatment of Brough, and nor should it have justified the treatment of Collins. Moreover, Brough and Collins shared a vulnerability factor: age. Brough's status as a juvenile was an influential factor. Collins' advanced age of 66 years was in issue as a vulnerability factor, yet this was not considered in rights-terms.²⁵⁸

Age was also relevant in *Foster*. Although the applicants in *Foster* were between 18 and 20 years of age at the time of the offence, and between 19 and 22 years of age at the date of sentencing, Judge Gucciardo was concerned about their treatment 'during a developmentally very significant period' of their lives, and undermining rehabilitation of the young by such long-term confinement.²⁵⁹ His Honour arguably went further than the HRC in noting the obligation to rehabilitate offenders and the undermining of that aim by use of solitary confinement.

2 ECHR

The ECtHR has found violations of rights based on solitary confinement.²⁶⁰ In *X v Turkey*,²⁶¹ X was placed in a shared cell with heterosexual inmates. Because of his sexual orientation, X requested to be transferred to another cell with homosexual inmates because he 'had been intimidated and bullied by his fellow

257 Ibid 18 [9.4].

258 The failure of the trial judge to properly take into account Collins' advanced age was a ground of appeal: *Collins v The Queen* [2012] VSCA 163, [51], [65]–[74] (Hansen JA).

259 *Foster* (Unreported, County Court of Victoria, Judge Gucciardo, 17 February 2014) 12 [53]. Judge Gucciardo was prescient with these comments, with Sam Liszczak currently on remand in prison awaiting trial for allegedly committing fresh criminal offences: 'Vic Shooters Linked to Williams Attack', *Sky News* (online), 21 July 2015 <<http://www.skynews.com.au/news/top-stories/2015/07/21/two-men-arrested-over-police-shooting.html>>.

260 See Clayton and Tomlinson, above n 165, 511–12 [8.114]–[8.116].

261 (European Court of Human Rights, Chamber, Application No 24626/09, 9 October 2012).

inmates'.²⁶² X was placed in an individual cell on his own, being a type of cell used for solitary confinement as a disciplinary measure, or for inmates accused of rape or paedophilia. He was deprived of contact with other inmates and social activity, and only allowed out of the cell to see his lawyer or attend court hearings.²⁶³ Across 13 months, X spent one month in a psychiatric hospital, shared his cell with another homosexual prisoner for three months, and was kept in solitary confinement for eight months and 18 days.

The ECtHR reiterated that article 3 of the *ECHR* 'compels the State to ensure that a person is detained in conditions which are compatible with respect for his human dignity'; 'that the manner and method' of the detention 'do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention'; and that, 'given the practical demands of imprisonment, his health and well-being are adequately secured'.²⁶⁴ When assessing the conditions of detention, 'regard must be had to their cumulative effects and to the applicant's specific allegations'.²⁶⁵ The ECtHR noted that various factors influence whether solitary confinement breaches article 3: 'the particular conditions, the stringency of the measure, its duration, the objective pursued and its effects on the person concerned'.²⁶⁶ Regarding duration, the ECtHR carefully examined its justification, its necessity, the proportionality compared to other measures, the safeguards against arbitrariness, and 'the measures taken by the authorities to satisfy themselves that the applicant's physical and psychological condition allowed him to remain in isolation'.²⁶⁷

The ECtHR held that X's 'conditions of detention in solitary confinement were capable of causing him both mental and physical suffering and a feeling of profound violation of his human dignity,' such that the conditions amounted to inhuman and degrading treatment.²⁶⁸

There are similarities between *X v Turkey* and *Collins v The Queen*, providing strong comparative jurisprudence for rights-based arguments. First, in both *X v Turkey* and *Collins v The Queen*, the prison authorities were concerned about the risk of physical abuse of a prisoner. In *X v Turkey*, the concerns were based on complaints by the prisoner, whereas in *Collins v The Queen* the concerns arose from an incident where the prisoner would not complain. *X v Turkey*, however, did not turn on the *source* of the safety concerns. Rather, *X v Turkey* turned on the *need* for security measures. Whether prisoner-driven or prison-driven, security concerns had to be addressed.

262 Ibid [8].

263 Ibid [9]–[10].

264 Ibid [33].

265 Ibid [34].

266 Ibid [40].

267 Ibid.

268 Ibid [45]. In particular, the conditions, 'exacerbated by the lack of an effective remedy', led to the breach. The applicant had attempted to get the solitary confinement lifted in numerous court proceedings, but failed: see at [12]–[22]. The ECtHR also held that the applicant had been discriminated against on the basis of his sexual orientation, relying on art 14 when read with art 3: at [46]–[58].

Secondly, *X v Turkey* demonstrates that security needs do *not* trump rights: if ‘fears made it necessary to take certain security measures to protect the applicant, [the fears] do not suffice to justify a measure totally isolating the applicant from the other prison inmates’.²⁶⁹ This reasoning applies directly to *Collins v The Queen*,²⁷⁰ yet was not argued.

Thirdly, nothing suggests that the ECtHR would have decided differently if X was unwilling to confirm the prisoner–prisoner assault. In *X v Turkey*, once the safety fear was identified, action was considered necessary.²⁷¹ This pragmatic approach is necessary in a prison, where the norm is for prisoners not to identify perpetrators of violence for a myriad of reasons, including fears of reprisals. To suggest in *Collins v The Queen* that Collins’ subjection to the conditions of detention in protective custody was of his own making is to ignore the reality of prisons.

Fourthly, the factors identified in *X v Turkey* were relevant in *Collins v The Queen*. Justice Hansen considered whether the manner and mode of the conditions of detention exceeded the intensity inherent in detention, and the reasonableness of the objectives behind the conditions of detention. However, other factors were not addressed, including the health and wellbeing of Collins, the stringency of the measures, and the cumulative effects on Collins. In particular, factors relevant to the duration of solitary confinement would have been highly influential, given Justice of Appeal Hansen’s concession that Collins’ confinement ‘does not seem justly sustainable over time’.²⁷²

The Scottish decision of *Shahid v Scottish Ministers* (‘*Shahid*’)²⁷³ outlined the conditions that must be satisfied for extended solitary confinement to *not* amount to a violation of article 3 of the *ECHR*. Like *X v Turkey*, there had to be ‘a proper purpose in the segregation’, such as safety concerns for the prisoner based on

269 Ibid [42].

270 The source of the fear in *X v Turkey* was the prisoner himself, whereas the source of the fear in Collins was the prison authorities. However, this difference is of no consequence because no significance was attached to the source of the fear in *X v Turkey*.

271 This is confirmed in *DF v Latvia* (European Court of Human Rights, Chamber, Application No 11160/07, 29 October 2013), where Latvia was found to violate art 3 because it did not adequately protect a police informer.

272 *Collins v The Queen* [2012] VSCA 163, [77]. This would have required direct examination and assessment of the justification, necessity and proportionality of the confinement; the safeguards in place to ensure the confinement does not become unjustified; and the procedures in place to ensure Collins’ physical and psychological condition could withstand solitary confinement: *X v Turkey* (European Court of Human Rights, Chamber, Application No 24626/09, 9 October 2012) [40].

273 [2014] CSIH 18A.

threats from other prisoners, or threats to good order of the prison.²⁷⁴ In *Foster*, recall Judge Gucciardo's view that solitary confinement 'serv[es] no worthy purpose except to punish and degrade, an intent which after a period of time borders on the cruel and inhumane'.²⁷⁵ Given his Honour's sentiment, consideration of proper purpose from *X v Turkey* and *Shadid* quite conceivably could have resulted in a section 22 *Charter* violation had the *Charter* been argued in *Foster*.

3 New Zealand Bill of Rights

In *Vogel v Attorney-General (NZ)*,²⁷⁶ the New Zealand Court of Appeal held that the equivalent right to be treated humanely and with dignity when deprived of liberty under the *NZBORA*²⁷⁷ cast a positive duty on the State 'to ensure ... that the sentence was one which could safely be imposed'.²⁷⁸ Assessments about safety of sentence had to be made by the State,²⁷⁹ with the State not avoiding its positive duty 'on the basis that the prisoner sought the sentence imposed'.²⁸⁰

274 Ibid [43]. *Shahid* outlined five conditions to be satisfied. In addition to proper purpose, they were: secondly, procedural safeguards to ensure the continued justification for the segregation must be in place, such as regular reviews of the situation, concerning the substance of the matter and with input from the prisoner segregated; thirdly, reasons must be given for continuing the segregation; fourthly, the prisoner must not be held 'total isolation' – ie, the prisoner must have some access to telephones and visitors, and to regular exercise; and fifthly, the prisoner's health must be kept under review. On the facts of the case, the reclaimer had been held in solitary confinement for four years and eight months because of repeated threats by other prisoners, linking back to the racial motivation behind the crime committed by the reclaimer. Having considered the five factors for an art 3 violation, the Lords of Appeal held 'that the reclaimer's segregation was a proportionate response to the threat to his safety and the secondary threat to discipline within the prison', such that there was no violation of art 3: at [44].

275 *Foster* (Unreported, County Court of Victoria, Judge Gucciardo, 17 February 2014) 14 [62].

276 [2014] NZAR 67. In this case, a prisoner was charged with numerous counts of using a drug without the authority of a medical officer and refusing to provide urine samples. The statutory maximum penalty was 'confinement in a cell for any period not exceeding 15 days': *Penal Institutions Act 1954* (NZ) s 33(3)(g), as repealed by *Corrections Act 2004* (NZ) sch 4 pt 1. Vogel pleaded guilty, and expressly requested to be sentenced to 21 days in solitary confinement in order to break his drug habit, which Vogel knew was a significant factor affecting his chances of securing parole: *Vogel v Attorney-General (NZ)* [2014] NZAR 67 [21]. The Judge sentenced him to 21-days of solitary confinement: at [21]. The "principal restrictive features" of the sentence were: confinement to his cell for 23 hours a day; one hour for exercise and a shower; no access to television or radio, but access to reading materials; no visitors or telephone calls: at [29].

277 *NZBORA* s 23(5).

278 Ibid [72]. Section 23(5) also cast a positive duty on the State 'to ensure ... that the sentence imposed did not exceed the statutory maximum': at [72].

279 Ibid [72].

280 Ibid [73]. Vogel's confinement was held to violate the *NZBORA* (at [68] and [75]), with Vogel's vulnerability factors of drug addiction and diagnosed mental health issues being central to assessing whether the sentence could be safely imposed (at [71] and [72]). As with *Brough v Australia*, *Vogel v Attorney-General (NZ)* highlights the influence of vulnerability factors on sentencing and conditions of detention, and its application given the positive State duty to assess the safety of both. The Court of Appeal held that the confinement did *not* violate the right not to be subjected to torture or cruel, degrading or disproportionately severe treatment or punishment under s 9 of *NZBORA* (at [66]), which was consistent with the finding of the trial judge (at [65]).

As per *Castles, Vogel v Attorney-General (NZ)* reminds us that the section 22 Charter right contains a positive duty on the State regarding the safety of sentences imposed. To approach *Foster* and *Collins v The Queen* from a rights-perspective would bring this positive duty to the foreground of judicial assessment, in the context of ‘very difficult’²⁸¹ conditions of detention.

4 Queensland

In a series of cases,²⁸² the Supreme Court of Queensland reduced sentences for contempt of court from five months to between five and six weeks because the defendants would serve their sentences in the ‘Restricted Management Unit’ at Woodford Prison for Criminal Motorcycle Gangs, and would be subject to a ‘Restricted Management Regime’, including 22 hours’ solitary confinement per day.²⁸³

In *Callanan v Attendee X*, Applegarth J held that ‘the conditions under which a person will serve a term of imprisonment are relevant matters to be taken into account – at least where those conditions are shown to be different from, and more onerous than the conditions undergone by other prisoners’;²⁸⁴ and in particular, ‘[t]he prospect that a person might spend all or part of a term of imprisonment in unusually harsh conditions should be taken into account in determining an appropriate punishment’.²⁸⁵

Given that Attendee X was ‘highly likely’²⁸⁶ to be held in solitary confinement, his sentence was reduced to four weeks, taking into account the fact that ‘four weeks in solitary confinement is harsh punishment and carries a substantial risk of psychological harm’.²⁸⁷ In deciding between a shorter and longer term of imprisonment, Applegarth J noted the ‘risk that the respondent will suffer serious psychological harm by any substantial period in solitary confinement, and thereby receive what many would regard as a cruel and unusual punishment, must be taken into account’.²⁸⁸ In reducing the sentences,

281 *Collins v The Queen* [2012] VSCA 163, [4] (Warren CJ and Redlich JA).

282 *Callanan v Attendee X* [2013] QSC 340; *Callanan v Attendee Y* [2013] QSC 341; *Callanan v Attendee Z* [2014] 2 Qd R 11.

283 The policy is described in *Callanan v Attendee X* [2013] QSC 340, [28] (Applegarth J). A document entitled *Southern Queensland Correction Centre Detention Unit Management* (29 October 2013) contained the departmental policy applying to persons sentenced to imprisonment as punishment for contempt if those persons are ‘identified participants’ in a criminal organisation. The Queensland Police Service gives the Queensland Corrective Services Intelligence Group a list of criminal motorcycle gang (CGM) members. Under the policy, a ‘CGM prisoner’ is placed in a ‘Restricted Management Unit’ at Woodford Correctional Centre, and is subject to a ‘Restricted Management Regime’, including 22-hour lockdown.

284 [2013] QSC 340, [23].

285 *Ibid* [27].

286 *Ibid* [33].

287 *Ibid* [55].

288 *Ibid* [55].

Applegarth J made extensive reference to international law,²⁸⁹ and research on the harmful effects of solitary confinement.²⁹⁰

The Queensland decisions, based on rights-reasoning, were made in the *absence* of a *Charter*. Yet in Victoria, under the *Charter*, explicit rights arguments were not made in *Foster* or *Collins v The Queen*.

5 Conclusion

If space permitted, a similar case study could be built around the conditions of detention and bail where, although *Charter* arguments were relevant, neither counsel nor judges pursued them.²⁹¹ Whether in the sentencing or bail context, this lack of appeal of, and lack of engagement with, the *Charter* is perplexing. It may stem from a belief that the common law and sentencing laws deliver adequate protection. However, the British experience under the *ECHR* and the *Human Rights Act 1998* (UK) c 42 demonstrates that significant changes to sentencing practices are achievable with rights-based arguments.²⁹² It may also stem from the uncertainty surrounding *Charter* enforcement post-*VCA Momcilovic* and *HCA Momcilovic*. Either way, *Charter*-based arguments have a perception problem: they are perceived as an indication that one's legal claim is weak, and/or that one has more money than sense.

289 Justice Applegarth relied on the *ICCPR* arts 7, 10: *Callanan v Attendee X* [2013] QSC 340, [41]. At [40], his Honour quoted from *Concluding Remarks on Denmark*, UN Doc CCPR/CO/70/DNK, 3 [12]:

solitary confinement is a harsh penalty with serious psychological consequences and is justifiable only in case of urgent need; the use of solitary confinement other than in exceptional circumstances and for limited periods is inconsistent with article 10, paragraph 1, of the Covenant.

His Honour cited (at [40]) from the HRC, *General Comment No 20*, UN Doc HRI/GEN/1/Rev 9 (Vol I), 2 [6]: 'The Committee notes that prolonged solitary confinement of the detained or imprisoned person may amount to acts prohibited by article 7'. His Honour also cited (at [40]) from the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, *Standard Minimum Rules for the Treatment of Prisoners*, UN Doc A/CONF.6/C1/L1 (14 February 1955), held in Geneva in 1955, and approved by the Economic and Social Council by ECOSOC resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977).

290 Justice Applegarth cited especially Sharon Shalev, *A Sourcebook on Solitary Confinement* (Mannheim Centre for Criminology, 2008) <<http://www.solitaryconfinement.org/sourcebook>>. Particular emphasis was placed on the long-term psychological damage of solitary confinement, and that solitary confinement ought to only be used in exceptional circumstances and for limited periods of time: *Callanan v Attendee X* [2013] QSC 340, [34]–[38].

291 In the series of bail decisions for Paul Dale, *Charter*-based arguments were not made in support of bail applications, even though relevant and persuasive. Justice Byrne in *Re Dale* [2009] VSC 332 expressed concerns that clearly raised issues under ss 22(1), (2): at [15]–[17]), yet the *Charter* rights had no explicit influence in counsel's arguments or the judicial reasoning. The Court of Appeal, in *Dale v DPP (Vic)* [2009] VSCA 212, queried whether Dale's 'treatment can be reconciled' with s 22(1): at [38]; see also [33], [35]. Still, their Honours held 'that question does not, however, fall for consideration in this appeal, and hence we express no view about it': at [38]. *Charter* arguments were not pursued, even though judges at both levels identified *Charter*-relevant factors such as inhumane treatment, violation of the presumption of innocence, and arbitrary interference with family.

292 See, eg, *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837. See generally Clayton and Tomlinson, above n 165, 605–16 [10.95]–[10.121], 669–71 [10.272]–[10.275].

C *R v Kent: Charter Influence*

By way of contrast to *Foster* and *Collins v The Queen*,²⁹³ Bongiorno JA mentioned the *Charter* when sentencing a prisoner suffering a mental illness in *R v Kent*.²⁹⁴ His Honour recognised section 22(1), and noted that it is ‘hardly’ humane to place a person in a custodial environment where it is likely foreseeable ‘to result in their suffering a major psychiatric illness’, particularly as in this case where ‘no cogent grounds have ever been put forward as justifying such conditions for these prisoners’.²⁹⁵ His Honour held that ‘if the conditions of incarceration of a prisoner are so harsh as to produce’ a psychiatric illness, this ‘must be taken into account in determining the length of any appropriate sentence’.²⁹⁶

Justice of Appeal Bongiorno concluded that ‘[t]he fact that Kent is currently suffering from a psychiatric disorder ... makes it appropriate to take into account the probable conditions under which he will serve his sentence and the effect of those conditions on his psychological state’.²⁹⁷

VI CHARTER CHALLENGES

The narrow enforcement (*Castles*), mis-enforcement (*Percy Review*), and under/non-enforcement (*Weaven*, *Foster* and *Collins v The Queen*) of *Charter* rights in the prison context is problematic. An analysis of the themes from the

293 One other judgment made a passing reference to the *Charter*: in *Tarrant v Townsend* (Unreported, Magistrates’ Court of Victoria, Magistrate Garnett, 7 August 2010), Magistrate Garnett noted that ‘in considering the appropriate sentence I have taken into account ... the fact that he has been detained in the custody centre for an excessive period of 10 days which, in my opinion, is contrary to s 22 of the *Charter*... due to its inhumane conditions’: at [9].

294 [2009] VSC 375. Kent was originally charged with being a member of a terrorist organisation, but the jury was discharged because it could not reach a verdict. Subsequently, Kent was charged with two different terrorism-related offences, to which he pleaded guilty.

295 *Ibid* [32].

296 *Ibid*.

297 *Ibid* [41]. Justice of Appeal Bongiorno acknowledged that Kent suffered ‘from a recurrent major depressive disorder of moderate to severe clinical intensity’: at [30]. Justice of Appeal Bongiorno also indicated that Kent’s psychiatric condition would be considered in relation to general and specific deterrence: at [41]. With these and other factors in mind, Bongiorno JA proceeded to sentence Kent to 4.5 years’ imprisonment for being a member of a terrorist organisation, and 2.5 years’ imprisonment for being reckless as to the making of a document connected with a terrorist act, with the non-parole period of three years and nine months: at [50].

prison jurisprudence, and the uncertainty surrounding the *Charter* enforcement mechanisms arising from the *Momcilovic* litigation, may be to blame.²⁹⁸

A Thematic Issues

First, there is a distinct *under-utilisation* of the *Charter* in the context of prisons by litigants²⁹⁹ and judges.³⁰⁰ Compared to other jurisdictions, such as Canada, New Zealand and the United Kingdom, the *Charter* ‘has generated far less litigation concerning prisoners’.³⁰¹

Secondly, application of the section 32(1) *Charter* obligation to interpret all statutory provisions ‘in a way that is compatible with human rights’ ‘[s]o far as it is possible to do so consistently with their purpose’ has had *little impact* on prisoner’s rights. Section 32(1) has reinforced the existing and ordinary interpretation of legislative provisions,³⁰² but is yet to *necessitate* a rights-*compatible* ‘reinterpretation’ of an otherwise rights-*incompatible* provision. The remedial reach of section 32(1) is *key* to securing rights, yet it remains contested,³⁰³ and will be discussed below.

Thirdly, section 7(2) has been misapplied and misunderstood in the prison context. Much of the lawmaking and decision-making relating to prisoners require a balancing of interests – those of the individual prisoner against numerous other competing demands.³⁰⁴ To subject these laws and decisions to section 7(2) analysis is *key* to securing the rights of prisoners, because proportionality analysis often provides the *solution* to the rights restrictions – it helps to identify overreaches and excesses of laws and decisions, allows such excesses to be softened, helps to ensure the minimum intrusion on rights, highlights requisite safeguards, and ensures individualised decision-making.³⁰⁵ This remedial aspect of section 7(2) remains contested, and will be discussed below.

298 Procedural hurdles have also been identified as ‘chilling’ *Charter* arguments. In *R v Benbrika* (2008) 18 VR 410, the *Charter* right to a fair trial was *not* argued because, *inter alia*, reliance on the *Charter* would trigger the obligation to notify the Attorney-General and VEOHRC under s 35(1)(a) which, according to Bongiorno J, ‘would, of necessity, involve delay – perhaps considerable delay – which in the context of [this application] would be at least inconvenient and perhaps even intolerable’: at [17]. Intentionally or otherwise, s 35 may be used to delay or disrupt proceedings, and is a disincentive to reliance on the *Charter*. Section 35 ought to be amended. Justice Bongiorno suggested a residual judicial discretion ‘to relieve a party from giving notice where to do so would unduly disrupt or delay a proceeding or for other good reason’ noting the importance of this in criminal proceedings: at [18].

299 See, eg, *Collins v The Queen* [2012] VSCA 163; *Brazel v Westin* [2014] VSC 344, [90] (Osborn JA).

300 See, eg, *DPP (Vic) v Foster* (Unreported, County Court of Victoria, Judge Gucciardo, 17 February 2014).

301 Groves, above n 6, 217.

302 See, eg, *Castles* (2010) 28 VR 141.

303 For an exploration of *VCA Momcilovic* (2010) 25 VR 436 and *HCA Momcilovic* (2011) 245 CLR 1, see Debeljak, ‘Who Is Sovereign Now?’, above n 92; Debeljak, ‘Proportionality, Interpretation and Declarations’, above n 92.

304 In the context of security, competing interests are cast widely, encompassing the security of the community beyond the prison, of other detainees and persons within the prison, and of the individual detainee within the prison: see Naylor, ‘Protecting the Human Rights of Prisoners’, above n 13 and 109.

305 See Naylor, ‘Protecting the Human Rights of Prisoners’, above n 13.

Fourthly, section 38 unlawfulness has had little impact for prisoners outside the context of medical treatment.³⁰⁶ Section 38(1) provides that ‘it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right’. Corrections Victoria, and public and private entities that manage, run and operate prisons, are public authorities.³⁰⁷ Improvement of the conditions of detention and the treatment of detainees requires renewed focus on the rights aspects of substantive decisions and decision-making processes.

Finally, the longstanding judicial reluctance to interfere in the administration of prisons is evident in decisions,³⁰⁸ and must be challenged. Bureaucratic efficiency, the imposition of blanket rules on disparate individuals, the lack of resources, decision-making that is not rights-justified, and decisions-makers who are not willing to justify decisions in rights terms, are no longer acceptable in ‘the age of rights’.³⁰⁹

B Uncertainty of Enforcement

Given the uncertainty surrounding sections 7(2) and 32(1), this situation is not surprising. With *VCA Momcilovic* suggesting that section 32(1) is no more than the codification of the principle of legality, and section 7(2) proportionality is not relevant to assessing rights compatibility, where is the ‘value add’ of the *Charter*?

HCA Momcilovic casts a shadow over *VCA Momcilovic* and demands a closer analysis.³¹⁰ There are three key points.³¹¹ First, four High Court judges

306 See, eg, *Castles* (2010) 28 VR 141. However, even this decision did not turn on the *Charter*. See also *Percy Review* [2010] VSC 179 and *Rich* [2010] VSC 390. Section 38 has been used successfully in contexts other than prisons.

307 See *Charter* ss 3(1) (definition of ‘public authority’), 4.

308 See, eg, *Re Dale* [2009] VSC 332; Justice Emerton’s comments in *Castles* (2010) 28 VR 141, 176 [145], quote above n 102; *Brazel v Westin* [2013] VSC 527, [23] (Kaye J), quoting *Fyfe v South Australia* [2000] SASC 84, [18] (Martin J); *Brazel v Westin* [2014] VSC 344, [50] (Osborn JA), quoting *Rainsford v Governor, Her Majesty’s Prison at Ararat* [2000] VSC 141, [47] (Eames J). More recently, Rush J in *Knight v Shuard* [2014] VSC 475 held:

It is not for judges, save in the most obvious of cases, to supervise or interfere with the administrative decisions of prison authorities concerning the conduct of prisons and prisoners. While acknowledging that prisoners are in a position of particular disadvantage and any abuse of power by prison authorities is unacceptable ‘... the Court must avoid becoming enmeshed in the merits of particular decisions. The management of prisons is a particularly difficult and sensitive task involving complex practical considerations and security implications with which the court is not familiar and it is difficult to understand or fully appreciate from the comfort of court surroundings.

309 Francesca Klug, *Values for a Godless Age: The Story of the United Kingdom’s New Bill of Rights* (Penguin Books, 2000).

310 *HCA Momcilovic* (2011) 245 CLR 1

311 For more in-depth analysis, see Julie Debeljak, ‘Proportionality, Interpretation and Declarations’, above n 92. See also Justice Pamela Tate, ‘Statutory Interpretive Techniques under the *Charter*: Three Stages of the *Charter* – Has the Original Conception and Early Technique Survived the Twists of the High Court’s Reasoning in *Momcilovic*?’ [2014] 2 *Judicial College of Victoria Online Journal*; Sir Anthony Mason, ‘Statutory Interpretive Techniques under the *Charter* – Section 32’ [2014] 2 *Judicial College of Victoria Online Journal* 69.

acknowledge that section 7(2) analysis is part of the task of rights-compatible interpretation.³¹² In essence, this is a rejection of the *VCA Momcilovic* method, which has section 7(2) relevant only to exercising the section 36(2) declaration power.

Secondly, four High Court judges support an approach to section 32(1) interpretation based on the New Zealand and United Kingdom approaches.³¹³ In essence, if an ordinary interpretation of a provision limits a right, section 7(2) analysis is undertaken to assess if the provision is nevertheless ‘compatible with human rights’ because it is reasonable and justifiable. If the limit is not reasonable and/or justifiable under section 7(2), the ordinary interpretation is revisited under section 32(1) to assess if a rights-compatible interpretation is possible and consistent with statutory purpose. Importantly, this method structurally includes limitations/proportionality analysis which is often the *key* to resolving rights violations, and it identifies and enhances the *remedial* role of section 32(1) – rights-compatible interpretation of an otherwise rights-incompatible law is a complete remedy.

Thirdly, Chief Justice French’s judgment has been incorrectly identified as the ratio of *HCA Momcilovic*.³¹⁴ Chief Justice French was the only judge who accepted the VCA’s view that section 32(1) codified the principle of legality.³¹⁵ The judgments of Gummow, Hayne, Bell and Heydon JJ entertain section 32(1) being something quite different to the principle of legality.³¹⁶ The joint judgment of Crennan and Kiefel JJ is the closest to French CJ on section 32(1), but their

312 *HCA Momcilovic* (2011) 245 CLR 1, 91–2 [166]–[168] (Gummow J), 123 [280] (Hayne J relevantly concurring); 165–70 [415]–[426], especially 165 [415], 166 [417] (Heydon J); 247–50 [678]–[685], especially 249–50 [683] (Bell J).

313 *Ibid* 91 [166], 92 [168], 91–9 [190]–[199] (Gummow J), 123 [280] (Hayne J relevantly concurring); 181–3 [450]–[452] (Heydon J); 250 [684] (Bell J). The main point of difference between the UK and NZ methods is how “strong” the remedial use of s 32(1) would be – with s 3(1) of the *Human Rights Act 1998* (UK) being described as “strong” and s 6 of the *Bill of Rights Act 1990* (NZ) being “weak”. Justices Gummow, Hayne and Bell were certainly prepared to go as far as the NZ judges. Justice Heydon went further, holding that s 32(1) was a codification of the British case of *Ghaidan*. In the end, the *strength* of the rights-compatible interpretation enforcement mechanism is *less important than* the inclusion of proportionality analysis as part of the interpretative exercise aimed at interpretations that are “compatible with human rights”, and a re-visiting of statutory interpretation where an interpretation that is not “compatible with human rights” is not reasonable and/or demonstrably justified.

314 Debeljak, ‘Proportionality, Interpretation and Declarations’, above n 92, 382–5.

315 *HCA Momcilovic* (2011) 245 CLR 1, 50 [51] (French CJ).

316 *Ibid* 92–93 [168], [170]–[171] (Gummow J), 123 [280] (Hayne J relevantly concurring); 250 [684] (Bell J). Indeed, Heydon J explicitly rejects the *VCA Momcilovic* characterisation of s 32 as codifying the principle of legality: at 164 [411], 181 [450].

Honours explicitly reject the *VCA Momcilovic* methodology, which itself was based on the principle of legality characterisation.³¹⁷

Revisiting *HCA Momcilovic* is vital for rights protection in prisons. Much of the lawmaking and decision-making in the context of prisoners requires a balancing of interests, with proportionality analysis providing *the solution* in most cases – that is, proportionality analysis is a *remedy*. Moreover, the capacity to re-visit an ordinary interpretation of a provision where that provision unreasonably and/or unjustifiably limits a right is vital as a *remedy* – a rights-compatible interpretation is *the solution* to the implementation of an otherwise right-incompatible law.

The nuances in the sections 7(2) and 32(1) jurisprudence must be explored and tested. There is strong judicial opinion, based on the text and structure of the *Charter*, the intention of the *Charter*-enacting Parliament, and sound judicial reasoning, suggesting sections 7(2) and 32(1) have a much greater role to play than the role attributed in *VCA Momcilovic*. Provided sections 7(2) and 32(1) are given the role envisaged by Nettle J in *RJE v Secretary, Department of Justice*,³¹⁸ Bell J in *Kracke v Mental Health Review Board*,³¹⁹ Warren CJ in *Re Application under the Major Crime (Investigative Powers) Act 2004*,³²⁰ and four Justices of the HCA in *HCA Momcilovic*, there is plenty of reason for litigants to be utilising the *Charter* in argument. Indeed, with a remedial approach to proportionality and interpretation, the *Charter* should develop a more expansive rights-accommodating approach as per the comparative jurisprudence.³²¹

317 After an analysis of the meaning of s 32: *ibid* 210 [544]–[545], Crennan and Kiefel JJ hold that '[s]ection 32 does not state a test of construction which differs from the approach ordinarily undertaken by courts towards statutes ... The *Charter* forms part of the context in which a statute is to be construed': at 217 [565]. Their Honours relied on Lord Hoffman in *R (Wilkinson) v Inland Revenue Commissioners* [2005] 1 WLR 1718, 1723 [17]. Accordingly, their Honours *do not explicitly accept* the argument that s 32 is simply a codification of the principle of legality, and *do explicitly reject* the *VCA Momcilovic* methodology which is based on the principle of legality codification argument: *HCA Momcilovic* (2011) 245 CLR 1, 217 [565].

318 (2008) 21 VR 526, especially 552–8 [96]–[120] (Nettle JA).

319 (2009) 29 VR 1.

320 (2009) 24 VR 415.

321 The author would like to thank an anonymous reviewer for this point. There are differences in remedial provisions across the international, regional and comparative rights instruments. These differences in remedies may impact on litigation strategies under the different instruments. Discussion of this is beyond the scope of this article. However, it suffices to say that the *Charter* has similar remedy provisions to the *Human Rights Act 1998* (UK) c 42 and the *NZBORA*: Julie Debeljak, 'Parliamentary Sovereignty and Dialogue under the Victorian *Charter of Human Rights and Responsibilities*: Drawing the Line between Judicial Interpretation and Judicial Law-Making' (2007) 33 *Monash University Law Review* 9; Debeljak, 'Who is Sovereign Now?', above n 92. One could expect Victorian jurisprudence to be at least as effective as the jurisprudence in these jurisdictions.

C Conclusion

The challenge to judges and practitioners alike is to reinvigorate interest in and approaches to the *Charter*. A starting point is the clarification of the meaning of and interaction between sections 7(2) and 32(1).³²² It is time for judges and legal practitioners to ‘step up’ and shed the ‘tactical reticence’ to effectively engage with and utilise the *Charter*.³²³

322 See above n 304 and accompanying text.

323 Dame Sian Elias notes that, in the context of a 21-year retrospective on the *NZBORA*, Sir Geoffrey Palmer implored the judiciary to ‘step up’ on the subject of human rights, and noted that the judiciary’s ‘tactical reticence’ to ‘conflict with the political branches of government is destructive of human rights’: Chief Justice Dame Sian Elias, ‘A Voyage around Statutory Protections of Human Rights’ [2014] 2 *Judicial College of Victoria Online Journal* 4, 9, citing Sir Geoffrey Palmer, ‘The *Bill of Rights* after Twenty-One Years: The New Zealand Constitutional Caravan Moves On?’ (2013) 11 *New Zealand Journal of Public and International Law* 257.