IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
IN THE COURT OF APPEAL

S EAPCI 2021 0051

BETWEEN

Rebecca Falkingham (in her capacity as Secretary to the Department of Justice and Community Safety

First Applicant

Tracey Tosh (in her capacity as Governor of Barwon Prison)

Second Applicant

and

Craig Minogue

Respondent

AND BETWEEN

Colin Thompson (in his capacity as Governor of Barwon Prison)

Applicant

and

Craig Minogue

Respondent

PROPOSED WRITTEN SUBMISSIONS OF THE VICTORIAN ABORIGINAL LEGAL SERVICE

Date of Document:	11 October 2021
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Background and introduction

1. The Victorian Aboriginal Legal Service (**VALS**) seeks leave to intervene as amicus curiae in the application of Rebecca Falkingham (in her capacity as Secretary to the Department of Justice and Community Safety), Tracey Tosh (in her capacity as Governor of Barwon Prison) and Colin Thompson (in his capacity as Governor of Barwon Prison) (**Applicants**) for leave to appeal against the orders of the court below in *Minogue v Thompson* S ECI 2019 04631 and *Minogue v Falkingham and Tosh* S ECI 2020 00798 (**the appeal**).[1]

[1] See *Minogue v Thompson* [2021] VSC 56 **(Reasons**). VALS does not seek to make submissions regarding the nature of the relief ordered in *Minogue v Thompson* [2021] VSC 209 (see Ground 7 of the Amended Application for Leave to Appeal).

2. VALS seeks to make written and oral submissions in relation to Grounds 1 (and 5), 3 and 4 of the appeal, the determination of which will have a significant impact on its clients. The focus of VALS submissions is on providing important context, founded in the Charter and case law in Victoria, on the impact of these matters on people in prison in Victoria.

The universality of human rights: people in prison are entitled to equal human rights protection

3. Prior to addressing the relevant grounds of appeal, it is important to recognise that, despite the prison context,[2] all persons, including persons who are detained, are to be afforded equal human rights protection, regardless of their status or circumstances. For Aboriginal and Torres Strait Islander people, who have historically been denied equal protection of human rights in modern Australia, and who are also disproportionately represented in prisons in Victoria, this bedrock principle is of fundamental importance.

4. These principles are contained in the Preamble of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**the Charter**), which states that "all people are born free and equal in dignity and rights". The Preamble goes on to state that

> human rights belong to all people without discrimination, and the diversity of the people of Victoria enhances our community …
>
> human rights have a special importance for the Aboriginal people of Victoria, as descendants of Australia's first people, with their diverse spiritual, social, cultural and economic relationship with their traditional lands and waters.

5. Section 6(1) of the Charter provides that "[a]ll persons have the human rights in Part 2" and 'person' is defined in s 3(1) to mean "a human being".

6. Human rights have been described as those rights which are inherent to the dignity of every human person. By their very nature they "apply universally to all people equally".[3] As stated by Bell J:

> The bedrock value of human rights is that every individual without exception has a unique human dignity which is their birthright. The dignity of the individual and their entitlement to human rights protection 'cannot be separated from universal human nature' and is to be respected whether the person is able or disabled.[4]

7. Although the text of the Charter itself has primacy, international law, which may be considered in interpreting the Charter,[5] supports the proposition that people in prison

[2] *Cf.* Amended Written Case for the Applicants dated 18 August 2021 (**Applicants' Case**) at [9], [20], [25].
[3] *PBU & NJE v Mental Health Tribunal* (2018) 56 VR 141 at [83] (***PBU***).
[4] *PJB v Melbourne Health* (2011) 39 VR 373 at [32] (***Patrick's Case***) (footnotes omitted).
[5] Section 32(2) of the Charter provides: "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". See too Explanatory Memorandum, *Charter of Human Rights and Responsibilities Bill 2006* at

are entitled to the same level of human rights protection as those outside of prison, apart from essential limitations on the right to liberty. Principle 5 of the United Nations Basic Principles for the Treatment of Prisoners,[6] adopted by the General Assembly, 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.

8. The suggestions by the Applicants that "considerably less privacy is enjoyed by a person detained in a prison than is enjoyed by others",[7] and that "the context of a maximum-security men's prison" rendered urinalysis and strip-searching less inhumane than outside of prison,[8] must be considered in that context.[9]

Ground 1: proper consideration of human rights under s 38(1)

9. VALS' submissions regarding Ground 1 respond to the second and third submissions of the Applicants.[10]

10. In response to the second submission, the law in Victoria accords no special deference or weight to the views of public authorities, no matter how experienced.[11] In particular, due to the particular vulnerabilities of persons detained, Courts should be wary of providing a higher level of "weight and latitude" to prison authorities in comparison to any other public authority. VALS notes that this submission may also be relevant to Ground 5 of the appeal.

11. In response to the Applicants' third submission, the primary judge was right to find that "[t]he exercise [of giving proper consideration to human rights] is likely to be more demanding where the decision will affect a large number of people, with diverse characteristics, than in the case of a decision affecting a single person."[12]

12. The nature of the decision in this case, namely, the mandatory application of the Urinalysis Procedure,[13] was such that the nature and quality of consideration of relevant

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[2844]-[2845]; *Patrick's Case* at [73]; *Kracke v Mental Health Review Board* (2009) 29 VAR 1 (***Kracke***) at [2001]-[2002].

[6] United Nations General Assembly, *Basic Principles for the Treatment of Prisoners*, GA Res 45/111, UN GAOR, 45th sess, 68th plen mtg, UN Doc A/RES/45/111 (14 December 1990).

[7] Applicants' Case at [20].

[8] Applicants' Case at [25].

[9] See *Castles v Secretary, Department of Justice* (2010) 28 VR 141 at [108] (***Castles***).

[10] See Applicants' Case at [7]-[11].

[11] See *Patrick's Case* at [328], see also at [315]-[328] for a discussion of the meaning of 'weight and latitude', as distinct to 'a principle of deference'. See also Amended Written Case for the Applicants dated 10 September 2021 at [15]-[16].

[12] Reasons at [54].

[13] See Reasons at [26]-[29]. VALS notes that other relevant documents, particularly Instruction 3.10 regarding urine testing (Reasons at [22] and [24]) and the Strip Search Requirements and Instruction 1.05 (Reasons at [25]

human rights under s 38(1), must have been "at the more exacting end of the spectrum".[14] This is particularly so regarding decisions associated with urine testing and strip-searching given the intrusive and demeaning nature of those processes.[15]

13. Further, it is essential, rather than erroneous, for a decision-maker, again having regarding to the nature of the decision in this case,[16] to consider the affect of the decision on persons who may be affected by it and the possible impact on their rights. There are a number of important contextual factors that support the reasoning of the primary judge.

14. First, persons in prison in Victoria are particularly vulnerable.[17] In particular, decisions affecting adults in prison have a grossly disproportionate impact on Aboriginal and Torres Strait Islander people, who are 13.9 times more likely to be imprisoned than non-Indigenous adults in Victoria.[18] Further, people in prison are more likely to have a disability or serious mental illness.[19] Courts in Victoria have recognised the need for increased human rights scrutiny for persons with a disability.[20]

15. Both Instructions 3.10 and 1.05 apply to all adults in prison in Victoria, including women. Women in prison also face specific hardships which warrant separate consideration. Upwards of three quarters of imprisoned women in Australia are victim-survivors of domestic abuse and sexual violence,[21] and rates of mental illness, substance use issues and histories of homelessness are higher than among men in prison.[22] These issues disproportionately affect Aboriginal women, and Aboriginal women are imprisoned at extremely high rates – 21 times more than non-Aboriginal women.[23]

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and [82]-[91]) set out in detail the procedures to be undertaken in conducting a urine test and strip search. However, for the purposes of this appeal, VALS will refer generally to the Urinalysis Procedure, as this implemented both the procedure of urine testing and mandated a preliminary strip search at Barwon Prison (Reasons at [27]).

[14] Reasons at [66], [75].

[15] Reasons at [87].

[16] See Reasons at [66] and [75] regarding the large cohort of people affected by the decision to implement Instruction 3.10 and Instruction 1.05, which formed the basis of the Urinalysis Procedure.

[17] *Castles* at [93]; *De Bruyn v Victorian Institute of Forensic Mental Health* (2016) 48 VR 647 at [116] (***De Bruyn***), quoting *Taunoa v Attorney-General* [2008] 1 NZLR 429 (***Taunoa***) at [177]; *Haigh v Ryan* [2018] VSC 474 at [85] and [87] (***Haigh***).

[18] Australian Bureau of Statistics, Corrective Services Australia, *National and state information about adult prisoners and community based corrections, including legal status, custody type, Indigenous status, sex,* 16 September 2021 < https://www.abs.gov.au/statistics/people/crime-and-justice/corrective-services-australia/latest-release>.

[19] See, e.g., Martin Jackson et al, 'Acquired Brain Injury in the Victorian Prison System' (Paper 4, Corrections Victoria Research Paper Series, Department of Justice, 2011); Australian Institute of Health and Welfare, 'The health of Australia's prisoners 2018' (Cat No PHE 246, 30 May 2019) at 77; Stephane Shepherd et al., 'Aboriginal prisoners with cognitive impairment: is this the highest risk group?' (2017) No. 536 *Trends and Issues in Crime and Criminal Justice*, 1-14.

[20] *Patrick's Case* at [32]-[34]; *LG v Melbourne Health* [2019] VSC 183 at [81].

[21] Holly Johnson, 'Drugs and crime: A study of incarcerated female offenders, Research and public policy series' (Research and Public Policy Series no. 63, Ausralian Institute of Criminology, 2004); Justice Health and Forensic Mental Health Network, '2015 Network Patient Health Survey report' (2017); Mandy Wilson et al, 'Violence in the Lives of Incarcerated Aboriginal Mothers in Western Australia' (2017) 7(1) *SAGE Open* 1.

[22] Australian Institute of Health and Welfare, *Health of prisoners*, 23 July 2020 <https://www.aihw.gov.au/reports/australias-health/health-of-prisoners>.

[23] Human Rights Law Centre and Change the Record Coalition, *Over-represented and overlooked: the crisis of Aboriginal and Torres Strait Islander women's growing over-imprisonment*, May 2017 <https://static1.squaresp

16. The importance of protecting the human rights and dignity of Aboriginal and Torres Strait Islander people in prison has also been highlighted in a number of coronial inquests into Aboriginal deaths in custody.[24] Failure to adhere to human rights obligations in prison is a contributor to deaths in custody.

17. Second, the importance of increased human rights scrutiny with regard to decisions affecting persons in prison is supported by the well-documented increased risk of abuses of power in the prison context, particularly regarding strip-searching practices and powers.[25] There is also evidence from other jurisdictions that Aboriginal people are subjected to disproportionate rates of strip-searching compared to other persons in prison.[26]

18. Finally, regarding the specific decisions in this case, it is well documented that being subjected to intrusive searches can be not only be degrading and a source of re-traumatisation for vulnerable people in the prison system,[27] but ineffective.

19. This was highlighted by the primary judge, who found that there was insufficient evidence to establish "reasonable grounds for a belief that it is necessary for the security or good order of the prison to strip search every prisoner selected for random urine testing."[28] In fact, evidence and data on strip searches tends to point the other way, showing that they are often over-used, ineffective in uncovering contraband, and unnecessary.[29]

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ace.com/static/580025f66b8f5b2dabbe4291/t/59378aa91e5b6cbaaa281d22/1496812234196/OverRepresented_online.pdf>.

[24] See, for example, *Finding in Inquest into the Death of Ms Dhu* (Coroners Court of Western Australia, Ref 47/15, Coroner Fogliani, 16 December 2016) at [454]-[597]; *Finding in Inquest into the Death of Ms Day* (Coroners Court of Victoria, Ref COR 2017/6424, Coroner Caitlin English, 9 April 2020) at [151]-[155], [531]-[534]; *Inquest into the death of Cedric Trigger* [2010] NTMC 036 at [19] (SM Greg Cavanagh); *Inquest into the death of Michael David Ley* (Coroners Court of Queensland, State Coroner Barnes, 12 December 2012) at pp. 15-17; *Inquest into the death of Mark Corbett* [2003] NTMC 044 at [74] (SM Greg Cavanagh); *Inquest into the death of Terence Daniel Briscoe* [2012] NTMC 032 (SM Greg Cavanagh).

[25] Independent Broad-based Anti-Corruption Commission (**IBAC**), *Special report on corrections: IBAC Operations Rous, Caparra, Nisidia and Molara*, June 2021, pp 53-54 and 62, <https://www.ibac.vic.gov.au/publications-and-resources/article/special-report-on-corrections>.

[26] For example, in the ACT women's prison between October 2020 and April 2021, 58% of strip searches were of Aboriginal women, who made up only 44% of the prison population: Dani Larkin, 'Excessive strip-searching shines light on discrimination of Aboriginal women in the criminal justice system', *The Conversation*, <https://theconversation.com/excessive-strip-searching-shines-light-on-discrimination-of-aboriginal-women-in-the-criminal-justice-system-163969>.

[27] This was recognised by the primary judge at [120] of the Reasons, citing Karen Schneider et al, 'Psychological distress and experience of sexual and physical assault among Australian prisoners' (2011) 21 *Criminal Behaviour and Mental Health* 333. See also Dubravka Šimonović, Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences on Her Mission to Australia, UN Doc A/HRC/35/30 (17 April 2018) at [54]; see generally Victoria Tauli-Corpuz, Report of the Special Rapporteur on the Rights of Indigenous Peoples on Her Visit to Australia, UN Doc A/HRC/36/46/Add.2 (8 August 2017).

[28] Reasons at [117]-[119].

[29] IBAC, above n 25, p 54; Larkin, above n 26; Alexandra Alvaro, 'Female inmates in Tasmania subjected to 841 strip searches', *The ABC*, <https://www.abc.net.au/news/2021-09-03/strip-searches-of-female-prisoners-in-tasmania/100431432>.

Ground 3: The content of the right to privacy under s 13(a) of the Charter

20. Whether a person's privacy has been arbitrarily interfered with requires consideration of whether any interference is proportionate to a legitimate end.[30] This consideration overlaps with the justification analysis under s 7(2).[31]

21. The right to privacy under s 13 of the Charter is modelled on, and has been held to cover the same scope, as article 17 of the International Covenant on Civil and Political Rights (**ICCPR**).[32] Other international jurisprudence regarding the right to privacy has considered the scope of article 8 of the European Convention.[33]

22. In *Kracke,* Bell J stated:

> The purpose of the right to privacy is to protect people from unjustified interference with their personal and social individuality and identity. It protects the individual's interest in the freedom of their personal and social sphere in the broad sense. This encompasses their right to individual identity (including sexual identity) and personal development, to establish and develop meaningful social relations and to physical and psychological integrity, including personal security and mental stability.
>
> The fundamental values which the right to privacy expresses are the physical and psychological integrity, the individual and social identity and the autonomy and inherent dignity of the person.[34]

23. Emerton J described the right to privacy as "a right of considerable magnitude".[35] One of the bedrock values protected by the right to privacy is that of "personal inviolability, which is a value of equal importance that relates to the freedom of all persons not to be subjected to physical or psychological interference, including medical treatment, without consent."[36]

24. Accordingly, although less privacy may be enjoyed by persons detained in prison, the standard of arbitrariness should not be lessoned to such an extent that, in effect, the right is rendered meaningless for prisoners simply based on the evidence of prison

[30] *Patrick's Case* at [74]-[85]; *WBM v Chief Commissioner of Police* (2012) 43 VR 446 at [114] and [202] (***WBM***).
[31] *Kracke* at [109]-[110].
[32] *International Covenant on Civil and Political Rights,* GA Res 2200A (XXI), Treaty Series vol. 999, p. 171 (16 December 1966); Explanatory Memorandum, *Charter of Human Rights and Responsibilities Bill 2006,* 13. Bell J has stated that there is no difference between the scope of s 13 and the scope of art 17(1): *Kracke* at [591].
[33] Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos 11 and 14,* ETS 5 (4 November 1950).
[34] *Kracke* at [619]-[620], cited in *WBM* at [166], [202]; *Castles* at [77]; *Patrick's Case* [2011] VSC 327; 39 VR 373 at [54]; *Director of Public Prosecutions v Kaba* (2014) 44 VR 526 (***Kaba***) at [125]. See also *Director of Housing v Sudi* [2010] VCAT 328 (***Sudi***) at [29].
[35] *Castles* at [79]; see too *Patrick's Case* at [53].
[36] *PBU* at [128]. Bell J also held that this value was also central to the s 22(1) right.

officials. Human rights must be construed in the broadest possible way, including for persons in detention.[37]

25. We submit that the prison context further necessitates that the consideration of arbitrariness conform with the human rights approach.[38] Various decisions have recognised the importance of protection of the right to privacy for particular groups of vulnerable persons.[39] Similar logic applies to persons in custodial settings, who, as set out above, are particularly vulnerable to incursions on their right to privacy.

26. On numerous occasions the right to privacy has been held to apply to persons in detention or deprived of their liberty.[40] The common law right to privacy has also been considered by various courts in relation to the exclusion of evidence in criminal matters under s 138 of the *Evidence Act 2008* (Vic). Those decisions highlight the importance of applying the right to privacy for persons under criminal investigation and in lawful detention.[41]

Urine testing and strip searching under s 13(a)

27. We urge the court to exercise considerable caution when examining the Applicants' submissions in regard to international caselaw on urinalysis and strip-searches. While, as French CJ recognised in *Momcilovic*, relevant international material may be consulted, cautiously, when determining the content of the rights it recognises,[42] it is important to distinguish international material which is based on a substantially different test to that in Victoria.

28. In the United States, the Fourth Amendment prohibits unreasonable searches or seizures. United States courts have held that compelled urinalysis amounts to a search or seizure under the scope of the Fourth Amendment.[43] However, the circumstances in which compelled urinalysis is sought may render it to be 'reasonable'. It is important

[37] *DAS v Victorian Human Rights and Equal Opportunity Commission* [2009] VSC 381 at [80]. See also *Sudi* at [90]; *Kracke* at [75]-[91].
[38] In considering the word 'arbitrary' in s 21(2), in *Victoria Police Toll Enforcement v Taha* (2013) 49 VR 1 (***Taha***), Tate JA also preferred the human rights interpretation. Tate JA noted at [199] "It was unnecessary for the Court to decide in *WBM* whether the 'human rights meaning' applied in the context of the right not to have one's privacy arbitrarily interfered with, or whether the narrower dictionary meaning applied, that is, an action 'not based on any identifiable criterion, but which stems from an act of caprice or whim'. However, in the context of detention, an assessment of whether an encroachment upon one of the most elementary of all common law rights is 'arbitrary' in my view ought reflect the 'human rights meaning'. So much was understood by the Full Federal Court in *Minister for Immigration v Al Masri*, in the context of considering the text and history of Article 9 of the ICCPR, the model for s 21 of the Charter." (Footnotes omitted.)
[39] *Patrick's Case* at [53].
[40] In *Kracke*, the right to privacy was held to apply to the involuntary treatment of persons under the Mental Health Act 1986. In *Kaba* at [134], the right to privacy was held to apply to the demand for a person's name and address, even if the person had been lawfully pulled over by police.
[41] See *Kaba* at [89]-[90]. For example, in *R v Ireland* (1970) 126 CLR 321 at 335, the Court held, consistently with the right to privacy, that there was no power to require an arrested person to submit himself or herself to photography for any purpose other than identification. See too *Bunning v Cross* (1978) 141 CLR 54.
[42] *Momcilovic* (2011) 245 CLR 1, 37-8 [19].
[43] *Skinner v Ry Labor Executives' Ass'n*, 489 U.S. 602, 617 (1989); In *Thompson v Souza* 111 F.3d 694, 702 (9th Cir. 1997), the Ninth Circuit held that, though drug testing of prisoners for the purpose of combatting the presence of illicit drugs is reasonably related to legitimate penological interests, such testing must be reasonable in place, justification, scope, and manner.

to note is that the test of 'reasonableness' in the United States differs to the test of 'arbitrariness' under s 13 of the Charter.[44]

29. Likewise, in the United Kingdom, there has been acknowledgement that mandatory drug testing in prisons is prima facie a breach of article 8(1) of the European Convention. However, these tests may be allowed pursuant to the specific carve outs in article 8(2), which are in substantially different terms and do not involved a test for arbitrariness as under s 13(a) of the Charter. Nonetheless, in the context of the right to privacy, the European Court of Human Rights noted the importance of justifying strip-searching procedures in the case of *Milka v Poland* [2015] ECHR Application No 14322/12 and stated at [48]:

> The Court is aware of the need to assure security in institutions where people are deprived of their liberty, it considers however that highly invasive and potentially debasing measures like personal checks or strip searches require a plausible justification. It does not appear that such a justification was given by the prison authorities to the applicant in the instant case.

30. Similarly, the Applicants' reliance on *Fieldhouse v Canada* is misplaced,[45] as it relates to the test under article 8(2) of the European Convention. We also note that subsequent Canadian decisions, although not in regard to urinalysis, have introduced a more exacting standard.[46]

31. VALS notes that, in recognition of the harm of strip-searches, Rules 50, 51 and 52 of the Nelson Mandela Rules[47] set out clear rules for strip searches to comply with principles of proportionality, legality and necessity, all of which involve similar considerations to that of 'arbitrariness'.

Ground 4: The content of the right to humane treatment under s 22(1) of the Charter

32. As stated by the primary judge, the right under s 22(1) is a right to be treated with humanity and respect for dignity.[48] Further, it is specific to persons deprived of their liberty and must be interpreted in that context. As described by Bell J in *Patrick's Case* at [32], human dignity is the "bedrock value of human rights".

33. In *Castles*, the court described the right as a "dignity right", noting "[i]t is a special right for persons who are vulnerable and whose civil and political rights are compromised because of their imprisonment or detention."[49]

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[44] In *Bell v Wolfish*, 441 U.S. 520, 560 (1979), the Court held that in correctional institutions, determining whether a search is reasonable requires "[b]alancing the significant and legitimate security interests of the institution against the privacy interests of the inmates." This is a different test to the assessment of 'arbitrariness' under s 13(2). Further, the court also held at 547 that "prison administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." It is important to note that there is no principle of deference in Victoria in regard to the procedural obligation under s 38(1).

[45] Applicants' Case at [20] (footnotes omitted).

[46] See Lisa Kerr, 'Contesting Expertise in Prison Law' (2014) 60(1) *McGill Law Journal* 43-94.

[47] *United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules)*, 70th sess, 80th plen mtg, UN Doc A/RES/70/175 (8 January 2016).

[48] Reasons at [87].

[49] *Castles* at [93], see also at [96]-[97].

34. The Applicants have referred to the case of *Kudla v Poland* [2000] ECHR 512 at [94] in support of its negative definition of s 22(1).[50] With respect, the Applicants have conflated the right under s 10(b) of the Charter, which mimics that of article 3 of the European Convention (which was the subject of the relevant comments in *Kudla* relied on), with the right under s 22(1) of the Charter. The words "treated with humanity" and "with respect for … inherent dignity" impose positive obligations on prison authorities, and go further than the s 10(b) right.[51]

35. Rather than conflating s 22(1) with s 10(b) of the Charter, guidance can be sought from interpretations of the provision on which s 22(1) is founded, namely article 10 of the ICCPR.[52] The UN Human Rights Committee has issued General Comment No. 21 in relation to article 10 of the ICCPR, which states

> Article 10, paragraph 1, imposes on States parties a positive obligation towards persons who are particularly vulnerable because of their status as persons deprived of liberty, and complements for them the ban on torture or other cruel, inhuman or degrading treatment or punishment contained in article 7 of the Covenant. Thus, not only may persons deprived of their liberty not be subjected to treatment that is contrary to article 7, including medical or scientific experimentation, but neither may they be subjected to any hardship or constraint other than that resulting from the deprivation of liberty; respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons. Persons deprived of their liberty enjoy all the rights set forth in the Covenant, subject to the restrictions that are unavoidable in a closed environment.[53]

36. Accordingly, section 22(1) requires that persons who are in prison must be accorded the same rights and respect for their dignity, as persons who are free, apart from those restrictions which are the unavoidable result of their deprivation of liberty.

37. As stated by Emerton J in *Castles*, "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."[54] Her Honour also acknowledged that the necessary consequences of deprivation of liberty are that "[r]ights and freedoms which are enjoyed by other citizens will necessarily be 'curtailed', 'attenuated' and 'qualified' merely by reason of the deprivation of liberty."[55]

38. The effects of deprivation of liberty, and the consequences of the curtailment of that right, are no small matter. It ought to be kept in mind that prisoners, by virtue of their imprisonment, are already deprived of their dignity in many respects. It is for this very

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[50] Applicants' Case at [25].
[51] *Castles* at [99]; *De Bruyn* at [113]; *Haigh* at [81]. See also *Taunoa* at [79]-[80] (Elias CJ), [176]-[177] (Blanchard J), referred to in *De Bruyn* at [115]-[116].
[52] The Explanatory Memorandum of the Charter states, regarding section 22(1):
[53] Human Rights Committee, *CCPR General Comment No. 21: Article 10 (Humane Treatment of Persons Deprived of Their Liberty)*, 44th sess (10 April 1992), cited in *Castles* at [100]. See also Principles 1 and 5 of the UN Basic Principles for the Treatment of Prisoners.
[54] *Castles* at [108]. See too *Application for Bail by HL (No 2)* [2017] VSC 1 at [125].
[55] *Castles* at [111], referring to *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, 537 [5] (Lord Bingham). See too *Application for Bail by HL (No 2)* at [125].

reason that the right in s 22(1) exists, to ensure that no further deprivations of dignity and humanity occur than that which is strictly necessary.

39. There have not been any cases in Victoria that have found that specific conditions of detention breach the terms of s 22(1). However, concern has been expressed in a number of cases that conditions of detention may fall short of the standard in s 22(1).

40. In *Dale v Director of Public Prosecutions* [2009] VSCA 212 at [35]-[38], the Court of Appeal noted that the conditions of detention of a prisoner, which included solitary confinement, strip searches and shackling with leg irons when out of the unit, even though these conditions might have been imposed on him for his own protection, raise questions under s 22(1), though it declined to express a view on the matter.

41. In *DPP v Tiba* [2013] VCC 1075 at [31], the Court also raised a question as to whether conditions of solitary confinement complied with the provisions of s 22 of the Charter, but expressed no view on this.

42. In the Coronial Inquest into the Death of Yorta Yorta woman, Ms Tanya Day, the Coroner noted that s 22(1) of the Charter needed to be respected in custodial settings. She remarked that this required "public authorities to take positive measures to ensure a detainee is treated with dignity and humanity, which includes adequate conditions such as access to medical services" (at [532]). The Coroner emphasised that this was especially the case where the person has 'multiple vulnerabilities', including intoxication.

<u>Urine testing and strip searching under s 22(1)</u>

43. As discussed above, there is no need, under s 22(1), to find that urine testing is "inhumane".[56] The Applicants have not provided any other rationale to dispute the finding that urine testing and strip searching, where it is not justified by a clear rationale, goes against the responsibility on prison administrators to treat persons in prison with respect for humanity and their inherent dignity.

44. The degrading nature of strip-searches is self-evident. A number of government agencies have referred to strip searches as enlivening s 22(1) of the Charter. For example, IBAC has found that certain strip-searches in prison are inconsistent with s 22(1) of the Charter.[57]

45. Although caution ought to be exercised in referring to international decisions, we note that numerous international decisions have found that the strip-searching of prisoners, particularly in circumstances where it is routine or unjustified, can amount to both cruel

[56] Applicants' Case at [26].
[57] IBAC, above n 25, at p 34.

and degrading treatment, and to a breach of the right to be treated with humanity and respect for inherent dignity.[58]

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Signed by SARAH SCHWARTZ
Solicitor for the Victorian Aboriginal Legal Service

[58] *Wainwright v United Kingdom* [2006] ECHR 807 at [42]; see generally *Van der Ven v the Netherlands* [2003] ECHR Application No 50901/99; *Frerot v France* [2007] ECHR Application No 70204/01; *Wieser v Austria* [2007] ECHR Application No 2293/03,; *El Shennawy v. France* [2011] ECHR Application No 51246/08.