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SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

Case Title:	**Davidson v Director-General, Justice and Community Safety Directorate**
Citation:	**[2022] ACTSC 83**
Hearing Dates:	5 May 2021, 6 May 2021 and 3 June 2021
Decision Date:	17 June 2021
Reasons Date:	21 April 2022
Before:	Loukas-Karlsson J
Decision:	See [439]
Catchwords:	**HUMAN RIGHTS** – prison facilities – separate confinement – access to open air and exercise when in separate confinement – *Human Rights Act 2004* (ACT) – right to humane treatment while deprived of liberty – right to protection from cruel, inhuman or degrading treatment – right to protection from arbitrary detention – s 45 *Corrections Management Act 2007* (ACT) – Mandela Rules
Legislation Cited:	*Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 7, 22, 32, 38, 39 *Corrections (Management of Segregation and Separate Confinement) Policy 2020* (ACT) (NI2020-791) *Corrections Management (Management of Segregation and Separate Confinement) Policy 2019* (ACT) (NI2019-381) *Corrections Management (Management Unit) Policy 2011* (NI2011-48) *Corrections Management (Separate Confinement) Operating Procedure 2019* (ACT) (NI2019-384) cl 4.3 *Corrections Management Act 2007* (ACT) pt 9.2, ch 10, ss 7, 8, 9, 12, 14, 45, 57, 152, 154, 183, 184, 188 *Court Procedures Rules 2006* (ACT) r 1509 *Crimes (Sentencing) Act 2005* (ACT) s 63 *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, opened for signature 26 November 1987, ETS 126 (entered into force 1 February 1989) *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, ETS 5 (entered into force 3 September 1953) arts 3, 8 *Evidence Act 2011* (ACT) ss 4, 63, 136, 191 *Human Rights Act 2004* (ACT) sch 1, ss 7, 8, 9, 10, 12, 18, 19, 24, 28, 30, 31, 32, 36, 40, 40A, 40B, 40C *Human Rights Act 2019* (Qld) s 58 *Human Rights Amendment Act 2008* (ACT) *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) arts 7, 9, 10

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Parties:

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Director-General, Justice and Community Safety Directorate (Defendant)

ACT Human Rights Commissioner (Intervenor)

Representation:

Counsel

S Brenker (Plaintiff)

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Ken Cush & Associates (Plaintiff)

ACT Government Solicitor (Defendant)

ACT Human Rights Commission (Intervenor)

File Number: SC 328 of 2020

LOUKAS-KARLSSON J:

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Introduction

1. Nathan James Davidson (the plaintiff) was a sentenced detainee at the Alexander Maconochie Centre (AMC), after being sentenced to full-time imprisonment for six years and nine months, with a non-parole period of three years and eight months: *R v Davidson* [2018] ACTSC 227 (*R v Davidson*). During his time at the AMC as a sentenced detainee, the plaintiff was held in solitary or separate confinement and placed in the Management Unit for a total of 63 days. When placed in the Management Unit, the plaintiff was granted access to a small adjoining area connected to his cell enclosed by four walls and a mesh ceiling (rear courtyard). The plaintiff was not permitted to use a larger purpose-built exercise yard located outdoors (general exercise yard). The plaintiff brought proceedings against the Director-General of the Justice and Community Safety Directorate (the defendant) complaining that the defendant's practice of using the rear courtyard does not comply with its obligations under the *Corrections Management Act 2007* (ACT) (*Corrections Management Act*) and is unlawful under the *Human Rights Act 2004* (ACT) (*Human Rights Act*). The plaintiff sought a variety of declarations as to the validity of the defendant's practice of using the rear courtyard and a novel form of relief, namely, that the plaintiff's sentence be backdated by 63 days.

2. On 27 November 2020, the Human Rights Commissioner was granted leave by McWilliam AsJ to intervene in the proceedings pursuant to s 36 of the *Human Rights Act*. The hearing proceeded before me on 5 May, 6 May, and 3 June 2021. On 17 June 2021, I made the following declarations:

    (a) A declaration that access to the rear courtyard of the Management Unit of the AMC does not comply with s 45 of the *Corrections Management Act*;

    (b) A declaration that cl 4.3 of the *Corrections Management (Separate Confinement) Operating Procedure 2019* (ACT) (NI2019-384) is invalid as it is inconsistent with s 45 of the *Corrections Management Act*.

3. On that occasion, I also refused to make an order that the plaintiff's sentence of imprisonment be taken to have started on 19 October 2017, that is, taking into account the 63 days in the Management Unit, pursuant to s 40C(4) of the *Human Rights Act* and or s 63(1) of the *Crimes (Sentencing) Act 2005* (ACT) (*Crimes (Sentencing) Act*). I reserved reasons as to the declarations made and the refusal to grant the novel relief, as well as reserving my decision in respect of the declarations sought concerning the *Human Rights Act*. Reasons and the decisions concerning the *Human Rights Act* declarations now follow.

Agreed Facts

4. Pursuant to s 191 of the *Evidence Act 2011* (ACT) (*Evidence Act*), the Court received an agreed statement of facts that the parties confirmed were not in dispute. Those matters are as follows.

5. The defendant is a public authority for the purposes of s 40 of the *Human Rights Act*.

6. The plaintiff was detained at the Alexander Maconochie Centre (the AMC) from 21 December 2017. On 25 May 2018, the plaintiff was sentenced to full-time imprisonment for drug trafficking offences and receiving stolen property: *R v Davidson*. The aggregate sentence imposed on the plaintiff was six years and nine months' imprisonment

commencing on 20 December 2017 and expiring on 19 September 2024. A non-parole period of three years and eight months expiring on 19 August 2021 was fixed.

7. The Management Unit of the AMC has 14 cells of identical dimension. There are 9 cells on the “hard side” and 5 cells on the “soft side”.

8. Each cell in the Management Unit can house one detainee and has an adjoining rear courtyard which is accessible through an internal door of the cell (rear courtyard).

9. A rear courtyard:

    (a) Is 2330mm (2.33m) wide by 3600mm (3.6) long, with a total area of 8.39m^2;

    (b) Is of a similar area and dimension to a cell in the Management Unit;

    (c) Has four block walls, concrete flooring, and is covered overhead by a metal mesh;

    (d) Contains an access door with a built-in window looking outwards.

10. The Management Unit also has two general exercise yards which are annexed to the Management Unit building complex on either side of the building (general exercise yard):

    (a) One general exercise yard attached to the “hard side” of the Management Unit; and

    (b) One general exercise yard attached to the “soft side” of the Management Unit.

11. The general exercise yard:

    (a) On the “hard side” is 4840mm (4.84m) wide by 7250mm (7.25m) long, with a total area of 35.09m^2;

    (b) Has two concrete brick walls, concrete flooring, and two walls and the celling are made of metal mesh, which is wider than the mesh cover overhead of the rear courtyard;

    (c) Has two sets of metal exercise bars (a chin up bar and a dip bar) which allow detainees to perform body weight exercises.

12. The plaintiff was held in segregation or separate confinement in the “hard side” of the Management Unit (confinement period) as follows:

    (a) Separate confinement from 14 October 2018 to 14 October 2018 in Cell M.11A;

    (b) Separate confinement from 14 October 2018 to 20 October 2018 in Cell M.02A;

    (c) Segregation from 31 December 2018 to 31 December 2018 in Cell M.01A;

    (d) Segregation from 31 December 2018 to 7 January 2019 in Cell M.14A;

    (e) Investigative segregation from 12 March 2019 to 15 March 2019; separate confinement from 15 March 2019 to 19 March 2019; segregation from 19 March 2019 and 9 April 2019 (amounting to a total confinement period of 12 March 2019 to 9 April 2019 in Cell M.02A);

(f) Investigative segregation from 13 April 2019 to 16 April 2019, and separate confinement from 16 April 2019 to 20 April 2019 (amounting to a total confinement period of 13 April 2019 to 20 April 2019 in Cell M.02A);

(g) Segregation from 20 April 2019 to 29 April 2019 in Cell M.02A;

(h) Separate confinement from 9 September 2019 to 9 September 2019 in Cell M.03A;

(i) Separate confinement from 9 September 2019 to 11 September 2019 in Cell M.02A; and

(j) Separate confinement from 11 September 2019 to 16 September 2019 in Cell M.09A.

13. By reason of the matters in the preceding paragraph:

(a) The plaintiff was held in the "hard side" of the Management Unit:

i. For six consecutive nights from 14 October 2018 to 20 October 2018;

ii. For seven consecutive nights from 31 December 2018 to 7 January 2018;

iii. For 28 consecutive nights from 12 March 2019 to 9 April 2019;

iv. For seven consecutive nights from 13 April 2019 to 20 April 2019;

v. For eight consecutive nights from 21 April 2019 to 29 April 2019. The original segregation order was for the period 20 April 2019 to 27 April 2019, however, the plaintiff was transferred to the Crisis Support Unit on 20 April 2019 before being returned to the Management Unit on 21 April 2019. On 27 April 2019, the plaintiff's segregation order was extended for three days to 29 April 2019; and

vi. For seven consecutive nights from 9 September 2019 to 16 September 2019.

(b) The confinement period was a total of 63 days.

14. During the confinement period:

(a) When the internal door to the rear courtyard was remotely locked, the plaintiff was required to request access to the rear courtyard in order to remotely unlock the door and thereby access the rear courtyard;

(b) The internal door to the rear courtyard was required to be remotely locked and physically shut by the detainee during the "lunch lock-in", which occurred each day between approximately 11:30AM and 1:30PM for a duration of 60-90 minutes and prior to the evening muster at 6:00PM each day. The internal door to the rear courtyard was also required to be locked in the event that corrections officers were required to respond to incidents or emergency situations within the AMC;

(c) The plaintiff was not given access to the general exercise yard.

15. The *Corrections Management (Management Unit) Policy 2011* (ACT) (NI2011-48) was in force between 15 February 2011 and 12 June 2019 (the 2011 Operating Policy).

16. The *Corrections Management (Separate Confinement) Operating Procedure 2019* (ACT) (NI2019-384) has been in force since 13 June 2019 and continues to operate (the 2019 Operating Procedure).

Issues for Determination

17. The agreed issues to be determined in this matter are as follows:

    (a) What is the proper construction of s 45 of the *Corrections Management Act*?

    (b) What is the proper construction of cl 4.3 of the *Corrections Management (Separate Confinement) Operating Procedure 2019*?

    (c) By providing the plaintiff with access to the Rear Courtyard, in accordance with cl 4.3 or otherwise, has the defendant acted consistently with s 45 of the *Corrections Management Act*?

    (d) On the proper construction of s 45 of the *Corrections Management Act* and cl 4.3 of the *Corrections Management (Separate Confinement) Operating Procedure 2019*, is cl 4.3 valid?

    (e) Has the defendant acted consistently with the *Human Rights Act*?

    (f) If the plaintiff is entitled to relief, what is the appropriate form of relief?

Orders Sought

18. By way of the further amended originating application filed 13 May 2021, the plaintiff seeks the following orders:

    (a) A declaration that access to the rear courtyard of the Management Unit at the AMC does not comply with s 45 of the *Corrections Management Act*.

    (b) A declaration that cl 4.3 of the 2019 Operating Procedure is invalid by reason of it being inconsistent with s 45 of the *Corrections Management Act*.

    (c) A declaration pursuant to s 40C of the *Human Rights Act* that the defendant has breached the plaintiff's human rights under ss 10(1)(b), 18(1) and (2) and 19(1) of the *Human Rights Act*.

    (d) A declaration pursuant to s 32 of the *Human Rights Act* that cl 4.3 of the 2019 Operating Procedure is incompatible with the plaintiff's human rights:

        i. Not to be treated or punished in a cruel, inhuman or degrading way pursuant to s 10(1)(b) of the *Human Rights Act*; and/ or

        ii. To liberty and security of person and to not be arbitrarily detained pursuant to s 18(1) of the *Human Rights Act*; and/or

        iii. To not be deprived of liberty except on the grounds and in accordance with the procedures established by law pursuant to s 18(2) of the *Human Rights Act*; and/ or

iv. To be treated with humanity and with respect for the inherent dignity of the human person while deprived of liberty pursuant to s 19(1) of the *Human Rights Act*.

(e) An order that the plaintiff's sentence of imprisonment made by the Supreme Court of the ACT on 25 May 2018 be taken to have commenced on 19 October 2017 pursuant to s 40C(4) of the *Human Rights Act* and/ or s 63(1) of the *Crimes (Sentencing) Act 2005* (ACT) (*Crimes (Sentencing) Act*) with the effect that:

i. The plaintiff's sentence of imprisonment is taken to expire on 18 July 2024; and

ii. The plaintiff's non-parole period is taken to expire on 17 June 2021.

Relevant Legislation

19. This matter involves consideration of provisions in the *Corrections Management Act*, the *Human Rights Act*, the *Crimes (Sentencing) Act*, as well as notifiable instruments. It is appropriate that the relevant provisions are first set out here. Where relevant, sections are extracted later in the judgment.

Corrections Management Act

20. The sections of the *Corrections Management Act* that are referred to in this judgment are ss 7, 8, 9, 12, 14 and 45. It is appropriate to first set out s 45 and then s 12, before ss 7, 8, 9 and 14.

21. Section 45 states:

> **45 Access to open air and exercise**
>
> (1) The director-general must ensure, as far as practicable, that detainees—
>
> (a) have access to the open air for at least 1 hour each day; and
>
> (b) can exercise for at least 1 hour each day.
>
> (2) The standards under subsection (1) may both be satisfied during the same hour on any day.
>
> (3) For chapter 10 (Discipline), this section is taken to provide an entitlement for each detainee in relation to access to the open air and exercise.

22. Section 12 relevantly provides:

> **12 Correctional centres—minimum living conditions**
>
> (1) To protect the human rights of detainees at correctional centres, the director-general must ensure, as far as practicable, that conditions at correctional centres meet at least the following minimum standards:
>
> …
>
> (e) detainees must have reasonable access to the open air and exercise;
>
> …

23. Section 7 of the *Corrections Management Act* details the objects of the Act:

> **7 Main objects of Act**
>
> The main objects of this Act are to promote public safety and the maintenance of a just society, particularly by—
>
> (a) ensuring the secure detention of detainees at correctional centres; and
>
> (b) ensuring justice, security and good order at correctional centres; and
>
> (c) ensuring that detainees are treated in a decent, humane and just way; and
>
> (d) promoting the rehabilitation of offenders and their reintegration into society.

24. Section 8 establishes how correctional services must operate to achieve the main objects in s 7:

> **8 Management of correctional services**
>
> Correctional services must be managed so as to achieve the main objects of this Act, particularly by—
>
> (a) ensuring that public safety is the paramount consideration in decision-making about the management of detainees; and
>
> (b) ensuring respect for the humanity of everyone involved in correctional services, including detainees, corrections officers and other people who work at or visit correctional centres; and
>
> (c) ensuring behaviour by corrections officers that recognises and respects the inherent dignity of detainees as individuals; and
>
> (d) ensuring that harm suffered by victims, and their need for protection, are considered appropriately in decision-making about the management of detainees.

25. Section 9 sets out how detainees in correctional centres in the ACT are to be treated:

> **9 Treatment of detainees generally**
>
> Functions under this Act in relation to a detainee must be exercised as follows:
>
> (a) to respect and protect the detainee's human rights;
>
> (b) to ensure the detainee's decent, humane and just treatment;
>
> (c) to preclude torture or cruel, inhuman or degrading treatment;
>
> (d) to ensure the detainee is not subject to further punishment (in addition to deprivation of liberty) only because of the conditions of detention;
>
> (e) to ensure the detainee's conditions in detention comply with section 12 (Correctional centres—minimum living conditions);
>
> (f) if the detainee is an offender—to promote, as far as practicable, the detainee's rehabilitation and reintegration into society.

26. Section 14 sets out the procedure for the defendant to make policies consistent with the *Corrections Management Act*. The 2011 Operating Policy and the 2019 Operating Procedure were enacted pursuant to s 14. Section 14 states:

> **14 Corrections policies and operating procedures**
>
> (1) The director-general may make corrections policies and operating procedures, consistent with this Act, to facilitate the effective and efficient management of correctional services.

(2) Each corrections policy or operating procedure is a notifiable instrument.

Note 1 A notifiable instrument must be notified under the Legislation Act.

Note 2 The amendment or repeal of a corrections policy or operating procedure is also a notifiable instrument. See the Legislation Act, section 46 (Power to make instrument includes power to amend or repeal).

(3) Each corrections policy or operating procedure—

(a) must be available for inspection by anyone at each correctional centre; and

(b) may be made available for inspection at any other place decided by the director-general.

2011 Operating Policy

27. The key matters from the 2011 Operating Policy are the following:

> **Use of handcuffs and restraints**
>
> The movement of prisoners using restraints will be at the discretion of the CO3.
> The use of restraints for other purposes will be in accordance with the *Use of Restraints Policy* and *Procedure*, and the *Use of Force Policy* and *Procedure*.
>
> **Access to exercise**
>
> Prisoners in the Management Unit will have access to the exercise yard at the rear of their cell. Prisoners may also have access to a larger exercise yard in the unit, subject to the operational requirements of the unit and the prisoner's conformity to the unit's routine. The CO4/CO3s will determine access to the yard.

2019 Operating Procedure

28. Clause 4.3 of the 2019 Operating Procedure reads:

> 4.3 The open rear cell door will count as the minimum one (1) hour of fresh air and exercise.

Human Rights Act

29. The plaintiff claims that the defendant did not comply with his human rights under the *Human Rights Act*. The substantive rights relied upon by the plaintiff are: ss 19(1), 10(1)(b), 18(1) and (2) of the *Human Rights Act*. Also relevant to this judgment are the following sections: ss 28, 30, 40, 40A, 40B and 40C. The sections mentioned herein will now be set out.

30. Section 19 of the *Human Rights Act* provides:

> **19 Humane treatment when deprived of liberty**
>
> (1) Anyone deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person.
>
> (2) An accused person must be segregated from convicted people, except in exceptional circumstances.
>
> *Note* An accused child must also be segregated from accused adults (see s 20 (1))
>
> (3) An accused person must be treated in a way that is appropriate for a person who has not been convicted.

31. Section 10 relevantly states:

> **10 Protection from torture and cruel, inhuman or degrading treatment etc**
>
> (1) No-one may be—
>
> …
>
> (b) treated or punished in a cruel, inhuman or degrading way.
>
> …

32. The relevant subsections from s 18 in this matter are (1) and (2), which provide:

> **18 Right to liberty and security of person**
>
> (1) Everyone has the right to liberty and security of person. In particular, no-one may be arbitrarily arrested or detained.
>
> (2) No-one may be deprived of liberty, except on the grounds and in accordance with the procedures established by law.
>
> …

33. Section 28 of the *Human Rights Act* establishes how human rights may be limited:

> **28 Human rights may be limited**
>
> (1) Human rights may be subject only to reasonable limits set by laws that can be demonstrably justified in a free and democratic society.
>
> (2) In deciding whether a limit is reasonable, all relevant factors must be considered, including the following:
>
> (a) the nature of the right affected;
>
> (b) the importance of the purpose of the limitation;
>
> (c) the nature and extent of the limitation;
>
> (d) the relationship between the limitation and its purpose;
>
> (e) any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.

34. Section 30 is a rule of interpretation and provides:

> **30 Interpretation of laws and human rights**
>
> So far as it is possible to do so consistently with its purpose, a Territory law must be interpreted in a way that is compatible with human rights.

35. It is an agreed fact that the defendant is a public authority for the purposes of ss 40 and 40A of the *Human Rights Act*. Section 40 states:

> **40 Meaning of *public authority***
>
> (1) Each of the following is a ***public authority***:
>
> (a) an administrative unit;
>
> (b) a territory authority;
>
> (c) a territory instrumentality;
>
> (d) a Minister;
>
> (e) a police officer, when exercising a function under a Territory law;
>
> (f) a public employee;

(g) an entity whose functions are or include functions of a public nature, when it is exercising those functions for the Territory or a public authority (whether under contract or otherwise).

Note A reference to an entity includes a reference to a person exercising a function of the entity, whether under a delegation, subdelegation or otherwise (see Legislation Act, s 184A (1)).

(2) However, ***public authority*** does not include—

(a) the Legislative Assembly, except when acting in an administrative capacity; or

(b) a court, except when acting in an administrative capacity.

36. Section 40A provides:

40A Meaning of *function of a public nature*

(1) In deciding whether a function of an entity is a ***function of a public nature***, the following matters may be considered:

(a) whether the function is conferred on the entity under a territory law;

(b) whether the function is connected to or generally identified with functions of government;

(c) whether the function is of a regulatory nature;

(d) whether the entity is publicly funded to perform the function;

(e) whether the entity performing the function is a company (within the meaning of the Corporations Act) the majority of the shares in which are held by or for the Territory.

(2) Subsection (1) does not limit the matters that may be considered in deciding whether a function is of a public nature.

(3) Without limiting subsection (1) or (2), the following functions are taken to be of a public nature:

(a) the operation of detention places and correctional centres;

(b) the provision of any of the following services:

(i) gas, electricity and water supply;

(ii) emergency services;

(iii) public health services;

(iv) public education;

(v) public transport;

(vi) public housing.

37. Section 40B states:

40B Public authorities must act consistently with human rights

(1) It is unlawful for a public authority—

(a) to act in a way that is incompatible with a human right; or

(b) in making a decision, to fail to give proper consideration to a relevant human right.

(2) Subsection (1) does not apply if the act is done or decision made under a law in force in the Territory and—

(a) the law expressly requires the act to be done or decision made in a particular way and that way is inconsistent with a human right; or

(b) the law cannot be interpreted in a way that is consistent with a human right.

Note A law in force in the Territory includes a Territory law and a Commonwealth law.

(3) In this section:

public authority includes an entity for whom a declaration is in force under section 40D.

38. Section 40C of the *Human Rights Act* establishes the procedure for legal proceedings in relation to public authority actions:

40C Legal proceedings in relation to public authority actions

(1) This section applies if a person—

(a) claims that a public authority has acted in contravention of section 40B; and

(b) alleges that the person is or would be a victim of the contravention.

(2) The person may—

(a) start a proceeding in the Supreme Court against the public authority; or

(b) rely on the person's rights under this Act in other legal proceedings.

(3) A proceeding under subsection (2) (a) must be started not later than 1 year after the day (or last day) the act complained of happens, unless the court orders otherwise.

(4) The Supreme Court may, in a proceeding under subsection (2), grant the relief it considers appropriate except damages.

(5) This section does not affect—

(a) a right a person has (otherwise than because of this Act) to seek relief in relation to an act or decision of a public authority; or

(b) a right a person has to damages (apart from this section).

Note See also s 18 (7) and s 23.

(6) In this section:

public authority includes an entity for whom a declaration is in force under section 40D.

Crimes (Sentencing) Act

39. In seeking the novel relief to have his sentence backdated, the plaintiff relied upon s 63 of the *Crimes (Sentencing) Act*. That section states:

63 Start of sentences—backdated sentences

(1) The court may direct that a sentence of imprisonment is taken to have started on a day before the day the sentence is imposed.

Evidence

Evidence of the Plaintiff

First Affidavit

40. The plaintiff prepared an affidavit affirmed on 15 September 2020 (the plaintiff's first affidavit) which was tendered in the proceedings. In the plaintiff's first affidavit, the plaintiff deposed that he has a longstanding diagnosis of bipolar disorder. The plaintiff stated that during his time in the AMC, he had been ordered to spend time in the Management Unit for disciplinary reasons.

41. In the plaintiff's first affidavit, the plaintiff stated that the rear courtyard essentially formed part of the cell. The plaintiff noted that the rear courtyard provides an area for detainees in the Management Unit to smoke.

Second Affidavit

42. The plaintiff prepared a second affidavit affirmed on 7 April 2021 (the plaintiff's second affidavit). In the plaintiff's second affidavit, the plaintiff confirmed that he spent a total of 63 days in the Management Unit.

43. The plaintiff's second affidavit responds to affidavits in the proceeding relied on by the defendant that describe the "hard side" of the Management Unit. The plaintiff confirmed that he was a detainee that fell within the description of a person detained within the "hard side" of the Management Unit. The plaintiff deposed that he was never given access to the general exercise yard for the "hard side" during the confinement period.

44. The plaintiff stated that being in the rear courtyard made him feel that he was still in his cell because of the surrounding four concrete walls and its small size. The plaintiff deposed that there was no air circulation or breeze in the rear courtyard. The plaintiff stated that there was no direct sun and that if sunlight does come through, it is darkened by the mesh roof. The plaintiff opined that the rear courtyard did not give him adequate space to exercise, as he was unable to run or jog inside the space and was not provided with any exercise equipment during his time in the Management Unit.

45. In the plaintiff's second affidavit, the plaintiff stated that in order to seek access to the rear courtyard from his Management Unit cell, he used an intercom to buzz the correctional officer's station. If the plaintiff's request was granted for time out in the rear courtyard, the correctional officer would remotely open the rear cell door. The plaintiff's request was either granted or denied. To the plaintiff's observation, there was no time nor routine as to when a correctional officer would remotely unlock the door to the rear courtyard. The plaintiff had to ask permission for the door to the rear courtyard to be opened.

46. The plaintiff deposed that on some days during the confinement period, he was not granted access to the rear courtyard at all and remained in his cell for 24 hours. The plaintiff stated that he never refused to go into the rear courtyard.

47. The plaintiff again referenced that he has a longstanding diagnosis of bipolar disorder and stated that he informed the defendant of this diagnosis when he was first imprisoned in the AMC. The plaintiff noted that one of his general coping techniques for his mental condition is regular, strenuous exercise.

48. In the plaintiff's second affidavit, the plaintiff stated that being in a Management Unit cell for 24 hours a day severely impacted his mental and physical health. The plaintiff stated that he was made to feel anxious and depressed in his time in the Management Unit.

49. On 5 January 2019, the plaintiff completed a "prisoner's complaint form" and complained about being in a cell for 24 hours per day. The plaintiff deposed that the next day, a custodial officer responded to his complaint and said words to the effect of "the current Management Unit regime provides for access to fresh air and sunlight in yard at the rear of cell for min 1 hour each day". As the complaint was not resolved, the complaint was escalated to an officer at CO3 level. The plaintiff stated that the CO3 level officer wrote that the "Management Unit is not as comfortable as other housing units but is still compliant with human rights legislation". A copy of the plaintiff's complaint form was exhibited to the plaintiff's second affidavit.

50. The plaintiff was then moved back to regular housing in the AMC because of his mental health concerns. Thereafter, the plaintiff was again put in segregation and separate confinement in March 2019. The plaintiff stated that being confined for 24 hours a day made him feel depressed.

51. On 14 March 2019, the plaintiff again complained to the AMC about the lack of open air and exercise and the impact it was having on his mental health.

52. On 20 March 2019, the plaintiff contemplated hurting and killing himself. In the plaintiff's second affidavit, the plaintiff detailed an attempt to suicide via hanging. The plaintiff ceased the attempt and contacted corrections' staff requesting immediate mental health assistance.

53. On 22 March 2019, the plaintiff forwarded his complaints about the lack of open air and exercise to the Ombudsman. Copies of the complaints made in March 2019 were exhibited to the plaintiff's second affidavit.

54. The plaintiff stated that based on his observations, the Management Unit general exercise yard was the same as the general exercise yards in Sentence Unit 1 and 2 and Remand Unit 1 and 2 at the AMC. The plaintiff however noted that the general exercise yards in the sentence and remand units have more exercise equipment.

Oral Evidence

55. The plaintiff gave oral evidence at the hearing. The plaintiff confirmed that when he was first remanded in custody at the AMC, he was placed in Sentenced Unit 1 as an unplaced prisoner for his first year in custody. The plaintiff stated that he would utilise the exercise equipment that was available in the exercise yard annexed to Sentenced Unit 1. This equipment included a general exercise machine that allows a user to perform various exercises including leg press, bench press, and arm curls.

56. The plaintiff gave evidence that he was integrated with the remainder of the general prison population and there were 38 detainees in Sentenced Unit 1. The plaintiff noted that it became a "pretty hostile and violent yard". The plaintiff confirmed that he had assaulted several people during his time in custody at the AMC and that he had been involved in "physical contests". The plaintiff stated that certain detainees were at risk by being assaulted by him.

57. When asked in examination-in-chief why he had been placed in the Management Unit, the plaintiff confirmed that the first occasion was on account of him lighting a fire in his cell. The plaintiff gave evidence that the remaining times he was placed in the Management Unit was due to him participating in fighting. The plaintiff stated he had never threatened a Corrections Officer, nor had he been violent to AMC staff. The plaintiff gave evidence that he is not a smoker and that he never smoked during his time in the AMC.

58. The plaintiff was asked about the process of being moved to the Management Unit from the general accommodation. The plaintiff gave evidence that AMC staff would arrive at his cell in general accommodation, direct him to put his hands through the hatch or direct him to stand at the back of the cell and place his hands behind his head. Thereafter, he would be restrained and escorted to the Management Unit. Once inside a Management Unit cell, the plaintiff stated that the AMC staff then proceed to remove the handcuffs, perform a strip search and then close the door.

59. The plaintiff stated that initially, the process of seeking access to the rear courtyard was not explained to him. The plaintiff recalled AMC staff saying there was no smoking in the cell and that if detainees wanted to smoke, they would have to do so out the back of the cell. The plaintiff stated he remembered predominantly asking to access the general exercise yard and then over time, he learnt to "buzz up" and request access to the rear courtyard. The plaintiff gave evidence that "buzz up" referred to utilising the intercom panel in the cell to contact the AMC staff that are responsible for the Management Unit.

60. The plaintiff gave evidence that to get access to the rear courtyard, he learnt that he had to "buzz" and "then pretty much beg for [AMC staff] to open the back door". The plaintiff stated that there were occasions where he was refused access to the rear courtyard because he "didn't ask politely". The plaintiff gave evidence that AMC staff denied his request for access to the rear courtyard on several occasions and that he was not provided with a reason for a denial. The plaintiff further stated that he had been told on occasion "maybe later" or "I'm busy" by AMC staff. The plaintiff stated that he was granted access to the rear courtyard on other occasions.

61. The plaintiff noted that it was hard to determine the proportion of times he was told "yes", "no", "maybe later" by AMC staff. The plaintiff also stated that there were days he was in the Management Unit where he did not ask to be granted access to the rear courtyard. The plaintiff noted that there were occasions that he did not want to ask in light of been refused access at time and feeling defeated. The plaintiff stated he felt it was a sign of weakness to ask.

62. The plaintiff stated that his impression of the "hard side" of the Management Unit was that AMC staff intentionally made his time in the Management Unit hard on him. The plaintiff stated that the "hard side" was designed to be hard on the detainee. The plaintiff described it as "physically hard and mentally hard".

63. When asked about the occasions he was granted access to the rear courtyard, the plaintiff confirmed that the door is manual and he physically had to push it open after it was unlocked electronically. The plaintiff was asked how long he would stay in the rear courtyard when it was accessible and he responded that the "general understanding" was for access for one hour. The plaintiff noted that it could be more than one hour or could be less than one hour depending on what was occurring in the AMC.

64. The plaintiff stated that during the day if the door to the rear courtyard had been opened in the morning, detainees would be directed to close the door to facilitate the lunch lock-in or any security response that the Management Unit staff needed to attend to. When asked what the process would be if he wanted to have further access into the rear courtyard after being directed to close the door for lunch lock-in, the plaintiff gave evidence that he would have to use the intercom to "buzz up" and request access again. The plaintiff stated that on some occasions he would be granted further access and on others, he was told, "you've already had your hour" or "maybe later".

65. The plaintiff gave evidence that the intercom was able to be turned off by Management Unit staff and stated that he experienced the intercom being turned off on multiple occasions. The plaintiff stated that when the intercom was switched off, he was unable to contact the Management Unit staff and his only option of communicating with staff was to kick the cell door or yell. The plaintiff stated he presumed Management Unit staff would turn off an intercom if he was bothering them.

66. The plaintiff was asked about his bipolar affective disorder. The plaintiff gave evidence that the symptoms he experiences includes periods of heightened activity, which are then followed by long periods of severe depression. In a period of heightened activity, the plaintiff described being in a manic phase, getting less sleep with heightened senses and extreme beliefs. The plaintiff stated that when he was first remanded in AMC, he experienced periods of being low, where he had little energy and felt negative and unmotivated.

67. The plaintiff confirmed that he was treating the depression when he was first remanded in the AMC with an antidepressant. The plaintiff stated that he also found that exercise and a healthy lifestyle help to manage his symptoms. Before being remanded in the AMC, the plaintiff exercised every day, as much as he could. When in Sentenced Unit 1, the plaintiff would attempt to perform weight exercises for at least two hours each morning and then would remain active throughout the day, such as by jogging or walking. The plaintiff stated that when he could not do two hours of weights and walking, he would feel like "shit" as he relied upon exercise significantly as a coping technique.

68. The plaintiff stated that while he was in the Management Unit, he felt that he was at the lowest point of his entire life. The plaintiff gave evidence about an attempted suicide that occurred while he was in the Management Unit and noted it was due to being aware he was spending a long time in the AMC and the way he was going, he was likely to spend a large proportion of this time in the Management Unit.

69. The plaintiff was referred to the list which contained particulars of when he was in the Management Unit, including the duration of time he spent and the reason he was in there. In reference to the occasion where the plaintiff spent 28 days in the Management Unit, the plaintiff said it made him feel like he was never getting out and that he was going to be in the cell forever.

70. The plaintiff confirmed he did not take issue with being placed in the Management Unit and accepted that if he misbehaved in the AMC, there were to be consequences for that conduct. The plaintiff stated that his issue was with the treatment that came with being in the Management Unit. The plaintiff stated he wanted to utilise the general exercise yard and that he was not permitted to do so.

71. When asked why the plaintiff wanted access to the general exercise yard, the plaintiff stated that the general exercise yard was open to air, provided adequate space for him to exercise and equipment for him to train with. Of the rear courtyard, the plaintiff stated, "I suppose I've always seen the rear courtyard as part of the cell". The plaintiff stated that he did not see the rear courtyard as encapsulating time out of his cell. The plaintiff gave evidence that he felt the general exercise yard provided open air because he would be able to see the surrounding landscape, as well as be able to feel the sun and wind on his skin. In respect of adequate space, the plaintiff noted that if he were to lie down in the rear courtyard, he would be "touching end to end" which was inadequate.

72. The plaintiff was shown photographs of the general exercise yard and confirmed that he had never been in that area of the Management Unit. The plaintiff noted that he was able to see the general exercise yard from when he was using the telephone in the Management Unit.

73. In cross-examination the plaintiff confirmed that there were occasions that he was denied further access to the rear courtyard in circumstances where he had already

accessed the rear courtyard for one hour that day. The plaintiff further confirmed there were occasions where he was denied access in circumstances where he had not been granted access to the rear courtyard at all on the relevant day. The plaintiff was asked about occasions where he initially requested access and was denied, and whether the plaintiff would subsequently request access to the rear courtyard at a later time that day. The plaintiff gave evidence that he generally would not ask again because he was too ashamed and did not want to utilise the intercom to "beg".

74. The plaintiff was taken to an exhibit of the plaintiff's second affidavit, the prisoner complaint form. It was put to the plaintiff that the form did not contain a complaint as to denial of access to the rear courtyard. The plaintiff stated that the denial of access was "to be implied" from his complaint that he was "locked down 24 hours a day". The plaintiff accepted that the complaint form did not explicitly contain a complaint that the plaintiff had ever been denied access to the rear courtyard.

75. The plaintiff was taken to a further exhibit of his second affidavit, a handwritten note addressed to the Ombudsman. The plaintiff accepted that the note to the Ombudsman did not contain a complaint as to the denial of access to the rear courtyard. The plaintiff accepted that the note only contained a complaint of being denied access to open air and exercise.

76. The plaintiff was referred to his evidence given in evidence-in-chief that the Management Unit staff had the capacity to turn a detainee's intercom off and that as a result, there were occasions where the plaintiff was unable to contact staff. The plaintiff confirmed his evidence that when this arose, he would have to "kick the door" or yell to get the attention of the staff. The plaintiff was then referred to an exhibit of his second affidavit which set out the Detainee Observations Forms of the plaintiff for the confinement period he spent in the Management Unit. The plaintiff accepted that there were hourly observations of himself while he was in his designated Management Unit cell. The plaintiff however stated that the staff would merely come past and give "a cursory look" when conducting observations. It was put to the plaintiff that he could have requested access to the rear courtyard when the Management Unit staff were conducting hourly observations. The plaintiff responded that he "suppose[d] I could have begged and asked. Yes".

77. In re-examination, the plaintiff stated that his note to the Ombudsman and other complaints did not reference denial of access to the rear courtyard because his main complaint has always been that he did not consider the rear courtyard as an area that provided open air and exercise.

Evidence of Shannon Pickles

78. Mr Shannon Pickles prepared an affidavit affirmed on 3 February 2021, which was relied on by the plaintiff. Mr Pickles confirmed that since July 2017, he has been appointed as an Official Visitor, Corrections in accordance with s 57 of the *Corrections Management Act*.

79. As part of his role, Mr Pickles has undertaken inspections of correctional facilities in the ACT and has taken complaints from detainees, pursuant to the *Official Visitor Act 2012* (ACT). In this capacity, Mr Pickles also provides regular written reports directly to the Minister for Corrections and Justice Health (the Minister).

80. In his affidavit, Mr Pickles confirmed he met with the plaintiff to hear the plaintiff's concerns about the Management Unit. Mr Pickles further confirmed that as a result of formal complaints received by Official Visitors in respect of the Management Unit, the Official Visitors submitted reports to the Minister. Mr Pickles noted that the reports do not name specific detainees but rather raise systemic issues to be dealt with by the defendant's staff and the Minister.

81. Mr Pickles stated that issues concerning the operation of the Management Unit were also raised in a formal quarterly report for the period January to March 2019. In his affidavit, Mr Pickles noted that the Minister's response to the quarterly report for the period January to March 2019 was received in around June 2019.

82. Annexed to Mr Pickles' affidavit was the response from the Minister, which relevantly provided:

> In all instances detainees within the Management Unit have been afforded at least the minimum amount of time out in accordance with the *Corrections Management Act*. This is in addition to where detainees have been able to access the small courtyards attached to their cells [rear courtyard], not inclusive of.

83. Mr Pickles stated in his affidavit that he was aware that for a significant period of time, the defendant considered access to the rear courtyard for one hour as being sufficient to meet the required living conditions for detainees at the Management Unit. Mr Pickles deposed that he disagreed with the position of the defendant but the AMC management were firm in their view it was sufficient.

84. Mr Pickles stated that he is of the view that a detainee in the "hard side" of the Management Unit can be easily escorted to the general exercise yard to exercise and be in the open air. Mr Pickles confirmed that he has observed a rear courtyard and opined that it is not a space designed for exercise, in contrast to the general exercise yard. Mr Pickles stated that a rear courtyard has four solid walls and is covered. Mr Pickles noted that the level of cover overhead results in the rear courtyard not being exposed to unobstructed sunlight.

85. Mr Pickles observed that detainees kept in the Management Unit are in conditions which are "more difficult and intense". Mr Pickles stated that the conditions of the Management Unit are more severe than the ordinary circumstances of the AMC. Mr Pickles stated that it is very important that detainees who are in the Management Unit at least get the bare minimum of an hour of exercise in open air. Mr Pickles opined that the defendant ought to make available the general exercise yard, which was purpose built, to detainees in the Management Unit.

86. Mr Pickles was not required for cross-examination and did not give oral evidence at the hearing.

Evidence of Timothy Rust

87. Mr Timothy Rust prepared an affidavit affirmed on 23 March 2021, which was relied upon by the defendant. Mr Rust subsequently took extended leave and was not able to attend the hearing to give oral evidence. The parties disagreed as to whether Mr Rust was "unavailable" within the meaning of s 4 of the *Evidence Act* dictionary and the Court was not ultimately required to decide this question, nor whether s 63 of the *Evidence Act* had application. I ruled that pursuant to s 136 of the *Evidence Act*, the affidavit of Mr Timothy Rust could only be used for a limited purpose insofar as its

content was adopted by Mr Gregory Tarlinton. The following summary of Mr Rust's affidavit evidence therefore only references content that is adopted by Mr Gregory Tarlinton, which is also subsequently summarised at [128]-[174].

88. At the time of deposing his affidavit, Mr Rust was the Senior Director of Operations at the AMC and had been employed in that position since December 2017. Mr Rust confirmed that the Management Unit accommodates detainees who are placed under segregation or separate confinement.

89. Mr Rust noted that segregation is the removal of a detainee from the regular prison population for one or more of the following reasons, in accordance with pt 6 of the *Corrections (Management of Segregation and Separate Confinement) Policy 2020* (ACT) (NI2020-791) and pt 9.2 of the *Corrections Management Act*:

    (a) The safety of anyone else at the AMC, or security and good order at the AMC (safety and security segregation);

    (b) The protection of the detainee (protective custody);

    (c) To reduce the spread of disease (health segregation); or

    (d) For investigation of an alleged disciplinary breach (investigative segregation).

90. Mr Rust highlighted that separate confinement is the separation of a detainee from their regular accommodation as an administrative penalty for a disciplinary breach under ch 10 of the *Corrections Management Act*. Mr Rust's affidavit also describes the procedure for placing someone into the Management Unit, which need not be explicated in detail here.

91. Mr Rust noted that the Management Unit was constructed as part of the original building plans for the AMC and opened on 11 September 2008. The Management Unit has accommodated detainees who are under segregation and separate confinement since its opening and at any one time, can accommodate up to 14 detainees. Mr Rust stated that the Management Unit is staffed by two Corrections Officers and attended by the Duty Manager on a daily basis.

92. Mr Rust confirmed that the Management Unit has 14 cells of identical dimensions. Each cell can house one detainee. The rear courtyard for each cell is identical in size and dimension and a rear courtyard itself is of a similar size and dimension to the cell. The door to the rear courtyard can be locked and unlocked electronically by staff but is only able to be physically opened and closed by the detainee. Exhibited to Mr Rust's affidavit were photographs of a rear courtyard of a "hard side" cell taken in or about October 2020. Mr Rust confirmed that the photographs depict the same state of the rear courtyard as would have been experienced by the plaintiff between October 2018 and September 2019. The photographs of a rear courtyard and "hard side" cell are annexed to this judgment marked "Annexure A".

93. Mr Rust's affidavit also contains a description of the general exercise yards which are attached to the Management Unit building complex on either side of the building. Mr Rust stated that within the general exercise yard, there are two metal exercise "bars" which allow detainees to perform body weight exercises. Mr Rust's affidavit also exhibited photographs of a general exercise yard taken in or about October 2020. The

photographs of the general exercise yard are annexed to this judgment marked "Annexure B".

94. Mr Rust noted that the access doors to the general exercise yards do not have hatches for detainees to insert their hands through. Mr Rust stated that this made it impossible for AMC staff to implement the Management Unit's handcuffing procedure pursuant to item 4.13 of the 2019 Operating Procedure.

95. Mr Rust's affidavit also included a description of the "hard side" and the "soft side" of the Management Unit. Mr Rust confirmed that the determination to place a detainee on either side of the Management Unit is dependent on whether the detainee is under segregation or separate confinement and, if they are under segregation, the type of segregation order that has been made. Mr Rust further noted that the "hard side" is for detainees who are being accommodated in the Management Unit for the following reasons:

    (a) Separate confinement due to a disciplinary breach under ch 10 of the *Corrections Management Act*;

    (b) Investigative segregation; and

    (c) Safety and security segregation.

96. Mr Rust noted that it is the Management Unit's policy that hard side detainees generally do not have access to the general exercise yard, in light of the access to the rear courtyard. However, Mr Rust further stated that a "hard side" detainee might "from time to time" be granted access to the general exercise yard if a Corrections Officer in the Management Unit had conducted a review and decided that it was safe and appropriate to allow the detainee access. The detainee would be required to be kept in handcuffs and supervised by two Corrections Officers during any time spent in the general access period in light of safety and security risks. Mr Rust then however noted that due to there only ever being two staff supervising the Management Unit at any one time, it is not possible for those staff to provide supervised access for a "hard side" detainee in the general exercise yard.

97. Mr Rust noted that when a detainee is placed on separate confinement for a disciplinary breach, the period of time for which they remain in separate confinement can be either three, seven, or 28 days, which is dependent on the severity of the breach. Mr Rust had authority as the Senior Director of Operations to conduct a review after a detainee had completed their period of separate confinement to determine whether the detainee could be returned to the general prison population or whether it was necessary for them to be placed under segregation for a period of time. If a safety and security direction for segregation was made, a detainee may then be required to remain on the "hard side" of the Management Unit until the period of segregation was completed.

98. In respect of the rear courtyard, Mr Rust confirmed that its purpose is for detainees to have access to outdoor air, light, a space to do solitary exercise, and to smoke cigarettes. Mr Rust noted that the door between each cell and rear courtyard is able to be locked and unlocked electronically by staff. Mr Rust stated that detainees are informed that they can request that the door be unlocked for access to the rear courtyard at any time after the morning muster until the evening lock-in. Once the door to the rear courtyard is opened, a detainee can physically close it at any time between morning muster and 6:00PM. Mr Rust further noted that if a detainee chooses to leave

the door open during that time, it will remain open and unlocked until the evening lock-in. Mr Rust confirmed that all detainees on the "hard side", whether they are under separate confinement or segregation, have the same level of access to the rear courtyard. Mr Rust recalled being informed by staff in 2018 and 2019 that detainees often asked for the door to the rear courtyard to be unlocked after morning muster and then chose to leave it unlocked all day, so that they could access the rear courtyard whenever they liked until evening lock-in.

99. Mr Rust noted that Management Unit staff conduct "rounds" of the area every hour. During rounds, the staff enquire with detainees and offer them access to their statutory entitlements. Such entitlements include making a phone call, requesting to be seen by a case manager or liaison officer, or requesting access to the rear courtyard. Mr Rust stated that detainees also have an intercom buzzer located within their cell, which can be used to communicate with the Management Unit staff.

100. Mr Rust confirmed that pursuant to the *Corrections Management (Management of Segregation and Separate Confinement) Policy 2019* (ACT) (NI2019-381), detainees receive a copy of the document titled "Segregation/ Separate Confinement Rule and Regime for the Management Unit" at the commencement of their period of segregation or separate confinement in the Management Unit, a copy of which was exhibited to Mr Rust's affidavit.

101. In respect of the general exercise yards, Mr Rust stated that in their current state, the general exercise yards pose a security and/ or safety risk to detainees and AMC staff. Hence, it is the policy of the Management Unit that detainees on the hard side generally do not have access to the general exercise yards. As the doors to the general exercise yards do not contain hatches to handcuff detainees prior to their exit from the yard, Mr Rust noted there is a safety risk to AMC staff in attempting to reapply the handcuffs before transporting a detainee back to their cell. Due to the absence of the hatches, AMC staff would be required to enter the general exercise yard in order to restrain the detainee. If the detainee was non-compliant, it would pose a safety risk to the AMC staff member's safety to attempt to apply the handcuffs.

102. Mr Rust further noted that the mesh used for the walls of the general exercise yards is thick and widely spaced enough to allow a detainee to climb the mesh wall to the top of the enclosed space. Mr Rust stated that such an action presents a serious risk to safety and security for the following reasons:

    (a) A detainee can climb to the top of the 4.33 metres high enclosure, above the sight of the CCTV camera and out of sight of the Management Unit staff;

    (b) A detainee can climb to the top of the enclosure to avoid being returned by staff to their cell;

    (c) A detainee can climb the mesh in order to jump or throw themselves from a height onto the ground or on other detainees or AMC staff, potentially causing serious injury or death;

    (d) A detainee can use the mesh as a ligature point.

103. Mr Rust also highlighted that the two exercise bars that are contained within the general exercise yard also present possible ligature points for a detainee to attempt self-harm. Mr Rust noted that in light of the safety and security risks, "hard side" detainees

generally do not get access to the general exercise yards and are instead provided with access to their rear courtyard for outdoor air, light, and space for exercise.

104. Mr Rust's review of the plaintiff's records set out the various occasions that the plaintiff was placed in the Management Unit and the reason he was placed under separate confinement/ segregation/ investigative segregation during those periods. It includes that the plaintiff was alleged to have deliberately caused a power outage by starting a fire in his cell, various assaults on other detainees, and disciplinary breaches. Mr Rust noted that during the plaintiff's period of segregation from 20 April 2019 to 29 April 2019, he recalled being informed by a team member that after the plaintiff was placed under segregation on 20 April 2019, he said he was going to hang himself. Thereafter, the plaintiff was referred for assessment by Justice Health Services at the Crisis Support Unit within the AMC. The assessment was completed and the plaintiff was returned to the Management Unit by Justice Health Services on 21 April 2019.

105. Mr Rust's affidavit also outlines his interactions with the plaintiff. Mr Rust recalled that the plaintiff said to him on several occasions in or about 2019 that he felt AMC staff were discriminating against him because of his "political views". The plaintiff had said to Mr Rust words to the effect that "AMC staff were discriminating against white detainees" because they did not recognise or celebrate the culture of white detainees.

106. Mr Rust also recalled the plaintiff saying to him in or about 2019 words to the effect that AMC staff were placing him in an "impossible position" by increasing the numbers of "non-white" detainees in the Sentenced Unit in which he was accommodated. The plaintiff said words to the effect that he was concerned that if the proportion of Indigenous and non-white detainees got bigger, he would find himself in a position where he was likely to assault them.

107. Mr Rust recalled that on or about 16 April 2019, he was informed by AMC staff who had contact with the plaintiff at that time that a search had been conducted of his cell in the Sentenced Unit. During that search, AMC staff:

    (a) Found what they considered to be a significant amount of extremist publications on display in the plaintiff's cell, including images of a swastika and the Nazi flag;

    (b) Observed a drawing of a large gravestone on the wall of the plaintiff's cell, alongside the words "RIP" and "drain the swamp"; and

    (c) Observed a tally that was marked on the gravestone drawing, which Mr Rust was informed by AMC staff they suspected was a reference to the detainees the plaintiff had been able to have removed from his accommodation unit.

108. Mr Rust attended the plaintiff's cell shortly after the search was conducted and observed the images of the swastika and Nazi flag in situ on the cell wall, as well as the drawing of the gravestone and tally. AMC staff advised Mr Rust that photographs had been taken of the items displayed in the plaintiff's cell. Mr Rust's affidavit exhibits the photographs of the search. The photographs show that the plaintiff had multiple images of swastikas displayed in his cell, a drawing with a swastika and a skull with cursive handwriting reading "make Australia great again", a print out of a Canberra Times article entitled "Prison assault rate remains high as overcrowding concerns grow" which was surrounded by printed images from the film American History X, hand

drawn swastikas and handwriting reading “make SU1 [Sentenced Unit 1] great again” and “drain the swamp”.

109. Mr Rust recalled being informed by Management Unit staff that the plaintiff was generally compliant with the orders and directions given to him by staff. Mr Rust further recalled staff informing him that during the plaintiff’s time in the Management Unit in 2019, the plaintiff continued to say words to the effect that he did not want to be placed with Indigenous or culturally diverse detainees in the AMC and expected to have his views catered for.

Evidence of Matthew Kelly

110. Mr Matthew Kelly prepared an affidavit sworn on 23 March 2021, which was relied upon by the defendant. Mr Kelly is an Area Manager of Operations of the AMC and has worked in that role since October 2018. Mr Kelly commenced working at the AMC in April 2015. Mr Kelly previously worked as a custodial manager in the United Kingdom. In his current role, Mr Kelly is responsible for overseeing the operations of the Management Unit and undertaking compliance checks of the Management Unit.

111. Mr Kelly confirmed in his affidavit that the Management Unit is made up of 14 cells, which are split into a “hard side” and a “soft side”. Mr Kelly stated that the “hard side” is for detainees under separate confinement, investigative segregation or safety and security segregation. The “soft side” is for detainees under protective custody or health segregation.

112. Mr Kelly stated that the “hard side” and the “soft side” are separated by a central office, as well as security doors on either side of the office. Mr Kelly noted that there are two general exercise yards in the Management Unit, one on either side of the building.

113. Mr Kelly noted that there are only two Corrections Officers rostered on to the Management Unit at any one time. Those Officers are responsible for supervising and managing the detainees on both the “hard side” and the “soft side”. The Officers are also required to facilitate detainees’ access to their standard entitlements, which generally occurs between 8:30AM and 6:00PM. Mr Kelly confirmed that after 6:00PM, detainees are required to remain in their cells.

114. Mr Kelly is responsible for conducting regular management and compliance inspections in the Management Unit and stated that he typically completes inspections two to three times per day. The inspections involve the following tasks:

    (a) Conducting security checks, including ensuring that all required documents are completed and that daily cell inspections are conducted and recorded. Detainee request forms are completed by staff in the area and then forwarded to the relevant location;

    (b) Reviewing the Visitor Log;

    (c) Ensuring all detainees are present and that all doors to the cells and the adjoining rear courtyards are locked prior to lock-in at 6:00PM each day.

115. Mr Kelly outlined the process of what occurs when a detainee first arrives at the Management Unit in his affidavit. Mr Kelly or another Area Manager will meet with the detainee and explain why they have been placed in the unit. A Corrections Officer from the Management Unit then conducts an induction where the detainee is given a copy

of the Segregation/ Separate Confinement Rule and Regime for the Management Unit. A copy of this document was annexed to Mr Kelly's affidavit.

116. Mr Kelly noted that detainees housed in the "soft side" of the Management Unit have access to the same entitlements that all detainees have during their time in custody, as well as other privileges including access to a kitchenette containing a microwave, toaster, and kettle, as well as access to the general exercise yard on the "soft side" of the Management Unit.

117. Mr Kelly stated that detainees contained in the "hard side" remain in their cell for most of the day and are generally only permitted to leave their cell to access their entitlements. Mr Kelly confirmed that "hard side" detainees do not have access to the privileges that those on the "soft side" have. Mr Kelly stated in his affidavit that "hard side" detainees are not entitled to have access to the general exercise yard on the "hard side" of the Management Unit.

118. Mr Kelly noted that when a detainee on the "hard side" is taken out of their cell, they are required to be handcuffed and accompanied by at least two staff from the Management Unit, depending on the willingness of the detainee to comply with directions and the risk posed by the detainee. Mr Kelly confirmed that some detainees may require additional staff members to control them, which is dependent on the risk assessment of the detainee. The handcuffing procedure is set out in the 2019 Operating Procedure.

119. Prior to the enactment of the 2019 Operating Procedure, Mr Kelly stated that the previous practice was that "hard side" detainees were to be handcuffed whenever they were being moved from their detail, at the discretion of a supervising Corrections Officer. The decision as to handcuff a detainee or not was based on the safety or security risk posed by the detainee. Mr Kelly noted that a risk assessment would be conducted for each detainee.

120. Mr Kelly stated that the process of handcuffing a "hard side" detainee first requires the detainee to put their hands through a hatch in their cell door so that a Corrections Officer can apply the handcuffs. The detainee would then retract their handcuffed wrists back into the cell, the cell door would then be opened before the attending Corrections Officers (usually two) would escort the detainee from the cell.

121. Mr Kelly confirmed that neither of the general exercise yards in the Management Unit have doors with hatches. As a result, Mr Kelly stated it is not possible for staff to implement the handcuffing policy for "hard side" detainees. Mr Kelly noted that the absence of hatches in the general exercise yards also means it is not always possible for staff to safely remove or reapply a detainee's handcuffs in the general exercise yards.

122. Mr Kelly also deposed that the Management Unit does not have sufficient staffing numbers to undertake escorting nine "hard side" detainees to and from the general exercise yard for one hour each. Instead, Mr Kelly relied upon the availability of the rear courtyard as a means of providing access to the outdoor air and a space to exercise or smoke cigarettes.

123. Mr Kelly confirmed that detainees housed within both the "hard side" and the "soft side" of the Management Unit can request access to their rear courtyard at any time after morning muster and before the 6:00PM lock-in, by pressing the internal intercom inside

their cell. Mr Kelly also noted that the two Corrections Officers who work in the Management Unit also undertake "rounds" of the Management Unit hourly, during which detainees are given an opportunity to make requests, such as for access to the rear courtyard and cigarette lighters.

124. Mr Kelly stated that when a detainee requests access to their rear courtyard, the Management Unit staff electronically unlock the door via remote means. Mr Kelly noted that very occasionally, staff will advise the detainee that there might be a short delay if the staff are already undertaking another task. Mr Kelly stated that once the door to the rear courtyard is remotely unlocked, it remains open until the detainees choose to physically close the door or it will be locked by staff for the 6:00PM lock-in.

125. Mr Kelly further noted that sometimes a detainee will be moved from the "hard side" to the "soft side" as part of their transition from the Management Unit back to regular AMC accommodation. Mr Kelly could not recall if the plaintiff was ever moved from the "hard side" to the "soft side" during his time in the Management Unit.

126. Mr Kelly recalled first meeting the plaintiff when the plaintiff was placed in Sentenced Unit 1. Mr Kelly recalled the plaintiff initiating conversations, including asking Mr Kelly about his experience working in UK prisons. In 2018 and 2019, Mr Kelly spoke to the plaintiff during the plaintiff's time when he was in the Management Unit. Mr Kelly noted that the plaintiff was always polite and respectful to him and other AMC staff. However, Mr Kelly further noted that he was aware from his discussions with Management Unit staff and from his review of documentation in 2018 and 2019 that some of the plaintiff's placements in the Management Unit were a result of him assaulting other detainees.

127. Mr Kelly was not required for cross-examination and did not give oral evidence at the hearing.

Evidence of Gregory Tarlinton

Affidavit

128. Mr Gregory Tarlinton prepared an affidavit affirmed on 27 April 2021 that was relied upon by the defendant. Mr Tarlinton is employed as an Area Manager of Accommodation (Corrections Officer 3 level role) at the AMC and has been working in that role since approximately September 2020. Mr Tarlinton has worked at the AMC since 2011.

129. Mr Tarlinton was made aware of the affidavit of Mr Rust in relation to this matter. Mr Tarlinton noted that Mr Rust is currently on medical leave from his employment and it is not known when he will return. Mr Tarlinton's affidavit was prepared for the purpose of responding to and, where appropriate, adopting or supplementing, the evidence of Mr Rust. Mr Tarlinton had also read the plaintiff's second affidavit.

130. Mr Tarlinton adopted the description of the Management Unit as set out in Mr Rust's affidavit. Mr Tarlinton noted that unlike Mr Rust, he does not have authority to make a direction to place a detainee under separate confinement but adopted the description given of the process for placing a detainee under separate confinement.

131. Mr Tarlinton also adopted Mr Rust's description of the rear courtyard. In response to the plaintiff's second affidavit, Mr Tarlinton further noted that the access door to each rear courtyard has a clear glass window which is positioned above the door handle, approximately at eye level, and is approximately 10cm narrower than the width of the

door to allow for the frame of the window. Mr Tarlinton referred to Mr Rust's description of the built-in observation panel, expanding on this statement to add that the panel serves as a window to allow the detainee to see the area outside the rear courtyard, which includes grass and paths to the Colourbond fence around the perimeter of the Management Unit. Mr Tarlinton further noted that the window provides a view of the same grassed area and fence as is visible from the general exercise yard, varying slightly depending on which cell the detainee is housed in. Mr Tarlinton also stated that the rear courtyard walls are approximately 2.65 metres high.

132. Mr Tarlinton agreed with Mr Rust's description of the 2019 Operating Procedure as to handcuffing but clarified that he instead refers to the "handcuffing policy" as described by Mr Rust as the "handcuffing practice" as before 13 June 2019 it was not a written policy. In respect of Mr Rust's discussion of "hard side" detainees not being permitted access to the general exercise yards, Mr Tarlinton further emphasised that only one "hard side" detainee can be accommodated in a general exercise yard at any one time. Mr Tarlinton noted that this was on account of safety and security risks, as well as detainees in separate confinement being prohibited from socialising with other detainees.

133. Mr Tarlinton also adopted Mr Rust's description of the rear courtyards adjoining the Management Unit cells. Mr Tarlinton further noted that the door handle to the rear courtyard is an anti-ligature door handle and once unlocked, a detainee must physically open the door to pass through it. The electronic locking system does not control the physical opening or closing of the door. Mr Tarlinton noted that the usual practice in the Management Unit is for a detainee's request for the door to be unlocked to be granted immediately, or within a few minutes if AMC staff are completing another task, and for the door to remain open until physically closed by the detainee or for evening lock-in. Mr Tarlinton stated that during his employment at the AMC, he had not known or heard of any detainees' requests to have access to the rear courtyard being denied, other than in exceptional circumstances.

134. Mr Tarlinton adopted Mr Rust's description of the Management Unit staff conducting "rounds" as well as confirming that all detainees on the hard side have the same level of access to the rear courtyard. Mr Tarlinton further confirmed that he had recollection that during 2018 and 2019 detainees in the Management Unit would often ask for the door to the rear courtyard to be unlocked after morning muster and then chose to leave it unlocked until the lock-in, so that they could use the rear courtyard throughout the day.

135. Mr Tarlinton adopted Mr Rust's description of the general exercise yards and the safety risks posed by granting detainees access to these spaces. Mr Tarlinton further noted that the most significant issue with allowing detainees access to a general exercise yard is the ability of the detainees to climb the mesh in a large space. Mr Tarlinton also recalled being advised by an AMC staff member in his team that the plaintiff had said he was going to hang himself. Mr Tarlinton noted that he had not had a direct conversation with the plaintiff as to this issue.

136. Mr Tarlinton recalled speaking to the plaintiff during the plaintiff's time in the Management Unit on most days that he was rostered to work, approximately 3-4 days per fortnight on average. Mr Tarlinton also had regular conversations with the plaintiff in his previous role as a supervisor in Sentenced Unit 1 when the plaintiff was housed there from 2017 until July 2018. Mr Tarlinton adopted Mr Rust's outline of his

conversations with the plaintiff where the plaintiff would complain about the increasing numbers of “non-white” detainees. Mr Tarlinton noted that he had had conversations with the plaintiff with words to the similar effect in or about 2018.

137. Mr Tarlinton also adopted Mr Rust’s description of the search executed on the plaintiff’s cell when he was housed in Sentence Unit 1. Mr Tarlinton recalled attending the plaintiff’s cell himself and observing the Nazi paraphernalia.

138. Mr Tarlinton further adopted Mr Rust’s description of conversations with the plaintiff during his time in the Management Unit. Mr Tarlinton’s dealings with the plaintiff in or about early 2019 is consistent with the plaintiff expressing that he did not wish to be placed with Indigenous or culturally diverse detainees and expected to have his views catered for.

139. Mr Tarlinton’s affidavit also responded to content contained within the plaintiff’s second affidavit. Mr Tarlinton agreed with the plaintiff’s outline of his time spent in the Management Unit, the reasons why the plaintiff was in the Management Unit, and the particular cell that the plaintiff was housed in. Mr Tarlinton accepted that the confinement period was 63 days and further accepted that the plaintiff was never given access to a general exercise yard during the confinement period.

140. In respect of the plaintiff’s description of there being no air circulation, breeze, or direct light in the rear courtyard, Mr Tarlinton noted that his observation of the rear courtyard is that one can see the sky through the mesh cover of the rear courtyards. Mr Tarlinton further noted that sunlight and rain penetrate the mesh into the courtyard. Mr Tarlinton also stated that cigarette smoke dissipates through air movement past the open mesh and into the atmosphere.

141. Mr Tarlinton also responded to the plaintiff’s outline of the process to seek access to the rear courtyard and whether access may be denied. Mr Tarlinton stated that in his experience, there are only two exceptional reasons why a detainee’s access to the rear courtyard would be denied:

    (a) If a detainee is threatening imminent self-harm. Mr Tarlinton noted that the door to the rear courtyard will not be opened upon request in this circumstance because the open door presents a potential ligature point for self-harm; and

    (b) If a detainee refuses to comply with directions. For example, if a detainee is refusing to put their hands through the hatch for application of handcuffs according to the handcuffing procedure. Mr Tarlinton stated that access to the rear courtyard will not be granted whilst the detainee is being actively non-compliant.

142. Mr Tarlinton stated that if a detainee is denied access to the rear courtyard, the usual practice would be for this denial to be recorded by AMC staff in the case notes and in the Management Unit Daily Log Sheet. Mr Tarlinton further confirmed that hourly rounds are conducted for detainees in the Management Unit in which detainees are visually inspected as being present in the cell. The Management Unit Daily Log Sheet coins the list of detainee entitlements that are checked off throughout the day by staff as each entitlement is met. Mr Tarlinton confirmed that the sheet is used to record whether a detainee is present in their cell for each hourly observation round.

143. Mr Tarlinton conducted a review of the plaintiff's case notes and daily check sheets. Mr Tarlinton could not discern a reference to the plaintiff being denied access to the rear courtyard during his time in the Management Unit. However, Mr Tarlinton acknowledged there was a single reference to the plaintiff being denied access to the "external yard", which was recorded on the case note sheet dated 27 March 2019.

144. Mr Tarlinton also referred to an exhibit of the plaintiff's second affidavit; the Detainee Observation Forms, in respect of the plaintiff's claim that on some occasions, he did not access the rear courtyard at all and remained in his cell for 24 hours. Mr Tarlinton noted that when conducting hourly observation rounds of the detainees, the AMC staff member will look through the glass window of the cell door and record whether the detainee is present. Mr Tarlinton stated that this is often recorded as "in cell", which means that the detainee was present and securely located behind the cell door. Mr Tarlinton clarified that "in cell" may include if the detainee was sighted in the rear courtyard with the internal door open.

145. Mr Tarlinton addressed the portion of the plaintiff's second affidavit where the plaintiff outlined his completion of a "Prisoner's Complaints Form" on 5 January 2019. Mr Tarlinton recalled having a conversation with the plaintiff on or about 5 January 2019, during which the plaintiff said words to the effect of, "this place is uncomfortable, I don't have access to my usual property and activities". Mr Tarlinton recalled that he then explained to the plaintiff that the Management Unit is not intended to be comfortable and that it does comply with the minimum entitlements. Mr Tarlinton's recollection was that the plaintiff was then frustrated and said words to the effect of, "I just want to get back to being able to exercise properly and regularly". Mr Tarlinton was aware of his previous interactions with the plaintiff in the sentenced area that the plaintiff was a regular user of the gym equipment in the Sentenced Unit 1 exercise yard.

146. Mr Tarlinton formed the view during his discussions with the plaintiff at this time that the plaintiff was experiencing difficulty coping emotionally. Mr Tarlinton considered the plaintiff's mental health state and formed the view that the benefit of keeping the plaintiff in segregation for safety and security reasons did not outweigh the risk of deterioration of his mental health. Mr Tarlinton had the power at the time to move detainees in the Management Unit back into the regular AMC accommodation. Accordingly, Mr Tarlinton made the decision to return the plaintiff to his regular AMC accommodation.

147. Mr Tarlinton also responded to the affidavit of Mr Pickles. In respect of Mr Pickles' reference to the "grassed area" surrounding the Management Unit, Mr Tarlinton confirmed that the AMC do not use the grassed area for any detainee access as it is not a secure area. Mr Tarlinton noted that the grassed area is outside the contained secure area inside the electric fence and that the fence surrounding the grassed area is merely a courtesy fence, rather than a security fence.

Oral Evidence

148. Mr Tarlinton gave oral evidence at the hearing. Parties agreed that to expedite the matter, his evidence-in-chief was brief with more extensive cross-examination and the opportunity for re-examination. In cross-examination, Mr Tarlinton confirmed that the plaintiff was always polite to him and that from his experience, he had not seen the plaintiff have any issues with AMC staff.

149. Mr Tarlinton gave evidence that the “hard side” “was a less comfortable area” initially but then stated that the difference between the sides of the Management Unit was by name only and that they contained the same facilities.

150. Mr Tarlinton confirmed that the door to the general exercise yard could be opened remotely by Management Unit staff. Mr Tarlinton further confirmed that the handcuffing practice is a blanket policy that applies to all detainees in the Management Unit for safety reasons.

151. When asked whether if the handcuffing practice was not in place, it could be possible for a Management Unit detainee to be granted remote access to the general exercise yard, Mr Tarlinton confirmed it was possible and it had been a previous practice. However, Mr Tarlinton stated that it was not a successful practice as a lot of detainees had caused damage to the Management Unit and there were also occasions of detainees refusing to go back into their cells. Mr Tarlinton gave evidence that such damage included the telephones being broken, detainees throwing cups of urine or faeces over other detainees’ doors, and throwing things under the Management Unit staff station door.

152. Mr Tarlinton accepted that it was possible to replace the door to the general exercise yard with a hatch in order to comply with the handcuffing practice. Mr Tarlinton gave evidence that under the previous practice of allowing detainees to access the general exercise yard by remotely unlocking the door, there were instances of detainees climbing the fence, sitting on top of the CCTV cameras, and refusing to come down. Mr Tarlinton noted that it was dangerous to allow detainees access to the general exercise yard for the particular detainee, the staff and the other detainees who would not be able to contact the staff if the staff were preoccupied with attempting to get a detainee down from the fence.

153. Mr Tarlinton confirmed that it was his belief from the beginning that the rear courtyard fulfilled the requirement for access to open air and exercise, even before the implementation of the 2019 Operating Procedure.

154. When referred to the checklist completed by Management Unit staff each daily for each detainee, Mr Tarlinton confirmed that “time out of cell” does not include when a detainee uses the rear courtyard. Instead “time out of cell” would include when a detainee comes out of the cell to use the telephone, go to a visit or to a health appointment.

155. Mr Tarlinton stated that if a detainee requests access to the rear courtyard, it is typically opened immediately or if not, within a matter of minutes. Mr Tarlinton accepted that was his own experience of detainees’ access to their rear courtyard. Mr Tarlinton further accepted that his belief that the plaintiff was not ever denied access to the rear courtyard was based on the review of documentation, rather than his own personal knowledge. When it was put to Mr Tarlinton that the plaintiff maintained he was denied access to the rear courtyard on some occasions, Mr Tarlinton responded that he doubted that that had occurred. Mr Tarlinton noted that there have been other detainees who have been non-compliant where it would present a danger to open the rear courtyard.

156. Mr Tarlinton was asked whether it could be possible for there to be a rolling roster where the rear courtyard door was opened everyday for one hour, rather than a detainee having to request access each time. Mr Tarlinton stated that this was not possible due to safety and security concerns in the Management Unit. Mr Tarlinton was

then asked whether such a roster could be utilised to allow Management Unit detainees access to the general exercise yard where only one detainee would be taken out at a time and if a hatch was installed on the door. Mr Tarlinton responded that the AMC would not follow such a course because of safety reasons. Mr Tarlinton noted that it hypothetically could be done but that access to the rear courtyard is sufficient and no detainees in the Management Unit "misses out on it" as they all have the same access.

157. Mr Tarlinton confirmed that if the handcuffing procedure was not in place and if it did not require the Senior Director of Operations' approval, it would be possible to allow detainees who were compliant to be taken on a walk outside for an hour. Mr Tarlinton noted that this would also depend on whether there was sufficient staffing resources to give 14 detainees, assuming the Management Unit is at full capacity, that amount of exercise.

158. Mr Tarlinton gave evidence that the intercom in a Management Unit cell is not able to be turned off by the Management Unit staff. When asked whether it would be possible to simply ignore the "buzzing" of the intercom, Mr Tarlinton stated that the intercom makes a loud noise and it would be difficult to ignore it. Mr Tarlinton further noted that if Management Unit staff were to ignore a detainee using the intercom, that would cause serious issues for the staff, particularly if it was a detainee complaining of a medical issue.

159. Mr Tarlinton stated that Management Unit staff would remotely unlock the rear courtyard door if they had noticed that a detainee had not requested it that day, to allow a detainee to access the rear courtyard for exercise. Mr Tarlinton stated that this was to encourage detainees to access the rear courtyard if it had been observed that the detainee had not exercised that day. Mr Tarlinton noted that most detainees typically request for the rear courtyard door to be opened electronically.

160. When asked whether there was a reason the mesh covering the roof of the rear courtyard was narrower than the mesh in the general exercise yard, Mr Tarlinton noted that the mesh in the rear courtyard is intentionally narrower to prevent it being a ligature point. Mr Tarlinton acknowledged he had previously noted that the open door to the rear courtyard could also present as a ligature point, but noted that there was a higher risk of self-harm in the general exercise yard.

161. Mr Tarlinton gave evidence that if a detainee is at risk of self-harm, an at-risk referral would be completed and submitted. Mr Tarlinton noted that the detainee would then be kept under constant observations until they were assessed by a forensic mental health clinician and moved to the Crisis Support Unit of the AMC. Mr Tarlinton stated that a detainee would not be placed in the Management Unit if staff felt there was a risk of self-harm or suicide. Counsel for the plaintiff then questioned Mr Tarlinton about the risk of self-harm in the general exercise yard and that it would then not be relevant to an assessment of whether a detainee can be granted access to the general exercise yard, on this basis that if they were at risk of self-harm they would be removed from the Management Unit. Mr Tarlinton conceded this point.

162. It was put to Mr Tarlinton that the only reasons that Management Unit detainees are not allowed to access the general exercise yard is due to the hand-cuffing procedure, which could be adequately addressed by the installation of a hatch or remote access to the general exercise yard; the risk of detainees scaling the fence; and the risk that the detainees will scale the fence and sit on the CCTV camera. Mr Tarlinton accepted that those were reasons that contributed to the decision, but further emphasised that

the size of the general exercise yard creates an issue if a detainee is not compliant and requires restraint. Mr Tarlinton further accepted that another reason that the general exercise yard is not utilised is because the rear courtyard is used as the default.

163. Mr Tarlinton gave evidence that there was no exception to the rear courtyard being used as the default and there is no assessment to determine whether a detainee can access the general exercise yard. Of the general exercise yard, Mr Tarlinton stated "we don't use it" and confirmed this had been the practice since cl 3.4 of the 2019 Operating Procedure came into effect. Mr Tarlinton stated that a risk assessment to determine whether or not a detainee can access the general exercise yard is "not something we do as part of a person's fresh air and exercise".

164. Mr Tarlinton agreed that when detainees were allowed to use the general exercise yard between 2012-2017, a purpose of the rear courtyard was to allow detainees to smoke. Mr Tarlinton noted that the rear courtyard was never designated as a smoking area but the preference was that if detainees were to smoke, they could do so in the rear courtyard.

165. It was put to Mr Tarlinton that the reason it is called the "hard side" of the Management Unit is because it is harder on detainees to be put there. Mr Tarlinton disagreed with the proposition and stated that the names had stuck since the area first opened. Mr Tarlinton stated that the most secure cell in the Management Unit was cell 5, which was located on the "soft side".

166. In re-examination, Mr Tarlinton was asked whether a risk assessment was undertaken in relation to the plaintiff each time when he was placed in the Management Unit on the various occasions he was there during the confinement period. Mr Tarlinton gave evidence that no specific risk assessment was undertaken and instead the order that led to a detainee being placed in the Management Unit was relied upon.

167. When asked why a detainee is placed on the "hard side" of the Management Unit, Mr Tarlinton again noted that there was "no difference" between the cells on either side of the Management Unit.

168. Counsel for the defendant asked Mr Tarlinton why the plaintiff was not given access to the general exercise yard. Mr Tarlinton responded "because the process in the unit is that we don't use it". Mr Tarlinton gave evidence that the general exercise yard is not used because "it's just much less safe than giving someone the exercise in the rear courtyard of their cell".

169. Mr Tarlinton was asked whether the plaintiff was considered a risk as a consequence of his placement in the Management Unit. Mr Tarlinton noted that the plaintiff was often placed in the Management Unit due to assaulting other detainees and so the plaintiff did pose a risk. Mr Tarlinton stated that the AMC does not do anything that puts the staff more at risk than is necessary.

170. In respect of the possibility of installing a door with a hatch to the general exercise yard, Mr Tarlinton was then asked what would occur if such a door was installed and a detainee using the yard refused to exit the general exercise yard by inserting their hands into the hatch. Mr Tarlinton stated that the Management Unit staff would negotiate with the detainee for a period of time, which in his experience has the capacity to take hours or even up to three quarters of a day. Mr Tarlinton noted that if a detainee remained non-compliant after negotiation, a team of officers in personal protective

equipment (PPE), including helmets, vests and shields, would be assembled and then an extraction would occur whereby the detainee is taken control of, handcuffed and returned to their cell.

171. Mr Tarlinton was asked whether that scenario presented a greater risk than containment in the rear courtyard. Mr Tarlinton confirmed that the general exercise yard presented a greater risk because if a detainee became non-compliant in their courtyard, they would already be contained and there was no risk of the detainee being at heights and falling.

172. Mr Tarlinton further stated that he did not recall the plaintiff ever having indicated to him that he had been denied access to the rear courtyard during the confinement period. Mr Tarlinton confirmed that he had no recollection of any other staff member informing him that the plaintiff had made such a complaint.

173. Mr Tarlinton was then asked why it was dangerous to automatically keep the door open to the rear courtyard. Mr Tarlinton gave evidence about the door providing a ligature point and gave a description of how a detainee might attempt to hang themselves from the door, noting that the AMC had experienced a number of occurrences where that had taken place. Mr Tarlinton noted that that risk informed the requirement for staff to perform observations. When asked whether detainees had ever not wanted the door to the rear courtyard opened, Mr Tarlinton confirmed that that had occurred in circumstances where a detainee simply refuses to go outside.

174. Mr Tarlinton confirmed in light of the risk assessment that takes place if a detainee indicates a risk of self-harm, there are occasions where the outcome of that assessment allows for a detainee, who is at potential risk of self-harm but not immediate risk, to remain in the Management Unit. If the risk is more immediate, a detainee will be moved to the Crisis Support Unit.

View of Management Unit

175. Prior to the hearing, the plaintiff's solicitors filed an application in proceeding seeking that the Court inspect the Management Unit, pursuant to r 1509 of the *Court Procedures Rules 2006* (ACT) (*Court Procedures Rules*). The application sought the inspection of the following areas of the Management Unit:

    (a) The inside of a cell located within the Management Unit;

    (b) The inside of a rear courtyard to the cell within the Management Unit;

    (c) The two general exercise yards located on either side of the Management Unit.

176. Rule 1509 of the *Court Procedures Rules* relevantly provides:

> **View by court**
>
> On application by a party, or on its own initiative, the court may inspect a place, process or thing, and witness any demonstration about which an issue arises in the proceeding.

177. The application was granted on 30 April 2021. The inspection of the Management Unit took place on 6 June 2021. The Court, including myself, my associates, the parties, and legal representatives inspected the inside of a Management Unit cell, the rear courtyard adjoining the cell, and the two general exercise yards.

178. What was seen during the inspection is part of the evidence in the case and is taken into account by me along with the other evidence.

What is the proper construction of s 45 of the *Corrections Management Act*?

Statutory Construction

179. The principles regarding statutory construction were usefully summarised in *Director of Public Prosecutions (ACT) v Graham* [2018] ACTCA 23; 13 ACTLR 280 at [25]-[28]:

> A recent concise statement of the proper approach to the construction of a statute is found in the judgment of Kiefel CJ, Nettle and Gordon JJ in *SZTAL v Minister for Immigration and Border Protection* [2017] HCA 34; 91 ALJR 936 as follows:
>
> > 14. The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose. Context should be regarded at this first stage and not at some later stage and it should be regarded in its wildest sense. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if is ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.
> >
> > (footnotes omitted)
>
> Their Honours drew on the judgment of McHugh, Gummow, Kirby and Hayne JJ in *Project Blue Sky Inc v Australian Broadcasting Authority* [1998] HCA 28; 194 CLR 355 which included the following:
>
> > 69. The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined "by reference to the language of the instrument viewed as a whole". In *Commissioner for Railways (NSW) v Agalianos,* Dixon CJ pointed out that "the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed". Thus, the process of construction must always begin by examining the context of the provision that is being construed.
> >
> > (footnotes omitted)
>
> In the ACT the role which consideration of the purpose of a provision is to play is governed by s 139 of the *Legislation Act 2001* (ACT) (the Legislation Act) which provides:
>
> (1) In working out the meaning of an Act, the interpretation that would best achieve the purpose of the Act is to be preferred to any other interpretation.
>
> (2) This section applies whether or not the Act's purpose is expressly stated in the Act.
>
> Section 138 of the Legislation Act defines what is meant by the working out of the meaning of an act as follows:
>
> > In this part:
> >
> > "working out the meaning of an Act" means –
>
> (a) resolving an ambiguous or obscure provision of the Act; or

(b) confirming or displacing the apparent meaning of the Act; or

(c) finding the meaning of the Act when its apparent meaning leads to a result that is manifestly absurd or is unreasonable; or

(d) finding the meaning of the Act in any other case.

180. A similar approach has been adopted in *KN v The Queen* [2019] ACTCA 37; 14 ACTLR 289 at [23]. See also: *Will v The Queen (No 2)* [2021] ACTCA 14; 16 ACTLR 50 at [116]-[125].

181. Section 45 of the *Corrections Management Act* is to be construed in accordance with established statutory interpretation principles discussed above and s 30 of the *Human Rights Act*. Section 45 must be construed so that it is consistent with the language and purpose of the *Corrections Management Act*, interpreted as a whole: ss 139 and 140 *Legislation Act 2001* (ACT) (*Legislation Act*); *Project Blue Sky v Australian Broadcasting Authority* [1998] HCA 28; 194 CLR 355 at [68]-[70].

182. The importance of detainees' human rights is given express prominence in the preamble of the *Corrections Management Act* in paragraphs 1 to 3, as well as in ss 7(c), 8(b)-(c), and 9(a) to (e). The Explanatory Statement to the Corrections Management Bill 2006 (ACT) (Explanatory Statement to the Corrections Management Bill) supports the importance of detainees' human rights in the *Corrections Management Act*.

183. Section 12 of the *Corrections Management Act* sets out the minimum standards that must apply at correctional centres. Section 12(1)(e) provides as follows:

12 Correctional centres—minimum living conditions

(1) To protect the human rights of detainees at correctional centres, the director-general must ensure, as far as practicable, that conditions at correctional centres meet at least the following minimum standards:

…

(e) detainees must have reasonable access to the open air and exercise;

…

184. Section 45 of the *Corrections Management Act* states:

45 Access to open air and exercise

(1) The director-general must ensure, as far as practicable, that detainees—

(a) have access to the open air for at least 1 hour each day; and

(b) can exercise for at least 1 hour each day.

(2) The standards under subsection (1) may both be satisfied during the same hour on any day.

(3) For chapter 10 (Discipline), this section is taken to provide an entitlement for each detainee in relation to access to the open air and exercise.

185. "Reasonable access" in s 12(1)(e) translates into access for "at least 1 hour each day" in s 45. The *Corrections Management Act* distinguishes between "entitlements" and "privileges", whereby "entitlements" cannot be ousted by segregation or disciplinary action while "privileges" can: ss 45(3), 152, 154, 183, 184 and 188 *Corrections Management Act*. Section 45(1) is phrased as a mandatory obligation on the defendant,

s 45(3) provides that access to the open air and exercise for at least one hour each day are minimum entitlements which every detainee has. This includes detainees in segregation and separate confinement.

186. The plaintiff submitted that the substantive human rights and s 30 of the *Human Rights Act* provides a scheme by which the *Corrections Management Act* is to be interpreted. The plaintiff relied upon the following rights from the *Human Rights Act*:

    (a) The right to humane treatment while deprived of liberty: s 19(1)

    (b) Further and alternatively, the right not to be treated or punished in a cruel, inhuman or degrading way: s 10(1)(b); and

    (c) Further and alternatively, right not to be not to be arbitrarily detained: s 18(1) and the right not to be deprived of liberty except on the grounds and in accordance with the procedures established by law: s 18(2).

187. It was submitted by the plaintiff that the substantive rights from the *Human Rights Act* inform the interpretation of s 45 of the *Corrections Management Act*. The plaintiff and the defendant outlined the content of the substantive rights. The Human Rights Commissioner relied only upon s 19(1) of the *Human Rights Act*. It is important to state at the outset that in my view, as discussed in this judgment, the question of the plaintiff's human rights is relevantly and appropriately considered through the right to humane treatment while deprived of liberty: s 19(1) *Human Rights Act*. Nevertheless, it is appropriate to set out the scope and content of each human right relied upon by the plaintiff.

Section 30 of the *Human Rights Act*

188. In considering ss 10(1)(b), 18(1) and (2), and 19(1) of the *Human Rights Act* and s 45 of the *Corrections Management Act,* it is now relevant to refer to s 30 of the *Human Rights Act*. Section 30 provides as follows:

> **Interpretation of laws and human rights**
>
> So far as it is possible to do so consistently with its purpose, a Territory law must be interpreted in a way that is compatible with human rights.

189. Section 30 of the *Human Rights Act* is relevant to the issue of determining the proper construction of s 45 of the *Corrections Management Act*. I note that s 30 of the *Human Rights Act* was wholly replaced in 2008.

190. The Explanatory Statement to the Human Rights Amendment Bill 2007 (ACT) (Human Rights Amendment Bill) introducing the s 30 amendment provides:

> Clause 5 replaces the existing interpretative provision in the *Human Rights Act 2004*. It clarifies the interaction between **the interpretive rule and the purposive rule such that as far as it is possible a human rights consistent interpretation is to be taken to all provisions in Territory laws**. This means that unless the law is intended to operate in a way that is inconsistent with the right in question, the interpretation that is most consistent with human rights must prevail. This is consistent with the Victorian approach contained in subsection 32(1) of the *Charter of Human Rights and Responsibilities Act 2006*.
>
> (emphasis added)

191. The Explanatory Statement made clear that s 30, like s 32 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (Victorian *Charter*), is an interpretation provision. The Explanatory Statement also suggested that s 30 will result in varying levels of consistency with human rights depending on the purpose of the particular legislation, and on what interpretations are available in any particular case. The Human Rights Commissioner, in my view, correctly noted that whether this means that s 28 of the *Human Rights Act*, the equivalent of s 7(2) of the Victorian *Charter*, is a part of the interpretive process, and if so, the nature of that role, remains to be determined: see also *R v QX (No 2)* [2021] ACTSC 244 (*R v QX (No 2)*).

192. In *Andrews v Thomson* [2018] ACTCA 53; 340 FLR 439 (*Andrews v Thomson*), the Court of Appeal confirmed that s 30 of the *Human Rights Act* should be interpreted in the same way as the "close equivalent" s 32 of the Victorian *Charter*, and also applied *Momcilovic v The Queen* [2011] HCA 34; 245 CLR 1 (*Momcilovic v The Queen)* to s 30 at [35].

193. In *Momcilovic v The Queen*, six Justices of the High Court held that s 32 of the Victorian *Charter* is an ordinary rule of interpretation: [51] (French CJ); [146], [170] (Gummow J with Hayne J agreeing at [280], [545]-[546], [565], [574] (Crennan and Kiefel JJ), [684] (Bell J). In light of the decision in *Momcilovic v The Queen*, the proper interpretation and application of s 32 of the Victorian *Charter* has since been the subject of extensive consideration by the Victorian Court of Appeal: *Slaveski v Smith* [2012] VSCA 25; 34 VR 206 (*Slaveski v Smith*); *Noone, Director of Consumer Affairs Victoria v Operation Smile (Australia) Inc* [2012] VSCA 91; 38 VR 569; *Nigro v Secretary to the Department of Justice* [2013] VSCA 213; 41 VR 359 (*Nigro v Secretary to the Department of Justice*); *WBM v Chief Commissioner of Police* [2012] VSCA 159; 43 VR 446; *Director of Public Prosecutions v Leys* [2012] VSCA 304; 44 VR 1; *Victoria Police Toll Enforcement v Taha* [2013] VSCA 37; 49 VR 1.

194. In *Slaveski v Smith* at [24], the Victorian Court of Appeal interpreted *Momcilovic v The Queen* as preserving a role for s 32 of the Victorian *Charter* where the words of a statute are capable of more than one meaning:

> Consequently, if the words of a statute are clear, the court must give them that meaning. If the words of a statute are capable of more than one meaning, the court should give them whichever of those meanings best accords with the human right in question.

195. In *Nigro v Secretary to the Department of Justice,* the Victorian Court of Appeal also held, applying its understanding of *Momcilovic v The Queen*, that s 32 of the Victorian *Charter* applies in the same manner as the principle of legality at [85]:

> Section 32(1) is not to be viewed as establishing a new paradigm of interpretation which requires courts, in the pursuit of human rights compatibility, to depart from the ordinary meaning of the statutory provision and hence from the intention of the parliament which enacted the statute. **Accordingly, as was observed in *Slaveski v Smith*, the court must discern the purpose of the provision in question in accordance with the ordinary techniques of statutory construction essayed in *Project Blue Sky*. The statute is to be construed against the background of human rights and freedoms set out in the Charter in the same way as the principle of legality is applied.** The human rights and freedoms set out in the Charter incorporate or enhance rights and freedoms at common law. Section 32(1) thus applies to the interpretation of statutes in the same way as the principle of legality but with a wider field of application.
>
> (emphasis added)

196. It is therefore uncontroversial that the task of statutory construction of s 45 of the *Corrections Management Act* occurs against the background of the *Human Rights Act.*

Section 19(1): The contents of the right to humane treatment while deprived of liberty

197. Schedule 1 to the *Human Rights Act* confirms that the right in s 19(1) is modelled on art 10 of the *International Covenant on Civil and Political Rights*. This right recognises the particular vulnerability of persons in detention: *Castles v Secretary, Department of Justice* [2010] VSC 310; 28 VR 141 (*Castles v Secretary, Department of Justice*) at [93] and [108].

198. In *Taunoa v Attorney-General* [2007] NZSC 70; [2008] 1 NZLR 429 at [177] (New Zealand Supreme Court decision of *Taunoa v Attorney-General*) Blanchard J made the following observations about the equivalent New Zealand provision of this right:

> protecting a person deprived of liberty and therefore particularly vulnerable (including a sentenced prisoner) from conduct which lacks humanity, but falls short of being cruel; which demeans the person, but not to an extent which is degrading; or which is clearly excessive in the circumstances, but not grossly so.

199. Section 19(1) of the *Human Rights Act* provides a general entitlement to humane treatment. Whether or not that entitlement has been denied is a question of fact and degree to be assessed in all the circumstances: *Islam v Director-General of the Justice and Community Safety Directorate* [2015] ACTSC 20 (*Islam v Director-General of the Justice and Community Safety Directorate*) at [87]. In line with authority considering the Victorian *Charter* equivalent of s 19(1), the right is not limited to specific incidents of ill-treatment but may also encompass the general conditions of detention: *Application for Bail by HL (No 2)* [2017] VSC 1 at [124]-[130]; *Certain Children v Minister for Families and Children* [2016] VSC 796; 51 VR 473 at [171]-[178] (*Certain Children*); *Certain Children v Minister for Families and Children (No 2)* [2017] VSC 251; 52 VR 441 at [251] (*Certain Children (No 2)*).

200. The right in s 19(1) should not be conflated with s 10(1)(b), the prohibition on cruel, inhuman or degrading treatment. In *Castles v Secretary, Department of Justice* at [99] Emerton J usefully distinguished that the Victorian *Charter* equivalents of s 10(1)(b) as a right that prohibits "bad conduct" towards any person, whereas the equivalent of s 19(1) mandates "good conduct" towards detainees. Emerton J further observed at [100] that the equivalent of s 19(1) imposes an obligation on public authorities to take positive measures to ensure that detainees are treated with dignity and humanity.

201. Relevantly, in *Taunoa v Attorney-General* (2004) 7 HRNZ 379 (New Zealand High Court decision of *Taunoa v Attorney-General*) Young J made the following findings at [117]-[119] regarding the Behaviour Management Regime (BMR) in that matter:

> BMR allowed one exercise period per day for stage 1 and 2 inmates and two hours per day for stage 3 and 4 inmates. At phase 1 the one hour exercise was in another cell without furniture, similar in size to the inmate's prison cell. For phases 2,3 and 4 at least two of the exercise periods per week were to be outside in the yards. There were major problems throughout the time the applicants were on BMR with access to yards. There seemed to be three main problems with access to yards. Firstly, because each BMR inmate required an escort of three Corrections Officers, the unit often had insufficient officers to ensure those entitled to a "yard" got one. Secondly, guards at the yard were to be supplied from other units in the prison and often they were not available. Finally, the yard doors regularly malfunctioned at times for months without repair.

> Sometimes inmates chose not to exercise outdoors because, for example, of bad weather. However, it is clear from the evidence that for significant periods inmates who wanted a "yard" were not able to have one despite a regular entitlement. Inmates were locked up 22 or 23 hours per day. Exercise outside for the one or two hours of unlock per day was obviously important to them. Repair of yard gates and attention to staff numbers did not get the priority in Corrections it should have.
>
> There were two "exercise" cells. One was the same size as an ordinary BMR cell, the other 3 to 4 times bigger. Each exercise cell had a table. Neither had any exercise equipment. The outside yards were modest in size surrounded by walls and had no equipment.

202. In referring to the New Zealand prison regulation which provided that detainees "may on a daily basis, take at least one hour of physical exercise outside their cell" and "if practicable in the circumstances, physical exercise may be taken outdoors", Young J found at [121]-[122]:

> This of course is a minimum. This regulation does not explicitly require equipment for exercise to be provided. However the provision of a 10 ft x 6 ft cell with a table for physical exercise barely, if at all, complies with Regulation 49. The only difference between the inmates' normal cell and the exercise cell was that the bed and toilet had been removed. The other relevant perspective is that at stage 1 and 2 the inmates were receiving the minimum time only out of their cell, one hour per day.
>
> My conclusions are that Mr Taunoa and Robinson and probably other applicants on BMR received an inadequate opportunity to exercise and particularly to exercise outdoors during their time on BMR. **The opportunity for such exercise fell below the standards set by the Regulations for such prisoners.**
>
> (emphasis added)

203. Young J came to a conclusion at [272]-[276] that the conditions of detention described above meant that Corrections failed to treat the prisoners in that facility with humanity and with the inherent dignity due to every person, the equivalent of s 19(1) of the *Human Rights Act*.

204. I note at this juncture that the Supreme Court of New Zealand is New Zealand's highest court and sits above the New Zealand High Court and its Court of Appeal. The New Zealand High Court decision of *Taunoa v Attorney-General* was determined by a single judge, whereas the New Zealand Supreme Court decision of *Taunoa v Attorney-General* was determined by its apex court consisting of five judges.

205. The defendant agreed with the plaintiff's framing of the purpose of s 19(1) and its source in the *International Covenant on Civil and Political Rights*. The defendant also agreed that the starting point for s 19(1) is that prisoners should not be subjected to hardship or constraint other than that resulting from the deprivation of liberty: *Castles v Secretary, Department of Justice* at [108]. The defendant however emphasised that later in *Castles v Secretary, Department of Justice*, when referring to *R (Daly) v Secretary of State for the Home* Department [2001] 2 AC 532 at [5], Emerton J observed at [111] that a necessary consequence of the deprivation of liberty is that '[r]ights and freedoms which are enjoyed by other citizens will necessarily be 'curtailed', 'attenuated' and 'qualified' by reason of the deprivation of liberty". This statement of Emerton J was cited with approval in *Certain Children* at [175].

206. The equivalent right to art 10 of the *International Covenant on Civil and Political Rights* in the *European Convention for the Protection of Human Rights and Fundamental*

Freedoms (*European Convention on Human Rights*) is art 3. The defendant referred to *Kudla v Poland* (2002) 35 EHRR 11 (*Kudla v Poland*), where it was held at 91 that in order to establish a breach of art 3, a person must show more than merely deprivation of a benefit or subjection to ill-treatment. It was submitted that instead, it is necessary to establish a minimum level of severity, which will depend on an assessment of all of the circumstances of the case, and include the nature and context of treatment, the manner and method of execution, the duration of treatment, and its physical and mental effects on the victim: *Kudla v Poland*, cited with approval in *Eastman v Chief Executive Officer of the Department of Justice and Community Safety* [2010] ACTSC 4; 4 ACTLR 161 at [91].

207. The defendant also referred to the question that arises as to what s 19(1) represents that is not already accommodated by s 10(1)(b) of the *Human Rights Act*. The defendant noted that the proscription in s 19(1) operates in its unique context, namely detention. It was submitted that this context was important in interpreting the scope of s 19(1). The defendant submitted that any suggestion that s 19(1) imports a lower bar than s 10(1)(b), should be rejected.

208. I note in dealing with the defendant's submissions that in *Islam v Director-General, Justice and Community Safety Directorate* [2021] ACTSC 33 (*Islam v Director-General, Justice and Community Safety Directorate*) at [79] McWilliam AsJ observed that the rights in the *Human Rights Act* are to be construed in "the broadest way possible".

209. I also note that in *Eastman v Chief Executive of the Department of Justice and Community Safety* [2011] ACTSC 33 at [73] Mansfield J rejected a claim that the failure to provide the plaintiff in that matter with employment of his choosing involved a failure to treat him with humanity and with respect for the inherent dignity of the human person. Mansfield J's observations were cited with approval by Mossop M, as his Honour then was, in *Islam v Director-General of the Justice and Community Safety Directorate*. At [87] Mossop M concluded that s 19(1) provides a "general entitlement to humane treatment" and that the question of whether or not "that statutory entitlement has been denied is a question of fact and degree to be assessed in all the circumstances".

210. Importantly, in *Castles v Secretary, Department of Justice*, Emerton J held at [108] that when analysing the right to humane treatment, "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".

211. It is apposite to now refer to international jurisprudence. Section 31(1) of the *Human Rights Act* provides that international law, and the judgments of foreign and international court and tribunals relevant to a human right may be considered in interpreting the human right. Relevantly, the Human Rights Commissioner highlighted that the Victorian Supreme Court has taken the UN Standard Minimum Rules for the Treatment of Prisoners (Mandela Rules) into account when defining the scope of rights in the Victorian *Charter*: *Certain Children* at [154]; *Certain Children (No 2)* at [264]-[265]; *De Bruyn v Victorian Institute of Forensic Mental Health* [2016] VSC 111; 48 VR 647 (*De Bruyn v Victorian Institute of Forensic Mental Health*) at [176]-[178].

212. I interpolate to note that the Mandela Rules are guidelines provided by the United Nations Office on Drugs and Crime for participating countries for protecting the rights of persons deprived of their liberty. The Mandela Rules recognise obligations to treat detainees with respect for their inherent dignity and value as human beings, as well as the prohibition of torture and other degrading treatment.

213. The Human Rights Commissioner referred to the discussion of r 23(1) of the Mandela Rules, the exercise and open air entitlement, in *A Human Rights Approach to Prison Management: Handbook for Prison Staff,* which was cited in the Explanatory Statement to the Corrections Management Bill. Reference was also made to the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment in its Second General Report, specifically the following:

> Specific mention should be made of outdoor exercise. The requirement that prisoners be allowed at least one hour of exercise in the open air every day is widely accepted as a basic safeguard…. **[A]ll prisoners without exception (including those undergoing cellular confinement as a punishment) should be offered the possibility to take outdoor exercise daily.** It is also axiomatic that outdoor exercise facilities should be reasonably spacious and whenever possible offer shelter from inclement weather…
>
> (emphasis added)

214. The jurisprudence of the European Court of Human Rights (European Court) is consistent with the above position: see *Muršić v Croatia* (European Court of Human Rights, Application No 62936/00, 6 April 2009) at [125]. The *European Convention on Human Rights* does not contain a standalone right to humane treatment when deprived of liberty, akin to s 19(1) of the *Human Rights Act*. It is treated as an implied right within the scope of art 3 of the Convention, which prohibits torture and inhuman or degrading treatment or punishment.

215. The European Court's analysis has involved prominent consideration of the physical characteristics of outdoor exercise facilities: *Ananyev and Others v Russia* (European Court of Human Rights, Application Nos. 42525/07 and 60800/08, 10 January 2012) at [52]. In *Moiseyev v Russia* (European Court of Human Rights, Application No 62936/00, 9 October 2008) (*Moiseyev v Russia*) at [125], the European Court determined that an exercise yard that is two square metres larger than the cell, is surrounded by three-metre-high walls, and has an opening to the sky covered with metal bars and a thick net did not offer inmates proper opportunities for recreation and recuperation.

216. I note the United Nations Office for Project Services' publication titled *Technical Guidance for Prison Planning: Technical and Operational Considerations Based on the Nelson Mandela Rules,* that provides the following technical guidance for the purposes of prison planning:

> International standards require that prisoners receive a minimum of one hour access to open air per day (excluding weather limitations) to ensure their health and well-being.
>
> Prison facilities must provide a suitable space and equipment to provide prisoners with indoor or outdoor exercise. In the case of inclement weather, alternative arrangements for exercise should be provided…
>
> All prisoners should have access to controlled outdoor space, with a minimum area of at least 4m² per person. This is based on a reasonable expectation of space for movement and recreation activities. In wet weather and hot climates where sun shading is needed to maintain suitable shelter, a covered area may provide a suitable space for recreational and cultural activities.

217. As discussed earlier, the New Zealand Supreme Court decision of *Taunoa v Attorney-General*, the BMR to manage very difficult and dangerous prisoners was considered. At [50]-[51], Elias CJ made the following observations about the scope of the rights of those deprived of liberty, using international materials:

> As already discussed, in phase 1 of the BMR no yard exercise at all was permitted and the prisoners were unlocked only for one hour per day. In that hour they had access to the smaller exercise cell, but Ronald Young J found it barely adequate for exercise purposes…
>
> In addition to non-compliance with the minimum entitlement under the regulations, the exercise component of the regime fell far short of that required by the United Nations Standard Minimum Rules for the Treatment of Prisoners. These are the standards which New Zealand, in its reports to the United Nations Human Rights Committee, has said are observed by New Zealand legislation and regulations. Rule 21 of the standards sets as a minimum requirement "one hour of suitable exercise in the open air daily if the weather permits", in which the able-bodied shall receive "physical and recreational training" with suitable equipment. The importance of outdoor exercise for prisoner wellbeing is emphasised by the Committee for the Prevention of Torture in the 1991 report cited by Blanchard at para [194]. And as the Court of Appeal in the present case commented of the minimum entitlement:
>
> > **"[180] It should not be underestimated how important such an entitlement would be to someone confined for 22 or 23 hours per day in a cell".**
>
> (emphasis added)

218. The need for a compelling justification when "elemental human needs" are interfered with was discussed by Elias CJ at [96]:

> The position in relation to exercise was, in the administration of the BMR, even more restricted than the non-complying entitlement in the programme as designed. Because of his very lengthy period of segregation, that impacted most severely on Mr Taunoa, but all prisoners were affected. Ronald Young J accepted the deprivations were serious for the inmates. **No penological justification for deprivation of such elemental human needs as fresh air, exercise, and "constructive use of time" is suggested. Such deprivation, as the setting of minimum standards suggests, risked the physical and mental integrity of the prisoners, contrary to the standards described above at para [72].** These were not privileges, around the gradual introduction of which some incentive for good behaviour could legitimately be constructed. **They were minimum human needs, recognised as such by the legislation and by international standards.**
>
> (emphasis added)

219. Blanchard J compared the conditions faced by prisoners on the behaviour modification program with the standards set by the Committee established under the *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* at [194]:

> The entitlement to outside exercise sometimes was not met for significant periods because of prison staff shortages, malfunctioning of yard doors and, to a lesser extent, the choice of the prisoner not to take a "yard", for example because of bad weather. This does not sit comfortably with the emphasis placed by, for example, the Committee established under the European Convention for the Prevention of Torture upon the importance of regular outdoor exercise to sentenced prisoners…

220. I have taken the authorities discussed above into account in considering the right to humane treatment while deprived of liberty under s 19(1) of the *Human Rights Act*. This is relevant to the proper construction of s 45 of the *Corrections Management Act*. I have come to the conclusion that s 19(1) is relevant rather than ss 10(1)(b) and 18(1) and (2) of the *Human Rights Act* to the construction exercise relating to s 45 of the

Corrections Management Act. Nevertheless, the content of the rights are set out below for completeness.

Section 10(1)(b): The contents of the right not to be treated or punished in a cruel, inhuman or degrading way

221. Schedule 1 of the *Human Rights Act* refers to s 10(1)(b) of the Act being modelled on art 7 of the *International Covenant on Civil and Political Rights*. The plaintiff submitted that this right is not only considered with the physical integrity of individuals, but also with their mental integrity and their inherent dignity as human beings: UN General Comment No 20 at [2] and [5]. The plaintiff referred to *Certain Children (No 2)* at [250] where it was held that cruel or inhuman treatment or punishment involves acts which do not constitute torture, but which nevertheless possess a minimum level of severity. In *R (Limbuela) v Home Security* [2006] 1 AC 396 at [7], it was held that treatment is "inhuman or degrading if, to a seriously detrimental extent, it denies the most basic needs of any human being". Dixon J observed in *Certain Children (No 2)* at [250] that "the purpose of the offender's conduct will, at the very least, be a factor to be taken into account, though the absence of such a purpose does not conclusively rule out a violation of the right". In this context, use of the word "offender" refers to the person or entity imposing the treatment.

222. As underlined earlier, the *European Convention on Human Rights* does not contain a stand-alone right to humane treatment when deprived of liberty (an equivalent to s 19(1) of the *Human Rights Act*) and as such, the European case law on access to open air and exercise is discussed in relation to art 3 of the *European Convention on Human Rights*, which prohibits torture and inhuman or degrading treatment or punishment.

223. In support of its sought interpretation of s 45, the plaintiff relied upon *Moiseyev v Russia*. In that matter, the exercise yards in a Moscow prison were two square metres larger than the cells, making it difficult to utilise the space for exercise. The yards were surrounded by three-metre-high walls with an opening to the sky protected with metal bars and a thick net. The European Court of Human Rights considered that the restricted space coupled with the lack of openings undermined the facilities available for recreation and recuperation. The Court found that the fact that the applicant was obliged to live, sleep and use the toilet in poorly lit and ventilated cells for almost four years, without any possibility for adequate outdoor exercise must have caused him distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention. At [125]-[126] the Court held that it followed that the conditions of the applicant's detention amounted to inhuman and degrading treatment.

224. The defendant noted that the concepts of "cruel, inhuman and degrading" necessarily require ill treatment that reaches a minimum level of severity in order for there to be a contravention: *Kalashnikov v Russia* [2002] ECHR 596; 36 EHRR 34 cited in *Islam v Director-General, Justice and Community Safety Directorate (No 3)* [2016] ACTSC 27. The defendant highlighted that relevant factors for determining whether conduct is cruel, inhuman or degrading are: the purpose for which the ill-treatment is inflicted, the context in which it is inflicted, intention or motivation behind it, and whether the victim was in a vulnerable situation: *Nicolae Virgiliu Tănase v Romania* [2019] ECHR 491 at [121], cited in *Islam v Director-General, Justice and Community Safety Directorate* at [90]. Conduct that is otherwise legitimate treatment or punishment does not contravene s 10(1)(b) of the *Human Rights Act*, even though there may be a degree of inevitable

humiliation connected with the treatment: *Wainwright v United Kingdom* (2007) EHRR 40, cited in *Islam v Director-General, Justice and Community Safety Directorate* at [94].

225. The defendant underlined McWilliam AsJ's summary of the principles in *Islam v Director-General, Justice and Community Safety Directorate* at [95]-[97]:

> Before treatment will be found to be in breach of the human right in question, the suffering and humiliation involved must go beyond that connected with a given form of legitimate treatment or punishment: *Novoselov* at [38]. However, even when official conduct does go beyond legitimate treatment, and does go beyond legitimate treatment, and does not accord with 'rigorous adherence to procedures and all due respect to [a prisoner's] human dignity' (*Wainwright* at [44]), that may not necessarily amount to conduct that is 'degrading'.
>
> Similarly, official conduct which is excessive or disproportionate also does not necessarily contravene the right: see *Wotton v Queensland (No 5)* FCCA 1457; 352 ALR 146 at [697] and the examples there-cited, which included the excessive use of pepper spray by police or handcuffing a person for a court appearance.
>
> Given the facts under consideration, specific reference should be made to the fact that the segregation of a prisoner from the prison community does not in itself constitute a form of inhuman treatment. Prolonged solitary confinement is undesirable, but regard must be had to the particular conditions, the stringency of the measure, its duration, the objective pursued and its effects on the person concerned: see *Certain Children* at [167] and the authority there-cited.

226. Having discussed the relevant authorities concerning ss 19 and 10(1)(b), in particular *Castles v Secretary, Department of Justice*, it is tolerably clear that s 19(1) "right to human treatment while deprived of liberty", rather than s 10(1)(b), is the relevant right to be considered in this case.

Section 18(1) and (2): The contents of the right to liberty and security of person and not to be arbitrarily detained

227. Schedule 1 of the *Human Rights Act* confirms that the rights contained within s 18 are modelled on art 9 of the *International Covenant on Civil and Political Rights*. In *Monaghan v ACT (No 2)* [2016] ACTSC 352; 315 FLR 305 (*Monaghan v ACT (No 2)*), Mossop AsJ, as his Honour then was, observed at [228] that *Manga v Attorney-General* [2000] 2 NZLR 65 (*Manga v Attorney-General*) provided authority for the proposition that unlawful detention is arbitrary detention. In *Manga v Attorney-General*, Hammond J held at [40] that lawful detentions may also be arbitrary "if they exhibit elements of inappropriateness, injustice or lack of predictability of proportionality". *Sleiman v Commissioner of Corrective Services* [2009] NSWSC 304 at [34]-[36] helpfully summarises the principles on arbitrary detention.

228. The plaintiff drew upon the UN Human Rights Committee General Comment No 35, where the committee observed that arts 7 and 10 of the *International Covenant on Civil and Political Rights* primarily address the conditions of detention; detention may become arbitrary within the meaning of art 9 if the manner in which a prisoner is treated does not relate to the purpose for which they are ostensibly being detained.

229. The plaintiff referred to the New Zealand Supreme Court decision of *Taunoa v Attorney-General* at [102] where Elias CJ noted, in accordance with observations made by McIntyre J in *R v Smith (Edward Dewey)* [1987] 1 SCR 1045 that:

> if treatment is authorised by law and imposed in accordance with standards or principles which are rationally connected to the purpose of the legislation, it will not be arbitrary. When it departs from the terms and purpose of legislation, it is likely to be arbitrary in its application and there is no assurance that it will conform to proper standards.

230. The defendant noted that the term "arbitrary" in the context of s 18(1) of the *Human Rights Act* refers to conduct extending beyond lawfulness to unreasonable conduct: *Monaghan v ACT (No 2)* at [233]. The defendant submitted that the term should be interpreted to include elements of inappropriateness, injustice and lack of predictability: *A v Australia* (Communication 560/1993 3 April 1997) at [9.2] cited in *Monaghan v ACT (No 2)* at [231]. Regard should also be had to the nature and extent of any departure from the substantive and procedural standards involved: *Neilsen v Attorney-General* [2001] 3 NZLR 433 at [34], cited in *Monaghan v ACT (No 2)* at [229].

231. The defendant noted that s 18 of the *Human Rights Act* is concerned with the deprivation of liberty, and not the conditions of detention. It was submitted that the conditions of detention is the express preserve of s 19, and more generally of s 10 of the *Human Rights Act*. On the relevant authorities discussed above I accept this submission.

Section 45 of the *Corrections Management Act*

232. The interpretation of s 45 must be approached in light of s 30 of the *Human Rights Act*. Therefore, consideration of the phrases "access to the open air", "can exercise", and "as far as practicable" must be ascribed the meaning that accords with the human right in question. The human right that is most directly relevant to s 45 of the *Corrections Management Act* is the right to humane treatment when deprived of liberty, s 19(1) of the *Human Rights Act*.

233. The *Corrections Management Act* was drafted taking into account consideration of the protection of human rights. Section 7(e) of the *Corrections Management Act* provides that a main object of the Act is to promote public safety and the maintenance of just society by ensuring that detainees are treated in a decent, humane and just way. Section 8 deals with management of correctional services to achieve the main objects of the Act. Section 9 addresses treatment of detainees. Section 12 sets out the minimum living conditions of detainees. In my view, the phrases in s 45 ought to be interpreted consistently with rights of detainees to access the open air and exercise as set out in the decisions discussed above.

"Access to the open air"

234. The defendant submitted that in construing the scope of the obligation in s 45(1) of the *Corrections Management Act*, the plaintiff's reference to the context in which "open air" is afforded ought to be understood specifically as the Management Unit, which houses particular types of detainees. The defendant referred to evidence of Mr Tarlinton, which made clear that detainees are only sent to the Management Unit under separate confinement (a disciplinary penalty) or segregation. Reference was also made to the plaintiff's evidence that he did not disagree with his placement in the Management Unit and his concession that he was probably a security risk to other detainees in light of his violent conduct.

235. The defendant submitted that the plaintiff had overstated what is a minimum standard or treatment, in the references to the "free flow" of fresh air; "abundant" natural light, a

"clear view" of the sky, and a "wide view" of vegetation. It was submitted that the characterisation of "open air" as a matter of impression was unsupported by authority.

236. The defendant submitted that the ordinary meaning of the words "open air" provided little assistance in understanding the defendant's obligation, that is divorced from the context in which those words are used. The defendant noted that the ordinary meaning of "open air" is not appropriate to apply to detainees in a prison facility, and ignores the question of "access" to it, which is qualified by considerations of practicability.

237. The defendant submitted that on the plaintiff's urged interpretation of "open air", no detainee in the AMC has or could have access to a "free or unenclosed space" as they are detained in a prison facility. The defendant submitted that "outdoors" cannot be given its ordinary meaning for the purposes of interpreting "open air" in s 45 because to do so would suggest detainees ought to have access to a space that is "out of doors… not indoors or under cover". It was submitted that that construction of "open air" was simply inappropriate for a prison context. The defendant urged an interpretation of "access to the open air" which is qualified by considerations of practicability in the prison context.

238. The defendant urged an interpretation of "open air" and "outdoors" in the context of s 45 of the *Corrections Management Act* as a space which is exposed to fresh air, changes in the weather, permits natural light, and from which a "glimpse of the world outside" can be obtained: *A Sourcebook on Solitary Confinement,* citing *Poltoratskiy v Ukraine* (European Court of Human Rights, Application No 38812/97, 29 April 2003).

239. The defendant submitted that giving the words a construction which is compatible with human rights , in the context of s 45, "access to the open air" ought to be construed as encompassing a space external, or in addition, to the detainee's cell, from which the detainee has a view of the area immediately beyond that space, and which receives natural light and is exposed to fresh air and changes in the weather: Mandela Rules r 23(1).

240. The phrase "access to the open air" is not defined in the *Corrections Management Act*. Nor have the words been construed by any Australian court in this context. The content of this concept is informed by the natural and ordinary meaning of the words, read in their context: *Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation* (1981) 147 CLR 297 at 304-305, 319-321; *Momcilovic v The Queen* at [16], [40], [56]; *Australian Leisure and Hospitality Group v Director of Liquor Licensing* [2012] WASC 463 at [22].

241. The plaintiff relied on the Oxford English Dictionary definition of "the open air" as the ordinary definition of the words. That definition is "[f]ree or unenclosed space outdoors, usually exposed to the weather". It was submitted that this definition is consistent with the preceding term "access to", which the plaintiff submitted conveys entry to a particular area. It was submitted it was also consistent with the preceding definite term "the": "the open air", which connotes a place outdoors.

242. Nevertheless, it cannot be lost sight of that the context in this case is the fact that any access to the open air must occur within the AMC grounds, by virtue of being imprisoned: *Castles v Secretary, Department of Justice* at [100] and [112].

243. Section 45 of the *Corrections Management Act* is derived from r 23(1) of the Mandela Rules, as referenced in the Explanatory Statement to the Corrections Management Bill.

Rule 23(1) of the Mandela Rules provides that "[e]very prisoner who is not employed in outdoor work shall have at least one hour of suitable exercise in the open air daily if the weather permits". It was submitted that the words "outdoor" and "if the weather permits" are consistent with the ordinary meaning advanced by the plaintiff.

244. A space that gives a detainee the impression of being outdoors in that it does not give the impression of being indoors, will be a space that constitutes being in "the open air". In my view, the impression of being outdoors is realised through the provision of a spacious area with free flow of fresh or open air, ample natural light, a clear view of the sky, exposure to the natural elements and preferably, a view of vegetation.

245. In addition to the Mandela Rules, the Explanatory Statement to the Corrections Management Bill further notes that the standards of section 12 of the *Corrections Management Act* are relevantly derived from the handbook *A Human Rights Approach to Prison Management*. In relation to "exercise in the open air", the handbook states:

> Many prisoners, in particular pre-trial prisoners, spend the majority of their days indoors in conditions of relatively close confinement, with limited access to light and fresh air. In these circumstances **it is essential for both physical and mental health that they should be given an adequate amount of time each day in the open and should have the opportunity to walk about or to take other exercise.**
>
> The minimum recommended time in the fresh air is one hour each day. During this period prisoners should be able to walk about in relatively large areas and should also, **if it all possible, be able to see natural growth and vegetation**. **The practice in some countries of placing large numbers of prisoners into small walled yard, which are in effect cells without roofs, for an hour each day does not satisfy the obligation to give the opportunity to exercise in the open air.**
>
> **The right to exercise in the open air applies to all prisoners, including those who are under any kind of segregation or punishment.**
>
> (emphasis added)

246. In my view, in light of the foregoing and in line with the international authorities, "access to the open air" may be interpreted as meaning an "outdoor space" as discussed above. The plaintiff conceded that the general exercise yard met the requirement of "access to open air" and was relevantly an "outdoor space". On the evidence, I agree.

"Can exercise"

247. The defendant accepted that s 45 requires it to provide detainees with a reasonable space within which to physically exert themselves. It was noted that what is reasonable will depend, in part, on the number of detainees required to use the space at any one time. The defendant referred to r 23(1) of the Mandela Rules which states that the practice of "placing large numbers of prisoners into small walled yards…does not satisfy the obligation to give the opportunity to exercise in the open air".

248. The defendant rejected the proposition that a requirement to provide exercise equipment can be read into s 45 of the *Corrections Management Act*, even if regard was had to s 30 of the *Human Rights Act*. It was submitted that all that is required under s 45 is that the defendant ensure, as far as practicable, that the plaintiff "can exercise" for the prescribed minimum period. In reference to the Human Rights Commissioner's submission, the defendant submitted the Commissioner failed to have regard to the real risks of providing detainees with access to exercise equipment, as there are safety

risks to detainees and staff generally as well as specific risks presented by threats of violence.

249. It was submitted by the plaintiff that the words “can exercise” require the defendant to provide detainees with an adequate space within which to physically exert themselves. The adequacy of the space will depend on, among other things, the size of the space, the extent of air ventilation and natural light. The plaintiff submitted that the availability of exercise equipment may also be a relevant factor: New Zealand High Court decision of *Taunoa v Attorney-General* at [119], [121]-[122]; New Zealand Supreme Court decision of *Taunoa v Attorney-General* at [50]-[51], [193], [210]. The plaintiff ultimately submitted that the concepts of “the open air” and an adequate space to exercise are fixed. It was submitted that either a space is adequate for the purpose of exercise and in the open air or it is not.

250. In light of the foregoing “can exercise” should be interpreted as meaning “suitable to exercise in”. It was conceded by the Human Rights Commissioner that the rear courtyard could be utilised by a “highly motivated” detainee to exercise using bodyweight alone. Nevertheless, it was ultimately submitted that the rear courtyard is not suitable for or equipped for recreation and exercise in the way envisaged by the international materials. On the evidence, including the view I undertook of the relevant space, I agree. I note that the issue of whether or not exercise equipment is required is not an issue I must determine in this case. The crux of the issue in this case revolves around a suitable space in which to exercise.

“As far as practicable”

251. The defendant submitted that the phrase “as far as practicable” is not an “exception to or qualification of a fundamental obligation under the *Corrections Management Act*’. Instead, the defendant submitted it is an inherent qualification that defines the scope of the obligation. It was submitted that the plaintiff had misstated the test and the onus, as well as the position of the defendant. The defendant acknowledged that the rear courtyard does not provide the same degree of access to “open air” and room for exercise as the general exercise yard. The defendant however submitted that its obligation is to ensure, “as far as practicable”, that detainees have access to the open air and can exercise for the prescribed daily minimum.

252. The defendant submitted that the plaintiff’s submission that “as far as practicable” does not refer to “routine, operational or policy matters” could not be sustained in the statutory context of corrections management, if the plaintiff intended to implicate matters of safety or security.

253. In respect of the examples which might render it impractical for a detainee to have access to open air and exercise as provided in the Explanatory Statement to the Corrections Management Bill, the defendant submitted that there was no indication that those examples were intended to be exhaustive: s 132(1) *Legislation Act.* The defendant submitted that while the examples provided were extreme circumstances, it did not mean that non-extreme circumstances were excluded. It was submitted that what is practicable is to be determined in the context of corrections management, and includes considerations of the security and safety of detainees and staff at the AMC.

254. I note that the Explanatory Statement to the Corrections Management Bill states the following:

> The entitlement is not absolute, as there may be practical reasons why the entitlement cannot be implemented every day. For example, a state of emergency, or a natural disaster etc.

255. The defendant referred to the submission of the Human Rights Commissioner that placed reliance on the decision of *CNK v The Queen* [2011] VSCA 228; 32 VR 641 (*CNK v The Queen*) *to* argue that "as far as practicable" means "as far as it is possible to go" or "to the maximum extent possible". The defendant noted that in *CNK v The Queen*, the phrase "as far as practicable" operated in the criminal sentencing of a child and set out what the Court "must, as far as practicable" have regard to in sentencing. At [8] the Victorian Court of Appeal held:

> …the words "as far as practicable operate, in context, as words of emphasis. Since the word "practicable" means "feasible" or "able to be done or accomplished", the phrase "as far as practicable" means as far as it is possible to go.

256. In light of the above passage, the defendant noted emphasis is to be placed on the context in which the phrase appears. Therefore, the context of s 45 of the *Corrections Management Act* is different to the sentencing regime for young people and children, which was under considered in *CNK v The Queen*. The defendant pressed an interpretation that in s 45 of the *Corrections Management Act*, the phrase qualifies the measures to be taken to ensure access to open air and exercise.

257. The defendant noted that the Court in *CNK v The Queen* endorsed the decision of *Owen v Crown House Engineering Ltd* [1973] 3 All ER 618 (*Owen v Crown House Engineering*). The Court held in *Owen v Crown House Engineering* at 622:

> It is important not to equate 'practicable' with 'possible'. When considering whether a course of action is possible, it is not permissible to consider the results of that course of action; if it can be done, it must be done. But when considering whether a course of action is practicable it may be permissible to look at the end result. Like so many other words in the English language 'practicable' will take considerable colour from the context in which it is used.

258. The defendant submitted that in determining whether the defendant ensured "as far as practicable" that detainees have "access to the open air" and "can exercise", it is not adequate to only consider what was physically possible for the defendant to do. It was submitted that regard must also be had to the end result of the defendant taking a particular course of action, including the consequences of taking such a course of action. In the present matter, the defendant submitted this included considering the safety and security of the detainees and staff at the AMC.

259. The defendant submitted that the following matters were important to the question of what is "practicable":

    (a) The inability to implement the handcuffing policy in the general exercise yards;

    (b) Limited staffing availability for escort of detainees to and from, and supervision of detainees in, the general exercise yards;

    (c) The mesh walls of the general exercise yards in the Management Unit have wider gaps between them, which detainees can use as ligature points;

    (d) The general exercise yards contain exercise equipment which can also be used as ligature points; and

(e) The walls of the general exercise yards in the Management Unit are 4.33m high and can be climbed by the detainees for a variety of purposes, which make cause serious injury or death.

260. The defendant further submitted that the Intervenor appeared to have conflated the terms "possible" and "practicable" in its submission that it is "possible" for the defendant to make changes to the current environment and resourcing levels in the AMC. The defendant submitted that *Owen v Crown House Engineering* demonstrated that the fact that something is physically possible does not mean it is also, in context, practicable.

261. The defendant also referred to *Castles v Secretary, Department of Justice*, where Emerton J had referred to the impracticality of providing a detainee with access to all medical treatment that is available in the community, which the plaintiff in that matter argued there was entitlement to under s 22 of the Victorian *Charter*, the equivalent of s 19(1) of the *Human Rights Act*. At [112] Emerton J stated:

> It is also to be noted that General Comment No 21 in relation to Art 10 of the ICCPR refers to prisoners' enjoyment of ICCPR rights, "subject to the restrictions that are unavoidable in a closed environment". This statement of principle is therefore based on the prisoner remaining in a "closed environment". Although it may be theoretically possible to enable prisoners to enjoy their human rights (other than the right to liberty) to the fullest extent by allowing them to leave prison on an escorted or accompanied basis, it would not be practicable to do so and would, arguably, be inconsistent with the very purpose of imprisonment itself.

262. It was submitted that Emerton J's remarks supported the defendant's argument that the scope of the words "as far as practicable" in section 45 must be considered with reference to the context of prison management. The defendant submitted that the submission that s 30 of the *Human Rights Act* requires "as far as practicable" to be interpreted in a way which is compatible with the plaintiff's human rights would negate the operation of those words, which are self-limiting. It was submitted that s 30 of the *Human Rights Act* does not require or authorise departure from the ordinary meaning of the words as used in s 45 of the *Corrections Management Act*.

263. It is clear that the defendant has an obligation to ensure, "as far as practicable", that detainees access the open air and can exercise for at least one hour per day. The phrase "as far as practicable" must be construed in that context: *Avondale Motors (Parts) Pty Ltd v Federal Commissioner of Taxation* (1971) 45 ALJR 280 at 283. In my view, the phrase provides an exception to or a qualification of a fundamental obligation under the *Corrections Management Act*: to ensure that detainees are provided with an entitlement which cannot be taken away by disciplinary action and which assumes particular importance to the wellbeing of detainees in segregation or separate confinement.

264. Something being practicable involves it being capable of being put into practice or feasible: *Pioneer Concrete Services Ltd v Yelnah Pty Ltd* (1986) 5 NSWLR 254 at 268. It was emphasised that the phrase used is "as far as practicable", as opposed to "if practicable". The inquiry is therefore not simply what is or is not practicable. The words "as far as" mean that the defendant must ensure the fullest expression of the entitlement that is feasible up to the point at which it becomes impracticable: *CNK v The Queen* at [8].

265. This interpretation of the phrase "as far as practicable" is consistent with both the Mandela Rules and the Standard Guidelines for Corrections in Australia, which state

that restrictions on prisoners in segregation or separate confinement must be "no more than necessary".

266. The Explanatory Statement to the Corrections Management Bill states in relation to cl 45: "the entitlement is not absolute, as there may be practical reasons why the entitlement cannot be implemented every day. For example a state of emergency, or a natural disaster etc". The examples cited indicate the kind or class of events which the Legislative Assembly intended would be impracticable. That is, exceptional circumstances which are external to the normal operation of the AMC.

267. It was submitted by the plaintiff that the Explanatory Statement indicated that the phrase "as far as practicable" refers to the frequency at which the entitlement is provided. The plaintiff submitted that it does not serve to read down the meaning of "the open air" or "can exercise".

268. The phrase "as far as practicable" explains why open air and exercise may not be provided on a particular day. The phrase, in my view, cannot operate as a method for the defendant not to provide open air or space to exercise, for detainees on an ongoing basis.

269. The plaintiff ultimately submitted that the phrase "as far as practicable" does not refer to routine, operational or policy matters, which are intrinsic to the operation of a correctional facility.

270. As referred to earlier at [262], if something is "practicable", it involves it being put into practice or feasible and that "as far as practicable" means "as far as it is possible to go" or "to the maximum extent possible": *CNK v The Queen* at [8]; *Owen v Crown House Engineering* at 622. It is accepted that security requirements in prisons will affect what is "possible". The international case law may be used to guide a Court in determining what is expected from the defendant in terms of what is possible or feasible for first world prisons.

271. In applying s 30 of the *Human Rights Act*, obstacles that can be relatively efficiently and practicably dealt with should not be placed in the way of affording detainees their entitlement to open air and exercise. Readily resolved practical matters are not insurmountable obstacles.

272. The fact that a particular area of the AMC has been built in a manner that does not provide a hatch through which a detainee can be handcuffed cannot limit what is considered "possible" because it is possible and necessary to change the built environment. It is practicable to install a door with a hatch.

273. Further, the fact that providing detainees with their basic entitlements would require an increase in staffing cannot limit what is considered practicable because it is possible, it is feasible and it is necessary to increase staffing if the current staffing level makes it impossible to provide basic entitlements whilst maintaining prison security.

274. In my view, in using the phrase "as far as practicable", the Legislative Assembly made provision for unexpected or non-routine events that make providing the entitlement on any particular day impossible, such as a lockdown in the AMC. The examples provided in the Explanatory Statement to the Corrections Management Bill emphasise the unanticipated and non-everyday nature of the type of event that may prevent the provision of the entitlement.

What is the proper construction of cl 4.3 of the *Corrections Management (Separate Confinement) Operating Procedure 2019*?

275. Section 14 of the *Corrections Management Act* permits the defendant to enact corrections policies to facilitate the effect and efficient management of correctional services. The effect of such a policy is that it becomes a notifiable instrument.

276. Between 15 February 2011 and 17 June 2019, the 2011 Operating Policy was in place and provided:

> Access to exercise
>
> Prisoners in the Management Unit will have access to the exercise yard at the rear of their cell. Prisoners may also have access to a larger exercise yard in the unit, subject to the operational requirements of the unit and the prisoner's conformity to the unit's routine. The CO4/CO3s will determine access to the yard.

277. The 2011 Operating Policy did not mandate use of either the rear courtyard or the general exercise yard for detainees' exercise or out-of-cell-time.

278. From 18 June 2019, the 2019 Operating Procedure has been in place and cl 4.3 states:

> The open rear cell door will count as the minimum one (1) hour of fresh air and exercise.

Defendant Submissions

279. The defendant submitted that cl 4.3 of the 2019 Operating Procedure provides instruction to staff managing detainees placed on separate confinement as to the manner in which the minimum requirement in s 45 of the *Corrections Management Act* may be met. It was submitted that cl 4.3 does not prohibit or preclude the defendant from providing detainees with access to the general exercise yards. The defendant stated that cl 4.3 operates similarly to the 2011 Operating Policy, which also permitted access to the general exercise yards. It was submitted that this construction of cl 4.3 was consistent with the affidavit evidence of Mr Rust and Mr Tarlinton that "hard side" detainees "generally do not have access" to the general exercise yards, but "might from time, to time, be given access to the general exercise yard if a Corrections Officer in the Management has conducted a review and decided that it is safe and appropriate to allow them access".

280. The defendant rejected the plaintiff's submission that the reference to "fresh air" in cl 4.3 demonstrated a misunderstanding of the entitlement. The defendant submitted that any purported distinction between "fresh air" and "open air" in the context of a prison was elusive, as detainees are confined to spaces that are neither "unenclosed", "unconfined", nor "open" in light of being detained. It was submitted that the reference to "fresh air" in cl 4.3 did not reveal any misunderstanding of the obligation in s 45(1) of the *Corrections Management Act*.

Consideration

281. The plaintiff, in my view, correctly, submitted that the words "will count as" indicate that cl 4.3 is a deeming provision. Thereby, the rear courtyard is taken to comply with s 45 of the *Corrections Management Act*, regardless of the detainee's circumstances or the events taking place on any particular day.

282. In contrast to the 2011 Operating Policy, cl 4.3 of the 2019 Operating Procedure attempts to "deem" compliance with the requirements of the right to humane treatment: s 19(1) of the *Human Rights Act*.

283. The plaintiff highlighted that cl 4.3 uses the term "fresh air" instead of "the open air" as appears in s 45 of the *Corrections Management Act*. It was submitted that the two terms are not synonymous. The plaintiff noted that the ordinary meaning of "fresh air" in the Oxford English Dictionary is "[t]he air outside, as opposed to air within a room or other enclosed space". The plaintiff submitted that the distinction was of importance as it is easier to provide access to fresh air than to provide access to the open air. The plaintiff referred to the following observation by the Irish High Court in *Whelan v Governor of Mountjoy Prison* [2015] IEHC 273 (*Whelan v Governor of Mountjoy Prison*) at [8]: "[i]f this is open air, then a cell which has bars which admit light and air would similarly be in the open air".

284. As for the debate surrounding "fresh air" or "open air", this is not an issue that is necessary for me to determine in this context. In my view, the critical consideration is that cl 4.3 of the 2019 Operating Procedure clearly attempts to deem compliance with s 45 of the *Corrections Management Act*. The fresh air/ open air issue will be discussed later in these reasons. Though it must be said that it is a somewhat arid debate in the context of this case.

By providing the plaintiff with access to the Rear Courtyard, in accordance with cl 4.3 or otherwise, has the defendant acted consistently with s 45 of the *Corrections Management Act*?

Defendant Submissions

285. The defendant submitted that the question of compliance with s 45 of the *Corrections Management Act* cannot be answered merely by reference to the physical characteristics of the rear courtyard. It was noted that the plaintiff accepted that the rear courtyard provides fresh air and the defendant submitted that the rear courtyard also provides access to sunlight, changes in weather, a view of the sky, and of the area immediately beyond the rear courtyard. It was submitted that the defendant has provided access to the open air and a space to exercise, as far as the considerations of the safety and security of the AMC permit. The defendant submitted that such facts are legitimate considerations of practicability under s 45 of the *Corrections Management Act*.

Access to the open air

286. In reference to the plaintiff's submission as to the impression of the rear courtyard as a small, claustrophobic space, the defendant submitted such a submission was problematic. The defendant noted that the plaintiff did not cite authority to rely on an objective test of "impression", nor was there any evidence that the rear courtyard made the plaintiff feel claustrophobic. The defendant referred to the plaintiff's submission that the rear courtyard impedes full penetration of the rain and natural light from the sun, in submitting that the evidence did not establish this. The defendant noted that such an inference could not be drawn in circumstances where it was not raining on the day of the inspection, nor was the sun shining on that occasion. Instead, the defendant emphasised the evidence of Mr Tarlinton that "if it's raining you can get wet. If it's sunny there's sun coming in" and highlighted that his evidence in this regard was not challenged.

287. The defendant rejected the plaintiff's claim that the rear courtyard is analogous to the exercise yard in *Whelan v Governor of Mountjoy Prison*. The defendant submitted that it was not relevantly analogous as in *Whelan v Governor of Mountjoy Prison*, the Court determined that the yard was not in the open air on the basis that the entire area was enclosed, including an impenetrable roof, with only some light and air admitted through the top meshed part of the side walls. The mesh was "well above the head height of individuals using the area': at [8], and did not afford a view of the sky directly above. The defendant also emphasised that unlike the yard in *Whelan v Governor of Mountjoy Prison*, the rear courtyard has a window that functions as an observation panel.

288. The defendant further noted that the in the yard in *Whelan v Governor of Mountjoy Prison*, there were four lights on the central trusses supporting the steel roof, suggestive of the fact that the area needed illumination at least part of the time. The defendant also noted that while the inspection of the rear courtyard revealed one light on one of the side walls, there was no evidence and no inference should be drawn, that it was necessary to illuminate the rear courtyard during daylight hours.

289. In *Whelan v Governor of Mountjoy Prison* at [9] the Court observed: "a person is in the open air when he/she can look up and see the sky and have the sun in his eyes or feel the rain on her face". The defendant submitted that rear courtyard could be distinguished as it meets all of those requirements, as the evidence of Mr Tarlinton indicated.

290. The defendant submitted that even if the yards were relevantly analogous, it would not be enough to establish a breach of s 45 of the *Corrections Management Act*. The defendant noted that in *Whelan v Governor of Mountjoy Prison*, the relevant legislation contained a proviso of practicality that was referable only to "the weather on the day concerned": at [2]. The defendant submitted that s 45 is not similarly constrained. It instead requires that the defendant ensure access to open air "as far as practicable". It was submitted that the absence of that phrase in the provision examined in *Whelan v Governor of Mountjoy Prison* was considered determinative of how the obligation and the words of the section ought to be construed: at [30].

291. The defendant further submitted that the reliance of the plaintiff on the text *A Human Rights Approach to Prison Management* was inapt, as there is no practice in the Management Unit of placing "large numbers of prisoners" into small yards. Instead, the Management Unit permits a single detainee to have individual access to the rear courtyard.

292. The defendant agreed that the number of people in a space is relevant to the defendant's obligation under s 45 of the *Corrections Management Act* with regard to exercise but not to the characterisation of "open air". The defendant noted that this issue does not arise in the present matter. The defendant referred to the advice referenced in the plaintiff's submissions that areas "covered with metal mesh obstructing the view of the sky… should be avoided" and submitted that this advice does not address the function or utility of the mesh to ensure the safety of detainees, such as from self-harm.

Detainees can exercise

293. In referring to the plaintiff's submission that the rear courtyard is not an adequate space in which a detainee can exercise, the defendant noted that the plaintiff had failed to establish that he cannot physically exert himself in the rear courtyard. Instead, the

plaintiff had compared the size of the rear courtyard to other exercise yards. The defendant submitted that the question under s 45 of the *Corrections Management Act* is referable to whether the plaintiff "can exercise" for at least one hour each day. The defendant noted that the *Corrections Management Act* does not prescribe the manner of exercise, nor the degree of exertion.

294. The defendant accepted that there is no exercise equipment in the rear courtyard but submitted that the provision of equipment is not a requirement. The defendant submitted that the plaintiff had not demonstrated there is inadequate air ventilation and natural light in the rear courtyard for the purpose of exercise. The defendant also submitted that the plaintiff had failed to demonstrate a lack of crossflow of air in the rear courtyard on account of the ceiling being made of mesh and noted that this could not be assumed nor inferred from the view of the rear courtyard.

295. The defendant submitted that the matter of access must be assessed in light of the particular detainee and the reasons for their placement in the Management Unit. While Mr Tarlinton indicated that the general exercise yards had not been used since the 2019 Operating Procedure came into the effect, the defendant submitted this did not demonstrate a "blanket policy" as opposed to a default position. It was submitted that the default position was subject to exceptions, as determined by a corrections officer in the circumstances of the individual detainees. The defendant submitted that this was consistent with the evidence that, from time to time, a detainee might be given access to the general exercise yard if an assessment is conducted and it is deemed safe to do so.

296. The defendant also referred to the Prisoner Complaints Form dated 20 March 2019, in which the plaintiff made a complaint seeking "humane treatment" and the response given in the section entitled "outcome of complaint/ action taken" was: "…exercise area currently is the rear courtyard at present, large exercise yard can be discussed in the next review in 7 days". The defendant also referred to the plaintiff's case note dated 27 March 2019, which indicated that: "CO – Detainee asked about time out in the external yard but was advised that [this] would [be] discussed at his review date".

297. Reference was made to the evidence of Mr Tarlinton that the rear courtyard was an additional means of access to the entitlement under s 45 of *Corrections Management Act*. The defendant stated that while Mr Tarlinton gave evidence that there is no written risk assessment for access to the general exercise yard, he had clarified that the risk assessment undertaken assesses whether someone is safe to go into a general exercise yard.

As far as practicable

298. The defendant noted it was not its case that the plaintiff was precluded from accessing the general exercise yard because of the staffing levels in the Management Unit. It was submitted that the issue of staffing levels belied the complexity of the matter. The defendant noted that when Mr Tarlinton accepted that detainees could be taken outside if there was staffing resources to give 14 detainees that much exercise, the context of the question was that Mr Tarlinton had to assume the "best case scenario" in that the detainees did not pose a threat to themselves or to AMC staff. The defendant also emphasised that Mr Tarlinton's evidence was premised on the assumption that the detainees would be compliant.

299. The defendant submitted that the plaintiff's submission did not account for the other risks faced by the Management Unit staff. For example, if a detainee was taken to the general exercise yard and refused to return to their cell, the presence of additional staff in the Management Unit would not obviate the need to negotiate a peaceable outcome and referred to Mr Tarlinton's evidence on this aspect. The defendant noted that during such a time, the Management Unit staff would not be able to facilitate access to the general exercise yard for any other detainee until the non-compliant detainee had been removed.

300. It was emphasised in respect of Mr Tarlinton's evidence, that this would present a greater risk than containment in the rear courtyard on account of a detainee being at heights and falling down. The defendant submitted that containment in the courtyard reduces the risk to the detainee and officers. It was underlined that the risk to the detainee and to staff, whether it be rare or otherwise, cannot be ignored.

301. The defendant submitted that the plaintiff's reliance on the rear courtyard door also having a ligature point to undermine the default use of the rear courtyard ignored the evidence of the greater risk of self-harm presented by the general exercise yard. The defendant further submitted that the evidence did not merely go to the existence of ligature points, but also to the potential for intentional or accidental harm arising form the general exercise yard.

302. It was also submitted that the plaintiff's submission that detainees at immediate risk of self-harm would be removed from the Management Unit ignored the possibility of the risk presented by detainees who are not assessed as presenting an immediate risk of self-harm. The defendant submitted that this did not mean that the subjective risk presented by detainees not at immediate risk who instead experience some suicidal ideation or feelings of hopelessness, and the objective risk presented by the wider steel bars, and the assailable height of the walls in the general exercise yard can or should be ignored. It was submitted that this was evident in the case of the plaintiff, who was placed under segregation from 20 – 29 April 2019, after having indicated that he was going to attempt suicide. It was noted that after having been referred for assessment at the Crisis Support Unit, the plaintiff was returned to the Management Unit.

303. The defendant noted that the plaintiff's submission that detainees who were not at risk of self-harm were still not permitted to access the general exercise yard was a generalised submission without reference to a specific detainee and as such, was unsupported by evidence. The defendant submitted that this submission also ignored the other reasons detainees were not granted access to the general exercise yard.

304. In respect of the plaintiff's submission that Mr Tarlinton accepted that the risk of self-harm was not relevant to the defendant's assessment of whether a detainee could use the general exercise yard, the defendant submitted that this was a misrepresentation of Mr Tarlinton's evidence. It was noted that the question put to Mr Tarlinton was premised on a scenario in which a detainee at immediate risk of self-harm is assessed and then moved to the Crisis Support Unit and then ultimately removed from the Management Unit. It was in that context that Mr Tarlinton agreed with the proposition that the risk of self-harm in the general exercise yard would not be relevant to an assessment whether the detainee is granted access to the general exercise yard.

305. The defendant referred to the evidence of Mr Kelly and Mr Tarlinton where they had stated that there was a need for Management Unit detainees to be handcuffed and that was for the protection of staff and other detainees. It was emphasised that the evidence

revealed that detainees in the Management Unit are also controlled by at least two staff members whenever they are in their cell. It was submitted that the risks posed by the necessity for containment in the general exercise yard are alleviated, but not answered, by the installation of a door with a hatch. The defendant further referred to Mr Tarlinton's evidence as to why the policy of permitting detainees to access the general exercise yard without handcuffs between 2012 and 2017 was changed.

306. It was submitted that the risk of harm to detainees or officers while "hypothetical" is nonetheless real in circumstances where the defendant's witnesses had identified past incidents in which detainees have been non-compliant or violent resulting in property damage and threatening to other detainees. It was submitted that the absence of evidence of physical harm does not negate the risk of such harm, nor should the reasons for that absence be the subject of speculation.

307. The defendant further submitted that by implication of the "same procedure" of extraction occurs in relation to the general exercise yard and the rear courtyard, it did not mean that the risk of extraction to the detainee and the officers is the same across both forms of yard. Moreover, it was submitted that the fact that such extraction is "rare" does not mean that the risk of non-compliance is similarly so. Even if it was, it does not deny the necessity of addressing that risk.

308. The defendant accepted that the plaintiff was generally polite to AMC staff, however, it was emphasised that Mr Tarlinton's evidence was that the plaintiff presented a risk given his history of assaulting other detainees. Mr Tarlinton stated that he did not personally "feel that risk" but did indicate that there is a risk wherein inmates have low impulse control and may "snap" when they get upset. Therefore, Mr Tarlinton stated that the Management Unit is conducted in its current method "because [he] want[s] [his] officers to go home at night safely, we don't do anything that puts officers more at risk than what we need to".

309. It was submitted that the plaintiff's contention that no individualised risk assessment was performed for the purposes of s 45 of the *Corrections Management Act*, or when the detainee is placed in the Management Unit is not an accurate representation of the evidence.

310. The defendant noted that Mr Tarlinton indicated that there was no specific risk assessment in relation to the plaintiff but there would have been a separate confinement order. Those separate confinement orders, as well as the segregation orders in respect of the plaintiff were also tendered in evidence. The defendant submitted that those various orders indicate the reasons for the placement in the Management Unit, and by virtue of the severity of the disciplinary breach, the period of time for which the plaintiff is to remain in separate confinement, or in segregation to maintain the safety and security of the AMC.

311. It was submitted that the risk presented by the plaintiff to the safety of other detainees and to the security and good order of the AMC is assessed by virtue of those orders, and reflected in the time spent in separate confinement, being three, seven or 28 days. The defendant noted that the risk was assessed by Mr Rust in his affidavit but acknowledged that Mr Tarlinton did not adopt that paragraph because he himself did not make those orders. However, Mr Tarlinton did confirm a process in which he would review the directions for segregation and separate confinement. That review included consideration of the detainee's behaviour, the circumstances of their placement in the Management Unit, and their security classification to assess the risk they posed.

312. The defendant submitted that the above referenced assessment process is supported by Mr Tarlinton's oral evidence that there was no written risk assessment for access to the general exercise yard, but that it was "something the officers would decide, in collaboration with their supervisor". The defendant also referred to Mr Tarlinton's evidence that the assessment is not focused on access to fresh air and exercise, but is around assessing whether someone is safe to go into the yard. It was submitted that this consideration informs the obligation in s 45 of the *Corrections Management Act*, to ensure access "as far as practicable". The defendant stated that it could not seriously be suggested that access to any area of the Management Unit should be afforded, if it is not considered safe to do so.

313. It was noted that s 45(1) of the *Corrections Management Act* does not dictate the frequency or manner of the assessment of practicability. It was submitted that such an assessment was undertaken in relation to the plaintiff at the point of placement in the Management Unit, and subsequently on review. The defendant emphasised that the plaintiff was placed in the Management Unit for 63 out of 337 days between 14 October 2018 and 16 September 2019, as a consequence of actual and threatened violent conduct. The plaintiff admitted that he had assaulted several people whilst in custody; that he conducted himself in the Management Unit in a way which could be perceived as violent or aggressive; and he accepted that he posed a security risk in light of the assaults he had perpetrated or threatened to perpetrate. The defendant further referred to the evidence that the officers responsible for managing detainees in the Management Unit did inform themselves of the reasons for the plaintiff's placement in the Management Unit.

314. The defendant ultimately submitted that a declaration should not be made that access to the rear courtyard does not comply with s 45 of the *Corrections Management Act*. It was submitted that it could not be said that there is no circumstance in which access to the rear courtyard complies with s 45 of the *Corrections Management Act*. On the contrary, it was submitted in the plaintiff's circumstances, access to the rear courtyard met the defendant's statutory obligation.

Consideration

315. The plaintiff correctly submitted that the determination of this issue is a question of fact: *Whelan v Governor of Mountjoy Prison* at [8] and [30]. In my view the evidence establishes that the rear courtyard is not in "the open air".

Not in "the open air"

316. Having inspected the Management Unit, I find that the rear courtyard gives the impression of being indoors and specifically, of being in a cell. There are four brick walls, covered by a narrow mesh ceiling. The mesh ceiling undeniably obstructs a clear view of the sky and thereby impedes natural light from the sun. There was no crossflow of air and one could not feel the wind flowing through the space, in contrast to the general exercise yard. In respect of the observation window on the rear door, it was a narrow window and does not enable a detainee to see out in more than a limited way.

317. Further, the plaintiff correctly submitted that the rear courtyard was analogous to the "exercise area" in *Whelan v Governor of Mountjoy Prison*. The plaintiff noted that the only structural difference to the rear courtyard is that in *Whelan v Governor of Mountjoy Prison*, the steel mesh was not on the ceiling but was located along the top quarter of

the walls and giving an oblique view of the sky. Murphy J held at [8] and [30] that the exercise area was not in "the open air" in the natural and ordinary meaning of that term.

318. The plaintiff also drew upon *A Sourcebook on Solitary Confinement*, cited in *Callanan v Attendee Z* [2013] QSC 342; [2014] 2 Qd R 11 (*Callanan v Attendee Z*) at [33], which stated that the practice of using areas "covered with metal mesh obstructing the view of the sky… should be avoided".

319. In my view, rear courtyard is not located in "the open air" and its use therefore does not comply with the defendant's obligation to ensure access to the open air under s 45(1)(a) of the *Corrections Management Act*.

Not an adequate space in which a detainee "can exercise"

320. The plaintiff further and alternatively submitted that use of the rear courtyard does not comply with s 45(1)(b) of the *Corrections Management Act* as it is not an adequate space in which a detainee can exercise. It was noted that whether the rear courtyard is of an adequate size is again a question of fact. The plaintiff submitted that a rear courtyard is small and is of a similar size to a Management Unit cell, as it is 2.3m wide by 3.6m long with a total of 8.4m².

321. The plaintiff noted that the rear courtyard is significantly smaller than the exercise area in *Whelan v Governor of Mountjoy Prison*, which Murphy J at [30] observed to be 5.32m by 6.88m with a total area of 36.6m². The plaintiff referred to the European Committee for the Prevention of Torture which had stated in its Report to the Swedish Government on the visit to Sweden carried out by the CPT from 9 to 18 June 2009, that an area measuring some 25m² is "not large enough to allow [inmates] to exert themselves physically".

322. The plaintiff again referred to *Moiseyev v Russia* and the New Zealand High Court decision of *Taunoa v Attorney-General* in support of its submission that the rear courtyard is not a sufficient space. Emphasis was also placed on there being inadequate air ventilation and natural light in the rear courtyard for the purpose of exercise, as well as the lack of exercise equipment.

323. It was ultimately submitted by the plaintiff that the rear courtyard is not an adequate space for the purpose of exercise. I accept this submission as it accords with my view of the evidence in this case, in particular having viewed the area in question.

Defendant has not ensured access "as far as practicable"

324. The plaintiff correctly accepted that the general exercise yard would comply with s 45 of the *Corrections Management Act*. It was submitted that the defendant has not ensured access "as far as practicable" on a fundamental level – the defendant permits access only to rear courtyard and not to the general exercise yard or another outdoor area as a matter of policy, as set out in the evidence of the AMC staff. It was noted that it was not the case that the rear courtyard is only used on days when it is impracticable to use the general exercise yard or another outdoor area.

325. The plaintiff referred to the three reasons of the defendant as to why it was not practicable to use the general exercise yard as the default option. It was submitted that those reasons merely attempted to explain why the defendant provided less open air and less space to exercise to the plaintiff, not why the defendant could not provide access to the open air and exercise on any particular day. Therefore it was submitted

that those reasons did not justify the failure of the defendant to comply with s 45 of the *Corrections Management Act*, nor did they hold up to scrutiny following the evidence at the hearing. It is important that I examine those reasons at this juncture.

326. The first reason is the staffing levels in the AMC. The plaintiff referred to the evidence of Mr Tarlinton that due to staffing levels, it is not possible for AMC staff to provide supervised access to a detainee in the general exercise yard. Emphasis was placed on the concession Mr Tarlinton made in cross-examination that AMC staff could hypothetically take detainees on a walk outside in handcuffs if staffing levels allowed. In my view, staffing levels cannot be a reason to deny detainees' minimum entitlements: New Zealand Supreme Court decision of *Taunoa v Attorney-General* at [194].

327. Second, the ligature points in the general exercise yard. The plaintiff correctly submitted that this point was undermined by the evidence. Mr Tarlinton gave evidence that the rear courtyard also had a ligature point in the form of the open door, yet it was still used as the default option. It is also relevant to emphasise Mr Tarlinton's evidence that if a detainee was at an acute risk, they would be removed from the Management Unit. Notwithstanding this policy, detainees who were not at risk of self-harm were still not permitted access to the general exercise yard. The policy was to instead use the rear courtyard regardless of a detainee's risk of self-harm.

328. The third reason was that access to the general exercise yard presents a security risk to correctional officers. The plaintiff noted that this reason was twofold. The first element of this reason was the defendant's policy to mandate use of handcuffs for all Management Unit detainees when they leave the cell and the fact that the door to the general exercise yard did not have a hatch. It is important that I highlight in this regard that Mr Tarlinton accepted that it would be possible to replace the door with a model with a hatch.

329. The second element of the third reason concerned the size and structure of the general exercise yard. Counsel for the defendant had stated in opening that "what one has by way of the general exercise yard is greater space and, therefore, greater difficulty of containment". It was submitted that the defendant's proposition was directly contrary to s 45(1)(b) of the *Corrections Management Act* which requires the defendant to provide an adequate space in which detainees can exercise. In my view, to accept the defendant's reasoning would be to undermine s 45(1)(b).

330. In respect of Mr Tarlinton's evidence as to the danger to detainees and officers posed by non-compliant detainees climbing the general exercise yard walls and refusing to come down, it was submitted that the Court did not receive evidence of harm to detainees or officers. The plaintiff correctly submitted that on the available evidence, the risk was merely hypothetical. In referring to Mr Tarlinton's evidence that a non-compliant detainee in the general exercise yard would require officers to negotiate with the detainee for an extended period and enter in PPE, the plaintiff emphasised that Mr Tarlinton also gave evidence that this procedure is adopted when a non-compliant detainee refuses to close the rear courtyard door. Mr Tarlinton had also stated that the sending in of officers in PPE to extract a non-compliant detainee in the general exercise yard had been a "rare occurrence". It was submitted that a "rare occurrence" extraction, with no evidence of actual harm being suffered by correctional officers, could not discharge the defendant's onus of proof. It does not, in my view, justify the defendant's policy of not allowing any detainees to use the general exercise yard. The observations of Young J in the New Zealand High Court decision of *Taunoa v Attorney-General* at

[277] are apposite here: “unlawful and difficult behaviour by prisoners can never justify unlawful conduct by their jailers”.

331. It was emphasised that the plaintiff’s entitlement under s 45 had not been temporarily limited due to state of emergency, natural disaster of other such extreme situation. Instead, it had been permanently denied as a matter of facility. For that assumption to justify not providing detainees with open air and exercise defeats the very purpose of the minimum entitlement contained in s 45. In my view, This minimum entitlement must be afforded to detainees in segregation and separate confinement. For the 63 days the plaintiff spent in the Management Unit, the defendant did not ensure that the plaintiff had his entitled access to the open air and exercise as far as practicable. In doing so, I find that the defendant has acted contrary to s 45 of the *Corrections Management Act*.

332. The Human Rights Commissioner submitted, and I agree on the evidence, that the rear courtyard is in reality, another small enclosed room like the Management Unit cell itself. The following are relevant factors: the dimensions of the cell; the fact that it is comprised of four solid block concrete walls and covered by a roof made of perforated metal sheeting. In my view, the rear courtyard is a fully enclosed space with a metal mesh roof, which does not provide access to open air. The rear courtyard does not meet the open air and exercise requirements established by the international jurisprudence.

333. The plaintiff ultimately sought a declaration that access to the rear courtyard does not comply with s 45 of the *Corrections Management Act* in respect of this issue. As noted earlier, I made that declaration.

On the proper construction of s 45 of the *Corrections Management Act* and cl 4.3 of the *Corrections Management (Separate Confinement) Operating Procedure 2019*, is cl 4.3 valid?

Defendant Submissions

334. The defendant noted that as the 2019 Operating Procedure came into effect on 13 June 2019, the plaintiff’s challenge to cl 4.3 is only relevant in respect of his placement in the Management Unit from 11 September 2019 to 16 September 2019. In respect of this issue, the defendant submitted that the stipulation in cl 4.3 that access to the rear courtyard will meet the obligation in s 45 of the *Corrections Management Act*, is not inconsistent with that provision. It was submitted that cl 4.3 sets a minimum standard of access, and thereby allows for circumstances which exceed that standard. That is, cl 4.3 does not preclude access to the general exercise yard in order to satisfy the obligation in s 45 of the *Corrections Management Act*. It was therefore submitted that cl 4.3 is not invalid.

Consideration

335. By reason of the matters determined under the first two issues, cl 4.3 of the 2019 Operating Procedure is invalid. Therefore, cl 4.3 is inconsistent with s 45 of the *Corrections Management Act*. Clause 4.3 was beyond the defendant’s power conferred under s 14(1) of the *Corrections Management Act* and for that reason, cl 4.3 is invalid.

336. The plaintiff referred to the defendant’s position that cl 4.3 sets a minimum standard of access which allows for circumstances which exceed that standard. The plaintiff correctly submitted that this was what the 2011 Operating Policy provided. The rear courtyard is not compliant with s 45 of the *Corrections Management Act*, it therefore

does not "count" as open air and exercise as referenced in cl 4.3. In my view, cl 4.3 is inconsistent with s 45 of the *Corrections Management Act*.

337. Clause 4.3 of the 2019 Operating Procedure attempts to "deem" compliance with the requirements of the right to humane treatment in s 19(1) of the *Human Rights Act* and is incompatible with that right. Clause 4.3 is also inconsistent with the rights protective purposes of the *Corrections Management Act.* The Human Rights Commissioner submitted that s 14(1) of the *Corrections Management Act* only authorises the making of policies and operating procedures that are "consistent with" the *Corrections Management Act*. In my view, cl 4.3 is therefore not authorised by s 14(1) of the *Corrections Management Act* and is invalid.

338. The Human Rights Commissioner submitted to the extent that cl 4.3 is inconsistent with s 45, or ss 7, 8, 9 and 12 of the *Corrections Management Act*, it is beyond power for that reason also. I agree. Clause 4.3 attempts to "deem" compliance with the open air and exercise requirements using a means that does not in fact provide open air and exercise. It is inconsistent with s 45 of the *Corrections Management Act* applying s 30 of the *Human Rights Act*, as well as being inconsistent with ss 7, 8, 9 and 12 of the *Corrections Management Act*.

339. The Court therefore made a declaration that cl 4.3 of the 2019 Operating Procedure is invalid by reason of it being inconsistent with the *Corrections Management Act*.

Has the defendant acted consistently with the *Human Rights Act*?

340. Section 40B was inserted into the *Human Rights Act* by the *Human Rights Amendment Act 2008* (ACT) (*Human Rights Amendment Act*). The Explanatory Statement to the *Human Rights Amendment Act* states:

> **Sub-section 40B(1) is modelled on section 38 of the Victorian *Charter of Human Rights and Responsibilities Act 2006*** and section 6 of the United Kingdom *Human Rights Act 1998*. **It is intended to ensure that public authorities act and make decisions compatibly with human rights.** An action that affects a protected right will be compatible with human rights where the extent to which that right is affected is justifiable in accordance with section 28 of the *Human Rights Act 2004*.
>
> (emphasis added)

341. The defendant is a public authority. As such, the requirements of s 40B of the *Human Rights Act* apply. The obligation in s 40B(1)(a) requires a public authority to act in a way that either does not limit human rights at all or only limits those rights in a manner that complies with s 28 of the *Human Rights Act*.

342. The obligation in s 40B(1)(b) requires a public authority to give a certain level of consideration, a "proper consideration", to "relevant" human rights.

343. The obligations in s 40B were considered in *Hakimi v Legal Aid Commission* [2009] ACTSC 48; 3 ACTLR 127 (*Hakimi v Legal Aid*). At [51] Refshauge J suggested the following questions for determining whether a public authority had complied with its obligations under s 40B of the *Human Rights Act*:

    (a) What is the act or decision which is the subject of challenge?

    (b) What is the human right engaged and what is its content?

(c) Is the entity engaging in the relevant act or making the relevant decision a public authority under ss 40 and 40A of the *Human Rights Act*?

(d) Is the relevant act or decision apparently inconsistent with, or does it impose a limitation on, any of the rights protected under pt 3 of the *Human Rights Act*?

(e) Is the limitation reasonable, insofar as it can be demonstrably justified in a free and democratic society having regard, inter alia, to the factors set out in s 28(2) of the *Human Rights Act*? To put it another way, is the limitation proportionate?

(f) Even if the limitation is proportionate, where the matter involves making a decision, did the decision maker give proper consideration to the protected right?

(g) Does the act or decision made under an Act or instrument give either no practical discretion in relation to the act or decision, or does the Act confer a discretion that cannot be interpreted under s 30 of the *Human Rights Act* consistently with the protected right?

344. For the purposes of s 40B(1)(a) of the *Human Rights Act*, once the plaintiff establishes prima facie incompatibility with certain human rights, the onus shifts to the defendant to justify the limitations created by its actions or decisions under s 28: *Certain Children (No 2)* at [203].

345. The approach taken by Refshauge J in *Hakimi v Legal Aid* is similar to the approach taken in Victoria in respect of the Victorian *Charter*: *Certain Children (No 2)* at [177].

346. The decisions of *Certain Children (No 2)* at [177]; *Minogue v Dougherty* [2017] VSC 724 (*Minogue v Dougherty*); *Haigh v Ryan* [2018] VSC 474 (*Haigh v Ryan*) at [46] in Victoria have adopted the following questions as being relevant for determining whether a public authority has complied with its obligations under the Victorian equivalent of s 40B:

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

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

(c) The proportionality or justification question: if so, is that limit under law (in the ACT: "set by laws") reasonable and demonstrably justified having regard to the matters set out in s 7(2) of the Victorian *Charter* (the equivalent of s 28 of the *Human Rights Act*)?

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

(e) The inevitable infringement question: was the act or decision made under an Act or instrument that gave the public authority no discretion in relation to the act or decision, or does the Act confer a discretion that cannot be interpreted in a way that is consistent with the protected right?

347. As can be seen from above, the questions posed by Refshauge J in *Hakimi v Legal Aid* converge with the questions developed in Victoria in *Certain Children (No 2); Minogue v Dougherty* and *Haigh v Ryan*. The plaintiff and the defendant both adopted the approach by Refshauge J in *Hakimi v Legal Aid.* The Human Rights Commissioner relied upon the question line derived from the Victorian jurisprudence. In this case, the questions will be answered together encompassing both the ACT and Victorian questions. Prior to answering the questions, it is appropriate to set out the jurisprudence concerning ss 28 and 40B.

Section 28: Reasonable limits set by laws

348. In *Hakimi v Legal Aid*, Refshauge J raised, but did not resolve, the question of whether justifiable limits permitted in s 28 of the *Human Rights Act* are able to be relied on in the absence of a law authorising the limit: at [92]. The Victorian jurisprudence with respect to the equivalent of s 28 of the *Human Rights Act* makes clear that in order to constitute a reasonable limit under that section, the limit must be imposed "under law". The Human Rights Commissioner submitted that the phrase "set by laws" used in s 28 of the *Human Rights Act* makes it even clearer than the Victorian *Charter* provision, s 7(2), that the reasonable limit must be authorised by law in order to be considered a reasonable limit.

349. In *Kracke v Mental Health Review Board* [2009] VCAT 646; 29 VAR 1 (*Kracke v Mental Health Review Board*) the issue of the lawfulness of any limits under s 7(2) of the Victorian *Charter* was considered by Bell J. His Honour concluded at [162] that the phrase "under law" confined the types of limitation that were permitted under that section, imposing a "legality requirement". Bell J also confirmed that at [165] that limitations can only be imposed under law, and that the relevant law must possess certain attributes. These attributes were summarised by reference to *Olsson v Sweden (No 1)* (European Court of Human Rights, Application No 10465/83, 24 March 1988), where the European Court of Human Rights held at [61] that the three requirements that were part of being "in accordance with law" under art 8(1) of the *European Convention on Human Rights* were: (a) precision and foreseeability (which did not mean excessive rigidity); (b) protection against arbitrariness, consistent with the rule of law; and (c) reasonable indication of the scope of any discretion, having regard to its legitimate aims.

350. Further, in *Kracke v Mental Health Review Board*, Bell J observed that the legality requirement in the Victorian *Charter* reasonable limits provision is an "essential component of fundamental importance". In the context of the *European Convention on Human Rights* legality requirement, Lord Bingham observed in *R (Gillan) v Commissioner of Police for the Metropolis* [2006] 2 WLR 537 at [34]:

> The lawfulness requirement in the Convention addresses supremely important features of the rule of law. The exercise of power by public officials, as it affects members of the public, must be governed by clear and publicly accessible rules of law. The public must not be vulnerable to interference by public officials acting on any personal whim, caprice, malice, predilection or purpose other than that for which the power was conferred. This is what, in this context, is meant by arbitrariness, which is the antithesis of legality. This is the test which any interference with or derogation form a Convention right must meet if a violation is to be avoided.

351. In *Director of Public Prosecutions v Kaba* [2014] VSC 52; 44 VR 526 (*DPP v Kaba*) at [468] it was confirmed that under s 7(2) of the Victorian *Charter* a person's human rights

can only be limited "subject to law". In that matter, the police had no lawful authority for the coercive questioning that limited the defendant's privacy and freedom of movement, therefore "the police actions could not satisfy the legality component of the limitations test in s 7(2)" at [468].

352. In *Certain Children (No 2)* at [202], it was held that in order to rely upon a law to provide reasonable justification for an action that limits human rights, the public authority must act within the confines of that law.

353. The requirement that a limitation be "set by law" similarly requires that any act that limits human rights must be based in law and authorised by law. "Set by law" means that any limiting act must conform to any legislative safeguards or requirements of the law relied upon to authorise it. Therefore, before the proportionality or justification question is asked, the defendant must show that any limit sought to be justified is a limit "set by law".

354. I have found that cl 4.3 is invalid. Of course even if cl 4.3 were valid, the limit that it authorised must be justified under the test in s 28 of the *Human Rights Act*. In *Minogue v Thompson* [2021] VSC 56 (*Minogue v Thompson*) at [82], the Victorian Supreme Court confirmed that the burden of establishing that a limit on rights is justified, or proportionate, rests with the party limiting (or seeking to limit) that right, and that this is a heavy burden:

> The standard of justification required is stringent; evidence required to prove that a limit on human rights is justified, having regard to the matters set out in s 7(2), should be 'cogent and persuasive'.

355. When assessing whether the test in s 7(2) of the Victorian *Charter* had been met, Richards J found at [88] that justification under s 7(2) had not been demonstrated by the prison governor's evidence of his belief that certain measures were necessary for the security and good order of the prison and further held that "anecdotal evidence is an insufficient basis upon which to limit human rights". In particular, Richards J concluded that the requirements of s 7(2) of the Victorian *Charter* were not met because the evidence did not show why alternative procedures that were less intrusive had not been adopted.

356. *Minogue v Thompson* makes clear that when considering the evidence put forward in support of any limit on rights by the defendant, s 28 of the *Human Rights Act* will require the Court to robustly examine that evidence to assess whether it demonstrably justifies the limits on rights. In doing so, the defendant must demonstrate that each of the individual factors in s 28 have been met.

357. The defendant did not address s 28 of the *Human Rights Act*.

Section 40B(1)(a): The obligation to act compatibly

358. The obligation to "act compatibly" under s 40(1)(a) of the *Human Rights Act* was raised in *Director of Public Prosecutions (ACT) v Close* [2015] ACTSC 10; 293 FLR 133. In considering the obligation to act compatibly, Burns J first considered at [52]-[68] whether a forfeiture order interfered with the right to not have one's home interfered with unlawfully or arbitrarily in s 12 of the *Human Rights Act*. Burns J then considered whether any limitation was demonstrably justified in a free and democratic society, applying the reasonable limits test in s 28 of the *Human Rights Act*. Burns J ultimately

concluded at [69] that the "actions of the DPP have not breached the human rights of the defendants and that s 40B of the *Human Rights Act* [is] not engaged".

359. The obligation to act compatibly was also considered in *Director of Public Prosecutions (ACT) v Nikro* [2017] ACTSC 15; 265 A Crim R 158 (*DPP v Nikro*), Burns J held at [33] that the DPP's action in initiating confiscation proceedings was "not the operative cause of any confiscation order, and as such cannot be the cause of any breach of the defendant's human rights under s 24 of the *Human Rights Act*, even assuming that the making of any such order constituted a breach of those rights".

360. This obligation has also been considered in *Miles v Director-General of the Justice and Community Safety Directorate* [2016] ACTSC 70. Burns J acknowledged at [35] that the *Human Rights Act* gave the Court powers to provide relief where public authorities act contrary to the *Human Rights Act* "and it should not hesitate to do so in appropriate circumstances". Burns J noted that it was for the applicant or plaintiff to establish that the respondent or defendant was acting in such a way as to breach his rights: at [41]. However, in *Re Application for Bail by Islam* [2010] ACTSC 147; 4 ACTLR 235 at [241] Penfold J previously confirmed that once a limitation has been shown to have occurred, the burden of proof shifts to the party seeking to justify the limitation of the right.

361. The decisions of the Victorian courts are generally consistent with the ACT jurisprudence in assessing whether an act is "incompatible" with a human right by reference to the reasonable limits provision in s 7(2) of the Victorian *Charter*: *Baker v Director of Public Prosecutions (Vic)* [2017] VSCA 58; 270 A Crim R 318 at [57]; *Certain Children (No 2)* at [199] and [206]; *De Bruyn v Victorian Institute of Forensic Mental Health* at [100]; *DPP v Kaba* at [468]; *Kracke v Mental Health Review Board* at [99]. The Victorian jurisprudence has recognised that it is for a plaintiff to show that their rights have been limited by the action of a public authority. The following additional guidance is provided about the practical demands of this burden:

    (a) Once a plaintiff has established prima facie incompatibility, the burden shifts to the defendant to justify the limitations caused by their actions and decisions: *Certain Children (No 2)* at [203];

    (b) The burden on a public authority to justify limitations is a heavy one, the standard of proof is high, requiring a degree of probability commensurate with the occasion and must be strictly imposed in circumstances where the plaintiff is particularly vulnerable: *Certain Children (No 2)* at [203].

362. In *Certain Children (No 2)* Dixon J confirmed that the statutory task given to the courts by s 38(1) of the Victorian *Charter*, the equivalent to s 40B of the *Human Rights Act*, is not the same as the task that the Court performs when undertaking judicial review of a decision. Under s 38(1) of the Victorian *Charter*:

    (a) Proportionality is to be judged by the Court, it is not to be assessed by the original decision maker: *Certain Children (No 2)* at [218]:

    (b) The Court itself must objectively assess the nature and extent of the limit on the right and the relationship between the limit and its purpose: *Certain Children (No 2)* at [206]; *Re Application under Major Crimes (Investigative Powers) Act 2004* [2009] VSC 381; 24 VR 415 (*Re Application under Major Crimes (Investigative Powers) Act 2004*) at [150].

(c) The determination of the Victorian *Charter* unlawfulness requires "an assessment that is closer to merits review than is usual in judicial review: *Certain Children (No 2)* at [206]; *PJB v Melbourne Health (Patrick's Case*) [2011] VSC 327; 39 VR 373 (*PJB v Melbourne Health*) at [223].

(d) The assessment of proportionality requires a greater intensity of review: *Certain Children (No 2)* at [206]; *PJB v Melbourne Health* at [223].

363. A failure to "act compatibly" can arise under the *Human Rights Act* from the failure to take action, where that failure to act is incompatible with the rights in the *Human Rights Act*. This is clear from the definition of "act" in the *Human Rights Act* dictionary. A breach of s 40B of the *Human Rights Act* does not depend upon a finding that the public authority intended to act incompatibly.

364. I have taken into account the authorities discussed above in determining whether the obligation to act compatibly has been discharged.

Section 40B(1)(b): The obligation to give proper consideration

365. *DPP v Nikro*, discussed above, involved an allegation that there was a failure to give proper consideration to the right in s 24 of the *Human Rights Act* when commencing confiscation proceedings. Nevertheless, the nature of the obligation imposed on a decision maker by s 40B(1)(b) has not been the subject of consideration in the ACT.

366. In Victorian courts, s 38(1) of the Victorian *Charte*r, the equivalent of s 40B(1)(b) of the *Human Rights Act*, has been interpreted as requiring that the obligation to give proper consideration arises when a right is "relevant" to a decision. The ACT provision also uses the phrase "proper consideration to a relevant human right". When determining which rights are relevant for the purposes of the proper consideration requirement, the Supreme Court of Victoria has held that courts should construe the rights in the Victorian *Charter* "in the broadest possible way", or "broadly and in a non-technical sense": *Re Application under Major Crimes (Investigative Powers) Act 2004* at [80]; *Castles v Secretary, Department of Justice* at [55]; *De Bruyn v Victorian Institute of Forensic Mental Health* [126] and *Director of Public Prosecutions v Ali (No 2)* [2010] VSC 503 at [59]. Reasonable and demonstrable limitation is not taken into account when identifying the scope of the right for these purposes: *DPP v Kaba* at [108].

367. In *Certain Children (No 2)* at [220] it was observed that the requirement to give proper consideration is not confined to circumstances where the right is in fact limited, rather the right merely needs to be "engaged". It was noted at [221] that there is a low threshold set for determining whether a human right is relevant to a decision such that it ought be given proper consideration.

368. In *De Bruyn v Victorian Institute of Forensic Mental Health* Riordan J addressed this issue, observing at [102]:

> For the defendant to be required to give proper consideration to human rights under s 38(1), such rights must be 'relevant'. Human rights will be relevant if the proposed decision will apparently limit such rights. A decision, which will apparently limit a right (without consideration of s 7(2) factors), is said to have 'engaged' the right. Engagement, in this sense, is to be contrasted with 'incompatibility', which applies when the limitation of the right cannot be demonstrably justified according to s 7(2).

369. Once a Court has determined which rights are relevant to a decision being made by a public authority, it must consider whether they were considered by that public authority

at all, and if so, whether that consideration was "proper". This has been interpreted as imposing the following requirements:

(a) It requires a public authority decision maker to understand in general terms which rights may be relevant and whether and how those rights will be interfered with by the decision that is being made: *Castles v Secretary, Department of Justice* at [185]-[186]; *Certain Children (No 2)* at [221].

(b) It requires a decision maker to have seriously turned his or her mind to the possible impact of the decision on an affected person's human rights and the implications for that person; and to identify the countervailing interests or obligations: *Castles v Secretary, Department of Justice* at [185]-[186]; *Certain Children (No 2)* at [221].

370. In *Minogue v Thompson* at [51]-[53], the Supreme Court of Victoria has indicated that the second step identified above requires that the public authority to assess whether limits are justifiable using the reasonable limits provision in the Victorian *Charter,* which is the equivalent of s 28 of the *Human Rights Act*:

> …Proper consideration requires both identifying the human rights impacts of a decision on those it may affect, and, where a right may be limited, assessing whether the limited is justified in accordance with s 7(2).
>
> …
>
> The expressions 'identifying countervailing interests and obligations' and 'balancing competing public and private interests' are used in many of the authorities concerning proper consideration. Those expressions are useful shorthand descriptions of the proportionality analysis that s 7(2) requires…
>
> In a prison context, the exercise of justification required by s 7(2) of the Charter requires attention to a wider range of matters than whether the human rights impact of a decision is justifiable in the interests of the management, good order or security of the prison. Section 7(2) also requires a decision-maker to have regard to the nature and extent of the limitation of human rights, the relationship between the limitation and its purpose, and any less restrictive means reasonably available to achieve that purpose.

371. In *Bare v IBAC* [2015] VSCA 197; 326 ALR 198 (*Bare v IBAC*) at [275]-[276] (Tate JA) and [217]-[221] (Warren CJ) it was held that the language of the obligation in s 38(1) of the Victorian *Charter* (the equivalent of s 40B of the *Human Rights Act*) imposes a higher standard than the obligation to take a consideration into account at common law or under statute. It was described in *Bare v IBAC* as "an obligation of some stringency" at [299]. Tate JA explained the basis of this interpretation of the obligation at [276]:

> The difference between the statutory language in s 38(1) and the manner in which the common law ground of review is expressed supports the view that s 38(1) is intended to impose a test that is more strict than that applicable at common law. **The word proper must be given some work to do in accordance with the maxim that all words in a statutory provision must be given meaning and effect**. This particularly so given that the word "proper" describes the nature of the consideration that is to be given; it qualifies the exercise in which a decision-maker is obliged to engage.
>
> (emphasis added)

372. In *Certain Children (No 2)* at [490]-[491], although the decision maker was found to have "seriously turned her mind to the possible limitation on human rights" and had identified the correct rights, Dixon J held that the nature of the consideration that

followed was not sufficient for the purposes of s 38(1) of the Victorian *Charter*. His Honour took into account the particular circumstances in which the decision had been made. Namely, following a decision of the Court which had identified a number of significant human rights concerns with the juvenile justice facility in question: *Certain Children*. At [491] of *Certain Children (No 2)* Dixon J observed:

> The contentious area is whether the Minister correctly balanced the competing public and private interest. I bear in mind that I ought not undertake the review overzealously…
>
> The circumstances here are exceptional, however, in that the Minister was guided by the Certain Children decision and the Charter compatibility was carried out by, or under the direction of, the VGSO. The standard of the decision makers' discharge of responsibility ought to be higher than what was expected of the Secretary in *Castles*.

373. Dixon J observed at [498] that one important aspect of "proper" consideration is that it must be based on correct factual assumptions, or at the very least there must be a procedure in place to avoid such errors before the consideration can be said to be "proper":

> The balancing decision was significantly impaired by these wrong factual assumptions. As a result, it was unreal. The process contained no procedure to avoid such error or otherwise achieve checks and balances that would ensure proper consideration was given.

374. Dixon J further observed at [515] that a public authority cannot merely give "lip-service" to a human rights instrument "whilst working towards a pre-determined outcome". This will not amount to giving "proper consideration" to human rights.

375. In *Minogue v Thompson* it was held that a court on judicial review should not give any latitude to a decision maker in determining whether they gave proper consideration to human rights at [49]:

> I do not agree that any latitude is to be given to a decision-maker in determining whether that decision-maker gave proper consideration to relevant rights in making a decision. **It is primarily a question of fact, whether in a given case, a decision-maker has given proper consideration to relevant rights,** as required by the procedural limb of s 38(1). This is a different exercise from proportionality review of a decision for compatibility with human rights, under the substantive limb of s 38(1).
>
> (emphasis added)

376. I take into account the authorities discussed above in determining whether the obligation to give proper consideration has been discharged.

Section 40B(2): Exceptions to the public authority obligation

377. Section 40B(2) of the *Human Rights Act* provides two separate exceptions to the obligations on public authorities to act (and make decisions) compatibly with human rights:

    (a) First, where the law expressly requires the act to be done (or decision to be made) in a particular way and that way is incompatible with a human right; or

    (b) Second, where the law cannot be interpreted in a way that is consistent with a human right.

378. The Explanatory Statement to the Human Rights Amendment Bill provides:

Sub-section 40B(2) sets out the circumstances in which the duty to act consistently with human rights does not apply. It is not unlawful for public authorities to act in a way that is incompatible with human rights, if:

- As a result of one or more provisions of a Territory law or a Commonwealth law in force in the Territory, the public authority could not have acted differently or made a different decision. In other words, the public authority was expressly directed in legislation to act in a particular way; or
- The public authority was acting so as to give effect to or enforce one or more provisions of a Territory law that cannot be read or given effect in a way that is compatible with human rights. In other words, the public authority was acting in accordance with a Territory law that was incapable of being interpreted consistently with human rights.

379. Section 40B(2)(a) of the *Human Rights Act* concerns laws that impose a duty on the public authority to act (or make decisions) in a particular way, whereas s 40B(2)(b) concerns laws that create a discretion for the public authority to act, or make a decision, in a particular way or ways.

380. The interpretative rule in s 30 of the *Human Rights Act* applies to both provisions of s 40B. Section 30 is likely to have only a marginal role to play in relation to s 40B(2)(a), as it concerns laws that expressly direct a public authority to act in an incompatible way. In both circumstances, however, for the exceptions to apply to an inconsistent act by a public authority, the relevant laws themselves must involve an incompatibility with the *Human Rights Act*. This incompatibility must be expressly on the face of the legislation for s 40B(2)(a) or because the law is incapable of being interpreted consistently with human rights for s 40B(2)(b).

381. Neither exception in s 40B(2), nor the explanatory material, contemplate any circumstance where a public authority may exercise a discretion inconsistently with human rights and be quarantined from consequence, if the enabling legislation is shown to be capable of being interpreted consistently with human rights.

382. In the present matter, the exceptions in s 40B(2) do not apply because the only provision that potentially falls within its ambit is cl 4.3 of the 2019 Operating Procedure. In my view as discussed above, cl 4.3 is invalid.

Compliance with s 40B in the present matter: Questions and Answers

ACT *Hakimi* Questions

(a) What is the act or decision which is the subject of challenge?

(b) What is the human right engaged and what is its content?

(c) Is the entity engaging in the relevant act or making the relevant decision a public authority under ss 40 and 40A of the *Human Rights Act*?

Victorian Question

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

383. In *Certain Children (No 2)* at [179] it was held that a human right under a human rights legislative instrument will be engaged if it "is relevant to a decision or action that a public authority has made, taken, proposed to take or failed to take".

384. Concerning the first three questions posed in *Hakimi v Legal Aid* and the first question of the Victorian jurisprudence, the following is relevant:

    (a) The acts or decisions which are the subject of challenge are:

        i. The decision to deny the plaintiff from accessing the general exercise yard while he was in the Management Unit and instead to open the rear cell door to the rear courtyard; and

        ii. The act of applying an inflexible policy in the form of cl 4.3 of the 2019 Operating Procedure notwithstanding the circumstances of each individual case.

    (b) The human right engaged is:

        i. The right to humane treatment and dignity while deprived of liberty s 19(1) *Human Rights Act*. Sections 10(1)(b) and 18(1) and (2) are not relevant.

    (c) The defendant is a "public authority" for the purposes of s 40B of the *Human Rights Act*: s 40(1) *Corrections Management Act*. The defendant confirmed there is no dispute that it is a public authority under ss 40 and 40A of the *Human Rights Act*.

Section 19(1): Humane treatment when deprived of liberty

385. The plaintiff's primary case concerns s 19(1) of the *Human Rights Act*, which requires the defendant to take positive measures to treat the plaintiff, as a person deprived of liberty, with humanity and respect for his inherent dignity. The jurisprudence concerning the scope of this right is set out above, in respect of issue one.

386. In summary, a denial of open air and exercise is a failure to treat a detained person with humanity and dignity: New Zealand Supreme Court decision of *Taunoa v Attorney-General* at [85], [95]-[96] and [210]. Relevantly in *Castles v Secretary, Department of Justice* at [100] it was held that access to at least one hour in the open air and an adequate space to exercise is not "unavoidable in a closed environment", particularly as the requirement is designed precisely for the closed prison environment. Such access has particular importance for detainees in segregation or separate confinement. Further, in the New Zealand Supreme Court decision of *Taunoa v Attorney-General* it was stated at [51] "it should not be underestimated how important such an entitlement would be to someone confined for 22 or 23 hours per day in a cell". In the New Zealand Supreme Court decision of *Taunoa v Attorney-General*, the Court held at [96] and [210] that for prisoners in solitary confinement, deprivation of open air and an adequate space to exercise risks physical and mental health. They are minimum human needs. It is relevant to note what as stated in *A Sourcebook on Solitary Confinement*:

> For prisoners held in solitary confinement, the exercise period is the only opportunity they have to get fresh air and a glimpse of the world outside their cells. This requirement is therefore of particular importance and should be strictly adhered to.

387. When the plaintiff was advised that he would be returning to the Management Unit towards the end of that period, on 20 April 2019, he attempted suicide. I note it was stated in submissions by counsel for the plaintiff that had the plaintiff been provided with access to the general exercise yard, he would not have brought these proceedings.

388. The defendant's practice and the decision to enact cl 4.3 of the 2019 Operating Procedure are unlawful. The defendant has not taken positive measures in accordance with s 19(1) of the *Human Rights Act*.

389. Alternatively, the plaintiff submitted that the defendant's practice also treated the plaintiff in a cruel, inhuman and degrading way, contrary to s 10(1)(b) of the *Human Rights Act*. The plaintiff relied on his outline of the jurisprudence on this right as set out in issue one.

390. Section 10(1)(b) of the *Human Rights Act* is put in the alternate to s 19(1) by the plaintiff. Having found for the plaintiff under s 19(1), it is not necessary to proceed to consider s 10(1)(b).

391. Alternatively, the plaintiff also submitted that the defendant's practice encroached upon the plaintiff's human rights pursuant to s 18(1) and (2) of the *Human Rights Act*. The plaintiff relied upon its outline of the jurisprudence pertaining to this right as set out in issue one.

392. Section 18(1) and (2) is put by the plaintiff in the alternate to s 19(1) of the *Human Rights Act*. Again, having found for the plaintiff under s 19(1), it is not necessary and therefore I do not propose to proceed to consider s 18(1) and (2).

393. The defendant underlined Refshauge J's observation in *Hakimi v Legal Ai*d at [52] that "not all questions will have to be answered in all questions". The defendant submitted that because it maintained that it did not limit the plaintiff's rights under ss 19(1), 10(1)(b) or 18(1) or (2) of the *Human Rights Act*, pursuant to s 28 of the *Human Rights Act* or otherwise, and accepting that the defendant is a public authority for the purposes of s 40B of the *Human Rights Act*, the only questions which required determination from *Hakimi v Legal Aid* were (a), (b) and (c), set out above at [384].

394. It was submitted that insofar as s 18(1) and (2) are concerned with the deprivation of liberty, and not the conditions of detention, the decision not to provide the plaintiff with access to the general exercise yards does not engage these rights.

395. I have already indicated at [232] that s 19(1) of the *Human Rights Act* is the relevant human right in this context, not ss 10(1)(b) nor 18(1) or (2).

396. The defendant rejected the proposition that it had acted in a way that was incompatible with the plaintiff's human rights or that it had imposed extraneous limits on the plaintiff's rights. It was submitted that even if the Court found that access to the rear courtyard was inconsistent with s 45 of the *Corrections Management Act*, it would not follow that the defendant had acted incompatibly with the plaintiff's human rights, particularly in respect of s 19(1) of the *Human Rights Act*. In answering the questions above posed by the ACT and Victorian authorities, I find that the defendant has acted incompatibly with s 19(1).

397. It was submitted that the plaintiff's ability to access the rear courtyard instead of the general exercise yard did not cause the plaintiff to experience any hardship or constraint beyond the hardship or constraint caused by the deprivation of his liberty,

having regard to the fact that a "necessary consequence" of his deprivation of liberty was that his rights were inevitably qualified or attenuated: *Castles v Secretary, Department of Justice* at [108] and [111]. I do not accept this submission. Access to the rear courtyard instead of the general exercise yard was not a necessary consequence of deprivation of liberty.

398. The defendant noted that while the obligation in s 19(1) of the *Human Rights Act* requires positive treatment of the plaintiff with humanity, it does not equate to an obligation to implement "positive measures". It was submitted that the plaintiff had not provided evidence of the impact of being in the Management Unit beyond the ordinary incidents of detention, save for the presentation of suicide ideation in April 2019. The defendant referred to the evidence that the plaintiff's suicide ideation had been treated in the Crisis Support unit. The defendant referred to the evidence of Mr Tarlinton, who stated that in considering the plaintiff's mental health state in around January 2019, he formed the view that keeping the plaintiff in segregation did not outweigh the risk of deterioration of the plaintiff's mental health, and decided to return the plaintiff to his regular AMC accommodation. I do not accept the submission that the plaintiff has not provided evidence.

399. It was submitted by the defendant that the plaintiff's criticism of the defendant's policy of requiring detainees to ask permission to access the rear courtyard was without substance. The defendant submitted that there is nothing inherently demeaning about asking for the door to the rear courtyard to be opened. It was submitted that the plaintiff ignored the obvious benefit of a practice that permits the detainee more than the minimum entitlement of access for one hour per day. The defendant further submitted that the plaintiff overlooked the evidence of Mr Tarlinton regarding the personal preference of some detainees who at times did not wish to have access to the rear courtyard. Emphasis was placed on the evidence of Mr Tarlinton that access to the rear courtyard was not denied as a matter of punishment. The defendant submitted that the evidence did not demonstrate that the plaintiff was treated other than as a human being, as per s 19(1) of the *Human Rights Act*. I note as a general observation that it is not necessarily demeaning to ask permission.

400. The defendant further rejected the description of the adoption of cl 4.3 as a "blanket policy". The defendant maintained that the evidence demonstrated that decisions were made to grant or deny access to the general exercise yard based on the circumstances of the individual detainee. The defendant noted that the fact that access was not granted did not deny that consideration was given to the question of access. It was submitted that the plaintiff's submission did not account for the decisions to grant access to the rear courtyard for more than one hour per day. I note the evidence that access was not granted to the general exercise yard.

401. The defendant submitted that cl 4.3 of the 2019 Operating Procedure is an expression of a detainee's entitlement to open air and exercise. It was submitted that there is no reason to suggest that the reference to "fresh air" is a deliberate lowering of the standard" or a "negligent disregard" of the obligation in s 45 of the *Corrections Management Act* or the plaintiff's human rights. As I have indicated earlier, there is no forensic utility to the "open air"/ "fresh air" debate within the context of this case. The defendant noted that in addressing the plaintiff's complaints, Mr Tarlinton indicated his satisfaction that the plaintiff's minimum entitlements were met at [51] of his affidavit. Self-evidently, Mr Tarlinton's satisfaction does not answer the relevant question.

402. In respect of the plaintiff's submission that the defendant "did not properly consider" the plaintiff's human rights", the defendant noted that it was brought to the attention of corrections officers by way of complaints of inhumane treatment. The defendant submitted that the plaintiff's submission was a complaint as to the outcome of that review or consideration. I do not accept the defendant's submission that this constitutes proper consideration. Proper consideration is discussed more broadly below at [409].

ACT *Hakimi* Question

(d) Is the relevant act or decision apparently inconsistent with, or does it impose a limitation on, any of the rights protected under pt 3 of the *Human Rights Act*?

Victorian Question

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

403. The plaintiff relied upon its submissions addressed to the previous issues in submitting that the defendant's decision to deny the plaintiff access to the general exercise yard and the inflexible policy to only grant access to the rear courtyard were actions of the defendant that were incompatible and therefore inconsistent with the plaintiff's human rights.

404. In my view, the decisions of the defendant were incompatible with s 19(1) of the *Human Rights Act*. Failing to provide the plaintiff with access to open air and a reasonably spacious space to exercise was a failure by the defendant to protect the plaintiff, as a person deprived of liberty and therefore vulnerable, from conduct which lacks humanity.

405. The defendant's failure to provide the plaintiff with an hour of "open air" and access to a suitable place to exercise limits the right to humane treatment in s 19(1) of the *Human Rights Act*. The defendant's failure is a clear limit to s 19(1).

ACT *Hakimi* Question

(e) Is the limitation proportionate? Section 28 *Human Rights Act*

Victorian Question

(c)The proportionality or justification question: if so, is that limit set by laws reasonable and demonstrably justified having regard to the matters set out in s 28 of the *Human Rights Act*?

406. At this point of the *Hakimi v Legal Aid* enquiry, the onus shifts to the defendant to justify the decision to deny the plaintiff access to the general exercise yard and the rear courtyard blanket policy under s 28 of the *Human Rights Act*: *R v Oakes* [1986] 1 SCR 103 at 136-138; *Re Application under Major Crimes (Investigative Powers) Act 2004* at [147]; *Certain Children (No 2)* at [175].

407. As the *Corrections Management Act* did not authorise the decisions of the defendant, the limits on the plaintiff's human rights were not "set by laws". In relying upon a construction of the phrase "as far as practicable" that does not read down the entitlement in s 45 of the *Corrections Management Act*, I find that the defendant's decisions were not reasonable limits that could be demonstrably justified in a free and democratic society. I note that the defendant has not sought to justify that the limitation was reasonable pursuant to s 28 of the *Human Rights Act*. See discussion in relation to s 28 of the *Human Rights Act* in *R v QX (No 2)* at [131]-[144] and *Andrews v Thomson* at [52]-[59].

408. The limit is not "set by law" because cl 4.3 is invalid. The predecessor 2011 Operating Policy did not and could not authorise a policy of non-compliance with the open air and exercise requirements in s 45 of the *Corrections Management Act*. The limit is not proportionate because the reasons for non-compliance, that is, the absence of a hatch and that taking detainees to the general exercise yard would require more staff, are practical obstacles that are readily overcome with the application of sufficient resources. The open air and exercise requirements are basic entitlements that countries with lesser economic means are required to resource. The limit is not something that only occurs in an emergency or occasionally.

ACT *Hakimi* Question

(f) Did the defendant give proper consideration to the protected right?

Victorian Question

(d) Even if the limitation is proportionate, where the matter involves making a decision, did the decision maker give proper consideration to the protected right?

409. For the purposes of s 40B(1)(b) of the *Human Rights Act*, failing to give "proper consideration" to a human right may include failing to advert to the right or unreasonably ignoring the right: *Hakimi v Legal Aid* at [94]. The breach should have been apparent to the public authority. There is an expectation that public authorities will be alive to the possibility of human rights breaches even in the absence of specific claims or complaints: *R v Forsyth* [2013] ACTSC 179; 281 FLR 62 at [198].

410. The defendant failed to properly consider s 19 of the *Human Rights Act* when enacting cl 4.3 and or adopting a policy of only using the rear courtyard and not using the general exercise yard. The evidence of Mr Tarlinton was that the old policy of allowing some detainees access to the general exercise yard was changed due to the property damage caused to the common area and because of the difficulties involved with extracting non-compliant prisoners from that yard. Since 2019, it has been a policy not to use the general exercise yard, access is not granted. This policy has continued to operate notwithstanding complaints received from the plaintiff and a report from Mr Pickles, the Official Visitor. The defendant was on notice of the breaches and unreasonably ignored them.

411. It was further submitted that the replacement of the term "open air" with "fresh air" in cl 4.3 betrays a deliberate lowering of the standard or, at least, a negligent disregard for the standard of entitlements in s 45 of the *Corrections Management Act* and Mandela

Rule 23(1), as well as the plaintiff's human rights. I have considered earlier that the "fresh air"/ "open air" debate is not of forensic consequence in this particular case.

412. On the main issue of proper consideration, it is relevant to refer to the following observation made by Emerton J in *Castles v Secretary, Department of Justice* at [185]-[186] in this context:

> Proper consideration will involve understanding in general terms which of the rights of the person affected by the decision may be relevant and whether, and if so how, those rights will be interfered with by the decision that is made. **As part of the exercise of justification, proper consideration will involve balancing competing private and public interests. There is no formula for such an exercise, and it should not be scrutinised over-zealously by the courts.**
>
> While I accept that the requirement in s 38(1) to give proper consideration to a relevant human right requires a decision-maker to do more than merely invoke the Charter like a mantra, **it will be sufficient in most circumstances that there is some evidence that shows the decision-maker seriously turned his or her mind to the possible impact of the decision on a person's human rights** and the implications thereof for the affected person, and that the countervailing interests or obligations were identified.
>
> (emphasis added)

413. The plaintiff submitted that the defendant has not put on any evidence to demonstrate it considered the human rights of detainees when enacting cl 4.3. The Court may infer in these circumstances that the defendant did not properly consider the plaintiff's human rights when making those decisions. The defendant took issue with this on the basis it was "unfair" (T32.19-25 and T37).

414. I accept the submission that there was no evidence that any consideration was given to the right in s 19(1) of the *Human Rights Act*, let alone "proper consideration". I do not accept the defendant's submission that the issue only arose in the plaintiff's closing. I accept the plaintiff's submission in this regard.

ACT *Hakimi* Question

(g) Does the act or decision made under an Act or instrument give either no practical discretion in relation to the act or decision, or does the Act confer a discretion that cannot be interpreted under s 30 of the *Human Rights Act* consistently with the protected right?

Victorian Question

(e) The inevitable infringement question: was the act or decision made under an Act or instrument that gave the public authority no discretion in relation to the act or decision, or does the Act confer a discretion that cannot be interpreted in a way that is consistent with the protected right?

415. The exceptions in s 40B(2) of the *Human Rights Act* do not apply. The *Corrections Management Act* did not authorise the decisions to not allow the plaintiff to access the general exercise yard, as well as the policy to only use the rear courtyard. Clause 4.3

of the 2019 Operating Procedure is directly inconsistent with the plaintiff's human rights and cannot be read down. Clause 4.3 is invalid.

Conclusion

416. The plaintiff correctly submitted that in denying the plaintiff access to the open air and an adequate space to exercise, the defendant had acted in a way that was incompatible with the plaintiff's human rights contrary to s 40B(1)(a) of the *Human Rights Act*. Further, the plaintiff correctly submitted that the evidence at the hearing revealed that the defendant failed to give proper consideration to the plaintiff's human rights contrary to s 40B(1)(b) of the *Human Rights Act*.

417. When the defendant made the decisions to deny the plaintiff access to the general exercise yard, the defendant was required to give proper consideration to the right in s 19(1) of the *Human Rights Act* and act compatibly with it.

418. I therefore find that the defendant has acted inconsistently with the plaintiff's human right pursuant to s 19(1) and has contravened its obligation in s 40B of the *Human Rights Act*. The plaintiff is therefore entitled to a declaration pursuant to s 40C, as set out below in dealing with the final issue.

If the plaintiff is entitled to relief, what is the appropriate form of relief?

419. At this outset in dealing with this final issue, it is important to acknowledge that the Human Rights Commissioner's submissions did not address this issue, particularly s 40C of the *Human Rights Act*, as it extended beyond the Human Rights Commissioner's intervention. A summary of the plaintiff's submissions now follows.

Plaintiff Submissions

420. The plaintiff confirmed that he sought the declarations as set out in the further amended originating application. Those sought orders are repeated here:

    (a) A declaration that access to the rear courtyard of the Management Unit at the AMC does not comply with s 45 of the *Corrections Management Act*.

    (b) A declaration that cl 4.3 of the 2019 Operating Procedure is invalid by reason of it being inconsistent with s 45 of the *Corrections Management Act*.

    (c) A declaration pursuant to s 40C of the *Human Rights Act* that the defendant has breached the plaintiff's human rights under ss 10(1)(b), 18(1) and (2) and 19(1) of the *Human Rights Act*.

    (d) A declaration pursuant to s 32 of the *Human Rights Act* that cl 4.3 of the 2019 Operating Procedure is incompatible with the plaintiff's human rights:

        i. Not to be treated or punished in a cruel, inhuman or degrading way pursuant to s 10(1)(b) of the *Human Rights Act*; and/ or

        ii. To liberty and security of person and to not be arbitrarily detained pursuant to s 18(1) of the *Human Rights Act*; and/or

        iii. To not be deprived of liberty except on the grounds and in accordance with the procedures established by law pursuant to s 18(2) of the *Human Rights Act*; and/ or

iv. To be treated with humanity and with respect for the inherent dignity of the human person while deprived of liberty pursuant to s 19(1) of the *Human Rights Act*.

(e) An order that the plaintiff's sentence of imprisonment made by the Supreme Court of the ACT on 25 May 2018 be taken to have commenced on 19 October 2017 pursuant to s 40C(4) of the *Human Rights Act* and/ or s 63(1) of the *Crimes (Sentencing) Act 2005* (ACT) (*Crimes (Sentencing) Act*) with the effect that:

i. The plaintiff's sentence of imprisonment is taken to expire on 18 July 2024; and

ii. The plaintiff's non-parole period is taken to expire on 17 June 2021.

421. The plaintiff submitted that sought orders (a) to (d), namely the declaratory relief, is the appropriate relief in this matter.

422. In respect of sought order (e), referred to by the plaintiff as a novel order, the plaintiff confirmed this novel order was relevant only to the claim under the *Human Rights Act*. The effect of the novel order would be that the plaintiff's sentence would be backdated by the 63 days for which his human rights were breached. In oral submissions, the plaintiff submitted that at the minimum, the plaintiff's sentence should be backdated by the 63 hours that he was deprived of access to the open air and exercise. However, the primary position of the plaintiff remained that the plaintiff's sentence ought to be backdated by 63 days.

423. The plaintiff noted that the primary source of power to award this novel relief is s 40C(4) of the *Human Rights Act*. Section 40C of the *Human Rights Act* provides:

> **40C Legal proceedings in relation to public authority actions**
>
> (1) This section applies if a person—
>
> (a) claims that a public authority has acted in contravention of section 40B; and
>
> (b) alleges that the person is or would be a victim of the contravention.
>
> (2) The person may—
>
> (a) start a proceeding in the Supreme Court against the public authority; or
>
> (b) rely on the person's rights under this Act in other legal proceedings.
>
> (3) A proceeding under subsection (2) (a) must be started not later than 1 year after the day (or last day) the act complained of happens, unless the court orders otherwise.
>
> **(4) The Supreme Court may, in a proceeding under subsection (2), grant the relief it considers appropriate except damages.**
>
> (5) This section does not affect—
>
> (a) a right a person has (otherwise than because of this Act) to seek relief in relation to an act or decision of a public authority; or
>
> (b) a right a person has to damages (apart from this section).
>
> *Note* See also s 18 (7) and s 23.
>
> (6) In this section:
> ***public authority*** includes an entity for whom a declaration is in force under section 40D.
>
> (emphasis added)

424. The plaintiff submitted that s 40C must be read as a whole. It was submitted that the requirements under s 40C(1) and (2) are made out in this matter, thereby empowering the Court under s 40C(4) to grant relief it considers appropriate except damages.

425. The plaintiff noted that s 40C(4) of the *Human Rights Act* is different to the equivalent provisions in Victoria and Queensland which explicitly require a plaintiff to have a separate right to relief outside the human rights legislation:

    (a) In Victoria, s 39(1) of the Victorian *Charter* provides that: "If, otherwise than because of this Charter, a person may seek any relief or remedy in respect of an act or decision of a public authority on the ground that the act or decision was unlawful, that person may seek that relief or remedy on a ground of unlawfulness arising because of this Charter".

    (b) In Queensland, s 58 of the *Human Rights Act 2019* (Qld) is the equivalent of s 40B of the *Human Rights Act*. Section 59(1) to (2) then provides that a person may "seek any relief or remedy in relation to an act or decision of a public entity on the ground that the act or decision was, other than because of section 58, unlawful" and, as long as the person has another ground for unlawfulness, they can seek the relief on the ground of unlawfulness under s 58 even if the other ground is not successful.

426. The plaintiff submitted that s 40C(4) of the *Human Rights Act* is worded as a free-standing power of the Supreme Court of the ACT to order any relief it considers appropriate except damages. It was noted that Gray J did not decide the point in *Morro v Australian Capital Territory* [2009] ACTSC 118; 4 ACTLR 78 at [38]-[39].

427. The plaintiff relied on the following principles in submitting that the novel order would be an appropriate form of relief. In *Hoare v The Queen* (1989) 167 CLR 348 at 354, the High Court observed that:

> A basic principle of sentencing law is that a sentence of imprisonment imposed by a court should never exceed that which can be justified as appropriate or proportionate to the gravity of the crime considered in the light of its objective circumstances.

428. The plaintiff further referred to the fact that a person on remand was detained in particularly burdensome or unusually harsh conditions has been held to be a mitigating factor in sentencing decisions: *Callanan v Attendee Z* at [26]; *R v Binse* [2014] VSC 253 at [36]-[44].

429. Where a person would likely be spending time in prison in solitary confinement, or in "23-lockdown conditions", their sentence may be discounted: *Director of Public Prosecutions (Vic) v Faure* [2005] VSCA 91; 12 VR 115 at [28]; *Tognolini v The Queen* [2012] VSCA 311 at [22],[29]; *Callanan v Attendee Z* at [52].

430. In *Callanan v Attendee Z* at [52] Applegarth J observed:

> In some circumstances one day in unusually harsh custody, such as an overcrowded watchhouse, can be roughly equated with a week spent in prison. It would be open to me to conclude that each day of a lengthy period of solitary confinement of the respondent would equate to a week spent in normal prison conditions.

431. The plaintiff submitted that solitary confinement without access to open air and exercise is more burdensome than solitary confinement that is compliant with human rights. The plaintiff also drew upon examples where part of a person's sentence is spent in

protective custody. In *AB v The Queen* [1999] HCA 46; 198 CLR 111 at [105] the High Court observed that it was a well-recognised principle that every year in protective custody is equivalent to a significantly longer loss of liberty under ordinary prison conditions: see also *Geddes v The Queen* [2012] NSWCCA 94 at [44]. The plaintiff submitted that this reasoning should apply equally to burdensome or harsh conditions that arise after the person has been sentenced, drawing upon an article in the *Melbourne Law Review* by Bagaric, Edney and Alexander entitled "(Particularly) burdensome prison time should reduce imprisonment length – and not merely in theory".

432. The plaintiff acknowledged that it is normally the case that, upon passing a person's sentence, the judicial power is exhausted: *Baker v The Queen* [2004] HCA 45; 223 CLR 513 at [29]. It was noted that judicial power to reconsider the sentence may be enlivened on appeal. However, as s 40C(4) of the *Human Rights Act* is a free-standing power to order relief, it was submitted that as long as the Court considered such a remedy "appropriate", s 40C(4) can enliven the judicial power to backdate the plaintiff's sentence, after the sentence has been handed down.

Consideration

433. The defendant submitted that even if the Court found in the plaintiff's favour as to the defendant acting inconsistently with the plaintiff's human rights, that there was no proper basis for the novel order sought by the plaintiff. I agree.

434. Section 63 of the *Crimes (Sentencing) Act* is not intended as a form of relief. It operates to allow a court at the time of sentencing an offender to take into account any time the offender has spent in custody prior to being sentenced.

435. By seeking an order under s 63(1) of the *Crimes (Sentencing) Act*, the plaintiff was asking the Court to "attenuate" his sentence of imprisonment in circumstances where the Court is not sitting in review or appeal of that sentence. In my view, granting the "novel" order would not be a proper exercise of judicial power. Therefore, the plaintiff became eligible for parole from 19 August 2021. The plaintiff is no longer in custody at the AMC.

436. On 17 June 2021, I made an order that I did not propose to backdate the plaintiff's sentence pursuant to s 40C(4) of the *Human Rights Act* and/ or s 63 of the *Crimes (Sentencing) Act*. I made the following declarations:

    (a) A declaration that access to the rear courtyard of the Management Unit at the AMC does not comply with s 45 of the *Corrections Management Act*.

    (b) A declaration that cl 4.3 of the 2019 Operating Procedure is invalid by reason of it being inconsistent with s 45 of the *Corrections Management Act*.

437. I reserved my decision in respect of the declarations sought pursuant to ss 40C and 32 of the *Human Rights Act*. I now make the further following declarations:

    (a) A declaration pursuant to s 40C of the *Human Rights Act* that the defendant has breached the plaintiff's human rights under s 19(1) of the *Human Rights Act*.

    (b) A declaration pursuant to s 32 of the *Human Rights Act* that cl 4.3 of the 2019 Operating Procedure is incompatible with the plaintiff's human rights

under s 19(1) to be treated with humanity and with respect for the inherent dignity of the human person while deprived of liberty.

438. I note in my concluding remarks that whether a prisoner is Nelson Mandela or alleged to be a neo-Nazi or anyone else, there are certain basic human rights that must be adhered to in our prisons.

Orders

439. The final orders are therefore as follows:

1. I make a declaration that access to the rear courtyard of the Management Unit at the AMC does not comply with s 45 of the *Corrections Management Act*.

2. I make a declaration that cl 4.3 of the 2019 Operating Procedure is invalid by reason of it being inconsistent with s 45 of the *Corrections Management Act*.

3. I make a declaration pursuant to s 40C of the *Human Rights Act* that the defendant has breached the plaintiff's human rights under s 19(1) of the *Human Rights Act.*

4. I make a declaration pursuant to s 32 of the *Human Rights Act* that cl 4.3 of the 2019 Operating Procedure is incompatible with the plaintiff's human rights under s 19(1) to be treated with humanity and with respect for the inherent dignity of the human person while deprived of liberty.

5. The defendant is to pay the plaintiff's costs.

I certify that the preceding four hundred and thirty-nine [439] numbered paragraphs are a true copy of the Reasons for Judgment of her Honour Justice Loukas-Karlsson

Associate: Rhiannon McGlinn

Date: 21 April 2022