SUPREME COURT OF VICTORIA

COURT OF APPEAL

S APCI 2016 0172

MINISTER FOR FAMILIES AND CHILDREN — First Applicant

and

SECRETARY TO THE DEPARTMENT OF HEALTH AND HUMAN SERVICES — Second Applicant

and

STATE OF VICTORIA — Third Applicant

v

CERTAIN CHILDREN BY THEIR LITIGATION GUARDIAN SISTER MARIE BRIGID ARTHUR — Respondents

and

VICTORIAN EQUAL OPPORTUNITY AND HUMAN RIGHTS COMMISSION — Intervener

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JUDGES:	WARREN CJ, MAXWELL P and WEINBERG JA
WHERE HELD:	MELBOURNE
DATE OF HEARING:	28 December 2016
DATE OF ORDERS:	28 December 2016
DATE OF REASONS:	29 December 2016
MEDIUM NEUTRAL CITATION:	[2016] VSCA 343
JUDGMENT APPEALED FROM:	[2016] VSC 796 (Garde J)

ADMINISTRATIVE LAW – Judicial review – Jurisdictional error – Relevant considerations – Power to establish centres for detention of young persons – Decisions of Governor-in-Council – Whether decision-maker failed to take into account relevant considerations – Whether power exercised for improper purpose – Appeal dismissed – *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 applied – *Children, Youth and Families Act 2005* ss 362, 478, 482.

APPEARANCES:	Counsel	Solicitors
For the Applicants	Mr R M Niall QC with Mr O P Holdenson QC and Mr L T Brown	Victorian Government Solicitor's Office
For the Respondents	Mr B E Walters QC with Mr M L L Albert and Ms S M C Fitzgerald and Mr A McBeth	Human Rights Law Centre and Fitzroy Legal Service
For the Intervener	Ms K M Evans	Victorian Equal Opportunity and Human Rights Commission

WARREN CJ
MAXWELL P
WEINBERG JA:

Summary

1 This proceeding by way of judicial review concerns decisions made under s 478 of the *Children, Youth and Families Act 2005* ('the Act') to establish a section of Barwon Prison as a centre for the detention of young persons. The trial judge held that Orders in Council ('the Orders') purportedly made under ss 478(a) and 478(c) of the Act were invalid.[1] His Honour also declared that the Orders were unlawful under s 38(1) of the *Charter of Human Rights and Responsibilities Act 2006* ('the Charter').[2]

2 The parties who were defendants at trial now seek leave to appeal from that judgment. The applicants for leave to appeal are, respectively, the Minister for Families and Children ('the Minister'), the Secretary to the Department of Health and Human Services ('the Secretary') and the State of Victoria. (We will refer to them interchangeably as 'the applicants' and 'the State'.)

3 In their proposed grounds of appeal, the applicants challenge both his Honour's finding that the Orders were invalid, and his declaration that the Charter was breached. Given the urgency of the matter, however, the Court proposed to the parties — and they agreed — that in the first instance argument on the application should be confined to those grounds directed at the finding of invalidity, and the orders consequent upon that finding. As the parties recognised, it was that finding, and those orders, which had immediate practical implications.

4 We had the benefit of most helpful argument from counsel on both sides, both in writing and orally. We wish to commend every member of the respective legal

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1 *Certain Children by their litigation guardian Sister Marie Brigid Arthur v Minister for Families and Children* [2016] VSC 796 ('Reasons') [295], [321].

2 Reasons [230], [321].

teams for their exemplary discharge of their professional duties, at a time of year when they might reasonably have been expecting to be on leave. The quality of the materials filed was quite remarkable, given the tight deadlines which had to be imposed.

5 Having considered those arguments, and the authorities relied on, we came to a unanimous conclusion that the applicants' challenge to the finding of invalidity should be dismissed. For reasons which follow, we concluded that no error had been shown in his Honour's finding that the Minister — and hence the Governor in Council, acting on the Minister's advice — failed to take into account relevant considerations bearing on the exercise of the power conferred by ss 478(a) and (c). At the same time, we concluded that his Honour erred in finding that the Orders in Council were made for an improper purpose.

6 A failure to take into account relevant considerations constitutes jurisdictional error.[3] Accordingly, that conclusion sufficed, by itself, to support the judge's finding of invalidity. Having reached that conclusion, we considered it both necessary and appropriate to announce our decision without delay.

7 After hearing submissions from the parties on the form of the orders to be made, we made orders disposing of the first part of the application for leave to appeal. We said we would publish our reasons as soon as practicable. These are those reasons.

8 The one outstanding ground of appeal concerns the judge's findings of Charter unlawfulness. With the concurrence of the parties, we adjourned the hearing of that part of the application for leave to appeal to a date to be fixed after 1 February 2017. Although the issues arising under the Charter were fully debated before the judge, and thoroughly dealt with in his reasons,[4] there is no apparent

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3 *Craig v South Australia* (1995) 184 CLR 163, 177.

4 Reasons [141]–[230].

urgency attaching to the resolution of that part of the present application.

9 A similar course was followed, with the consent of the parties, in *Sopov v Kane Constructions Pty Ltd*.[5] In that case, the splitting of the appeal was effected by ordering that the first question on the appeal be determined separately from the determination of the other questions in the appeal.[6]

10 Finally, we wish to make clear, in the interests of informed public discussion, that this Court (like the trial judge) is not concerned with, and expresses no view about, the merits of the decision made by the Minister to establish a youth detention centre at Barwon Prison. That is a matter of policy for Government, which is accountable to the electorate for its decisions. Quite properly, the courts play no part in such decisions.

11 The role of the Court in a case such as this is quite different. The function of judicial review is to ensure that Government operates according to law, that powers conferred on Ministers and public officials by statute are exercised within the legal limits fixed by Parliament. In this case, the judge held that those legal limits were exceeded, and hence that the decisions had not been made according to law. We have concluded that his Honour was correct in so finding.

12 It is one of the foundations of our democratic society that the courts perform this supervisory role, and do so independently of Government and immune from political pressure. This is one of the guarantees of the rule of law.

Background[7]

13 This proceeding concerns certain children on remand who are currently

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5 (2007) 20 VR 127, 129 [2]–[5].

6 *Supreme Court (General Civil Procedure) Rules 2015* r 47.04.

7 The following summary is taken from Reasons [1]–[3], [8]–[10].

detained in the newly-established Grevillea Youth Justice Precinct,[8] located within Barwon Prison. The children, who proceed by a litigation guardian, are the respondents to this application for leave to appeal.[9]

14 In their originating motion filed on 2 December 2016, the respondents sought the issue of a writ of habeas corpus and an order directing their release from Barwon Prison and transfer to a remand centre lawfully established under the Act. They also sought orders declaring invalid the two Orders made on 17 November 2016. By those Orders, the Grevillea unit in Barwon Prison was established as a remand centre and as a youth justice centre, under ss 478(a) and (c) of the Act respectively. Finally, they sought orders that the decisions made by the Secretary's delegate to transfer them to the Grevillea unit be declared invalid or quashed.

15 The proceeding before the trial judge was conducted as a matter of urgency. It was conducted without pleadings and the respondents did not file written submissions. The trial commenced on 12 December 2016 and ran until 15 December 2016. The trial judge handed down judgment on 21 December 2016.

16 In summary, the judge found that the Orders were:

(a) unlawful under s 38(1) of the Charter, because the Minister in recommending, and the Governor in Council in making, the Orders in Council failed to give proper consideration to the human rights described in ss 10(b), 17(2) and 22(1) of the Charter;[10]

(b) invalid and of no effect, in that the Minister in recommending, and the Governor in Council in making, the Orders in Council, failed to take into account relevant considerations;[11] and

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8 We will refer to this precinct interchangeably as 'the Grevillea unit' and 'Grevillea'.

9 The names of the defendants have been pseudonymised by orders made under the *Open Courts Act 2013* on 6 December 2016 by Garde J. Those orders were extended on 21 December 2016 by Garde J and further extended on 28 December 2016 by this Court.

10 Reasons [295], [321].

11 Ibid [278]–[280], [321].

(c) invalid and of no effect, in that the Minister in recommending, and the Governor in Council in making, the Orders in Council, acted for an improper or extraneous purpose.[12]

17 As a consequence of the Orders in Council being invalid, his Honour held, the transfer decisions were also invalid.[13] He proposed to order that the children be removed from the Grevillea unit by 4:00 pm on 22 December 2016. The State immediately indicated that it would seek leave to appeal, and sought a stay of the order for removal.

18 After hearing submissions, the trial judge granted a stay of the removal order until 4:00 pm on 28 December 2016 or further order. As anticipated, the stay allowed the applicants time to apply to this Court for leave to appeal.

The relevant circumstances

19 The circumstances leading to the institution of proceedings were helpfully set out in the judge's reasons:

> Prior to November 2016, there were two Youth Justice Custodial Precincts in Victoria: the Malmsbury Youth Justice Precinct ('Malmsbury') and the Parkville Youth Justice Precinct ('Parkville'). These facilities accommodate young persons:
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> > being held on remand or custody after being charged with an offence;
> >
> > aged 10-14 years and the subject of a youth residential centre order sentencing the young person to time in custody at a youth residential centre; and
> >
> > aged 15-20 years and the subject of a youth justice centre order sentencing the young person to a time in custody at a youth justice centre.
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> Parkville consists of three separate centres:
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> > the Melbourne Youth Justice Centre;

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12 Ibid [289]–[294], [321].

13 Ibid [321].

the Remand Complex, consisting of Remand North and Remand South; and

the Parkville Youth Residential Centre, consisting of the Parkview, Cullity and Barnett units.

In total, there are nine secure units at Parkville. In these units, there are four accommodation blocks: the Oakview unit (single storey 17-bed unit); the Southbank unit (single storey 15-bed unit); the Westgate unit (single storey 15-bed unit) and the Eastern Hill unit (double storey 15-bed unit). There is also a program centre used by Parkville College1 for vocational training and other education, a gymnasium and medical and dental consulting rooms.

…

The Grevillea unit is located on part of the site of Barwon Prison, 1140 Bacchus Marsh Road, Anakie. It is wholly enclosed within the prison. It was formerly a unit of the prison that held prisoners from the general prison population within Barwon Prison. There is no public transport to Barwon Prison.

On 17 November 2016 three Orders in Council were made by the Governor in Council – the first, to excise the Grevillea unit from Barwon Prison, and the second and third to establish it as a remand centre and youth justice centre for use as emergency accommodation.

The Grevillea unit shares walls and a roof with the Melaleuca unit of Barwon Prison. It is physically separated by a vacant or 'sterile' area with separate secure doors leading to each unit. Outside, it is surrounded by a sterile area.

When young persons are taken to the Grevillea unit they enter through a central admissions point. Visitors access the Grevillea unit via the main gate to Barwon Prison.

The Grevillea unit comprises a two-storey building which is divided into two sides known as 'Side A' and 'Side B'. Each side is separated by a control office which may only be entered via secure doors. Each side of the Grevillea unit has two floors of cells. Between Side A and Side B, the Grevillea unit has 43 cells; both single and shared cells. Subject to availability, safety and security, detainees can be located in a single cell or a shared cell.

At present, only Side A is available as Side B is undergoing renovations.

The Grevillea unit has a small room, a multi-purpose common area and an outdoor yard for recreational purposes. There is a Visit Centre. It also has video-conferencing facilities and a food preparation area.

…

Parkville riots

Over the weekend of 12–13 November 2016, a series of incidents occurred at Parkville which resulted in significant property damage being caused to four units within the Melbourne Youth Justice Centre.

The first incident occurred on the evening of 12 November 2016 and involved extensive property damage to the Westgate and Southgate units by young persons within the Melbourne Youth Justice Centre. The Westgate unit was destroyed and the persons housed there had to be re-accommodated.

Early on 13 November 2016, Ian Lanyon, Director Secure Services at the Department, identified that the damage to the Westgate unit was extensive and would require significant renovation before young people could be housed there. Fifteen beds had been lost. The Southbank unit also suffered extensive damage to the common areas, although the accommodation wings were still useable.

On the evening of 13 November 2016 and in the early hours of 14 November 2016, further extensive property damage occurred at the Melbourne Youth Justice Centre. The result was that the young people residing in these units had to be moved to new locations. All 60 beds within the Melbourne Youth Justice Centre were lost.

By the end of 14 November 2016, young persons were relocated to other units at Parkville where there were vacant beds, including the girls' unit and the younger persons' unit. However, there were not enough secure beds. Once the Parkville facility was full, 27 young persons were transferred to Malmsbury and six more were transported to the Mill Park Police Station holding cells.

The damage meant that the Melbourne Youth Justice Centre was unable to be used and all accommodation there was lost. Nearly one half of the accommodation at Parkville was lost. Young persons were placed in safe rooms, isolation rooms and holding cells. These rooms were not designed to accommodate children in the long term; they did not have fixed bedding, a toilet, a shower or a television. There was also the requirement to segregate the sentenced youth from the remandees and to ensure that difficult youth were housed securely.

On 14 November 2016, Chris Asquini, Deputy Secretary, Operations at the Department and Mr Lanyon discussed the available options for the placement of young persons.

At the meeting on 14 November 2016, the relocation options considered and rejected were:

> Disability Forensic Assessment and Treatment Service facilities, including the facility adjacent to the Thomas Embling Hospital;
>
> Fairfield Residential Services;
>
> Plenty Residential Services;
>
> Maribyrnong Detention Centre (which required Commonwealth Government approval); and
>
> Secure Welfare Services (ineligible under s 482(1)(b) of the Act).

At this time, there were many young persons accommodated in far from ideal

> circumstances at Parkville, including on mattresses on the floor of rooms with no bathroom facilities. Some were held in the police cells at the Mill Park Police Station. No proper matching process had been undertaken. Several young people at both Parkville and Malmsbury were confined to their rooms for lengthy periods in the aftermath of the riots at Parkville. There were also significant risks at Parkville because older young males were being separately housed in the Cullity and Barnett units and in the female unit. There was pressure from police to vacate the Mill Park Police Station.
>
> By late afternoon on 14 November 2016, Corrections Victoria ('Corrections') had identified only one unit in Victoria which could meet the Department's needs – the Grevillea unit at Barwon Prison. It was considered that this was the best that could be achieved in the circumstances.
>
> At this time, the Grevillea unit was housing 40 adult prisoners. The 40 adult prisoners were moved. The Grevillea unit had to be decommissioned as an adult prison and established as a remand centre and youth justice centre.[14]

20 Orders in Council were therefore necessary to excise the Grevillea unit from Barwon Prison and to establish it as a remand centre and youth justice centre to which the respondents could be transferred. No challenge is made to the Order in Council that effectively excised the Grevillea unit from Barwon Prison. A Ministerial briefing paper ('briefing paper') was prepared on 16 November 2016 for the Minister in relation to the scheme, and a recommendation was made to sign draft orders in advance of a special Executive Council meeting on 17 November 2016.

21 Meanwhile, also on 16 November 2016, applications were made to the Youth Parole Board to transfer seven children to Barwon Prison. The Youth Parole Board rejected the applications, declining to exercise its powers under s 467 of the Act.

22 On 17 November 2016 the Orders in Council were published in Victoria Government Gazette S354.[15] The trial judge explained their operation in the following terms:

> The first was made under s 10(1) and 10(3A) of the Corrections Act 1986. This

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14 Reasons [12]–[14], [16]–[22], [25]–[35].

15 Minister for Corrections, '*Corrections Act 1986* Revocation and Appointment of Her Majesty's Prison Barwon' in Victoria, *Victoria Government Gazette*, No S354, 17 November 2016, 1; Minister for Families and Children, '*Children, Youth and Families Act 2005* Establishment of a Remand Centre' in Victoria, *Victoria Government Gazette*, No S354, 17 November 2016, 2; Minister for Families and Children, '*Children, Youth and Families Act 2005* Establishment of a Youth Justice Centre' in Victoria, *Victoria Government Gazette*, No S354, 17 November 2016, 3.

> revoked the appointment of Barwon Prison as a prison, simultaneously appointing the same area less the Grevillea Unit as a prison. The practical effect was to excise the Grevillea unit from Barwon Prison. No challenge is made to this Order in Council.
>
> The second Order in Council was made under s 478(a) of the Act. It purported to establish the area of the former Grevillea unit of the Barwon Prison amounting in all to 2943m2 as 'a remand centre for emergency accommodation'. The third Order in Council also established the same area as 'a youth justice centre for emergency accommodation' under s 478(c) of the Act. The second and third orders are challenged in this proceeding.[16]

23 Once the Grevillea unit had been established as a remand centre and as a youth justice centre, transfer decisions were made affecting a number of respondents and other children. From 21 November 2016, children were removed to Grevillea from Parkville and Malmsbury.

24 On 22 November 2016 the Victorian Aboriginal Legal Service brought proceedings challenging the detention of Aboriginal and Torres Strait Islander children at Grevillea. A week later, the Secretary undertook to the Court that she would not authorise or cause the removal of any Aboriginal or Torres Strait Islander child to Grevillea for a period of 18 months, unless in exceptional circumstances. All Aboriginal and Torres Strait Islander children were removed from Barwon Prison.

Evidence before the trial judge

25 At trial the respondents relied on evidence from two solicitors who visited the children in Grevillea, one of the children who is detained at Grevillea, and the Executive Principal of Parkville College. The applicants relied on the evidence of several witnesses, including Mr Lanyon, Director, Secure Services, at the Department.

26 Ms Fitzgerald, a solicitor at Fitzroy Legal Service, visited the Grevillea unit on 1 and 5 December 2016 and affirmed two affidavits dated 2 and 6 December 2016.[17]

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16 Reasons [41]–[42].

17 The following description of Ms Fitzgerald's evidence is taken from Reasons [57]–[92].

She deposed to what she saw and was told at Grevillea. She was not cross-examined. The trial judge summarised her description of Grevillea as follows:

> the Grevillea Unit [had] two floors, with cells lining each side. The single cells were around 3m long and 2m wide. Some children were in double cells sharing the cell with another child.
>
> The internal wide corridor or ground space on the bottom floor is used as a common area. The common area was completely enclosed, without natural light or air flow. All parts of the internal common room were observable by a control room through glass windows, which contains multiple CCTV cameras for monitoring the unit and the children. During Ms Fitzgerald's visit on 1 December 2016, half of the young persons were able to spend a limited time in the common area on rotation.
>
> There was no facility within the design of the unit permitting individual young persons, or groups of young persons, to be separated from one another without reliance on lockdown procedures or isolation. As a result of this, it was inevitable that the children needed to be locked down for long periods of time to prevent them from associating with other children with whom they may not be able to associate safely.
>
> [There were] three or four couches, one table tennis table, one or two tables and chairs, and a laundry style sink and bench. There was one microwave for use by the children. Activities available to the young persons were chess, cards, table tennis and colouring-in.
>
> Young persons were escorted to and from the exercise yard in handcuffs, and use the yard in small groups of two or three.[18]

27 In terms of lock-down arrangements and the amount of time the children were allowed to be out of their cells, Ms Fitzgerald's evidence was that:

> all young persons reported experiencing lockdown conditions for minimum periods of 20 hours per day. This meant that they were unable to exit their cells for minimum periods of 20 hours per day;
>
> all reported a lack of consistency in lockdown conditions with slight improvements in recent days. There was no information or communication as to how lockdown conditions would be handled day to day, or into the future;
>
> between 22–27 November 2016, young persons were allowed out of their cells for less than one hour per day. During this time, they were allowed out in pairs on rotation at different times each day;
>
> since around Sunday 27 November 2016, young persons reported being allowed out of their cells for between 1-4 hours per day. Half of the young

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18 Reasons [58]–[62].

> persons were now allowed out at a time. When allowed out, they remained in the common area when cells are open;
>
> until around 27 November 2016, young persons did not have any time outside the Grevillea unit. Young persons at Grevillea did not have any time outside the unit for up to six or seven days;
>
> as at 1 December 2016, young persons were allowed outside the unit into an outdoor gym area for between 10 and 20 minutes per day, two young persons at a time.[19]

Ms Fitzgerald was also advised that:

> following an incident on 4 December 2016, the whole unit was locked down from around 5pm on 4 December 2016 to after 10am on 5 December 2016.[20]

28 Throughout her first visit to Grevillea, children persistently and loudly banged on their cell doors and screamed. Some refused to return to their cells after being out and became visibly distressed when staff required them to return to their cells.

29 Ms Fitzgerald also deposed to the presence and visibility of Corrections Officers at Grevillea. Based on her conversations with the children, she gave evidence of interactions between them and Corrections staff, and of threats the children reported having received from the Grevillea unit manager and other staff.

30 In relation to education, Ms Fitzgerald's evidence was that there did not appear to be any adequate place for schooling:

> There was no capacity at Grevillea for more than one classroom to facilitate the teaching of more than one subject or one cohort of young persons at a time. There was one enclosed room with a glass wall separating it from the common area. Ms Fitzgerald saw it used by doctors, lawyers and other staff or visitors requiring a separate area.[21]

31 On both of her visits, the children said they had not received schooling since arriving at Barwon Prison, and that they missed school.

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19 Ibid [65].

20 Ibid [66].

21 Ibid [75].

32 Ms Fitzgerald deposed that the children informed her there had been no family visits to any of them at Grevillea. For some children, this may have been their own choice. Ms Fitzgerald said that some of the children did not want their family to visit them at Grevillea because it would be too upsetting for their families to see them in the Barwon Prison environment. For other children, Barwon Prison was too far for their families to travel. Another child was told that family visits were 'not gonna happen anytime soon'.[22]

33 At the time of her second visit, some of the respondents had still not had contact with their lawyers. For those who had, phone calls with their lawyers took place in a cage with a Departmental staff member in attendance.

34 More generally, Ms Fitzgerald deposed to the respondents' reported feelings of distress, isolation, loneliness and boredom since being transferred to Grevillea, particularly those respondents in single cells. Reasons for those feelings included 'uncertainty about their routine each day, punitive approach of staff, consistent lockdowns in the unit, lack of time outside and lack of education and engagement'.[23]

35 Ms Leikin is a solicitor at the Human Rights Law Centre. She visited Grevillea on 26 November 2016 and 1 and 5 December 2016 and affirmed an affidavit dated 12 December 2016.[24] Ms Leikin asked the respondents whether they were given a reason for their transfer to Grevillea and whether they were consulted before the transfer. Her evidence was that:

> One young person asked why he had to go and said he did not want to go. He was told that he had to leave Parkville or they would take him by force.
>
> One young person said that when he was told he would be going to Barwon Prison, he asked not to go and was told he would be moved by force if he did not go.
>
> One young person said that he said he would come to Barwon Prison because he was told that if he didn't they would use force. He was told that he and

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22 Ibid [78].

23 Ibid [86].

24 The following description of Ms Leiken's evidence is taken from Reasons [93]–[98].

> the other children were brought to Barwon Prison because they were the 'compliant' prisoners.
>
> All other young persons said that they were not asked about being transferred nor provided any explanation for the transfer but did not recall asking any questions about it or explicitly requesting not to be transferred.[25]

36 One of the respondents, Mr Aleksov, swore an affidavit, which was filed on 14 December 2016.[26] As the applicants did not have a proper opportunity to respond to the affidavit, the trial judge did not draw any inferences adverse to the applicants from the affidavit. On 15 December 2016, Mr Aleksov was joined as a plaintiff to the proceeding on a limited basis for the purpose of determining the questions in the proceeding as they affect the validity of the Orders in Council.

37 Mr Aleksov deposed that on 22 November 2016 he was told that he would be moved to Barwon Prison because he showed a risk of bad behaviour. He was not asked whether he agreed to the transfer. He asked to call his mother to tell her, but this request was refused. He was transferred that afternoon.

38 The trial judge summarised key aspects of Mr Aleksov's evidence as follows:

> Mr Aleksov states that he hates being at Barwon Prison and wants to return to Parkville or Malmsbury. He said that he does not feel safe at Barwon, feels very low and hopeless, and rarely leaves his room. He is bored and there is no routine or programs. He is not able to do the classes that he likes and is 'too down to do school', which is not classes but worksheets most of the time.
>
> He says that the staff are 'tense and drained' and 'used to be nice, but now they are acting like guards'.
>
> Mr Aleksov says that every time he goes outside he is handcuffed, including when he goes to the basketball court which is the only outdoor area, or the Visit Centre. This makes him not want to go out of the unit.
>
> Mr Aleksov says that on the first day he was at Grevillea, he saw from his cell the SESG officers attend the unit with a dog. They handcuffed one of the other young persons and took him into isolation.
>
> He says that the workers threaten 'take downs' if the young persons do something wrong. This is when 'they drop you to the ground and restrain

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25 Reasons [96].

26 The following description of Mr Aleksov's evidence is taken from Reasons [99]–[115].

you'.[27]

39 Mr Aleksov gave evidence of his time in and out of his cell from 22 November 2016 to 1 December 2016, and of an extended lock-down from 8:00 pm on 10 December 2016 to 12 December 2016. He said that on any given day, he does not know whether he will be allowed outside his cell or in the outdoor area, and if so, for how long. He also gave evidence of time he has spent in the 'punishment room'.[28] He is one of the respondents who does not want his family to see him in Barwon Prison.

40 Finally for the respondents, Mr Murray, the Executive Principal of Parkville College, gave evidence.[29] Mr Murray visited Grevillea and assessed it to see what was possible in terms of providing schooling. All respondents requested that teachers go to Grevillea.

41 Mr Murray gave evidence as to the arrangements with the Department of Education and Training ('DET') for the provision of educational services at Grevillea. Since 5 December 2016, teachers have attended Grevillea, but the lock-downs have interfered with their ability to teach. He also deposed to correspondence with DET in which DET informed him that the Victorian Registration and Qualifications Authority would not register Grevillea as a school. The difficulties with registering Grevillea as a school included insufficient classroom space and uncertainty about Barwon Prison's compliance with child safety standards. This meant that the children at Grevillea could not be provided with any accreditation or qualifications for education undertaken at Grevillea, and that they may need to repeat a year.

42 The judge heard evidence from Mr Lanyon for the applicants[30] in relation to the setting up of the Grevillea unit and the works required to be performed before it

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27 Reasons [106]–[110] (citations omitted).

28 Ibid [114].

29 The following description of Mr Murray's evidence is taken from Reasons [116]–[125].

30 The following description of Mr Lanyon's evidence is taken from Reasons [44]–[51].

was ready for the children to be accommodated there. His evidence was that the required works have not been completed.

43 According to Mr Lanyon, the children were on Safety Separation Management Plans for the first several days in Grevillea, but time out of cells was gradually improved. As to Corrections Victoria's Security and Emergency Services Group ('SESG'), Mr Lanyon's evidence was that:

> the SESG was authorised to carry OC spray, but was prohibited from the use of lethal force. SESG access to Grevillea unit occurred twice in the first week of occupation, but has not occurred subsequently. Since the week commencing 5 December 2016, the SESG has been prohibited from bringing dogs into the Grevillea unit.[31]

44 There was also before the Court evidence of public statements made by the Minister. The trial judge treated those comments as relevant to the 'general climate of decision-making', which he said was 'impossible to ignore'.[32] The public statements made by the Minister included:

(a) 'perpetrators of the damage to Parkville will face serious consequences';

(b) 'we are developing a range of tougher measures to ensure that we put a stop to this';

(c) 'a "significant number" of the inmates would be temporarily transferred to an adult prison while the damaged facility was "strengthened"';

(d) 'we are taking the legal steps now to ensure that a number of these offenders will be transferred to an adult correctional facility'; and

(e) 'enough is enough these perpetrators of this damage will face serious consequences'.[33]

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31 Reasons [50].

32 Ibid [219].

33 Ibid [39].

Charter unlawfulness

45 As noted earlier, the judge concluded that the Orders in Council were unlawful under s 38(1) of the Charter. His Honour made a declaration to that effect. Noting the uncertainty as to whether unlawfulness under s 38(1) results in the invalidity of an act or decision, his Honour said that that question 'stands to be finally decided by the appellate courts at a future time'.[34]

46 By reason of that uncertainty, the ultimate finding of invalidity did not rest on his Honour's finding of Charter unlawfulness. For that reason, as mentioned earlier, we adjourned the applicants' challenge to that finding.

Construction of pt 5.7 of the Act

47 The power to establish a remand centre and a youth justice centre is found in s 478, which provides as follows:

> **478 Governor in Council may establish corrective services**
>
> For the purposes of this Act the Governor in Council may, by notice published in the Government Gazette, establish or abolish—
>
> (a) remand centres for the detention of children awaiting trial or the hearing of a charge or awaiting sentence or in transit to or from a youth residential centre or youth justice centre; or
>
> (b) youth residential centres for the care and welfare of children ordered under this Act, … to be placed in a youth residential centre and which provide special direction, support, educational opportunities and supervision; or
>
> (c) youth justice centres for the care and welfare of persons ordered to be detained in youth justice centres under this Act, … ; or
>
> (d) youth justice units for persons—
>
> (i) referred to them as a condition of a probation order, youth supervision order, youth attendance order or other order made by the Court; or

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[34] Ibid [227]; see also *Bare v Independent Broad-Based Anti-Corruption Commission* (2015) 326 ALR 198, 236–38 [139], [142]–[146] (Warren CJ); 310 [397] (Tate JA); 333 [496] (Santamaria JA).

(ii) referred to them as a requirement of a parole order.

48 Section 478 is in pt 5.7 of the Act, which is entitled 'Establishment of corrective services for children'. The other relevant provisions of that Part are ss 481 and 482, which provide as follows:

> **481 Standard of Service**
>
> The Minister may issue directions relating to the standards of services established under section 478 or approved under section 479 or 480 and may establish procedures that are appropriate to ensure that those directions are given effect.
>
> **482 Form of care, custody or treatment**
>
> (1) The Secretary must—
>
> (a) determine the form of care, custody or treatment which he or she considers to be in the best interests of each person detained in a remand centre, youth residential centre or youth justice centre; and
>
> (b) not detain in a community service or secure welfare service a person who is on remand or is serving a period of detention and is not released on parole; and
>
> (c) separate persons who are on remand from those who are serving a period of detention by accommodating them separately in some part set aside for the purpose unless—
>
> (i) the Secretary considers it appropriate not to separate them, having regard to the best interests, rights and entitlements of the persons on remand; and
>
> (ii) the persons on remand consent; and
>
> (d) separate persons held on remand who are under the age of 15 years from those held on remand who are of or above the age of 15 years unless exceptional circumstances exist.
>
> (2) Persons detained in remand centres, youth residential centres or youth justice centres—
>
> (a) are entitled to have their developmental needs catered for;
>
> (b) subject to section 501, are entitled to receive visits from parents, relatives, legal practitioners, persons acting on behalf of legal practitioners and other persons;
>
> (c) are entitled to have reasonable efforts made to meet their medical, religious and cultural needs including, in the case of Aboriginal children, their needs as members of the Aboriginal community;

(d) are entitled to receive information on the rules of the centre in which they are detained that affect them and on their rights and responsibilities and those of the officer in charge of the centre and the other staff;

(e) are entitled to complain to the Secretary or the Ombudsman about the standard of care, accommodation or treatment which they are receiving in the centre;

(f) are entitled to be advised of their entitlements under this subsection.

49 As will appear, the phrase 'developmental needs' in s 482(2)(a) is significant. The Act defines 'development' to mean 'physical, social, emotional, intellectual, cultural and spiritual development'.[35] It was common ground that 'developmental needs' should be interpreted accordingly.

50 Before the judge, the respondents argued that the purposes of the Act and of s 478, and some or all of the requirements and responsibilities in ss 482(1) and (3), and the entitlements in s 482(2), were jurisdictional facts. They argued that the power in s 478 was only enlivened if those jurisdictional facts were satisfied.[36]

51 The trial judge rejected this argument, holding instead that:

> the existence of the duties imposed on the Secretary under s 482(1) and the entitlements granted to detainees under s 482(2) are relevant considerations which must be taken into account before a s 478 decision can be made rather than jurisdictional facts. I also accept that the purposes of the Act, and the specific purpose of the facilities in s 478(a)–(d) must be met.[37]

52 At the same time, his Honour rejected the argument for the State that these were merely 'permissible considerations', that is, considerations which may properly be taken into account but need not be.[38] His Honour said:

> They are also relevant considerations in decision-making that cannot be

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35 The Act s 3 (definition of 'development').

36 See, eg, *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144, 179 [57].

37 Reasons [263].

38 See, eg, *Sean Investments Pty Ltd v MacKellar* (1981) 38 ALR 363, 375; *Greenpeace Australia Pacific Pty Ltd v Chief Executive Officer of the Australian Radiation Protection and Nuclear Safety Agency* (2002) 125 FCR 186, 204 [69].

ignored. I reject the defendants' construction that would permit the decision-maker to give no attention to the Secretary's duties and the detainees' entitlements when a power under s 478 is exercised despite the purposes of the Act and the references in s 478 to care and welfare of detained persons and the like.

While it is true that the Secretary's duties will have to be discharged, and the entitlements honoured from the commencement of the use of a facility established under s 478, the interpretation that I have adopted will ensure that they are considered when the power under s 478 is exercised, and cannot be completely overlooked or disregarded.[39]

53 The judge summarised his conclusions as follows:

Reading Part 5.7 of the Act as a whole and considering its purposes, I conclude that the powers contained in s 478 are not unfettered but are subject to a number of limitations:

(1) The powers in s 478 can only be used for the purposes of the Act. These are the main purposes set out in s 1 of the Act. These purposes, as relevant considerations, must be taken into account by the decision-maker.

(2) The individual powers set out in s 478(1)-(d) can only be used for the purposes set out in those powers and for no other purposes. Again, the respective specific purposes must be taken into account by the decision-maker.

(3) The exercise of the power in s 478 must take into consideration as a relevant consideration that the Secretary is obliged to conduct the facility in accordance with s 482(1)(a)–(d) from establishment.

(4) The exercise of the power in s 478 must take into consideration as a relevant consideration that young persons at the facility will have the entitlements set out in s 482(2), particularly (a)–(c) from establishment.

There are a number of additional reasons why the exercise of the power in s 478 requires the consideration of matters by the Minister and Governor in Council relating to the protection, care and welfare of children, including the duties, responsibilities and entitlements found in s 482.

First, as I have noted, s 35(1) of the Interpretation of Legislation Act 1984 (Vic) directs that an interpretation that would promote the purpose or object underlying the Act is to be preferred to a construction that would not promote that purpose. Plainly, the interpretation supported by the plaintiffs, and the construction that I have adopted, would better promote the protection of children (s 1(b)) than the construction preferred by the defendants. This consideration is strengthened by the use of the expression

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39 Reasons [263]–[264].

'For the purposes of the Act' at the start of s 478.

Secondly, it would be a bizarre result if the exercise of the power in s 478 is entirely unfettered by the duties, responsibilities and entitlements set out in s 482, but that the instant a power in s 478 is exercised, those obligations spring into existence on an continuing basis, and have to be performed, even if not considered at the time when the decision to establish the new centre under s 478 was made.

Thirdly, adopting a contextual approach to construction, it is sensible if the five sections in Part 5.7 of the Act are read together to achieve a practical and workable outcome.

Fourthly, s 478 adopts the purposes of the Act and refers to the care and welfare of detained young persons or like expressions in (b) and (c). It would be strange if this were considered to be separate from ss 481 and 482 which give definition to the care and welfare of detained young persons. The 'special direction, support, educational opportunities and supervision' and 'the care and welfare of persons' referred to in s 478(b) and (c) includes that given by s 482. Nothing is more fundamental under these provisions than that consideration be given to what must be done under s 482.[40]

What were the relevant considerations?

54 The State contends that the judge erred in concluding that:

> the [Secretary's] capacity to comply with duties imposed on her under s 482(1), and the entitlements of detainees under s 482(2), were mandatory considerations conditioning the power of the Governor to make the Orders in Council under ss 478(1) and (c) of the Act.

55 The starting-point for consideration of this ground is the judgment of Mason J (as his Honour then was) in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*.[41] Although it is now more than 30 years old, his Honour's judgment continues to be viewed as the authoritative exposition of this ground of judicial review, universally expressed as 'failure to take into account a relevant consideration'.[42]

56 In *Peko-Wallsend,* Mason J said that this ground:

> can only be made out if a decision-maker fails to take into account a

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40 Ibid [263]–[270].

41 (1986) 162 CLR 24 ('*Peko-Wallsend*').

42 See, eg, *Williams v Minister for Justice and Customs* (2007) 157 FCR 286, 293 [32] ('*Williams*'); *The Pilbara Infrastructure Pty Ltd v Economic Regulation Authority* [2014] WASC 346, [127]–[130].

consideration which he is *bound* to take into account in making that decision.[43]

His Honour continued:

> What factors a decision-maker is bound to consider in making the decision is determined by construction of the statute conferring the discretion. If the statute expressly states the considerations to be taken into account, it will often be necessary for the court to decide whether those enumerated factors are exhaustive or merely inclusive. *If the relevant factors - and in this context I use this expression to refer to the factors which the decision-maker is bound to consider - are not expressly stated, they must be determined by implication from the subject-matter, scope and purpose of the Act*. In the context of judicial review on the ground of taking into account irrelevant considerations, this Court has held that, where a statute confers a discretion which in its terms is unconfined, the factors that may be taken into account in the exercise of the discretion are similarly unconfined, except in so far as there may be found in the subject-matter, scope and purpose of the statute some implied limitation on the factors to which the decision-maker may legitimately have regard. By analogy, where the ground of review is that a relevant consideration has not been taken into account and the discretion is unconfined by the terms of the statute, *the court will not find that the decision-maker is bound to take a particular matter into account unless an implication that he is bound to do so is to be found in the subject-matter, scope and purpose of the Act.*[44]

57 In the present case, as in *Peko-Wallsend* itself, the provision conferring the relevant power is silent on the considerations which must be taken into account by the repository of the power in deciding whether or not it should be exercised. That being so, the State accepts, it is a matter of construing the Act 'by reference to its scope, subject-matter and purpose' in order to determine the matters which have to be taken into account. It is a process of necessary implication.[45]

58 The submission for the State is that the Act

> cannot be construed in a way that imposes pre-conditions on the Governor in Council's exercise of power under s 478 other than those that arise from the natural and ordinary meaning of the words used in the provision. The exercise of the Governor in Council's power is not conditioned upon giving consideration to whether a particular state of affairs bearing upon the welfare of unascertained individual young persons will be brought about by the Secretary at some unidentified point in the future, after the power has been exercised.[46]

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43 (1986) 162 CLR 24, 39 (emphasis in original).

44 Ibid 39-40 (citations omitted) (emphasis added).

45 Ibid 44; *Macedon Ranges Shire Council v Romsey Hotel Pty Ltd* (2008) 19 VR 422, 434 [42].

46 Citations omitted.

59 The State identifies three factors which are said to militate against the conclusion that s 482 'imposes any limitation on the power' conferred by s 478. The first – and the one most strongly pressed in oral argument – is that ss 482(1)(a) and (2) confer rights, and impose obligations, which only arise 'as a consequence of a young person's being detained'. That being so, they could not be relevant considerations at the prior stage when a decision was made to establish a place as a detention centre.

60 According to the submission, to treat the matters set out in s 482 as bearing on a decision under s 478 would be to give s 482 'a temporal operation that extends beyond its clear terms'. It would require the Governor in Council

> to evaluate the likelihood of the Secretary being able to comply with the provisions of s 482 at an unspecified point (perhaps far) into the future.

Such a construction was 'indeed unlikely'.

61 The second factor relied on is that the Act divides responsibility for the administration of the youth justice system amongst a number of parties, namely:

- the Governor in Council, who may establish corrective services under s 478;
- the Secretary, who has legal custody of young persons in detention under ss 484(2) and 484(1);
- the Youth Parole Board, which has jurisdiction over young persons detained in a youth justice centre under s 463; and
- the Children's Court, which may order that a young person be detained under ss 347 and 412.

62 It must follow, the State submits, that in exercising the power under s 478 the Governor in Council

> is not required to give consideration to the manner in which other persons responsible for the administration of the youth justice system may exercise their functions in the future.

On this argument, the responsibilities of the Secretary under s 482 were no more relevant to a decision under s 478 than those of the Youth Parole Board.

63 Thirdly, the State points to the language of s 482(1)(a), which obliges the Secretary to

> determine the form of care, custody or treatment which he or she considers to be in the best interests of *each person detained* in a remand centre, youth residential centre or youth justice centre.[47]

The duty thus imposed, it is said, is owed to each detainee individually, not to detainees as a group. Breach of the duty owed to a particular young person might entitle that person to civil remedies but

> the individual nature of the obligations owed under s 482 is such that they are not a consideration to be taken into account in the establishment of a corrective service, when the identities and needs of the young persons who will be detained there are unknown.

Consideration

64 We concluded that these submissions must be rejected. They seek to draw what, on a proper reading of pt 5.7 of the Act, is an unsustainable distinction between the power to establish a detention centre for children and Parliament's express specification of the essential attributes of detention in such a centre. Both the co-location of the provisions in pt 5.7 and the statutory language employed require that they be read together.

65 Emphasising the importance of context in statutory interpretation, the judge said:

> Part 5.7 is concerned with the establishment of corrective services for children. Section 478 is found within Part 5.7, and in the immediate context of ss 481 and 482. There are only five sections in the entire Part. These provisions describe and define the services, care, custody and treatment to be provided in the centres and units that can be established under s 478(a)–(d). It is plain that decisions made under s 478 profoundly affect the practical content of the entitlements to be provided under s 482(2), as well as the discharge of the duties of the Secretary under s 482(1). It would be a sensible

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47 Emphasis added.

> and beneficial construction if in the exercise of power under s 478, consideration also had to be given to what has to be done under s 482. It would give effect to main purpose (b) of the Act and the intent underlying s 478.[48]

66 It is of great significance, in our view, that s 482(2) is a provision conferring rights on young persons who are detained in a centre established under s 478.[49] The language of s 482(2)(a) is especially powerful. Read with the definition of 'development', its effect is that each young person detained in such a centre is entitled to have his/her needs (physical, social, emotional, intellectual, cultural and spiritual) 'catered for'.

67 By way of reinforcing the importance of this and the other entitlements conferred by s 482(2), the Parliament has imposed on the Secretary under s 482(3) the responsibility 'to make sure' that sub-s (2) is complied with, that is, that the entitlements conferred on the detainees are delivered. This is not merely an obligation to 'take all reasonable steps', or to do to what is 'reasonably practicable', to secure compliance. It is an obligation to 'make sure', that is, to do whatever is necessary to *ensure* that the specified state of affairs exists in each detention centre.[50] And, by way of further reinforcement of the necessity of compliance, Parliament has directed that 'at least once each year' the Secretary report to the Minister on the 'extent of compliance with sub-s (2)'.

68 Equally significant, in our view, is the duty imposed on the Secretary by s 482(1)(a), to determine the form of 'care, custody or treatment'–

> which he or she considers to be in the best interests of each person detained in a [centre established under s 478].

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48 Reasons [258]. His Honour cited *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* (2009) 239 CLR 27, 46–7 [47].

49 The phrase used in each of the sub-paragraphs of s 482(2) is 'entitled to'. The words 'right' and 'entitlement' are synonymous (see Lesley Brown (ed), *The New Shorter Oxford English Dictionary* (Clarendon Press, 3rd ed, 1993) Vol 2, 2598). They are used interchangeably in these reasons, as they were in the course of argument.

50 Cf *The Queen v Commercial Industrial Construction Group Pty Ltd* (2006) 14 VR 321, 331 [44].

This is, as the State points out, a duty owed to each young detainee individually. It requires the Secretary to determine what will be in the best interests of each detainee and then — by necessary implication — to promote those interests by the form of 'care, custody or treatment' provided.

69 It is entirely consistent with the informing philosophy of the Act, and its stated purposes, that the legislature has here treated the rights and interests of young people in detention as governing considerations. As was pointed out in argument, that philosophy is likewise exemplified by s 362(1) of the Act, which provides as follows:

> **362 Matters to be taken into account**
>
> (1) In determining which sentence to impose on a child, the Court must, as far as practicable, have regard to—
>
> (a) the need to strengthen and preserve the relationship between the child and the child's family; and
>
> (b) the desirability of allowing the child to live at home; and
>
> (c) the desirability of allowing the education, training or employment of the child to continue without interruption or disturbance; and
>
> (d) the need to minimise the stigma to the child resulting from a court determination; and
>
> (e) the suitability of the sentence to the child; and
>
> (f) if appropriate, the need to ensure that the child is aware that he or she must bear a responsibility for any action by him or her against the law; and
>
> (g) if appropriate, the need to protect the community, or any person, from the violent or other wrongful acts of the child.

70 This provision governs the Children's Court's discharge of its function of sentencing children who have been found guilty of criminal offences. The contrast with the provisions of the *Sentencing Act 1991*, applicable to adult offenders, is

striking.[51] There is no mention here of punishment or denunciation. Instead, the provision is directed almost entirely to a consideration of the best interests of the child offender.[52]

71 We note at this point that the power conferred by s 478(c) of the Act is a power to establish youth justice centres 'for the care and welfare of persons ordered to be detained' in such centres. Plainly, as the Solicitor-General conceded, the Parliament viewed the care and welfare of detainees as the paramount consideration in the establishment of such a centre. It necessarily followed, he accepted, that it would not be open to the Minister to recommend that a place be established as a youth justice centre unless it was capable of serving that statutory purpose.

72 Crucially for present purposes, the rights under s 482(2) accrue — and the duties under ss 482(1) and (3) are owed — to a young person by virtue of his/her status as a person detained in a centre established under s 478. The Solicitor-General properly conceded that this was so. It follows, as a matter of necessary implication, that Parliament intended a place established under s 478 for the detention of young people to be a place where those entitlements could be enjoyed, and those duties performed.

73 Put another way, Parliament has expressly treated the fact of a young person's detention in a s 478 centre as enlivening that person's entitlements under s 482(2) and the Secretary's duties to that person under (relevantly) ss 482(1)(a) and 482(3). That being so, it is an essential attribute of detention in such a centre that those provisions be — and hence be able to be — complied with.

74 The converse seems self-evident. That is, in deciding whether to establish a place as a detention centre under s 478, the Minister must consider whether — and to what extent — it is a place where those provisions will be able to be complied with.

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51 *R v Evans* [2003] VSCA 232 [44]–[45].

52 *CNK v The Queen* (2011) 32 VR 641, 644–45 [8]–[15].

Will the Secretary be able to 'make sure' that each detainee's developmental needs are catered for? Will she be able to determine, for each detainee, a form of care, custody or treatment which is in that detainee's best interests?

75 On the material, the Minister (and those advising her) did advert to certain of the requirements under s 482 of the Act. Thus, under s 482(1)(c), the Secretary must

> separate persons who are on remand from those who are serving a period of detention by accommodating them separately in some part set aside for the purpose.

Unsurprisingly, the briefing paper prepared for the Minister contained this statement:

> It is necessary to establish the area as both a youth justice centre and a remand centre so that the area can accommodate either or both sentenced and remanded young people, as need and numbers dictate, but always with a physical separation being maintained in the area between any young people serving sentences and the young people on remand, as required by the *Children, Youth and Families Act.*

76 Plainly enough, as the Solicitor-General conceded, it was seen as essential to the suitability of Grevillea as a youth justice centre or remand centre that it was a place where the Secretary would be able to discharge her statutory duty under s 482(1)(c) as soon as any young person was detained there. We note that the duty to ensure the physical separation of remandees was here described as 'required by the [Act]'.

77 This example is sufficient to dispose of the State's argument about temporal or chronological separation between ss 478 and 482. In deciding whether a place can be designated as suitable for this special purpose — the detention of young persons — it is obviously necessary to consider whether, once designated as such, the place will meet the statutory requirements for the detention of young people.

78 Similarly, Mr Lanyon gave evidence that he developed a list of 'non negotiables', for the purpose of assessing possible options for an alternative detention centre. One of his requirements was that

> the facility had to have its own recreational space, program and education areas, as well as its own visitor centre.

Doubtless, this requirement reflected the entitlement of detainees under s 482(2)(b)

> to receive visits from parents, relatives, legal practitioners … and other persons.

And Mr Lanyon may also have had in mind the entitlement of detainees under s 482(2)(a) 'to have their developmental needs catered for', those needs being defined to include physical, social and intellectual needs.

79 It is, of course, correct that a person does not have entitlements under s 482(2) unless he/she is detained at a centre which has been established under s 478. But the entitlements attach to persons, not places. And these decisions were expressly directed at creating a remand centre, and a youth justice centre, which could house young persons already detained under the Act and in the Secretary's custody. As detainees, each of those young persons already had the entitlements under s 482(2). And each of them was a person to whom the Secretary already owed the duty under s 482(3), to 'make sure' that those entitlements were delivered, and the duty under s 482(1)(a), to make decisions about custody in his/her best interests.

80 It is unambiguously clear that Parliament intended that those entitlements, and those duties, should subsist whenever a young person was detained and in whatever place of detention he/she was held. Once again, the Solicitor-General properly conceded that this was so. For the remandees who were to be transferred, Grevillea was not a place where entitlements would spring into existence for the first time. On the contrary, the effect of s 482 was that it had to be a place where those entitlements could continue to be enjoyed and the Secretary's duties could continue to be performed.

81 This analysis is unaffected by the second and third factors relied on by the State, which may be disposed of shortly. As to the second, it is immaterial that the Act elsewhere confers youth justice responsibilities on other persons and bodies. As these reasons demonstrate, the conclusion we have reached rests on the direct nexus

between ss 478 and 482, within pt 5.7 of the Act.

82 As to the third, it is plain enough that the Secretary's duty under s 482(1)(a) is a duty owed 'to each person detained'. It is equally plain that her duty under s 482(1)(c) is owed to remandees as a group. Either way, the duties are of universal application in respect of young detainees, by virtue of their status as such. Clearly enough, it was Parliament's intention that these duties should be capable of being performed in any place established under s 478 of the Act for the detention of young persons.

83 Two final points should be made. First, a decision under s 478 is a decision about the setting in which detainees will experience the deprivation of their liberty, imposed on them for their breaches, or alleged breaches, of the criminal law. On ordinary principles, that is a powerful consideration supporting the conclusion that the rights and entitlements conferred on detainees *in respect of their detention* should be at the forefront of the decision-maker's mind.[53]

84 Secondly, the State did not suggest that the obligation to consider these matters would impose any undue burden on the Minister or those assisting her. On the contrary, the Solicitor-General expressly conceded that it would not.

Did the Minister take the relevant considerations into account?

85 The trial judge next analysed whether the Minister (and hence the Governor in Council) took those relevant considerations into account when making the impugned decisions. To do this, his Honour reviewed the briefing paper, the papers submitted to the Governor in Council (including the Orders) and the Minister's public statements.[54] No evidence was led as to what the Minister considered in her decision-making process, either from the Minister herself or from any of the

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53 Cf *Williams v The Queen* (1986) 161 CLR 278, 292; *RJE v Secretary to the Department of Justice* (2008) 21 VR 526, 537 [37].

54 Reasons [272].

signatories to the briefing paper (which included the Secretary and a Deputy Secretary).

86 After reviewing those materials, the trial judge found that some of the relevant considerations had not been taken into account at or before the time the Orders were made:

> There is no consideration of the general purposes of the Act, the purposes of each facility, or the Secretary's duties and responsibility under s 482(1) and (3). There is no reference to the entitlements of detained young persons. In short, there is nothing about the protection, care and welfare of detained persons other than a passing reference in the talking points to the fact that the gazettal of the cells at Barwon Prison as [a] youth justice facility 'will enable youth justice detainees to be safely accommodated in them' while the Parkville Youth Justice Precinct undergoes repairs.
>
> …
>
> There is no evidence that any report as to the suitability of the Grevillea unit for the purposes of the Act or for the protection, care or welfare of young persons was ever provided to the Minister. None was tendered in evidence. The Minister did not visit the Grevillea unit before the Orders in Council were made. Nor did anyone on her behalf. Essentially the Department and the Minister were flying blind as to the real situation and suitability of the Grevillea unit when the Orders in Council were made. According to the evidence, the Grevillea unit was taken over effectively site unseen without report to the Minister as to its suitability for use or acceptability prior to the time that Orders in Council were made.
>
> For these reasons, I conclude that the following considerations were relevant, were required to be taken into account, and were not taken into account by the Minister and Governor in Council at or before the time that the Orders in Council were made relating to the Grevillea unit:
>
> (1) the purposes of the Act;
>
> (2) the specific purposes of a remand centre and a youth justice centre;
>
> (3) the duties of the Secretary under s 482(1) and what this would entail in the new location;
>
> (4) the entitlements of detained young persons under s 482(2), and how they would be met in the new location; and
>
> (5) the Secretary's responsibility under s 482(3).[55]

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55 Ibid [273], [277]–[278] (citations omitted).

87 The State challenges these findings, contending that they were not supported by the evidence. Reliance is placed on the following statements in the briefing paper to the Minister:

> The Barwon Precinct has entry and exit points, and exercise yard and visitor space that are separate to the rest of the prison.
>
> As with the Mill Park Police Station, it is necessary to establish this precinct at Barwon Prison as a remand centre and youth justice centre under the *Children, Youth and Families Act* to accommodate the young people lawfully.
>
> ...
>
> Under this proposal the Barwon site would be staffed by youth justice staff and youth health and education services, and other programs would continue to be delivered.

88 The Solicitor-General argued that the reference here to 'youth justice staff' was critical, because those staff were answerable to the Secretary and it was through them that she would discharge her duties under s 482. Likewise, the reference to 'youth health and education services' should be taken as a reference to the Secretary's continuing responsibilities to provide such services. Finally, it was submitted that the reference to 'accomodat[ing] the young people lawfully' should be read as encompassing all of the legal obligations under s 482.

89 In the light of these statements, the State contends, it was not possible for the judge to draw 'the inference to the requisite standard' that the relevant considerations were not taken into account. Alternatively, it was submitted, the absence of express reference in the briefing paper to the s 482 considerations did not justify the drawing of an inference that they were not taken into account. Reliance was placed for this purpose on a passage from the plurality judgment in *Plaintiff M64/2015 v Minister for Immigration and Border Protection*.[56]

90 That case concerned a decision by a delegate of the Minister to refuse an application for certain visas. The delegate informed the applicants by letter that the

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[56] (2015) 90 ALJR 197 ('*Plaintiff M64/2015*').

relevant criterion for the grant of the visas had not been satisfied.[57] The High Court rejected the applicants' contention that the delegate had failed to consider particular matters. The plurality (French CJ, Bell, Keane and Gordon JJ) said that the applicants could not

> show that relevant material was ignored simply by pointing out that it was not mentioned by the Delegate, who was not obliged to give comprehensive reasons for his decision.[58]

91 Determining whether relevant considerations were taken into account by the decision-maker is a question of fact, as the Solicitor-General properly conceded. In seeking to support the judge's finding, the respondents relied on what the High Court said recently about the limits on appellate interference with a judge's findings of fact. In *Robinson Helicopter Co Inc v McDermott*, the Court said in a unanimous judgment:

> A court of appeal conducting an appeal by way of rehearing is bound to conduct a 'real review' of the evidence given at first instance and of the judge's reasons for judgment to determine whether the judge has erred in fact or law. If the court of appeal concludes that the judge has erred in fact, it is required to make its own findings of fact and to formulate its own reasoning based on those findings. But a court of appeal should not interfere with a judge's findings of fact unless they are demonstrated to be wrong by 'incontrovertible facts or uncontested testimony', or they are 'glaringly improbable' or 'contrary to compelling inferences'.[59]

92 The Solicitor-General's response was that this statement had no application to the present appeal, as the evidence on which the finding of fact rested was wholly documentary. As a result, he submitted, this Court was in as good a position as the trial judge to determine the question.

Consideration

93 We deal first with the state of the evidence. As the judge noted, the briefing

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57 Ibid 202 [19].

58 Ibid 204 [5].

59 (2016) 90 ALJR 679, 686–87 [43] (citations omitted).

paper was the only evidence before the Court showing what matters were drawn to the Minister's attention that the time she decided to recommend the making of the Orders in Council. No oral evidence was called from any of those who participated in the decision-making process.

94 There was, as the State pointed out in its submissions, no statement from the Minister of her reasons for decision. She was not, of course, obliged to provide such a statement. It remains the case at common law that a decision-maker is not obliged to give a statement of reasons.[60] Nor is there a statutory right in Victoria to seek a statement of reasons, unless the decision is one to which the rules of natural justice apply.[61]

95 We do not accept, however, that the absence of a statement of reasons can operate to the advantage of the decision-maker, as the State's submission seemed to suggest. It simply has the consequence that the reviewing court is left to proceed on the basis of such other material as is in evidence. In a case such as the present, where the ground of judicial review is that relevant considerations were not taken into account, the court can reasonably assume that the respondent decision-maker, doubtless wishing to uphold the validity of the decision, will seek to put into evidence all such materials as will demonstrate that the relevant considerations *were* taken into account.

96 The briefing paper provided to the Minister was a document of a quite different character from the 'decision letter' considered by the High Court in *Plaintiff M64/2015*. It is the kind of document which is conventionally prepared for, and intended to be relied on by, a decision-maker. Typically, as in this case, the document will recommend to the decision-maker that a particular course of action be taken or a particular decision made. And, for obvious reasons, the document will

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60 *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656, 662–3.

61 *Administrative Law Act 1978* s 2 (definition of 'tribunal'); s 8; cf *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 13; *Administrative Appeals Tribunal Act 1975* (Cth) s 28.

therefore be assumed to include all of the matters which those advising the decision-maker consider he/she needs to be made aware of in order to be able to make an informed decision.

97 There is, in other words, a presumption of completeness or comprehensiveness in relation to a document of this character, at least when it has been prepared for the consideration of a Minister. It is a presumption which may, of course, be rebutted if there is evidence of oral briefings or prior communications relating to the decision. Absent such evidence, there is a sound basis for inferring that a matter not mentioned in a briefing paper of this kind is a matter which the decision-maker did not consider. Such inferences have regularly been drawn on the basis of such documents.[62]

98 In our view, no basis has been shown for interfering with the judge's finding. There is nothing in the briefing paper to indicate that the Minister was made aware of, less still that she considered, the rights of detainees under s 482(2)(a) or the duties of the Secretary under ss 482(1)(a) or (3) of the Act. The reference to 'youth health and education services' being provided at Barwon was no more than a statement of intention or expectation.

99 For the reasons we have given, what the Act required, at a minimum, was actual consideration of the suitability of Grevillea to enable the developmental needs of present and future detainees to be catered for, and to enable the Secretary to discharge her duties to present and future detainees under ss 482(1)(a) and 482(3). By failing to consider those matters, the Minister exceeded the authority conferred on her by the Act.[63]

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62 See, eg, *Peko-Wallsend Ltd* (1986) 162 CLR 24, 30-31, 65-66; *Williams* (2007) 157 FCR 286, 291–92 [21]–[26], 298 [50]; *ID, PF and DV v Director-General, Department of Juvenile Justice* (2008) 73 NSWLR 158, 189 [253], 190 [262]–[263]; *Gbojueh v Minister for Immigration and Citizenship* (2012) 202 FCR 417, 430 [63].

63 *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323, 351 [82].

Improper purpose

100 The judge then considered the respondents' argument on improper/ extraneous purpose. Based on the terms of the Orders, his Honour found that the powers in ss 478(a) and (c) had been exercised solely for the purpose of 'emergency accommodation'. That was the only purpose expressed in the Orders in Council. The powers under s 478(a)-(d) were conditional on the pursuit of specified purposes, which did not include 'emergency accommodation'. Those specified purposes were:

> In the case of 'remand centres' under s 478(a), … 'the detention of children awaiting trial of the hearing of a charge …'. In the case of s 478(c), … 'for the care and welfare of persons ordered to be detained in youth justice centres under this Act …'[64]

101 The trial judge accepted the respondents' submission that:

> The purpose of 'emergency accommodation' is not one that is authorised for a remand centre by s 478(a) nor for a youth justice centre by s 478(c). It is simply not known to the Act.
>
> The purpose of 'emergency accommodation' is extraneous to the purpose for which the powers contained in s 478(a) and (c) were granted. Clearly, 'emergency accommodation' is a substantial purpose of the exercise of power. Indeed it is the only purpose stated in the Orders in Council. The powers were exercised solely to give effect to the extraneous purpose. The use of the expression 'emergency accommodation' could be sought to be supported as one component of the purpose of 'care and welfare'. However, the plaintiffs submitted, this does not overcome the problem that the purpose that s 478(c) allows is not 'emergency accommodation' but 'care and welfare of persons ordered to be detained in youth justice centres'. The purpose of 'emergency accommodation' is entirely different from the sole purpose for which a remand centre may be established.[65]

102 His Honour was of the view that the terms 'youth justice centre' and 'remand centre' involve much more than 'emergency accommodation'. In fact:

> much more is expected of a remand centre or a youth justice centre than just 'emergency accommodation'. The term 'emergency accommodation' reflects a failure to anticipate that what was required to be done. This was much more comprehensive than accommodation on an emergency basis.
>
> Apart from the fact that both provide a form of accommodation, a remand

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64 Reasons [286].

65 Ibid [289]–[290].

> centre and emergency accommodation are entirely dissimilar in common understanding. One is a permanent and highly regulated custodial institution operating under statute, the other is a voluntary, usually temporary, home or camp ordinarily managed by relief workers with unrestricted access. The two expressions have only the loosest association.[66]

103 We respectfully disagree. In our view, the words 'for emergency accommodation' were, at most, descriptive of the circumstances in which the new remand centre, and the new youth justice centre, were being established. The need for the new centres had arisen because of an emergency. The words may also have been intended to convey some temporal element, such as that the centres were being established on a temporary or interim basis, until the 'emergency' had passed.

104 However that may be, there is no reason to doubt that what was to be established was — as the Order stated — '*a remand centre* for emergency accommodation'.[67] As senior counsel for the respondents properly conceded, a remand centre and a youth justice centre are both places of accommodation. Provided that the centres were established for the purposes of the Act, and with proper consideration of the requirements of s 482, simply to describe them as 'emergency accommodation' could not affect the validity of the decision to establish them. Those additional words were not in any way incompatible with the purposes expressly stated in the Act.

Conclusion

105 As mentioned at the outset of these reasons, the judge's finding that the orders were invalid is unaffected by our conclusion that there was no improper purpose. The 'relevant considerations' ground of review, which we have upheld, is sufficient to sustain the finding.

106 The Court did, however, accede to the Solicitor-General's request that the declarations of invalidity should be amended by deleting the words 'and of no

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66 Ibid [291]–[292].

67 Emphasis added.

effect'. The Solicitor-General submitted that questions might arise — in connection with possible civil liability — about whether the Orders were invalid from the moment they were made, or only from the date of the declaration. The deletion would, he suggested, be of assistance should it become necessary to advance the latter interpretation.

107 We were content to make the amendments requested by the Solicitor-General, which the respondents did not oppose. We express no view on the question of the operative date of invalidity, save to note that (as the Solicitor-General accepted) a finding of jurisdictional error ordinarily has the consequence that there was, in law, no decision at all.[68]

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[68] *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597, 614–15 [51]; cf *Jadwan Pty Ltd v Department of Health and Aged Care* (2003) 145 FCR 1, 16 [42], 22 [64].