



# **A Current Snapshot of the Victorian Charter of Human Rights<sup>1</sup>**

**Remarks of the Honourable Marilyn Warren AC  
Chief Justice of Victoria**

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Legal networks and associations perform an important role within the legal profession, and in the broader community. They bring together lawyers who have something in common, whether it be a shared heritage, culture, religion, idea, purpose, or interest in a particular area of law. Such associations provide legal practitioners with opportunities for networking, mentoring, and education.

These legal associations, which give practitioners an opportunity to break from regular legal work and think about whatever brings them together, are also one of many ways lawyers can lighten the impact of what is often a stressful job.

Based on its goal of helping the vulnerable and underprivileged gain access to justice, and its blog, it appeared to me that one of the Muslim Legal Network's keen interests is human rights. In particular, posts that discuss State and Federal anti-discrimination law, and commentary on proposed legislative amendments that infringe on human rights, all demonstrate a concern for educating practitioners and the public on the subject of human rights. The Muslim Legal Network

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<sup>1</sup> This is an edited version of remarks delivered by the author at the Muslim Legal Network Annual Legal Profession Iftar, Melbourne, 15 June 2017.

undertakes a worthy purpose: an informed legal profession and public are essential to a community with a culture of respect for human rights.

Seeing this interest led me to choose my topic of discussion tonight, human rights.

In Victoria, the *Charter of Human Rights and Responsibilities Act 2006* is testament to the importance that the Victorian community places on human rights. Victoria is one of only two jurisdictions in Australia that have human rights legislation.

However, having a human rights charter is not necessarily an answer to the claim that human rights are recognised for some yet denied to others. If the Charter only operates in favour of those less in need of protection, namely the dominant or prevailing groups within the community, then its value is severely diminished. A test of a human rights charter's worth is the extent to which it may be called upon as a vehicle for recognition and protection.

This evening I propose to look at a few recent cases decided in the Supreme Court of Victoria, to illustrate the role the Charter, and human rights, are playing in our society.

## **Bendigo mosque case**

The first Charter case I will talk about is *Hoskin v Greater Bendigo City Council*,<sup>2</sup> better known as the Bendigo mosque case. This case started with objections at the local council level, then moved to VCAT, before being considered by the Victorian Court of Appeal, and finally the High Court of Australia.

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<sup>2</sup> (2015) 212 LGERA 362.

The facts are interesting. According to census data, in 2011 Greater Bendigo was home to 200 people who identified Islam as their religion.<sup>3</sup> Bendigo's Muslim community worships within part of a building within Latrobe University (Bendigo campus). To address this situation the Australian Islamic Mission Inc sought a permit to construct a mosque. The permit application attracted expressions of support, but also 254 objections from 435 individuals. The City of Greater Bendigo Council granted the permit.

Eleven of the 435 objectors applied to VCAT seeking review of the council's decision. Standing in the shoes of the council, VCAT considered afresh whether the permit should be granted.

In the course of the six day hearing before VCAT, the permit applicant argued that the proposed permit was consistent with Victoria's planning objectives set out in the *Planning and Environment Act 1987*.<sup>4</sup> This was because the mosque would allow Bendigo residents to exercise religious freedom in a purpose built facility.

On the other hand, the objectors raised concerns with respect to adverse social effects, within the meaning of s 60(1)(f) of the *Planning and Environment Act*, which is a matter an authority such as the council is obliged to consider before deciding upon an application. In essence they argued that an Islamic mosque was an intrinsically unacceptable land use because of the very nature of Islam.<sup>5</sup>

The tribunal ultimately determined to grant the permit. It was not satisfied that granting the permit would likely result in any significant social effects.

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[http://www.censusdata.abs.gov.au/census\\_services/getproduct/census/2011/communityprofile/LGA22620?opendocument&navpos=220](http://www.censusdata.abs.gov.au/census_services/getproduct/census/2011/communityprofile/LGA22620?opendocument&navpos=220). The total population of Greater Bendigo in 2011 was 101,618. Data from the 2016 census concerning religious affiliation is scheduled to be released in June 2017.

<sup>4</sup> See *Planning and Environment Act 1987* s 4(1).

<sup>5</sup> (2015) 212 LGERA 362, 376 [57].

Two of the 11 objectors before VCAT then came to the Court of Appeal seeking leave to appeal. They argued that the tribunal misdirected itself in relation to significant social effects within the meaning of s 60(1)(f).

The Court of Appeal, constituted by myself and Justices Osborn and Santamaria, confirmed that the Charter informed the interpretation of the planning objectives in the *Planning and Environment Act* and s 60(1)(f) of that Act.<sup>6</sup> This was because s 32(1) of the Charter provides that ‘so far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights’. The human rights relevant to the Bendigo mosque case were the Charter rights to freedom of culture, religion and belief.<sup>7</sup>

With those rights in mind, the Court of Appeal held that Victoria’s planning objectives embraced ‘the development and provision of appropriate facilities for worship by those holding Islamic religious beliefs “as part of a community, in public”’.<sup>8</sup>

When interpreting the expression ‘significant social effects’ in s 60(1)(f) of the planning legislation, the Court again relied on the Charter. The Court said that the ‘facilitation of the practice of religious worship as such cannot itself be regarded as constituting a significant adverse social effect of a proposed use or development’.<sup>9</sup> The Court held that ‘objections to the religious beliefs of others are not town planning considerations’.<sup>10</sup>

The Charter was also relevant in that it required the council and the tribunal to consider the human rights of the proposed future users of the mosque when deciding whether to grant the permit.<sup>11</sup>

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<sup>6</sup> Ibid 368 [26], 369 [31], 371 [40].

<sup>7</sup> *Charter of Human Rights and Responsibilities Act 2006* ss 14 and 19.

<sup>8</sup> (2015) 212 LGERA 362, 368 [27].

<sup>9</sup> Ibid 368 [28].

<sup>10</sup> Ibid.

<sup>11</sup> Ibid 368 [31], 371 [39].

In the result, the Court of Appeal affirmed the tribunal's decision. The Court held that in the absence of supporting evidence, it was open to the tribunal not to be persuaded that the objections to the mosque were of substance.

The two objectors sought special leave to appeal to the High Court. In June last year the High Court refused special leave.

Relevantly, a group of approximately 200 people within a city of over 110,000 people, successfully relied on the Charter to overcome strong objection to their proposal to build suitable facilities to practise their faith.

It may be that the same result would have been achieved even without the Charter, because in its decision the Court of Appeal referred to a common law principle of interpreting legislation consistently with freedom of religion.<sup>12</sup>

However the relevance of the Charter is that it provides courts with an express footing on which to decide cases by reference to fundamental human rights.

## **Another approach to religious freedom**

However, I should note one, very recent, case, which resolved a similar issue without reference to the Charter- *RSSB Australia Pty Ltd v Ross*,<sup>13</sup> a decision of Emerton J.

The decision concerned the use of a piece of land in Carrum Downs, which was governed by the Frankston Planning Scheme. The land was also in a designated 'Green Wedge Zone' which had

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<sup>12</sup> (2015) 212 LGERA 362, 368-369 [29]-[30].

<sup>13</sup> [2017] VSC 314.

further planning implications for the site. Of particular importance in this case, was the distinction between two phrases in the Frankston Planning Scheme – ‘a place of worship’, and ‘a place of assembly’.

A place of worship is defined in the Scheme as ‘land used for religious activities, such as a church, chapel, mosque, synagogue, and temple’. A ‘place of assembly’ is defined by the Scheme as ‘land where people congregate for religious or cultural activities, entertainment or meetings’. Importantly, land determined to be used as a ‘place of assembly’ in a Green Wedge Zone could only be used for that purpose 10 times per calendar year, whereas a ‘place of worship’ was not so restricted.

The applicant was the owner of the site. The applicant was also the corporate trustee for Radha Soami Satsang Beas Australia, the Australian arm of the global organisation. The applicant sought to build what it contended was ‘a place of worship’ on the site. As the applicants were hoping to use the site several times per week, it was vital for their purposes that it be deemed ‘a place of worship’ and not ‘a place of assembly’.

While the Frankston City Council determined to grant a permit to build a place of worship on the site, the respondent, who is the secretary of the group Defenders of the South East Green Wedge, successfully applied to have this decision set aside in VCAT. The Tribunal determined that RSSB was not a religion, and therefore would not be using the land as ‘a place of worship’ but rather as a ‘place of assembly’. As the use proposed was for several meetings per week, the Tribunal concluded that it could not grant a permit.

In considering what would constitute a ‘religion’ the Tribunal referred to a 1983 decision of the Victorian Court of Appeal, which concerned Scientology.<sup>14</sup> From that decision, the Tribunal elucidated a number of ‘indicia’ of a religion, which it said to be:

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<sup>14</sup> *Church of the New Faith v Commissioner for Payroll Tax* [1983] 1 VR 97.

- The nature of the ideas fundamental to the concept of a religion
- Whether the beliefs provided answers to ultimate questions
- Whether the set of ideas involved adherence to formal ceremonies and services
- Public acceptance
- Whether the applicant sought to persuade members and potential members that the set of ideas represents the true faith or true answers to questions of ultimate concern
- Commercialisation whereby seeking to exploit for commercial advantage was a criterion against activities being of a religious character<sup>15</sup>

The Tribunal was unpersuaded that RSSB satisfied these criteria. In particular I note the following finding of the Tribunal:

A clear indication in my view that RSSB is not a religion, is the absence of any unique sacred texts or set of values and belief systems regarding the person and divinity of God, and man's relationship to God.<sup>16</sup>

The applicant appealed to the Supreme Court. It argued that the Tribunal erred in concluding, on the basis that RSSB was not a religion, that the proposed use was not a 'place of worship'. Alternatively, the applicant argued that if this was the correct question to ask, the Tribunal erred in finding that RSSB was not a religion.

The applicant succeeded on both grounds, and the appeal was allowed.

First, Emerton J concluded that the Tribunal asked itself the wrong question. The question was not, 'is RSSB a religion?', but 'what was the purpose of the proposed use of the site?' It was the use, not the applicant, that the Tribunal should have focused upon. Although the character of the

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<sup>15</sup> *Ross v Frankston CC* [2017] VCAT 274 [17].

<sup>16</sup> *Ibid* [27].

applicant may be relevant, Emerton J found that this was not determinative. Accordingly Emerton J concluded that Tribunal did not carry out the task required of it.

Second, and perhaps most interestingly, Emerton J concluded that in any event, the Tribunal's application of the 'indicia' of religion involved legal error. This was because the Victorian Court of Appeal's decision relied upon had been unanimously overruled by the High Court. Unfortunately, this had not been brought to the Tribunal's attention, and the applicant had in fact relied upon the overturned decision before the Tribunal.

However the error came about, it was nonetheless an error- one which vitiated the Tribunal's decision. While each of the three separate High Court judgments posited a different approach to defining religion, they were unified in their rejection of taking a narrow, prescriptive approach to the question, and unified in their rejection of the Court of Appeal's indicia. Indeed, Murphy J observed that to take the Court of Appeal's earlier approach would result in 'intolerable religious discrimination'.<sup>17</sup>

Emerton J concluded that:

None of the indicia identified by the High Court would require RSSB to have 'unique sacred texts or set of values and belief systems regarding the person and divinity of God, and man's relationship to God' and/or engage in the persuasion of members and potential members that its set of ideas represents 'the true faith' or true answers to questions of ultimate concern.

After considering the evidence which was before the tribunal Emerton J ordered that the order of the tribunal be set aside and in lieu thereof ordered that the application for review be dismissed.

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<sup>17</sup> (1983) 154 CLR 120, 161.



This is but one example of the Courts engaging with the common law to uphold human rights, and resisting attempts to curtail them.

The relationship between religion and the common law was remarked upon at the first multi-faith opening of the legal year in Victoria, in 2015. The opening was supported by the Victorian Council of Churches, the Islamic Council of Victoria, the Buddhist Council of Victoria, the Hindu Community Council of Victoria, and by lay and Rabbinical representatives of the Jewish Legal Community. Associate Professor Rufus Black traced the relationship between religion and the common law, and said:

The roots of the common law are deep in the soil of religious belief systems. It grew out of natural law theory, which itself has roots in Jewish understandings of law and the extraordinary late Medieval conversation between the Aristotelian texts that returned to the West via Islamic scholarship and pre-reformation Catholic theology.<sup>18</sup>

This long-standing relationship remains, evidently from the cases I have referred to, in both the common law, and now in the statutory expression of those principles within the Charter.

## **Children in Supreme Court criminal proceedings**

The next cases I will discuss concern the treatment of children in the criminal justice system.

In *DPP v SL*, SL was a 15 year old who had pleaded guilty to charges including attempted murder. Given the seriousness of the charges, the matter was heard in the Supreme Court instead of the Children's Court.

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<sup>18</sup> Rufus Black, Address for the Multi-Faith Opening of the Legal Year 2015, Government House, Melbourne, 2 February 2015.

If Victoria did not have the Charter and Bell J had not made the ruling that I will come to shortly, SL would have been treated as an adult. For instance, SL would have been detained before and after court, and during adjournments, in the court's cells, along with adult defendants.<sup>19</sup>

In Victoria the Charter recognises rights particular to children.

In *DPP v SL* Bell J emphasised these rights, which he said are based on the fundamental principle of the best interests of the child.<sup>20</sup> Those Charter rights included:

- s 23, which provides that:
  - (1) An accused child who is detained or a child detained without charge must be segregated from all detained adults.
  - (2) An accused child must be brought to trial as quickly as possible.
  - (3) A child who has been convicted of an offence must be treated in a way that is appropriate for his or her age.
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- s 25(3), which provides that a child charged with a criminal offence has the right to a procedure that takes account of his or her age and the desirability of promoting the child's rehabilitation.

Bell J explained that when it comes to the procedures to be followed in children's hearings, and the detention of children at court, courts must apply the relevant Charter rights.<sup>21</sup>

Bell J held that the Charter rights reflect the fact that children are especially vulnerable in several ways.<sup>22</sup> They are vulnerable to physical and emotional harm and negative formative influence in

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<sup>19</sup> *DPP v SL* [2016] VSC 714, [9], [14].

<sup>20</sup> *Ibid* [4].

<sup>21</sup> *Ibid* [6].

<sup>22</sup> *Ibid* [7].

criminal detention. They are vulnerable to discriminatory exclusion in the operation of the processes of the criminal law. Bell J said that as a general principle, courts should take reasonable and necessary steps to ensure that the trial process does not expose a child defendant to avoidable intimidation, humiliation and distress. Further, courts should take steps to assist a child defendant to participate in the proceeding effectively.<sup>23</sup>

To this end, in accordance with the court's obligations under the Charter, Bell J ruled that directions and sentencing hearings for SL be conducted in a number of practical respects to reflect this vulnerability.

SL's plea and sentencing were subsequently conducted in accordance with this ruling.

In another case- *DPP v SE*<sup>24</sup>- the Court was again concerned the Court's accommodation of a child defendant. This time the defendant was a 17 year old Aboriginal person with an intellectual disability. SE had pleaded guilty, and applied for bail in the Supreme Court. Bell J heard the application and granted bail subject to conditions.

In terms of the procedure to be adopted for the bail hearing, Bell J held that SE's Charter rights applied to bail applications as much as they applied to plea and sentencing hearings. He adopted substantially the same special procedures as were adopted in *DPP v SL*.

In so directing, Bell J relied on the Charter rights already discussed, and also the right in s 19(2), which concerns the cultural rights of Aboriginal persons. That right required the court to respect SE's cultural rights when conducting and determining SE's bail application.

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<sup>23</sup> Ibid [12].

<sup>24</sup> [2017] VSC 13.

Bell J reflected that taking children's human rights into account in the administration of criminal justice can promote the growth of their understanding of and respect for the human rights of others.<sup>25</sup> Ideally, he said, this process of developing a culture of and respect for human rights begins at the first opportunity, which may be the hearing of a bail application.

Bell J also considered the nature of the disadvantage faced by SE. He noted that SE faced discriminatory disadvantage and was vulnerable on account of being an Aboriginal person, being a child, and being a person with an intellectual disability.<sup>26</sup> Bell J said that those different forms of disadvantage likely cumulated and interacted, making accommodation in terms of court procedures even more necessary.<sup>27</sup>

The Supreme Court of Victoria has now developed a protocol entitled 'Principles for Managing Children in the Custody of the Supreme Court'. In essence, the protocol, which is not prescriptive, reflects the directions given by Bell J in *DPP v SL* and *DPP v SE*.

### ***Certain Children cases***

The last cases I will discuss this evening are the two *Certain Children v Minister for Families* matters.<sup>28</sup>

On a Saturday evening, November 12 2016, a number of children detained at the Parkville Youth Justice Precinct rioted. The media reported that police dressed in riot gear and dog handlers

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<sup>25</sup> Ibid [14].

<sup>26</sup> Ibid [28].

<sup>27</sup> Ibid.

<sup>28</sup> [2016] VSC 796; [2017] VSC 251; the remarks on the *Certain Children* cases were also delivered at the Commonwealth Law Conference on 21 March 2017 in a speech entitled '*A Civil Case and the Rule of Law*'.

attended the facility to restore order.<sup>29</sup> 15 beds were lost and common areas were rendered unusable as a result of the riot.<sup>30</sup>

The following night another riot broke out. Property was damaged and fire alarms were set off.<sup>31</sup> Some of the children were alleged to be carrying tools taken from a workshop.<sup>32</sup> For 17 hours, a stand-off ensued between emergency services and a number of the children who had retreated to inaccessible areas of the facility.<sup>33</sup>

After the riot ended and control of the facility was handed back to the Department of Health and Human Services, an account was taken of the wreckage. It was claimed that 60 beds were lost, amounting to almost half of the accommodation at Parkville.<sup>34</sup> The detained children had to be relocated.

On Tuesday afternoon the government announced that a number of children would be sent to Barwon, a maximum security prison<sup>35</sup> for adult offenders, close to Geelong, south of Melbourne.

On Wednesday 16 November 2016, applications were made by the Secretary of the Department of Health and Human Services to the Youth Parole Board seeking to have seven children moved to Barwon Prison. Each of these applications was rejected by the Board.<sup>36</sup>

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<sup>29</sup> ABC News, 'Riot Police, Dog Handlers Called After Another Riot at Melbourne Youth Justice Centre' (13 November 2016) ABC News <<http://www.abc.net.au/news/2016-11-13/melbourne-justice-centre-riot-police-dog-handlers-called/8021236>>.

<sup>30</sup> *Certain Children v Minister for Families* [2016] VSC 796, [27].

<sup>31</sup> ABC News, 'Melbourne Youth Justice Centre: Police Negotiating With Young Rioters Holed Up in 'Inaccessible Area'' (14 November 2016) ABC News <<http://www.abc.net.au/news/2016-11-14/melbourne-youth-justice-centre-riot-police-called-second-time/8022206>>.

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.* ABC News, 'Melbourne Youth Justice Centre: Riot At Juvenile Prison Ends Peacefully' (14 November 2016) ABC News <<http://www.abc.net.au/news/2016-11-14/melbourne-youth-justice-centre-riot-ends/8023882>>.

<sup>34</sup> *Certain Children v Minister for Families* [2016] VSC 796 [28].

<sup>35</sup> Department of Justice, Government of Victoria, *Corrections, Prisons & Parole: Barwon Prison* <<http://www.corrections.vic.gov.au/home/prison/barwon+prison.shtml>>.

<sup>36</sup> *Certain Children v Minister for Families* [2016] VSC 796 [40].

On Thursday, 17 November 2016 the Minister for Families and Children gazetted an Order in Council referring to the *Children, Youth and Families Act 2005*. The order excised an area of Barwon Prison known as the Grevillea Unit from classification as a 'prison' and established it as 'a remand centre for emergency accommodation'.<sup>37</sup> Later that day, a number of children in custody were moved to Grevillea.

Late afternoon on Friday 2 December 2016, a writ of originating motion was filed in the Supreme Court of Victoria seeking habeas corpus and an order requiring the removal of those children from detention in the Grevillea Unit at Barwon Prison. This gave rise to the first *Certain Children* matter.

The matter came before Garde J of the Supreme Court, sitting as the Practice Court judge. As allegations were made that the children would suffer significant detrimental effects if left in an environment formerly an adult prison, the matter was treated as urgent and proceeded to trial without pleadings.

Garde J heard the trial over four days from 12–15 December.

The plaintiffs relied on the Charter. The Charter provides that 'it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right'.<sup>38</sup> The plaintiffs submitted that in making the Order in Council to establish Grevillea as a remand centre, the Minister had failed to give proper consideration to the human rights of the detained children. They identified ss 10(b), 17(2), and 22(1) of the Charter. Respectively, those sections record that people are not to be treated in a cruel, inhuman or degrading way, that children have the right to such protection as is in their best interests simply by reason of their being a child, and that all persons deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person.

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<sup>37</sup> Ibid [41]–[42]. Order in Council:  
<http://www.gazette.vic.gov.au/gazette/Gazettes2016/GG2016S354.pdf#page=2>

<sup>38</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 38(1).

The plaintiffs also made administrative law arguments. They argued that the government's decision to annexe Grevillea as a remand centre suitable for children had not had due regard to certain mandatory statutory considerations. The *Children, Youth and Families Act 2005* under which the Minister had the power to create a remand centre also provided certain entitlements for the children who would be detained there.<sup>39</sup> For example, children 'are entitled to have their developmental needs catered for' (e.g. education).<sup>40</sup>

Garde J delivered judgment on 21 December 2016; six days after the hearing concluded, and less than six weeks after the initial riot. Ultimately, Garde J found that the decision embodied in the Order in Council limited and engaged the human rights relied on by the plaintiffs. Further, the Order in Council was unlawful as the Minister had failed to give proper consideration to those Charter rights, in contravention of s 38(1) of the Charter.<sup>41</sup>

Garde J emphasised that the obligation to consider human rights is even more critical in emergency situations. He said:

In an emergency or extreme circumstance, or where critical decisions have to be made with great haste, there are grave risks that human rights may be overlooked or broken, if not life or limb endangered. The existence of an emergency, extreme circumstance or need for haste confirms, not obviates, the need for proper consideration to be given to relevant human rights. <sup>42</sup>

Garde J also held that according to principles of administrative law, the Minister was required by the *Children, Youth and Families Act 2005* to consider whether a remand centre of Grevillea would

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<sup>39</sup> *Children, Youth and Families Act 2005*, s 482.

<sup>40</sup> *Ibid* s 482(2)(a).

<sup>41</sup> *Certain Children v Minister for Families* [2016] VSC 796 [230], [321].

<sup>42</sup> *Ibid* [188].

answer the children's statutory entitlements. Garde J found that there was no evidence that these had ever been considered in making the decision.<sup>43</sup> He declared the Order in Council invalid and ordered the government party to remove the children from the unit.<sup>44</sup>

The Minister sought leave to appeal against Garde J's decision. The hearing of the Minister's application was split into two components: first the appeal against the administrative law component; second, the appeal against the finding of breach under the Charter.

The hearing in respect of the administrative law component was heard and determined on 28 December 2016, just seven days after Garde J delivered judgment. The Court of Appeal, constituted by me, Maxwell P and Weinberg JA, affirmed Garde J's decision.

The Charter component of the appeal was deferred to a later date and was subsequently discontinued by the government. Garde J's finding that the decision to detain children in the Grevillea facility at the relevant time was in breach of the Charter stands.

Where human rights are limited by executive action and plaintiffs seek to challenge that action, prompt resolution by the courts is essential. Delays are not simply a matter of costs or judgment interest. Delays may translate into continued physical and/or mental harm. In the first *Certain Children* matter, the Court was able to hear and determine the plaintiffs' claims and the defendants' application for leave to appeal in less than four weeks from the plaintiffs filing their originating motion. The Charter was also shown to be robust in the face of executive claims of necessity.

I will now discuss the second *Certain Children* matter.

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<sup>43</sup> Ibid [275]–[278].

<sup>44</sup> Ibid [321].



On 29 December 2016, the Victorian government re-gazetted the Grevillea Unit of Barwon Prison as a remand centre and as a youth justice centre for youth detainees. The detention of children in that facility continued.

On the basis that children remained in the Grevillea Unit another Writ was issued seeking judicial review of the second gazettal of the Grevillea Unit on 29 December 2016 and of the decision to 'transfer' children to that unit. The matter was heard over six days in April 2017, finishing on 10 April, and John Dixon J handed down his 225 page decision on 11 May 2017.

The plaintiffs had again made a two-pronged attack on the decision to re-gazette Grevillea and the decisions to transfer children there. Their claim involved an administrative law component, and a Charter component. In the second *Certain Children* matter, the plaintiffs failed on the administrative law aspect of their claim. They did, however, succeed on the Charter component of their claim, making the Charter the decisive factor in that case. For this reason, the second *Certain Children* case is a seminal Charter decision.

When dealing with the plaintiffs' Charter claim, Dixon J first dealt with engagement of rights. He noted that the threshold for engagement is low,<sup>45</sup> and found that the re-gazettal and transfer decisions engaged the human rights in s 17(2) and 22(1) of the Charter.

The next step was to consider whether the impugned decisions limited those rights. The judge considered the evidence, including evidence from children detained in Grevillea that:

- they felt very unsafe at Barwon;<sup>46</sup>
- they felt like they were losing their mind;<sup>47</sup> and

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<sup>45</sup> [2017] VSC 251 [179].

<sup>46</sup> Ibid [363], [383].

<sup>47</sup> Ibid [367].

- Grevillea felt like an adult prison, with visible barbed or razor wire, and everything about it felt bad.<sup>48</sup>

Dixon J found that the re-gazettal and transfer decisions did limit those rights. Once it was held that the re-gazettal and transfer decisions limited human rights, the burden was on the defendants to show that the limitation was demonstrably justified under s 7(2) of the Charter. Dixon J reminded us that '[i]n light of what must be justified, the standard of proof is high'.<sup>49</sup> When deciding whether the limitations were justified, Dixon J was prepared to afford the defendants some degree of latitude or deference.<sup>50</sup> He also accepted that the defendants faced a real accommodation crisis in the youth justice system, and that the youth justice system was at capacity.<sup>51</sup> Nevertheless, the judge concluded that the defendants had not met that high standard of proof. He observed:

... I remain unpersuaded that the defendants appreciate the true nature of the engaged rights.

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The evidence does not support the proposition that the defendants thought extensively or creatively about solutions to the emergency crisis that was before them. A traditional, but limited, response emerged that imposed some significant limitations on the rights of a few.<sup>52</sup>

As the limitations on human rights were unreasonable and not demonstrably justified,<sup>53</sup> the re-gazettal and transfer decisions were incompatible with the relevant Charter rights. This meant they were unlawful under s 38(1) of the Charter.<sup>54</sup>

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<sup>48</sup> Ibid [370], [372], [375], [378], [383], [386], [387].

<sup>49</sup> Ibid [175], [203], [471].

<sup>50</sup> Ibid [218]-[219].

<sup>51</sup> Ibid [457], [574].

<sup>52</sup> Ibid [455], [474]-[475].

<sup>53</sup> Ibid [476].

<sup>54</sup> Ibid [448].

Dixon J was satisfied that the Minister had seriously turned her mind to the relevant Charter rights.<sup>55</sup> But the content of the obligation to give proper consideration to human rights was not the same as it was in the first *Certain Children* decision. Dixon J held that because the Minister was guided by the first *Certain Children* decision, and the Charter assessment was carried out by the VGSO, she was to be held to a higher standard of consideration of human rights.<sup>56</sup> When it came to balancing the competing public and private interests involved in re-gazetting Grevillea, the Minister fell short of the standard of giving ‘proper consideration’ to human rights.<sup>57</sup> This was partly because the Charter assessment was not informed by expert psychological or psychiatric opinion, and the true consequences for the children of the limitations on their rights had not been appreciated.<sup>58</sup>

In relation to the decisions to transfer children to Grevillea, Dixon J concluded:

I am persuaded that the defendants determined that a certain number of children had to be transferred to Grevillea, regardless of its suitability for detaining children... Giving lip-service to the Charter whilst working towards a pre-determined outcome does not amount to proper consideration.<sup>59</sup>

Dixon J made declarations that the re-gazettal and transfer decisions were unlawful under the Charter. He also declared that the Secretary was prohibited from detaining children at a place that had been declared to be unlawful. Further, Dixon J restrained the defendants from detaining or continuing to detain at Grevillea, any person in the Secretary’s custody.

The practical effect of the Court’s decisions regarding the Charter can be illustrated by the government’s reported compliance with the second *Certain Children* decision and removal of all children from Grevillea.<sup>60</sup> There was no appeal in the second case.

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<sup>55</sup> Ibid [490].

<sup>56</sup> Ibid [491].

<sup>57</sup> Ibid [492].

<sup>58</sup> Ibid [492], [503].

<sup>59</sup> Ibid [515].

<sup>60</sup> <http://www.skynews.com.au/news/national/vic/2017/05/13/vic-govt-moves-youths-out-of-adult-jail.html>.

## Conclusion

I now pose the question, what may we take from these decisions concerning the Charter?

Emerton J has considered the requirement in s 38(1) of the Charter to give proper consideration to human rights. Emerton J explained that:

The consideration of human rights is intended to become part of decision-making processes at all levels of government. It is therefore intended to become a 'common or garden' activity for persons working in the public sector, both senior and junior.<sup>61</sup>

The Charter is an important part of Victorian law.<sup>62</sup> A body of jurisprudence has developed of which lawyers should be aware. The cases discussed tonight demonstrate that the Charter arises in a broad range of matters, including matters concerning statutory interpretation, review of executive action, and even court practice and procedure. The Charter matters, and importantly, the cases demonstrate that the Charter has been successfully relied on by those in need of its protection.

The Human Rights Charter is legislation with which lawyers will increasingly raise their awareness, practical experience and confidence. The Courts have developed their jurisprudence- so too will lawyers develop their knowledge through vehicles such as the cases I have overviewed this evening, and the many other cases involving the Charter which the Courts have considered in recent times.<sup>63</sup> The Charter is embedded in Victoria's jurisprudence, and it is incumbent on all legal practitioners to consider its relevance or potential application, to their practice.

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<sup>61</sup> *Castles v Secretary of the Department of Justice* (2010) 28 VR 141, 184 [185].

<sup>62</sup> The Judicial College of Victoria provides an excellent Charter of Human Rights Bench Book available at <http://www.judicialcollege.vic.edu.au/eManuals/CHRBB/index.htm#57496.htm>.

<sup>63</sup> See, for example, *BA v Attorney-General* [2017] VSC 259; *Matsoukatidou v Yarra Ranges Council* [2017] VSC 61.