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**“The Impact of *Charter*  
jurisprudence on Human Rights in  
Closed Environments**

**Presented at *Human Rights in*  
*Victoria under the Charter:*  
*The Development of Human Rights*  
*Law in Victoria***

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# INTRODUCTION

## PRISONS

### FIRST, THE HIGH POINT

#### *Castles: The Decision*

- 1) Facts
- 2) Section 38(1) of the *Charter*

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- 3) Section 22 of the *Charter*: the right to be treated with humanity and dignity when deprived of liberty
- a) Relevant issues
  - b) Content of s 22 of the *Charter* informed by:
    - i. Standard Guidelines for Corrections in Australia;
    - ii. Section 47(1)(f) of the *Corrections Act*, which provides that all prisoners have a 'right to have access to *reasonable* medical care and treatment *necessary* for the preservation of health'.

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- c) Starting point for s 22
  - d) Section 22 'necessarily comprised'
  - e) Section 47(1)(f) satisfies these requirements of the s 22 *Charter* right.
  - f) Problem: conflation of two issues
    - i. First, what is the content of the s 22 right?
    - ii. Secondly, if s 22 is compromised by a law or a decision, is this reasonable and demonstrably justified?



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4) Section 47(1) of the  
Corrections Act

- a) Is IVF treatment both *reasonable* and *necessary* for the preservation of Ms Castles' health under s 47(1)(f)? Yes
- b) Focus on "necessity"



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## Difficulties with the decision

1) The rights

2) The limits analysis

3) Section 32(1) for purists



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## **SECONDLY, THE LOW POINT**

1) *DPP v Foster*:

- a) Facts
- b) Sentencing remarks of Judge Gucciardo
- c) Remarkable?

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## 2) *Collins v R*

- a) Facts
- b) Hansen JA
- c) Chief Justice Warren and Justice Redlich: 'the Court asked the appellant's counsel whether he was making any submissions based on the *Charter*. Counsel expressly disavowed any reliance on the *Charter*.'

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### 3) Missed Opportunities:

- a) *Brough v Australia* (2006): the **UN Human Rights Committee** found that Australia violated art 10 of the *ICCPR*. Specific vulnerability factors reinforcing this conclusion include Brough's age, indigenous status and his mild intellectual disability.

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- b) *X v Turkey* (2012): **the European Court of Human Rights** held that the detention of X in solitary confinement for X's protection amounted to inhuman and degrading treatment in violation of art 3 of the ECHR.
- i. Factors relevant to whether solitary confinement breaches art 3: 'the particular conditions, the stringency of the measure, its duration, the objective pursued and its effects on the person concerned': at [40]
  - ii. Regarding duration, carefully examine its justification, the necessity, the proportionality compared to other measures, the safeguards against arbitrariness, and 'the measures taken by the authorities to satisfy themselves that the applicant's physical and psychological condition allowed him to remain in isolation': at [40].

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- c) *Mathew v Netherlands* (2005): the **European Court of Human Rights** held that, although Mathews' sentence was reduced as "compensation" for his treatment, the judgment of the domestic court 'stop[ped] short of finding the applicant's conditions of detention unacceptable' under art 3 (at [151]). Because the applicant was not expressly or substantively acknowledged to be the victim of an art 3 violation, he could still claim a violation of art 3 (at [151]).

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- d) *Vogel v Attorney-General & Ors* (2013): the **New Zealand Court of Appeal** found a 21 days sentence to solitary confinement violated the right to be treated humanely and with dignity when deprived of liberty. The right cast a positive duty on the State 'to ensure ... that the sentence was one which could safely be imposed' (at [72]), with the State not avoiding its positive duty 'on the basis that the prisoner sought the sentence imposed' (at [73]). Vogel was considered vulnerable because of his drug addiction and his diagnosed mental health issues – factors that were key to assessing whether the sentence could be safely imposed (at [71] and [72])

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- e) *Shahid v Scottish Ministers* (2014): the **Scottish Lords of Appeal** outlined the conditions that must be satisfied for extended solitary confinement to *not* amount to a violation of art 3 of the *ECHR* (at [43]):
- i. 'a proper purpose for the segregation';
  - ii. procedural safeguards, such as regular reviews, including prisoner input;
  - iii. reasons must be given for continuing the segregation;
  - iv. the prisoner must not be held 'total isolation';
  - v. the prisoner's health must be kept under review.

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- f) *Callanan v Attendee X; Callanan v Attendee Y; Callanan v Attendee Z* [2013]: the **Supreme Court of Queensland** reduced sentences for contempt of court from 5 months to between 5 and 6 weeks, because defendants would serve their sentences in the 'Restricted Management Unit' at Woodford Prison, and would be subject to a 'Restricted Management Regime', including 22 hours per day of solitary confinement.:
- i. reduced the sentence to four weeks, taking into account 'the fact that a period of four weeks in solitary confinement is harsh punishment and carries a substantial risk of psychological harm' (at [55]);
  - ii. noted the 'risk the respondent will suffer serious psychological harm by any substantial period in solitary confinement, and thereby receive what many would regard as a cruel and unusual punishment, must be taken into account' (at [55]);
  - iii. made extensive reference to international law, and research on the harmful effects of solitary confinement.
  - iv. Queensland does not have a Charter of Rights!



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## **THIRD, KEY ISSUES MOVING FORWARD**

- 1) First, s 32(1)
- 2) Secondly, s 7(2)
- 3) Thirdly, under-utilisation and last resort
- 4) Inter-related issues

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5) Revisit *Momcilovic*:

- a) Julie Debeljak, 'Proportionality, Rights-Consistent Interpretation and Declarations under the Victorian *Charter of Human Rights and Responsibilities*: the *Momcilovic* Litigation and Beyond' (2014) 40(2) *Monash University Law Review* (forthcoming)

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- b) Debeljak conclusions
    - i. First, four judges acknowledged that proportionality analysis under s 7(2) was part of the task of “rights compatible” interpretation.
    - ii. Secondly, four judges support the approach to interpretation in NZ and the UK.
    - iii. Thirdly, with respect, French CJ judgment is not the ratio; only French CJ characterised s 32 as codifying the principle of legality.
  - c) Revisiting *Momcilovic* is vital for rights protection in this area.