VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

HUMAN RIGHTS DIVISION

HUMAN RIGHTS LIST

A64/2013

Applicant	**RW on behalf of HL**
First Respondent	**State of Victoria (Department of Education and Early Childhood Development)**
Second Respondent	**Karen Dauncey**
Intervener	**Victorian Equal Opportunity and Human Rights Commission**

AMENDED SUBMISSIONS OF THE VICTORIAN EQUAL OPPORTUNITY AND HUMAN RIGHTS COMMISSION

Date of document: 14 July 2014 ~~**26 February 2014**~~
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A. INTRODUCTION

1. The Victorian Equal Opportunity and Human Rights Commission (**Commission**) sought leave to intervene in these proceedings pursuant to section 159 of the *Equal Opportunity Act 2010* (Vic) (**EOA 2010**) by way of letter dated 30 January 2014.

2. Section 159 of the EOA 2010 empowers the Commission to seek leave to intervene in and be joined as a party to proceedings that involve issues of equality of opportunity, discrimination, sexual harassment or victimisation. These proceedings are claims of indirect discrimination and failure to provide reasonable adjustments by an educational authority and therefore clearly involve issues of discrimination and equality of opportunity.

3. The Tribunal granted the Commission leave to intervene in the application in its Orders dated 7 February 2014 and directed the Commission to file any written submissions by 26 February 2014.

4. As an intervener, the Commission will act as an independent party, exercising its functions under section 155 of the EOA 2010. These functions include

promoting and advancing the objectives of the EOA 2010 and to act as an advocate for the EOA 2010.

5. The Commission also has the right of intervention under section 40 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the **Charter**). That right can be exercised in proceedings before any court or tribunal in which a question of law arises that relates to the application of the Charter, or where a question arises with respect to the interpretation of a statutory provision in accordance with the Charter.

6. The Commission confirms that, in addition to intervening under the EOA 2010, it is also exercising its statutory right to intervene and be joined as a party in this proceeding under subsection 40(1) of the Charter, in order to make submissions relating to the Applicant's claim that the Respondents have breached subsection 38(1) of the Charter and provide guidance on the application of section 32 of the Charter.

The Commission's submissions

7. The Commission does not seek to make submissions on each issue in the proceedings, but seeks to assist the Tribunal by making confined submissions on the following specific areas:

   (a) An overview of the framework for considering claims.

   (b) The appropriate approach to indirect discrimination claims by the Tribunal in the education context, including a consideration of how to deal with multi-part claims such as the Applicant's.

   (c) The interpretation and application of section 40 of the EOA 2010 in the education context.

   (d) The relevance of compliance with the *Federal Disability Standards for Education 2005* (**Disability Standards**) outside of the context of subsection 40(4) of the EOA 2010.

   (e) The application and scope of the exceptions that the Respondents rely upon under the EOA 1995 and the EOA 2010.

   (f) The use of section 32 of the Charter when applying the statutory authority exception in section 69 of the EOA 1995 and section 75 of the EOA 2010.

   (g) The scope and application of the rights in section 8, subsection 10(b), subsection 17(2), and subsections 21(1) – (3) of the Charter.

(h) How to assess whether the Respondents have breached the Charter.

B. BACKGROUND

8. This is an application by RW (the **Applicant**) on behalf of her son HL as his next friend. The claim relates to the treatment of HL at Marnebeck School and the way that the school managed HL's disabilities put forward by the Applicant as severe autism spectrum disorder, a moderate intellectual disability, expressive language delay, receptive language delay and fine motor skills delay.[1]

9. The Particulars of Complaint filed in the Tribunal dated 19 July 2013 allege that the State of Victoria (**First Respondent**) and Karen Dauncy, Principal of Marnebeck School (**Second Respondent**, together the **Respondents**):

   (a) indirectly discriminated against HL on the basis of his impairment/disability under subsection 37(2)(a) and (c) of the *Equal Opportunity Act 1995* (**EOA 1995**)[2] and 38(2)(a) and (c) of the EOA 2010 through the imposition of the following requirements or conditions:[3]

   - under the EOA 1995, that HL meaningfully participate in his education without "reasonable adjustments";[4] and
   - under the EOA 2010, that HL meaningfully and safely undertake education without "reasonable adjustments";[5]

   (b) failed to make reasonable adjustments for HL under section 40 of the EOA 2010 to ensure that he could participate in and derive substantial benefit from his education;[6] and

   (c) failed to properly consider HL's human rights in breach of section 38 of the Charter and in doing so, unreasonably limited his rights in subsection 8(2) (freedom from discrimination), subsection 10(b) (freedom from cruel, inhuman or degrading treatment), section 12 (freedom of movement), subsection 17(2) (protection of a child in their best interests), and section 21 (right to liberty and security).[7]

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[1] Applicant's Particulars of Complaint (**POC**) p2, [9].
[2] POC p6, [16].
[3] POC p12, [22].
[4] POC p6, [16].
[5] POC p12, [22].
[6] POC p12, [25].
[7] POC p23 [38.5].

10. “Reasonable adjustments” is defined at paragraph 13 of the Particulars of Claim for the purposes of both the indirect discrimination claim and the claim under section 40 of the EOA 2010 as the following measures:

    (a) a full-time dedicated aide;

    (b) a formal communication method; and

    (c) a positive behaviour plan.

11. The Applicant clarified by way of letter from her advocate Ms Julie Phillips dated 14 January 2014 that the phrase “reasonable adjustments” as used in the formulation of her indirect discrimination claim is not intended to refer to or cross reference the obligation to make “reasonable adjustments” in section 40 of the EOA 2010, and is simply a phrase used as a shorthand for the different measures that the Applicant says were not provided to HL. In the same letter, Ms Phillips clarifies that the “positive behaviour plan” refers to a two way token board.

12. Finally, the Applicant also claims that the Second Respondent has authorised and assisted the above alleged discrimination under sections 105 and 106 of the EOA 2010, and is vicariously liable for the discrimination under section 109 of the EOA 2010.

C. FRAMEWORK FOR CONSIDERING CLAIMS

13. In determining the Applicant’s complaints, the Tribunal must consider each claim separately in light of the particular facts and circumstances of the case. This means the Tribunal should determine whether, on the balance of probabilities, each factual allegation is made out on the evidence provided and whether each allegation amounts to a breach of the EOA 1995, EOA 2010 or the Charter (as applicable according to the Particulars of Claim).

14. The Tribunal should also bear in mind that despite the Applicant using the term “reasonable adjustments” in her claim of indirect discrimination, she has informed the parties that she is not seeking to import the concept from section 40 of the EOA 2010 in that claim. However, the Respondents have referred to section 40 and 41 of the EOA 2010 in their Particulars of Defence in relation to the claim of indirect discrimination under the EOA 1995.[8]

[8] Particulars of Defence [16] and [19]

15. The Commission submits that in any event it would be improper for the Tribunal to do so, as there are separate tests for indirect discrimination and failure to provide reasonable adjustments by an educational authority (particularly in relation to reasonableness), both of which can separately amount to discrimination under section 7 of the EOA 2010. It is therefore irrelevant for the purpose of a claim of indirect discrimination under either the EOA 1995 or EOA 2010 if adjustments provided to HL complied with section 40(2) or (4) of the EOA 2010. Similarly, it is irrelevant to the EOA 1995 claim of indirect discrimination whether the adjustments were reasonable within the meaning of section 41(c) of the EOA 2010.[9]

16. The Tribunal must therefore consider the Applicant's claim of indirect discrimination separately from her claim of failure to provide reasonable adjustments, focusing on the tests provided in the legislation.

17. The Commission acknowledges the challenges in assessing claims relating to applicants with intellectual disabilities, Autism Spectrum Disorder, and behaviours which are a manifestation of those disabilities, but nevertheless the Tribunal should approach these types of claims in the same way as claims relating to physical disabilities. The Tribunal must take care that it doesn't expect a higher standard for particularisation of claims in relation to claims of indirect discrimination for non-physical disabilities.

D. DISCRIMINATION IN EDUCATION

18. Section 37 of the EOA 1995 and section 38 of the EOA 2010 prohibit discrimination against students or prospective students by educational authorities.

19. More specifically, subsection 37(2) of the EOA 1995 and subsection 38(2) of the EOA 2010 both provide that an educational authority must not discriminate against a student:

    (a) by denying or limiting access to any benefit provided by the authority;

    (b) by expelling the student; or

    (c) by subjecting the student to any other detriment.

[9] Particulars of Defence [16], [19]

20. The Applicant has alleged that the Respondents discriminated against her son by limiting or denying his access to a benefit in breach of subsection 37(2)(a) of the EOA 1995 and subsection 38(2)(a) of the EOA 2010.

21. The Commission submits that the term 'benefits' under subsection 38(2)(a) of the EOA 2010 encompasses access to educational activities and to education generally.

22. In *Turner v Department of Education and Training*,[10] the Tribunal found that 'class participation, access to the educational curriculum, and (generally) the opportunity to achieve educational potential' were 'benefits' provided by the State of Victoria for the purposes of subsection 37(2)(a) of the EOA 1995.[11]

23. The Applicant has also alleged that the Respondents discriminated against her son by subjecting him to a detriment under subsection 37(2)(c) of the EOA 1995 and subsection 38(2)(c) of the EOA 2010.

24. The term "detriment" is used in subsection 37(2)(c) of the EOA 1995 and subsection 38(2)(c) of the EOA 2010 in a broad manner, and is defined non-exhaustively in section 4 of the EOA to include humiliation and denigration. The Commission therefore submits that the term "detriment" should be given its ordinary meaning by the Tribunal.

25. In determining its ordinary meaning, the Tribunal may wish to consider the dictionary meaning of "detriment". The *New Oxford English Dictionary* defines detriment as 'the state of being harmed or damaged'. Similarly, the Online Macquarie Dictionary defines detriment as '(1) loss, damage or injury; and (2) a cause of loss or damage'.[12]

26. In order to succeed in a complaint of discrimination under section 37 of the EOA 1995 and section 38 of the EOA 2010, the Applicant must prove on the balance of probabilities that the Respondents have indirectly discriminated against HL, by limiting or denying his access to a benefit, or subjecting him to detriment. The test for indirect discrimination is considered below.

E. INDIRECT DISCRIMINATION

27. There are two different tests for indirect discrimination relevant to the Applicant's claim. It is important that the Tribunal does not conflate the two. By

[10] *Turner v Department of Education and Training* [2007] VCAT 873 (upheld on appeal).
[11] *Turner v Department of Education and Training* [2007] VCAT 873 [586]
[12] The Macquarie Dictionary Online (accessed February 2014), http://www.macquariedictionary.com.au

way of comparison, the Commission sets out the different tests below. The Commission also provides submissions to assist the Tribunal with the following matters:

(a) general principles for formulation of a requirement, condition or practice;

(b) how to approach composite conditions;

(c) determining the reasonableness of a condition; and

(d) interpreting a condition framed in the negative.

Indirect discrimination under the EOA 1995

28. Indirect discrimination occurs under subsection 9(1) of the EOA 1995 (for conduct prior to 1 August 2011) where a person imposes, or proposes to impose, a requirement, condition or practice:

(a) that someone with an attribute does not or cannot comply with;[13] and

(b) that a higher proportion of people without that attribute, or with a different attribute, do or can comply with;[14] and

(c) that is not reasonable.[15]

29. The Commission addresses each aspect of this test in turn below.

Subsection 9(1)(a)

30. In making the assessment of whether "a person with the attribute is unable to comply" under subsection 9(1)(a) of the EOA 1995, the Tribunal should clearly take into account the evidence of HL's personal circumstances and whether that shows whether he has been unable to comply. This has also been the approach of the Federal Court in considering claims of indirect discrimination under the *Disability Discrimination Act 1992* (Cth) (**DDA**), discussed below.

31. The Federal Court in *Travers v New South Wales*[16] held that a 'reasonably liberal' approach was required in assessing whether the complainant was able to comply with the relevant condition.[17] In both the Federal Court and in the Tribunal the jurisprudence indicates that a person will be "unable to comply"

[13] Section 9(1)(a), *Equal Opportunity Act 1995* (Vic) (**EOA 1995**).
[14] Section 9(1)(b), EOA 1995.
[15] Section 9(1)(c), EOA 1995.
[16] [2000] FCA 1565.
[17] [2000] FCA 1565 [17].

even if they can strictly or literally comply but they are at a "serious disadvantage" in doing so.

32. For example, in *Catholic Education Office v Clarke*[18] the Full Court noted that:[19]

> [T]he primary judge found that it was not realistic to say that Jacob could comply with the model of learning and support offered to him (at [49]). Had he been required to do so he would have faced serious disadvantages that his hearing classmates would not. In substance, Jacob could not meaningfully "participate" in classroom instruction without Auslan interpreting support. He therefore could not have meaningfully received classroom education in the College.

33. In *Hurst v State of Queensland*[20] the Full Federal Court unanimously held:[21]

> [I]t is sufficient to satisfy that component of s 6(c) that a disabled person will suffer serious disadvantage in complying with a requirement or condition of the relevant kind, irrespective of whether that person can "cope" with the requirement or condition. A disabled person's inability to achieve his or her full potential, in educational terms, can amount to serious disadvantage. In Tiahna's case, the evidence established that it had done so.

34. A similarly liberal approach was taken in *Beasley v Department of Education and Training*[22] :

> Could Dylan comply with this requirement or condition? In *Clarke* and *Sinnappan* it is made clear that compliance must be looked at in a meaningful way. The effect of these cases when applied to his case is that if Dylan was at a serious disadvantage with respect to compliance or could not comply in a similar way to his hearing peers or could not meaningfully comply with the requirement or condition then he will be taken not to be able to comply with the requirement or condition. I find this to be the case here.

35. In this case, *if* any serious disadvantage found by the Tribunal *resulted from the condition being imposed*, that will be sufficient to show that HL could not comply with the condition. For example, if the evidence showed that HL fell behind academically or developmentally, or had required significantly more restrictive behaviour management by his teachers, he would arguably have suffered serious disadvantage.

36. It is for the Tribunal to assess whether there is a causal nexus between the condition imposed and any serious disadvantage, as an ordinary exercise of fact-finding. The question of HL's experience on moving schools may provide information relevant to this consideration of causation. In *Beasley* the Tribunal used the fact that a student had *not* improved after moving to a new school where he had the support he was seeking, as indicating a lack of causal nexus

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[18] (2004) 138 FCR 121
[19] *Catholic Education Office v Clarke* (2004) 138 FCR 121 [66]
[20] (2006) 151 FCR 562
[21] *Hurst v State of Queensland* (2006) 151 FCR 562 [134]
[22] [2006] VCAT 187 [60]

between the alleged deficiencies at the earlier school and his lack of progress.[23]

37. Similarly if the Tribunal finds that HL now has some or all of the specific assistance he alleges was required, this may also provide information relevant to a consideration of causation. In *AB v Ballarat Christian College* (***AB***) the member noted that:[24]

> …to the extent that the applicant's case is that those measures were required to mitigate [the student's] behaviours, it is relevant that ['the student's] behaviour improved in 2013, without a formal PSG [Program Support Group/ Student Support Group], IEP [Individual Education Plan], or PBP [Positive Behaviour Plan] in place.

38. Conversely in this case, if the evidence shows that HL has improved since moving to his new school where he has the relevant support this may indicate the presence of a causal nexus between the disadvantage and the condition, which in turn would indicate that HL *could not comply with the condition* in the relevant sense.

39. This case may therefore be distinguishable from the situation in *Kiefel v State of Victoria*[25] where the applicant was *unable* to show that the particular additional assistance sought was necessary in a given case. Where an applicant is able to compare outcomes from "before" and "after", they will not be reliant on expert opinion about likely benefit or detriment and can report on actual results.

Subsection 9(1)(b)

40. The requirement under subsection 9(1)(b), to show that a higher proportion of people without the attribute, or with a different attribute do or can comply with the requirement, condition or practice, has been considered in the educational context. In *Clarke v Catholic Education Office*[26] Madgwick J found that the relevant base group in that case was 'either those students attending Year 7 at the College in 2000, or all students enrolling in classes in that year'.[27] The judge rejected the respondent's submission that the base group should be

[23] *Beasley v Department of Education and Training* [2006] VCAT 187 [114], [128], [129]
[24] *AB v Ballarat Christian College (Human Rights)* [2013] VCAT 1790 [191]
[25] [2013] FCA 1398
[26] (2003) 202 ALR 340
[27] *Clarke v Catholic Education Office* (2003) 202 ALR 340, 352 [46] ~~[64]~~

defined by reference to students with a similar disability to the applicant's.[28] This was confirmed on appeal by the Full Federal Court.[29]

Subsection 9(1)(c)

41. The reasonableness of the requirement, condition, or practice under the EOA 1995 depends on all the relevant circumstances of the case, including the consequences of failing to comply, the cost of alternative requirements, conditions or practices, and the financial circumstances of the person imposing or proposing to impose the requirement, condition or practice.[30]

Indirect discrimination under the EOA 2010

42. The test for indirect discrimination in section 9 of the EOA 2010 (for conduct occurring on or after 1 August 2011) now provides that indirect discrimination occurs if a person imposes, or proposes to impose, a requirement, condition or practice:

    (a) that has, or is likely to have, the effect of disadvantaging persons with an attribute; and

    (b) that is not reasonable.

43. As can be seen, the EOA 2010 has removed the technical difficulties associated with the test for indirect discrimination under the EOA 1995.[31] In particular, the EOA 2010 has:[32]

    (a) removed the requirement that the person claiming indirect discrimination must demonstrate that he or she cannot comply with the requirement, condition or practice, instead requiring the person to show that the requirement, condition or practice causes, or is likely to cause, him or her disadvantage;

    (b) removed the requirement that the person claiming indirect discrimination must establish that a higher proportion of people without his or her attribute can comply with the requirement, condition or practice.

44. However, the EOA 2010 goes further. Subsection 9(2) of the EOA 2010 now provides that the person who imposes, or proposes to impose the requirement,

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[28] *Clarke v Catholic Education Office (*2003) 202 ALR 340, 352 ~~[64]~~[48]
[29] *Catholic Education Office v Clarke* (2004) 138 FCR 121 [114]
[30] Subsection 9(2), EOA 1995
[31] Second Reading Speech for the Equal Opportunity Bill 2010, 5
[32] Explanatory Memorandum, Equal Opportunity Bill 2010, 13-14.

condition or practice, has the burden of proving that it is reasonable. This shifts the onus of proof regarding the reasonableness of the requirement, condition or practice from the person claiming indirect discrimination to the person who imposed or proposes to impose it.[33]

45. Subsection 9(3) of the EOA 2010 also extends the factors to be considered in determining whether a requirement, condition or practice is reasonable. This will be discussed in further detail below.

46. In considering the claim of indirect discrimination in the period after 1 August 2011, the Commission submits that the Tribunal should treat jurisprudence on the definition of indirect discrimination under the EOA 1995 with caution particularly in relation to those aspects of the test that have now been removed.

General principles for formulation of a requirement, condition or practice

47. The test for indirect discrimination requires a complainant to set out the 'requirement, condition or practice' that forms the basis of the complaint. This requirement is the same for the EOA 1995 and the EOA 2010.

48. The EOA 2010 does not define the terms 'requirement, condition or practice'. However, case law has established that the terms should be interpreted broadly,[34] and reasonably liberally.[35]

49. The Commission submits that jurisprudence from comparative jurisdictions provides useful guidance on the meaning of 'requirement, condition or practice'. In *Australian Iron & Steel Pty Ltd v Banovic*[36], the High Court held that: [37]

> [T]he words "requirement or condition" should be construed broadly so as to cover any form of qualification or prerequisite … Nevertheless, it is necessary in each particular instance to formulate the actual requirement or condition with some precision.

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[33] The Explanatory Memorandum for the *Equal Opportunity Bill 2010* explained that 'requiring the person imposing the requirement, condition or practice to demonstrate that it is reasonable in all of the circumstances reflects the fact that information necessary to make an assessment of what is reasonable is most likely to lie with the person who has imposed the requirement, condition or practice and not the person claiming indirect discrimination'.
[34] For example, see *Victoria v Turner* (2009) 23 VR 110, 124 [53].
[35] *Travers v New South Wales* [2000] FCA 1565 [17]; *Sluggett v Commonwealth of Australia* [2011] FMCA 609 [132].
[36] (1989) 168 CLR.
[37] *Australian Iron & Steel Pty Ltd v Banovic* (1989) 168 CLR 165, 185 in relation to a decision under the *Anti-Discrimination Act 1977* (NSW) per Dawson J; cited with approval in *Victoria v Turner* (2009) 23 VR 110, 124 [53].

50. Further, in circumstances where inaction by the respondent is alleged as part of the condition, requirement or practice, clarity and specificity is essential.[38]

51. The requirement, condition or practice does not have to be explicit. It may be implied in the circumstances.[39] Therefore, it is open to the Tribunal to find that the alleged requirements or conditions were imposed on the Applicant's son even if it was not done explicitly.

52. A complainant must also identify a requirement, condition or practice that is necessarily separate from the inherent nature of providing education.[40] In other words, the requirement, condition or practice must be something 'over and above' the inherent terms of providing education.

53. Equally, it is not appropriate to define a service 'so as to incorporate as part of that service something which, in reality, is a condition or requirement of it'.[41] In *Catholic Education Office v Clarke*,[42] the Full Court of the Federal Court warned that 'an alleged discriminator should not be permitted to evade the statutory prohibition or indirect discrimination by defining its services so as to incorporate the alleged requirement or condition'.[43]

54. The Commission submits, for example, that it may be an inherent requirement of the provision of education that a student participate in and receive classroom instruction. However, it may not be an inherent requirement that a student participates in and receives classroom instruction without the assistance of a one-on-one teacher's aide. This was the case in *Turner v Department of Education and Training*,[44] in which the Tribunal was satisfied that the respondent had imposed a requirement or condition that the complainant access her education without a full-time teacher's aide.

55. A number of cases have also accepted that the requirement that students participate in and receive instruction without the assistance of an Auslan

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[38] *Walker v State of Victoria* (2011) 279 ALR 284, 314-5; *Sievwright v State of Victoria* [2012] FCA 118 [178], *New South Wales v Amery* (2006) 230 CLR 174 at 212 (Kirby J), *Abela v State of Victoria* [2013] FCA 832 [94].
[39] *Waters v Public Transport Corporation* (1991) 173 CLR 349, 360.
[40] *Waters v Public Transport Corporation* (1991) 173 CLR 349, 361 (Mason CJ and Gaudron J).
[41] *State of Victoria v Bacon* [1998] 4 VR 269, 278.
[42] (2004) 138 FCR 121.
[43] (2004) 138 FCR 121, 143 [103]; citing *Waters v Public Transport Corporation* (1991) 173 CLR 349, 394 (Dawson and Toohey JJ).
[44] [2007] VCAT 873 [569].

interpreter is an additional requirement over and above the educational service being provided.[45]

Composite conditions

56. The Applicant has used a composite condition in the formulation of her claim for indirect discrimination.

57. The Tribunal is not a jurisdiction in which pleading rules apply unless the Tribunal specifically chooses to adopt them.[46] Where the issues before the Tribunal are well understood by the parties and the Tribunal, issues with the manner in which a claim has been plead should not prevent a matter from being determined on its merits. In *State of Victoria v Turner*[47] (***Turner***) Kyrou J notes:[48]

> Determination of claims on their merits is a key feature of proceedings before the tribunal and it would undermine this key feature if a party with a good claim on the merits were to fail before the tribunal on the basis of a technical "pleading" point where there is no breach of the rules of natural justice.

58. Further, the Tribunal is not bound by a complainant's formulation of a requirement, condition or practice. Rather, the Tribunal must consider all of the facts and circumstances to determine the true formulation or existence of a requirement, condition or practice.[49] In doing so the Tribunal may consider the constituent parts of a condition where a condition is divisible into a number of distinct parts.[50]

59. The Commission submits that, in the event that the rolled up term "reasonable adjustment" causes concern to the Tribunal in determining the Applicant's case, then it is within the Tribunal's jurisdiction to extract each measure contained within that composite term and consider them independently if necessary.

60. For example, the claim under the EOA 1995 could be expanded thus:

    (a) that HL meaningfully participate in his education without a one-on-one aide;

    (b) that HL meaningfully participate in his education without a formal communication method;

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[45] *Catholic Education Office v Clarke* (2004) 238 FCR 121; *Hurst v Queensland* (2006) 151 FCR 562.
[46] Section 98(1)(b) *Victorian Civil and Administrative Act 1998* (Vic).
[47] (2009) 23 VR 110.
[48] (2009) 23 VR 110, 125 [57]
[49] *State of New South Wales v Amery* (2006) ALR 196, 245 [208] (Callinan J).
[50] *Victoria v Turner* (2009) 23 VR 110 [60]-[61].

(c) that HL meaningfully participate in his education without a behaviour management plan in the form of a two-way token board and rewards system.

61. It is also open to the Tribunal to consider whether it would be appropriate to consider the evidence of whether these expanded conditions or requirements apply to individual subjects or parts of his education, as was the case in *Turner.*

Determining the reasonableness of a condition

62. Reasonableness is a feature of the indirect discrimination provisions in both the EOA 1995 and the EOA 2010, however the burden of proof has shifted. Under the EOA 1995 an applicant is required to show a condition "is not reasonable" and under the EOA 2010 a respondent is required to show a condition "is reasonable".

63. Subsection 9(3) of the EOA 2010 sets out a non-exhaustive list of factors to be taken into account in determining whether a requirement, condition or practice is reasonable, including:

(a) the nature and extent of the disadvantage resulting from the imposition, or proposed imposition, of the requirement, condition or practice;

(b) whether the disadvantage is proportionate to the result sought by the person who imposes, or proposes to impose, the requirement, condition or practice;

(c) the cost of any alternative requirement, condition or practice;

(d) the financial circumstances of the person imposing, or proposing to impose, the requirement, condition or practice; or

(e) whether reasonable adjustments or reasonable accommodation could be made to the requirement, condition or practice to reduce the disadvantage caused, including the availability of an alternative requirement, condition or practice that would achieve the result sought by the person imposing, or proposing to impose, the requirement, condition or practice but would result in less disadvantage.

64. In *Turner* the Victorian Supreme Court set out the legal principles which applied to the EOA 1995 and continue to apply to the test for indirect discrimination under section 9 of the EOA 2010, including that:[51]

(a) The test of reasonableness is less demanding than one of necessity, but more demanding than one of convenience. The criterion is an objective one, requiring the Tribunal to weigh the nature and extent of the discriminatory effect, on the one hand, against the reasons advanced in favour of the condition, on the other.

(b) The Tribunal must consider all the circumstances of the case in determining the reasonableness of the condition. Those circumstances include:

i. All the circumstances set out in the EOA which are not exhaustive;

ii. The position of the respondent as well as the complainant;

iii. The financial or economic circumstances of the respondent, including the cost of imposing the condition and the cost of not imposing it;

iv. The availability of an alternative condition which is equally efficacious, and its cost;

v. The presence of a logical and understandable basis for the condition; and

vi. Where the respondent is a government or statutory body, policy objectives.

(c) Where the respondent has a policy or program to deal with the type of disadvantage alleged by the complainant, if the Tribunal decides that the policy is a logical and understandable response to that type of disadvantage, this is an important consideration on the question of whether the alleged discriminatory condition is not reasonable.

(d) Whether a condition is not reasonable is a question of fact for the Tribunal to determine.

[51] *Victoria v Turner* (2009) 23 VR 110, 135-136, paraphrasing [100]

Interpreting a condition framed in the negative

65. Under section 11(b) of the EOA 1995 and EOA 2010, it is irrelevant whether discrimination occurs because of a person doing an act or *omitting* to do an act. This means that where sufficient detail is provided by the Applicant, it is possible to frame a claim of indirect discrimination in the negative, that is, by reference to something that the Respondent has failed to provide.

66. The following are examples of cases where the courts have considered a requirement, condition or practice that is framed in the negative:

    (a) In *Turner* the Supreme Court of Victoria upheld the Tribunal's finding that the Department of Education and Training had imposed a requirement or condition that the complainant access her education without a full-time teacher's aide. This matter was heard under the EOA 1995.

    (b) In *Walker v State of Victoria*,[52] the Federal Court of Australia accepted that it was a requirement or condition under section 6 of the DDA that the complainant access his education without one-to-one assistance in his academic subjects.

    (c) In *Catholic Education Office v Clarke*,[53] the Full Court of the Federal Court found that it was open to the Federal Court to find that a requirement or condition under section 6 of the DDA had been imposed on a profoundly deaf student to participate in and receive classroom instruction without the assistance of an Auslan interpreter.

    (d) In *Hurst v State of Queensland*,[54] the Full Court of the Federal Court of Australia found that the State of Queensland imposed a requirement under section 6 of the DDA that a deaf student be taught in English (including signed English) without the assistance of an Auslan teacher, or an Auslan interpreter.

67. In light of this authority, including that of the Supreme Court of Victoria which binds this Tribunal, the Commission submits that in the Victorian education context, a "requirement or condition" can be framed in the negative and can relate to services not provided by the Respondents.

[52] (2011) 279 ALR 284, 323 [249].
[53] (2004) 138 FCR 121.
[54] (2006) 151 FCR 562.

68. However, the Commission notes that conditions framed in the negative are not without difficulty and the courts have taken different approaches in considering whether these conditions framed in the negative are appropriately neutral or applicable to a group of people.

69. For example, in *Abela v State of Victoria*[55] Justice Tracey considered a negatively-framed condition that the applicant access his education "without the assistance the applicant required" was not a properly formulated condition under section 6 of the DDA. This was because it was not sufficiently particularised or 'facially neutral' but rather, was directed at alleged deficiencies on the part of the Department in response to the applicant's particular disability-related needs.[56] The assistance sought included "significant if not full time, one to one assistance in academic subjects", modified curriculum, and an individual education plan.

70. The Commission also notes that the Tribunal has considered claims of indirect discrimination where the condition, requirement or practice has been framed in the negative, in relation to other areas of public life. For example, in *Hall-Bentick v Greater Union Organisation Pty Ltd*[57] the Tribunal upheld a claim that a cinema had indirectly discriminated against an applicant in a wheel chair, by imposing a requirement that to see films at the Russell Cinemas, a person needed to be able to get up and down stairs. In considering the breach the Tribunal focused on the general requirement imposed and the reasonableness of that requirement generally, not what was specifically required for the applicant to access the cinema.[58]

F. REASONABLE ADJUSTMENTS

71. Section 40 of the EOA 2010 applies where a person with a disability can show they require adjustments to be made by an educational authority, in order for them to participate in or continue to participate in or derive or continue to derive any substantial benefit from an educational program.[59]

72. Subsection 40(2) of the EOA 2010 provides that an educational authority *must* make reasonable adjustments for a person with a disability, unless the person could not participate in or continue to participate in or derive or continue to

[55] [2013] FCA 832
[56] [2013] FCA 832 [88], [92]
[57] [2000] VCAT 1850
[58] *Hall-Bentick v Greater Union Organisation Pty Ltd* [2000] VCAT 1850 [82], [91]-[107].
[59] Subsection 40(1), EOA 2010

derive any substantial benefit from an educational program even after the adjustments are made.

73. Member Wentworth in *AB* stated that section 40:[60]

> …undoubtedly requires a school to consider how funds and other resources might be used to make adjustments that will increase and improve participation by a student with a disability in education, and consider whether reasonable adjustments can facilitate the student's participation in an educational program, and/or derive a substantial benefit from it.

74. Section 40 is a stand-alone provision, breach of which amounts to discrimination without reference to the tests for direct or indirect discrimination in sections 8 and 9 of the EOA 2010.[61]

Reasonableness of required adjustment

75. Subsection 40(3) sets out that all relevant facts and circumstances must be considered by the Tribunal in ascertaining whether a required adjustment is reasonable, and sets out a non-exhaustive list of matters which the Tribunal must consider including:

(a) the person's circumstances, including the nature of their disability;

(b) the nature of the adjustment required to accommodate the person's disability;

(c) the effect on the person of making the adjustment, including the effect on the person's ability to achieve learning outcomes, participate in courses or programs, and to work independently;

(d) the effect on the educational authority, staff and other students of making the adjustment, including the financial impact of making the adjustment, and the number of people who would benefit from or be disadvantaged by making the adjustment;

(e) the consequences for the educational authority of making the adjustment;

(f) the consequences for the person of not making the adjustment;

(g) any relevant action plan made under the DDA or the *Disability Act 2006* (Vic).[62]

[60] *AB v Ballarat Christian College (Human Rights)* [2013] VCAT 1790 [168].
[61] Section 7(1)(b), EOA 2010.
[62] Subsection 40(3), EOA 2010.

76. Section 40 requires an educational authority to balance varying interests. None of these factors are determinative on their own and there may be other factors that are relevant to a particular case.[63] In *AB,* Member Wentworth noted that: [64]

> …a school is not required to use all available funds and all available teacher time in order to make adjustments for one student. Nor is it required to do so to the detriment of the needs of other students, and the ability of teachers to use their time, expertise and energy towards the education of all the students in their class.

77. Whilst the Commission agrees with this statement, it submits that the Tribunal should also give due weight to the evidence regarding the needs of the student, the effect on the student of making the adjustments and the benefit they would derive from those adjustments, and whether the adjustments will facilitate the student's participation in their education. This means that in an overall budgetary context, the measures should not be ruled out simply because they will cost money or may require the reallocation of budget. This would undermine the operation of section 40 and the full range of factors to be considered.

78. Further, in *AB,* Member Wentworth was commenting on the issues that were relevant in the context of an individual non-government school respondent. The Commission submits that where the respondent is the State of Victoria in respect of the Department of Education and Early Childhood Development, the focus must be on the resources of the Department and not simply on the resources of an individual school.

79. The fact that the Department is a public authority under the Charter, and has an obligation to give proper consideration to, and act consistently with, human rights, will also be relevant to any consideration of *what is reasonable in all the circumstances*. The Department's obligations under the Charter (discussed below) will therefore be relevant to the application of section 40.

Breach of subsection 40(2) obligation

80. An educational authority may make adjustments for a person with a disability in a number of ways. However, this will depend on the particular circumstances of

[63] Explanatory Memorandum, *Equal Opportunity Act 2010*, cl 40.
[64] *AB v Ballarat Christian College (Human Rights)* [2013] VCAT 1790 [172].

the case.[65] By way of guidance, section 40 includes the following examples of reasonable adjustments for a person with a disability:

(a) providing a teacher's aide or particular software packages for computers; or

(b) moving a particular course or event from an inaccessible venue to an accessible venue.

81. Therefore, in order to ascertain whether there has been a breach of the obligation in subsection 40(2) for an educational authority to provide reasonable adjustments, the Tribunal must consider whether there is evidence provided by the Applicant which:

(a) shows how the adjustments sought would have been effective measures to accommodate HL's disabilities and assist him to participate in or derive any substantial benefit from an educational program; and

(b) addresses the relevant facts and circumstances for reasonableness under subsection 40(3) outlined above.

82. In summary, in considering subsection 40(2), the Tribunal must not make unsupported assumptions and inferences about HL, his disabilities or his needs – or conversely the impact on the educational authority, staff, other students or any other person.[66] However, to the extent that any witness (regardless of their qualification) provides an opinion as to whether an adjustment was reasonable, it remains a question for the Tribunal to decide weighing the factors in subsection 40(3).[67]

Role of the Disability Standards for Education 2005

83. The federal Disability Standards were made under the DDA to ensure that students with disabilities are able to access and participate in education on the same basis as other students.

84. The Applicant has raised the Disability Standards in her particulars of claim, apparently to address any claim by the Respondents that they have complied with the Disability Standards and are therefore not required to make reasonable adjustments, in accordance with subsection 40(4) of the EOA 2010.

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[65] Explanatory Memorandum, *Equal Opportunity Act 2010*, cl 40.
[66] *Slattery v Manningham CC (Human Rights)* [2013] VCAT 1869 [144].
[67] *AB v Ballarat Christian College (Human Rights)* [2013] VCAT 1790 [52], [54].

85. Subsection 40(4) of the EOA 2010 provides:

> An educational authority is not required to make an adjustment under subsection 2 to the extent that the educational authority has complied with or has been exempted from compliance with, a relevant disability standard made under the Disability Discrimination Act of the Commonwealth in relation to the subject matter of that adjustment.

86. The Respondents have relied upon compliance with the Disability Standards but further say:

(a) the Tribunal has no jurisdiction to determine any allegation that the Disability Standards have been breached, and

(b) the Disability Standards have no role to play in section 40 other than in relation to providing a complete defence under subsection 40(4) of the EOA 2010.

87. The Commission agrees that the Tribunal does not have jurisdiction to hear and determine an allegation that the Disability Standards have been breached. Section 32 of the DDA makes it unlawful for a person to breach the Disability Standards. Such a claim must therefore be made through the Federal anti-discrimination system governed by the *Australian Human Rights Commission Act 1986*.

88. However, the Commission considers that the Tribunal is able to consider evidence of compliance with the Disability Standards outside of subsection 40(4). The Commission submits that where there is evidence that shows a respondent has not fully complied with the Disability Standards the Tribunal may also consider the extent to which there has been non-compliance by a respondent in determining whether an adjustment is reasonable under subsection 40(3) in "all relevant circumstances".

89. The purpose of subsection 40(4) is to ensure that section 40 does not place a higher burden on an educational authority than under the DDA in providing adjustments for students with disabilities. It is not intended to limit the matters that can be considered in assessing reasonableness under subsection 40(3).

90. The Tribunal can also consider the Disability Standards to assist in determining whether the adjustment sought is one that would facilitate the student's participation in an educational program, and/or derive a substantial benefit from it. This was the approach taken in *AB* where those standards are discussed. The member noted that the Disability Standards were relevant to the

consideration of section 40, and included "a helpful discussion of reasonable adjustments". [68]

G. STATUTORY AUTHORITY EXCEPTION

91. If the Tribunal is satisfied that the Respondents have discriminated against the Applicants, the Tribunal must then consider whether an exception applies to the conduct of the Respondents. The Respondents bear the onus of establishing that any exception applies based on the evidence.[69]

92. In construing the exceptions in the EOA, it is trite that the Tribunal should start from the general position that exceptions should be construed narrowly and in a manner that least restricts the rights protected by the relevant legislation.[70] It will sometimes be necessary to interpret legislation restrictively 'in order to preserve the scope of the beneficial effect of the legislation'.[71]

93. It is also well accepted that the Tribunal must take into account the beneficial nature of equal opportunity legislation, as well as the express objectives in both the EOA 1995 and the EOA 2010 to eliminate discrimination to the greatest possible extent.[72] This is the accepted approach to the interpretation of beneficial legislation:[73]

> If an Act is intended to benefit a particular person or class of persons, it is preferable for any ambiguity to be resolved in favour of the intended beneficiary.

94. The Respondents have relied on section 69 of the EOA 1995 and section 75 of the EOA 2010 in its Particulars of Defence (only the EOA 2010 section will be referred to for reasons of brevity).[74] These provisions provide an exception to unlawful discrimination for "things done with statutory authority", and each provide:

> (1) A person may discriminate if the discrimination is necessary to comply with, or is authorised by:
>
> (a) a provision of an Act, other than this Act;

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[68] *AB v Ballarat Christian College (Human Rights)* [2013] VCAT 1790 [180]
[69] Section 13(2), EOA 2010 and section 12, EOA 1995 (as interpreted in *Ellis v Mount Scopus Memorial College* [1996] VADT 16; *Re Hall v Victorian Amateur Football Association* (1999) 15 VAR 183; *Colyer v State of Victoria* (1997) 12 VAR 175; *South v RVBA* [2001] VCAT 207).
[70] *H J Heinz Company Australia Pty Ltd v Turner* [~~1988~~1998] 4 VR 872, 882. Also see *Wojcik v Roads Corporation* [1997] VADT 75.
[71] Pearce & Geddes, *Statutory Interpretation in Australia 7th edition* at [9.5].
[72] *Waters v Public Transport Corporation* (1991) 173 CLR 349, 359 (per Mason CJ and Gaudron J), 394 (per Deane and Toohey JJ)
; Also see *Tanevski v Fluor Australia Pty Ltd* [2008] NSWADT 217 [75]-[78].
[73] Pearce & Geddes, *Statutory Interpretation in Australia 7th edition* at [9.4].
[74] Particulars of Defence [47]-[48]

(b) an enactment, other than an enactment under this Act.

(2) It is not necessary that the provision refer to discrimination, as long as it authorises or necessitates the relevant conduct that would otherwise constitute discrimination.

95. The effect of section 75 is that any discriminatory conduct authorised by another statutory provision will be deemed not unlawful, under section 13 of the EOA 2010.

96. However, in applying section 75 the Tribunal should bear in mind:

(a) it is not enough if a statutory provision gives a broad discretion or simply permits discrimination in a general sense, more is required for the discrimination to be considered 'necessary to comply with, or… authorised by' the legislative provision;[75]

(b) it is necessary for there to be proportionality between the statutory provision and the means used to achieve what is authorised by that provision;[76]

(c) it is necessary that any provision purporting to authorise discrimination be framed in sufficiently specific language rather than general language;[77]

(d) a decision-maker is obliged to interpret the provision relied upon, compatibly with human rights, if any of the rights protected by the Charter are relevantly engaged.[78]

97. The first of these principles is discussed in *Waters v Public Transport Corporation*[79] (***Waters***) where Dawson and Toohey JJ note in relation to the provisions of another discrimination statute that:[80]

> If it were necessary for the respondent to commit acts of discrimination in order to carry out the specific directions of the Minister for Transport or the Director-General of Transport then, by virtue of s 39(e)(ii), those acts would not be unlawful, but if there were a discretion as to the manner in which the specific directions might be carried out which offered a choice between discrimination and no discrimination, the adoption of discriminatory means would be afforded no protection by s 39(e)(ii).

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[75] *Waters v Public Transport Corporation* (1991) 173 CLR 349, 389-390 (Dawson and Toohey JJ).
[76] *Slattery v Manningham CC (Human Rights)* [2013] VCAT 1869 [138] relying on *H J Heinz Company Australia Pty Ltd v Turner* [1988] 4 VR 872.
[77] *Waters v Public Transport Corporation* (1991) 173 CLR 349, 368-369.
[78] *Victoria Police Toll Enforcement & Ors v Taha & Anor* [2013] VSCA 37 [187].
[79] (1991) 173 CLR 349.
[80] *Waters v Public Transport Corporation* (1991) 173 CLR 349, 389-390.

98. The second of these principles is discussed in *H J Heinz Company Australia Pty Ltd v Turner*[81] ***(Heinz)*** where President Winneke notes:[82]

> The only question is whether it is authorised by or under a law of Victoria. Where an employer has introduced, pursuant to obligations imposed on it by the law of Victoria, a regime of work practices *appropriately designed to secure*, inter alia, the health and safety of a category of employees, it must, in my view, be authorised by the law to implement that regime without concern as to whether such implementation is operating discriminately or not. (emphasis added)

99. The President's discussion indicates that the concepts of authority or necessity in section 75 (and its predecessor) must be construed narrowly, so that the discriminatory conduct exempted by the provision is "appropriately designed to secure" something authorised or made necessary by a statutory provision.

100. The third of these principles is discussed in the judgment of Mason CJ and Gaudron J in *Waters*, which provides that:[83]

> It is one thing to provide that the Act should give way to an express direction contained in an actual provision of another Act or in a statutory instrument. It is quite a different thing to provide, in effect, that the Act shall give way to any subordinate direction, no matter how informal, to which a provision of any other Act requires obedience.

101. The fourth of these principles is discussed in the judgment of Tate JA in *Victoria Police Toll Enforcement & Ors v Taha & Anor* in the context of Victorian infringements legislation:[84]

> Applying s 32 as at least analogous to the principle of legality with an extended sphere of application invites close attention to the particular right said to be engaged by the statutory provision that falls for interpretation. If a statutory provision is to be interpreted in a manner that does not abrogate or curtail a right, unless 'such intention is clearly manifested by unambiguous language, which indicates that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment', it is necessary to determine the scope of ay relevant right to ensure that the interpretation to be adopted does not intrude upon it. Unless the necessary intention to abrogate or curtail the right can be found, *a construction must be adopted which is compatible with the continued enjoyment of the right.* (emphasis added)

***Occupational Health and Safety Act 2004* (OHS Act)**

102. In their Particulars of Defence, the Respondents rely on the OHS Act as an Act under section 75 authorising any discriminatory conduct found by the Tribunal to have occurred. However, the Respondents do not particularise which sections of the OHS Act they specifically rely on.

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[81] [1988] 4 VR 872.
[82] *H J Heinz Company Australia Pty Ltd v Turner* [19~~89~~98] 4 VR 872, 882.
[83] *Waters v Public Transport Corporation* (1991) 173 CLR 349, ~~368-~~369.
[84] [2013] VSCA 37 [195].

103. The Commission makes the following submissions, presuming that the Respondents will rely on the duties in sections 21 and 23 of the OHS Act to:

(a) so far as is reasonably practicable, provide and maintain for employees of the employer a working environment that is safe and without risks to health (section 21); and

(b) ensure so far as is reasonably practicable, that persons other than employees of the employer are not exposed to risks to their health or safety arising from the conduct of the undertaking of the employer (section 23).

104. The Commission agrees that the OHS Act may in certain situations provide the basis for a respondent relying on the exception in section 75 of the EOA 2010 whereby the health and safety duties necessitate differential treatment in order to ensure a safe workplace or minimise risks to health and safety.[85] The four principles set out in paragraph 96 must be considered in determining whether the OHS Act provides a statutory exception.

105. The assessment of the Respondents obligations under section 21 of the OHS Act will involve similar consideration to those arising under section 86 of the EOA 2010 which specifically deals with health and safety issues (discussed below). The sections should operate in parallel when it comes to the obligations in section 21 of the OHS Act. In the same way that section 86 requires "reasonable necessity", measures taken under the OHS Act must be "appropriately designed to secure" the Respondents' obligations. This approach was confirmed by the Tribunal in *Slattery v Manningham City Council*[86] (***Slattery***).

106. In *Slattery,* a regime established by a city council to ban the applicant from all council-owned buildings was not found to be appropriately designed to secure the health and safety of employees, because it had not been appropriately designed for the applicant to provide a "commensurate measure of protection from an identified level of risk".[87] In other words, the action taken to ban Mr Slattery was not specifically required in order, as far as is reasonably practicable, to provide and maintain a working environment that was safe and without risks to health.

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[85] See e.g. *H J Heinz Company Australia Pty Ltd v Turner* [1988] 4 VR 872, 882.
[86] [2013] VCAT 1869.
[87] *Slattery v Manningham CC (Human Rights)* [2013] VCAT 1869 [138].

107. In these proceedings, the Respondents have not particularised the specific risk that HL's disability or behaviours posed to staff, students and HL himself, which warranted their actions. For the Respondents to succeed in relying on the OHS Act as giving them specific statutory authority for their conduct, they will need to carefully articulate these matters.[88] They will need to provide evidence to show, on the balance of probabilities, that the actions taken were appropriately designed to secure the health and safety of its employees and of HL, in direct response to the identified level of risk HL's behaviours posed to staff and himself.

Education and Training Reform Regulations 2007

108. Section 75 not only applies to provisions of other Acts which authorise or necessitate discriminatory conduct (section 75(1)(a)) but it also applies to 'an enactment, other than an enactment under this Act' which does so (section 75(1)(b)). 'Enactment' is defined in section 4 of both the EOA 1995 and EOA 2010 as 'a rule, regulation, by-law, local law, order, Order in Council, proclamation or other instrument of a legislative character'.

109. The Respondents rely in these proceedings on Regulation 15 and say this enactment provides authority for any discrimination arising out of any restraint of HL which is found to have taken place.

110. Regulation 15 of the *Education and Training Reform Regulations 2007* is an "enactment" that provides that:

> A member of staff of a Government school may take any reasonable action that is immediately required to restrain a student of the school from acts or behaviour dangerous to the member of staff, the student or any other person.

111. As with ordinary legislation, the four principles set out in paragraph 96 must be considered in determining whether Regulation 15 provides a statutory exception.

112. Given that Regulation 15 purports to authorise the use of restraint against children, the rights in sections 8, 10(b), 17 and 21 of the Charter (discussed below) are engaged by the Regulation. If it is possible to interpret Regulation 15 so that it does not curtail those rights, section 32 of the Charter requires that such an interpretation must be adopted. Further, if there is no "constructional choice" that does not curtail rights at all but there is a "constructional choice"

[88] Section 13(2), EOA 2010.

about the extent to which legislation interferes with rights, the interpretation that least interferes with rights should be adopted.[89]

113. The Commission submits that additional care must be taken when applying the statutory authority exception to "enactments" that are not Acts of Parliament, because of the separation of powers issues involved when an enactment made by the executive purports to override legislation enacted by Parliament. For example, subordinate legislation may be invalid if it is repugnant to Acts other than that which empowered it, because it would involve the executive attempting to override the will of the Parliament expressed in the other Act.[90] Whilst the issue of repugnancy is not raised here because of the operation of section 75, enactments should not be interpreted broadly when applying section 75 in the recognition that this favours executive discretion at the cost of parliamentary supremacy.

114. Because it is a statutory instrument, the Tribunal must consider whether Regulation 15 of the *Education and Training Reform Regulations 2007* is able to authorise discriminatory conduct in circumstances where the head legislation, the *Education and Training Reform Act 2006* provides no specific authority for such discriminatory conduct.

115. The High Court decision in *Waters* considered a legislative requirement under the *Transport Act 1983 (Vic)* (***Transport Act***) to carry out directions of the Minister. The question was whether directions given by the Minister could authorise discrimination under the equivalent of section 75.

116. McHugh J directly considers the separation of powers issues involved when this exception is applied to non-parliamentary enactments or pronouncements:[91]

> These propositions, though not directly expressed in the *Transport Act*, are self-evident. They are self-evident because, under a government of laws and not of men and women, it is axiomatic that, in the absence of express word or necessary intendment, Parliament does not intend the recipient of the power to authorize a Minister, statutory body or government official to break the general law of the land… in the end the question is whether, in enacting s 31(1), Parliament intended that the Minister could give directions which have the effect of converting an otherwise unlawful act of the Corporation into a lawful act… in the absence of a plain intention, Parliament, in conferring such a power, also does not intend the recipient of the power to authorize acts which, but for the direction would be unlawful… Parliament cannot be taken to have authorized the

[89] *Victoria Police Toll Enforcement & Ors v Taha & Anor* [2013] VSCA 37 [192] (Tate JA).
[90] *Northern Territory v G P A O* (1999) 196 CLR 553 [38] (Gleeson CJ and Gummow J), [202] (Kirby J).
[91] *Waters v Public Transport Corporation* (1991) 173 CLR 349, 413-4.

> minister to give directions to the Corporation to perform acts which but for the directions would be a breach of the Act. The present case is altogether different from one where the Minister has a statutory duty to give the direction.

117. The question for the Tribunal, consistent with the approach of McHugh J in *Waters*, is whether in conferring the power to make regulations Parliament intended the recipient of the power to authorise acts which would otherwise be unlawful discrimination. The Tribunal can only find such an intention from "express word or necessary intendment" in the legislation.

118. The *Education and Training Reform Regulations 2007* were made on 26 June 2007 by the Governor in Council under sections 5.10.1 and 5.10.2 of, and Schedules 5 and 8 to, the *Education and Training Reform Act 2006* and came into operation on 1 July 2007.

119. Section 5.10.1 of the *Education and Training Reform Act 2006* provides for the making of regulations and section 5.10.2 outlines the scope of the regulations that are empowered to be made under the Act. Although section 5.10.2 makes very detailed provision for the manner in which regulations may operate and apply in a *differential* manner (for example they may be of general or limited application, and may differ according to time, places or circumstances), the section contains no "express word or necessary intendment" to indicate that regulations empowered by section 5.10.1 may be discriminatory. It would therefore be *ultra vires* for a regulation to be made under section 5.10.1 that was discriminatory.

120. Section 22 of the *Interpretation of Legislation Act 1984* (Vic) requires that subordinate legislation be construed so as not to exceed the power to make the instrument conferred by the Act under which it is made.

121. Because section 5.10.1 does not authorise the making of discriminatory regulations, Regulation 15 *must be construed* so as not to authorise unlawful discrimination and may therefore not provide the basis of an exception under section 75.

122. Alternatively, if the Tribunal considers the *Education and Training Reform Act 2006* does provide for the making of discriminatory regulations, the Tribunal must then turn its mind to the scope of Regulation 15 and whether the Respondents have acted in accordance with Regulation 15 in taking action to restrain HL (if that action is proven to have occurred).

123. The Commission submits that this exercise will involve a consideration of the evidence to ascertain in each instance restraint is found to have been used:

(a) whether the action was *reasonable* in the circumstances; and

(b) whether that action was *immediately required*; and

(c) whether HL's behaviour was *dangerous* to a member of staff, to HL, or any other person.

124. The onus is on the Respondents to prove these matters on the balance of probabilities, in accordance with section 13(2) of the EOA 2010 and the jurisprudence in relation to section 12 of the EOA 1995.[92]

125. The Commission submits if the Tribunal finds that these factors are not each met in each circumstance restraint is found to have been used, then the Respondents will not have acted within the powers granted by Regulation 15, and as a result that regulation will not "authorise" that particular action under section 75 of the EOA 2010.

126. Finally, the action or decisions of the Respondents may be unlawful because they breach section 38 of the Charter, as will be discussed below. As a matter of public policy an unlawful decision by a public authority should not be considered "reasonable" under Regulation 15 because it should never be considered reasonable for public authorities to act unlawfully.

H. HEALTH AND SAFETY EXCEPTION

127. In the alternative, the Respondents seek to rely on the exception for protection of health, safety and property contained in section 80 of the EOA 1995 and section 86 of the EOA 2010 (the latter will be referred to for reasons of brevity) in relation to the protection of the health and safety of HL or others.

128. These sections provide that a person may discriminate against another person on the basis of disability/impairment or physical features if the discrimination is reasonably necessary:

(a) to protect the health or safety of any person (including the person discriminated against) or of the public generally; or

[92] *Ellis v Mount Scopus Memorial College* [1996] VADT 16; *Re Hall v Victorian Amateur Football Association* (1999) 15 VAR 183; *Colyer v State of Victoria* (1997) 12 VAR 175; *South v RVBA* [2001] VCAT 207.

(b) to protect the property of any person (including the person discriminated against) or any public property.

129. The Respondents say in their Particulars of Defence that if their conduct was discriminatory, it was warranted and justified by the duty that the First Respondent has to protect the health and safety of its employees and/or HL. As with the reliance on the OHS Act, the First Respondent has not yet particularised its reliance on this exception.

130. The health and safety exception was considered in *Slattery,* with Senior Member Nihill relying on the test set out in *Hall v Victorian Amateur Football Association*[93] (***Hall***) to determine whether action is "reasonably necessary" to protect health and safety under section 86 of the EOA 2010.[94]

131. In *Hall* the question of what is "reasonably necessary" was considered in the context of an HIV positive person being banned from playing football. The Tribunal held that the test was an objective one of whether the ban was 'on a reasonable judgment, necessary for that purpose'.[95] In that case the Tribunal held that:[96]

> Whilst we conclude that not all risk to the health and safety of the class in question from transmission from Matthew Hall to other players can be excluded if Matthew Hall is permitted to play football, the risk is so low (and can be further reduced by the proper application of VAFA policy) that it is not "reasonably necessary" to discriminate against him by banning him from playing football.
>
> In our view the health and safety of the class in question is better protected by an understanding of the nature of the very low risk and by an understanding of and the implementation of the proper procedures to be taken in further reducing such risk, than by banning Hall. The Respondent has not satisfied us that sec 80(1) applied in the circumstances of this case.

132. The following questions from *Hall* must be considered in order to decide whether or not, in all the circumstances, the conduct of the Respondents was reasonably necessary to protect the health and safety of staff at the school and HL:[97]

1. What is the class whose health and safety are to be protected? What is the size of that class?

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[93] (1999) 15 VAR 183;~~(1999) EOC 92-997~~.
[94] *Slattery v Manningham CC (Human Rights)* [2013] VCAT 1869 [127].
[95] *Hall v Victorian Amateur Football Association* ((1999) 15 VAR 183, 186.~~1999) EOC 92-997 [79361], p 4.~~
[96] *Hall v Victorian Amateur Football Association* (1999) 15 VAR 183, 196-197. ~~(1999) EOC 92-997 [79369].~~
[97] *Hall v Victorian Amateur Football Association* (1999) 15 VAR 183, 186-187. ~~(1999) EOC 92-997 [79362].~~

2. What is the risk from which that class is being protected? What is the magnitude of that risk? What are the consequences to the class to be protected if the risk becomes reality?
3. To what degree will the ban protect the health and safety of the class? Will it eliminate or reduce the risk to the health and safety of that class?
4. Does the ban contain within itself any risk to the health and safety of the class?
5. Are there measures currently in place to protect the health and safety of the class from that risk? Are they effective to protect the health and safety of that class from that risk?
   Will the ban give that class a protection from that risk of a kind or degree that those current measures do not give?
6. Are there non-discriminatory alternatives that will give the class protection from the risk that is equal to or better than the ban? If there are, is there any reason why it may be impracticable for the respondent to adopt these alternatives?
7. Did the respondent, at the time of the ban, believe that the ban was reasonably necessary to protect the health and safety of the class? On what information or enquiries was this belief based? What information on the matter was reasonably available to the respondent?

133. A consideration of what is "reasonably necessary" under section 86 of the EOA 2010 will involve a proportionality analysis.[98] In undertaking this analysis, the Commission submits that the Tribunal must determine whether there is evidence that the health or safety of anyone at school was in fact affected by HL's conduct. Evidence of being offended, angered, or frustrated by a person's conduct has been held by this Tribunal as insufficient to show a risk to health and safety.[99]

134. As with the OHS Act under the statutory authority exception, proportionate and tailored strategies, informed by research and training, that are regularly reviewed and provide appropriate and commensurate protection from an identified level of risk, may be considered reasonable. Disproportionate, blunt, broad or insufficiently tailored measures may not be.[100]

135. Finally, the action or decisions of the Respondents may be unlawful because they breach section 38 of the Charter, as will be discussed below. As a matter of public policy an unlawful decision by a public authority should not be considered "reasonable" or "reasonably necessary" under section 86 of the EOA 2010 because it should never be considered reasonable, or reasonably necessary, for public authorities to break the law.

I. CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES

136. The Charter will be relevant to the extent that any of the human rights protected in the Charter are potentially limited by the decisions or actions of the

[98] *Hogan v Hinch* (2011) 243 CLR 506 [32]; *Slattery v Manningham CC (Human Rights)* [2013] VCAT 1869 [138].
[99] *Slattery v Manningham CC (Human Rights)* [2013] VCAT 1869 [130].
[100] *Slattery v Manningham CC (Human Rights)* [2013] VCAT 1869 [166].

Respondents. If any Charter rights are potentially limited, the Tribunal should consider:

(a) the scope of the right and whether the right has been limited by any *act* of the Respondents;

(b) whether any such limit on human rights is reasonable in accordance with the test set out in subsection 7(2) of the Charter;

(c) whether the Respondents gave proper consideration to human rights before making *decisions* that potentially limited them.

137. Section 38 of the Charter makes it unlawful to "act inconsistently" with Charter rights, and to fail to give "proper consideration" to Charter rights. When considering section 38 unlawfulness, the current jurisprudence of the Supreme Court indicates that subsection 7(2) of the Charter must be applied when assessing both acts and decisions: [101]

> We have seen that, under s 38(1), the act or decision of a public authority will be unlawful if it is "incompatible with a human right" or proper consideration to a human right was not given. The concept of compatibility with human rights in s 38(1) calls up the concept of justification in s 7(2).

138. The obligation in s 38(1) to give proper consideration to rights in making a decision was explained by Emerton J in *Castles v Secretary, Department of Justice*:[102]

> Proper consideration need not involve formally identifying the "correct" rights or explaining their content by reference to legal principles or jurisprudence. Rather, proper consideration will involve understanding in general terms which of the rights of the person affected by the decision may be relevant and whether, and if so how, those rights will be interfered with by the decision that is made. As part of the exercise of justification, proper consideration will involve balancing competing private and public interests. There is no formula for such an exercise, and it should not be scrutinised over-zealously by the courts.
>
> ... [I]t will be sufficient in most circumstances that there is some evidence that shows the decision-maker seriously turned his or her mind to the possible impact of the decision on a person's human rights and the implications thereof for the affected person, and that the countervailing interests or obligations were identified.

139. Justice Emerton also considers what is required in order to have given "proper consideration" to rights for the purposes of section 38 in *Giotopoulos v Director of Housing*: [103]

> The Tribunal, despite its error, purported to carry out a proportionality analysis in relation to interference in home and family in the penultimate paragraph of its reasons. This analysis, which consists almost entirely of a recitation of the terms of s 7(2) of the Charter would, if taken in isolation, have been insufficient to satisfy the requirements of s 38(1) of the Charter. As this Court said in *Castles v*

[101] *PJB v Melbourne Health ("Patrick's Case")* [2011] VSC 327 [304].
[102] (2010) 28 VR 141 [185]-[186].
[103] [2011] VSC 20 [90].

> *Secretary to the Department of Justice*, "the requirement in s 38(1) to give proper consideration to a relevant human right requires a decision-maker to do more than merely invoke the Charter like a mantra". I note, however, that there was considerable material before the tribunal to enable the proportionality analysis to be undertaken and that the Tribunal, in identifying and comparing the respective hardships of Mr Giotopoulos and the Director, went some way to analysing whether the refusal to grant a tenancy order and give Mr Giotopoulos security of tenure would be "justified" in the relevant sense in the circumstances of this case.

140. The Tribunal has jurisdiction to consider breaches of the Charter that accompany claims of discrimination under the EOA 1995[104] or EOA 2010, because the lawfulness of the public authority's actions is already a question before the Tribunal.[105] Once the Tribunal is properly seized of a Charter matter it may consider and make findings of Charter breaches notwithstanding a finding that the claims of discrimination are not made out. The onus is on the public authority respondent to satisfy the Tribunal that the limitations on human rights in its case were justified, and the standard of justification is stringent.[106]

141. It will be a matter of fact for this Tribunal to decide on the basis of the evidence that comes out at the hearing whether the Respondents (both of which are public authorities) acted consistently with, or gave proper consideration to, any rights that the Tribunals finds were engaged when they were dealing with HL.

J. SCOPE OF RIGHTS ENGAGED

142. The Commission has considered the engagement of the Charter from the hypothetical position that all the factual allegations made by the Applicant result in positive findings of fact by the Tribunal. The Commission acknowledges that almost all of these factual allegations are wholly denied by the Respondents. The Commission is not able to assist in any way with the resolution of these factual disputes.

143. Whilst a number of rights are raised by the Applicant, the Commission will focus on the content of the right to equality (section 8), the right not to be treated or punished in a cruel, inhuman and degrading way (subsection 10(b)), the right, without discrimination, of children to such protection as is in their best interests and is needed by reason of being a child (subsection 17(2)) and the right to liberty (subsections 21(1)-(3)). These rights appear to be engaged by the Applicant's claims.

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[104] This will not apply to actions or decisions of a public authority prior to 1 January 2008, when Divisions 3 and 4 of Part 4 of the *Charter of Human Rights and Responsibilities Act 2006* (**Charter**) came into force. Section 2(2), Charter.
[105] *Caripis v Victoria Police* [2012] VCAT 1472; *Slattery v Manningham CC (Human Rights)* [2013] VCAT 1869 [160].
[106] *PJB v Melbourne Health ("Patrick's Case")* [2011] VSC 327 [310]; *Re Application under the Major Crime (Investigative Powers) Act 2004* (2009) VR 415, 449-450.

Equality

144. The right to equality contains a number of subsidiary rights:

    (a) the right to recognition as a person before the law;

    (b) the right to enjoy human rights without discrimination;

    (c) the right to equality before the law;

    (d) the right to the equal protection of the law without discrimination;

    (e) the right to equal protection against discrimination.

145. The right listed in (b) is protective of the other rights in the Charter, whereas (a), (c), (d) and (e) are independent and substantive human rights of their own.[107]

146. The specific aspects of the right listed in (b) and (d) may be engaged if the Applicant proves that there has been discrimination within the EOA 1995 or the EAO 2010. In the Charter 'discrimination' is defined as discrimination within the meaning of the EOA. Notably the Charter does not contain the exceptions contained in the EOA nor does it refer to *unlawful* discrimination. This means that *even where an exception applies*, where there is discrimination *simpliciter* under the EOA these rights will be engaged. However where the application of the EOA exception satisfies the reasonable limits test in the case being considered, the limit on the equality right will not be unlawful under the Charter.

147. In considering (b) the Tribunal will need to consider whether HL has been discriminated against in his enjoyment of the other Charter rights, either directly or indirectly. However, this will not simply involve a repeat of the assessment of whether each of those rights have been limited. For example if the right to liberty is found to have been limited, but it is found that any limit is reasonable under subsection 7(2), HL may still be found to have had his enjoyment of that right limited *in a discriminatory way*, which will be a separate breach of the aspect of the equality right referred to in (b) above. For example the aspect of the equality right referred to in (b) may be limited if it is found that HL was restrained because of manifestations of his disabilities. This is because it would involve him being discriminated against in his enjoyment of the right to liberty.

148. The aspect of the equality right referred to in (d) above is concerned with being protected by the law in an equal way with others, 'without discrimination'. There may be unequal legal protection that involves direct discrimination where

[107] *Re Lifestyle Communities Ltd (No 3)* [2009] VCAT 1869 [126]. See also his Honour's examination of the jurisprudence in relation to the international equivalents to ss 8(3) of the Charter at [134]-[161].

children are treated unfavourably under the law *because they are children*. For example:

(a) if *children with disabilities* are able to be subject to restraint more readily than *adults with disabilities* rather than using less invasive alternatives;

(b) if *children in Victorian State schools* are able to be subjected to restraint or seclusion without the legislative protection or safeguards that have been put in place for the use of restraint and seclusion upon *adults in Victorian State institutions* (for example in the disability context under the *Disability Act 2006* discussed below).

149. There may also be unequal protection of the law for school children with HL's disabilities if it is found that it is not indirect discrimination to fail to provide the assistance necessary for HL to meaningfully participate in his education, when the assistance necessary for deaf children to meaningfully participate in their education has been found to be indirect discrimination.

Cruel, inhuman and degrading treatment or punishment

150. There is no specific definition of 'cruel, inhuman or degrading' in either the *ICCPR* or the *Torture Convention*, both of which also contain this right.

151. International jurisprudence provides the following guidance on the phrase:

(a) Ill-treatment must attain a minimum level of severity if it is to fall within the scope of the prohibition;[108]

(b) The assessment of this minimum level of severity is relative, it has to be assessed with regard to the circumstances of any given case;[109]

(c) The assessment of the minimum level of severity may consider the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim; [110]

(d) Recourse to physical force against a person which has not been made strictly necessary by their conduct diminishes human dignity and is in principle an infringement of the right;[111]

(e) The prohibition was held to have been breached in a case where the applicants were found to have experienced 'a profound sense of

[108] *Rachwalski and Ferenc v Poland* (Judgment) (Application 4709/99) ECHR 28 July 2009 at [52].
[109] *Ireland v United Kingdom* judgment of 25 March 1993, Series A no 247-C, at [30].
[110] *Cobzaru v Romania* (Judgment) (Application 48254/99) 26 July 2007 at [61].
[111] *Rachwalski and Ferenc v Poland* (Judgment) (Application 4709/99) ECHR 28 July 2009 at [59]; *Matko v Slovenia* (Judgment) (Application 43393/98) 2 November 2006 at [98].

vulnerability, powerlessness and affront which can reasonably be described as humiliating and therefore degrading'.[112]

152. The relative nature of the concept of the "minimum level of severity" in the international jurisprudence allows factors such as the youth of victims to be considered alongside the nature of the treatment. The European Court of Human Rights has indicated that the "minimum level of severity" for a young person will ordinarily be lower than for an adult:[113]

> The Court also attaches great importance to his young age (seventeen at the time of the events) which made him particularly vulnerable in front of his aggressors.

153. The Supreme Court has made a finding in relation to subsection 10(b) of the Charter in the context of a wrongful dismissal claim by a public health worker who moved someone in his care who had fallen over and could not get up:[114]

> Mr Davies dragged CJ, who was naked, approximately 1.5 metres across a carpeted hallway and in so doing, caused his injury. He then failed to report the incident to his supervisor. *I consider this treatment to have been disrespectful, cruel and degrading* to CJ. It contravened CJ's human rights under s 10(b) of the Charter… (emphasis added)

154. The (contested) allegations that HL was locked in a room as punishment, routinely led around by a wrist strap and regularly physically restrained to have him sit through assemblies, are things that if substantiated could constitute cruel, inhuman and degrading treatment or punishment. Such a finding would depend on all of the circumstances including any evidence about why the treatment was considered necessary.

Protection of children

155. The right, without discrimination, of children to such protection as is in their best interests and is needed by reason of being a child requires the adoption of special measures to protect children. In doing so, the best interests of the child must be taken into account in all actions affecting a child. The nature and scope of this right has been discussed in a Supreme Court decision on appeal from the Children's Court, *Secretary, Department of Human Services v Sanding*[115]. In that context Justice Bell also notes that:[116]

> Children bear rights personally, and are entitled to respect of their individual human dignity. The views of children should be given proper consideration in relation to matters affecting them.

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[112] *Rachwalski and Ferenc v Poland* (Judgment) (Application 4709/99) ECHR 28 July 2009 at [61].
[113] *Corsacov v Moldova* (Judgment) (Application 18944) 4 April 2006, [64].
[114] *Davies v State of Victoria* [2012] VSC 343 [56].
[115] [2011] VSC 42.
[116] *Secretary, Department of Human Services v Sanding* [2011] VSC 42 [11].

156. Unlike many rights in the Charter the right to protection imposes a positive obligation on government to provide protection to children, rather than a negative obligation not to interfere with the right. This right may be engaged if HL is able to be subjected to restraint or seclusion without the protections and safeguards that are considered necessary to protect against arbitrary misuse of restraint and seclusion in other areas (as discussed below in the context of the right to liberty). The right does not require that HL actually have been harmed, it is a right that involves active protection rather than restraint from harm.

Liberty

157. Subsection 21(1) expresses the general right of individual liberty and may be regarded as the statutory equivalent of the common law "right to be at liberty" referred to in *RJE v Secretary to the Department of Justice*.[117] The right to liberty is engaged by any form of detention, even if it is temporary.

158. Subsection 21(2) and (3) provide protection against arbitrary or unlawful interferences with individual liberty. These are separate requirements: an otherwise lawful deprivation of liberty may nevertheless be arbitrary.

159. A lawful interference is one that is authorised by a positive law that is adequately accessible and formulated with sufficient precision to enable a person to regulate his or her conduct by it.[118]

160. Further, even if "lawful" in this sense, an interference may nevertheless be "arbitrary". What amounts to an "arbitrary" interference with the right to privacy was considered by the Court of Appeal in *WBM v Chief Commissioner of Police*.[119] In that case, Warren CJ (Hansen J agreeing) preferred the "human rights meaning" of the concept of arbitrariness in s 13(a) to the narrower "dictionary meaning".[120] The "human rights meaning" is that reflected in the international jurisprudence: "concerned with capriciousness, unpredictability, injustice and unreasonableness – in the sense of not being proportionate to the legitimate aim sought."[121]

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[117] (2008) 21 VR 526 [37] (Maxwell P and Weinberg JA).

[118] *Sunday Times v UK* (1979) 2 EHRR 245, cited in *Kracke v Mental Health Review Board* (2009) 29 VAR 1 [173]-[174] in relation to the words "under law" in s 7(2) of the Charter.

[119] [2012] VSCA 159.

[120] The "dictionary meaning" was described as being a decision or action, which is not based on any relevant identifiable criterion, but which stems from an act of caprice or whim": *WBM v Chief Commissioner of Police* [2012] VSCA 159 [99], referring to the decision of the trial judge at [2010] VSC 219 [51]-[57].

[121] *WBM v Chief Commissioner of Police* [2012] VSCA 159~~at~~ [117]. See also *PJB v Melbourne Health* [2011] VSC 327 at [84]; *Patrick's Case* [2011] VSC 327 at [80]-[84]; *ZZ v Secretary to the Department of Justice* [2013] VSC 267 at [85].

161. The Commission contends that, consistently with Warren CJ's approach in *WBM,* the "human rights meaning" of arbitrariness is to be preferred. Although *WBM* dealt with the concept of arbitrariness in the context of the right to privacy Tate JA in *Victoria Police Toll Enforcement & Ors v Taha & Anor* indicated that the meaning of arbitrary in section 21 should conform to the "human rights meaning" of arbitrary, which is:[122]

> …arbitrariness is concerned with capriciousness, unpredictability, injustice and unreasonableness – in the sense of not being proportionate to the legitimate aim sought.

162. The Full Federal Court in *Minister for Immigration v ~~El~~ Al Masri* and has also considered the "human rights meaning" of arbitrary, in a judgment that confirms that it is the law itself, not just the subsequent exercise of the power, that must not be arbitrary:[123]

> [I]t is not enough for the deprivation of liberty to be provided for by law; *the law itself* must not be arbitrary. (emphasis added)

163. *If* Regulation 15 is relied upon as the "law" authorising the deprivation of liberty it is *likely* to be considered arbitrary according to these standards if the Tribunal considers the regulation is vague, lacking in predictability and procedural safeguards.

164. Compare Regulation 15 with the provisions in the *Disability Act 2006* that make provision for the use of restraint and seclusion in the context of regulating the treatment of adults with disabilities by disability services. Those provisions span over 12 pages of legislation (from subsections 140 - 149) and provide for the following protections and safeguards:

(a) the use of restraint and seclusion must be included in the person's behaviour support plan;

(b) the behaviour support plan must be reviewed;

(c) an independent person must explain to the person the inclusion of the proposed use of restraint and seclusion in the behaviour support plan and inform them of their right to seek review of this;

(d) the Public Advocate has powers to refer the matter to the Senior Practitioner or apply to VCAT for review;

(e) the person can have the behaviour support plan reviewed by VCAT.

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[122] *Victoria Police Toll Enforcement & Ors v Taha & Anor* [2013] VSCA 37 198] – [199] (Tate JA), referring to the earlier decision of *WBM v Chief Commissioner of Police* [2012] VSCA 159 in which the definition of arbitrary in s 21 was also discussed.
[123] (2003) 126 FCR 54 [143].

165. A detention pursuant to Regulation 15 will breach the right to liberty if it is considered that protections and safeguards in the nature of those listed above are needed to prevent the regulation from 'lacking in predictability and procedural safeguards'.

J. REASONABLE LIMITS

166. If the Tribunal considers that *an act* of the Respondents has limited any of HL's Charter rights, the Tribunal must consider whether that limit is reasonable under subsection 7(2). If the limit is not reasonable the act will be unlawful under section 38 of the Charter.

167. If the Tribunal considers that any of HL's Charter rights were engaged by any of *the decisions* being made by the Respondents, the Tribunal must consider whether the Respondents gave "proper consideration" to those rights, which should involve a consideration of whether any limits would be reasonable under subsection 7(2) of the Charter. If the Respondents did not give proper consideration to any of HL's Charter rights that were engaged by any of the decisions being made by the Respondents, the making of the decision will be unlawful under section 38 of the Charter. The nature of this proper consideration has been referred to above.

168. In *Re Lifestyle Communities Ltd (No 3)*,[124] there is a useful discussion of how subsection 7(2) of the Charter is applied in practice. The following observations indicate what the subsection requires:

    (a) The section imposes a 'stringent standard of justification which can be satisfied only when there is a pressing and substantial need for limitation.[125]

    (b) The purpose (or end) of the limitation must be legitimate and of sufficient importance to warrant overriding a Charter right.[126]

    (c) The limitation (or means) must be proportionate and appropriate for achieving that purpose.[127]

    (d) The nature of the right and the importance of the purpose of the limitation are 'foundational'.[128]

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[124] *Re Lifestyle Communities Ltd (No 3*) [2009] VCAT 1869 [126].
[125] *Re Lifestyle Communities Ltd (No 3*) [2009] VCAT 1869 [324].
[126] *Re Lifestyle Communities Ltd (No 3*) [2009] VCAT 1869 [326].
[127] *Re Lifestyle Communities Ltd (No 3*) [2009] VCAT 1869 [326].
[128] *Re Lifestyle Communities Ltd (No 3*) [2009] VCAT 1869 [327].

(e) 'The right is identified purposively in terms of the cardinal values and fundamental interests it represents. This anchors the justification analysis in the values and interests enshrined in the Charter, which are constitutive of "a democratic and inclusive society that respects the rule of law, human dignity, equality and freedom" [Preamble to the Charter].'[129]

(f) When looking at the importance of the purpose of the limitation 'the focus is on the underlying values and interests of the purpose, which are considered against the value system of the Charter. The purpose must accord with the values of the Charter and be sufficiently important to warrant the limitation.'[130]

(g) 'When the values protected by the rights have been identified and the purpose of the limitation is seen to be important enough to warrant some limitation on those rights, the proportionality of the limitation can be assessed according to the other factors.'[131]

(h) When looking at the nature and extent of the limitation as part of the proportionality analysis the means of limitation is considered.[132]

(i) When looking at the relationship between the limitation and its purpose – the Tribunal must find that the means are appropriate for achieving the end.[133]

(j) Finally 'any limitations should impair human rights as little as possible and will not be proportionate and justified if they go further.'[134]

169. Given how context specific these considerations are, it is only possible to make some general observations about the application of subsection 7(2) of the Charter to this case:

(a) The right to cruel, inhuman or degrading treatment is not subject to limitation at international law so it is difficult to imagine what could justify its limitation, if it is found to have been limited.

(b) The rights of other children and adults will be inevitably engaged in this process and are considered under subsection 7(2) of the Charter. These will be aspects of the purpose of any limitation referred to in paragraph 7(2)(b) of the Charter.

[129] *Re Lifestyle Communities Ltd (No 3*) [2009] VCAT 1869 [328].
[130] *Re Lifestyle Communities Ltd (No 3*) [2009] VCAT 1869 [329].
[131] *Re Lifestyle Communities Ltd (No 3*) [2009] VCAT 1869 [327].
[132] *Re Lifestyle Communities Ltd (No 3*) [2009] VCAT 1869 [330].
[133] *Re Lifestyle Communities Ltd (No 3*) [2009] VCAT 1869 [331].
[134] *Re Lifestyle Communities Ltd (No 3*) [2009] VCAT 1869 [332].

(c) It will not be possible to say that "proper consideration" has been given, *if there is no evidence that consideration was given* to rights that are found to have been limited.

K. CONCLUSION

170. The Commission submits that:

(a) whether a child can comply with a requirement, condition or practice imposed by an educational authority under section 9 of the EOA 1995 may be considered on the basis of whether they suffer any "serious detriment" in complying with it;

(b) the Tribunal should be flexible in deciding what the requirement, condition or practice is in relation to the claims under both the EOA 1995 and EOA 2010, and is not bound by an applicant's specific formulation of the requirement, condition or practice;

(c) what is a "reasonable" adjustment under section 40(2) of the EOA 2010 must be considered in the context of all the circumstances, with due weight being placed on the impact on an applicant;

(d) compliance with the Disability Standards may be broadly relevant to "reasonableness" under section 40 of the EOA 2010;

(e) the exceptions in sections 75 and 86 of the EOA 2010 (and their predecessors in the EOA 1995) both require a consideration of proportionality;

(f) Regulation 15 is not able to found an exception under section 75 of the EOA 2010;

(g) the rights in section 8, subsection 10(b), subsection 17(2), and subsections 21(1)-(3) of the Charter appear to be engaged;

(h) it will be a question of fact for determination by the Tribunal whether the Respondents gave proper consideration to those rights, and/or acted consistently with them, and as a result whether there has been a breach of section 38 of the Charter.

S M C Fitzgerald
Ninian Stephen Chambers