IN THE VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL **REF NO: G9396**

IN THE MATTER OF AN APPLICATION FOR ADVICE UNDER SECTION 44 OF THE *GUARDIANSHIP AND ADMINISTRATION ACT 2019*

OUTLINE OF SUBMISSIONS OF THE VICTORIAN EQUAL OPPORTUNITY AND HUMAN RIGHTS COMMISSION

1. The Victorian Equal Opportunity and Human Rights Commission (the **Commission**) intervenes in this application under s 40(1) of the *Charter of Human Rights and Responsibilities 2006* (Vic) (the **Charter**) and pursuant to invitation by the Tribunal. These submissions are filed pursuant to orders made by the Tribunal on 15 October 2021.

I THE APPLICATION

2. The Public Advocate has made an application for advice under s 44 of the *Guardianship and Administration Act 2019* (the **Act**) with respect to the following questions:

   (1) Does the scope of the guardian's power to make decisions about medical treatment extend to making decisions about restraint (in this case physical restraint), if that restraint is required to provide medical treatment?

   (2) If the use of restraint for the purposes of providing medical treatment is not within the scope of a guardian's medical treatment authority, is the use of restraint a personal matter for which VCAT may appoint a guardian?

   (3) Is restraint a matter caught by s 38(1)(b) of the Act as a thing necessary to be done to give effect to the power of the guardian to consent to medical treatment?

   (4) Does the use of restraint for the purposes of providing medical treatment require an application to be made under s 45 of the Act for an order for the represented person to comply with the guardian's decision?

3. The Commission seeks to assist the Tribunal (and the Public Advocate) by:

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(1) explaining the nature and content of the rights engaged in this matter to assist in compliance with the duties in s 38(1) and inform the application of s 32 of the Charter;

(2) making submissions on how s 32 of the Charter affects the Tribunal's interpretation of each section raised by the Public Advocate's questions;

(3) making submissions on the duties imposed by s 38(1) of the Charter on both the Tribunal and the Public Advocate with respect to any authorisation given by the Tribunal to use restraints;

(4) outlining safeguards on the use of restraint when a guardian has been appointed under the Act, that aim to ensure that its use does not become arbitrary or disproportionate and otherwise complies with s 7(2) of the Charter.

II ENGAGEMENT OF CHARTER RIGHTS

4. Charter rights are engaged whenever a human right is relevant to a decision or action that a public authority has made, taken, proposed to take or failed to take.[1] After construing rights "in the broadest possible way"[2], a public authority must understand in general terms how Charter rights *may* be relevant to their action.

5. The Commission submits that the following human rights are engaged by this application: ss 8(2), 8(3), 9, 10(b), 10(c), 12, 13(a), 21 and 22(1). Each of these rights is discussed in turn below.

Equality rights

6. Section 8 of the Charter protects a number of equality rights. Relevantly, s 8(2) protects the right of every person "to enjoy his or her human rights without discrimination". Section 8(3) provides "Every person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination."

7. The concept of discrimination in the Charter is tied to the *Equal Opportunity Act 2010* (**EO Act**). The right to enjoy human rights without discrimination, and right to the equal and effective protection against discrimination, should be understood in this context. Discrimination is prohibited by the EO Act if it occurs on the basis of an attribute set out in s 6 of that Act. Section

[1] *Certain Children by their Litigation Guardian Sister Marie Brigid Arthur v Minister for Families and Children (No 2)* [2017] VSC 251, [179].
[2] *Application Under the Major Crimes (Investigative Powers) Act 2004; DAS v Victorian Equal Opportunity Commission* (2009) 24 VR 415, [80]; *De Bruyn v Victorian Institute of Forensic Mental Health* (2016) 48 VR 647, [126]; *DPP v Ali (No 2)* [2010] VSC 503, [29]; *DPP v Kaba* (2014) 44 VR 526, [108].

6 of that Act sets out the attributes of prohibited discrimination, including, relevantly, disability. Section 7(1)(a) of the EO Act defines discrimination to mean "direct or indirect discrimination on the basis of an attribute". Direct and indirect discrimination are defined in the EO Act. Section 8 of the EO Act specifies that direct discrimination under the EO Act occurs where a person treats a person with an attribute unfavourably because of that attribute and s 9 of the EO Act states 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 a person with an attribute; and (b) that is not reasonable".

8. Section 8(3) of the Charter has three limbs. The Commission relies on the second and third limbs. The second limb of s 8(3) protects substantive equality, one that accommodates difference. It recognises that certain groups may need to be treated differently in order to ensure that everyone has equal protection of the law.[3] In *Victoria Police Toll Enforcement v Taha*, her Honour Tate JA observed:[4]

> This is a principle of equality that recognises that uniformity of treatment between different persons may not be appropriate or adequate but that disadvantaged or vulnerable persons may need to be treated differently to ensure they are treated equally. This may have procedural implications for the way people are treated in court and tribunal proceedings.

9. The third limb of s 8(3) provides a right to equal and effective protection against discrimination. This right extends beyond merely requiring that the law protects people equally and without discrimination – it also gives every person a separate and positive right to be effectively protected against discrimination.[5] Both the second and third limbs have already been recognised to have procedural implications for Courts.[6]

10. The right in s 8(3) may require legislation to apply differentially if that is necessary in order to avoid discrimination. In *Matsoukatidou v Yarra Ranges Council* Bell J held that the right to equal protection of the law without discrimination in s 8(3) of the Charter was concerned with the content or substance of the law:[7]

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[3] *Lifestyle Communities Ltd (No 3) (Anti-Discrimination)* [2009] VCAT 1869, [257]; *Victorian Toll v Taha; State of Victoria v Brookes* [2013] VSCA 37 [210] (Tate JA); *Matsoukatidou v Yarra Ranges Council* [2017] VSC 61, [50], [61], [105].
[4] *Victoria Police Toll Enforcement v Taha* (2013) 49 VR 1, 70-71 [210] (Tate JA).
[5] *Lifestyle Communities Ltd* [141]; *Matsoukatidou* [50], [61], [106].
[6] *Matsoukatidou v Yarra Ranges Council* [2017] VSC 61, [40]-[46], [50]-[55], [61]; *Cemino v Cannan* [2018] VSC 535.
[7] *Matsoukatidou v Yarra Ranges Council* [2017] VSC 61, [105] (Bell J).

> This element of the right may require that the substantive law include positive adjustments and accommodations so that some parties are treated differently to other parties in order to ensure that they have equal protection of the law.

11. The decision of whether to authorise the use of restraint on [redacted], and the legal mechanism for that use, engages the rights in ss 8(2) and 8(3) of the Charter. This is particularly so in circumstances where specific provision is made for the regulation of the use of restraint under other legal regimes that apply in Victoria, in particular the *Mental Health Act 2014* and the *Disability Act 2006*. The absence of similar legislative protections in the Act may require the Tribunal to provide those protections through its orders when authorising the use of restraint in order to ensure [redacted] receives equal protection.

The right to life

12. Section 9 of the Charter states:

> Every person has the right to life and has the right not to be arbitrarily deprived of life.

13. This right is modelled on Article 6(1) of the *International Covenant on Civil and Political Rights* (**ICCPR**). The right is protected in numerous other human rights instruments, including in Article 2 of the *European Convention on Human Rights* (**ECHR**). The UN Human Rights Committee has described it as "the supreme right".[8] At international law, it is an absolute right. While there are no absolute rights under the Charter, the fundamental nature of this right must be considered in determining whether any limitation is justified.

14. At international law, the right to life places negative and positive obligations on State parties: a negative obligation to refrain from conduct that will result in the arbitrary deprivation of life and a positive obligation to take measures to prevent and protect individuals against the arbitrary deprivation of life.[9] In interpreting the scope of this right, s 32(2) of the Charter permits the Court to have regard to "international law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right".

15. In applying the right to life the South African courts determine whether a positive obligation to act arises by balancing the interests of the parties and the conflicting interests of the community.[10] In *Re J* the New Zealand Court of Appeal upheld a guardianship order made in respect of a child

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[8] UN Human Rights Committee (HRC), *CCPR General Comment No. 6: Article 6 (Right to Life)*, 30 April 1982.
[9] In *Osman v United Kingdom* (1998) VIII EurCourt HR 3124 [115], the European Court of Human Rights has found that, in certain circumstances, the right to life imposes a position obligation on a State to protect life, or take steps to do so.
[10] *Carmichele v Minister of Safety and Security* 2001 (4) SA 938, [43].

whose parents refused to provide consent to the child being given a blood transfusion, on the basis of their religious beliefs.[11] A positive obligation to take measures to mitigate risk to life will not arise in all circumstances, however where the State has legislated for interference with a person's medical autonomy for beneficial reasons, it is clearly engaged.

The right to be free of inhuman or degrading treatment and medical treatment without consent

16. Section 10(b) of the Charter provides that 'A person must not be … treated or punished in a cruel, inhuman or degrading way'. This right was modelled on Article 7 of the ICCPR,[12] and is also protected in Article 3 of the ECHR.

17. As to whether the right to protection from cruel, inhuman or degrading treatment is engaged, there is a minimum threshold that applies to the standard of treatment in question. Treatment "must reach a minimum level of severity or intensity before it can amount to cruel, inhuman or degrading treatment".[13] In the context of the use of force in law enforcement, it has been held that the right will not be engaged unless the use of force is grossly disproportionate to the purpose it seeks to achieve and results in pain and suffering which reaches that minimum threshold of severity.[14]

18. The Commission submits that there is no evidence that this right has been engaged or that there is any risk of it being engaged in this case, but that protective safeguards should be considered to ensure that treatment does not give rise to a breach of this right. Although s 10(b) is not engaged, the right to humane treatment when deprived of liberty may be.[15]

19. Section 10(c) of the Charter provides that a person must not be subjected to medical treatment without their full, free and informed consent. This section largely reflects the requirements of Victorian legislation, which makes it unlawful to render medical treatment without the informed consent of the

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[11] *Re J* [1996] 2 NZLR 134.
[12] Opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).
[13] *Kracke v Mental Health Review Board* (2009) 29 VAR 1, [559] – [560], [574]; *Certain Children by their Litigation Guardian Sister Marie Brigid Arthur v Minister for Families and Children (No 2)* [2017] VSC 251, [250].
[14] *Certain Children by their Litigation Guardian Sister Marie Brigid Arthur v Minister for Families and Children (No 2)* [2017] VSC 251, [250].
[15] In *Castles v Secretary to the Department of Justice* (2010) 28 VR 141; [2010] VSC 310 at [99] the Supreme Court explained that s 22(1) is a right enjoyed by persons deprived of their liberty; s 10(b) applies more generally to protect all persons against the worst forms of conduct. Section 10(b) prohibits 'bad conduct' towards any person; s 22(1) mandates 'good conduct' towards people who are detained. See also *De Bruyn v Victorian Institute of Forensic Mental* Health (2016) 48 VR 647; [2016] VSC 111 [113].

person concerned, except in limited circumstances, and which permits a person who is competent to give consent to refuse medical treatment.[16]

20. Since the enactment of the Charter it has been accepted that medical treatment can occur without consent in circumstances prescribed by law, for example where a person is mentally ill and requires immediate treatment for their own safety and for the safety of members of the public.[17] These cases have identified that involuntary medical treatment limits the right in s 10(c) of the Charter but can be justified under s 7(2) where it is necessary for a person's own safety and for the safety of other people. Limitations on this right that arise because of a person's disability will also limit the right in s 8(2) of the Charter to enjoy human rights without discrimination. The application of s 7(2) of the Charter will need to consider the proportionality and reasonableness of any limits on s 10(c) in the context that the right in s 8(2) is also limited. Discriminatory limits on rights arguably require greater justification, or at least the discriminatory aspect of the limit needs to be specifically justifiable in its own right.

Freedom of movement

21. Section 12 of the Charter provides for the right to freedom of movement. It states:

> Every person lawfully within Victoria has the right to move freely within Victoria and to enter and leave it and has the freedom to choose where to live.

22. The scope of the right to freedom of movement was examined in *Re Kracke and Mental Health Review Board*:[18]

> The purpose of the right to freedom of movement in s 12 is to protect the individual's right to liberty of movement within Victoria and their right to live where they wish. It is directed to restrictions on movement which fall short of physical detention coming within the right to liberty in s 21. The fundamental value which the right expresses is freedom, which is regarded as an indispensable condition for the free development of the person and society.

23. The right to freedom of movement is concerned with those incursions on personal movement that are less egregious, and frequently more mundane, than those to which the liberty right in s 21 of the Charter applies. In this regard Bell J noted that the real contest with respect to this right is generally dealt with at the proportionality stage of the assessment:[19]

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[16] *Department of Health and Community Services v JWB and SMB (Marion's Case)* (1992) 175 CLR 218, 233–4; *Re BWV; Ex parte Gardner* (2003) 7 VR 487.
[17] *Kracke v Mental Health Review Board* (2009) 29 VAR 1, [541] –[547] (Bell J); *MH6 v Mental Health Review Board* [2008] VCAT 846, [66] – [72]; *MH10 v Mental Health Review Board* [2009] VCAT 1919, [19] – [21].
[18] *Kracke v Mental Health Review Board* (2009) 29 VAR 1, [588] (Bell J).
[19] *Kracke v Mental Health Review Board* (2009) 29 VAR 1, [584].

> When imposed, restrictions on the right to freedom of movement are relatively easy to establish. Therefore, the cases have mostly concerned whether the restrictions are justified as proportionate to the legitimate aim of the law or measure at issue.

24. In *Nigro v Secretary to the Department of Justice* the Court of Appeal considered an order made under the *Serious Sex Offenders (Detention and Supervision) Act 2009* that included a condition requiring the person subject to it to reside at a specified address each night and not to move from that address without the prior written consent of the Adult Parole Board. The Court held that the order would significantly limit the right in s 12 of the Charter.[20]

25. The right is engaged by treatment orders that require patients to attend a health service to take medication.[21] It is likely to be engaged where an order of the Tribunal will authorise the use of restraint to force a person to take medication to the extent that restraint would also prevent a person from removing themselves from the place where they are restrained.

Privacy

26. The scope of the right to privacy in s 13(a) of the Charter is a right of considerable breadth.[22] Although the scope of what is "private" may be broad, that is only the first step in determining whether the right is limited. The second step involves consideration of whether there is lawful authority for the intrusion on privacy, and the manner of, reasons for, and predictability of, the intrusion. This second step tempers the breadth of the right.

27. This two-step approach is reflected in the internal qualifications in s 13(a) of the Charter relating to lawfulness and arbitrariness. Niall J has recently held that "a lawful and non-arbitrary interference with privacy is not incompatible with the Charter and therefore does not need to be justified under s 7 of the Charter".[23]

28. The cases concerning the equivalent right in Article 8 of the ECHR apply three criteria, with the first effectively imposing a *de minimis* rule:[24]

    (1) the alleged threat to personal autonomy must attain a certain level of seriousness;

    (2) the right will be engaged if the claimant has a reasonable expectation of privacy in any of the senses of privacy accepted in the cases;

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[20] *Nigro v Secretary to the Department of Justice* (2013) 41 VR 359, [206].
[21] *Kracke v Mental Health Review Board* (2009) 29 VAR 1, [738] and [779] (Bell J).
[22] *Castles v Secretary of the Department of Justice* (2010) 28 VR 141, [79].
[23] *Grooters v Chief Commissioner of Police* [2021] VSC 329, [87]- [88] (Niall JA, trial division).
[24] *Wood v Commissioner of Police of the Metropolis* [2009] EWCA Civ. 414, [22] (Laws LJ).

(3) the breadth of the protections in Article 8(1) may in many instances be curtailed by the scope of the justifications in Article 8(2).

29. With respect to the first step in considering whether there is any limitation on the right to privacy, the right has been held to include physical integrity, and also encompasses the autonomy and inherent dignity of the person.[25]

30. In *Kracke* Bell J considered the meaning of the terms "unlawful" and "arbitrary" in the Charter.[26] In *obiter* comments, his Honour noted that an interference will be lawful if it is permitted by a law which is precise and appropriately circumscribed, and will be arbitrary only if it is capricious, unpredictable, unjust or unreasonable, in the sense of being disproportionate to the legitimate aim sought.[27] This mirrors the requirement under Article 8(2) of the ECHR, summarised by Lord Sumpton in the UK Supreme Court in *R (Catt) v Association of Chief Police Officers*, that a law that limits privacy must satisfy certain qualitative requirements in order that the limit can be considered "in accordance with law" for the purposes of the exception in Article 8(2) of the ECHR.[28] Under Article 8(2) this requires:[29]

(1) that the measure has some basis in law and must be compatible with the rule of law, which means that it would comply with the twin requirements of accessibility and foreseeability;

(2) that the law be "accessible", which requires that it be published and comprehensible, and "foreseeable", which requires that the consequences of the law must be foreseeable and any discretion conferred should not be so broad that its scope is dependent on the will of those who apply it rather than on the law itself;

(3) the law must afford protection against arbitrariness and be clear as to the manner of its exercise;

(4) safeguards should be present where broad discretions are provided, to prevent arbitrary and disproportionate interference with Convention rights;

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[25] *Kracke v Mental Health Review Board* (2009) 29 VAR 1, [619] – [620].
[26] *Kracke v Mental Health Review Board* (2009) 29 VAR 1, [162] – [197].
[27] *Kracke v Mental Health Review Board* (2009) 29 VAR 1, [162] – [197].
[28] *R (Catt) v Association of Chief Police Officers* [2015] UKSC 9, [11] – [14] (Lord Sumpton).
[29] *R (Catt) v Association of Chief Police Officers* [2015] UKSC 9, [11] – [14] (Lord Sumpton).

(5) the rules governing the scope and application of measures need not be statutory, provided that they operate within a framework of law and that there are effective means of enforcing them;

(6) the requirement for reasonable predictability does not mean that the law has to codify answers to every possible issue.

31. The Commission submits that these qualitative requirements should provide the foundation for any orders the Tribunal makes under s 45(1) of the Act. This will ensure that any limits on privacy are lawful and not arbitrary, but will also ensure that the requirement in s 7(2) of the Charter that any limits on Charter rights occur "under law" is complied with. To avoid arbitrariness in the manner in which [redacted]'s rights are limited, the use of restraint must be regulated in a manner that provides sufficiently prescriptive guidance about when, where, how, why and by whom it can be used, in order to provide the safeguards and predictability needed to avoid arbitrary use.

Liberty and humane treatment while deprived of liberty

32. Section 21 of the Charter relevantly provides as follows:

> **Right to liberty and security of person**
>
> (1) Every person has the right to liberty and security.
>
> (2) A person must not be subjected to arbitrary arrest or detention.
>
> (3) A person must not be deprived of his or her liberty except on grounds, and in accordance with procedures, established by law.

33. The right to liberty applies only when a person is deprived of their liberty, rather than where there are restrictions on movement that fall short of physical detention.[30] In *Kracke* Bell J described the right in this way:[31]

> The purpose of the right to liberty and security is to protect people from unlawful and arbitrary interference with their physical liberty, that is, deprivation of liberty in the classic sense. It is directed to all deprivations of liberty, but not mere restrictions on freedom of movement. It encompasses deprivations in criminal cases but also in cases of vagrancy, drug addiction, entry control, mental illness etc. The difference between a deprivation of liberty and a restriction on freedom of movement is one of degree or intensity, not one of nature and substance.

34. When considering whether a deprivation of liberty has occurred under the ECHR, the European Court of Human Rights has observed that "the starting point must be the concrete situation of the

[30] *Kracke v Mental Health Review Board* (2009) 29 VAR 1, [588], [664] (Bell J); *Antunovic v Dawson* (2010) 30 VR 355, [72] (Bell J); Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006, 16.
[31] *Kracke v Mental Health Review Board* (2009) 29 VAR 1, [664].

individual concerned and account must be taken of a whole range of factors arising in a particular case such as the type, duration, effects and manner of implementation of the measure in question".[32] A trio of cases in the House of Lords in 2008 considered whether a variety of restrictions imposed by control orders on individuals amounted to a deprivation of liberty under the ECHR, rather than a mere restriction on movement. They illustrate how different levels of restrictions have been treated with respect to the right to liberty.

(1) In *Secretary of State for the Home Department v MB*, the House of Lords held that confinement to one's home for 14 hours a day, and otherwise being confined to a nine-mile area, with restrictions on visitors during curfew hours, was not a deprivation of liberty.[33]

(2) In *Secretary of State for the Home Department v E*, the House of Lords held that home confinement for 12 hours a day where the person's wife and children lived, without any other geographical restriction on movement, was not a deprivation of liberty.[34]

(3) In contrast, in *Secretary of State for the Home Department v JJ*, the House of Lords held that being confined to a one-bedroom flat for 18 hours a day and otherwise being confined to a defined urban area did amount to a deprivation of liberty.[35]

35. More recently, in *Dolan*, the UK High Court considered whether the obligation not to stay overnight at a place other than where the person or their linked household is living amounted to a deprivation of liberty under Article 5 of the ECHR. After referring to *JJ*, Lewis J said as follows:

> In the present case, there is no arguable basis that the provision of [the version] of regulation 6 in force on 2 July 2020 would amount to a deprivation of liberty in the light of the current case law. Persons will be in their own home overnight. They will be with their families or others living with them as part of their household. They will have access to all the usual means of contact with the outside world. The prohibition is on staying overnight at a place other than their home (although that will, in practice necessitate them staying in their own home overnight). They are able to leave their home during the daytime to work or to meet others (subject to the requirements of regulation 7 on gatherings). Furthermore, regulation 6 is limited in time and has to be reviewed regularly and the restriction must be removed as soon as it is no longer necessary to combat the threat posed.

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[32] *Guzzardi v Italy* (1980) 3 EHRR 333, [92]. See also *Secretary of State for the Home Department v JJ* [2008] 1 AC 385, [16] (Lord Bingham); *Director of Public Prosecutions (Vic) v Kaba* (2014) 44 VR 526, [110] (Bell J).
[33] *Secretary of State for the Home Department v MB* [2008] 1 AC 440.
[34] *Secretary of State for the Home Department v E* [2008] 1 AC 499.
[35] *Secretary of State for the Home Department v JJ* [2008] 1 AC 385.

> The facts fall far short of anything that could realistically be said to amount to a deprivation of liberty within the existing case law.

36. As already discussed, the Victorian case law makes the same distinction between freedom of movement and liberty as is reflected in the decisions made under the ECHR.[36] For example, in *Antunovic v Dawson* Bell J observed that the imposition of a requirement on Ms Antunovic to live in a particular place, with a requirement to return at night, may not amount to a restriction on her liberty for the purposes of s 21, although the Court did not decide the issue.[37] Similarly in *Loielo v Giles* Ginnane J held that lockdown restrictions under public health legislation that included a curfew did not engage the right to liberty but rather engaged the right to freedom of movement.[38]

37. Although the title of s 21 refers to the "right to liberty and security of person", a right to "security *of person*" is not contained in s 21 in those terms. This aspect of the right remains unsettled.[39] Section 21(1) provides that "every person has the right to liberty and security". The right to security of person in Article 9 of the ICCPR has been said to protect against intentional infliction of bodily and mental injury, regardless of whether the person is arrested or detained.[40] However, the Victorian Parliament made specific choices about the scope of the right to liberty in the Charter, and was "concerned primarily with physical liberty".[41] The explanatory memorandum states that s 21(1) is intended to operate differently to the equivalent right in the *Canadian Charter of Human Rights and Freedoms* because "the Victorian provision is not intended to extend to such matters as a right to bodily integrity, personal autonomy or a right to access medical procedures".[42] In *Kracke* Bell J observed that these matters are picked up under other rights.[43] Whether these matters are covered by s 21 or not, the Commission submits that these aspects of security of person under comparative instruments are a part of the right to privacy under the Charter, which incorporates physical and psychological integrity, individual and social identity and autonomy, and the inherent dignity of the person.[44]

38. Whilst the use of restraint in order to administer medication to [redacted] may not in itself limit the right to liberty, other aspects of the Tribunal's guardianship orders, and other decisions made

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[36] *Kracke v Mental Health Review Board* (2009) 29 VAR 1, [588].
[37] *Antunovic v Dawson* (2010) 30 VR 355, [76].
[38] *Loielo v Giles* (2020) 63 VR 1, [217] – [218].
[39] Pound & Evans, *Annotated Victorian Charter of Rights 2ed*, p 191.
[40] United Nations Human Rights Committee, *General Comment no 35*, [3] and [9].
[41] *Explanatory Memorandum*, Charter of Human Rights and Responsibilities Bill 2006.
[42] *Explanatory Memorandum*, Charter of Human Rights and Responsibilities Bill 2006.
[43] *Kracke v Mental Health Review Board* (2009) 29 VAR 1, [628].
[44] *Kracke v Mental Health Review Board* (2009) 29 VAR 1, [619] – [620].

by her guardian, may limit that right to the extent that [redacted] is required to live at a particular place and prevented from leaving her residence when she chooses. If [redacted]s liberty is restrained, the right in s 22(1) will become relevant to the use of restraint while deprived of liberty.

39. Section 22(1) of the Charter provides:

> All persons deprived of liberty must be treated with humanity and with respect for the inherent dignity of the person.

40. As is apparent, this right is framed in very broad terms. The United Nations Human Rights Committee, in ICCPR General Comment No 21 concerning the humane treatment of persons deprived of liberty, has stated that this right (which is found in Article 10 of the ICCPR) imposes obligations over and above the right to be free from torture and other cruel, inhuman or degrading treatment or punishment.

41. In particular, paragraph 3 of General Comment No 21 states that persons deprived of their liberty may not:

> be subjected to any hardship or constraint other than that resulting from the deprivation of liberty; respect for the dignity of such persons must be guaranteed under the same conditions as for that of free persons. Persons deprived of their liberty enjoy all the rights set forth in the Covenant, subject to the restrictions that are unavoidable in a closed environment.

42. The right in s 22(1) recognizes the vulnerability of all persons deprived of their liberty.[45] It acknowledges the important starting point when assessing whether there has been a limitation of this right, namely that persons deprived of their liberty should not be subject to hardship or restraint other than the hardship that results from the deprivation of liberty.[46]

43. When interpreting the human rights in the Charter, it is legitimate to look to other international treaties that may shed light on the meaning of those rights. In identifying what is required to treat a person "with respect for the inherent dignity of the person", the provisions of other treaties to which Australia is a party are relevant. For present purposes, that requires attention to be given to the requirements of the *Convention on the Rights of Persons with Disabilities* (**CRPD**), which has been ratified by Australia and informs the concept of "inherent dignity" as it applies to people with disabilities.

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[45] *Castles v Secretary Department of Justice* (2010) 28 VR 141, [93].
[46] *Castles v Secretary Department of Justice* (2010) 28 VR 141, [108].

44. Article 10 of the CRPD provides that States reaffirm that all persons have the inherent right to life and that States will take all necessary measures to ensure its effective enjoyment by persons with disabilities on an equal basis with others.

45. Article 12 of the CRPD relevantly provides:

> 1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
>
> 2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
>
> 3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.
>
> 4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.

46. Article 16 of the CRPD relevantly provides:

> 1. States Parties shall take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse, including their gender-based aspects.
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> …
>
> 3. In order to prevent the occurrence of all forms of exploitation, violence and abuse, States Parties shall ensure that all facilities and programmes designed to serve persons with disabilities are effectively monitored by independent authorities.

47. Article 17 of the CRPD provides:

> Every person with disabilities has a right to respect for his or her physical and mental integrity on an equal basis with others.

48. Article 25 of the CRPD relevantly provides:

> States Parties recognize that persons with disabilities have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability. States Parties shall take all appropriate measures to ensure access for persons with disabilities to health services that are gender-sensitive, including health-related rehabilitation. In particular, States Parties shall:
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> …

> (d) Require health professionals to provide care of the same quality to persons with disabilities as to others, including on the basis of free and informed consent by, inter alia, raising awareness of the human rights, dignity, autonomy and needs of persons with disabilities through training and the promulgation of ethical standards for public and private health care;

49. The CRPD should inform the Tribunal's assessment of what is required to treat a person "with respect for the inherent dignity of the person" for the purposes of s 22(1) of the Charter, where a person with a disability is deprived of their liberty. This approach to the scope of s 22(1) promotes the right in s 8(2) of the Charter to enjoy human rights without discrimination.

III THE TRIBUNAL AND PUBLIC ADVOCATE ARE PUBLIC AUTHORITIES

50. The concept of a "public authority" is a key element in the scheme of the Charter. The Charter defines a "public authority" in s 4(1) by the identification of a list of persons.

51. Both the Tribunal and the Public Advocate are caught by the definition set out in s 4(1)(b): "an entity established by a statutory provision that has functions of a public nature". However some persons or bodies are expressly declared by the Charter not to be public authorities. Section 4(1)(j) provides that a public authority does not include:

> a court or tribunal except when it is acting in an administrative capacity;
>
> Note: Committal proceedings and the issuing of warrants by a court or tribunal are examples of when a court or tribunal is acting in an administrative capacity. A court or tribunal also acts in an administrative capacity when, for example, listing cases or adopting practices and procedures.

52. The key distinguishing factor to determine if the Tribunal is acting as a public authority is whether it is "acting in an administrative capacity". Consistent with the earlier decision in *RB* that reassessing a guardianship order is administrative rather than judicial,[47] in *PJB v Melbourne Health* Bell J held that the functions of the Tribunal in its original jurisdiction under the Act are administrative:[48]

> Applying these principles to the present case, we have seen that the jurisdiction of the tribunal under the Guardianship and Administration Act is original jurisdiction for the purposes of the Victorian Civil and Administrative Tribunal Act. It is a jurisdiction to make guardianship and administration orders, which are orders for the appointment of substitute decision-makers for persons with a disability. The power to make such orders is discretionary in nature and involves the application and consideration of protective criteria, being the core principles and the personal autonomy of the person. The powers are subject to rehearing on the merits and also to regular reassessment. The Public Advocate has

[47] *RB* [2010] VCAT 532, [445].
[48] *PJB v Melbourne Health* (2011) 39 VR 373, [125].

> statutory protective functions and appearance rights in the tribunal. The powers of the tribunal are similar in nature to the powers of the Mental Health Review Board (when exercised in the board's original jurisdiction) and the tribunal (when exercised in the tribunal's review jurisdiction) under the Mental Health Act, which are administrative. In my view, the functions of the tribunal under the Guardianship and Administration Act to appoint guardians and administrators are administrative in the public law sense and the tribunal performs those functions in its original jurisdiction in that capacity.

53. The Tribunal has also held that it is acting in an administrative capacity when providing advice on the scope of a guardian's powers under s 30 of the Act.[49] The Commission submits that when making orders under s 45(1) the Tribunal is similarly acting in an administrative capacity.

54. As public authorities, the obligations in s 38(1) apply to the Public Advocate and the Tribunal.

IV SECTION 38 OF THE CHARTER

55. Section 38(1) of the Charter imposes two distinct obligations on a public authority.[50] It makes it unlawful for a public authority to act in a way that is incompatible with a human right and in making a decision, to fail to give proper consideration to a relevant human right. These obligations do not apply if the public authority cannot reasonably act differently or make a different decision under law: s 38(2).

Justified limits on rights

56. Human rights are not generally absolute and s 7(2) of the Charter outlines how they may be justifiably limited. It is well established that s 7(2) of the Charter applies to the obligation on a public authority to "act compatibly" with Charter rights.[51] Where a public authority limits a right but the limit is justified, the human right is not breached and there is no contravention of the obligation on a public authority to act compatibly with human rights under s 38 of the Charter.[52]

57. Where an act or decision is shown to limit the exercise of a right or freedom, the onus passes to the party seeking to justify that limit under s 7(2) of the Charter.[53]

58. The justification question involves an assessment made by reference to the matters set out in s 7(2) of the Charter, "including (a) the nature of the right; and (b) the importance of the purpose of the limitation; and (c) the nature and extent of the limitation; and (d) the relationship between

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[49] *NLA* [2015] VCAT 1104, [13].
[50] *Baker v DPP* [2017] VSCA 58, [48] (Tate JA); *Bare v IBAC* (2015) 48 VR 129, [245] (Tate JA).
[51] *De Bruyn v Victorian Institute of Forensic Mental Health* (2016) 48 VR 647, [100]; *Kracke v Mental Health Review Board* (2009) 29 VAR 1 [99]; *PJB v Melbourne Health* (2011) 39 VR 373, [332].
[52] *Baker v DPP* [2017] VSCA 58, [57] (Tate JA with whom Maxwell P and Beach JJA agreed).
[53] *Certain Children v Minister for Families and Children (No 2)* (20170 52 VR 441, [175].

the limitation and its purpose; and (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve".[54] Section 7(2) of the Charter embodies a proportionality test.[55]

59. Section 7(2) also requires that limits be "under law". The legality requirement, like the similar requirement in Article 8(2) of the ECHR discussed above, has been held to require that broad discretionary powers are accompanied by sufficient safeguards against arbitrary or discriminatory use.[56] Because the Act does not outline specific safeguards for the use of restraint, unlike the *Mental Health Act 2016* and the *Disability Act 2006*, it is essential that appropriate safeguards are provided through any orders that the Tribunal makes allowing restraint (either under s 45(1) of the Act or through whatever mechanism the Tribunal uses to authorise restraint). This is necessary to comply with the requirement in s 7(2) of the Charter that any limits on Charter rights occur "under law" and will ensure that [redacted] has equal protection of the law without discrimination, regardless of whether her disability does or does not bring her within the purview of the *Mental Health Act 2016* or the *Disability Act 2006* (consistent with s 8(3) of the Charter). The Commission outlines some appropriate safeguards below, by reference to the safeguards that exist in legislation that governs the treatment of people who have similar vulnerabilities. The Public Advocate and the Tribunal each have relevant expertise in guardianship, disability and mental health settings more generally, and the obligation remains on them to determine what safeguards are needed on a case by case basis drawing upon that expertise.

Proper consideration to relevant human rights

60. Section 38(1) imposes two obligations on a public authority. Even if a limitation on a human right is ultimately found to be proportionate, if the public authority has made a decision, it is still required to give proper consideration to relevant human rights. The Commission submits that the obligation to give proper consideration to relevant human rights does not depend on any determination of compatibility and there is no textual warrant for conflating the two forms of obligation imposed by s 38(1) of the Charter.[57]

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[54] *Baker v DPP* [2017] VSCA 58, [57] (Tate JA with whom Maxwell P and Beach JJA agreed).
[55] *Momcilovic v R* (2011) 245 CLR 1, [22] (French CJ).
[56] *Beghal v DPP* [2016] AC 88, [29] – [30].
[57] *Certain Children by their Litigation Guardian Sister Marie Brigid Arthur v Minister for Families and Children (No 2)* [2017] VSC 251, [177], [225]-[226].

61. The principles concerning the content of the procedural obligation are now settled in Victorian law. The test, first stated by the Supreme Court in *Castles v Secretary of Department of Justice* requires a decision maker to:[58]

(1) understand in general terms which rights would be affected by the decision and how they may be interfered with by the decision;

(2) seriously turn their mind to the possible impact of the decision on the person's human rights;

(3) identify the countervailing interests or obligations; and

(4) balance competing private and public interests.

62. The Supreme Court recognized in *Castles* that there is "no formula" for the proper consideration exercise. It follows that the proper consideration obligation can be discharged in a manner suited to the particular circumstances.[59] However, the obligation imposes a higher standard than the obligation to take into a consideration at common law or under statute.[60] This follows from the obligation to give "proper" consideration to human rights.[61]

63. While assessing proper consideration should not be scrutinized "over-zealously" by the courts, the obligation would not be satisfied by merely invoking the Charter "like a mantra".[62] The review that is necessitated by the obligation of a decision-maker to give proper consideration is a review of the substance of the decision-maker's consideration rather than form.[63]

64. In this proceeding, the obligation to give proper consideration to relevant Charter rights requires the Tribunal to undertake a *Castles* analysis when deciding whether to authorise the use of restraint on [redacted] and what orders to make to ensure restraint is only used in a manner that is compatible with her Charter rights.

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[58] *Castles v Secretary of Department of Justice* (2010) 28 VR 141, 184 [185]-[186]; *De Bruyn v Victorian Institute of Forensic Mental Health* (2016) 48 VR 647, [139]-[142]; *Bare v IBAC* (2015) 48 VR 129, [217]-[221] (Warren CJ), [277]-[278] (Tate JA), [534] (Santamaria JA) (each of the three Justices of Appeal applied the "Castles test" for proper consideration by way of *obiter dicta).*
[59] *PJB v Melbourne Health* (2011) 39 VR 373, [311] (Bell J).
[60] *Bare v IBAC* (2015) 48 VR 129, [275]-[276] (Tate JA), [217]-[221] (Warren CJ).
[61] *Bare v IBAC* (2015) 48 VR 129, [275]-[276], [299] (Tate JA).
[62] *Castles v Secretary of Department of Justice* (2010) 28 VR 141, 144.
[63] *De Bruyn v Victorian Institute of Forensic Mental Health* (2016) 48 VR 647, [142].

VII SECTION 32 OF THE CHARTER

65. Section 32(1) provides:

> So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.

66. The operation of s 32(1) of the Charter was extensively examined in *Momcilovic v The Queen*. But as Nettle JA (as his Honour then was) has observed:[64]

> The problem is that the judgments of the High Court in *Momcilovic v The Queen* do not yield a single or majority view as to what is meant by interpreting a statutory provision in a way that is compatible with human rights within the meaning of s 32 of the Charter.

67. While the High Court divided sharply in relation to some questions concerning the operation of s 32(1), the following principles are clear following *Momcilovic*:

(1) section 32(1) forms part of the body of interpretative rules to be applied at the outset in ascertaining the meaning of the provision. As the Court of Appeal stated in *Slaveski v Smith*, s 32(1) requires "the court to discern the purpose of the provision in question in accordance with the ordinary techniques of statutory construction essayed in *Project Blue Sky Inc v Australian Broadcasting Authority*";[65]

(2) in determining what interpretations are possible, the Court should apply the ordinary techniques of statutory construction including the presumption against interference with rights in the absence of express language or necessary implication in the statutory provision;

(3) when the meaning of the relevant provision has been ascertained in accordance with the body of interpretative rules, including s 32(1), the Court must then consider whether the relevant provision, so interpreted, breaches or limits a human right protected by the Charter. It is only if such a breach or limit is identified that the Court has occasion to apply s 7(2) and consider whether the limit on the relevant human right is justified."[66]

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[64] *WK v The Queen* [2011] VSCA 345, [55].
[65] *Slaveski v Smith* [2012] VSCA 25, [20] (Warren CJ, Nettle and Redlich JJA).
[66] *Slaveski v Smith* [2012] VSCA 25, [35(2)].

(4) compliance with s 32(1) means exploring all "possible" interpretations of the provision in question and adopting that interpretation which least infringes Charter rights. As the Court of Appeal stated in *Nguyen v Director of Public Prosecutions*:[67]

> Where more than one interpretation of a provision is available on a plain reading of the statute, then that which is compatible with rights protected under the Charter is to be preferred.

68. Bell J considered the application of s 32(1) to the Act in *PJB v Melbourne Health*, noting there is added complexity where a piece of legislation is benevolent but there is a clear intention to limit some rights for that beneficial purpose, and where the interpretive choices are not binary. His Honour observed:[68]

> I will go into the English cases because they state principles of application which assist in resolving problems of interpretation involving interference with rights and freedoms where there is a no simple binary choice between an interpretation which is unmistakably open and one which is not. There is no such choice in the present case. The purposes of the Guardianship and Administration Act are benevolent. For those purposes, its provisions unmistakably authorise some interference with a person's rights and freedoms, and even drastic interference when that is called for. In doing so, the legislation strikes a balance between respecting the person's rights and freedoms and authorising what is necessary in their best interests. In this case, Patrick accepts the provisions have that general operation, but not, in his submission, to authorise the drastic interference in his case. The problem of interpretation is to determine the scope of the permissible interference in this context.
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> In such cases, it is surely necessary to go beyond stating an oracular conclusion that a "strict" interpretation means the legislation does not authorise the drastic interference or that the legislation unmistakably permits it. That is not the nature of the interpretative problem. It is hardly pertinent to say the legislation should be interpreted strictly when it unmistakably authorises some or even a substantial interference with rights. It is equally unhelpful to say the legislation contains provisions having that unmistakable effect when there is legitimate dispute about the scope of operation of those provisions, properly interpreted. It is necessary to engage more intensely and explicitly with the purposes of the legislation and its impact on individual rights and freedoms and then determine where, on a proper interpretation of the provisions, the legislative balance has been struck. The principle of legality allows this to be done, and transparently.
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> …
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> Applying this principle to legislation which unmistakably intends some interference to be authorised but the scope of the permitted interference is in issue, it is first necessary to identify the right or freedom which is said to be infringed and consider the importance of the interests which it protects in the particular circumstances. Then it is necessary to identify the nature and extent of the interference by, and the purposes of, the statutory

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[67] *Nguyen v Director of Public Prosecutions* [2019] VSCA 20, [103] referring to *R v DA* (2016) 263 A Crim R 429.
[68] *PJB v Melbourne Health* (2011) 39 VR 373, [247] – [248], [271], [287] (Bell J).

> provisions in question. If the interference complained of goes beyond what is shown to be reasonably necessary to meet a substantial and pressing need or legitimate aim, the proper interpretation will be that the interference is beyond the scope of the provision. In that regard, the more substantial is the infringement with the right or freedom, the more is required to show that the interference is necessary to meet the aims postulated and the interference should be the least necessary for that purpose.
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> …
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> Under s 32(1) of the Charter, s 46(1)–(4) must be interpreted compatibly with human rights so far as that is possible consistently with the purpose of those provisions. I have identified the purpose of the provisions as protective and benevolent and being for the appointment of an administrator to control and manage the estate and financial affairs of people with disabilities. An interpretation cannot be adopted which is inconsistent with that purpose. The possible interpretations must be explored within the framework of the ordinary rules of interpretation, having regard to that purpose. The interpretation which least infringes human rights must be adopted. The interpretation which I have identified in that way and adopted is the one which is consistent with the purpose of the provisions and least infringes human rights.

69. The Commission agrees with the conclusions reached by the Public Advocate, and makes the following further observations, in relation to the first three interpretive questions posed by the Public Advocate:

(1) interpreting the phrase "medical treatment" as including the use of any restraint required to provide medical treatment;

(2) interpreting the use of restraint as a "personal matter" for which the Tribunal may appoint a guardian; and

(3) interpreting restraint as a thing "necessary to give effect any power or duty vested in the guardian";

would prevent any limits on Charter rights that arise through application of these provisions from satisfying the reasonable limits test in s 7(2) of the Charter. This is because those interpretations would allow restraint to be used without appropriate safeguards to ensure its use is not arbitrary, so the requirement that a limit be "under law" would not be satisfied.

70. However, the Commission does not agree with the Public Advocate that s 32(1) of the Charter precludes the use of s 45(1) of the Act by the Tribunal to make an order allowing the use of restraint on the represented person in order to compel them to comply with the guardian's decision. This interpretation appears to be inconsistent with the legislative purpose. It also limits

the right to life, to the extent that it would prevent the Tribunal from authorising the use of restraint to administer life-saving medical treatments, regardless of necessity or proportionality.

71. Section 32(1) of the Charter requires an interpretation that is consistent with the legislative purpose. In this case:

(1) section 45(3) strongly indicates that the power in s 45(1) was intended to be used to authorise physical coercion by providing that a guardian is not liable for false imprisonment or assault, if authorised to take the relevant action under s 45(1);

(2) the Statement of Compatibility for the Bill introducing the Act clearly anticipated that s 45 would authorise physical coercion, and includes the following discussion:

> Clause 45 may limit a represented person's right to freedom of movement under section 12 of the Charter to the extent that it may authorise a guardian or other specified person to use physical or non-physical measures to force a represented person to comply with a guardian's decision, such as a change of accommodation. … However in addition to the safeguards outlined above in respect of the duties imposed on a guardian, the Bill provides for oversight of the exercise of the power to enforce compliance by providing that VCAT must authorise a person to take 'specified measures' and must hold a hearing to reassess an order made under clause 45 as soon as practicable after the making of that order, but within 42 days (clause 45(2)). In my view, any limitation of section 12 of the Charter and other Charter rights discussed above imposed by clause 45 is reasonable and justifiable.

72. The Commission submits that although s 45(1) cannot be interpreted as excluding the making of orders allowing for the use of restraint, it is clear that Parliament intended that the limits imposed on rights under orders made pursuant to s 45(1) were to be reasonable and justifiable and that the regular review function under s 45(2) was intended be rights protective. Further, s 32(1) has work to do by requiring the most rights protective interpretation of s 45(1) that is available to be adopted by the Tribunal. The Commission submits that the phrases "specified person" and "specified measures or actions" should be interpreted as requiring a high level of specificity with respect to the persons and the precise measures or actions that are authorised by the Tribunal (and the context in which they are authorised). In doing so, the orders made should give very clear guidance about what can be done by whom, to ensure that Charter rights are only limited in a proportionate manner and for sufficiently important purposes.

73. Given that the Tribunal is a public authority when making orders under s 45(1), its duty to act compatibly with Charter rights will also require that any limit on rights that occurs as a result of those orders is reasonable and justifiable. To achieve this, where rights are limited by s 45(1) orders, the Tribunal must incorporate appropriate safeguards in its orders to ensure that the use

of any restraint is compatible with those rights. Some relevant safeguards identified by the Commission are set out below.

VIII PROPOSED SAFEGUARDS

74. The Commission has undertaken a review of the legislative safeguards that the Victorian and other State legislatures have enacted when authorizing the use of restrictive practices within disability, mental health and guardianship settings.

75. The Commission has identified a number of recurring themes in the safeguards that *may* ensure that where restrictive practices are used they are only used when needed for a sufficiently important purpose and to ensure that the way they are used does not undermine human dignity. It is for the Tribunal, and for the Public Advocate, as the relevant public authorities who are taking action and making decisions that will limit [redacted]'s Charter rights, to ensure that this is the case. A failure to do so would be unlawful, because it would involve a failure to comply with the obligations in s 38(1) of the Charter, and to act within the confines of the discretion conferred by s 45(1) of the Act, which Parliament intended to operate compatibly with Charter rights.

76. The Commission submits that in order to ensure that any order made by the Tribunal is not incompatible with Charter rights, and to ensure that any limit on Charter rights occurs "under law", the Tribunal should incorporate safeguards akin to those found in other legislative regimes that provide for the use of restraints in a benevolent context, in a form appropriately modified to their implementation under an order of the Tribunal made under s 45(1) of the Act. The Commission suggests some appropriate safeguards that might be made alongside any order under s 45(1) authorising the use of restraint to provide medication or therapeutic treatment below (noting the obligation remains on the Tribunal and the Public Advocate to determine what safeguards are needed on a case by case basis). The suggested safeguards are to require:

(1) the approval by the Tribunal of a *restraint plan* proposed by [redacted]s treating practitioners and approved by the guardian;

(2) a draft of the restraint plan to be discussed with [redacted] to ascertain her feedback and make adjustments in accordance with her wishes where possible;

(3) the restraint plan to incorporate a reference to [redacted]'s preferences with respect to the manner of implementing restraints or the form of restraints, where this can be ascertained, and to have regard to any advance care directive in place for [redacted];

(4) provision of the restraint plan to [redacted] with an explanation of what it provides for and who the authorised people are, so that she knows what to expect and who is allowed to do what;

(5) [redacted] to be informed, after each reassessment by the Tribunal under s 45(2), that the restraint plan will be reassessed at least every 42 days by the Tribunal and that she can tell the Tribunal her views at that reassessment;

77. The restraint plan should:

(1) specify the precise measures of restraint that are authorised;

(2) require that [redacted]'s dignity be protected to the extent possible in the manner in which any restraint is used;

(3) require that [redacted]s preferences expressed in the restraint plan should only be overridden when they do not effectively facilitate the therapeutic objective for which restraints are being used;

(4) specify the medicine and types of treatment that warrant the use of restraint, including a threshold of therapeutic seriousness for unforeseen treatments or medication, and prohibit the use of restrictive practices for less serious therapeutic goals where the consequences of not acting do not pose a sufficiently serious risk to [redacted]s health, safety or life to warrant the use of restraint;

(5) identify the circumstances in which each measure is authorised to be used and the circumstances in which those measures must be withdrawn in favour of any therapeutically acceptable delay in the administration of medication or performance of treatment;

(6) outline a less restrictive approach to medication administration and medical treatment that must be attempted before restraint is used, such as the one currently in use whereby a familiar nurse will ask [redacted] on three separate occasions whether she agrees to the medication or treatment;

(7) provide that a person authorised to use restraint must also consider whether there are any other less restrictive means of achieving the therapeutic goal in the circumstances confronting them at that time, and if so to attempt that less restrictive method, before using restraint;

(8) specify the persons who are authorised to use restraint;

(9) specify that [redacted] must at all times be accompanied by a person authorised to use that restraint while she is subject to any restraint;

(10) require that all uses of restraint be documented, with a record of the timing and results of the three voluntary attempts, any other less restrictive strategies attempted and the results of those strategies, the name of the authorised person, the medication or procedure for which restraint was used, how long the restraint was applied for and [redacted]s response to the use of restraint;

(11) require reporting of the above records by the treating practitioners to the guardian as soon as practicable after the use of that restraint.

78. The Commission defers to the expertise of the Public Advocate and the Tribunal in guardianship matters, and notes that there may be additional matters that warrant attention when identifying appropriate safeguards. These safeguards are augmented by the existing requirement in s 41(1)(d) of the Act for the guardian to act in such a way so as to protect the represented person from neglect, abuse or exploitation.

Dated: 5 November 2021

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