

INQUEST INTO THE DEATH OF TANYA DAY

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 inquest as of right under s 40(1) of the *Charter of Human Rights and Responsibilities 2006* (Vic) (the **Charter**).
2. This outline of submissions is limited to the Court's determination of the scope of the inquest. The Commission reserves its position to make further submissions concerning the application of the Charter in the inquest. The Commission does not wish to be heard on any issue unrelated to the Charter.

I THE ISSUE

3. The Coroners Court is an investigative and inquisitorial Court responsible for making findings concerning the cause and circumstances of reportable deaths: ss 67(1), 89(4) of the *Coroners Act 2008* (Vic) (the **Coroners Act**). A Coroner investigating a death must find, if possible:
 - (a) the identity of the deceased;
 - (b) the cause of death;
 - (c) the circumstances in which the death occurred (unless the deceased was not a person placed in custody or care immediately before they died and there is no public interest in making a finding regarding those circumstances); and
 - (d) any other prescribed particulars.¹

¹ Coroners Act, s 67.

4. In discharging this fact-finding function, a Coroner is obliged to pursue all reasonable lines of inquiry into the cause and circumstances of the death² and “do everything possible” to make a determination of these matters.³
5. The Coroners Court has an important preventative function: “to contribute to the reduction of the number of preventable deaths and fires through the findings of the investigation of deaths and fires, and the making of recommendations, by coroners”: s 1(c). Section 72(2) of the Coroners Act confers a broad power enabling a Coroner to “make recommendations to any Minister, public statutory authority or entity on any matter connected with a death or fire which the coroner has investigated, including recommendations relating to public health and safety or the administration of justice.” To give effect to this important purpose, in addition to making factual findings and recommendations, a Coroner may also make comments on “any matter connected with the death, including matters relating to public health and safety or the administration of justice”: s 67(3).
6. The Coroner is presently defining the scope of the inquest into the death of Tanya Day, an Aboriginal woman who died after being removed from a V-line train and arrested for public drunkenness and held in Police custody on 5 December 2017.⁴ The Coroner has already foreshadowed that she will be making a recommendation for the abolition of the offence of public drunkenness in s 13 of the *Summary Offences Act 1966* (Vic).⁵
7. The deceased’s family contends that systemic racial discrimination (that is, discrimination on the basis of race) should be within the scope of the inquest and requests the Coroner to investigate whether it contributed to the cause and circumstances of Tanya’s death. The Commission supports this submission. The Commission submits that investigating whether systemic racial discrimination contributed to Tanya’s death is compatible with the application of the Charter to this inquest.
8. In summary, the Commission submits:
 - 8.1 the Charter rights engaged in determining the scope of the inquest are the equality rights (ss 8(2) and 8(3)), the right to life (s 9) and a person’s right to enjoy their culture (s 19(2)(a));

² *Priest v West* (2012) 40 VR 521, 524 [3]-[4] (Maxwell P and Harper JA); 560 [167]-[172] (Tate JA).

³ *Ibid*, 524 [6] (Maxwell P and Harper JA).

⁴ Coronial Brief of Evidence (**BOE**) (4), Summary of Circumstances.

⁵ Transcript of Directions Hearing held on 6 December 2018, T3.18-T4.8.

8.2 various operative provisions in the Charter apply to the Court in determining the scope of the inquest:

8.2.1 first, as a “public authority” the Court is bound by s 38(1) of the Charter. Discharging the obligations in s 38(1) of the Charter imposes both a procedural and substantive obligation on the Court. Absent any material justifying a reasonable limitation on the rights engaged, the Court should act compatibly with the rights by investigating whether systemic racism was a cause or circumstance of Tanya’s death. Further, to give effect to s 19(2) of the Charter, the Court should inquire into whether Tanya received culturally safe and trauma-informed care by the various agencies who engaged with her on the day of her arrest up until her death;

8.2.2 further or alternatively, if the Court is not acting as a public authority under the Charter, the rights protected in s 8(3), 9 and 19 of the Charter are in any event directly applicable to the Court by reason of s 6(2)(b) of the Charter. By reason of the direct application of these rights to the Court, in determining the scope of the inquest, the Court should construe its functions broadly to permit it to examine whether systemic racism was a cause or circumstance of Tanya’s death;

8.3 further, independently of both s 38(1) and s 6(2)(b), by applying the interpretative rule in s 32(1) of the Charter the Court should:

8.3.1 interpret the Court’s function in s 67(1) to determine “the circumstances in which the death occurred” compatibly with the right to an effective investigation into Tanya’s death protected by s 9 of the Charter by investigating whether systemic racism was a cause or circumstance of Tanya’s death;

8.3.2 alternatively, take into account relevant rights when carrying out its statutory functions.

II ENGAGEMENT OF CHARTER RIGHTS

9. A helpful first step in approaching the Charter is to identify relevant Charter rights. The threshold for the engagement of a Charter right is low.⁶ Charter rights are engaged whenever a right is relevant to a decision or action that a public authority has made, taken, proposed to take or failed

⁶ *Certain Children by their Litigation Guardian Sister Marie Brigid Arthur v Minister for Families and Children (No 2)* [2017] VSC 251, [179] (*‘Certain Children (No 2)’*).

to take.⁷ After construing rights “in the broadest possible way”⁸, a public authority must understand in general terms how Charter rights *may* be relevant to their action.

10. The Commission submits that the following human rights are engaged in this inquest: ss 8(2), 8(3), 9 and 19(2)(a).

Equality rights: s 8(2) and s 8(3)

11. 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.”
12. The concept of discrimination in the Charter is tied to the *Equal Opportunity Act 2010* (Vic) (**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 6 of that Act sets out the attributes of prohibited discrimination, including, relevantly, race and sex. 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. For example, 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’.
13. 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.⁹ In *Victoria Police Toll Enforcement v Taha*, her Honour Tate JA observed (footnotes omitted):

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

⁷ *Ibid.*

⁸ *Application Under the Major Crimes (Investigative Powers) Act 2004; DAS v Victorian Equal Opportunity Commission* (2009) 24 VR 415 (*‘Major Crimes’*), 434, [80]; *De Bruyn v Victorian Institute of Forensic Mental Health* (2016) 48 VR 647 (*‘De Bruyn’*), 691 [126]; *DPP v Ali (No 2)* [2010] VSC 503 [29]; *DPP v Kaba* (2014) 44 VR 526 [108].

⁹ *Lifestyle Communities Ltd (No 3) (Anti-Discrimination)* [2009] VCAT 1869 (*‘Lifestyle Communities Ltd’*) [257]; *Victorian Toll v Taha*; *State of Victoria v Brookes* [2013] VSCA 37 [210] (Tate JA); *Matsoukatidou v Yarra Ranges Council* [2017] VSC 61 (*‘Matsoukatidou’*) [50], [61], [105].

equally. This may have procedural implications for the way people are treated in court and tribunal proceedings.¹⁰

14. 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.¹¹ Both the second and third limbs have already been recognised to have procedural implications for Courts.¹²
15. Tanya was entitled to the protection of these rights during her life. Whether a denial of their protection was a cause or circumstance of her death is a matter that this Court should investigate.
16. Associate Professor Anthony identifies in her report several indicia of systemic racism (that is, discrimination on the basis of race) in the treatment of Tanya, including allegations of:
 - 16.1 racially discriminatory treatment of Tanya in the police call-out and the response to the call out;¹³
 - 16.2 racially discriminatory policing, including racial profiling, in the course of the arrest;¹⁴
 - 16.3 racially discriminatory treatment of Tanya in the police cells and by paramedics,¹⁵ including the failure to check and attend to welfare and health needs,¹⁶ rough handling of Tanya¹⁷ and the pervasive view of intoxication between police and paramedics leading to delayed medical assistance and Tanya’s transfer to hospital;¹⁸
 - 16.4 other types of discrimination in the treatment of Tanya, including on the basis of her gender;¹⁹ and
 - 16.5 systemic racism in the flaws in the investigation into the death of Tanya.²⁰
17. The decision of whether to include issues of systemic racism within the scope of the inquest engages the rights in ss 8(2) and s 8(3) of the Charter.

¹⁰ *Victoria Police Toll Enforcement v Taha* (2013) 49 VR 1, 70-71 [210] (Tate JA).

¹¹ *Lifestyle Communities Ltd* [141]; *Matsoukatidou* [50], [61], [106].

¹² *Matsoukatidou* [40]-[46], [50]-[55], [61]; *Cemino v Cannan* [2018] VSC 535 (*‘Cemino v Cannan’*).

¹³ *Report on systemic racism in relation to the death of Tanya Louise Day for the Coronial Court of Victoria*, Dr Thalia Anthony, 26 March 2019 at [59] – [63] (*Anthony Report*).

¹⁴ *Anthony Report*, [64] – [68].

¹⁵ *Ibid* [69] – [72].

¹⁶ *Ibid* [73] – [79].

¹⁷ *Ibid* [80].

¹⁸ *Ibid* [81] – [83].

¹⁹ *Ibid* [84] – [87].

²⁰ *Ibid* [88] – [89].

The right to life

18. Section 9 of the Charter states:

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

19. This right is modelled on art 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”.²¹ 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.

20. 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.²²

21. Victoria’s coronial system gives effect to this right. As the Statement of Compatibility to the *Coroners Bill 2008* stated:

The right to life is protected by section 9 of the charter. In other jurisdictions this right has been interpreted to include an obligation on government to ensure an effective investigation into certain deaths. As the most significant investigative mechanism into reportable and reviewable deaths, the coronial system *gives effect to this right*. The operation of an effective investigation process raises other relevant rights. Limitations on these rights have been found to be reasonable when balancing and giving effect to this aspect of the right to life.”²³

22. 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”.

23. The right to an “effective” investigation requires careful and thorough scrutiny that “takes into account all the surrounding circumstances”.²⁴ In respect of the United Kingdom jurisdiction, Dr

²¹ UN Human Rights Committee (HRC), *CCPR General Comment No. 6: Article 6 (Right to Life)*, 30 April 1982.

²² 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 positive obligation on a State to protect life, or take steps to do so.

²³ Statement of Compatibility to the Coroners Bill 2008, Victorian Parliamentary Hansard, Legislative Assembly, 9 October 2008 at p 4030 (Mr Hulls, Attorney-General).

²⁴ *McKerr v United Kingdom* [2001] ECHR 329 at [109], [115]. See also *McCann v United Kingdom* (1996) 21 EHRR 97; [1995] ECHR 31 at [157]-[164]; *R (Amin) v Home Secretary* [2011] 1 AC 653; *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182.

Freckleton and Coroner McGregor have noted that what is required by way of a death investigation that is compliant with the right to life (protected by Article 2 of the ECHR) is a flexible approach that is responsive to the facts of each case.²⁵ The European Court on Human Rights has taken the view that “in the light of the importance of the protection afforded by Article 2, the Court must subject complaints about deprivations of life to the most careful scrutiny, taking into consideration all relevant circumstances.”²⁶

24. This Court has already recognised the relevance of s 9 of the Charter in Victorian inquests. In *Coronial Investigation of 29 Level Crossing Deaths - Ruling on the Interpretation of Clause 7(1) of Schedule 1 to the Coroners Act* the Court had to determine whether the previous Coroners Act or current Act applied to the inquest. The Coroner held that the current Act applied, her conclusion fortified by the preventative focus in the current Act which gave effect to the right to life. Thus, it was said (at 19):

[I]n order to comply with the State’s requirements to protect the right to life, an Inquest in relation to the level crossing deaths must address broader systemic and prevention issues that may have contributed to the death.²⁷

25. Very recently in *Finding without inquest into the death of John Edwin Wilks*, a case involving the death of a man who fell in his wheelchair when riding a bus, Coroner McGregor found that a number of Charter rights were relevant including the right to life under s 9 of the Charter.²⁸
26. The right to life is plainly engaged in the circumstances of this inquest. Tanya died after suffering head injuries while in Police custody.²⁹ The positive scope of the right to life requires that there be an effective investigation into her death.

The right to be free of inhuman or degrading treatment

27. 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,³⁰ and is also protected in Article 3 of the ECHR.
28. As a matter of international law, the right not to be treated in a cruel, inhuman or degrading way includes a right to have credible allegations of such treatment effectively and independently

²⁵ Freckleton and McGregor, *Coronial Law and practice, A human rights perspective* (2014) 21 JLM 584, 592.

²⁶ *Anguelova v Bulgaria*, ECHR, Application no. 38361/97, Strasbourg, 13 June 2002, [110].

²⁷ *Coronial Investigation of 29 Level Crossing Deaths - Ruling on the Interpretation of Clause 7(1) of Schedule 1 to the Coroners Act* (25 June 2010), p 19 [15].

²⁸ *Finding into death without an inquest*, Coroners Court of Victoria, COR 2017 4263, 19 March 2019, [11].

²⁹ BOE (11-12), Summary of Circumstances.

³⁰ Opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

investigated. This implied procedural right is recognised in the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, to which Australia is a party, which expressly requires an impartial investigation of allegations of cruel, inhuman and degrading treatment.³¹

29. However, notwithstanding the settled international jurisprudence on the equivalent ICCPR and ECHR right, the Victorian Court of Appeal held in *Bare v Independent Broad-based Anti-corruption Commission*³² that s 10(b) of the Charter does not protect an implied procedural right to have credible allegations of such treatment or punishment independently investigated.³³
30. The decision in *Bare* arose in the context of an alleged victim of cruel, inhuman and degrading treatment by Victoria Police submitting that there was an implied right to have a credible allegation of a breach of s 10(b) of the Charter investigated independently of Victoria Police by the Office of Police Integrity. Plainly, the Coroners Court is an independent investigative Court. Once an inquest is convened, the Court can also investigate whether a deceased person has been subject to cruel, inhuman or degrading treatment by a public authority in breach of the Charter. .
31. 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. It “must reach a minimum level of severity or intensity before it can amount to cruel, inhuman or degrading treatment”.³⁴ Relevantly, in the context of the use of force in law enforcement, 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.³⁵
32. The Commission makes no submission as to whether the right is engaged, but notes that its engagement in this case has been alleged by Tanya Day’s family³⁶. In circumstances where s 10(b) is not engaged, the right to humane treatment when deprived of liberty may be engaged.³⁷

³¹ Opened for signature 10 December 1984, ATS 1989 No 21 (entered into force 26 June 1987) Arts 12, 13, 16(1).

³² (2015) VSCA 197 (*Bare*).

³³ *Bare* at [186]–[215] (Warren CJ) [398]–[458] (Tate JA), [640]–[666] (Santamaria JA)).

³⁴ *Kracke v Mental Health Review Board* (2009) 29 VAR 1; [2009] VCAT 646 [559] – [560], [574]; *Certain Children (No 2)* [2017] VSC 251 [250].

³⁵ *Certain Children (No 2)* [2017] VSC 251 [250].

³⁶ Family’s Submissions Regarding Scope of the Inquest, dated 29 March 2019, [80.3].

³⁷ 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].

33. The Commission submits that if the Court is satisfied that a credible allegation of cruel, inhuman or degrading treatment by a public authority arises on the evidence before it, the Charter requires the Coroners Court to give proper consideration to it when deciding the scope of the inquest.

Cultural rights

34. Section 19 of the Charter protects cultural rights as well as distinct Aboriginal rights. It states:
- (1) All persons with a particular cultural, religious, racial or linguistic background must not be denied the right, in community with other persons of that background, to enjoy his or her culture, to declare and practice his or her religion and to use his or her language.
 - (2) Aboriginal persons hold distinct cultural rights and must not be denied the right, with other members of their community –
 - (a) to enjoy their identity and culture; and
 - (b) to maintain and use their language; and
 - (c) to maintain their kinship ties; and
 - (d) to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and customs.
35. The expression “Aboriginal” is defined in s 3 of the Charter as “a person belonging to the indigenous peoples of Australia, including the indigenous inhabitants of the Torres Strait Islands, and any descendants of those peoples.”
36. There is no definition in the Charter of “culture” and the scope of s 19 has yet to be given any detailed consideration in Victorian law. However, comparative rights are protected in national and international human rights instruments. The United Nations Human Rights Committee has confirmed a broad and flexible interpretation of “culture” for the purposes of Article 27 of the ICCPR.³⁸ It encompasses traditional beliefs and practices, as well as social and economic activities that are part of a group’s tradition.³⁹ Cultural rights are collective rights that may be exercised individually by a person.⁴⁰ In respect of (the equivalent right in) s 20 of the New Zealand Bill of Rights Act, Elias CJ has observed “Cultural identification is an aspect of human dignity and always an important consideration where it is raised, as are the preferences and

³⁸ Human Rights Committee, Views: Communication No 197/1985, UN Doc CCPR/C/33/D/197/1985 (27 July 1988) [9.2]-[9.3] (*Kitok v Sweden*’).

³⁹ Ibid; Human Rights Committee, Views: Communication No. 511/1992, 52nd sess, UN Doc CCPR/C/52/D/511/1992 (8 November 1994) [9.2] (*Lansman v Finland*’).

⁴⁰ Human Rights Committee, General Comment No 23: Article 27 (Rights of Minorities), 8th sess, UN Doc CCPR/C/21/Rev.1/Add.5 (8 April 1994) [1].

practices which come with such identification, as s 20 of the New Zealand Bill of Rights Act 1990 affirms.”⁴¹

37. Article 27 of the ICCPR recognises the existence of a “right” to culture and requires that it should not be denied by States parties to the ICCPR. Consequently, the United Nations Human Rights Committee’s General Comment 23 recognises that positive measures by States parties may be necessary to protect against the denial or violation of the Article 27 rights:

6.1 Although article 27 is expressed in negative terms, that article, nevertheless, does recognize the existence of a “right” and requires that it shall not be denied. Consequently a State party is under an obligation to ensure that the existence and the exercise of this right are protected against their denial or violation. Positive measures of protection are, therefore, required not only against the acts of the State party itself, whether through its legislative, judicial or administrative authorities, but also against the acts of other persons within the State party. [...]

38. The Commission submits that s 19(2) of the Charter, even though expressed as a negative, confers a positive right on an Aboriginal person to enjoy his or her culture or identity. In *Poma Poma v Peru*,⁴² the UN Human Rights Committee recalled its General Comment 23⁴³ and confirmed that positive measures by States parties may be necessary to protect against the denial or violation of the Article 27 rights.⁴⁴ The requirement for a state party to take positive legal measures was also noted in *Mahuika v New Zealand*.⁴⁵
39. Human Rights Committee jurisprudence confirms that the impact of the denial or violation of the right must meet a threshold. In *Lansman v Finland*,⁴⁶ the Committee held that the impact of the interference on the rights contained in Article 27 must be “so substantial that it does effectively deny [Article 27 rights].”⁴⁷ In *Poma Poma v Peru*, the Committee said that a limited impact on the way of life and livelihood of persons belonging to that community would not necessarily amount to a denial of the rights under article 27.⁴⁸ However, there is otherwise limited guidance

⁴¹ *Takamore v Clarke* [2013] 2 NZLR 733 [15].

⁴² United Nations Human Rights Committee, Views: Communication No 1457/2006, UN Doc. CCPR/C/95/D/1457/2006 (27 March 2009) (*Poma Poma v Peru*).

⁴³ United Nations Human Rights Committee, General Comment 23: The rights of minorities, Fiftieth session, 1994, in *Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies*, HRI/GEN/1/ [6.2].

⁴⁴ *Angela Poma Poma v Peru* at [7.2].

⁴⁵ United Nations Human Rights Committee, Communication No. 547/1993, UN Doc. CCPR/C/70/D/547/1993 (16 November 2000) [9.5].

⁴⁶ United Nations Human Rights Committee, Views: Communication No 511/1992, UN Doc. CCPR/C/52D/511/1992 (8 November 1994).

⁴⁷ *Ibid*, [9.5].

⁴⁸ *Poma Poma v Peru*, [7.4].

available from the Human Rights Committee as to the precise threshold at which “interference” becomes “so substantial” that it amounts to a “denial”. It is a question of degree.

40. It has been established in Victorian law that s 19 of the Charter can impose particular obligations on Courts. In *Cemino v Cannan*⁴⁹, the Supreme Court held that the Magistrates Court was obliged by the Charter to consider the distinct cultural rights of Aboriginal people in the Charter when exercising its discretion to send a case to the Koori Court. In the different context of a bail application, in *DPP v SE*⁵⁰ the Supreme Court held in a bail application that it was necessary for the Court to recognize that “different forms of discriminatory disadvantage and vulnerability may be experienced by Aboriginal persons, children and persons with intellectual disability and that someone who is disadvantaged and vulnerable in all three discriminatory respects is in a position of exacerbation.”⁵¹
41. The Commission submits that s 19(2) is engaged in this inquest for the following reasons:
- 41.1 Tanya was an Aboriginal woman who held distinct cultural rights by reason of her race. As the Charter’s Preamble recognises ‘human rights have a special importance for the Aboriginal people of Victoria, as descendants of Australia’s first people’;
- 41.2 the overrepresentation of, and “cultural ignorance” towards Aboriginal people in the criminal justice system are well-documented;⁵² and
- 41.3 as an Aboriginal woman, Tanya faced particular psychological challenges while in police custody due to Indigenous inter-generational trauma, including by reason of the death of her family member in custody, Harrison Day. For example, there is evidence in the Coronial Brief that Tanya was highly distressed about being placed in police custody⁵³ and felt unsafe and agitated while in custody.⁵⁴ While in custody, Dr Anthony identifies

⁴⁹ [2018] VSC 535.

⁵⁰ [2017] VSC 13.

⁵¹ *DPP v SE* [2017] VSC 13 [28] (Bell J). Sections 19(1) and (2) of the Charter were also identified as relevant rights in *Secretary to the Department of Human Services v Sanding* (2011) 36 VR 221 [156], [249].

⁵² Victorian Department of Justice (2005), *Victorian Implementation Review of the Recommendations from the Royal Commission into Aboriginal Deaths in Custody: Review Report*, Volume 1, 5. Available at <https://www.parliament.vic.gov.au/papers/govpub/VPARL2003-06No165Vol1Sections1-5.pdf>; Anthony Report, 14 [27].

⁵³ BOE (104), Statement of Kristian Hurford, [5] (“We parked in the sally port and got the female out of the back. She was wobbling on her feet, a bit bemused by the situation and began to cry. I told her to calm down she was not in any trouble and we were trying to get her help.”); BOE (297), Statement of Belinda Stevens, [69], [71], [73].

⁵⁴ BOE (297), Statement of Belinda Stevens, [73]; BOE (304), Statement of Warren Stevens, [52a]; BOE (111), Statement of Wayne Rowe, 4 (“At first, she didn’t want to comply but she wasn’t being resistant, she just wasn’t listening to what we were saying and kept asking us “Why?” and trying to bargain with us to release her.”); BOE (126), Statement of Edwina Neale (“each time we checked on her she asked when she could go home”).

the failure of Victoria Police to properly attend to Tanya’s health and welfare in the holding cell owing to adherence to dominant views of Aboriginal women as “intoxicated” and “troublesome”.⁵⁵ Tanya’s Aboriginal identity raises for consideration by this Court the cultural competence of those who interacted with Tanya in the lead up to her death, and the extent to which the unique fears Aboriginal persons experience in custody were recognised by those involved with her on the day of her arrest and informed appropriate culturally safe and trauma-informed care.⁵⁶

42. The Commission submits that s 19(2) is engaged in this inquest.
43. The Commission makes a particular submission concerning the scope of the inquest to give effect to s 19(2): namely, that the Court should enquire into whether Tanya received culturally safe and trauma-informed care by the various agencies who engaged with her on the day of her arrest up until her death, and inquire into the matters identified by Dr Anthony concerning whether Tanya was provided with culturally appropriate care.

III THE COURT IS A PUBLIC AUTHORITY WHEN DECIDING THE SCOPE OF THE INQUEST

44. The Commission submits that the Coroners Court is acting as a public authority in determining the scope of the inquiry and making factual findings and recommendations.
45. 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. 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.

⁵⁵ Anthony Report, 41 [69] and [70]; BOE (125) Edwina Neale, Statement, 3 (“her manner towards myself and the other members was still quite beligerant, she clearly didn’t want to be here”).

⁵⁶ See Martin Laverty, Dennis McDermott and Tom Calma, ‘Embedding Cultural Safety in Australia’s Main Health Care Standards’ (2017) 207(1) *Medical Journal of Australia* 15; Judy Atkinson, ‘Trauma-informed services and trauma-specific care for Indigenous Australian children’, Resource sheet no. 21, 23 July 2013, found at: < <http://earlytraumagrieff.anu.edu.au/files/ctg-rs21.pdf>>. The Commission understands that the provision of culturally safe health care is an issue currently under consideration by the Court in the coronial inquest into the death of Harley Larking.

46. The Coroners Court is a “Court” within the meaning of the Charter. Indeed, it was added to the Charter definition by consequential amendments made by the Coroners Act.⁵⁷
47. The key distinguishing factor to determine if a court is acting as a public authority (or not) is whether the court is “acting in an administrative capacity”. That expression is not defined in the Charter. However, the note to s 4(1)(j), which forms part of the provision,⁵⁸ gives examples of matters that Parliament considers meet the description.
48. There is no judicial authority to the Commission’s knowledge on whether the Coroners Court is a public authority under the Charter when determining the scope of an inquest, and more broadly, conducting an inquest and exercising the powers in the Coroners Act to make findings and recommendations on matters connected with a death.
49. The Commission submits these tasks are administrative, having regard to the decided cases on s 4(1)(j) of the Charter.⁵⁹ While some of the Court’s functions may be judicial in nature, such as ruling on the lawfulness of a subpoena, the task of conducting an inquest, which includes determining the scope of the inquest, is confined by the purpose of findings facts and not apportioning guilt.⁶⁰ There is no binding determination made between parties and the process does not determine the criminal or civil liability of any person. The functions and powers conferred on a coroner are consistent with the character of an inquest as an inquisitorial and not adversarial process.⁶¹
50. The fact that parties represented at an inquest may take different positions about the scope of an inquest does not make the task of deciding the scope a judicial function. It is the obligation of the

⁵⁷ The definition of “Court” in the Charter was amended by the Coroners Act commencing on 1 November 2009. Prior to the amendment, Justice Bell, sitting as President of the Victorian Civil and Administrative Tribunal noted the absence of the Coroners Court from the Charter in *Kracke v Mental Health Review Board* (2009) 29 VAR 1 at [300]-[301]; see Pound and Evans, *Annotated Victorian Charter of Rights* (Second edition, Lawbook Co, 2019), [CHR.3.80], 22.

⁵⁸ *Interpretation of Legislation Act 1984* (Vic) s 36(3A).

⁵⁹ *Sabet v Medical Practitioners Board of Victoria* (2008) 2 VR 414 (*Sabet*) (the Medical Practitioners Board of Victoria was acting in an administrative capacity when deciding to suspend a practitioners’ registration); *PJB v Melbourne Health* (*Patrick’s Case*) (2011) 39 VR 373 (the Victorian Civil and Administrative Tribunal was acting in an administrative capacity in exercising its power to appoint an administrator over the estate of a person with a mental illness); *Slaveski v R* (2012) 40 VR 1 (the Court’s function to grant or refuse an adjournment is not acting in an administrative capacity); *R v Debono* [2013] VSC 407 (Supreme Court of Victoria was acting in an administrative capacity when making a coercive powers order under the *Major Crime (Investigative Powers) Act 2004* (Vic). For a catalogue of cases in which Courts and the VCAT have been held to be acting in an administrative capacity, see Pound and Evans, *Annotated Victorian Charter of Rights* (Second edition, Lawbook Co, 2019), [CHR.4.240], 32-34. In *Harmsworth v The State Coroner* [1989] VR 989, which concerned the old Coroners Act, the Supreme Court decided that the Court performed an administrative function.

⁶⁰ *Priest v West* (2012) 40 VR 521, 560 [167] (Tate JA).

⁶¹ *Ibid.*

Coroner, independently of the positions taken by the parties, to perform the statutory task of determining, if possible, the cause and circumstances of death.⁶²

51. Significantly, the question of whether the Coroners Court is a public authority under the Charter was considered at the time of the enactment of the Coroners Act. In its review of the Coroners Bill, the Scrutiny of Acts and Regulations Committee (**SARC**) asked the Minister to clarify what capacities of the Court are non-administrative. In his response, the Minister stated “although most of the functions of the Coroners Court would be administrative, some of the Court’s powers would be judicial, such as a decision regarding the release of a body (see clauses 47 & 48); and a decision regarding contempt of court (see clause 103).” The Minister continued: “when exercising the majority of its powers, the Coroners Court will be acting in an administrative capacity and will therefore be bound as a public authority by the obligation in s 38 of the Charter.” Finally, he stated that where the Court is acting in a non-administrative capacity, “it will be bound by section 32 of the Charter to interpret all statutory provisions in a way that is compatible with human rights, so far as it is possible to do so consistently with their purpose.”⁶³
52. As a public authority, the obligations in s 38(1) apply to the Court.

IV SECTION 38 OF THE CHARTER

53. Section 38(1) of the Charter imposes two distinct obligations on a public authority.⁶⁴ 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).
54. A useful roadmap for the Court to follow in order to ensure it is acting lawfully under s 38(1) is for the Court to ask itself the following questions:⁶⁵
- 54.1 is any Charter right relevant to the decision or action that the Court has made, taken, proposed to take or failed to take (the relevance or engagement question);

⁶² *Ibid*, 560 [169].

⁶³ Ministerial Response to the Scrutiny of Acts and Regulation Committee, Parliament of Victoria, Alert Digest No. 15 (2008).

⁶⁴ *Baker v DPP* [2017] VSCA 58 (*‘Baker v DPP’*), 13 [48] (Tate JA); *Bare* at 205 [245] (Tate JA).

⁶⁵ *Certain Children (No 2)* at [174]; *Minogue v Dougherty* [2017] VSC 724 at [74]. These questions build on the three-step approach articulated in *Sabet* at [108] which was applied by the Court of Appeal in *Baker v DPP* at [56].

- 54.2 if so, has the Court done or failed to do anything that limits that right? (the limitation question);
- 54.3 if so, is that limit reasonable and is it demonstrably justified having regard to the matters set out in s 7(2) of the Charter? (the proportionality or justification question);
- 54.4 even if the limit is proportionate, if the Court has made a decision, did it give proper consideration to the Charter right? (the proper consideration question);
- 54.5 was the act or decision made under a provision of the Coroners Act that gave the Coroner no discretion in relation to the act or decision, or does the Coroners Act confer a discretion that cannot be interpreted under s 32 of the Charter in a way that is consistent with the protected right (the inevitable infringement question).

Justified limits on rights

55. 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.⁶⁶ 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.⁶⁷
56. The justification question involves an assessment made by reference to the matters set out in 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 the limitation and its purpose; and (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve”.⁶⁸ Section 7(2) of the Charter embodies a proportionality test.⁶⁹
57. The onus rests on the party seeking to justify a limitation.⁷⁰
58. The first factor in s 7(2) calls for an examination of the nature of the right. This involves considering the quality of the right and the importance of the values that underpin it.⁷¹ The rights engaged in this proceeding protect important values including life, equality and freedom from discrimination, as well as the protection of culture in the administration of the law.

⁶⁶ *De Bruyn* at 682 [100]; *Kracke v Mental Health Review Board* (2009) 29 VAR 1 [99]; *PJB v Melbourne Health (Patrick’s Case)* (2011) 39 VR 373 [332].

⁶⁷ *Baker v DPP* at 15 [57] (Tate JA with whom Maxwell P and Beach JJA agreed).

⁶⁸ *Ibid.*

⁶⁹ *Momcilovic v R* (2011) 245 CLR 1, 39 [22] (French CJ).

⁷⁰ *Major Crimes*, 449 [148].

⁷¹ *Re Lifestyle Communities*, 350 [328].

59. The second factor in s 7(2) requires the purpose of the limitation on a right to be identified. The purpose must both accord with the values of the Charter and be sufficiently important to warrant the limitation. As Bell J said in *Re Lifestyle Communities*: “[t]he more important is the purpose so understood, the more the limitation is likely to be justified, and vice versa.”⁷²
60. The third factor identified in s 7(2)(c) is a critical step in the proportionality exercise. It is necessary to identify objectively how greatly the limitation constrains the rights. The greater the constraint, the more compelling must be the justification, and vice versa.
61. Finally, the fourth and fifth factors require that there is a rational connection between the limitation and its purpose⁷³ and the limitation should impair the right to the minimum extent possible.⁷⁴

Proper consideration to relevant human rights

62. 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.⁷⁵
63. 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*⁷⁶ requires a decision maker to:
- 63.1 understand in general terms which rights would be affected by the decision and how they may be interfered with by the decision;
 - 63.2 seriously turn his or her mind to the possible impact of the decision on the person’s human rights;
 - 63.3 identify the countervailing interests or obligations; and

⁷² *Re Lifestyle Communities*, 351 [329].

⁷³ *Major Crimes*, 449 [148].

⁷⁴ *Ibid.*

⁷⁵ *Certain Children (No 2)*, [177], [225]-[226].

⁷⁶ *Castles v Secretary of Department of Justice* (2010) 28 VR 141 (*Castles*), 184 [185]-[186]; *De Bruyn*, 669-701 [139]-[142]; *Bare*, 198-199 [217]-[221] (Warren CJ), 218-219 [277]-[278] (Tate JA), 297 [534] (Santamaria JA) (each of the three Justices of Appeal applied the “Castles test” for proper consideration by way of *obiter dicta*).

63.4 balance competing private and public interests.⁷⁷

64. 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.⁷⁸ However, the obligation imposes a higher standard than the obligation to take into a consideration at common law or under statute.⁷⁹ This follows from the obligation to give “proper” consideration to human rights.⁸⁰
65. 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”.⁸¹ 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-makers consideration rather than form.⁸²
66. In this proceeding, the obligation to give proper consideration to relevant Charter rights requires the Court to undertake a *Castles* analysis when deciding the scope of the inquest.

V SECTIONS 8(3), 9 AND 19 APPLY TO THE COURT IN THE EXERCISE OF ITS FUNCTIONS

67. Further and alternatively to the Commission’s submissions concerning the Court acting as a public authority, a second way in which the Commission contends that the Charter applies to the Court in respect of determining the scope of the inquest is by reason of s 6(2)(b) of the Charter.
68. Section 6(2)(b) states that the Charter applies to ‘courts and tribunals, to the extent that they have functions under Part 2 and Division 3 of Part 3’. The reference in s 6(2)(b) to “functions” includes a power, authority and duty.⁸³
69. Three possible constructions of s 6(2)(b) have been proffered.⁸⁴ The intermediate construction of s 6(2)(b) has been consistently accepted in the Supreme Court.⁸⁵ There is little or no support for

⁷⁷ *Castles*, 184 [185]-[186].

⁷⁸ *PJB v Melbourne Health (Patrick’s Case)* (2011) 39 VR 373 [311] (Bell J).

⁷⁹ *Bare*, 217-218 [275]-[276] (Tate JA), 198-199 [217]-[221] (Warren CJ).

⁸⁰ *Ibid*, 217-218 [275]-[276], 226 [299] (Tate JA).

⁸¹ *Castles*, 144.

⁸² *De Bruyn*, 701 [142].

⁸³ Section 3(2)(a) of the Charter.

⁸⁴ *Victoria Police Toll Enforcement v Taha* (2013) 49 VR 1, [246] (Tate JA), Judicial College Bench Book, 2.5.

⁸⁵ *Cemino v Cannan*, [110]; *De Simone v Bevnol Constructions* (2009) 25 VR 237, 247 [52] (Neave JA and Williams AJA); *Kracke v Mental Health Review Board* (2009) 29 VAR 1, 63 [250] (Bell J); *Victoria Police Toll Enforcement v Taha* (2013) 49 VR 1, [247]-[248] (Tate JA); *Matsoukatidou*, [32] and references cited in footnote 12; *DPP v SL* [2016] VSC 714, [6]; *Application for bail by HL* [2016] VSC 750, [72] (Elliot J); *DPP v SE* [2017] VSC 13, [12] (Bell J); *Cemino v Cannan*, [110].

the alternative broad or narrower constructions referred to in *Taha*.⁸⁶ Pursuant to the intermediate construction, the function of the court is to enforce directly only those rights enacted in Part 2 of the Charter that directly relate to court proceedings.⁸⁷

70. To be directly applicable under s 6(2)(b), the right can relate to a function of the Court if it relates not only to the procedures of Courts, but also to the determination of a matter before the Court.⁸⁸ If a right applies directly to the Court via s 6(2)(b), when assessing whether the Court has acted compatibly with the right, s 7(2) should be applied.⁸⁹
71. In *Cemino v Cannan* [2018] VSC 535 Justice Ginnane confirmed that the rights protected in s 8(3) and s 19(2)(a) were directly applicable to the Magistrates' Court by reason of s 6(2)(b) of the Charter.⁹⁰ In that case, the Magistrate acted unlawfully by not considering the functions of the Magistrates Court under s 8(3) and s 19(2)(a) when making the decision to refuse an Aboriginal person's request to be heard in the Koori Court.⁹¹
72. The Commission submits that the Court has functions in respect of s 8(3), s 9 and s 19.
73. The second and third limbs in the equality right protected in s 8(3) of the Charter have been recognised to impose procedural obligations on a Court.⁹² In relation to the decision about whether including systemic racism within the scope of the inquest, the second and third limb of s 8(3) are engaged. Tanya was an Aboriginal woman with a protected attribute under s 6 of the Equal Opportunity Act. There are indicia of racially discriminatory treatment by those involved with her on the day of her arrest. The Court has a function to investigate the cause and circumstances of her death and "do everything possible" to make a determination of these matters.⁹³
74. In respect of s 9 of the Charter, the Commission contends that the Court has a function to carry out an effective investigation into her death. This requires the Court to exercise its investigatory powers in a manner that gives effect to the statutory purpose of the Coroners Act, to reduce future

⁸⁶ *Cemino v Cannan*, [110].

⁸⁷ *Victoria Police Toll Enforcement v Taha* [246]; *Cemino v Cannan*, [110].

⁸⁸ *X v General Television Corporation Pty Ltd* (2008) 187 A Crim R 533; [2008] VSC 344 [34]–[45]; *News Digital Media Pty Ltd v Mokbel* (2010) 30 VR 248, 259 [38] (Warren CJ and Byrne AJA) (s 15 of the Charter was applied in respect of making a suppression order); *DPP v SE* [2017] VSC 13, [12], [21] (s 8(3), s 17(2), s 19(2) and s 23(1) of the Charter) and *Application for bail by HL* [2016] VSC 750, [70] (s 17(2), s 22(1), s 22(3), and s 25(3) of the Charter were applied in bail applications).

⁸⁹ *Matsoukatidou*, [58]; *Victoria Police Toll Enforcement v Taha* (2013) 49 VR 1, [250] and footnote 283.

⁹⁰ *Cemino v Cannan*, [144], [147].

⁹¹ *Cemino v Cannan*, [150].

⁹² *Matsoukatidou*, [40]; *Cemino v Cannan*, [11], [142]–[144], [147]–[149].

⁹³ *Priest v West* (2012) 40 VR 521, 524 [6] (Maxwell P and Harper JA).

preventable deaths by making findings and recommendations, by examining whether systemic issues contributed to Tanya’s death.

75. Finally, s 19 also has application to the Court by reason of s 6(2)(b). The Court is obliged to pursue all reasonable lines of inquiry to establish the cause and circumstances of Tanya Day’s death. As stated above, this inquest raises questions about the cultural competence of those who interacted with Tanya in the lead up to her death, and the extent to which she received culturally safe and trauma-informed care by those who interacted with her. The Commission submits that this is a reasonable line of inquiry in the context of this inquest.

VII SECTION 32 OF THE CHARTER

76. 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.

77. The operation of s 32(1) of the Charter was extensively examined in *Momcilovic v The Queen* (*Momcilovic*). But as Nettle JA (as his Honour then was) has observed:⁹⁴

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.

78. 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*:

78.1 s 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*”.⁹⁵

78.2 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;

⁹⁴ *WK v The Queen* [2011] VSCA 345 at [55].

⁹⁵ [2012] VSCA 25 [20] (Warren CJ, Nettle and Redlich JJA).

78.3 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.”⁹⁶

78.4 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 recently stated in *Nguyen v Director of Public Prosecutions*:⁹⁷

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.⁹⁸

79. Section 32(1) was applied by the Coroners Court in *Coronial Investigation of 29 Level Crossing Deaths*.⁹⁹ Coroner Jane Gendtliss decided that s 32(1) of the Charter required that, wherever possible “interpretation of the law in the Coroners Court must give effect to the public health and safety provisions of the new Act.” In that case, which involved the investigation of multiple level crossing deaths, the Coroner decided that in order to comply with the State’s requirement to protect the right to life, an inquest in relation to the deaths must address broader systemic and prevention issues that may have contributed to the death. That outcome was “consistent with Australia’s international obligations under the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights and s 9 (right to life) of the *Charter of Human Rights and Responsibilities Act*”.¹⁰⁰

80. The Commission makes two submissions concerning the application of s 32(1) in determining the scope of this inquest.

81. First, the Commission submits that when construing its power in s 67(1) to make a finding on “the circumstances in which the death occurred”, the Court should construe that power to give effect to the preventative purpose of the Coroners Act in s 1(c) to reduce the number of preventable deaths and compatibly with the procedural obligation within the scope of the right to life in s 9 of the Charter, by ensuring there is an comprehensive, thorough and effective

⁹⁶ Ibid, at [35(2)].

⁹⁷ [2019] VSCA 20.

⁹⁸ Ibid, [103], referring to *R v DA* (2016) 263 A Crim R 429.

⁹⁹ *Coronial Investigation of 29 Level Crossing Deaths – Ruling on the Interpretation of Clause 7(1) of Schedule 1 of the Coroners Act 2008 (Vic)* (25 June 2010).

¹⁰⁰ Ibid, 19 [13].

investigation into Tanya's death. In the Commission's submission, this requires the Court to expand the scope of the inquest to examine whether the circumstances in which Tanya died involved systemic racial discrimination. The effect of this submission is that the Commission contends that the Court's discretion in respect of the scope of this inquest is constrained by reason of s 9 of the Charter which requires an "effective" investigation to be undertaken.

82. Alternatively, the Commission submits that when construing its statutory functions, including the power in s 67(1) to make a finding on "the circumstances in which the death occurred", human rights protected by the Charter provide an additional dimension to the meaning of that expression¹⁰¹ and have to be taken into account by the Coroner when deciding the scope of the inquest.¹⁰² The Coroner should construe the power after taking into account relevant Charter rights and adopt a construction of its power that is most compatible with human rights. The Commission submits that the most compatible interpretation of the power in s 67(1) of the Coroners Act is one that involves the Coroner investigating whether systemic racial discrimination contributed to Tanya's death. The Preamble and s 1(c) of the Coroners Act make clear that the purposes of the Victorian coronial system include to contribute to the reduction of the number of preventable deaths, and to promote public health and safety and the administration of justice. Interpreting s 67(1) in a manner compatible with the right to equality, the right to life and cultural rights is consistent with this purpose. If the Coroner is not minded to undertake an investigation into systemic issues, the Court must consider whether this outcome is will be incompatible with any Charter rights.

Dated: 29 April 2019

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¹⁰¹ *Hogan v Hinch* (2011) 243 CLR 506, 534 [27] (French CJ), 548 [70] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); *Nigro v Secretary to the Department of Justice* (2013) 41 VR 359, 411 [199]. See also *DPP v Ali (No 2)* [2010] VSC 503 (10 November 2010) [45].

¹⁰² *Cemino v Cannan*, [12] (s 32(1) of the Charter required the Magistrates' Court to take into account the plaintiff's rights under s 8(3) and s 19(2)(a) when deciding whether to transfer the proceedings to the Koori Court).