

MEMORANDUM OF ADVICE

A. Advice Sought

1. On [REDACTED] [a] child was transferred from Parkville Youth Justice Centre to an adult prison by the Youth Parole Board, on the application of [REDACTED] (the delegate) under delegation from the Secretary of the Department of Justice and Community Safety, relying on the power in s 467 of the *Children Youth and Families Act 2005* (Vic) (**CYFA**).
2. I have been requested by the Victorian Ombudsman to advise on the adequacy of the Department's human rights assessment of that transfer. In particular:
 - 2.1 In making the decision to apply to the Youth Parole Board for the transfer under s 467 of the CYFA did the delegate:
 - (a) act in a way that was incompatible with a human right?
 - (b) fail to give proper consideration to a relevant human right?
 - 2.2 If the answer is 'yes', what can be done to strengthen the human rights assessment to ensure compatibility with s 38(1) of the *Charter of Human Rights and Responsibilities Act 2006* (**Charter**)?
3. The short answer to these questions is:
 - 3.1 based on the information provided by the Department, I consider that the delegate did not act compatibly with the child's human rights, including the rights in ss 14(1)(b), 17(2), 19(1), 22(1) and 23(3) of the Charter, when making the decision to apply to the Youth Parole Board for the transfer of the child to prison;
 - 3.2 the human rights assessment does not evidence proper consideration having been given to the child's human rights, including the rights in ss 14(1)(b), 17(2), 19(1), 22(1) and 23(3) of the Charter, when making the decision to apply to the Youth Parole Board for the transfer of the child to prison.

4. The human rights assessment could better achieve proper consideration of Charter rights by:
 - 4.1 undertaking the assessment before the decision to seek transfer is made;
 - 4.2 engaging genuinely and thoroughly with the impact of the transfer on the child;
 - 4.3 ensuring that information about the conditions that the child will be held in (if they are transferred to an adult prison) is considered in the assessment;
 - 4.4 not making the assumption that all other options have been considered; and
 - 4.5 ensuring that the purpose of the limitation of human rights is consistent with the Secretary's legislative duties towards the child.
5. In **Part B** of this advice I set out the factual background to the child's transfer to prison, which I have ascertained from the materials that I have been briefed with – including materials obtained from the Department by investigating officers. **Part C** then addresses the legal context in which these events occurred. **Part D** explains the obligations imposed by s 38(1) of the Charter, considers whether those obligations were complied with, and what could be done to strengthen the human rights assessment of child transfer decisions. **Part E** considers an additional matter that is beyond the scope of the advice I was requested to give.

B. Factual Background

6. On [REDACTED] the child was issued two warnings by the Youth Parole Board for serious staff assaults. On [REDACTED] the child committed a further serious assault on a staff member. At that stage the view was taken that the child's behaviour posed an unacceptable significant risk to staff and other young people and was impacting on other young people's progress and opportunities in custody, such that he could no longer be properly controlled in a Youth Justice setting.

7. On [REDACTED] Youth Justice staff met with the Major Offenders Unit of Corrections Victoria at which time it appears that the placement of the child in prison was discussed. On [REDACTED] the delegate applied to the Youth Parole Board to transfer the child to an adult prison. The Department notes that this was the day that the application was 'formally lodged with the Board', which suggests that the transfer decision may have been made the day before – when the incident occurred. A human rights assessment of the transfer was conducted by the Department on [REDACTED], which concluded that the transfer was compatible with the child's Charter rights. In anticipation of the transfer, on [REDACTED] a handover meeting occurred with the Major Offenders Unit of Corrections Victoria. On [REDACTED] the Board approved the transfer and the child was transferred to a management unit at the Melbourne Assessment Prison (**MAP**) – the Spring Unit – and was classified as a 'major offender'.
8. The child had only six weeks left on his sentence, after which he was to be remanded back at Parkville Youth Justice Centre in relation to new charges. A child on remand cannot be held in an adult prison.
9. The materials I have been briefed with indicate that while he was imprisoned in the Spring Unit the child was not allowed to mix with other prisoners, on the basis that mixing was not appropriate because of his age. He was classified by Corrections Victoria as a 'major offender' and was referred to the High-Risk Management Advisory Panel, because of his age. The materials also state that he was given 'protection status' and held in a 'management unit', and it appears that this was by reason of being a child in an adult prison.
10. Information provided by the Department states that each day the child was able to access one hour out of his cell in what is referred to as an 'airing yard' and that he was offered additional time daily. The 'Out of Cell Hours' register provided by Corrections Victoria indicates that the small amount of out of cell time that the child had was spent in one of the unit's two internal 'yards', other than when he was out of his cell for a visit. The 'yards' are shown on a unit plan provided by Corrections Victoria – they are shown as rooms in the unit that are slightly less than twice the size of a cell. In photographs taken by the Ombudsman's investigating officers during a tour of the unit it appears that the two 'yards' are rooms in the unit that

are completely empty other than a fixed metal bench and a wall mounted telephone. A portion of the roof is made of metal mesh through which the sky can be seen.

11. Although the Ombudsman's investigating officers were told that the child had access to the gym facility, the 'Out of Cell Hours' register indicates that the child did not access the gym facility on any occasion during the six weeks.
12. It appears from the 'Out of Cell Hours' register that during the entire six week period that the child was imprisoned he was not ever provided with access to an outdoor area or allowed outdoors.
13. While at MAP the child was placed on a handcuff regime, which required him to be handcuffed when he was outside of his cell in the unit including when being moved around the prison and when attending visits. The child's review minutes state that 'the location assesses his handcuff regime on a daily basis'. The General Manager's diary also makes a statement that 'MAP management agreed to review this [handcuff] regime every day, to enable progression as soon as appropriate'. This is contrary to what in fact occurred – the child remained on a handcuff regime for his entire six week stay despite 'engaging appropriately' with staff and no incidents for the entire six weeks. On [REDACTED], during a meeting with the Major Offenders Unit, the child asked when his handcuff level would be lowered so he could be moved by normal staff and not have to wait to be moved by the Emergency Response Group (ERG), and he was told 'in the adult system, that risk to staff is paramount and that it takes time for these decisions to be made'. The only change over the entire period was that on [REDACTED] the child was downgraded from an H3 handcuff regime to an H2 handcuff regime.
14. While the child was at MAP he was not allowed to have contact visits with his family, or any other visitor. Although the child was allowed to have box visits with his family, he did not have any. In my experience a box visit allows much less human interaction than a contact visit. The prohibition on family contact visits was apparently a consequence of the child being on a handcuff regime, not for any other reason.

15. The likely conditions of the child's imprisonment were matters that could have been readily ascertained or predicted by the delegate prior to the application for transfer on the basis that:
- 15.1 It was inevitable that the child would be given protection status, classified as a major offender and placed in a management unit.
 - 15.2 Management units have internal 'yards' with no access to the outdoors.
 - 15.3 The child would not be able to mix with other prisoners and would therefore have very limited human contact.
 - 15.4 The child would be placed on a handcuff regime, given that in order to meet the legislative threshold for transfer to an adult prison an eligible child will have violent behaviours that will result in a high V (violence) rating.
 - 15.5 The child would not be allowed to have contact visits with his family, or any other visitor, given that he would inevitably be placed on a handcuff regime.

C. Legal Context

16. Section 467(2)(d) of the CYFA provides that the Youth Parole Board may only direct that a child serve their sentence of detention in a youth justice centre as a sentence of imprisonment if it is satisfied that the child:
- 16.1 has engaged in conduct that threatens the good order and safe operation of the youth justice centre; and
 - 16.2 cannot be properly controlled in a youth justice centre.
17. Section 482(1)(a) of the CYFA provides that the Secretary must determine the form of care, custody or treatment which they consider to be in the best interests of each person detained in a youth justice centre. Section 482(2) requires that children who are detained in youth justice centres must have their developmental needs catered for, and are entitled to have reasonable efforts made to meet their medical, religious and cultural needs.

18. Section 487 sets out a number of actions that are prohibited in relation to a person who is detained in a youth justice centre:
 - 18.1 the use of isolation (within the meaning of section 488) as a punishment;
 - 18.2 the use of physical force unless it is reasonable and necessary for the identified purposes or otherwise authorised by law;
 - 18.3 administering corporal punishment;
 - 18.4 the use of psychological pressure intended to intimidate or humiliate the person or child;
 - 18.5 the use of any form of physical or emotional abuse; and
 - 18.6 the adoption of any kind of discriminatory treatment.
19. Section 488 of the CYFA regulates the use of isolation in youth justice centres, which is defined in that section as ‘the placing of the person in a locked room separate from others and from the normal routine of the centre’. A child can only be isolated in a youth justice centre if their behaviour presents an immediate threat to their own safety or the safety of any other person or to property. A person placed in isolation must be closely supervised and observed at intervals of not longer than 15 minutes.
20. These protections, entitlements and obligations are lost when a child is transferred to an adult prison because they are no longer a person who is ‘detained in a youth justice centre’. The *Corrections Act 1986* (Vic), which governs the rights of both adult and child prisoners in adult prisons, does not provide equivalent protections to these beneficial protections contained in the CYFA.

D. Section 38(1) of the Charter

21. Section 38(1) of the Charter requires the delegate both to give ‘proper consideration’ to the human rights that are relevant to the application and to act ‘compatibly’ with human rights, which in the context of decision-making means to reach a decision that is compatible with the Charter. A likely outcome of the delegate’s application for transfer under s 467 of the CYFA is that the Youth Parole

Board will direct that the child be transferred to an adult prison, so the rights that will be limited if the transfer occurs are, in practical terms, limited by the application itself.

D-1 Was the transfer compatible with the child's Charter rights?

22. The Victorian Supreme Court has found that the assessment of whether an act is 'compatible' with any human rights that it limits is to be undertaken by reference to the reasonable limits provision in s 7(2) of the Charter.

23. The Court has held on at least two separate occasions that:

It is generally not considered to be in the best interests of a child deprived of liberty to be placed in an adult prison or other facility for adults.

24. In *Certain Children v Minister for Families and Children (No 2)* the Court held that the decision to transfer two children to a unit within a maximum security adult prison that had recently been gazetted as a youth justice centre, was incompatible with the rights in ss 17(2) and 22(1) of the Charter. The Court made this finding on the basis of the combined effects on young detainees of the following matters:

- 24.1 the extensive use of isolation;
- 24.2 the use of handcuffs;
- 24.3 the requirement to take the children through the adult prison to get outdoors;
- 24.4 the physical high security prison environment;
- 24.5 the lack of natural light and fresh air;
- 24.6 the noise;
- 24.7 the visible presence of prison officers;
- 24.8 the lack of privacy;
- 24.9 the lack of education, stimulation and time out of doors; and
- 24.10 the confined outdoor space.

25. Further, as discussed above, in the case of a transfer from a youth justice centre to prison, upon transfer the child will automatically lose the various legal entitlements and safeguards provided to people who are detained in youth justice centres. This negative consequence was not a feature of the *Certain Children* cases because the children were being transferred to an area within the adult prison that had been de-gazetted as a prison and re-gazetted as a youth justice centre.
26. The current practices of Corrections Victoria with respect to the placement of children in adult prisons means that a child will inevitably be imprisoned in much more restrictive conditions than most maximum security adult prisoners. They will be classified as major offenders and protection prisoners; held in a management unit; not allowed any access to outdoor space; only allowed a very short period of time out of their cell; required to be handcuffed whenever they are out of their cell; and not allowed to mix with any other prisoner for the entire period of their imprisonment.
27. The harsh conditions in Corrections Victoria's management units have been the subject of judicial consideration in a number of cases involving adults. The Court of Appeal has observed that there are 'very great deprivations associated with being so held'. Recently, the Court of Appeal observed that the conditions in another management unit, with severe restrictions on time out of cell and interaction with other prisoners 'were, in effect, solitary confinement'. The regime in one such unit was described by a forensic psychiatrist as 'undoubtedly a very austere and restrictive regime that would be challenging to the most mentally able in the community'.
28. Management units are used to accommodate prisoners who are not suitable for the mainstream prison population due to the risks they pose to other prisoners, or the risks they face from other prisoners. For the first two weeks that the child was held in the Spring Unit he was placed in a cell close to a prisoner who 'is known for being very noisy during the night and for making racist remarks'. It was recorded that this upset the child ([REDACTED]) and he asked to be moved, which the General Manager notes 'the staff were able to finally facilitate'.

29. The documentation provided by the Department notes that while he was detained in Parkville Youth Justice Centre the child was engaging with [REDACTED] weekend services, 'which he values as a source of connection to both his cultural heritage and faith ... these opportunities have been instrumental in fostering his well-being, strengthening his cultural and spiritual connections, and promoting a sense of stability'. The Department's material indicates that the child engaged minimally with behavioural support and forensic intervention services. The cultural support team appears to be the only service within Parkville that was able to develop genuine rapport with the child. Upon transfer to prison the child did not have any connection with [REDACTED] and was unable to attend weekend services.
30. The imprisonment of any child in an adult prison is likely to have a negative impact on their mental health and wellbeing, which will limit the right of children to such protection as is in their best interests. It is also likely to impose hardship that goes beyond that which is required to be imposed as a necessary consequence of incarceration, which will limit the right to humane treatment when deprived of liberty. Further it does not accord the child treatment that is appropriate for his age, which requires governments to adopt all necessary actions and procedures to protect children from physical and emotional harm in criminal detention.
31. In light of the above I have concluded that the following human rights of the child were clearly limited by transferring him to prison:
- 31.1 his right to such protection as is in his best interests and is needed by reason of being a child;
 - 31.2 his right to be treated with humanity and with respect for the inherent dignity of the human person, while deprived of liberty;
 - 31.3 his right to be treated in a way that is appropriate for his age; and
 - 31.4 his freedom to demonstrate his religion in worship, observance, practice and teaching as part of a community and to enjoy his culture and practice his religion.

32. I have concluded that the lack of connection to [REDACTED] and loss of attendance at weekend services has impacted on the child's religious and cultural rights for the purposes of both s 14(1)(b) and s 19(1) of the Charter. I consider that the equality rights in s 8 of the Charter were also limited, although in this context the limitation is indistinguishable from the limits on the right to age appropriate treatment whilst incarcerated. However I do not consider that the minimum level of severity required for limitation of any of the rights in s 10(b) of the Charter – cruel, inhuman or degrading treatment – has been met.
33. Having found that Charter rights were limited by the transfer, it is necessary to consider whether those limits were:
- 33.1 'under law'; and
- 33.2 reasonable and demonstrably justified taking into account all relevant matters including those listed in s 7(2) of the Charter.
34. A limit on Charter rights will only be 'under law' if it conforms with the legislation that authorises the decision-maker's action. For reasons discussed below, there is a possibility that the decisions of the delegate were *ultra vires*.
35. I observe that the Charter assessment that was provided to the delegate and annexed to the application to the Youth Parole Board stated that 'the transfer application also involves an element of denunciation or deterrence'. This suggests that part of the reason for the transfer was to denounce. The Oxford Dictionary defines denounce as 'publicly declare to be wrong or evil'.
36. Section 482(1)(a) of the CYFA provides that the Secretary must determine the form of care, custody or treatment which they consider to be in the best interests of each person detained in a youth justice centre. The Secretary owed this obligation to the child at the time of the transfer application. Whilst s 482(1)(a) may allow the Secretary to act in a manner that maximises the best interests of all detainees by making compromises between *the competing needs of detainees*, denunciation is not a proper basis for determining the form of the child's custody. It is for this reason that I have suggested that the delegate's decision may have been *ultra vires* if it was made for this purpose, which I consider may be an improper purpose.

37. Turning to the second question – whether the limits on the child’s rights were reasonable and demonstrably justified – this requires a consideration of all relevant matters ‘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’. Section 7(2) of the Charter embodies a proportionality test.
38. In this matter a primary consideration under s 7(2) is that the relevant Charter rights were very significantly limited by the transfer.
39. On the other side of the ledger are the purposes for which the child was transferred. I observe that one of the purposes of the transfer was ‘denunciation or deterrence’. Denunciation is not a defensible purpose for significant limits on a child’s right to humane treatment; treatment appropriate to their age; to protection in their best interests; or religious and cultural rights. However it appears that the primary purpose of the transfer was the safety of staff, which is clearly a very important purpose (including in circumstances where lack of staff safety leads to staff shortages which has resulted in lockdowns within youth justice centres).
40. There does appear to be a relationship between the limitation and the valid purpose of staff safety. However, the transfer did not provide a long term solution to that issue – it only resolved it for the six week period of the transfer. The child was required to be returned to Parkville Youth Justice Centre after six weeks, whilst he was on remand.
41. Section 7(2)(e) requires consideration of whether there are any less restrictive means that are reasonably available to achieve the purpose that the limitation seeks to achieve. The Department’s assessment states that the purpose of the transfer is the need to ensure the good order and safe operation of youth justice centres, including maintaining the safety and wellbeing of other young people and of staff. There are two potentially less restrictive options that may have been available to achieve this purpose – isolation at Parkville Youth Justice Centre or transfer to Cherry Creek Youth Justice Centre.

42. The assessment contains no consideration of why the purpose of staff safety could not be achieved by the use of isolation within Parkville Youth Justice Centre, under s 488 of the CYFA, on the basis that the child's behaviour presented an immediate threat to the safety of staff. The child had previously had a six week period of separation to function without peers to focus on behaviour modification and anger management. Presumably this was under the isolation power in s 488. It is not clear why isolation within a youth justice centre, as opposed to being transferred into solitary confinement within an adult prison, was not preferred on this occasion.
43. If the child remained in a youth justice centre under isolation he would have retained the entitlements and protections that the CYFA attaches to that detention setting. In circumstances where the transfer to prison involved the child being held in solitary confinement, in close proximity with adult management prisoners, on a handcuff regime, with no access to outdoor spaces, I consider that it would have been less restrictive to detain the child in isolation under s 488 of the CYFA.
44. If the child's behaviour was not severe enough to meet the threshold for the isolation of a child in a youth justice centre, set by Parliament in s 488 of the CYFA, it was arguably not proportionate to transfer him into solitary confinement in a prison.
45. I am instructed that Cherry Creek Youth Justice Centre was designed to be better suited to young people with complex needs. It has smaller units of four children, so staff can provide more targeted and individual support in a safer environment – including modern security systems. When it was opened the Minister for Youth Justice made a statement that it would provide better safety for staff. There is a brief unexplained statement in the assessment that [REDACTED] exclude him from placement at Cherry Creek'. Whilst [REDACTED] are a rational placement consideration, it is not evident that there was any consideration of whether it would be preferable for the child to be transferred to Cherry Creek notwithstanding this placement consideration, in order to avoid transferring him to prison.

D-2 Did the delegate give proper consideration to relevant Charter rights?

46. The Charter does not stipulate what 'proper consideration' involves, nor what form it should take. In what has come to be known as 'the *HJ* test', the Court of Appeal has confirmed that in order to give proper consideration to a relevant human right a decision-maker must:
 - 46.1 understand in general terms which of the rights of the person affected by the decision may be relevant and whether, and if so how, those rights will be interfered with by the decision;
 - 46.2 seriously turn their mind to the possible impact of the decision on a person's human rights and the implications for the affected person;
 - 46.3 identify the countervailing interests or obligations; and
 - 46.4 balance competing private and public interests as part of the exercise of justification.
47. Prior to the transfer application the Department prepared a human rights assessment, which included a table that contained a column for each of the factors listed in s 7(2) of the Charter, and rows for each of the Charter rights that would be limited by the transfer (although only the s 17(2) right was addressed, with the entries for subsequent rights merely stating 'As above re s 17'). I have considered whether the consideration reflected in this assessment satisfies the requirement to give proper consideration to Charter rights.
48. I have been provided with an internal Departmental email from [REDACTED] in which the author of the human rights assessment observes that 'It's relatively short, but I think the numbers of previous assaults and number of previous warnings really speaks for itself in this case.' There is then a comparison of the bare numbers of assaults and warnings with those numbers for another child who was transferred to prison in 2022. The author then notes that:

The one missing piece is what other measures may be open to YJ to take before going to transfer – though if he has progress[ed] through the full hierarchy of warnings, I would assume YJ have also been considering all other options as well.

Assuming other options have also already been explored, then it appears there would be no reasonably available less restrictive means available.

49. The human rights assessment itself, and the Departmental correspondence reflecting what was taken into account in conducting the assessment, suggests that the consideration was focussed on justifying the transfer (the third and fourth steps of the *HJ* test) rather than on understanding the impact on the child (the first two steps in the *HJ* test). There is nothing in the Department's documents to support the assumption that all other options had been considered.
50. I do not consider that the human rights assessment reflected a genuine understanding of how the child's rights would be interfered with by the transfer and the implications of the transfer for the child, including because the assessment did not give any consideration to the conditions in which the child was to be imprisoned (nor did Departmental officers consider these matters when undertaking the assessment). This was information that was readily available to the Secretary, who is responsible for both prisons and youth justice centres, and which should have been requested by the delegate when exercising the Secretary's delegated powers.
51. In *Certain Children (No 2)* the Court found that proper consideration had not been given – including because the assessment undertaken was based on a number of wrong factual assumptions:

The balancing decision was significantly impaired by these wrong factual assumptions. As a result, it was unreal.

52. In this case there was no consideration of the following important matters which could have been identified by the delegate prior to the application for transfer:

52.1 Upon transfer to prison the child would be treated as a 'protection' prisoner, and a 'major offender' and placed in a management unit.

52.2 Management units have internal 'yards' with no access to the outdoors.

52.3 The child would not be able to mix with other prisoners and would effectively be held in solitary confinement for six weeks.

52.4 The child would be placed on a handcuff regime requiring him to be handcuffed when out of his cell.

52.5 The child would not be allowed to have contact visits with his family or any other visitor, given that he would be placed on a handcuff regime.

52.6 The child would no longer be able to attend weekend services.

52.7 The child was required to be returned to a youth justice centre only six weeks after transfer, because his sentence ended and he was remanded in relation to new offences. Transferring the child for only six weeks was potentially destabilising and did not provide a long term solution to the ongoing issue of managing his behaviour within a youth justice setting.

D-3 What can be done to strengthen the human rights assessment?

53. It appears from the Department's internal correspondence that the human rights assessment was focused solely on justifying a decision to apply for transfer of the child that had already been made. This meant that there was not a genuine application of the first two steps of the *HJ* test – with the focus solely on justification and countervailing interests.

54. The human rights assessment would be strengthened by:
- 54.1 undertaking the assessment before the application for transfer is inevitable, so that it is possible for the assessment to affect the outcome of the decision;
 - 54.2 engaging genuinely and thoroughly with the impact of the transfer on the child (for example by seeking expert advice from a child psychologist who is aware of the child's background and circumstances);
 - 54.3 ensuring that information about the conditions that the child will be held in if they are transferred to an adult prison is considered in the assessment; and
 - 54.4 ensuring that the purpose of the limitation of Charter rights is consistent with the Secretary's legislative duties towards the child.

E. Additional Matter

55. The issue of whether particular yards in the management units at Barwon Prison and the Metropolitan Remand Centre constitute 'the open air' for the purposes of s 47(1)(a) of the *Corrections Act 1986* (Vic) has been considered by the Supreme Court of Victoria in *Marrogi v Secretary Department of Justice and Community Safety & Ors* [2026] VSC 4, and is the subject of an appeal to the Court of Appeal. The yards in the management units at MAP are similar to those that have been considered by the Supreme Court in this judgment. I do not consider that during times when the child had access to the airing yards the child was 'in the open air' as required by s 47(1)(a) of the *Corrections Act 1986* (Vic). It appears from the 'Out of Cell Hours' register that during the entire six week period that the child was imprisoned he was denied his entitlement to an hour 'in the open air' under s 47(1)(a) of the *Corrections Act 1986* (Vic).

21 May 2026

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