



Department of Justice and Community Safety

Commissioner, Youth Justice

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Annexure A - Charter Assessment for decision to apply to the Youth Parole Board under s 467 of the *Children, Youth and Families Act 2005* for a direction that [REDACTED] be transferred to a prison

Purpose

Section 38 of the *Charter of Human Rights and Responsibilities Act 2006* (**Charter**) requires that public authorities, including Secretary (and or delegate), give proper consideration to relevant human rights when making decisions.

This document has been prepared by the Department to provide information for the decision-maker to take into account in addition to their own subject-matter knowledge, experience and expertise.

Context

This is an application to the Youth Parole Board (**Board**) for transfer [REDACTED] from Parkville Youth Justice Centre to prison under section 467 of the *Children, Youth and Families Act 2005*, following [REDACTED].

As the Board is not a 'public authority' for the purpose of the Charter, it is an open question as to whether the Charter applies to the making of this application. Nonetheless, given the significant impact on rights effected by a transfer decision, it is appropriate to consider human rights in these circumstances.

The transfer application is accompanied by a report to the YPB, as required by s 467, which sets out:

- the antecedents and [REDACTED] behaviour relevant to this application;
- [REDACTED] age and maturity;
- the conduct of [REDACTED] that threatens the good order and safe operations of Youth Justice centres;
- the attempts made to properly control [REDACTED] within Youth Justice Custodial Services (YJCS); and
- the steps taken to avoid the need to transfer [REDACTED] to prison.

The transfer application also relies on the following documents:

- [REDACTED] offending history
- a report dated [REDACTED] requesting a warning from the Board in relation to an incident that occurred on [REDACTED];
- a report dated [REDACTED] requesting a warning from the Board in relation to an incident that occurred on [REDACTED];
- an earlier s 467 report dated [REDACTED];
- [REDACTED];

• [REDACTED]

Proper consideration

Table 1 outlines the relevant matters that should be considered by the decision-maker in accordance with the four step test for giving 'proper consideration' to human rights. The decision-maker must:

1. understand in general terms the rights of the person (or cohort of persons) affected by the decision (**columns 1 & 2**);
2. seriously turn their mind to the possible impact of the decision on a person's human rights and the implications for that person (**column 3**);
3. identify the countervailing interests or obligations (**column 4**); and
4. balance competing private and public interests as part of the exercise of justification (**column 4, Conclusion**).

Table 1: Relevant rights, impact of decision, and countervailing interests

Human right	Relevance	Impact	Countervailing interests/Justification
Protection of children Section 17(2) of the Charter provides that every child has the right, without discrimination, to such protection as is in their best interests and is needed by them by reason of being a child. 'Child' is defined in the Charter as a person under the age of 18 years.	This is an important right recognising the particular vulnerability of children within custodial settings. It seeks to ensure that children are treated in a way that takes into account their best interests. [REDACTED] is 18 years old, and therefore this right does not expressly apply to him. However, it is acknowledged that [REDACTED] was convicted of his offences as a child, under the <i>Children Youth and Families Act</i>, and therefore was anticipated to complete his sentence within a youth custodial facility, with the rights and protections of legislation and procedure tailored to children and young people.	If [REDACTED] were to be transferred to adult prison, he would no longer be subject to the frameworks and services that prioritise the protection of his best interests as a child, to which he was entitled to as a sentenced child. The impacts on his existing services, which will be significant, is as follows: <u>Current engagement with Youth Justice services</u> These are the services currently available to [REDACTED] as a young person at Parkville: • education/clinical support/recreation: [REDACTED] services in Youth Justice includes Education, Offence Specific Treatment, Cultural and Religious programs, primary and mental health care and dedicated supports [REDACTED] • focus on rehabilitation: [REDACTED] Statewide Rehabilitation Service for offence specific treatment [REDACTED]	The importance of the decision: The purpose of the decision is 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. Both the Secretary and DJCS have legislative and common law duties to provide safe working environments for DJCS staff, and a safe and secure custodial environment for young people and children in the State's care. The information provided indicates [REDACTED] cannot be properly controlled in a youth justice centre [REDACTED] [REDACTED] [REDACTED] he can longer be properly controlled in a youth justice setting.

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		• Access to friends/family: [REDACTED] access personal visits daily, however, this is via a strict endorsement process which does not allow for friends and associates [REDACTED] access to Zoom's with approved visitors. • access to peers of a similar age [REDACTED] mental health services [REDACTED] [REDACTED] care team [REDACTED] <u>Impact of transfer on services</u> Access to programs offered in youth justice are designed to meet the needs of adolescents and in the event a transfer to prison occurs, [REDACTED]'s progress with these services will be impacted. His reintegration opportunities and earlier access to parole will be impacted and require [REDACTED] to self-advocate and engage with services available in adult custody.	[REDACTED] was transferred to adult prison in [REDACTED] for 6 weeks following two significant staff assaults in [REDACTED]. Following an expiry of his YJCO and reverting to child remand, [REDACTED] was transferred back to Parkville [REDACTED]. [REDACTED] The transfer application request thus serves a legitimate and important purpose aimed at protecting the safety, security and human rights of other young people and staff in youth justice centres, including the right to life and the right to security and humane treatment when detained. <u>The relationship between the limitation and its purpose</u> Removal of [REDACTED] from youth justice centres is an immediate and effective means of eliminating the risk to staff and other young people in youth justice centres. This will ensure the safe operation and good order of youth justice centres generally.

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		Should [REDACTED] transfer adult custody, he will continue to have access to services including education, offence specific treatment and mental health supports, in addition to having access to different trades to assist him explore his future employment opportunities. He will initially have limited access to these services until his level of risk is assessed before developing his individual sentence management plan and goals. [REDACTED] will also be able to continue having support from his family whilst in adult custody. Subject to placement decisions, [REDACTED] will be entitled to one in person, one box visit and three Zoom visits per week which is a decrease from his entitlements in youth custody. He will have access to mental health services on entry into the adult system which will be offered to him. Should [REDACTED] transfer to prison, his care team will handover all relevant information to support his goal setting and planning forward. [REDACTED] previous experience in adult custody as a 16 years old (as a result of a prior transfer decision) saw the continuation of Youth Justice Services meeting with him regularly as a child and in preparation for his return to youth justice [REDACTED] is 18 years old, this will not occur aside from Parkville College Transitions, the Cultural Liaison Officers [REDACTED]	[REDACTED] <u>Any less restrictive means reasonably available</u> There are no less restrictive means reasonably available to achieve the purpose served by the transfer application. <u>Warnings</u> [REDACTED] has progressed through the hierarchy of warnings [REDACTED] [REDACTED] was transferred to prison on [REDACTED] following a serious staff assault [REDACTED] was given a Unit Manager warning for [REDACTED] [REDACTED]

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Right for convicted child to be treated in an age-appropriate manner Section 23(3) provides that a child who has been convicted of an offence must be treated in a way that is appropriate for that child's age.	This is an important right recognising the particular vulnerability of children within custodial settings. It seeks to ensure that children are treated separately, including being segregated from adults, and treated in a way that is appropriate for their age. As above, while it is acknowledged that [REDACTED] is now over 18 years of age, he remains within the younger age range. [REDACTED] was convicted under <i>Children Youth and Families Act</i>, and has been experiencing legislative and practice frameworks designed for children.	In addition to the impacts [REDACTED] may experience to his services, as outlined above, the transfer decision will affect his entitlements to be segregated from adults and treated in an age appropriate way. <u>Placement with adults</u> Due to [REDACTED] being 18 years of age, [REDACTED] It is likely that he may be exposed to a much older, more entrenched adult cohort.	[REDACTED] matters were escalated directly to a transfer under s 467 of the CYF Act [REDACTED] <u>Separation / isolation</u> [REDACTED] has previously been separated [REDACTED] [REDACTED] Isolation is not alternative measure that is available to mitigate against the risk posed by [REDACTED]. The use of isolation as a long-term management strategy is not permitted under the CYFA. Further, extended periods of isolation would have a poor impact on [REDACTED] overall wellbeing, mental health, capacity to engage in education and recreation, or function appropriately within a unit. <u>Remaining at Parkville</u>

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		[REDACTED] If [REDACTED] is transferred he will likely be received to [REDACTED] where he will be separated to allow for interviews to be completed to assess where he will be placed within the Corrections Victoria system [REDACTED] The Classification and Placement Unit will conduct a case conference with key stakeholders in adult custody, including operations from the location sharing all risks, needs and documentation to support [REDACTED] if transferred to prison. Due to the nature of the proposed transfer, [REDACTED] will be reviewed quarterly before the Young Offenders Transfer Review Group which includes Youth Parole Board members, Youth Justice Executives, Sentence Management Operations and the Children's Commission.	[REDACTED] The above is not reasonably sustainable due to the limitations of safe functioning locations across the site due to [REDACTED] <u>Alternative placement options:</u> Other placement options within the Youth Justice system are extremely limited: • Cherry Creek [REDACTED] • Parkville [REDACTED] • Malmesbury [REDACTED]

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		██████████ The High-Risk Panel will no longer be available to ██████████ in the event he is transferred. <u>Conditions of custody</u> ██████████ will no longer be subject to the management framework of the CYF Act (including the protection of the 'prohibited actions' in s 487), and will instead be subject to the management powers under the Corrections Act. This will include being managed by prison officers as opposed to youth justice officers, who do not have the same specialised training and experience of managing children. He will be subject to the security arrangements of adult prison, including being subject to the use of force and restraint provisions of the Corrections Act, which can involve the use of dogs, batons and OC spray, as well as a potentially higher incidence of handcuffs. He will be subject to the security classification scheme of adult prison, and depending on how his risk is assessed by Corrections Victoria, may be subject to restrictions associated with higher security classes of management. He will have some reduced entitlements to visits including a reduction in in-person contacts. ██████████ ██████████ CPU will support his family in navigating how to book visits were he to be transferred.	██████████ The safety and security of these precincts / units could not be appropriately managed if ██████████ was transferred there. <u>Conclusion</u> While an application for a transfer, if granted by the Board, will likely have significant and varied impacts on ██████████ human rights (as outlined in this assessment), these impacts on rights are considered appropriate in the circumstances with regard to: • The important and pressing purpose of the decision, to ensure good order and safety of youth justice precincts in circumstances where ██████████ is assessed as posing an uncontrollable risk to safety, which promotes the human rights of others to life, security of person and protection of children; • Less restrictive measures, such as warnings and isolation, have failed to mitigate this risk; • There are no reasonably available alternative placements within the youth justice system; and • ██████████ is now an adult who presents with age-██████████

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		██████████ will likely be subject to a period of restricted movements in the initial stages of his transfer, inclusive of the use of isolations and handcuff regimes while his security considerations are being assessed. ██████████ <u>Parole</u> The decision will transfer ██████████ into the jurisdiction of the Adult Parole Board, which adopts a different focus with regards to parole decisions. While the Youth Parole Board prioritises rehabilitation and the best interests of a young person in parole decisions, the Adult Parole Board is more heavily focussed on community safety and community supervision. To be afforded parole in the adult custody, ██████████ will need to be self-motivated to engage with services and supports available.	Accordingly, the decision to apply for a transfer is assessed as compatible with the Charter.
Humane treatment when deprived of liberty Section 22(1) relevantly provides that all persons deprived of liberty must be treated with humanity and with	This is an important right recognising the particular vulnerability of prisoners. It seeks to ensure that prisoners should not be subjected to hardship or constraint other than that which is a necessary consequence of their deprivation of liberty.	Insofar as imprisonment in an adult prison or facility has the consequence that young people are not accorded treatment appropriate to their age, and denies young people adequate opportunities for educational and vocational training, recreation and social and physical development, this may be considered a hardship that goes beyond that which is required to be imposed as a necessary consequence of incarceration.	

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respect for the inherent dignity of the human person.		However the right to humane treatment is subject to conditions and restrictions necessary to ensure security and safe custody.	
Religious and cultural rights (ss 14 and 19) Section 14 of the Charter protects the freedom to have or adopt a religion or belief of one's choice and to demonstrate one's religion or belief either individually or as part of a community. Section 14(2) provides that a person must not be coerced in a way that limits this freedom. Section 19(1) provides that all	This is an important right recognising the particular vulnerability of prisoners. It seeks to ensure that prisoners have access to and a means of practicing culture and religion whilst subject to custody. Imprisonment in an adult prison has the consequence that young people may not have access to religious and cultural programs pursuant to their age and developmental needs. Freedom of culture and religion is restricted as such inclusive of limitations in dress, the wearing of cultural or religious items, and access to religious and cultural gathering which is required to be imposed as a necessary consequence of	[REDACTED] [REDACTED] has access to religious and cultural supports in Youth Justice. [REDACTED] Currently, [REDACTED] access to programs is [REDACTED]. [REDACTED] Were [REDACTED] to be transferred to prison, the restrictions he is subject to within youth custody would no longer be relevant, and he would be assessed as per the adult system. It is noted that when transferred to prison as a 16-year-old, [REDACTED] declined to engage with the cultural and religious supports offered to him by Youth Justice, which included people he had strong relationships with. Given [REDACTED] the lack of familiarity	

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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 their culture, declare and practise their religion, and use their language.	incarceration so as to engage s 14 and s 19.	with service providers within the adult prison system may present as a barrier to [REDACTED]'s engagement with this right. Accordingly, while [REDACTED] will not be denied the rights to practice his religion and culture in adult prison [REDACTED] will have access to cultural and religious supports dependent on where he is assessed to be best placed within the system), the decision has the potential to interfere with his current enjoyment of these rights. [REDACTED] may experience initial restrictions whilst risk assessments are completed, and consideration is required for [REDACTED]	

The following rights were considered not to be engaged by this decision:

- **Recognition and Equality before the law (s 8)** – [REDACTED] will be provided equality before the law which protects enjoyment of human rights without discrimination and equal and effective protection from discrimination, including in relation to age and disability.
- **Protection from torture and cruel, inhuman or degrading treatment (s 10)** - There are appropriate systems and processes in place to ensure that [REDACTED] would not be subject to ill-treatment or punishment that amounts to humiliation or debasement if he were transferred to prison. These include independent visitors, the Victorian Ombudsman and his community support services.
- **Liberty and security of the person (s 21)** – As [REDACTED] is currently detained in Youth Justice custody, a transfer to prison would not constitute any greater restriction on his right to liberty. [REDACTED] right to security of the person would be protected by limits on the use of force and restraint that apply in prisons and the obligation of correctional authorities to comply with the Charter.
- **Rights in criminal proceedings (s 25)** – If transferred to prison, [REDACTED] would have continued access to his legal representatives.