



Media Release

Detention of children in youth justice facility within Barwon Prison found unlawful under the Victorian Charter of Human Rights and Responsibilities Act

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The plaintiffs, who are all of the children detained at the remand centre and youth justice centre contained within the Barwon adult maximum security prison, known as the Grevillea Unit, today succeeded in their challenge to the lawfulness of their detention at Grevillea under the Victorian *Charter of Human Rights and Responsibilities Act*.

In November 2016, following a riot at the Parkville Youth Justice Precinct that significantly reduced its capacity, the Grevillea Unit was established as a remand centre and youth justice centre under the *Children Youth and Families Act*. Certain children issued a proceeding challenging the validity of its establishment and succeeded before Garde J on 21 December 2016. On 28 December 2016, the Court of Appeal dismissed an appeal by the Minister, confirming that the November Orders in Council were invalid, and required the plaintiffs to be detained in a lawful facility.

The defendants then made certain decisions that were challenged in a second proceeding by the plaintiffs. Today, the Honourable Justice John Dixon found that each of the following challenged decisions were unlawful under s 38(1) of the Charter:

- Orders in Council made on 29 December 2016 establishing Grevillea as both a Youth Justice Centre and Remand Centre under the *Children Youth and Families Act* were unlawful due to being incompatible with the human rights under ss 17 and 22(1) of the Charter (the right of every child, without discrimination to such protection as is in his or her best interests and the right of all persons deprived of liberty to be treated humanely). His Honour also found that the Governor in Council had failed to give proper consideration to those rights when making the re-gazettal decisions.
- The decisions made on 1 February 2017 to transfer to Grevillea the two plaintiffs who, at the time of the trial, remained there (the only transfer decisions to which a challenge was maintained) were unlawful due to being incompatible with human rights under ss 17 and 22(1) of the Charter. His Honour also found that the DHHS Secretary's delegate had failed to give proper consideration to those rights when making the transfer decisions.
- Orders in Council made on 27 January 2017 that, by exemption granted under s 8B of the *Control of Weapons Act*, allowed the possession and use by specified Corrections Victoria staff of oleoresin capsicum spray (OC spray) and extendable batons within Grevillea, were unlawful as the Governor in Council had failed to give proper consideration to the human rights under s 17(2) and 22(1) of the

Charter, of those detainees who were innocent bystanders when OC spray might be used by Emergency Response Group officers within the confined space of the Grevillea Unit.

His Honour found that the limitations imposed on the human rights of the detainees were not demonstrably justified in a substantive sense as reasonable in a free and democratic society based on human dignity, equality and freedom. The principal limitations on the plaintiffs' human rights included:

- The impact of Grevillea's built environment on youths who are children detained there which was, and remains, immutably, that of a maximum security adult gaol.
- The extensive incidence of isolation by lockdown for substantial periods of the day, extending up to 23 hours, in cells designed for occupation by adult men. These conditions existed at the time of the relevant decisions and continued well into February 2017.
- The continuing use, to the time of trial, of handcuffing in order to move detainees between one wing of Grevillea and the outdoor exercise area, through an unused area of the adult prison.
- A failure to consider the heightened risk of detainees developing mental health problems, directly relating to the environment at Grevillea including depression, anxiety conditions, cognitive problems, hypersensitivity, and paranoia, or exacerbation of existing mental health problems.
- The limitations on the developmental needs of detainees, specifically their physical, social, emotional, intellectual, and spiritual needs, that were affected by the use of Grevillea as a Youth Justice Precinct.

His Honour rejected the plaintiffs' claim that any of the challenged decisions were subject to, or conditional for their exercise on, various jurisdictional facts that the plaintiffs argued could not be established to permit the exercise of the powers. None of the impugned decisions was found to be invalid on that ground. His Honour also found that the delegate of the Secretary to the DHHS who made the transfer decisions was not required to accord procedural fairness to a child in respect of that decision.

His Honour made declarations to the effect that each of the December Orders in Council, the two transfer decisions and the weapons exemption were unlawful under s 38(1) of the Charter and that the Secretary for the DHHS and State of Victoria be restrained from detaining, or continuing to detain, at the Grevillea Precinct, any person deemed to be in the Secretary's custody. Orders were made for the transfer of the plaintiff remaining at Grevillea, and regarding the use of OC spray at Grevillea.

The full judgment is available on Austlii at <http://www.austlii.edu.au/au/cases/vic/VSC/2017/251.html>

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