IN THE CORONERS COURT OF VICTORIA
AT MELBOURNE **COR 2017 6424**

INQUEST INTO THE DEATH OF TANYA DAY

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

I INTRODUCTION AND SUMMARY

1. The *Charter of Human Rights and Responsibilities 2006* (Vic) (the **Charter**) confers on the Victorian Equal Opportunity and Human Rights Commission (the **Commission**) a right to intervene and be joined as a party to proceedings in which a question of law arises with respect to the interpretation of a statutory provision in accordance with the Charter.

2. The Commission exercised this right on 15 March 2019 and made written and oral submissions concerning the scope of the Inquest. These submissions were made in response to an application by Tanya Day's family to have the Coroner consider whether systemic racism contributed to the cause and circumstances of Tanya's death. The Commission submitted that investigating whether systemic racial discrimination contributed to Tanya's death is compatible with the application of the Charter to this inquest.

3. On 25 June 2019, the Coroner made a Ruling on the scope of the Inquest. In that Ruling, the Coroner agreed to consider whether racism played a role in the decision making and treatment of Tanya on the day she was taken into custody. In respect of the Charter, the Coroner accepted that s 32 of the Charter applied to s 67 of the *Coroner's Act 2008*[1] and stated that she will consider "whether Charter obligations were complied with, the extent to which Tanya's Charter rights were engaged and if they were infringed".[2] Given these conclusions, the Coroner stated that she "did not propose to determine the submissions made in respect of the application of sections (sic) 38(1) or section 6(2)(b) of the Charter".[3]

4. On 23 August 2019, the Commission was served with a Charter notice by Tanya's family stating various questions of law under the Charter.

5. The hearing of the evidence has now been completed. The Commission did not appear at this stage of the Inquest to put evidence before the Coroner or cross-examine witnesses. Counsel Assisting the Coroner, and interested parties have now filed final submissions. The Charter is discussed in the submissions of Tanya's family, V/Line, Victoria Police and Ambulance Victoria. Counsel Assisting's submissions indicate that the Charter will be addressed at the oral hearing on 11 November 2019.[4]

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[1] Ruling on application regarding the scope of the Inquest, 25 June 2019 (**Ruling on Scope**) at [18].
[2] Ruling on Scope, [80].
[3] Ibid, [19].
[4] Final submissions by Counsel Assisting, 27 September 2019, [89].

6. The Commission now makes submissions on two substantive matters.

7. **Part II** of these submissions augments the Commission's previous submissions concerning the requirement that the Court should undertake a comprehensive, thorough and effective investigation into Tanya's death to act compatibly with s 9 of the Charter. The Commission submits that it is incumbent on the Coroner, in undertaking an effective investigation, to scrutinize not only the immediate causes of Tanya's death but also examine the broader precipitants and systemic causes and circumstances that were occurring when she died.

8. **Part III** addresses two matters concerning the application of the Charter to public authorities (other than the Court):

   8.1. First, the identification of public authorities;

   8.2. Secondly, the scope of Charter rights that have been referred to in parties' submissions.

9. It is necessary to understand the scope of the rights that may be relevant to the facts before reaching a conclusion about whether Charter rights have been breached in the circumstances of Tanya's death. In its previous written submissions, the Commission addressed the scope of the rights protected in ss 8(2) and (3)[5], s 9[6], s 10(b)[7] and s 19(2)[8] of the Charter, as well as the test for the engagement of Charter rights,[9] the content of the public authority obligation in s 38(1) of the Charter[10] and when Charter rights may be limited.[11] Those submissions continue to be relevant to this Inquest. The Commission now makes submissions on the scope of the right to freedom of movement in s 12, the right to liberty in s 21 and the right to humane treatment when deprived of liberty in s 22(1) in the Charter. Tanya's family also referred to the right to privacy in s 13 of the Charter. This right is discussed within the scope of s 22(1).

10. The Commission notes that the Coroner has not yet made any factual findings in this Inquest. In these circumstances, it does not make any submission on whether any of these Charter rights has been breached by a public authority. That assessment may be assisted by the Commission's Scope submissions regarding the content of the public authority obligation.

II. WHAT s 9 OF THE CHARTER REQUIRES THE CORONER TO DO

"*Coroners… have a role to play in public health and safety; their recommendations as a result of inquests can pave the way for much-needed social and administrative change."*[12]

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[5] Outline of submissions of the Victorian Equal Opportunity and Human Rights Commission dated 29 April 2019 (**VEOHRC's Scope Submissions**), [11]-[17].
[6] [18]-[26].
[7] [27]-[33].
[8] [34]-[43].
[9] [9].
[10] [53]-[54].
[11] [55]-[61].
[12] The Honourable Marilyn Warren AC, former Chief Justice of the Supreme Court of Victoria, "Foreword" in Ian Freckleton and David Ranson, *Death Investigation and the Coroner's Inquest* (OUP, 2006), v.

"The Royal Commission provides a timeless reminder that every avoidable Indigenous death calls upon us to identify its underlying causes, consider Indigenous disadvantage, uncover the truth about the death and resolve upon practical steps to prevent others."[13]

11. When Parliament enacted s 9 of the Charter, it guaranteed Tanya that her life would be protected from arbitrary deprivation. Further, it guaranteed Tanya and her family that if she died in circumstances in which the conduct of a public authority is implicated, there would be an effective investigation into her death. The Victorian Parliament also recognised that it was making these guarantees to Tanya and her family when the *Coroners Act 2008* was passed. In the Statement of Compatibility accompanying the Bill, after referring to the procedural obligation to conduct an effective investigation into certain deaths, the Attorney-General stated: "[a]s the most significant investigative mechanism into reportable and reviewable deaths, the coronial system gives effect to this right."[14]

12. The right to life is protected in article 2 of the European Convention on Human Rights.[15] It has mandated a level of coronial investigation into a death in custody that extends "well beyond proximate issues and requires scrutiny of broader precipitants and systemic causes."[16] The requirement imposed by the procedural obligation in s 9 is that the Coroner effectively investigate Tanya's death by subjecting the deprivation of her life to "the most careful scrutiny, taking into consideration not only the actions of State agents but also all the surrounding circumstances."[17]

13. The Western Australian Coroner appeared alive to the need for an effective investigation in the *Inquest into the death of Julieka Ivanna Dhu*, an Aboriginal woman who died in police custody. The Coroner recognised the contribution of systemtic racism in Ms Dhu's death:

> The police were affected by preconceptions or assumptions concerning Ms Dhu. In order to assist in better recognizing the risk factors for persons in custody, including Aboriginal persons who may be at greater risk of ill health, and breaking down preconceptions or unfounded assumptions, I make the following recommendations…[18]

14. Whilst it is accepted that this finding was based on the evidence before the Coroner in that case, the Dhu case illustrates that systemic racism can properly be the subject of findings in a coronial inquest.

15. In this Inquest, the Coroner has expert evidence concerning systemic racism and unconscious bias from Dr Thalia Anthony and Professor Jill Klein. Counsel Assisting the Coroner submits that their expertise in such matters and description of the existence and operation of systemic

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[13] Watterson, Brown and McKenzie, *Coronial Recommendations and the Prevention of Indigenous Death* (2008) 12 (SE2) Australian Indigenous Law Report, 6.
[14] Statement of Compatibility, Coroners Bill, 9 October 2008, Hansard, page 4030.
[15] Article 2 states: "1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law."
[16] Freckleton and McGregor, Coronial law and practice: A human rights perspective (2014) 21 JLM 584, 592.
[17] *Salman v Turkey*, [2000] ECHR 357 (27 June 2000), [99]-[100]. See also *McCann v United Kingdom* (1996) 21 EHRR 97 at [157]-[164]; *Jordan v United Kingdom* (2003) 37 EHRR 2; *R (Amin) v Home Secretary* [2004] 1 AC 653 and *R (Middleton)v West Somerset Coroner* [2004] 2 AC 182.
[18] State Coroner R V C Fogliani, *Inquest into the death of Julieka Dhu* (11020-14), 15 December 2016, [863].

racism and unconscious bias should be accepted.[19] The Commission submits that it is incumbent on the Coroner, in undertaking an effective investigation (including making findings and comments), to give this evidence very careful consideration and consider not only the immediate causes of Tanya's death but also the broader precipitants and systemic causes which may have contributed to her death and properly form the circumstances of her death.

III. THE APPLICATION OF THE CHARTER TO PUBLIC AUTHORITIES (OTHER THAN THE COURT)

A Public authorities

16. The obligation in s 38(1) of the Charter applies to a "public authority" as defined in s 4 of the Charter. Victoria Police is a core public authority listed in s 4(1)(d) of the Charter.

17. The Commission submits (and does not understand it to be in dispute) that V/Line and Ambulance Victoria are also public authorities for the purposes of the Charter.

    17.1. V/Line is a public authority by reason of s 4(1)(b) being 'an entity established by a statutory provision that has functions of a public nature': ss 128, 132 of the *Transport Integration Act 2010*;

    17.2. Ambulance Victoria is a public authority by reason of s 4(1)(c) being 'an entity whose functions are or include functions of a public nature, when it is exercising those functions on behalf of the State or a public authority (where under contract or otherwise)'.

B Scope of Charter rights

18. Two general points may be recalled at the outset. First, the threshold for the engagement of a Charter right is low.[20] After construing rights "in the broadest possible way"[21], a public authority must understand in general terms how Charter rights *may* be relevant to their conduct or a decision. The Supreme Court of Victoria has accepted that Charter rights are engaged even when there is no immediate effect of an act or decision on a particular person. For example, in *Certain Children v Minister for Families and Children*, the Supreme Court held that Charter rights were engaged, and had to be properly considered, by the State when deciding to establish a youth justice centre, before any particular person was sent there.[22]

19. Secondly, all Charter rights may be subject to reasonable limitations under s 7(2) of the Charter. Section 7(2) requires a limitation to be "demonstrably justified". It has been accepted that the effect of this requirement is that where an act or decision of a public authority can be shown to

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[19] Final submissions by Counsel Assisting, 27 September 2019, [83]; see also Submissions by Belinda Day/Stevens, Warren Stevens, Apryl Watson and Kimberley Watson, 15 October 2019, [71].

[20] *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)***').

[21] *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].

[22] *Certain Children by their Litigation Guardian Sister Marie Brigid Arthur v Minister for Families and Children)* [2016] VSC 796, [157].

limit the exercise of a right or freedom, the onus passes to the party seeking to justify the act or decision to establish that the limit is nonetheless compatible with human rights.[23]

Right to humane treatment when deprived of liberty: s 22(1)

The Victorian community should have confidence in what happens behind the closed doors of custodial facilities – that detainees are managed in a fair and consistent manner; that they are treated with dignity and respect for their human rights; and that those responsible for caring for detainees are held accountable for their actions.[24]

20. Section 22(1) of the Charter states:

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

21. Central to this right is the recognition that persons in detention are vulnerable. The right is based on article 10 of the International Covenant on Civil and Political Rights and has been recognised to be a "fundamental and universally applicable rule".[25] The Supreme Court of Victoria said in *Castles v Secretary to the Department of Justice*:[26]

> The starting point for analysing the scope of s 22(1) should be that persons who are detained must not be subjected to hardship or constraint other than that which results from the deprivation of their liberty, accepting that a necessary consequence of the deprivation of liberty is that rights enjoyed by other citizens will be compromised to some extent.[27]

22. Detention will inevitably impose a limitation on a person's right to privacy. Like all Charter rights, this right is subject to reasonable limitations that are demonstrably justified. Amongst the necessary and inevitable restraints on a person's human rights in detention will be reasonable limitations on their privacy (for example, by being monitored) and freedom of movement (for example, by not being able to move freely within the place of detention).

23. When a person is detained, s 22(1) mandates the "good conduct" that should occur by public authorities responsible for their custody. This right requires that public authorities take positive measures to ensure that detained persons are treated with dignity and humanity.[28] The protection of human dignity encompasses such matters as ensuring adequate conditions of accommodation, food and personal hygiene, clothing and bedding standards, access to medical services and

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[23] *Kracke v Mental Health Review Board* (2009) 29 VAR 1 at [108]; *Re Application under Major Crimes (Investigative Powers) Act 2004* (2009) 24 VR 415 at [147]; *Certain Children v Minister for Families and Children (No 2)* (2017) 52 VR 441 at [175], [203].
[24] Victorian Ombudsman, Investigation into deaths and harm in custody, March 2014, 9.
[25] UN Human Rights Committee (HRC), *CCPR General Comment No. 21: Article 10 (Humane Treatment of Persons Deprived of their Liberty)*, 10 April 1992, [4].
[26] *Castles v Secretary to the Department of Justice* (2010) 28 VR 141 (Emerton J) ('***Castles***').
[27] *Castles* at [99], [108] (Emerton J). See also *De Bruyn v Victorian Institute of Forensic Mental* Health (2016) 48 VR 647; [2016] VSC 111 [113].
[28] General Comment No 21 at [3]; *Castles* at [100]; *Haigh v Ryan* [2018] VSC 474 at [85].

contact with persons outside of detention.[29] In paragraphs 28-33 below, we set out the relevant aspects of the scope of the right that arise for consideration in this Inquest.

24. When defining the scope of Charter rights, the Victorian Supreme Court has had regard to international non-binding rules on detention.[30] Relevantly, the *Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment* provides the following principles relevant to actions considered in this Inquest:[31]

> **Principle 1**
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> All persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person.
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> **Principle 24**
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> A proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after his [or her] admission to the place of detention or imprisonment, and thereafter medical care and treatment shall be provided whenever necessary. This care and treatment shall be provided free of charge.

25. To similar effect, the United Nations *Code of Conduct for Law Enforcement Officials* states:[32]

> **Article 2**
>
> In the performance of their duties law enforcement officials shall respect and protect human dignity and maintain and uphold the human rights of all persons.
>
> **Article 6**
>
> Law enforcement officials shall ensure the full protection of the health of persons in their custody, and in particular, shall take immediate action to secure medical attention whenever required.

26. For s 22(1) to be engaged, a person must be deprived of their liberty. Under the Charter, a deprivation of liberty may be contrasted with a restriction on freedom of movement. The difference is one of fact and degree.[33] Whether a person has been deprived of their liberty is a question of fact. Arrest by a police officer is a clear instance of deprivation of liberty. A person may also be in "police custody" even though not formally under arrest and therefore "deprived

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[29] See for example the United Nations Standard Minimum Rules for the Treatment of Prisoners available at <https://www.ohchr.org/EN/ProfessionalInterest/Pages/TreatmentOfPrisoners.aspx>.
[30] *Certain Children v Minister for Families and Children* (2016) 51 VR 473 at [154]; *Certain Children v Minister for Families and Children (No 2)* (2017) 52 VR 441 at [264]-[265]; *De Bruyn v Victorian Institute of Forensic Mental Health* (2016) 48 VR 647 at [176]-[178].
[31] Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, adopted by United Nations General Assembly resolution 43/173 (9 December 1988) available at <https://www.ohchr.org/EN/ProfessionalInterest/Pages/DetentionOrImprisonment.aspx>.
[32] Code of Conduct for Law Enforcement Officials, adopted by United Nations General Assembly resolution 34/169 (17 December 1979) available at <https://www.ohchr.org/EN/ProfessionalInterest/Pages/LawEnforcementOfficials.aspx>.
[33] *DPP v Kaba* (2014) 44 VR 526 at [110].

of liberty" for the purposes of the Charter where they are led to believe that they have lost their liberty.[34]

27. Section 22(1) is engaged in this Inquest by Tanya's arrest and detention in the police cell.

Assessing whether s 22(1) was complied with in this Inquest

28. As a general proposition, what constitutes a breach of the right in s 22(1) will depend on the circumstances in the case including the nature and extent of the treatment, its duration or mental effects and in some instances, the sex, age and state of health or other status of the victim.[35]

29. The relevant matters that arise in this Inquest that the Court should assess include:

    29.1. whether the treatment of Tanya by Victoria Police officers respected her dignity;

    29.2. whether Tanya was provided with appropriate care and management of her health during her detention, including through the appropriate provision of medical treatment;

    29.3. whether Tanya was provided with sufficient conditions to ensure her personal hygiene; and

    29.4. whether Tanya was adequately monitored whilst in detention in a manner that took into her account her cultural identity and particular vulnerabilities.

30. The recognition of the particular vulnerabilities of a person in detention is essential to provide humane treatment in detention. The particular vulnerability of Aboriginal persons in detention is a relevant matter.[36] So too is the vulnerability of an intoxicated person. This Court has recognised the importance of public authorities identifying the vulnerability of a person in detention in other inquests. For example, in the *Inquest into the death of Dalvir Singh* Coroner Jacqui Hawkins commented:[37]

> Recognition of the multiple vulnerabilities experienced by immigration detainees is an essential first step in the provision of appropriate care and management. Many of these paths of vulnerability are common to all detainees including estrangement from family, friends and community, uncertainty about the future, and loss of liberty and control over their personal circumstances.
>
> The importance of applying an understanding of these vulnerabilities when working with detainees cannot be understated and foreshadows the need to take positive action towards ensuring that this translates into effective policies and procedures for the promotion of health and wellbeing…

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[34] *Eatts v Dawson* (1990) 21 FCR 166 ay 179 (the Court held at [47]: "An Aboriginal person who is given by the police to understand firmly that he will be restrained from leaving his house at his own will may, one should have thought, properly be said to be in police custody."); *Van Der Meer v The Queen* (1988) 62 ALJR 656 at 661 (Mason CJ) (a person who has not been formally arrested nevertheless may be in custody if the person believes that he/she must stay there, and the police have acted so as to make him/her think that they can detain him/her there.)

[35] Human Rights Committee, Views: Communication No. 1184/2003, 86th sess, UN Doc CCPR/C/86/D/1184/2003 (17 March 2006).

[36] Ibid.

[37] Inquest into the Death of Dalvir Singh (COR 2014 0867) [2015] VicCorC 34 (26 March 2015) at [233].

31. The Commission submits that s 22(1) required Victoria Police to treat Tanya as a unique human being with multiple vulnerabilities, and not just "another person in detention". Recognising Tanya's vulnerabilities means that Victoria Police had to first understand the particular risks involved in placing Tanya in a police cell in circumstances where she was an intoxicated Aboriginal woman.

32. Victoria Police then had to ensure Tanya's detention respected her dignity, and involved appropriate care and management, including by monitoring her in an appropriate manner that took into her account her cultural identity and particular vulnerabilities. As Ambulance Victoria recognises,[38] a one-word "yes" response to a question may not always mean acceptance but may be given to appear compliant to authorities. In our submission, questions that seek to illicit from a highly vulnerable detainee no further response than "yes" are plainly inadequate to constitute proper monitoring for the purposes of compliance with s 22(1), as the Victoria Police Guidelines[39] and Castlemaine Standard Operating Procedures[40] themselves recognise.

33. One of the best ways to measure whether s 22(1) of the Charter has been breached is to consider whether minimum conditions of detention established by public authorities have been complied with.[41] After all, these are the minimum standards established by the public authorities themselves. For example, in respect of monitoring, the VPM Guidelines require Level 3 observation for detainees affected by alcohol or drugs, which requires the detainee to be physically checked and roused at least every 30 minutes.[42] Compliance with minimum standards does not however necessarily lead to the conclusion that s 22(1) has not been breached. The Commission refers to paragraph 29 which sets out a list of relevant matters arising in this Inquest for the Court to assess.

34. This Court has found public authorities have failed to comply with s 22(1) in other inquests. For example, in the *Inquest into the death of Ling Gong Tang*, Deputy State Coroner West made a finding that Mr Tang, who was intoxicated and held in a holding cell at a police station in a soiled condition without being physically checked "as a person deprived of his liberty, was not treated with humanity and respect for the inherent dignity of a human person as required by the Charter."[43]

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[38] Ambulance Victoria Aboriginal and Torres Strait Islander Cultural Awareness Slideshow and Audio Script Exhibit 71, [39], [39a]; TS 1381.10-13.
[39] Coronial Brief, page 254. Level 3 requires detainees to be physically checked and roused at least every 30 minutes. The detainee is to be actively engaged during every physical check. The Guidelines state that this includes "include speaking with them, asking questions about their health or welfare needs and obtaining responses."
[40] Coronial Brief, pages 579-581.
[41] *Taunoa v Attorney-General* (2004) 7 HRNZ 379 at [94].
[42] Coronial Brief, pp 246 and 254.
[43] *Inquest into death of Ling Gong Tang* (unreported, Coroners Court of Victoria, Deputy State Coroner Iain West, 9 December 2014) at [122].

Freedom of movement

35. Section 12 of the Charter states:

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

36. This right was based on art 12(1) of the ICCPR, which protects a right to "liberty of movement". It is regarded as an aspect of the general right to liberty at common law.[44] The relationship between s 12 and s 21 of the Charter has been considered by the Supreme Court. In *Kaba*, the Court stated that s 12 "is directed to restrictions on movement which fall short of physical detention coming within the right to liberty in s 21."[45]

37. The right includes a right to move freely within Victoria. That is, a right to movement without impediment.

38. V/Line argues that Mr Irvine did not make a decision for the purposes of s 38(1) of the Charter when he contacted Police. Relying on *Kaba*, V/Line submits "nothing he did effected Ms Day's rights, *per se*".[46] This submission should be rejected. As Counsel Assisting has set out in her Closing Submissions,[47] the evidence before the Coroner is that:

    38.1. Mr Irvine made a decision to call Victoria Police to attend at Castlemaine train station;

    38.2. Mr Irvine's evidence was that his reason for calling Police was that Tanya was under the influence of drugs or alcohol such that her safety was threatened by allowing her to continue to travel on the train.

39. Plainly Mr Irvine made a decision that Tanya should not proceed to travel on the train which he was conducting. Mr Irvine's evidence was that after questioning Tanya in the carriage he contacted the driver to inform him that there was a female passenger on the train who was "under the influence of drugs and alcohol" and that Police attendance was required.[48] He gave evidence that he "believed that her safety was .. threatened by allowing her to continue to travel in the state that she was in."[49] This evidence should be understood as evidence that Mr Irvine formed a view that she should not continue to travel on the train. The *Kaba* decision involved an entirely different set of facts. The facts in *Kaba* were that Victoria Police officers on patrol were engaging in routine and random traffic stops to check licensing and registration information and any outstanding warrants. Before asking a vehicle to stop, the police officers had no information about the particular driver or car.[50] The Magistrate found that the police officers' focus was "upon intercepting an adequate quota of vehicles during their shift."[51] The plaintiff's car was stopped during this random traffic operation and Mr Kaba was subjected to coercive questioning. The Court held that in these circumstances, the police did not make a decision under s 38(1) of the

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[44] *DPP v Kaba* (2014) 44 VR 526 (***Kaba***) at [79]-[82].
[45] Ibid, [114] relying on *Kracke v Mental Health Review Board* [2009] VCAT 646.
[46] Outline of final submissions on behalf of V/Line, [24].
[47] Final Submissions by Counsel Assisting, [16].
[48] TS 67.19-20; TS 70.5-20.
[49] TS 70.21-25.
[50] *Kaba*, [27].
[51] Ibid.

Charter to limit the plaintiff's freedom of movement, but rather, by subjecting him to coercive questioning, "acted" in a way that was incompatible with that right.[52] Random vehicle inspections are entirely different to making a decision to call police to attend a train station because of concerns for a passenger's safety. Mr Irvine plainly made a decision that engaged Tanya's right under s 12 of the Charter. The procedural and substantive obligations imposed by s 38(1) of the Charter therefore applied to his conduct. The Commission submits that Mr Irvine's decision limited Tanya's right to freedom of movement. If the Court accepts this submission, the next step is for the Court to determine whether the limitation was reasonable and demonstrably justified having regard to the matters set out in s 7(2) of the Charter.

Right to liberty

40. Section 21 of the Charter protects various rights to liberty and security including the following right in s 21(3):

> a person must not be deprived of his or her liberty except on grounds, and in accordance with procedures, established by law.

41. As for s 22(1), for this right to be engaged, a person must be deprived of their liberty: see above [26]. In circumstances where a person is deprived of their liberty, this right requires that the deprivation of liberty be "on grounds and in accordance with procedures established by law" and not arbitrary, in that it is not disproportionate or unjust in all of the circumstances.[53]

42. This means that detention pursuant to statutory power will be lawful only in circumstances and to the extent that is permitted by the law. The Supreme Court of Victoria has given consideration to the lawfulness requirements in s 21, holding that any criteria or other steps which condition the exercise of the power must be satisfied.[54]

43. The question of whether s 21 of the Charter is engaged in this Inquest raises for consideration whether the lawfulness of Tanya's arrest is within the scope of the Inquest, and if so, what the Coroner's finding on that matter is. The Commission notes that the Coroner has determined that the "factual circumstances and appropriateness of the decision of Victoria Police to arrest Ms Day" is within the scope of the Inquest. Counsel Assisting has submitted that it is beyond the scope of the Inquest to determine the lawfulness of Tanya's arrest. In these circumstances, the Commission does not make any submission about whether s 21 is engaged at this time.

Dated: 22 October 2019

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[52] Ibid, [466]-[470].
[53] *Victoria Police Toll Enforcement v Taha* (2013) 49 VR 1 at [199]-[200] (Tate JA).
[54] *Antunovic v Dawson* (2010) 30 VR 355 at [72], [178]-[184]; *DPP v Piscopo* (2011) 33 VR 182 at [66].