IN THE SUPREME COURT OF VICTORIA
COMMON LAW DIVISION
JUDICIAL REVIEW AND APPEALS LIST

Not Restricted

S ECI 2025 05282

BETWEEN:

ANDRE McKECHNIE — Plaintiff

v

SECRETARY TO THE DEPARTMENT OF JUSTICE AND COMMUNITY SAFETY — First Defendant

- and -

THE COMMISSIONER OF CORRECTIONS VICTORIA — Second Defendant

JUDGE:	Harris J
WHERE HELD:	Melbourne
DATE OF HEARING:	24 July 2026
DATE OF JUDGMENT:	26 October 2026
CASE MAY BE CITED AS:	McKechnie v Secretary to the Department of Justice and Community Safety (No 2)
MEDIUM NEUTRAL CITATION:	[2026] VSC 699

JUDICIAL REVIEW – Judicial review application bought by a prisoner – Decision to prohibit Vegemite in Victorian prisons – Whether contravention of s 47(1)(b) of the *Corrections Act 1986* (Vic) – Whether a food necessary for well-being of a prisoner – Duties of prison Governors and officers with respect to security and good order of the prison – Where Vegemite may interfere with passive alert detection dogs' identification of contraband in prisons – Where Vegemite may be used to brew alcohol – *Corrections Act 1986* (Vic), ss 20, 21, 47(1)(b).

HUMAN RIGHTS – Cultural rights under s 19(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) – Whether cultural rights extend to access to foods with cultural significance – Whether Vegemite an aspect of 'Australian culture' – Whether cultural rights limited by prohibition on Vegemite – Whether prohibition is demonstrably justified – *Charter of Human Rights and Responsibilities Act 2006*, ss 7(2), 19(1), 32, 38.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	In person, by audio visual link from Barwon Prison	Self-represented
For the Defendants	Ms M Isobel	Victorian Government Solicitor's Office

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HER HONOUR:

Introduction

1 The plaintiff, Andre McKechnie, is serving a sentence of imprisonment at HM Prison Barwon. He brings an application for judicial review against the **Secretary** to the Department of Justice and Community Safety[1] and the **Commissioner** of Corrections Victoria with respect to a decision to refuse his request 'to no longer be prohibited from consuming Vegemite'.

2 Mr McKechnie claims that the refusal of the request contravenes s 47(1)(b) of the ***Corrections Act*** *1986* (Vic) and denies him of his right under s 19(1) of the ***Charter*** *of Human Rights and Responsibilities Act 2006* (Vic) to enjoy his culture as an Australian in community with other persons of Australian background.

3 The Secretary and the Commissioner do not accept that there is a right under the *Corrections Act* or pursuant to the *Charter* to consume Vegemite while in prison. They say that if there is a limitation on the right in s 19(1) of the *Charter*, it is a reasonable limit which can be demonstrably justified pursuant to s 7(2) of the *Charter*. Their evidence is that the reasonable and demonstrable justification for the prohibition of Vegemite in Victorian prisons is:

(a) the potential that Vegemite may impair the ability of detection dogs to detect contraband; and

(b) the potential to use Vegemite in making alcohol.[2]

4 The Victorian Equal Opportunity & Human Rights Commission was notified of the proceeding but advised the Court that it would not exercise the right in s 40 of the *Charter* to intervene.[3]

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1 The evidence did not establish that the Secretary to the Department of Justice and Community Safety had a part in the adoption of the policy to prohibit Vegemite, nor in the decision to refuse Mr McKechnie's access to it. I infer that Mr McKechnie identified the Secretary as the first defendant because he is in the legal custody of Secretary, pursuant to section s 6A of the *Corrections Act 1986* (Vic).

2 Affidavit of Dale Slater affirmed 20 February 2026 (**Slater Affidavit**), [17]–[22]; Affidavit of Kevin White affirmed 20 February 2026 (**White Affidavit**), [13]–[15]; Affidavit of Melissa Sueanne Westin affirmed 20 February 2026 (**Westin Affidavit**), [16]–[24].

3 Letter to the Court dated 6 July 2026.

5 I have decided that Mr McKechnie's application is to be dismissed. That is because, in summary:

(a) There is no infringement of Mr McKechnie's right in s 47(1)(b) of the *Corrections Act* to be provided with food that is adequate to maintain the health and well-being of the prisoner, including when that right is construed in accordance with the rights in s 19 of the *Charter*.

(b) The cultural rights in s 19(1) of the *Charter* may encompass rights with respect to certain foods, where that food has become an aspect of a particular cultural background which can be enjoyed as a cultural practice in community with other persons of that background. Vegemite is a food that may be regarded as part of an Australian culture in that it is a food strongly and traditionally associated with people of Australian background.

(c) Mr McKechnie's right to enjoy Australian culture in community with other persons of Australian background is engaged by the decision to maintain the prohibition of Vegemite in Victorian prisons. Mr McKechnie's cultural rights are limited primarily by the fact that he has been sentenced to a term of imprisonment. However, because some foods additional to standard prison food are made available to prisoners, the specific prohibition on permitting prisoners to access Vegemite does impose a further substantive limitation on the right. It is that prohibition and the decision to apply it with respect to Mr McKechnie which must be considered by reference to the *Charter*.

(d) The limitation of Mr McKechnie's right to acquire and consume Vegemite imposed by the prohibition and the decision is, having regard to the nature of the right and other factors relevant to the assessment under s 7(2) of the *Charter*, a reasonable limitation. It is demonstrably justified by the reasons identified by the defendants, which are directly related to the discharge of prison authorities' statutory obligations, including those relating to the management, security and good order of the prison and the safe custody and welfare of the prisoners.

The decision under review

6 Andre McKechnie has been a prisoner in Victoria for many years. He was imprisoned at Port Phillip Prison for a period until 11 November 2025, when he was transferred to HM Prison Barwon (**Barwon Prison**). He was imprisoned in Barwon Prison at the time of the hearing.[4] At all times relevant to his imprisonment in Victoria, Vegemite has been identified by Corrections Victoria authorities as contraband, and is banned in prisons.

7 Mr McKechnie seeks judicial review of a decision to refuse his request that he no longer be prohibited from consuming Vegemite, a request made by letter to the defendants dated 14 August 2025.[5] In that letter, he stated his view that 'Vegemite is an integral part of our Australian food culture' and that he had a cultural right, pursuant to s 19 of the *Charter*, to consume Vegemite. He requested that he 'no longer be prohibited from consuming Vegemite'.[6] A Deputy Commissioner of Corrections Victoria, Melissa Westin, responded by letter dated 8 September 2025, in which she advised of her **Decision** that she had considered the request and did not consider that the ban on Vegemite amounts to a breach of cultural rights, and that she did not intend to grant him permission to consume Vegemite.[7]

8 Mr McKechnie's Originating Motion identifies the following grounds of judicial review of the Decision:

> 1. The defendants breached s 47(1)(b) of the Corrections Act 1986 by failing to provide food adequate to maintain the plaintiff's well-being in that it restricted the plaintiff from enjoying his Australian culture by prohibiting him unlawfully from consuming Vegemite.
>
> 2. The defendants breached s 32(1) of the Charter by failing to interpret s 47(1)(b) of the Corrections Act 1986 in a way that is compatible with human rights when they prohibited the plaintiff from enjoying his culture as an Australian with respects [sic] to his right to consume Vegemite.

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4 Westin Affidavit, [9].

5 **Originating Motion** filed 9 September 2025, p 4.

6 Affidavit of Andre McKechnie dated 28 August 2025 and affirmed 23 June 2026, Exhibit AM-1. For an explanation of the circumstances of Mr McKechnie not being permitted to rely on affidavits which were not sworn nor affirmed, and him providing affirmed copies of affidavits many months after providing versions which were neither sworn nor affirmed, see: *McKechnie v Secretary to the Department of Justice and Community Safety (No 1)* [2026] VSC 472, [11]–[35] (Harris J).

7 Westin Affidavit, [28], Exhibit MSW-1, p 65.

3. The defendants breached s 19 of the Charter by denying the plaintiff his right to enjoy his culture as an Australian when they prohibited the plaintiff from consuming Vegemite.

4. The defendants breached s 38 of the Charter by failing to give proper consideration to the plaintiff's right under s 19 of the Charter to enjoy his Australian culture when it prohibited the plaintiff from consuming Vegemite.

5. The defendants' decision prohibiting the plaintiff from consuming Vegemite affects [sic] a limitation on the plaintiff's right under s19, to enjoy his culture as an Australian, that exceeds any reasonable limit contemplated by s 7(2) of the Charter.

9 Mr McKechnie seeks, as relief, three declarations and orders that the Decision be 'remade in accordance with the law' and for costs.[8] The declarations sought are to the effect that the defendants: (i) 'in breach of s47(1)(b), failed to provide food adequate to maintain the well-being of the plaintiff by prohibiting the plaintiff from enjoying his culture as an Australian'; (ii) 'denied the plaintiff his right under s 19 of the Charter to enjoy his culture as an Australian'; and (iii) 'failed to consider the plaintiff's rights under s 38 of the Charter when they made the decision to prohibit the plaintiff from enjoying his Australian culture'.

10 The defendants oppose Mr McKechnie's relief and seek orders that the proceeding be dismissed with costs.[9]

The facts relevant to Mr McKechnie's application

11 It was uncontroversial that Corrections Victoria authorities have, at all relevant times with respect to Mr McKechnie's claim, identified Vegemite as contraband, with the effect that it cannot be brought into Victorian prisons. The ban was recorded in a Commissioner's Requirement, and a Deputy Commissioner's Instruction, which are addressed further below.

12 On 14 August 2025, Mr McKechnie sent a letter to both of the defendants. That letter stated, relevantly:

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8 Originating Motion, pp 4–5. I note that Mr McKechnie was self-represented and as a prisoner benefits from a fee waiver pursuant to the *Supreme Court (Fees) Regulations 2018* (Vic), reg 14(1)(d). No basis was identified in the evidence on which any costs would be payable to him in the event that he was successful. See, for example, *Ganesh v National Australia Bank Ltd* [2021] VSCA 45, [85]–[89] (McLeish, Sifris and Kennedy JJA). It has not been necessary to consider this issue further.

9 **Defendants' Outline of Submissions** for Final Hearing filed 23 April 2026, [43].

> Vegemite is an integral part of our Australian food culture. To prohibit its consumption is a breach of a person[']s right to practice his or her culture. *The Charter of Human Rights and Responsibilities Act 2006* (the '*Charter*') relevantly provides
>
> > **19 Cultural rights**
> >
> > (1) All persons with a particular cultural … background must not be denied the right, in community with other persons of that background, to enjoy his or her culture … .
>
> The Victorian prison system has prohibited the consumption of Vegemite by banning its availability to those held in custody. Commissioner's Requirements 1.2.9 (Contraband and Controlled Items) (Current Issue Date November 2020) suggests that Vegemite is prohibited because it
>
> > 1. interferes with narcotic detection dogs; and
> >
> > 2. contains yeast
>
> These claims have been researched. It has been found that Vegemite does not interfere with narcotic detection dogs any more, and in some cases much less, than other non-prohibited non-cultural foods provided to those in custody (e.g. chocolate, peanut butter, coffee etc). Also there now have been many clinical tests that prove that, like bread, there is no live yeast in Vegemite. As scientifically proven, any piece of fruit would contribute more to the production of alcohol than would Vegemite. The reasons for the policy are invalid, and as a consequence the policy breaches s 19 of the *Charter*.
>
> It is for this reason that I now request that you provide to me your permission allowing me, as a person held in custody in Victoria wishing to enjoy my culture as an Australian, to no longer be prohibited from consuming Vegemite.[10]

13 Melissa Westin, Deputy Commissioner in the Custodial Operations Division of Corrections Victoria, responded by letter dated 8 September 2025. Deputy Commissioner Westin is responsible for the oversight of the public prison system and contract management oversight of private prisons in Victoria.[11] Her letter relevantly stated:

> In your letter you have noted Vegemite is presently banned in Victorian prisons and you have contended that the ban breaches your 'cultural rights' in s19 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**the Charter**). You have requested permission to consume Vegemite.
>
> I have considered your request and do not consider that the ban on Vegemite amounts to a breach of your cultural rights under the Charter. I also do not accept that the reasons for the current Vegemite ban are invalid. I therefore do not intend to grant you permission to consume Vegemite, or similar products which are also banned.

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10 Affidavit of Andre McKechnie dated 28 August 2025 and affirmed 23 June 2026, Exhibit AM-1, 6: Letter from Andre McKechnie to the Secretary of the Department of Justice and Community Safety and the Commissioner of Corrections Victoria dated 14 August 2025, p 1.

11 Westin Affidavit, [5].

> If you have any further material that you wish to provide in support of your request to consume Vegemite, then please provide this material by 22 September 2025.
>
> I will consider any further material you provide and will advise of my final decision.[12]

14 Deputy Commissioner Westin gave evidence that prior to sending this letter she considered a **Memorandum** prepared by Lisa Homatopoulos (Manager, Litigation & Coronial Matters, Custodial Operations Division) dated 5 September 2025.[13] The Memorandum analysed whether the ban on Vegemite and like products in prisons is compatible with the cultural rights in s 19(1) of the *Charter*. Ms Homatopoulos concluded after that analysis that 'the current ban on Vegemite in Victorian prisons does not breach cultural rights under the Charter, and that refusing to grant Mr McKechnie permission to consume Vegemite will not breach his Charter rights'.

Mr McKechnie's evidence about Vegemite as an aspect of his Australian culture

15 Mr McKechnie gave evidence about Vegemite as an aspect of Australian culture. His evidence was that he was born in Victoria, Australia in 1971 and that from his earliest memories:

> Vegemite has been a food that I associate with family, my family home, and my home Australia. I consider Vegemite and my consumption of Vegemite an integral part of the practice of my Australian culture.
>
> Without being able to consume Vegemite I feel deprived of being able to practice my Australian culture, sad and disconnected from my family and community.[14]

16 Mr McKechnie's evidence was that he is Jewish and observes Kosher law, which prohibits consumption of pork, and that both pork and Vegemite (which is Kosher) are sources of thiamine. His evidence was that because he cannot consume either, he suffers from thiamine deficiency and has been prescribed daily doses of thiamine since October 2024.[15] The defendants objected to Mr McKechnie's evidence insofar as it related to him having a thiamine deficiency as a result of not eating pork and

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12 Westin Affidavit, [28], Exhibit MSW-1, 65.
13 Westin Affidavit, [29], Exhibit MSW-1, 66–70.
14 Affidavit of Andre McKechnie dated 12 January 2026, affirmed 23 June 2026, [2]–[3].
15 Affidavit of Andre McKechnie dated 12 January 2026, affirmed 23 June 2026, [5]–[6].

Vegemite. Mr McKechnie did not press that evidence and said that he thought that issue was 'not important'.[16]

17 Mr McKechnie also tendered in evidence an article published in the journal *Gastronomica* titled 'Vegemite as a Marker of National Identity', by Paul Rozin and Michael Siegal. The authors conducted a study of Vegemite as a marker of cultural identity. They concluded:

> Vegemite may be the best predictor of national identity of any food in the world. That is, if you eat Vegemite, you are almost certainly Australian. … We examined early developmental and cultural influences that result in a preference for Vegemite over other foods and found that a taste for the spread strongly correlates with early exposure and to Australian birth and ancestry. These results suggest that Vegemite is one of the clearest markers of cultural identity that has yet been reported, and that early exposure is an important, though not necessary, condition for acquiring a taste for it.[17]

18 The article describes a study conducted with the objective of exploring the association between a taste for Vegemite and Australian birth and ancestry. The article makes observations about the results of the study with respect to consumption of Vegemite and as to its association with persons of Australian birth and ancestry. Most relevantly for present purposes, the authors make the following observations relevant to the national and cultural associations of Vegemite:

> The popularity of Vegemite is of particular interest for three reasons. First, it is a food product consumed almost solely within the borders of a single country, Australia. Specific foods are often described as markers of ethnic or national identity. Vegemite is almost universally consumed in Australia but is eaten nowhere else, except in New Zealand, where it is much less widely used and where it occupies a market share approximately equal to that of Marmite. Thus, a taste for Vegemite is an excellent predictor of national identity, making Vegemite a natural choice with which to explore the links connecting national identity, patriotism, and specific food preferences. [18]
>
> …
>
> Vegemite and Australia are strongly connected. Indeed, the eating of this food product and especially the enjoyment of it are specifically linked to Australian birth and ancestry.[19]

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16 Transcript 24/07/26, T38.20–T39.15.

17 Paul **Rozin** and Michael **Siegal**, 'Vegemite as a Marker of National Identity' (2003) 3(4) *Gastronomica*, 63, 63.

18 Rozin and Siegal, 63.

19 Rozin and Siegal, 66.

19 Mr McKechnie gave evidence of his opinion that 'Vegemite does not reduce the potential of prisoners producing alcohol'[20] (which I understood to be a submission that the *ban* on Vegemite does not reduce that potential). He also expressed the opinion that although Vegemite could be used as an ingredient in the production of alcohol, it is less useful as an ingredient for that purpose than foods containing sugar such as fruit. He referred to an article which stated that it is possible to make alcohol from Vegemite but that it is also possible to 'make alcohol from just about any food by adding the right type of yeast at the right time'.[21] He quoted an article from the *Herald Sun* newspaper dated 25 September 2017 which reported an instance of a man's unsuccessful use of Vegemite to conceal drugs that he sought to bring into a music festival in Victoria. Mr McKechnie observed that the attempt was reported as having been thwarted by the use of police drug detection dogs.[22]

20 Mr McKechnie gave evidence that he was a graduate of the University of Melbourne 'post grad Physics' and stated that he had 'made extensive enquiries and searched all reasonably accessible academic journals and found no evidence at all to support the claim that Vegemite interferes with drug detection dogs'. He said that on that basis, and 'because no supporting evidence has been provided by the defendants' he was 'confident that no such research … has been performed to determine whether Vegemite interferes with drug detection dogs'.[23] The defendants objected to the admissibility of this evidence, on the basis that it was argumentative and involved opinion without adequate foundation. I ruled the evidence to be inadmissible because Mr McKechnie had not identified what journals or other sources he had access to or had considered, and had not provided any proper foundation for the opinion.[24]

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20 **Plaintiff's Submissions** dated 20 March 2026, [26].

21 Plaintiff's Submissions, [27]–[30], quoting Maggie Hardy and Ben Schulz, 'Yes, you can make alcohol from Vegemite, but …', *The Conversation*, (Web Page, 14 August 2015) <https://theconversation.com/yes-you-can-make-alcohol-from-vegemite-but-46010>. This article was also referred to in the Memorandum of Lisa Homatopoulos which was provided to Deputy Commissioner Westin. See Westin Affidavit, Exhibit MSW-1, 69: Memorandum at [28] and footnote 16.

22 Plaintiff's Submissions, [41].

23 Affidavit of Andre McKechnie dated 14 March 2026 and affirmed 23 June 2026, [10]–[14].

24 Transcript 24/07/26, T43.30–T45.06.

Evidence relating to the reasons for the prohibition of Vegemite in Victorian prisons

21 Deputy Commissioner Westin gave evidence about the policy on prohibiting Vegemite in Victorian prisons. She gave evidence that in March 2024, the Commissioner, Corrections Victoria, Larissa Strong, issued a Commissioner's Requirement titled 'CR 1.2.9 – Contraband and Controlled Items' (**Commissioner's Requirement 1.2.9**). Her evidence was that on around 29 November 2006, the ban on Vegemite was imposed in all prisons, and for similar products in around February 2015.[25] The reasons for the ban on Vegemite and like products were recorded in Commissioner's Requirement 1.2.9 as being '[i]nterferes with narcotic detection dogs, contains yeast'.[26]

22 Deputy Commissioner Westin issued a Deputy Commissioner's Instruction on 5 March 2024, titled '**DCI 1.04** – Contraband and Controlled Items'. That document contains a 'Contraband and Controlled Items in Victorian Public & Private Prisoners' list (the **Contraband List**), which includes 'Vegemite & like products'. It also described the reason for that inclusion on the Contraband List as being '[i]nterferes with narcotic detection dogs, contains yeast'.[27]

23 The ban on bringing Vegemite into prisons in Commissioner's Requirement 1.2.9 and DCI 1.04 applies to prisoners, visitors, staff and contractors.[28]

24 Deputy Commissioner Westin stated that based on her review of Commissioner's Requirement 1.2.9 and DCI 1.04, she believed that Vegemite was banned in Victorian prisons 'due to concerns that its use may interfere with narcotic detection dogs and that it contains yeast'. She was not involved in the decision to prohibit Vegemite but referred to a 'Charter Assessment Record' which had been carried out with respect to the policy of banning Vegemite and which had been endorsed by her predecessor, Rod Wise, the then Deputy Commissioner, Operations, on 22 August 2013. A further Charter Assessment Record was endorsed by Deputy Commissioner Wise on 22 August 2014.[29] Both of the assessments related to the entirety of DCI 1.04 rather

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25 Westin Affidavit, [12].
26 Westin Affidavit, [10]–[14], Exhibit MSW-1 pp 10–19.
27 Westin Affidavit, [13]–[14], Exhibit MSW-1 pp 31–37.
28 Westin Affidavit, [11]–[12], Exhibit MSW-1, pp 10–19; 36.
29 Westin Affidavit, [16]–[18], Exhibit MSW-1, pp 61–64.

than the specific prohibition of Vegemite, and identified various human rights in the *Charter* which were engaged by the prohibition and control of contraband items effected by that instrument. Neither instrument identified s 19 cultural rights as being engaged.

25 Deputy Commissioner Westin gave evidence as to why she believed the ban on Vegemite was justified:

> 20. It is my understanding, based on advice I have received from officers in the Security and Emergency Services Group ("**SESG**") of Corrections Victoria (which I believe to be true), that there is a risk that Vegemite use may interfere with the ability of detection dogs to detect contraband in the Victorian prison system. That is the primary reason why the ban on Vegemite remains in force.
>
> 21. Narcotic detection dogs are used by officers of the SESG in the Victorian prison system to assist in locating contraband, including any contraband held by prisoners (such as illicit drugs and alcohol). If the dogs are unable to detect contraband or may be affected in detecting contraband, one of the tools we use to detect and prevent the spread of narcotics in the prison-system is negatively impacted, leading to increased security and safety risks, assaults, stand overs and other risks associated with contraband (including health risks associated to use and overdoses).
>
> 22. The second reason why Vegemite is banned is due to a concern that it can possibly be used to make or assist in making alcohol in prison.
>
> 23. Again, it is my understanding, based on advice I have received from officers in the Security and Intelligence Division which I believe to be true, that there is a possibility Vegemite may be used by prisoners to assist in creating alcohol. Alcohol is an "unauthorised article or substance" under the *Corrections Regulations 2019* (Vic) and it is a prison offence for a prisoner to consume alcohol.
>
> 24. There are various risks I am aware of and believe are associated with prisoners making and having alcohol in prisons. Key risks associated with alcohol, or "home brew", in prisons are that prisoners will consume the alcohol, become intoxicated and present health and safety risks. In particular, they can present a risk of violence to themselves or other persons (including other prisoners or staff). …[30]

26 Dale Slater, the General Manager[31] at Barwon Prison who has worked in Victorian prisons since 2007, also gave evidence about the importance of drug detection dogs

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30 Westin Affidavit, [20]–[24].

31 Corrections Victoria gives the title of 'General Manager' to the officer who holds the position of Governor for the purposes of the *Corrections Act*.

to the barrier control and safety of the prison.[32] He is aware that Vegemite could be used to make alcohol, although he was not aware of specific occasions of prisoners using Vegemite to make alcohol or interfere with the work of drug detection dogs.[33]

27 Mr Slater's opinion is that the ability of prison staff to effectively identify illicit substances during trafficking attempts through the use of drug detection dogs facilitates the protection of the safety of prison staff and prisoners from harm.[34] He also believes that the behaviour of prisoners under the influence of alcohol 'can be unstable and unpredictable, which presents a higher risk of [prisoners] engaging in violence and non-compliance with the directions of prison officers'.[35] Mr Slater also gave evidence of incidents that have taken place at the prison that affected its good order after prisoners consumed prison-made alcohol.[36]

28 Mr Slater believes the prohibition on Vegemite is necessary to mitigate the risks presented by drugs and alcohol.[37] He is in my view qualified to express this opinion given his many years of experience in prison management, including at Barwon Prison, and I accept his evidence.

29 Mr Slater also gave evidence, from his experience and observation as General Manager of Barwon Prison, of the food to which Mr McKechnie was given access. All prisoners in Barwon Prison, including Mr McKechnie, are provided with pre-prepared meals each day. As Barwon Prison is a maximum security prison, it does not provide for self-catering. However, some of its accommodation units contain kitchenettes with limited equipment. Access to these kitchenettes depends on the prisoner's classification in an 'incentive-based regime' (**IBR**) which is used in the prison to determine access to privileges. Mr McKechnie's IBR classification at the time of Mr Slater's evidence was 'IBR 3', which includes kitchen access.[38]

30 Mr McKechnie is provided each day with a pre-prepared lunch salad bowl and hot pre-packaged Kosher dinner supplied by a Kosher catering company. A list of

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32 Slater Affidavit, [7]; [21].
33 Slater Affidavit, [22].
34 Slater Affidavit, [21].
35 Slater Affidavit, [19].
36 Slater Affidavit, [20].
37 Slater Affidavit, [22].
38 Slater Affidavit, [9]–[12].

available foods from the Kosher caterer was in evidence and showed a wide range of different hot meals. He is also provided with a weekly box containing items of Kosher food to supplement his daily meals with non-essential discretionary food items. The list of supplementary items showed a range of vegetables, bread products, cheese, Kosher smallgoods and breakfast items.[39]

31 Kevin White is the General Manager of the Security and Emergency Services Group of Corrections Victoria (**SESG**). He is experienced in the use of drug detection dogs, and I accepted that this qualified him to give evidence about the use of detection dogs and give his opinion based on that experience. Mr White gave evidence that some of the drug detection dogs used by the SESG are 'passive alert detection dogs' which, using their scent, can detect illicit substances and indicate to their handler if a substance is present, and that this form of detection is a less invasive method of detecting drugs than a 'body search'. He gave evidence that Vegemite can interfere with the passive alert detection dogs' ability to accurately detect illicit substances by misidentifying whether illicit substances are present near them leading to the risk of false reporting.[40] In cross-examination, he gave evidence that:

> Now I manage the entire fleet of canines within the system and the staff and handlers along with it, and there are a number of times where either through journals, through documentation and through experience where any odour such as Vegemite which is pungent would distract a canine from detecting the illicit drugs they are trained to detect.[41]

32 Mr White also gave evidence of his experience of prisoners making 'home brew' from a range of substances, including hand sanitiser, potatoes, fruits and sugar. His understanding was that Vegemite is a byproduct from fermenting beer, and that although 'most if not all of the yeast is broken down in its processing', it can 'still be used to assist the fermenting process with natural ingredients'.[42] At trial he gave evidence that, from publicly available information which he had read about home-brewing of alcohol:

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39 Slater Affidavit, [13]–[15]; Exhibit DS-1, 13–14.
40 White Affidavit, [10]–[13].
41 Transcript 24/07/26, T25.01–07 (White XXN).
42 White Affidavit, [14]–[15].

> there's a whole range of items including Vegemite which will help make home brew ferment quicker than not having it present. Whilst it's yeast free, having that in a home brew mixture will help ferment it quicker.[43]

33 Mr McKechnie had issued a subpoena to the Commissioner of Corrective Services New South Wales, seeking documents relevant to whether Vegemite was available for purchase by prisoners in New South Wales, and if so, for how long.[44] By the time of the hearing on 24 July 2026, no documents had been provided in response to the subpoena. Mr McKechnie had exhibited to two of his affidavits a document titled 'Male & Female CSNSW Generic Weekly Grocery Buy-Up List', which listed food, toiletries and other items which could be purchased, with codes for each item, and included 'Spread – Vegemite' in this list.[45] Mr McKechnie identified the source of the document as being 'the Internet where it was purported to have been provided by prisoners who had recently served time in custody in New South Wales'.[46] As it was not possible to ascertain whether the list was in fact a copy of a true prison buy-up list, it was not possible to give the document any significant weight. However, in view of the contents of the document, I asked counsel for the defendants whether there would be any objection to the Court assuming, for the purposes of Mr McKechnie's judicial review application only, that Vegemite was available for purchase to prisoners in New South Wales prisons, for the last five years. Counsel for the defendants confirmed that there was no objection to the Court making that assumption for the purposes of the application and the hearing proceeded on that basis.[47] In the course of her evidence at trial Deputy Commissioner Westin was cross-examined. In re-examination she gave evidence that she was aware that although Vegemite was permitted in New South Wales prisons, prisons in Queensland, South Australia and Tasmania had bans on Vegemite. She was only

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43 Transcript 24/07/26, T26.29–T27.02 (White ReXN).

44 Subpoena to Produce addressed to 'the Commissioner of Corrective Services NSW', dated 16 June 2026 and filed 7 July 2026.

45 Affidavit of Andre McKechnie dated 18 June 2026 and affirmed 23 June 2026, Exhibit AM-6, 6; Affidavit of Andre McKechnie dated 7 July 2026 and affirmed 22 July 2026, Exhibit AM-8, 6–7.

46 Affidavit of Andre McKechnie dated 18 June 2026 and affirmed 23 June 2026, [2].

47 Transcript 24/07/26, T14.04–20. Subsequently, Deputy Commissioner Westin gave evidence that she had made contact with 'interstate counterparts', and the Commissioner, Corrections Victoria had also made contact with interstate counterparts. They ascertained that Vegemite was a banned substance in prisons in Tasmania, Queensland and South Australia: Transcript 24/07/26, T21.06–23 (Westin ReXN). Deputy Commissioner Westin confirmed that after her decision on 8 September 2025, at a time around two weeks before the hearing, she was informed by a representative of the New South Wales corrections system that prisoners in New South Wales are permitted to purchase Vegemite: Transcript 24/07/26, T22.09–28 (Westin ReXN).

aware of the reason for the ban in Queensland and South Australia, being the 'potential to interfere with a canine's ability to detect contraband'.[48]

Preliminary observation — formulation of grounds

34 Mr McKechnie identified two separate grounds relating to the question of whether the defendants breached s 47(1)(b) of the *Corrections Act*. The first is that they did so by 'failing to provide food adequate to maintain the plaintiff's well-being in that it restricted the plaintiff from enjoying his Australian culture by prohibiting him unlawfully from consuming Vegemite'.

35 The second ground is that the defendants 'breached s 32(1) of the Charter by failing to interpret s 47(1)(b) of the Corrections Act 1986 in a way that is compatible with human rights when they prohibited the plaintiff from enjoying his culture as an Australian with respects [sic] to his right to consume Vegemite'.

36 Section 32(1) of the *Charter* requires that 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. It is a provision which imposes that statutory interpretation obligation with respect to all Victorian legislation.[49]

37 Although s 32(1) applies to all persons interpreting statutes, it is not, in my view, meaningful or consistent with the purpose of s 32(1) to refer to the defendants as having 'breached' that interpretative requirement. I understand the essence of the ground as engaging the requirement to interpret s 47(1)(b) consistently with the *Charter*, in considering whether the right in s 47(1)(b) was breached when Mr McKechnie was not permitted to have access to Vegemite. That appears to be the intention of ground 1, given the way that is expressed. As s 47(1)(b) must be interpreted by reference to all relevant statutory interpretation requirements, including s 32(1), ground 2 does not add anything material to ground 1. I will consider the s 47(1)(b) issue as one issue.

38 Mr McKechnie also relied on grounds to the effect that the defendants 'breached' the *Charter*. Ground 3 is a ground alleging that the defendants 'breached' s 19 of the

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48 Transcript 24/07/26, T21.24–26 (Westin ReXN).

49 *Charter*, s 49(1).

Charter. There is no cause of action involving a direct 'breach' of a *Charter* right. Part 2 of the *Charter* sets out the human rights that all persons have, according to s 6(1). Those rights are relevant in several ways, including with respect to the scrutiny of new legislation (ss 28 – 30) and the interpretation of laws (ss 32 – 37). The obligations relevant to the availability of relief or a remedy under the *Charter* against a public authority are imposed by s 38. Section 38 makes it unlawful for a public authority to do two things: first, to act in a way that is incompatible with a human right (also known as the substantive limb); and secondly, in making a decision, to fail to give proper consideration to a relevant human right (also known as the procedural limb).[50]

39 I take ground 3 to be in substance a ground that the defendants, as public authorities, acted in a way that is incompatible with Mr McKechnie's rights under s 19.

40 Grounds 4 and 5 allege separately that the defendants breached s 38 of the *Charter* by failing to give proper consideration to his s 19 right; and that the defendants' decision effected a limitation on his s 19 right 'that exceeds any reasonable limit contemplated by s 7(2) of the Charter'. Whether any limitation of a right is reasonable and demonstrably justified within the meaning of s 7(2) is a matter which falls to be determined as an aspect of considering whether there has been unlawful conduct by a public authority under either of the two limbs of s 38, rather than a separate obligation.

41 It is also relevant to observe that Mr McKechnie brought this proceeding against the Secretary to the Department of Justice, and the Commissioner, Corrections Victoria. However, he identifies as the conduct of which he seeks judicial review the refusal of his request 'to no longer be prohibited from consuming Vegemite'.[51] That decision was not made by either of the defendants, but rather by Deputy Commissioner Westin. Although the Secretary has responsibilities with respect to prisoners, who are deemed by s 6A of the *Corrections Act* to be in the Secretary's custody, Mr McKechnie's Originating Motion and submissions do not seek to identify that there is any act or omission of the Secretary or the Commissioner of which he seeks judicial review. Further, although it is clear from the evidence that the prohibition of

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50 ***Thompson v Minogue*** (2021) 67 VR 301, 322 [79] (Kyrou, McLeish and Niall JJA).

51 Originating Motion, under heading 'The Decision'.

Vegemite in prisons has been effected by way of Commissioner's Requirement and Deputy Commissioner's Instruction, Mr McKechnie also does not seek review of the adoption of those instruments. The conduct the subject of his application is clearly limited to the Decision refusing to permit him to consume Vegemite notwithstanding the prohibition.

42 Taking into account grounds 3 to 5, and the evidence as to who in fact made the Decision, I regard the application as in substance raising the following two grounds of review:

(a) Deputy Commissioner Westin, by her Decision communicated in the letter of 8 September 2025, not to relieve Mr McKechnie of the prohibition on having Vegemite in prison, acted incompatibly with his right under s 19 of the *Charter* and so acted unlawfully within the meaning of the substantive limb of s 38(1).

(b) Deputy Commissioner Westin, in making the Decision, failed to give proper consideration to Mr McKechnie's rights under s 19 of the *Charter*, and so acted unlawfully within the meaning of the procedural limb of s 38(1).

Ground 1 — s 47(1)(b)

43 Section 47(1) of the *Corrections Act* provides for a range of prisoner rights. The rights in ss 47(1)(b) and (c) relate to prisoners' rights with respect to food:

> **47 Prisoners rights**
>
> (1) Every prisoner has the following rights—
>
> …
>
> (b) the right to be provided with food that is adequate to maintain the health and well-being of the prisoner;
>
> (c) the right to be provided with special dietary food where the Governor is satisfied that such food is necessary for medical reasons or on account of the prisoner's religious beliefs or because the prisoner is a vegetarian;

44 Mr McKechnie relies only on s 47(1)(b) in his Originating Motion and submissions.[52] He contends that by banning Vegemite the defendants 'failed to provide the plaintiff with food that is adequate to maintain his health in well-being [sic]'. He does not

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52 **Plaintiff's Outline of Submissions** filed 14 April 2026, [19].

elaborate on that assertion in submissions, but refers to certain paragraphs of one of his affidavits. Those paragraphs are to the effect that without being able to consume Vegemite, Mr McKechnie feels 'deprived of being able to practice my Australian culture, sad and disconnected from my family and community', and also to his evidence that he has a thiamine deficiency because of his inability to eat pork and Vegemite.[53] As he no longer relied on the evidence relating to thiamine deficiency,[54] his contention on s 47(1)(b) was limited to his position that the reference to 'welfare' in s 47(1)(b) engages a prisoner's ability to enjoy his or her culture. He submitted 'there needs to be a correlation between the welfare that it speaks about in s 47(1)(b) and culture'[55] and that 'by taking away someone's culture you're affecting their welfare'.[56]

45 It appeared from some of Mr McKechnie's submissions that the primary reason he had included the claim that s 47(1)(b) had been breached by the defendants was to address the limitation on legal proceedings for breaches of the *Charter* arising from the terms of s 39(1) of the *Charter*.[57] Section 39(1) provides:

> **39 Legal proceedings**
>
> (1) If, otherwise than because of this Charter, a person may seek any relief or remedy in respect of an act or decision of a public authority on the ground that the act or decision was unlawful, that person may seek that relief or remedy on a ground of unlawfulness arising because of this Charter.

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53 Plaintiff's Outline of Submissions, [19] referring to Affidavit of Andre McKechnie dated 12 January 2026 and affirmed 23 June 2026, [2]–[6].

54 See [16] above. I note that in light of Mr McKechnie's evidence that he was taking thiamine supplements, his evidence did not in any event indicate that he currently suffered any relevant thiamine deficiency.

55 Transcript 24/07/26, T48.18–20.

56 Transcript 24/07/26, T50.05–07; T48.24–26.

57 Plaintiff's Outline of Submissions, [16]–[19]; Plaintiff's Outline of Submissions in Reply filed 6 July 2026, [1]–[2]; Transcript 24/07/26, T48.03–27; T49.28–T50.12.

46 The defendants submit that this ground, having been advanced by Mr McKechnie with 'only cursory submissions', is 'colourable' in the sense that it was advanced only to provide a basis for making the *Charter* based claims.[58]

47 The defendants acknowledge that Mr McKechnie has a right to be provided with adequate food in prison but submit that he does not have a right to particular types of food or food products, as 'it is an inherent part of incarceration that prisoners are provided standard food by their gaolers'.[59] They submit that it 'is a matter for prison administrators in the management and administration of the prison system to determine what food should be available to prisoners', and that Mr McKechnie has failed to establish that the food with which he has been provided in prison does not satisfy the requirements of s 47(1)(b).[60]

48 The defendants also submit that Mr McKechnie is seeking to compel the defendants to perform the duty imposed by s 47(1)(b) in a particular manner. They submit that such a remedy is not available. They rely on ***Weaven*** *v The Secretary, Department of Justice*[61] where Macaulay J considered the plaintiff's argument that his rights under s 47(1)(b) were infringed by failing to be provided with satisfactory yeast free food, and declined to grant the order in the nature of mandamus which was sought by the plaintiff.[62]

Analysis

49 The rights in s 47(1) of the *Corrections Act* are rights which are, on their terms, afforded to all prisoners. They impose corresponding duties on the Secretary, who

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58 Defendants' Outline of Submissions, [14], [26]; Transcript 24/07/26, T59.29–T63.30. The defendants refer, with respect to the concept of colourable claims to 'fabricate' jurisdiction to consider *Charter* claims, to *McKechnie v Commissioner for Corrections Victoria* [2024] VSC 114, [41] (Gray J); *Kheir v Robertson* [2019] VSC 422, [100]–[101] (McDonald J); *Director of Housing (Vic) v Sudi* [2010] VCAT 328, [132] (Bell P); and *Berih v State of Victoria (No 2)* [2024] VSC 230, [66]–[70] (Richards J, as her Honour then was).

59 Defendants' Outline of Submissions, [28].

60 Defendants' Outline of Submissions, [28]–[29].

61 [2012] VSC 582; Defendants' Outline of Submissions, [30].

62 [2012] VSC 582, [23]; [37].

has legal custody of Mr McKechnie,[63] and on the prison Governor (being the General Manager of Barwon Prison who performs that role).[64]

50 The issue in this case is whether the 'right to be provided with food that is adequate to maintain the health and well-being of the prisoner' encompasses, as Mr McKechnie's submissions appear at their highest to contend, a right to be provided with food which the prisoner regards as culturally appropriate.

51 As acknowledged by Macaulay J in *Weaven*, the rights in s 47(1) are not vague, or merely setting a 'target', rather:

> The rights (and corresponding duties) in s 47 apply to 'every prisoner', and can only be meaningfully afforded by reference to the individual prisoner whose individual health or well-being is in issue.[65]

52 In construing the reference in s 47(1)(b) to 'food that is adequate to maintain the health and well-being of the prisoner', it is necessary to construe the text of that statutory phrase, in its context, which includes the objects of the legislation and the mischief that it was designed to overcome.[66] In interpreting s 47(1)(b), a statutory interpretation requirement which must be applied is the requirement imposed by s 32(1) of the *Charter* that:

> 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.

53 The natural and ordinary meaning of the words 'health and well-being of the prisoner' refer to a wellness of body and mind of the prisoner.[67] The requirement that the food be '*adequate*' for 'health and well-being' suggests that the requirement is for food which will be sufficient to sustain a state of physiological health, free of disease or sickness to the extent that food contributes to that objective. Specific

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63 *Castles v Secretary, Department of Justice* (2010) 28 VR 141, 177 [147] (Emerton J); *Weaven*, [5]–[7] (Macaulay J).

64 *Binse v Williams and Van Groningen* [1998] 1 VR 381, 392 (Charles JA, with whom Tadgell JA and Callaway JA agreed); *McCabe v Westin; McCabe v Pickering* [2024] VSC 145, [47] (Harris J).

65 *Weaven*, [12].

66 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow JJ); *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27, 46–47 [47] (Hayne, Heydon, Crennan and Kiefel JJ); *Certain Lloyd's Underwriters Subscribing to Contract No IH00AAQS v Cross* (2012) 248 CLR 378, 389 [24]–[25] (French CJ and Hayne J).

67 See, for example, the *Macquarie Dictionary* definition of 'health': '1. soundness of body; freedom from disease or ailment. 2. The general condition of the body or mind with reference to soundness and vigour: *good health*'.

physical or psychological medical needs which may make particular foods necessary as part of that diet may to some extent be protected by s 47(1)(b), but fall more naturally within the scope of s 47(1)(c).

54 The reference to 'well-being' in addition to 'health' in s 47(1)(b) indicates that the right is not simply to food adequate to prevent disease, but food which will maintain the bodily well-being of the prisoner. The context of the reference to well-being, both in its use in the composite phrase '*health* and well-being', and in the broader context of s 47(1), indicates that well-being is, although a broad concept, not intended to engage all potential aspects of a prisoner's well-being. Other aspects of s 47(1) address a range of other aspects of prisoner well-being, such as rights to clothing suitable for climate and adequate to maintain the health of the prisoner (s 47(1)(d)); rights to engage with others through letters and prison visits (ss 47(1)(k) and (m); rights to participate in educational programmes in prison (s 47(1)(o)); and rights to practise religion including, if it is consistent with prison security and good prison management, to join with other prisoners in doing so (s 47(1)(i)).

55 The specificity with which rights are expressly identified in s 47(1) suggests that the right to be provided with food that is adequate to maintain a prisoner's 'health and well-being' in s 47(1)(b) is similarly specific and is to be understood in the natural sense of that phrase, and not in any extended way. For that reason, I do not regard the reference to 'well-being', read in context, as involving such a broad conception as to encompass the enjoyment or contentment that a person may derive from consuming foods which have cultural significance to them.

56 An important aspect of the broader context of the s 47(1) rights in the *Corrections Act* is that they are rights of 'prisoners'. Prisoners are defined by the *Corrections Act* as being in the legal custody of the Secretary pursuant to an order for imprisonment, which is frequently a sentence of imprisonment imposed by a Court.[68] It is an inevitable and intended feature of imprisonment that prisoners do not have the freedom to access many of the usual features of community life, including many activities which have cultural significance. They will not be able to attend cultural

[68] *Corrections Act*, s 3, definition of prisoner ('***prisoner*** means a person who under Part 1A is deemed to be in the legal custody of the Secretary'), s 6A of Part 1A, relating to a person being in the legal custody of the Secretary when an 'order of imprisonment' is made, and s 6 of Part 1A, relating to what constitutes an 'order of imprisonment'.

celebrations in the community, attend sporting events that might have significance in a particular culture, or attend artistic performances. In relation to food, which is the subject of s 47(1)(b), it will also be the case that a prisoner will by reason of their sentence not have access to the full range of culturally significant foods that they would have in the community.

57 In ***Castles*** *v Secretary, Department of Justice*, Emerton J (as her Honour the former President then was) considered the right to reasonable medical care and treatment in s 47(1)(f) of the *Corrections Act*. Her Honour observed:

> Like other citizens, prisoners have a right to enjoyment of a variety of facilities, goods, services and conditions necessary for the realisation of a high standard of health. That is to say, the health of a prisoner is as important as the health of any other person.[69]

58 However, that principle was recognised in *Castles* to be necessarily qualified by reference to the situation of a prisoner who has been subjected under law to a term of imprisonment:

> Prisoners have been deliberately removed from the community and deprived of their liberty in accordance with well-established sentencing principles. As a result, for the period of their imprisonment, they are largely deprived of their freedom of association and, to a significant extent, their autonomy. Hence, although prisoners do not forgo their human rights, their enjoyment of many of the rights and freedoms enjoyed by other citizens will necessarily be compromised by the fact that they have been deprived of their liberty.[70]

59 Construing s 47(1)(b) as required by s 32 of the *Charter* does not give rise to any different outcome. I accept, for reasons set out below, that cultural rights with respect to culturally significant foods may be protected by s 19 of the *Charter*. However, it is not possible to construe s 47(1)(b) compatibly with protecting s 19 rights to access all foods of cultural significance *consistently with the purpose* of

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69 *Castles*, 169 [108]. The High Court, in the recent case ***Smith v Chief Executive,*** *Queensland Corrective Services* [2026] HCA 37, considered a statutory scheme which included a statutory statement of that principle. That case related to a prisoner's ability to access a specific medical service (preservation of fertility through extraction and freezing of eggs) in the context of the *Corrective Services Act 2006* (Qld). That Act includes in s 3(2) an explicit recognition that 'an offender's entitlements, other than those that are necessarily diminished because of imprisonment or another court sentence, should be safeguarded'. See the consideration of the effect of that statutory provision at [13] and [22], [24] (Gordon A-CJ and Beech-Jones J); [97] (Gleeson J); [146]–[148] (Jagot J).

70 *Castles*, 169 [109]. See also the discussion in *Smith v Chief Executive* [62] (Edelman J).

s 47(1)(b), as required by s 32(1).[71] The purpose, understood by reference to the terms of s 47(1)(b) and its context in the *Corrections Act*, is to protect the physical health and related well-being of prisoners serving a term of imprisonment, through provision of 'adequate' food. It is not to provide food which will promote a prisoner's well-being in all possible ways.

60 In coming to my conclusion that s 47(1)(b) does not extend to an obligation to provide to prisoners foods of cultural significance to enhance their well-being, it is important to reinforce that this does not reduce in any way the core obligation that s 47(1)(b) imposes to provide adequate food for prisoners to maintain a standard of health consistent with other members of the community.

Conclusion – there is no breach of s 47(1)(b)

61 I reject the grounds of appeal insofar as they are based on s 47(1)(b). There is some support for the conclusion that Mr McKechnie included this ground because he was aware that the effect of s 39(1) was that he could not seek relief on *Charter* grounds alone.[72] However, I do not find that the inclusion of these grounds was purely a device for the 'fabrication' of jurisdiction.

62 I also do not accept the defendants' primary contention that Mr McKechnie's claim based on s 47(1)(b) was misconceived primarily by reason of the unavailability of relief. The defendants relied for that submission on observations made by Macaulay J in *Weaven*. Justice Macaulay's observations related to the availability of an order in the nature of mandamus. His Honour observed that although performance of a public legal duty may be amenable to mandamus in certain circumstances, it will not control the performance of a duty by directing how it is to

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71 See the observations as to the effect of the words 'consistently with their purpose' in s 32(1) by the Court of Appeal in *R v Momcilovic* (2010) 25 VR 436, 446 [35]; 457–458 [74]–[77] (Maxwell P, Ashley and Neave JJA), overturned on appeal in ***Momcilovic*** *v The Queen* (2011) 245 CLR 1, but not on this issue. As observed by the Court of Appeal in *Slaveski v Smith* (2012) 34 VR 206, [20], the High Court in *Momcilovic* endorsed the conclusion that s 32(1) does not require courts, in the pursuit of human rights compatibility, to depart from the ordinary meaning of the statutory provision or from the intention of the Parliament which enacted the statute. In effect it requires courts '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* [(1998) 194 CLR 355]': see French CJ at 47–48 [46]. See too 92 [170] (Gummow J, with whose reasons on this issue Hayne J agreed at 123 [280]); 210 [544]–[545] (Crennan and Kiefel JJ); 250 [684] (Bell J). See also *Nigro v Secretary to the Department of Justice* (2013) 41 VR 359, 383 [85] (Redlich, Osborn and Priest JJA).

72 See [45] above.

be discharged.[73] In the present case, Mr McKechnie is not seeking mandamus directed to a particular end, but rather declarations and an 'order that the decision be remade in accordance with the law'. If Mr McKechnie had been successful in establishing that the Decision was made in breach of s 47(1)(b), an order setting the Decision aside and requiring that it be remade according to law (but not what the new decision should be) would be a remedy of an appropriate nature.

Does the Decision limit Mr McKechnie's human rights in contravention of s 38 of the *Charter*?

Relevant *Charter* provisions

63 Section 38(1) of the *Charter* provides that certain conduct of public authorities is 'unlawful'. It provides:

> **38 Conduct of public authorities**
>
> (1) Subject to this section, it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.

64 It is uncontroversial that Deputy Commissioner Westin is a public authority within the meaning of ss 4(1) and 38 of the *Charter*.[74]

65 The first aspect of Mr McKechnie's grounds of judicial review based on the *Charter* is whether the Deputy Commissioner Westin's Decision was incompatible with his cultural rights under s 19(1) of the *Charter*.

66 To understand the cultural rights referred to in s 19(1) in context, it is appropriate to refer to the terms of s 19 in full:

> **19 Cultural rights**
>
> (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 their culture, to declare and practise their religion and to use their 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

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73 *Weaven*, [8]–[11].

74 See *Charter*, s 4(1)(a); see also Transcript 24/07/26, T80.03–07.

(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.

67 Rights in the *Charter* may, by reason of s 7(2), only be subject under law to such reasonable limits as can be demonstrably justified in a free and democratic society. The defendants rely on s 7(2) in the event that, contrary to their position, the Court finds that the rights in s 19(1) include a right to consume Vegemite.

68 The task for the Court in considering whether a public authority has acted incompatibly with a right in the *Charter* is first to consider whether the human right on which reliance is placed has been engaged. If the right is engaged, the Court is then required to decide whether the public authority had placed any limitation upon the right and, if so, whether that limitation is lawful, reasonable and justified in accordance with s 7(2). It is only when the Court finds that a public authority has limited a human right in a manner that is not justified under s 7(2) that it can declare that the conduct of the public authority is in breach of s 38(1) and unlawful.[75]

69 The concept of 'engagement' of a right involves considering whether a human right in the *Charter* is relevant to the decision taken, in the sense that it may be interfered with or impeded, or promoted by a decision or an action.[76]

70 It is first appropriate to consider the scope of the cultural rights in s 19(1) before considering the effect of the Decision.

The meaning of 'particular cultural … background' and of 'culture' in s 19(1)

71 Section 19(1) protects the rights of persons with 'a particular cultural, religious, racial or linguistic background' to, in community with other persons of that background, 'enjoy their culture, to declare and practise their religion and to use their language'. Mr McKechnie relies only on the right to enjoy his culture and it is

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75 *Baker v Director of Public Prosecutions (Vic)* (2017) 270 A Crim R 318, 331–322; [2017] VSCA 58, [56]–[58] (Tate JA, with whom Maxwell P and Beach JA agreed); *Thompson v Minogue*, 326 [96] (Kyrou, McLeish and Niall JJA).

76 *Certain Children v Minister for Families and Children (No 2)* (2017) 52 VR 441, 497–498 [174(b)], [179] (John Dixon J).

unnecessary to consider the s 19(1) rights as they relate to persons of particular religious, racial or linguistic backgrounds.

72 The *Charter* does not define the terms 'culture' or 'cultural background'.

73 The **Explanatory Memorandum** for the Charter of Human Rights and Responsibilities Bill 2006 (Vic) states that clause 19 of the Bill, which became s 19, is 'modelled on article 27 of the Covenant' (the *International Covenant on Civil and Political Rights 1966* or **ICCPR**) and is 'also based on section 4 of the *Multicultural Victoria Act 2004* which enshrines in law a number of important principles of multiculturalism'.[77]

74 Section 4 of the ***Multicultural Victoria Act** 2004* (Vic) stated the 'principles of multiculturalism'. It was repealed on 1 September 2011 by the enactment of the *Multicultural Victoria Act 2011* (Vic), but the principles expressed in s 4(3) are reiterated in s 4(3) of the 2011 Act. Section 4 of the 2004 Act provided relevantly as follows:

> **4. Principles of multiculturalism**
>
> (1) Parliament recognises that the people of Victoria are united in their shared commitment to—
>
> (a) a democratic framework governed by the rule of law; and
>
> (b) Victoria and Australia and the people, interests and future of Victoria and Australia.
>
> (2) Parliament further recognises that all Victorians come from diverse cultural, religious, racial and linguistic backgrounds and values the richness that such diversity brings to the Victorian community.
>
> (3) Parliament supports the obligations of citizenship to which sub-section (1) refers and promotes the diversity to which sub-section (2) refers by recognising the following principles of multiculturalism—
>
> (a) all individuals in Victoria are entitled to mutual respect and understanding regardless of their cultural, religious, racial and linguistic backgrounds;
>
> …

75 Section 5 of the 2004 Act stated certain '[l]egal consequences of principles of multiculturalism', including in s 5(b) that Parliament did not intend by s 4 'to affect

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77 Explanatory Memorandum, 15.

in any way the interpretation of any law in force in Victoria'. The limitation in s 5(b) was omitted from the 2011 Act and has no direct application to the interpretation of the *Charter*. In circumstances where the Explanatory Memorandum expressly identifies s 19 of the *Charter* as being 'based on' s 4 of that Act, it plainly was intended by Parliament that the section provide some assistance in understanding both the history and the basis of the rights in s 19.[78] Section 4 records Parliament's recognition of the diverse cultural, religious, racial and linguistic backgrounds of Victorians and the value it accords to the richness that this diversity brings to the Victorian community; and that Parliament supports both the obligations of citizenship applicable to Victorians and promotes multicultural diversity recognising that Victorians are entitled to mutual respect and understanding, regardless of their cultural, religious, racial and linguistic backgrounds. The Parliamentary recognition of these matters is to be taken into account in construing s 19 of the *Charter*.

76 The other provision referred to in the Explanatory Memorandum, article 27 of the ICCPR, states:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

77 Neither the ICCPR nor the *Multicultural Victoria Act* attempt to define 'culture'. It has been observed by the authors of the *Annotated Victorian Charter of Rights* that the concept of 'culture' is 'greatly contested'.[79] That is true not only in the law but in sociological and other fields of discourse. It is also clear that culture is evolving and not static.[80]

78 It is fortunately unnecessary to attempt to define the scope of the concept of 'culture' in the *Charter* in the present case. However, it does remain necessary to determine

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78 See *Interpretation of Legislation Act 1984* (Vic), s 35(b)(iii), which remains in the same terms as at the time of the *Charter's* enactment.

79 Alastair Pound and Kylie Evans, *Annotated Victorian Charter of Rights* (Thomson Reuters, 2nd ed, 2018, CHR 19.40 (3)), 177.

80 Human Rights Committee, *Views: Communication No 511/1992*, 52nd sess, UN Doc CCPR/C/52/D/511/1992 (8 November 1994) ('*Länsman v Finland*') at [9.3]. See also *Brown v Director-General of the Justice and Community Safety Directorate* (2021) 364 FLR 155, 192–193 [124] (Crowe AJ) in the context of the protection of minority cultural rights in s 27 of the *Human Rights Act 2004* (ACT); See also in that context: *Williams v Director-General of the Justice and Community Safety Directorate* (2025) 397 FLR 280, 325 [232] (McWilliam J) and *Hubzin v Commissioner for Social Housing* (2026) 400 FLR 254, 282, [142] (McWilliam J).

whether a practice of the kind asserted by Mr McKechnie — the consumption of Vegemite, a food he says is culturally significant to Australians — falls within the scope of the right of a person of a particular cultural background to enjoy their culture in community with other persons of that background.

International law on cultural rights

79 Section 32(2) of the *Charter* provides that 'international law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision'. Section 32(2) is intended to 'operate as a guide',[81] and is consistent with the established recognition in Australia that legislation is to be read, so far as its language permits, so that it is in conformity and not in conflict with established rules of international law, including international obligations assumed by Australia when ratifying treaties and conventions.[82]

80 It is also recognised in Australian jurisprudence that official comments of United Nations bodies with responsibilities relating to international instruments constitute international sources that may inform applications of international conventions in Australian law.[83] Equally official comments or instruments of United Nations and its related bodies may be part of the context in which domestic laws that have been adopted, or informed by, international instruments are to be construed.[84] The scope of the sources of international law which may be considered pursuant to s 32(2), and general principles of interpretation, include the General Comments issued by United Nations treaty bodies. There are two General Comments of relevance to cultural rights relating to food:

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81 Explanatory Memorandum, 8. See also as to the breadth of the international jurisprudence and commentary, and the need equally to consider domestic extrinsic material relating to the *Charter*: *Castles*, 161 [70]–[71] (Emerton J).

82 See *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287–288 (Mason CJ and Deane J, Gaudron J agreeing at 304).

83 See ***Bare*** *v Independent Broad-Based Anti-Corruption Commission* (2015) 48 VR 129, 260 [398], 276–278 [448]–[456] (Tate JA); 341–342 [646]–[648] (Santamaria JA); *PJB v Melbourne Health* (2011) 39 VR 373, 392 [72] (Bell J); *Johnston v Carroll (Commissioner of the Queensland Police Service)* (2024) 19 QR 1, 88 [302] (Martin SJA).

84 *Smith v Chief Executive*, [63] (Edelman J).

(a) **General Comment No. 23** of the Human Rights Committee on Article 27 of the ICCPR;[85] and

(b) **General Comment No. 21** of the Committee on Economic, Social and Cultural Rights with respect to article 15(1)(a) of the *International Covenant on Economic, Social and Cultural Rights*, which, relevantly, provides that the States party to the Covenant recognise 'the right of everyone to take part in cultural life'.[86]

General Comment No. 23 and related international resources

81 General Comment No. 23 relevantly explains that:

> 6.2. Although the rights protected under article 27 are individual rights, they depend in turn on the ability of the minority group to maintain its culture, language or religion. …
>
> …
>
> 7. With regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.
>
> …
>
> 9. The Committee concludes that article 27 relates to rights whose protection imposes specific obligations on States parties. The protection of these rights is directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole. Accordingly, the Committee observes that these rights must be protected as such and should not be confused with other personal rights conferred on one and all under the Covenant. …

82 Article 27 emphasises the rights of minorities, and prohibits ethnic, religious and linguistic minorities from being denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religions, or to use their own language. In the language of General Comment No. 23,

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85 Office of the United Nations High Commissioner for Human Rights, *CCPR **General Comment No. 23**: Article 27 (Rights of Minorities)*, 50th sess, UN Doc CCPR/C/21/Rev.1/Add.5 (8 April 1994).

86 Committee on Economic, Social and Cultural Rights, ***General Comment No. 21**: Right of everyone to take part in cultural life (art. 15, para. 1(a), of the International Covenant on Economic, Social and Cultural Rights)*, UN Doc E/C.12/GC/21 (21 December 2009).

although the rights protected under article 27 are individual rights, they 'depend in turn on the ability of the minority group to maintain its culture, language or religion'. The protection of a minority group's maintenance of culture, language or religion is an objective which may give article 27 rights a particular importance and force, for example where the group's continued survival as an ethnic, religious or culturally distinct community is at risk.[87] It is also noteworthy that General Comment No. 23 emphasises in that context that article 27 cultural rights are to be protected 'as such' by contrast to 'personal rights' conferred generally by the ICCPR.

83 Those considerations relating to minorities are not directly relevant to s 19(1) of the *Charter*, which is expressed to apply to '[a]ll persons with a particular cultural … background', and is not limited by reference to the rights of minorities. However, that aspect of article 27 protecting the enjoyment of cultural rights 'in community with the other members of their group' reinforces, as observed in General Comment No. 23, the ability of the cultural group to 'maintain its culture'.[88] Section 19(1) by its terms also refers to the enjoyment of culture 'in community with other persons of that background'. This reference to community does not mean that s 19(1) will not prevent an individual person being denied the right to enjoy their culture, in community with others. It does however indicate the importance of the existence of a community of persons with a particular cultural background and is not intended to protect traditions or beliefs practised only by an individual.

84 The communal nature of the cultural rights which are protected in international law was discussed Justice O'Regan in the Constitutional Court of South Africa, when considering the rights to language and culture and the rights to members of cultural and religious communities in ss 30 and 31 of the Bill of Rights of the *Constitution of the Republic of South Africa 1996* in ***MEC for Education: KwaZulu-Natal*** *and Others v Pillay*.[89] Her Honour observed that the reference to rights of persons who are members of religious, linguistic or cultural communities 'with other members of that

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87 General Comment No. 23 at [9]: 'The protection of these rights is directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole'.

88 General Comment No. 23, [6.2].

89 [2007] ZACC 21. Section 30 of the Bill of Rights of the Constitution of the Republic of South Africa provides: 'Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights'.

community' in s 31 drew almost directly from article 27 of the ICCPR, and held that the protection of culture focussed on 'associative practices and not individual beliefs'.[90] In differentiating religion from culture, her Honour observed that although religion of its nature need not be associative, and may involve entirely personal beliefs:

> A cultural practice on the other hand is not about a personal belief but about a practice pursued by individuals as part of a community. The question will not be whether the practice forms part of the sincerely held personal beliefs of an individual, but whether the practice is a practice pursued by a particular cultural community.[91]

85 Section 20 of the *New Zealand Bill of Rights Act 1990* (NZ) is in similar terms to s 19 of the *Charter*, but has a closer relationship to article 27 of the ICCPR in that it retains the focus on the cultural rights of ethnic, religious or linguistic minorities:

> A person who belongs to an ethnic, religious, or linguistic minority in New Zealand shall not be denied the right, in community with other members of that minority, to enjoy the culture, to profess and practise the religion, or to use the language, of that minority.

86 New Zealand Courts have considered this right in the context of customary fishing for whānau gatherings, where there was evidence of a long held cultural practice of collecting seafood for a minority community event;[92] but has not on my researches been applied in a context similar to the present.

General Comment No. 21

87 The Committee on Economic, Social and Cultural Rights states in General Comment No. 21 that culture includes 'customs and traditions through which individuals, groups of individuals and communities express their humanity and the meaning

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90 *MEC for Education: KwaZulu-Natal*, [144], [157] (O'Regan J). The case related to a student of Durban Girls' High School who wished to wear a small gold nose stud which she said was part of a South Indian cultural and religious tradition. The School sought to prohibit her from wearing as it was alleged to be contrary to the School's Code of Conduct: [1]–[11].

91 *MEC for Education: KwaZulu-Natal*, [147]. O'Regan J noted at [154]–[156] that her views in this respect differed from those of Langa CJ to the extent that the Chief Justice referred to the appropriateness of protecting 'sincerely held religious and cultural beliefs and practices': at [114]. It is not entirely clear, however, that the Chief Justice considered that a belief or practice sincerely held by an individual would constitute a protected *cultural* right or whether it was the combined effect of the religious and cultural significance of the practice in that case which had some importance. The evidence was to the effect that it was not solely a personally held belief but 'a tradition that is some 4000 to 5000 years old, hailing predominantly from the south of India' and that it played 'an important part in many religions and is not limited to Hinduism': [11] (Langa CJ).

92 *Ministry for Primary Industries v Whati* [2020] DCR 287, [40] (Judge Cathcart).

they give to their existence, and build their world view representing their encounter with the external forces affecting their lives'.[93] The Committee also expressly recognises food as an element of culture:

> The Committee considers that culture, for the purpose of implementing article 15(1)(a), encompasses, inter alia, ways of life, language, oral and written literature, music and song, non-verbal communication, religion or belief systems, rites and ceremonies, sport and games, methods of production or technology, natural and man-made environments, food, clothing and shelter and the arts, customs and traditions through which individuals, groups of individuals and communities express their humanity and the meaning they give to their existence, and build their world view representing their encounter with the external forces affecting their lives. Culture shapes and mirrors the values of well-being and the economic, social and political life of individuals, groups of individuals and communities.[94]

88 There is otherwise very little in international law sources relating to rights to culturally significant foods as an aspect of cultural rights. Rights with respect to access to food with cultural significance have been asserted primarily through the lens of other human rights in the international context, including rights protecting the practise of religion.[95]

Is the s 19(1) right engaged by measures impacting access to culturally significant foods?

89 The ordinary contemporary meaning of 'culture' in s 19(1) of the *Charter* supports a recognition that the rights of persons of a particular cultural background to enjoy their culture in community with others encompass practices relating to preparation of foods according to cultural traditions, and enjoyment of food associated with specific cultural communities. When one considers the richly diverse cultural, religious, racial and linguistic backgrounds of people in the Victorian community, expressly recognised in the 'principles of multiculturalism' in the *Multicultural Victoria Act* referred to in the Explanatory Memorandum, one of the most prominent features of that multicultural community is the wide variety of different traditional foods and food practices.

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93 General Comment No. 21, [13].

94 General Comment No. 21, [13].

95 Maria Claire Maffei, 'Food as a Cultural Choice: A Human Right to Be Protected?' in Silvia Borelli and Federico Lenzerini (eds) *Cultural Heritage, Cultural Rights, Cultural Diversity: New Developments in International Law* (Brill Nijhoff, 2012) 83, 83–84.

90 The broad manner in which cultural rights are described in international jurisprudence is consistent with an understanding that article 27 of the ICCPR, the other identified basis of s 19, extends to the protection of cultural food practices and traditions.

91 Food related traditions in various communities can be some of the strongest manifestations of those communities' culture. Section 19(1) refers to the right to 'enjoy' culture in community with other persons of that cultural background. The reference to 'enjoy' in this beneficial context of conferring a protected right engages the broadest meaning of that word. That meaning encompasses its natural or ordinary meaning of 'to experience with joy; take pleasure in', the broader meaning of 'to have the benefit of'[96] and the legal meaning of possession, or use or exercise of a right.[97] Using the most commonly used sense of the word 'enjoy', food related practices — from community celebrations to preparing and eating a traditional meal with family — are particularly rich sources of enjoyment of culture for members of a community sharing common cultural heritage.

92 For these reasons, the right to enjoy culture in s 19(1) does, in my view, encompass the preparation and consumption of foods associated with a particular cultural background or community.

93 A greater difficulty is in defining what '*Australian* culture' means, for the purposes of Mr McKechnie's contention that he has been denied the right to enjoy his culture as an Australian. Mr McKechnie states in his evidence that Vegemite has been 'an integral part of the practice of [his] Australian culture'[98] but he does not attempt to identify any objective definition of what Australian culture is.

94 Australia as a nation encompasses numerous different cultures, informed by different racial and ethnic origins, religious traditions and national background. The importance and distinctiveness of Aboriginal persons in Australia is expressly recognised by the statement of the distinct cultural rights that they hold in s 19(2) of the *Charter*. There is no reference to other cultures or to 'Australian culture'. As recognised in the reference in the Explanatory Memorandum to the principles of

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96 See the *Macquarie Dictionary* online definition of 'enjoy', definitions 1 and 2.

97 *Black's Law Dictionary*, (Thomson West, 8th ed, 2004) at 571, 'enjoy' and 'enjoyment'.

98 Affidavit of Andre McKechnie dated 12 January 2026 and affirmed 23 June 2026, [2].

multiculturalism, Victoria is truly *multi*cultural. However, the existence and enjoyment of many different cultures in Australia does not negate the existence of an 'Australian' culture in addition to the many cultures enjoyed by residents of Australia.

95 It is unnecessary in this case to attempt a definition or description of what 'Australian culture' is. Assuming that 'Australian culture' entails cultural features associated with life in Australia, or with having been born, raised or spent significant time as a resident in Australia, 'Australian culture' will encompass a range of activity and traditions associated with community life in Australia, including traditions relating to foods.

96 It is also unnecessary to identify the scope of what foods may be regarded as being encompassed by Australian culture. In a case in which the *Charter* is invoked, it will be for the person invoking it to establish by evidence that cultural rights extend to a particular matter, including a particular food.

97 In the present case, Mr McKechnie has given his own evidence as to his experience of Australian culture and the significance he gives to eating Vegemite as part of that culture. That alone would not be sufficient to establish that it is an aspect of Australian culture shared with others of Australian background.[99]

98 The defendants contend that Mr McKechnie has done no more than assert that 'consuming Vegemite is part of Australian culture and that eating Vegemite is tantamount to him enjoying his culture as an Australian'.[100] They submit that this is based on nothing more than his own personal experience which does not establish the 'collective dimension' that s 19 requires.[101] The defendants' concern with needing to establish a culture which is shared with other persons of 'a particular cultural … background' to attract the terms of s 19(1) is well founded. It is a feature of the language of s 19, and, as discussed above, of the international law foundation of that section in article 27 of the ICCPR, that the right is primarily concerned with protecting the enjoyment of culture as a communal practice.

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99 See the observations at [82]–[84] above.

100 Defendants' Outline of Submissions, [38].

101 Transcript 24/07/26, T68.20–28.

99 However, I accept that the evidence tendered by Mr McKechnie is sufficient, in the present circumstances, to establish that Vegemite is a food which is, and has traditionally been, enjoyed by many persons of Australian background, and is strongly associated with Australia and persons of Australian background. It is unrealistic to expect that Mr McKechnie would call numerous witnesses of Australian background to give evidence of their views and practices in relation to Vegemite. It is unlikely that evidence of that nature would be of much utility, given that it could still only represent a cross section of the community of 'persons with a particular cultural … background' and could be selectively chosen. The article tendered by Mr McKechnie, 'Vegemite as a Marker of National Identity' authored by Rozin and Siegal, is of more utility. It is based on a study conducted at the University of Queensland in 1995. The study included testing for '[l]iking for Vegemite and other foods in native-born Australians' and questions relating to knowledge and memories of Vegemite of people born in Australia and those resident here.[102] The authors state:

> We examined early developmental and cultural influences that result in a preference for Vegemite over other foods and found that a taste for the spread strongly correlates with early exposure and to Australian birth and ancestry.

100 The authors conclude that 'Vegemite is one of the clearest markers of cultural identity that has yet been reported', and is 'a candidate for the most culturally specific food'.[103]

101 The defendants contended that the article establishes no more than that Vegemite is a reliable indicator of Australian identity.[104] Given the conclusions in the article relating to culture as well as nationality, I consider that it is adequate, in the absence of contradictory evidence, to establish for present purposes that eating Vegemite is something that many persons of Australian background, and primarily persons of Australian background, enjoy, and that this is sufficient to show that it is one feature of Australian culture.

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102 See Rozin and Siegal's article under the headings 'Method' and 'Results', 64.
103 Rozin and Siegal, 63, 66.
104 Transcript 24/07/26, T68.09–18.

102 For these reasons, I accept that a person who identifies as Australian is, for the purposes of s 19(1), a person of a particular cultural background who may regard Vegemite as an aspect of their culture, which they may enjoy in community with other persons of Australian cultural background. The human rights in s 19(1) are engaged by the Decision.

Were the s 19(1) cultural rights limited?

103 The defendants did not specifically contend that if the s 19(1) rights were engaged (which they did not admit), those rights were not limited by the Decision.[105] It remains necessary, given that the question of s 19(1) cultural rights of prisoners involves some complexities which do not attend other rights in the *Charter*, for the Court to consider for itself whether the Decision did in fact limit the right in the context in which Mr McKechnie asserts it.

104 Section 19(1) does not confer any right to be provided with services or facilities to enable enjoyment of cultural rights. It is, in terms, a prohibition on *denying* persons the right to enjoy their culture. The substantive obligation imposed on public authorities by s 38 of the *Charter*, in relation to s 19(1), is not to facilitate enjoyment of culture, but an obligation not to deny persons of a particular background the enjoyment of their culture. It is within the category of right that is sometimes referred to as a 'negative freedom', where the duty of public authorities is to not interfere unreasonably with a person's rights.[106]

105 In the present case, Mr McKechnie does not assert that prison authorities should provide him with Vegemite. His complaint is that he is prohibited from being able to consume Vegemite by reason of the ban on that product in Victorian prisons.

106 The fact that a prisoner is in prison, by reason of a sentence or other order for imprisonment, necessarily curtails the prisoner's right to consume the usual range of

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105 Defendants' Outline of Submissions, [38]–[41]; Transcript 24/07/26, T80.03–09.

106 See, for example, the Court of Appeal of New Zealand's discussion of s 20 of the New Zealand ***Bill of Rights Act*** *1990* (which is, as noted in [84] above, in similar terms to s 19 of the *Charter*) in the context of rights to religious freedoms in *Mendelssohn v Attorney-General* [1999] 2 NZLR 268, 273 [14], citing Grant Huscroft and Paul Rishworth, *Rights and Freedoms: The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993* (1995) at pp 228 and 254. Keith J delivering judgment for the Court contrasted this negative freedom with other parts of the *Bill of Rights Act* which 'do expressly impose on branches of the state positive obligations to act': at 273, [15].

food that may be enjoyed by a person at liberty in the community. A prisoner will also necessarily be unable to enjoy the full range of cultural practices and customs that they may have enjoyed in the community. It is, therefore, necessary to consider whether the denial of access to Vegemite for Victorian prisoners, including Mr McKechnie, arises as an incident of the loss of freedom inherent in the sentence of imprisonment, or arises by reason of the Decision under review.

107 Although not addressed with any specificity, the evidence was sufficient to establish that prisoners may make discretionary purchases of a range of non-prohibited food products in the prison canteen.[107] It may also be possible in some prisons for prisoners to receive such products from visitors or in packages sent to prison[108] but there was no evidence that Mr McKechnie could receive food in this way.

108 The Decision made by Deputy Commissioner Westin, consistent with the identification of Vegemite as prohibited contraband in Commissioner's Requirement 1.2.9 and DCI 1.04, was that she would not permit Mr McKechnie to consume Vegemite. In circumstances where some foods, although not provided by prison authorities to prisoners, are made available for purchase by prisoners, there is an element of decision making as to the food to which prisoners do or do not have access which is distinct from the restrictions on access to food which are inherent in the condition of being imprisoned.

109 For that reason it is possible, in my view, to regard the Decision as constituting a denial of Mr McKechnie's ability to consume Vegemite and therefore potentially of a right to enjoy a culturally significant food.

110 On one view, the Decision itself did not deny the right in s 19(1) to enjoy culture, which is expressed to be a right to be enjoyed 'in community with other persons of [the particular] background'. The limitation on Mr McKechnie's ability to enjoy Vegemite in community with other persons of Australian background is primarily that he is a prisoner, having been sentenced by a Court to a term of imprisonment. He is unable to consume Vegemite in the ways that he has described in his evidence as being important to him: he says it is a food he associates with family and his

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107 See the Affidavit of Andre McKechnie dated 14 March 2026 and affirmed 23 June 2026, [7].

108 *Corrections Act*, Division 4A, 'Letters and parcels to and from prisoners' regulates the sending and receiving of letters and parcels from prisons.

family home. His evidence was that '[w]ithout being able to consume Vegemite' he is 'sad and disconnected from [his] family and community'.[109] It is difficult to accept that the inability to consume Vegemite, rather than the fact of his imprisonment, is a material cause of his sadness and disconnection from his family and community. I do not give that evidence weight in my conclusions.

111 Notwithstanding this reality — that a primary cause of prisoners' disconnection from their cultural communities will be that they are in prison — it is possible, in my view, to conceive of the cultural rights in s 19 as encompassing enjoyment of cultural rights in community with others of the same background without being physically in the same place. A prisoner's consumption of particular foods with traditional religious or cultural significance may well contribute to that prisoner feeling part of their religious or cultural community, even when not physically in the company of other members of that community.

112 I conclude for these reasons that the Decision to refuse to permit Mr McKechnie to have access to Vegemite in prison limited his cultural rights under s 19(1) of the *Charter*.

Was the limitation a reasonable one which is demonstrably justified?

113 As I have concluded that the right in s 19(1) was limited by the Decision, it is necessary to consider whether that limitation was reasonably and demonstrably justified, having regard to the terms of s 7(2) of the *Charter*. The defendants bear the onus of establishing that the limitation was reasonable and demonstrably justified.[110]

114 The requirement in s 7(2) that the limitation be 'demonstrably justified' was described by the Court of Appeal in *Thompson v Minogue* as follows:

> The requirement that the limitation must be 'demonstrably justified' involves consideration of whether the limitation on the relevant human right is proportional to the purpose that the limitation seeks to achieve. The doctrine of proportionality is at the heart of the inquiry mandated by s 7(2) of the Charter.
>
> A corollary of the requirement that the limitation must be 'demonstrably justified' is that a measure of stringency is involved in meeting that standard.

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109 Affidavit of Andre McKechnie dated 12 January 2026 and affirmed 23 June 2026, [2]–[3].

110 *Thompson v Minogue*, 316 [47]–[48], 321 [74], 325–326 [92]–[93] (Kyrou, McLeish and Niall JA).

> Correspondingly, as discussed below, when, under s 38(1) of the Charter, the Court is considering whether a public authority has satisfied s 7(2), that consideration involves a greater degree of scrutiny than is traditionally undertaken by the Court in a judicial review proceeding.[111]

115 The Court is not entitled, in determining whether limitations are reasonable and whether they are demonstrably justified, simply to defer to the expertise and opinion of the decision maker on those questions.[112]

116 The defendants submit that the two justifications for prohibiting Vegemite in prisons identified in the evidence — that it may interfere with contraband detection dogs and it may be used to make alcohol — must be understood in the context of the 'important purpose achieved by maintaining the ban: i.e., the purpose of maintain prison security and mitigating against risk to the security or good order of the prison and the safety and welfare of prisoners, staff and visitors'.[113]

117 Part 5 of the *Corrections Act* ('Prison officers and other officers working in prisons') imposes duties and responsibilities on prison officers and prison Governors which are relevant to the control of the prison and the ability to exclude persons and substances from the prison. Section 20(1) provides that '[a]n officer in charge of a prison or part of a prison must take all reasonable steps for the security of the prison or part of the prison'. Section 21 imposes duties on a prison Governor, which by s 21(1) relevantly include that:

> The Governor of a prison is responsible for the management, security and good order of the prison and the safe custody and welfare of the prisoners.

118 Part 6 of the *Corrections Act* ('Management and administration of prisons') contains provisions conferring powers on prison officers and Governors, including powers relevant to the control of alcohol, drugs and other contraband. Section 29A permits the prison Governor to direct a prison to submit to tests for drugs and alcohol use. Section 31A makes it an offence for a prisoner to (among other things) possess, make or use certain items including drugs of dependence.

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111 *Thompson v Minogue*, 321 [71]–[72] (Kyrou, McLeish and Niall JJA).

112 *Thompson v Minogue*, 325–326 [92]–[93] (Kyrou, McLeish and Niall JJA); *Aeshaea v Secretary to the Department of Justice and Community Safety* [2026] VSC 629, [81] (Gorton J).

113 Defendants' Outline of Submissions, [41].

119 With respect to searches, s 27(1) provides that a prison officer may use an approved dog to assist the prison officer in a range of functions, including carrying out searches under Div 3 of that Part, which relates to search and seizure. Section 45 empowers a Governor of a prison, for the security or good order of the prison or the prisoners, to order a prison officer to search any part of the prison at any time. Section 46(1) provides for the seizure of things and objects found during a seizure, including anything found in the prison 'which the prison officer believes on reasonable grounds jeopardizes or is likely to jeopardize the security or good order of the prison or the safety of persons in the prison'.[114]

120 The ***Corrections Regulations*** *2019* (Vic) establish certain prison offences, which include possession of unauthorised substances:

> **65 Prison offences**
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> (1) A prisoner must not—
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> …
>
> (e) have in the prisoner's possession an article or substance that is not—
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> (i) issued or authorised by an officer; or
>
> (ii) prescribed by a medical officer, a registered medical practitioner or a dentist; or
>
> (iii) permitted under the Act or these Regulations; …

121 The *Corrections Act* and *Corrections Regulations* demonstrate clearly the importance that the legislature gives to the maintenance of security and good order in prisons, and the relationship between the maintenance of security and good order and the control of substances such as drugs and alcohol in prisons. It is against this statutory background that the analysis required by s 7(2) of the *Charter* is to be performed.

122 Section 7(2) of the *Charter* states:

> A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including—
>
> (a) the nature of the right; and

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114 *Corrections Act*, s 46(1)(a).

(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.

The nature of the right

123 The cultural rights in s 19 are undoubtedly valuable and important rights. They might be regarded as being of less fundamental importance than other *Charter* rights such as the right to life, the right to protection from torture and cruel, inhuman degrading treatment or punishment, or the right to be free from slavery and servitude in ss 9, 10 and 11. However, cultural rights may assume particularly acute significance and importance in some contexts. That may be the case where cultural rights also have religious origins and have profound significance to an individual. It may also be the case that the right not to be denied the right to enjoy culture in community with others of the same cultural background assumes particular importance where a culture, or specific cultural practices, are under threat of extinction. This is a particularly significant factor with respect to the cultures of minorities, as demonstrated by the international jurisprudence on cultural rights discussed above. While I have accepted that consuming Vegemite may be an aspect of Australian culture, shared with people of Australian background, I do not regard it as having the same sort of fundamental cultural significance as cultural practices with these more specific features, which would be more obviously at the core of the rights protected by s 19(1).

124 Mr McKechnie in his evidence asserts that by being prohibited from consuming Vegemite, he is 'deprived of an important part of [his] identity as an Australian', and 'deprived in a fundamental way of [his] Australian culture'.[115] He says Vegemite is a food he associates with his family, family home and Australia.[116] However, he gives no evidence of Vegemite playing a particular role in his family life, in his upbringing, or its use in the Australian community of which he was part before he was

115 Affidavit of Andre McKechnie dated 28 August 2025 and affirmed 23 June 2026, [5].

116 Affidavit of Andre McKechnie dated 12 January 2026 and affirmed 23 June 2026, [2].

imprisoned. There is no evidence that it played any role in cultural celebrations or traditions in which he participated with other members of his community.[117]

The importance of the purpose of the limitation

125 The purpose of the prohibition of Vegemite is to contribute to measures taken by prison authorities to exclude drugs and alcohol from Victorian prisons. I accept the evidence of Deputy Commissioner Westin, Mr Slater and Mr White, referred to at [21]–[32] above, that drugs and alcohol in prisons create significant risks to both the security and good order of prisons, but also to the health and safety of prisoners, including because of the risk of violence from intoxicated prisoners. The ability to take measures to control these risks are very important objectives. Prison Governors and officers have statutory duties to maintain good order and security in prisons and to take reasonable steps for the safe custody and welfare of prisoners. They must be able to exercise their powers, reasonably, to discharge those duties.

126 Although there is limited evidence of the contribution that the ban on Vegemite makes to facilitating the work of drug detection dogs and limiting the production of alcohol in Victorian prisons, this is, necessarily, in part because the ban has been of long standing and it could not be expected that there would be examples of Vegemite having been used to produce alcohol or disrupt the detection of drugs in prisons. I accept the evidence of Mr White, based on his experience working with passive alert detection dogs, that the dogs' ability to detect illicit substances may be affected by pungent substances such as Vegemite.

127 The purpose of the limitation is, in my view, of significant importance.

The nature and extent of the limitation

128 The prohibition of Vegemite in Victorian prisons is a total prohibition. In that sense, it is a complete prohibition on the s 19(1) right to consume a food which is a part of Mr McKechnie's Australian culture. However, that prohibition relates to only one aspect of Australian culture. It does not deny a prisoner the ability to enjoy other aspects of Australian culture that may be significant to them, such as listening to

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117 See the similar observation as to limitations on evidence which arose in *Ned Kelly Centre Ltd v Australian Rail Track Corporation* [2023] VSC 421, [35] (Richards J, as her Honour then was).

Australian music, reading Australian books, or eating other Australian foods which are not prohibited. In that sense, it may be understood as a relatively minor limitation on the s 19(1) rights to enjoy Australian culture.

Less restrictive means

129 Mr White gave evidence that passive alert detection dogs are used as a less invasive method than a 'body search'.[118] The *Corrections Regulations* provide in regs 85 to 88 for personal searches of various degrees of intrusiveness, including garment searches, pat-down searches and strip searches. Some searches are extremely intrusive and may themselves impair human rights.[119] If it may be possible for a passive alert detection dog to identify drugs or contraband without having to undertake such searches, it is an appropriate measure which is, in my view, less restrictive of human rights than, for example, strip searches.

130 Mr McKechnie contended that the fact that Vegemite is available in prisons in New South Wales was evidence of 'less restrictive means reasonably available'.[120] It is not possible to conclude from the fact that New South Wales prison authorities do not ban Vegemite in prisons, and permit it to be purchased from a buy-up list, that this is a less restrictive means reasonably available to manage the risks identified by the defendants' witnesses in this proceeding. It is not evident from the buy-up list obtained by Mr McKechnie whether all prisoners, at all levels of security in New South Wales prisons, may purchase Vegemite or whether there are any relevant access requirements imposed by any system such as the IBR at Barwon Prison.[121]

131 More importantly, there is no evidence of the context in which Vegemite is permitted, including no evidence of what other measures are available in New South Wales prisons that may be relevant to the management of risk posed by Vegemite. It may be that those prisons rely more on alternative contraband detection methods, such as body searches, than on passive alert detection dogs.

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118 See [31] above.

119 *Marrogi v Secretary to the Department of Justice and Community Safety (No 1)* (2026) 79 VR 216, 246–247 [123]–[126] (Harris J).

120 Affidavit of Andre McKechnie dated 10 May 2026 and affirmed 23 June 2026, part A.2 'Existence of Evidence of Less Restrictive Means Reasonably Available'.

121 See Mr Slater's evidence at [29] above.

132 I also take into account the evidence that the prison systems in three other States have regarded it as necessary to ban Vegemite in prisons, two of them due to its potential to interfere with the work of drug detection dogs.[122]

133 I do not accept that the availability of Vegemite in New South Wales prisons demonstrates that there is a less restrictive alternative to banning Vegemite, in the context of Victorian prisons.

The prohibition of Vegemite is a reasonable and demonstrably justifiable limitation on the s 19(1) rights

134 Taking all of the above considerations into account, the prohibition of Vegemite in Victorian prisons is a measure which is proportionate to the objective that prison authorities seek to achieve by the general prohibition imposed by Commissioner's Requirement 1.2.9 and DCI 1.04, and by the specific refusal to permit Mr McKechnie to have access to Vegemite. It is reasonable and demonstrably justified.

135 In these circumstances, the Decision did not involve any contravention of the substantive obligation in s 38(1) of the *Charter* not to act in a way that is incompatible with a human right.

Failure to consider human rights — s 38 of the *Charter*

136 The obligation of a decision maker pursuant to the procedural limb of s 38(1) of the *Charter* to give proper consideration to a relevant human right was explained by the Court of Appeal in *HJ (a pseudonym) v Independent Broad-based Anti-corruption Commission* as follows:

> For a decision-maker to give 'proper' consideration to a relevant human right in compliance with s 38(1) of the Charter, he or she must: (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; (2) seriously turn his or her mind to the possible impact of the decision on a person's human rights and the implications for the affected person; (3) identify the countervailing interests or obligations; and (4) balance competing private and public interests as part of the exercise of justification.[123]

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122 See [33] above.

123 (2021) 64 VR 270, 306 [155], citing *Castles*, 184 [185]–[186] (Emerton J) and *Bare*, 198–199 [217]–[221] (Warren CJ), 218–223 [277]–[289] (Tate JA), 297–298 [535]–[536] (Santamaria JA).

137 These observations were based on *Castles*, where Emerton J considered, in a context closely relevant to the present case, what is involved in giving 'proper consideration' as required by s 38(1). Her Honour observed:

> The requirement in s 38(1) to give proper consideration to human rights must be read in the context of the Charter as a whole, and its purposes. The Charter is intended to apply to the plethora of decisions made by public authorities of all kinds. The consideration of human rights is intended to become part of decision-making processes at all levels of government. It is therefore intended to become a "common or garden" activity for persons working in the public sector, both senior and junior. In these circumstances, proper consideration of human rights should not be a sophisticated legal exercise. Proper consideration need not involve formally identifying the "correct" rights or explaining their content by reference to legal principles or jurisprudence. Rather, proper consideration will involve understanding 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 that is made. As part of the exercise of justification, proper consideration will involve balancing competing private and public interests. There is no formula for such an exercise, and it should not be scrutinised over-zealously by the courts.
>
> While I accept that the requirement in s 38(1) to give proper consideration to a relevant human right requires a decision-maker to do more than merely invoke the Charter like a mantra, it will be sufficient in most circumstances that there is some evidence that shows the decision-maker seriously turned his or her mind to the possible impact of the decision on a person's human rights and the implications thereof for the affected person, and that the countervailing interests or obligations were identified.[124]

138 Deputy Commissioner Westin's evidence is that she understood the reasons for the prohibition on Vegemite in Victorian prisons imposed by Commissioner's Requirement 1.2.9, and its inclusion in the Contraband List in DCI 1.04, as being the potential impact on drug detection dogs, and the potential to make alcohol. She understood the relationship of those objectives to managing potential threats to the good order and security of prisons.[125]

139 In addition to that understanding, and most importantly, Deputy Commissioner Westin considered the Memorandum prepared by Ms Homatopoulos regarding Mr McKechnie's request before she made the Decision.[126]

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124 *Castles*, 184 [185]–[186].
125 Westin Affidavit, [11]–[12]; [16]–[24].
126 Westin Affidavit, [29], Exhibit MSW-1, 65.

140 Ms Homatopoulos' Memorandum set out clearly the nature of Mr McKechnie's request, and his view that his cultural rights under s 19(1) of the *Charter* were affected. It referred to the sources of the prohibition of Vegemite in Victorian prisons in Commissioner's Requirement 1.2.9 and DCI 1.04. The Memorandum then considered whether consuming Vegemite is a cultural right, and whether that right has been limited. It observed, on that issue:

> Other than a general assertion, Mr McKechnie has not provided any evidence to establish the following elements of the 19(1) right:
>
> Step 1: That 'Australian' is a 'particular….cultural background'. To establish a 'cultural right', Mr McKechnie would need to provide evidence of this, such that a group 'share a distinctive culture that they enjoy in community with each other'. However, we acknowledge that the concept of culture is greatly contested, and undefined in the Charter.
>
> Step 2: Assuming (Step 1) is made out, that eating Vegemite is tantamount to 'enjoying [his] culture' as an Australian.
>
> Step 3: Assuming (Step 2) is made out, that he would be enjoying his culture 'in community with other persons of [Australian] background.'
>
> In the unlikely event that Mr McKechnie establishes that consuming Vegemite is part of his 'cultural rights' as an Australian, he would likely not have difficulty providing that such a right has been limited by the ban on Vegemite and like products.[127]

141 The Memorandum then considered, in some detail, the factors identified in s 7(2) and whether the limitation on the right, if there was one, would be reasonable and justified. The Memorandum observed the importance of the statutory duties of officers and Governors of prisons with respect to security and good order and the safe custody and welfare of prisoners, and the relationship between the limitation and the prohibition of Vegemite and like products. The Memorandum referred to relevant case law, legal texts and sources of information about the potential to use Vegemite in making alcohol. It was a careful and detailed examination of the issues.

142 Mr McKechnie contended that the Memorandum did not provide information which would satisfy the requirement to consider the impact of the Decision on human rights.[128] That is not, in my view, a valid criticism. The Memorandum recorded Mr McKechnie's reasons for wanting to consume Vegemite, and noted that cultural

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127 Westin Affidavit, [29], Exhibit MSW-1, 65: Memorandum dated 5 September 2025, [14] and [15], square brackets and underlining in original, references omitted.

128 Transcript 24/07/26, T85.05–19.

rights are valuable and should be protected. The absence of any further observations in relation to the impact of the prohibition of Vegemite on human rights is readily explained by the fact that Mr McKechnie did not in his letter of 14 August 2025 identify specific ways that he had enjoyed Vegemite as a cultural right and what the impact of not having access to it was on him. The letter gave no information about the impact on his human rights of being unable to consume Vegemite, and instead made the general statements referred to at [12] above, to the effect that to prohibit consumption of Vegemite 'is a breach of a person[']s right to practice his or her culture'. There was no obligation on Ms Homatopoulos or Deputy Commissioner Westin to speculate about whether there was in fact some specific impact of the prohibition on Vegemite on Mr McKechnie's human rights in circumstances where he had not identified any himself.

143 I consider that Deputy Commissioner Westin, in taking into account the Memorandum, considered Mr McKechnie's human rights in a meaningful and appropriate way, and discharged the obligation in s 38(1) to give proper consideration to those rights when making the Decision.

144 I have noted above at [24] that the Charter Assessment Records completed with respect to DCI 1.04 did not identify cultural rights as being engaged by the contraband bans imposed by that instrument. That does not undermine the analysis of cultural rights considered by Deputy Commissioner Westin prior to making the Decision on Mr McKechnie's request to have access to Vegemite, notwithstanding the ban.

Conclusion

145 Mr McKechnie has failed to establish any of the grounds of judicial review. I will hear the parties on orders and on the question of costs.