SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY
COURT OF APPEAL

Case Title:	**Brown v Director-General of the Justice and Community Safety Directorate**
Citation:	**[2023] ACTCA 15**
Hearing Date(s):	24 February 2023
Decision Date:	11 April 2023
Before:	McCallum CJ, Mossop and Wheelahan JJ
Decision:	1. The appeal is dismissed with costs.
Catchwords:	**APPEAL** – HUMAN RIGHTS – Statutory interpretation - where appellant complains of failure by respondent to provide an Aboriginal Health Assessment while she was in custody – where appellant submits that respondent obligated by operation of *Corrections Management Act 2007* (ACT) and *Human Rights Act 2004* (ACT) to do so – consideration of *Corrections Management Act 2007* (ACT) – where applicant did not request health assessment – where applicant does not complain of any adverse outcome arising from absence of assessment – appeal dismissed with costs
Legislation Cited:	*Corrections Management Act 2007* (ACT), ss 12, 21, 53, 54, 67, 68 *Human Rights Act 2004* (ACT), ss 19, 27, 40B, 40C *Legislation Act 2001* (ACT), s 139
Cases Cited:	*2 Elizabeth Bay Road Pty Ltd v The Owners – Strata Plan No 73943* [2014] NSWCA 409 *Castles v Secretary, Department of Justice* (2010) 28 VR 141 *Hakimi v Legal Aid Commission* (ACT) [2009] ACTSC 48; 3 ACTLR 127 *Mitchell v The King; Rigney v The King; Carver v The King; Tenhoopen v The King* [2023] HCA 5 *Momcilovic v The Queen* [2011] HCA 34; 245 CLR 1
Parties:	Keira Brown (Appellant) Director-General of the Justice and Community Safety Directorate (Respondent)
Representation:	**Counsel** M Costello SC with T Jeffrie (Appellant) P Bindon (Respondent) **Solicitors** Ken Cush & Associates (Appellant) ACT Government Solicitor (Respondent)

File Number:	ACTCA 2 of 2022	
Decision under appeal:	Court/Tribunal:	ACT Supreme Court
	Before:	Acting Justice Crowe
	Date of Decision:	17 December 2021
	Case Title:	Brown v Director-General of the Justice and Community Safety Directorate
	Citation:	[2021] ACTSC 32

McCALLUM CJ:

1. I have had the benefit of reading the judgments of Mossop J and Wheelahan J in draft. I agree with the order proposed by Mossop J, for the reasons given by his Honour. I also agree with the additional reasons stated by Wheelahan J. I wish for emphasis to add only one additional consideration. It may be accepted that, to the extent of any tension between a statutory scheme and the common law, "it is the common law doctrine which must yield to ensure coherence": *Mitchell v The King; Rigney v The King; Carver v The King; Tenhoopen v The King* [2023] HCA 5 at [46] (Gageler J). Even so, the construction of s 53(1)(a) of the *Corrections Management Act 2007* (ACT) contended for by the declaratory relief initially sought by the appellant, which asserted the existence of a duty on the part of the Director-General to ensure that a particular kind of health assessment be carried out by a doctor on a particular kind of patient, would be a surprising statutory incursion on the therapeutic relationship between doctor and patient and the common law's well-established recognition of patient autonomy.

2. For completeness, I would make one further observation which does not affect any of the reasons stated here. As Mossop J has noted, in construing s 53(1)(a), the primary judge had regard to dictionary definitions of two of the words used in the section. As to the helpfulness or otherwise of dictionaries as an aid to statutory construction, I would respectfully adopt the remarks of Leeming J in *2 Elizabeth Bay Road Pty Ltd v The Owners – Strata Plan No 73943* [2014] NSWCA 409 at [79]-[81].

MOSSOP J:

Introduction

3. The appellant claimed that the Director-General of the Justice and Community Safety Directorate (Director-General), who is responsible for running the Alexander Maconochie Centre (AMC), had breached ss 53, 67 and 68 of the *Corrections Management Act 2007* (ACT) (CM Act) and ss 19 and 27 of the *Human Rights Act 2004* (ACT) (HR Act). This was said to be because the Director-General had failed to ensure that an "Aboriginal Health Assessment" was carried out on the appellant during two periods when she was detained

at the AMC in 2019-2020 and 2021. The primary judge gave judgment for the Director-General with costs. The appellant has appealed against that decision.

4. The decision of the primary judge was correct, essentially for the reasons that he gave. For that reason, the appeal must be dismissed.

Grounds of Appeal

5. There are eight grounds of appeal.

Ground 1

The learned trial judge erred in finding that s 53 of the *Corrections Management Act 2007* (ACT) (**CMA**), properly construed, required the Respondent to provide the Appellant access to a health assessment during her First and Second Detention, as opposed to a positive obligation to ensure that a health assessment was provided and/or offered during the Appellant's periods of detention.

Ground 2

In failing to interpret s 53 of the CMA as requiring the Respondent to ensure that health assessments were provided and/or offered to the Appellant, the learned trial judge erred in finding that the Respondent was not obliged to ensure that the Appellant was provided with a health assessment equivalent to a health assessment provided in the ACT community, being an Aboriginal Health Assessment.

Ground 3

In the event that the learned trial judge was correct to find that s 53 of the CMA required the Respondent to provide the Appellant access to a health assessment, his Honour erred in finding that the Respondent complied with its obligation in circumstances where it did not ensure that Justice Health provided access to Aboriginal Health assessments to the Appellant.

Ground 4

The learned trial judge erred in finding that the failure to provide an Aboriginal Health Assessment to the Appellant by either Justice Health or Winnunga Nimmityjah Aboriginal Health Services was not a breach of the Respondent's obligations under s 53 of the CMA.

Ground 5

The learned trial judge erred in finding that the human right in s 19 of the *Human Rights Act 2004* (ACT) (**HRA**) did not require the Respondent to ensure while the Appellant was in detention that she was provided with a health assessment equivalent to an assessment that would be provided in the community, being an Aboriginal Health Assessment, in one of the following circumstances:

(i) during her induction health assessment;

(ii) during the additional health assessment at 5 to 7 days following induction; or

(iii) during the remainder of the Appellant's First and Second Detention.

Ground 6

The learned trial judge erred in finding that the human right in s 27 of the HRA did not require the Respondent to ensure while the Appellant was in detention that she was provided health care that recognised her cultural and kinship ties as an Aboriginal and Torres Straits Islander person, being an Aboriginal Health Assessment, in one of the following circumstances:

(i) during her induction health assessment;

(ii) during the additional health assessment at 5 to 7 days following induction; or

(iii) during the remainder of the Appellant's First and Second Detention.

Ground 7

The learned trial judge erred in failing to hold that the failure to provide an Aboriginal Health Assessment to the Appellant during her First or Second detention was incompatible with the Appellant's rights under s 19 of the HRA.

Ground 8

The learned trial judge erred in failing to hold that the failure to provide an Aboriginal Health Assessment to the Appellant during her First or Second Detention was incompatible with the Appellant's rights under s 27 of the HRA.

6. These grounds of appeal raised the following issues:

   (a) Grounds 1-2: whether the trial judge's construction of s 53 of the CM Act was correct.

   (b) Grounds 3-4: whether the primary judge erred in finding that the respondent had not breached s 53 of the CM Act.

   (c) Grounds 5-8: whether the primary judge had erred in finding that there was no breach of ss 19 or 27 of the HR Act.

Background

7. The Alexander Maconochie Centre is the Territory's prison. The operation of the prison is governed by the CM Act. The appellant was detained at the prison from 10 September 2019 until 28 July 2020. She was detained again from 8 January 2021 until 26 May 2021. During that time she received medical assessments and treatment from Justice Health, a part of the Canberra Health Services Directorate. She also received medical care from the staff of Winnunga Nimmityjah Aboriginal Health and Community Services Ltd (Winnunga), a contracted community-based health service which provides, amongst other things, health services to Aboriginal and Torres Strait Islander people detained within the AMC.

8. Medical care within the AMC is provided by persons who are not subject to direction by the respondent. Rather, such care is provided through the staff of a different Directorate under the control of a different Director-General or through Winnunga which operates within the prison pursuant to a contract with the Territory.

9. An "Aboriginal Health Assessment" (AHA) is a form of health assessment which is reflected in a specific Medicare Benefits Schedule item (item 715). It is a comprehensive health assessment, the content of which was set out in the reasons given by the primary judge: *Brown v Director-General of the Justice and Community Safety Directorate* [2021] ACTSC 32 at [102]. It involves taking a detailed patient history, performing particular

examinations of the patient and considering, if appropriate, whether to obtain various screening tests.

10. The appellant had undergone an AHA in 2013 and again in 2014. While in the community between 2014 and 2019 she did not receive an AHA. She did not have an AHA during her first period in custody (September 2019 to July 2020). She had an AHA in July 2020 shortly after her release from custody. She did not have an AHA during her second period in custody (January 2021 to May 2021). Once again, she had an AHA in June 2021 shortly after being released from custody at the end of May 2021.

11. The appellant never requested an AHA while in detention. There was no allegation of any negligence on the part of the medical providers who treated her while in detention in failing to perform an AHA. There was no evidence that the performance of any of the history taking, examinations, screening tests or referrals contemplated by an AHA would have led to any health intervention that did not otherwise occur. There was no allegation of any adverse consequence of her not having an AHA performed while she was in detention. It was not proved that had the appellant not been detained an AHA would have been performed during the period when she was, in fact, in detention. Notwithstanding these facts, the claim in the proceedings was that the terms of the CM Act and HR Act obliged the respondent to ensure that an AHA was carried out in each of her two periods of detention.

12. The judgment of the primary judge was comprehensive, making detailed reference to the documentary and other evidence before him, setting out the relevant statutory provisions and summarising the detailed arguments that were made before him. It is unnecessary to repeat his recitation of the facts, legislative provisions or submissions made other than insofar as it is necessary to deal with the particular issues raised on appeal.

Ground 1-2: Construction of s 53 of the CM Act

Statutory provisions

13. Section 53 of the CM Act provides:

> **53 Health care**
>
> (1) The director-general must ensure that—
>
> (a) detainees have a standard of health care equivalent to that available to other people in the ACT; and
>
> (b) arrangements are made to ensure the provision of appropriate health services for detainees; and
>
> (c) conditions in detention promote the health and wellbeing of detainees; and
>
> (d) as far as practicable, detainees are not exposed to risks of infection.
>
> (2) In particular, the director-general must ensure that detainees have access to—

(a) regular health checks; and

(b) timely treatment where necessary, particularly in urgent circumstances; and

(c) hospital care where necessary; and

(d) as far as practicable—

(i) specialist health services from health practitioners; and

(ii) necessary health care programs, including rehabilitation programs.

14. Sections 19 and 27 of the HR Act provide, relevantly:

19 Humane treatment when deprived of liberty

(1) Anyone deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person.

...

27 Cultural and other rights of Aboriginal and Torres Strait Islander peoples and other minorities

(1) Anyone who belongs to an ethnic, religious or linguistic minority must not be denied the right, with other members of the minority, to enjoy his or her culture, to declare and practise his or her religion, or to use his or her language.

(2) Aboriginal and Torres Strait Islander peoples hold distinct cultural rights and must not be denied the right—

(a) to maintain, control, protect and develop their—

(i) cultural heritage and distinctive spiritual practices, observances, beliefs and teachings; and

(ii) languages and knowledge; and

(iii) kinship ties; and

(b) to have their material and economic relationships with the land and waters and other resources with which they have a connection under traditional laws and customs recognised and valued.

Note The primary source of the rights in s (2) is the United Nations Declaration on the Rights of Indigenous Peoples, art 25 and art 31.

Reasons of the primary judge

15. His Honour referred (at [126]) to the interpretation of the operation of the Victorian equivalent to s 30 of the HR Act in *Momcilovic v The Queen* [2011] HCA 34; 245 CLR 1 at [46], [50]-[51]. That involved the provision operating within available constructional choices consistent with the purpose of the statutory provision under consideration. His Honour described that as being consistent with the requirements of s 139 of the *Legislation Act 2001* (ACT). His Honour accepted the statements of principle in *Castles v Secretary, Department of Justice* (2010) 28 VR 141 at [108] to the effect that the plaintiff's status while she was in detention required that she be provided access to healthcare which she would have access to in the community.

16. His Honour accepted that s 53 should be interpreted, so as far as the text and statutory context allows, to be compatible with that right. Similarly, in relation to s 27, the primary judge accepted that s 53 must be interpreted, so far as the text and statutory context allow,

to be compatible with the protection of the plaintiff's identity as an Aboriginal Torres Strait Islander (ATSI) person.

17. In relation to s 53(1)(a), his Honour referred to dictionary definitions of "standard" and "available". He accepted the respondent's submission that s 53 reflects the object stated in s 12(1)(j) of the CM Act which provides:

> **12 Correctional centres—minimum living conditions**
>
> (1) To protect the human rights of detainees at correctional centres, the director-general must ensure, as far as practicable, that conditions at correctional centres meet at least the following minimum standards:
>
> ...
>
> (j) detainees must have access to suitable health services and health facilities;

18. So far as s 53(1)(a) is concerned, his Honour reasoned (at [223]-[225]):

    (a) Section 53(1)(a) required the Director-General to ensure that detainees are provided with access to health care services of the same quality which they could access in the community.

    (b) The paragraph does not mean that in a specific case a detainee must be provided with a particular service identical in form or substance with a service which might be provided in the community.

    (c) Rather, the paragraph requires that in a broad sense the detainee must have available to him/her the range of services which would be regarded as normal, adequate or acceptable in the ACT community.

    (d) Such an interpretation is entirely compatible with the right stated by s 19(1) of the HR Act.

    (e) In relation to s 27 of the HR Act, such an interpretation is entirely compatible if the obligation is understood as being qualified by the requirement that, relevantly, an ATSI detainee is provided with access to the range of services which would be regarded as normal, adequate or acceptable *for ATSI people* in the ACT community.

    (f) The language used in s 53(1)(a), having regard to the context of the CM Act as a whole, did not require the provision of a specific medical service, such as an AHA, to an ATSI detainee.

19. So far as s 53(1)(b) is concerned, his Honour reasoned that it was a mechanical provision which obliges the defendant to put in place "arrangements... to ensure the provision of appropriate health services for detainees".

20. He referred to the breadth of the word "arrangements" as encompassing "preparations or agreements". He recognised that this was in order to "ensure" the provision of a particular quality of health service. He referred to "appropriate" as meaning "suitable or fitting for a particular purpose, person or occasion".

21. He said (at [226]):

> Given the general scope of s 53(1), and the reference to "detainees" as opposed to a particular detainee, I see the obligation imposed under this paragraph as extending to the taking of steps to ensure that there are both medical staff and medical facilities available to detainees which are suitable, in the broad sense, having regard to their status as detainees.

22. Interpreted in this manner, his Honour saw the provision as consistent with s 19. Similarly, he saw that it was compatible with s 27 if the obligation to make arrangements was conditioned such that the health services for ATSI people are those that are "culturally suitable": at [227].

23. He did not accept that the text of s 53, when regard is had to the CM Act as a whole, required the provision by the defendant of a specific medical service as matter of ordinary practice because the provisions of s 53(1) are "stated at a far higher level of generality".

24. In relation to s 53(2) he concluded (at [231]) that, having regard to s 19(1) of the HR Act, s 53(2)(a) "should be interpreted to impose the obligation upon the [respondent] to ensure each detainee is able to obtain health checks either within the relevant correctional centre, or if necessary, outside it, with the degree of regularity required having regard to all the circumstances of that detainee." His Honour said that compatibility with s 27 required that the access to such health checks "should, for an ATSI person, when it is possible, be with a culturally appropriate medical service provider".

25. He did not accept that s 53(2) mandated the provision of an AHA to ATSI detainees. He went on to say (at [232]):

> However, it does seem to me that s 53(2)(a) did mandate the provision to such detainees of access to a culturally appropriate medical provider, such as Winnunga, for the purpose of health checks to be conducted with the regularity assessed as suitable by that provider for the particular detainee in question. Whether such a check should be an AHA would be a matter for the expertise of the relevant provider.

The submissions on appeal

26. The appellant submitted that s 53 required the respondent to ensure that an AHA, or its constituent elements, be provided or offered to ATSI detainees because the section requires that the standard of health care that is provided to the general ACT population be provided to detainees. Four reasons were put forward for that submission.

27. First, equivalency of standard must be measured in some way and requiring a specific medical service is a means of doing so.

28. Second, s 53(2)(a) indicates that the availability of health checks is one way in which the respondent can ensure that it is providing an equivalent standard of healthcare. Access to that service cannot be divorced from the requirement of equivalency in s 53(1).

29. Third, s 53 is ambiguous and the content of the obligation should be interpreted by reference to ss 19(1) and 27 of the HR Act. Because healthcare is critical to the dignity of a person "the requirement that specific treatment be provided (as opposed to access) becomes clear". Further it is "consistent with the content of the right in s 27" that a health check be provided by a culturally appropriate medical services provider and in accordance with a process specifically designed for ATSI people.

30. Fourth, the context and purpose of s 53 supports an interpretation requiring specific health services be provided. The contextual matters are: s 12 of the CM Act setting out minimum living standards; s 54 of the CM Act relating to transfer of detainees from AMC to receive medical attention; and, the terms of the explanatory statement for the bill which became the CM Act which provides that "detainees should receive healthcare equivalent to the community standard. The fact of detention should not be an impediment to healthcare consistent with Australian norms."

Decision

31. The submissions of the appellant do not demonstrate that the primary judge's interpretation was wrong. Section 53(1)(a) refers to a "standard" of healthcare, not to the provision of particular services. It also refers to that which is "available" to other people in the ACT, tending to emphasise *access to* rather than the *provision of* particular services. Section 53(1)(b) refers to arrangements being made for the provision of "appropriate health services". That emphasises, consistent with s 21 of the Act, that the Director-General is not responsible for the actual medical care of a detainee. In those circumstances, it would be an unusual interpretation to compel the Director-General to ensure that a particular service is provided.

32. So far as s 53(2) is concerned, the reference is to "access" and to "regular health checks". Obviously, the reference to "access" is different to, and does not compel, actual provision of that service in relation to any particular detainee at any particular time. Although "regular health checks" does not specify any particular content, it must be interpreted by reference to the standard specified in s 53(1)(a).

33. None of the specific arguments advanced on behalf of the appellant affect these considerations. So far as the first argument is concerned, it may be accepted that equivalency of standard must be measured in some way. However, that does not compel

the next step that it must be measured by the actual provision of a particular service, especially when the provision refers to "access".

34. So far as the second argument is concerned, it is true that s 53(2)(a) cannot be divorced from the standard specified in s 53(1)(a). However, that does not compel the next step that the absence of provision of in a particular case, as opposed to access to, demonstrates non-compliance with either provision.

35. So far as the third argument is concerned, neither ss 19 or 27 compel an interpretation which requires actual provision of a service in a particular case as opposed to, as the language of s 53 indicates, access to that service being available. Insofar as the primary judge concluded that s 27 required that the service provider be "culturally suitable", it is not clear what the content of this expression is and from which part of s 27 it arose. Given that nothing in this appeal turns on his Honour's use of this expression it is unnecessary to address this further other than to note that care must be taken to tie any interpretive consequences of a right such as that in s 27 to the actual language used in the statute.

36. So far as the fourth argument is concerned, none of the contextual matters referred to provide a basis for requiring the provision of access to rather than administration of any particular medical service.

37. These grounds of appeal are not established.

Grounds 3-4: Breach of s 53 of the CM Act?

Reasons of the primary judge

38. The primary judge accepted that the AHA is "an important and useful component of the health care of ATSI people". Because his Honour had concluded that access to the range of medical services which would be normal, adequate or acceptable for ATSI people in the ACT community was required, such medical services would include the availability of an AHA.

39. His Honour found that the plaintiff did have access to AHAs. Further, because of the funding agreement with Winnunga allowing it to provide health services within the AMC, such assessments were available "with what was clearly a culturally appropriate health care provider": at [241].

40. His Honour then went to examine why an AHA was not carried out. He described the evidence on that issue as being "not entirely clear". In relation to each of the periods of detention, his Honour described the chronology of medical care insofar as that could be discerned from the evidence before him.

41. In relation to the first period of detention, his Honour referred (at [243]) to the fact that her transfer to the care of Winnunga was delayed until the conclusion of her engagement with the Forensic Mental Health Service (which is also part of the Health Directorate). The primary judge made reference to the clinical notes of a Winnunga GP who had seen the appellant following her transfer from the Forensic Mental Health Service within the AMC. Those notes made specific reference to planning for a health check. The notes also indicated that the plaintiff was being seen almost on a daily basis by nursing staff, mainly in relation to medications. Following the review of some blood tests, the doctor made a note that the patient needed "GPMP and Care Plan, Mental Health Plan and Aboriginal Health Check". Following that note, the GP saw the appellant again and dealt with other issues. She continued to be seen regularly by nurses at the Winnunga clinic. She was discharged on 28 July 2020 and saw another doctor at the Winnunga clinic in the community who conducted an AHA. Between January 2020 and July 2020 she was seen on seven different occasions by Winnunga GPs as well as being seen frequently by nursing staff. The findings by the primary judge indicate a high level of access to medical services dealing with the appellant's mental and physical issues. In relation to this period his Honour (at [253]) made the following findings:

> Once the transfer [from Justice Health/Forensic Mental Health Service] was effected, the plaintiff came under the care of Dr Lord, a Winnunga GP. While Dr Lord considered that an AHA would be appropriate for the plaintiff (I read the references to "Health Check" and "Aboriginal Health Check" in the notes as references to AHAs), it is apparent that she did not see any urgency in carrying out that assessment. During the various consultations which the plaintiff had with Dr Lord, it appears that the latter took and recorded appropriate histories and conducted appropriate examinations. She also ordered the tests which she saw as necessary.

42. His Honour referred to the evidence of Professor O'Mara which provided strong support for the use of AHAs in the healthcare of ATSI people. His Honour said that the evidence was "pitched at a reasonably high level of abstraction" and noted that the professor was not asked to review the specific care provided to the plaintiff. As a result, he did not read the report as being critical of the standard of that care.

43. His Honour rejected a submission that the health service provided by Winnunga during the first period of detention fell below the appropriate standard of care. He found that the plaintiff must have known that Winnunga had the capacity to perform an AHA and made no such request. His Honour then found: "More importantly however, it seems to me that the timing of an AHA was a matter for the exercise of the treating GP's professional judgment". The GP had formed the view that an AHA was appropriate and saw no need for the assessment to be performed during the time she was consulting the plaintiff. An AHA was provided by another Winnunga GP after the plaintiff's release from AMC. His Honour concluded: "I am not prepared to find that Winnunga's care of the plaintiff while she

was in detention at that time fell below the standard of care which the plaintiff, as an ATSI person, would have received in the community."

44. In relation to the second period of detention, the plaintiff once again saw Winnunga nurses on an almost daily basis. She saw the Winnunga GP on three different occasions. Those consultations dealt with the particular concerns which the plaintiff had in relation to her health at those times. So far as this period was concerned his Honour found (at [257]):

> I can see nothing in the notations made by Dr Ochayi to suggest that that doctor failed to provide adequate or appropriate care to the plaintiff on the occasions of the consultations in the period of February to April 2021. I do not consider that the desirability of an AHA, in the abstract, provides a sufficient basis for concluding that the care provided by Winnunga fell below the standard I have referred to in the preceding paragraph.

Submissions of the appellant

45. The appellant first submitted that the primary judge's conclusion that the respondent did not breach s 53 was influenced by his erroneous interpretation of the requirement to provide the equivalent standard of health care and to ensure access to regular health checks in the CM Act. The submissions appeared to rely upon the evidence that Justice Health could provide AHAs and had not received a direction from the respondent to do so.

46. The appellant then submitted that his Honour somehow incorrectly assessed the clinical notes. The submission appeared to be that because medical practitioners at Winnunga contemplated an AHA but none was provided or offered, some failing was demonstrated.

47. The appellant submitted that his Honour's conclusion that the appellant could have asked for an AHA was made without an evidentiary basis.

48. The appellant appeared to submit that Professor O'Mara's expert evidence about the utility of an AHA indicated there was an error in concluding, on the basis of medical records, that there was no need to conduct such an assessment.

49. In Ground 3 of the Notice of Appeal and in oral submissions on the appeal the appellant shifted from complaining of a failure to either *ensure provision of* or at least *offer* an AHA, to complaining of a failure by Justice Health itself (as distinct from Winnunga) to provide *access to* such an assessment. It was said that s 53 was breached due to the latter failure.

Decision

50. There is no error in his Honour's reasoning. His Honour's careful examination of the facts, insofar as they were disclosed by the evidence, demonstrates that there exists a high level of access to medical care within the AMC. It discloses access to medical treatment for the appellant's mental health by a psychologist and a psychiatrist and regular access to

treatment by general practitioners and nursing staff employed by Justice Health and Winnunga. It discloses that consideration was given by the general practitioners at Winnunga to the utility of an AHA. The fact that one was not administered during the periods of detention does not demonstrate any failure to provide appropriate medical care or care equivalent to that which would have been available in the community. Rather, it is consistent with the doctors concerned being able to exercise appropriate clinical judgement without constraint arising from the fact that the appellant was in custody.

51. The attack on the primary judge's finding (at [256]) that the appellant must have known from past experience that Winnunga had the capacity to perform an AHA yet did not request one does not provide a basis for departing from the conclusion reached that there was no breach of s 53. The finding by the primary judge involved an inference available to his Honour based upon the fact that the appellant had previously had such assessments when treated by Winnunga. The appellant correctly pointed out that when those earlier AHAs were carried out she was 13 and 14 years old while she was 19 by the time of her first period of detention. The primary judge's finding was not an inappropriate observation in circumstances where the appellant had brought proceedings asserting a breach of the law by the failure to provide a particular medical service. It recognised that she retained her personal autonomy in relation to health care and the fact that it was open to the appellant to request further and more extensive treatment, even if she did not know the name of the service.

52. The appellant's attempt to shift the case from one which asserted a failure to carry out (or at least offer) an AHA to one which asserted a lack of "access to" an AHA should be rejected. The declarations sought by the appellant in the Second Further Amended Originating Application (filed on the second day of the hearing before the primary judge) sought declarations about a failure "to ensure an Aboriginal Health Assessment was carried out" on the appellant during her periods of detention. The case before the primary judge had been opened and run on that basis. At the hearing of the appeal the appellant invited the court to make a declaration that there had been a breach of s 53 of the CM Act by failing to ensure that the appellant "had access to" an AHA. The submission made was that even though Winnunga might have provided access to an AHA, Justice Health did not. This was relevant because during the early part of the appellant's first period of detention she was being cared for by Justice Health. This appears to have been so as to stabilise her mental health prior to transfer to Winnunga.

53. Notwithstanding the contention that different declarations to those sought at the hearing before the primary judge should be granted by the Court of Appeal, no application was made to amend the originating application. Had such an application made, it would have

been refused. Having run the case based on a particular factual contention (that AHAs ought to have been provided) it would not be fair to the respondent to permit a substantially different case to be run on appeal. That unfairness arises out of the new and different factual issues that would arise from a claim focusing on access rather than actual provision.

54. If an application for leave to amend the originating application been made and granted, the appellant would, on the available evidence, have failed in any event. Because the issue was not pleaded below, the issues relating to access to AHAs when the appellant was treated by Justice Health were not properly explored at trial. Although the appellant did demonstrate that no AHA was provided by Justice Health, the appellant failed to demonstrate that there was a denial of access to an AHA by Justice Health. The evidence sought to be relied upon by the appellant to establish a lack of access to AHAs when health services were provided by Justice Health rather than Winnunga was the evidence of Mr Rory McGuire, the Acting Operational Director of Justice Health Services. That evidence disclosed that there was no direction given by the Director-General responsible for the CM Act *requiring* the performance of AHAs and that the initial health assessment mandated by the CM Act (pursuant to ss 67 and 68) and the health assessment undertaken after five to seven days in custody did not cover all the matters covered by an AHA. However, the evidence did not establish that AHAs were not available as part of the treatment provided by general practitioners engaged by Justice Health. The statutory framework for the provision of health services within the AMC and the evidence of Mr McGuire was consistent with general practitioners having relevantly unconstrained professional judgement as to the services provided to prisoners. Given that an AHA is a service that is provided as a result of the exercise of the clinical judgement of a general practitioner, the evidence failed to establish that the medical services provided by Justice Health did not provide access to an AHA. Thus, the appellant would not have discharged her onus of proving that Justice Health did not provide access to AHAs.

Grounds 5-8: Breach of the *Human Rights Act 2004* (ACT)

Primary judge's reasons

55. The primary judge accepted (at [271]) the respondent's submission that if the respondent had met the obligations under ss 53, 67 and 68 of the CM Act construed in light of ss 19(1) and 27 of the HR Act then it would follow that the respondent had acted consistently the requirements of the HR Act. That would mean that there was no need for a further enquiry under s 40B or 40C of the HR Act. As a result, the fourth question posed by *Hakimi v Legal Aid Commission* (ACT) [2009] ACTSC 48; 3 ACTLR 127, namely, whether or not the relevant act or decision was apparently inconsistent with or imposed a limitation upon the

relevant right, was required to be answered in a way that was adverse to the appellant's claim.

Appellant submissions

56. The appellant's submissions were based upon the appellant's preferred interpretation of the obligation in s 53 of the CM Act. Counsel for the appellant accepted that if the appellant did not succeed on her statutory construction point the subject of grounds 1-2 then because of the equivalence between the provisions of s 53 and the effect of s 19 of the HR Act these grounds of appeal could not succeed.

Decision

57. As articulated above in relation to grounds 1-2, the appellant's interpretation of s 53 has not been accepted. In light of the acceptance by counsel for the appellant that, in those circumstances, grounds 5-8 could not be established, it is unnecessary to address them further.

Order

58. The order that I propose is:

    1. The appeal is dismissed with costs.

WHEELAHAN J:

59. I have had the privilege of reading in draft the reasons of Mossop J. I agree with his Honour that the appeal should be dismissed with costs, and with the addition of the following comments by way of emphasis, do so for the reasons that his Honour gives.

60. The orders sought in the notice of appeal reflected the relief sought at first instance, in that a declaration was sought that the respondent had breached s 53 of the *Corrections Management Act 2007* (ACT) by failing to ensure that an Aboriginal Health Assessment was *carried out* on the appellant during her two periods of detention.

61. At the hearing of the appeal, there was a shift in emphasis from the case that the appellant had advanced before the primary judge. The argument that was presented on appeal focused on a case relating to what health care was *offered* by the respondent, and to what care the appellant *had access*, rather than what care was actually provided to the appellant while in detention. Senior counsel for the appellant readily accepted towards the conclusion of his argument that declarations in the terms sought in the notice of appeal would not be appropriate having regard to the way the appeal had been argued. At the conclusion of the hearing, the Court gave leave to the appellant to communicate to the Court a re-formulation

of the relief sought on appeal. The re-formulation that was communicated to the Court relevantly confined the relief sought to a declaration that the respondent failed to ensure that the appellant *had access* to an Aboriginal Health Assessment.

62. The shift in the focus of the appellant's case had the consequence that grounds of appeal 1, 2, and 4, while not formally curtailed, were not squarely pressed to the extent that they claimed that the primary judge erred by failing to find that s 53 of the *Corrections Management Act* required the respondent to ensure that a Aboriginal Health Assessment was *provided to* the appellant during her periods of detention. To the extent that the remaining elements of grounds 1 and 2 claimed that the primary judge erred by failing to hold that the obligation in s 53 of the *Corrections Management Act* required that the respondent offer an Aboriginal Health Assessment to the appellant during her periods of detention, then, for the reasons given by Mossop J, those claims should be rejected.

63. As to the access case, which was a focus of the argument on appeal although not at trial, the evidence does not support a finding that the appellant did not have access to an Aboriginal Health Assessment. The primary judge referred at J [244]-[251] to clinical notes of Winnunga which recorded that the appellant had consulted general practitioners on several occasions between January 2020 and June 2020 during her first period of detention, and between February 2021 and April 2021 during her second period of detention. A clinical note of 23 June 2020 recorded that the appellant needed an Aboriginal Health Check, which Winnunga subsequently undertook on 30 July 2020 when the appellant was released from detention on the first occasion. No medical practitioner from Winnunga gave evidence that an Aboriginal Health Assessment was not available to the appellant during her periods of detention should such an assessment have been requested or recommended. The absence of any such direct evidence, together with the circumstantial evidence including the clinical notes, the nature of the Assessment as described by Professor O'Mara, being a 12-monthly check, and the fact that following detention the appellant was able on two occasions to have Aboriginal Health Assessments undertaken by Winnunga, are fatal to the appellant's case.

I certify that the preceding sixty-three [63] numbered paragraphs are a true copy of the Reasons for Judgment of the Court

Associate:

Date: 11 April 2023