# **Community fact sheet:** VALS intervention in Court of Appeal Strip Searching and Urine Testing Case

On 21-22 October 2021, the Court of Appeal is hearing an appeal in the matter *Thompson v Minogue.* That case is about whether strip searching and urine testing practices in Victorian prisons comply with the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**the Charter**). VALS has been granted leave to intervene in the matter, so that we can advocate for the rights of Aboriginal and Torres Strait Islander people in prison in Victoria.

## What is this case about?

Everyone deserves the right to privacy and to be treated with dignity and respect. This case is about the right of people in prison to be treated with dignity and humanity.

*Strip searches and Urine Testing*

People in prison are far more likely to have a history of trauma than the general population. Upwards of three quarters of imprisoned women in Australia are victim-survivors of domestic abuse and sexual violence. These issues disproportionately affect Aboriginal and Torres Strait Islander people, who are 13.9 times more likely to be imprisoned in Victoria than non-Aboriginal people.

Both strip searches and urine testing, requiring a person to take off their clothing and urinate into a container in full view of prison officers, are inherently harmful. Being subjected to intrusive searches can compound trauma, seriously undermine trust in the system, and impede a person's ability to recover and heal. Not only are strip searches harmful and degrading, but evidence shows they are often over-used, ineffective in uncovering contraband, and unnecessary. There is also evidence that strip searching practices and powers are prone to abuses of power by prison guards. Some data shows that Aboriginal people in prison are subjected to disproportionate rates of strip searching compared to non-Aboriginal people.



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*What the Supreme Court said*

Last year, Craig Minogue, who is detained in Barwon Prison, successfully challenged an order by a prison officer that he submit to a urine test and a strip search before that urine test. Dr Minogue successfully argued that this direction was in breach of his rights under sections 13 and 22 of the Charter to privacy and dignity and humane treatment.

In the Supreme Court, Justice Richards held that the order that Dr Minogue submit to urine testing and strip searches before urine testing breached his rights to privacy and dignity and humane treatment under the Charter. Her Honour held that government authorities had failed to properly consider relevant human rights under s 38(1) of the Charter when making policies regarding urine testing and strip searching.

Her Honour said that there was no evidence demonstrating that the practice of random urine testing was effective in minimising drug or alcohol use in prison. Her Honour noted that urine testing was applied regardless of a person's history with drugs or alcohol. There was also no explanation why urine tests were used instead of less invasive tests, such as breath tests used on motorists. Similarly, her Honour held that the Manager of Barwon prison did not provide reasonable grounds for his belief that strip searches before urine tests were necessary for security and welfare. There was no evidence that alternatives, such as x-ray scanners, used in other prisons, were considered, or that strip searches were necessary. On that basis, her Honour held that these infringements on human rights were not proportionate or justified under s 7(2) of the Charter.

The State of Victoria has appealed the decision and the matter will be heard in the Court of Appeal on 21-22 October 2021.

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## What rights do people in prison have to privacy and dignity under the Victorian Charter of Human Rights?

People in prison are entitled to the same human rights as other people. This is enshrined in the Preamble to the Charter, which states that "human rights belong to all people without discrimination, and the diversity of the people of Victoria enhances our community."

The Preamble also states that "human rights have a special importance for the Aboriginal people of Victoria, as descendants of Australia's first people, with their diverse spiritual, social, cultural and economic relationship with their traditional lands and waters".

Under international law, people in prison retain all of their human rights and fundamental freedoms, apart from those unavoidably lost by virtue of their imprisonment.

Under section 38(1) of the Charter, public authorities cannot act incompatibly with human rights. Public authorities must also properly consider human rights when making decisions.

Under section 13(a) of the Charter, all people have the right not to have their privacy arbitrarily interfered with. This right protects a person against invasions into their physical, social or psychological sphere. It protects a person's individual identity, bodily and psychological autonomy and inherent dignity.

Under section 22(1) of the Charter, all people deprived of their liberty have the right to be treated with humanity and respect for the inherent dignity of the human person. Section 22(1) recognises the importance of upholding human rights for persons imprisoned.

Under section 7(2) of the Charter, human rights can only be limited in strict circumstances, when these limits are reasonable and demonstrably justified.

All of these aspects of the Charter are relevant to the current case.

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## Why this case is important for VALS and Aboriginal and Torres Strait Islander people in Victoria?

The Court of Appeal's decision in this case will impact the human rights of every adult in prison in Victoria. If the case is successful, the decision may mean that current strip searching and urine testing practices in prisons in Victoria will be deemed unlawful.

Through our work with Aboriginal and Torres Strait Islander people who have been imprisoned, we know the devastating impacts of degrading practices such as strip searching and urine testing. These practices can often be used as a tool of power and control by police and prison officers. They can also re-traumatise people in prison and can be used discriminatorily against Aboriginal and Torres Strait Islander people. Harmful practices in prison can impact a person's ability to heal even once they are back in the community.

There are alternatives, such as x-ray scanners, which are more effective at locating contraband and are less likely to be used as a form of re-traumatisation, abuse and control.

Given what we know about the harm caused by strip searching and urine testing, VALS considered it important to provide the Court with information on the impact of strip searching and urine testing on Aboriginal and Torres Strait Islander people in prison, and the importance of upholding the human rights of Aboriginal and Torres Strait Islander people in prison.



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## What is VALS arguing?

We have been granted leave to intervene in the appeal, and VALS is arguing that:

1. People in prison are entitled to equal protection of their human rights;
2. Courts should stringently scrutinise human rights decisions affecting people in prison under sections 38(1) and 7(2) of the Charter, given the vulnerability of persons in prison to decisions affecting their human rights, systemic racism, and the potential for abuses of power in the prison context;
3. People in prison are entitled to equal protection of their right to privacy under section 13 of the Charter as people outside of prison, and strip searches and urine testing practices breach the right to privacy;
4. People in prison are entitled to dignity and humane treatment under section 22 of the Charter, and strip searches and urine testing clearly breach this right.

Read VALS' Submissions Seeking Leave to Intervene here.

Read VALS' Submissions on the Appeal here.



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