IN THE SUPREME COURT OF VICTORIA **No. SC I 2017 02241**
AT MELBOURNE
JUDICIAL REVIEW AND APPEALS LIST

BETWEEN:
ZAYDEN CEMINO Plaintiff

and

JASON TIMOTHY CANNAN AND ORS (in accordance with the attached schedule) Defendants

SUBMISSIONS OF THE VICTORIAN EQUAL OPPORTUNITY AND HUMAN RIGHTS COMMISSION (INTERVENING)

I. INTRODUCTION

1. The decision under review in this proceeding is a decision of the Magistrates' Court of Victoria to refuse an application by a Yorta Yorta man to have his criminal charges dealt with by the Koori Court. There was no dispute that the Koori Court had jurisdiction to have the proceedings transferred to it, or that the Plaintiff wanted the proceedings to be in the Koori Court. Without any regard to the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the **Charter**),[1] the Magistrate refused to transfer the proceedings.

2. The Victorian Equal Opportunity and Human Rights Commission (the **Commission**) intervenes in this proceeding pursuant to s 40(1) of Charter to make submissions concerning the application of the Charter to the proceedings before the Magistrates' Court and the subsequent decision made by that Court that is now under review. The Commission does not seek to be heard on any issues unrelated to the Charter.

II SUMMARY OF COMMISSION'S SUBMISSIONS

3. The Commission submits:

   (a) the Plaintiff's rights in s 8(3) and s 19 of the Charter were engaged in the proceedings before the Magistrates' Court;

   (b) the rights protected in s 8(3) and s 19 of the Charter were part of the relevant circumstances to be taken into account in the exercise of the Magistrates' Courts' discretion on whether to transfer the proceedings to the Koori Court and by reason of s 32(1) of the Charter, without binding the Court as to how the discretion should be exercised, the rights should have been taken into account by the Magistrate;

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[1] There is no mention of the Charter in the Transcript of the hearing on 13 April 2017.

(c) in making a decision on 13 April 2017 to refuse an application to transfer criminal proceedings to the Koori Court (the **decision**), the Magistrates' Court was a "public authority" within the meaning of that expression in s 4(1)(j) of the Charter and was subject to the obligations imposed on a public authority in s 38(1) of the Charter;

(d) further, the rights protected in s 8(3) and 19 were also directly applicable to the Magistrates' Court by reason of s 6(2)(b) of the Charter; and

(e) where a breach of s 38(1) of the Charter has occurred, the question of what relief or remedy may be granted is determined by s 39(1) of the Charter. Regardless of whether ground 1 succeeds, if the Court found that the decision was unlawful under s 38(1) of the Charter, the Court could at least make a declaration that the decision is unlawful.

III. CHARTER RIGHTS WERE ENGAGED IN THE MAGISTRATES' COURT PROCEEDINGS AND THE DECISION

4. The identification of relevant Charter rights is a helpful first step in approaching any of the operative provisions in the Charter.

5. In *Certain Children (No 2)*, his Honour Justice Dixon stated:

> Charter rights are engaged whenever a Charter right is relevant to a decision or action that a public authority has made, taken, proposed to take or failed to take. The threshold for identifying the engagement of a Charter right is low. After construing rights "in the broadest possible way"[2], a public authority must understand in general terms how Charter rights may be relevant. The relevance may be that the right is interfered with (i.e. a negative affect) or promoted.[3]

6. In this proceeding, the act or decision that is impugned is the decision of the Magistrate to refuse the Plaintiff's application to transfer criminal proceedings to the Koori Court after a contested hearing during which submissions were made by the parties through their legal representatives. There was no dispute that the Koori Court had jurisdiction to deal with the proceedings.

7. The Commission submits that s 8(3) and s 19 of the Charter were engaged in the proceedings before the Magistrates' Court.

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2 *Application Under the Major Crimes (Investigative Powers) Act 2004; DAS v Victorian Equal Opportunity Commission* (2009) 24 VR 415 ('***Major Crimes'***), 434, [80]; *De Bruyn v Victorian Institute of Forensic Mental Health* (2016) 48 VR 647 ('***De Bruyn***'), 691 [126]. See also: *DPP v Ali (No 2)* [2010] VSC 503 [29] where Hargrave J, in expressing the same idea, said that "[i]n accordance with the general approach to the interpretation of the human rights protected by the Charter, these rights [in issue in the proceeding] should be interpreted broadly and in a non-technical sense." See also *DPP v Kaba* (2014) 44 VR 526 [108] (Bell J).

3 *Certain Children by their Litigation Guardian Sister Marie Brigid Arthur v Minister for Families and Children (No 2)* [2017] VSC 251 ('***Certain Children (No 2)'***), [179].

Equality before the law

8. Section 8(3) of the Charter states:

> Every person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination.

9. Discrimination is defined in s 3 of the Charter in the following terms:

> in relation to a person, means discrimination (within the meaning of the **Equal Opportunity Act 1995**) on the basis of an attribute set out in section 6 of that Act;
>
> Note: Section 6 of the **Equal Opportunity Act 1995** lists a number of attributes in respect of which discrimination is prohibited, including age; impairment; political belief or activity; race; religious belief or activity' sex and sexual orientation.

10. Section 8(3) has three limbs. The Commission relies on the second and third limbs. The second limb of s 8(3) protects substantive equality, one that accommodates difference. In *Victoria Police Toll Enforcement v Taha*, her Honour Tate JA observed (footnotes omitted):

> This is a principle of equality that recognises that uniformity of treatment between different persons may not be appropriate or adequate but that disadvantaged or vulnerable persons may need to be treated differently to ensure they are treated equally. This may have procedural implications for the way people are treated in court and tribunal proceedings.[4]

11. Both the second and third limbs have been recognised to have procedural implications for Courts. In *Matsoukatidou v Yarra Ranges Council*[5] his Honour Justice Bell held that the County Court failed to make reasonable adjustments and accommodations in respect of the disability of one of the plaintiffs and that this amounted to a breach of the right to equality.

12. Plainly refusing a request by a Yorta Yorta man to have his proceedings heard and determined by the Koori Court engages his rights to the equal protection of the law without discrimination and right to equal and effective protection against discrimination. "Discrimination" means discrimination on the basis of an attribute set out in s 6 of the *Equal Opportunity Act 2010* (Vic). Race is one of the attributes in s 6 of the *Equal Opportunity Act 2010* (Vic). The very reason for establishing the Koori Court was to ensure greater participation of the Aboriginal community in the sentencing process in the Magistrates Court through the role to be played by Aboriginal elders and respected persons.[6] The Koori Court was established because the government recognised that there

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4 *Victoria Police Toll Enforcement v Taha* (2013) 49 VR 1, 70-71 [210] (Tate JA).
5 [2017] VSC 61 [40]-[46], [50]-[55], [61].
6 *Magistrates' Court (Koori Court) Act 2002* (Vic) s 1.

was a need for it. When accessed, it protects and promotes the rights in s 8(3) of the Charter for an Aboriginal person. As the Minister's Second Reading speech states:

> **Why have a Koori court?**
>
> The key to understanding the need for a Koori court is an acceptance that historically Aboriginal offenders often come from the most disadvantaged of backgrounds, and that they are often victims themselves. Only negotiated innovation can and will address this problem. […]
>
> **What is a Koori court?**
>
> In essence, the Koori court is an alternative way of administering sentences so that court processes are more culturally accessible, grounded in Aboriginal communities' efforts to promote rehabilitation and impose sanctions which are acceptable and comprehensible to the Aboriginal community.

13. Parliament established the Koori Court in 2002. The decision of the Magistrate was to deny its availability to the Plaintiff. In so doing, the decision engages the Plaintiff's equality rights because it denies the Plaintiff access to a Court that was created to redress the disadvantage suffered by Aboriginal persons, of which he is one.

Cultural rights

14. Section 19 of the Charter states:

> (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 his or her culture, to declare and practice his or her religion and to use his or her language.
>
> (2) Aboriginal persons hold distinct cultural rights and must not be denied the right, with other members of their community –
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> (a) to enjoy their identity and culture; and
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> (b) to maintain and use their language; and
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> (c) to maintain their kinship ties; and
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> (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.

15. Section 19 was modelled on, but is not identical to, Article 27 of the International Covenant on Civil and Political Rights (the **ICCPR**). Unlike the ICCPR rights, s 19 of the Charter does not protect cultural rights only of a "minority", and s 19(2) recognises that the cultural rights of Aboriginal persons are distinct from other cultural groups in society. "Aboriginal" is defined in s 3 of the Charter as "means a person belonging to the

indigenous peoples of Australia, including the indigenous inhabitants of the Torres Strait Islands, and any descendants of those peoples."

16. The scope of the rights protected in s 19 of the Charter have yet to be given any detailed consideration in Victorian law.[7] Recently, in *DPP v SE* [2017] VSC 13 the Court considered s 19 in the context of a bail application. The Court held that s 3A of the Bail Act should be read with the cultural rights of Aboriginal people under s 19 of the Charter. The Court found that it was necessary for the Court to recognize that "different forms of discriminatory disadvantage and vulnerability may be experienced by Aboriginal persons, children and persons with intellectual disability and that someone who is disadvantaged and vulnerable in all three discriminatory respects is in a position of exacerbation."[8]

17. Section 32(2) of the Charter permits the Court to consider international law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right when interpreting a statutory provision (including the Charter). Whilst being vigilant to textual differences in the formulation of Part 2 rights, regard to international materials on the meaning of the right is important in understanding the meaning and scope of the right.

18. In addition to article 27 of the ICCPR, comparative rights to s 19 are protected in s 20 of the New Zealand Bill of Rights Act and s 30 of the South African Bill of Rights. In respect of s 20 of the NZBORA, Elias CJ has observed "Cultural identification is an aspect of human dignity and always an important consideration where it is raised, as are the preferences and practices which come with such identification, as s 20 of the New Zealand Bill of Rights Act 1990 affirms."[9]

19. Cultural rights are collective rights that may be exercised individually by a person.[10]

Culture

20. The Charter does not define culture for the purposes of s 19. The United Nations Human Rights Committee has confirmed a broad and flexible interpretation of 'culture' for the purposes of Article 27 of the ICCPR.[11] It encompasses traditional beliefs and practices, as well as social and economic activities that are part of a group's tradition.[12]

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7 Section 19 of the Charter has been raised in applications in the Victorian Civil and Administrative Tribunal, see for example *Hoskin v Greater Bendigo City Council* [2015] VCAT 1124 (planning application); *Rutherford v Hume City Council* [2014] VCAT 786 (planning application); *Hobson Bay City Council* [2009] VCAT 1198 (anti-discrimination application); *Parks Victoria (Anti-Discrimination Exemption)* [2011] VCAT 2238 (anti-discrimination application); *OP v Secretary to the Department of Justice (Occupational and Business Regulation)* [2010] VCAT 1054 (application for a working with children check).

8 *DPP v SE* [2017] VSC 13 [28] (Bell J). Subsections 19(1) and (2) were also identified as relevant rights in *Secretary to the Department of Human Services v Sanding* (2011) 36 VR 221 [156], [249].

9 *Takamore v Clarke* [2013] 2 NZLR 733 [15].

10 Human Rights Committee, General Comment No 23: *Article 27 (Rights of Minorities)*, 8th sess, UN Doc CCPR/C/21/Rev.1/Add.5 (8 April 1994) [1].

11 Human Rights Committee, *Views: Communication No 197/1985*, UN Doc CCPR/C/33/D/197/1985 (27 July 1988) [9.2]-[9.3] ('*Kitok v Sweden'*).

12 Human Rights Committee, *Views: Communication No 197/1985*, UN Doc CCPR/C/33/D/197/1985

Positive measures of protection

21. Article 27 recognises the existence of a "right" and requires that it should not be denied by States parties to the ICCPR. Consequently, General Comment 23 recognises that positive measures by States parties may be necessary to protect against the denial or violation of the Article 27 rights:

> 6.1 Although article 27 is expressed in negative terms, that article, nevertheless, does recognize the existence of a "right" and requires that it shall not be denied. Consequently a State party is under an obligation to ensure that the existence and the exercise of this right are protected against their denial or violation. Positive measures of protection are, therefore, required not only against the acts of the State party itself, whether through its legislative, judicial or administrative authorities, but also against the acts of other persons within the State party. […]

Denial of rights

22. Human Rights Committee jurisprudence confirms that the impact of the denial or violation of the right must meet a threshold. In *Lansman v Finland*, the Committee held that the impact of the interference on the rights contained in Article 27 must be "so substantial that it does effectively deny [Article 27 rights]." In *Poma Poma v Peru*, the Committee said that a limited impact on the way of life and livelihood of persons belonging to that community would not necessarily amount to a denial of the rights under article 27.[13] However, there is otherwise limited guidance available from the Human Rights Committee as to the precise threshold at which "interference" becomes "so substantial" that it amounts to a "denial". It is a question of degree.

23. The Commission submits that the preclusion of a procedure that is sensitive to the Plaintiff's Aboriginal culture can amount to a denial of his cultural rights.[14] Contrary to the Defendants' submission, it is not to the point that the other parts of the criminal justice system can, or do, accommodate the needs of Aboriginal persons. The effect of the outcome of the decision was to deny the Plaintiff an opportunity to have his case heard in a setting that positively protects his cultural rights.

(27 July 1988) [9.2] ('*Kitok v Sweden'*); Human Rights Committee, *Views: Communication No. 511/1992*, 52nd sess, UN Doc CCPR/C/52/D/511/1992 (8 November 1994) [9.2] ('*Lansman v Finland'*).

13 Human Rights Committee, Views: Communication No 1457/2006, UN Doc CCPR/C/95/D/1457/2006 (27 March 2009) [7.4] (*'Angela Poma Poma v Peru'*).

14 See for example, the Hon Kate Darveniza speaking on the Magistrates' Court (Koori Court) Bill: "The Koori court is an alternative way of administering sentences so that the court processes are more culturally accessible, acceptable and comprehensible to our indigenous community. The emphasis is on the court setting up an atmosphere that is informal and accessible and allows greater participation by the Indigenous community. Koori elders, a respected person, Aboriginal justice workers, indigenous offenders and their families can be involved in the court and in sentencing processes. The aim is to reduce any intimidation or cultural alienation that might be experienced by the indigenous offender. It is also about finding the best possible outcomes through the court processes and deliberations to enable the offender to have some form of rehabilitation…": Victoria, *Parliamentary Debates*, Legislative Council, 5 June 2002, 1613 (Kate Darveniza).

24. The identification of relevant rights is a helpful first step in analysing the application of the Charter in these proceedings. The next step is to consider whether and how the relevant rights apply to the Magistrates' Court.

IV. THE MAGISTRATES' COURT IS A PUBLIC AUTHORITY WHEN MAKING A DECISION TO TRANSFER PROCEEDINGS TO THE KOORI COURT

25. The concept of a "public authority" is a key element in the scheme of the Charter. It is employed in s 38 of the Charter, which imposes obligations on public authorities to act compatibly with human rights and, when making a decision, to give proper consideration to relevant human rights.

26. For the purposes of the Charter (including for the purposes of s 38(1) of the Charter), the term "public authority" is defined in s 4(1) of the Charter by the identification of a list of persons. Some persons or bodies are expressly declared by the Charter not to be public authorities. Thus, section 4(1)(j) provides that a public authority does not include:

> a court or tribunal except when it is acting in an administrative capacity; [or]
>
> Note: Committal proceedings and the issuing of warrants by a court or tribunal are examples of when a court or tribunal is acting in an administrative capacity. A court or tribunal also acts in an administrative capacity when, for example, listing cases or adopting practices and procedures.

27. It is immediately apparent that the expression "acting in an administrative capacity" is the key distinguishing factor that will determine if a court or tribunal is a public authority under the Charter. This expression is not defined in the Charter. However, the Note contained in s 4(1)(j), which forms part of the provision, [15] gives examples of matters that Parliament considers meet the description.

28. While the extent to which Courts and tribunals are "acting in an administrative capacity" in making particular decisions or performing particular acts has been the subject of decisions of this Court,[16] there is no authority to the Commission's knowledge on the question of whether transferring a proceeding in the Magistrates' Court to the Koori Court Division involves the Magistrates Court "acting in an administrative capacity".

29. The answer to this question is determined by statutory construction of the provisions conferring the Magistrates' Court power to transfer a proceeding to the Koori Court.

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15 *Interpretation of Legislation Act 1984* (Vic) s 36(3A).

16 *Sabet v Medical Practitioners Board of Victoria* (2008) 2 VR 414 (the Medical Practitioners Board of Victoria was acting in an administrative capacity when deciding to suspend a practitioners' registration); *PJB v Melbourne Health ('Patrick's Case')* (2011) 39 VR 373 (the Victorian Civil and Administrative Tribunal was acting in an administrative capacity in exercising its power to appoint an administrator over the estate of a person with a mental illness); *Slaveski v R* (2012) 40 VR 1 (the Court's function to grant or refuse an adjournment is not acting in an administrative capacity); *R v Debono* [2013] VSC 407 (Supreme Court of Victoria was acting in an administrative capacity when making a coercive powers order under the *Major Crime (Investigative Powers) Act 2004* (Vic)).

The Magistrates Court's power to transfer a proceeding to the Koori Court

30. The Magistrates' Court is established in s 4 of the *Magistrates' Court Act 1989* and consists of the Magistrates, the judicial registrars and the registrars of the Court: s 4(2).

31. The Commission accepts the Defendants' submission that criminal proceedings must ordinarily be commenced in the 'proper venue' of the Magistrates' Court before a proceeding can be transferred to the Koori Court.

32. Section 11(1) of the *Criminal Procedure Act 2009* provides that a criminal proceeding in the Magistrates' Court is to be heard "at the venue of the court that is nearest to - (a) the place where the office is alleged to have been committed; or (b) the place of residence of the accused, except where otherwise provided by this or any other Act or by a nomination under subsection (2).".

33. Section 31 of the *Criminal Procedure Act 2009* empowers the Magistrates' Court to transfer any criminal proceedings to a different venue. Notably, the power is conferred on the Magistrates' Court, rather than on a Magistrate. At first blush, the reference to the Magistrates' Court may be regarded to be a reference to the whole Court, including magistrates, judicial registrars and registrars of the Court. However, s 31 requires an "order" to be made, which except by way of consent, judicial registrars and registrars of the Court do not have power to make.[17] Section 31 provides:

> If the Magistrates' Court considers that –
>
> (a) a fair hearing in a criminal proceeding cannot otherwise be had; or
>
> (b) for any other reason it is appropriate to do so –
>
> the court may order that the hearing be held at another place or venue of the court that the court considers appropriate.

34. Section 4F of the Magistrates' Court Act was inserted into the Magistrates' Court Act by the *Magistrates' Court (Koori Court) Act 2002*, before the enactment of the Criminal Procedure Act. It confers a power to transfer a proceeding to the Koori Court. It provides:

> Subject to and in accordance with the rules –
>
> (a) a proceeding may be transferred to the Koori Court Division, whether sitting at the same or a different venue; and
>
> (b) the Koori Court Division may transfer a proceeding (including a proceeding transferred to it under paragraph (a)) to the Court, sitting other than as the Koori Court Division, at the same or a different venue.

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[17] The *Magistrates' Court (Judicial Registrar) Rules 2015* (Vic) confer power on judicial registrars in criminal proceedings in rules 6 and 7. Rule 9 provides "Without limiting Rule 8 but subject to Rules 10, 11, 12 and 13, a judicial registrar may, with the consent of the parties to a proceeding, deal with and exercise all or any powers of the Court to make final orders in the proceeding."

35. Section 4F does not expressly identify who may exercise this power and imposes no requirement for an order to be made. The Criminal Procedure Act was enacted subsequent to s 4F and provides that the "Magistrates' Court" may exercise the power to transfer proceedings to another place or venue of the court. Section 31 applies to a transfer to "any place or venue of the court", not only to the Koori Court. It is likely to have clarified the way that s 4F of the Magistrates' Court Act is to operate.

Section 32 of the Charter

36. Section 32(1) of the Charter provides:

> 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.

37. In *Momcilovic*,[18] the High Court divided sharply concerning the operation of s 32.[19] As Nettle JA (as his Honour then was) has observed:[20]

> The problem is that the judgments of the High Court in Momcilovic v The Queen do not yield a single or majority view as to what is meant by interpreting a statutory provision in a way that is compatible with human rights within the meaning of s 32 of the Charter.

38. In *Slaveski v Smith*, the Court of Appeal distilled the effect of *Momcilovic* concerning the operation of s 32 as requiring "the court 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*".[21] While the precise boundaries of s 32(1) remain unclear[22] it is unnecessary to resolve the uncertainties concerning the operation of s 32 of this proceeding.

39. Section 32 is relevant in this proceeding in the following way. Section 31 of the *Criminal Procedure Act* creates a statutory discretion allowing the Magistrates' Court to transfer a proceeding to the Koori Court if "it is appropriate to do so". Regardless of whether the Magistrates' Court was acting in a judicial or administrative capacity when making its decision, this discretion is not at large. There is no such thing as an unbridled discretion

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18 (2011) 245 CLR 1.

19 French CJ, Bell and Heydon JJ gave separate judgments, Crennan and Kiefel JJ delivered a joint judgment and Hayne J agreed with the reasons of Gummow J on this issue.

20 *WK v The Queen* [2011] VSCA 345 at [55].

21 [2012] VSCA 25 at [20] (Warren CJ, Nettle and Redlich JJA).

22 *Victoria Police Toll Enforcement v Taha* (2013) 49 VR 1, 61-62 [188]–[190] (Tate JA). See also Julie Debeljak, 'Proportionality, Rights-Consistent Interpretation and Declarations under the Victorian Charter of Human Rights and Responsibilities: The Momcilovic Litigation and Beyond' (2014) 40 *Monash University Law Review* 340; Justice Pamela Tate, 'Statutory Interpretive Techniques under the Charter: Three Stages of the Charter — Has the Original Conception and Early Technique Survived the Twists of the High Court's Reasoning in Momcilovic?' (2014) 2 *Judicial College of Victoria Online Journal* 43; Sir Anthony Mason, 'Statutory Interpretive Techniques under the Charter — Section 32' (2014) 2 *Judicial College of Victoria Online Journal* 69.

in Australian law.[23] The discretion must be exercised in accordance "any applicable law" including the common law and the Charter, which forms part of the law of Victoria.[24]

40. The evaluative task that is reflected in s 31 of the *Criminal Procedure Act* involves consideration of the rights in Part 2 of the Charter. In this way, s 32(1) provides an additional dimension to the discretion.[25] This is not to assert that the Charter *binds* the Court as to how it should exercise its discretion. Rather, Charter rights form part of the relevant circumstances to be taken into account in the exercise of the discretion.[26] Because of their significance, the Charter rights should be given significant weight in the exercise of the discretion by the Court.

The Magistrates' Court is acting in an administrative capacity and therefore is a public authority when deciding whether to transfer a proceeding to the Koori Court

41. The Commission submits that the Magistrates' Court is acting in an administrative capacity when making a decision to transfer a proceeding to the Koori Court. In determining this question, the decision in *R v Debono* (2012) 268 FLR 261 (***R v Debono***) is particularly useful. By contrast, the decision of the Court of Appeal in *Slaveski v R* (2012) 40 VR 1 ***(Slaveski)*** is of limited assistance. The Court's remarks in *Slaveki* were concerned with emphasising that early decisions of the Court (and the VCAT) considering s 4(1)(j) of the Charter were concerned with administrative tribunals and not Courts, a distinction that does not require consideration in this case.

42. The decision in *R v Debono* involved consideration of whether a function of a *court* involved the exercise of administrative power. The particular function was issuing a coercive powers order under the *Major Crime (Investigative Powers) Act 2004* (Vic). Relevant factors that were identified in conclusion that that Court was acting in an administrative capacity, that are also present in this case, are:

    (a) the decision does not involve a dispute between parties;[27]

    (b) the decision is not a binding determination of existing rights or obligations between persons.[28] The decision to transfer a proceeding to the Koori Court is a procedural step that determines where the proceedings will be heard. The purpose of transferring a criminal proceeding to the Koori Court is to enable a determination of the criminal charges at a location and in a setting that accommodates the special requirements of Aboriginal offenders. There is no

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23 *Wotton v State of Queensland* (2012) 246 CLR 1, 10 [10].

24 *Wotton v State of Queensland* (2012) 246 CLR 1, 9 [9]; *Hogan v Hinch* (2011) 243 CLR 506, 534 [27] (French CJ), 548 [70] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); *Victorian Police Toll Enforcement v Taha* (2013) 49 VR 1, 63 [193]; *DPP v Ali (No 2)* [2010] VSC 503 (10 November 2010) [45] (Hargraves J).

25 *Hogan v Hinch* (2011) 243 CLR 506, 534 [27] (French CJ), 548 [70] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); *Nigro v Secretary to the Department of* Justice (2013) 41 VR 359, 411 [199]. See also *DPP v Ali (No 2)* [2010] VSC 503 (10 November 2010) [45] (Hargraves J).

26 Ibid.

27 *R v Debono*, 276 [64].

28 Ibid.

difference in the procedural fairness that an accused will be given by the Magistrates' Court that depends on where the proceeding is heard. The same range of sentencing options are available for a proceeding in the Magistrate Court as within the Koori Court Division. It is at a later stage that a binding determination of legal rights and duties between the parties is made - namely when the accused's guilt or innocence is determined;

(c) the fact that the Magistrate (or judge)'s role in assessing the considerations required to make a decision about whether to transfer the proceeding to the Koori Court resembles the role that Magistrates or judges routinely perform in the course of their judicial functions is not determinative.[29] It is not uncommon for a judge or Magistrate to hear argument and weigh competing considerations in listing cases for trial, a matter clearly expressed by the Parliament to involve the Court acting in an administrative capacity under the Charter;[30] and

(d) there is no right to appeal a decision of the Magistrates' Court refusing to transfer a proceeding to the Koori Court.[31]

43. The repository of the power is a relevant factor to be considered. The power to transfer a proceeding to the Koori Court is conferred on the Magistrates' Court. However, this is only one of the factors to be considered and is not conclusive.[32] Courts and judges exercise administrative functions.[33] This factor should be given little weight when the function in question closely resembles other administrative processes undertaken by a Court, such as listing cases.

44. Contrary to the Defendants' submission,[34] the fact that transfer powers form part of the governance of a criminal trial and determination of guilt and punishment, and occur in the course of adversarial proceedings, is not determinative. So too does listing cases, which is expressly stated to be a matter involving courts and tribunals acting in an administrative capacity.

45. If (as the Commission contends it should) the Court finds that the Magistrates' Court was a public authority when making the decision, it will be necessary to consider s 38(1) of the Charter.

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29 Ibid, 277 [68].

30 See for example, *Certain Children by their Litigation Guardian Sister Marie Brigid Arthur v Minister for Families and Children* [2017] VSC 153. cf *R v Williams* (2007) 16 VR 168 at [50].

31 Ibid, 277 [72].

32 *Love v Attorney General of NSW* (1999) 169 CLR 307, 320-321; *R v Debono*, 277 [69].

33 See for example, s 28AAA of the *Supreme Court Act 1986* (Vic) which confers administrative responsibility on the Chief Justice of Victoria. Section 12A of the *Magistrates' Court Act 1989* (Vic) is to a similar effect for the Chief Magistrate.

34 Submissions on behalf of the First to Eighth Defendants, [82].

V. SECTION 38 OF THE CHARTER

46. Section 38 of the Charter relevantly provides:

> (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.
>
> (2) Sub-section (1) does not apply if, as a result of a statutory provision or a provision made by or under an Act of the Commonwealth or otherwise under law, the public authority could not reasonably have acted differently or made a different decision.

47. It is well accepted that s 38(1) confers two distinct obligations on a public authority: a substantive obligation and a procedural obligation.[35] The Plaintiffs have alleged that both limbs of s 38(1) have been infringed.

48. For the reasons that are explained below, the Court's task in assessing whether either of the limbs of s 38(1) have been breached differs depending on the limb. Because s 7(2) of the Charter applies to the substantive obligation, where this limb is alleged to have breached, the Court will often have to assess evidence about whether there was a reasonable and demonstrable limitation on the Charter rights. In contrast, where the procedural obligation has been allegedly breached, the task of the Court is to examine whether the consideration given to relevant rights was sufficient to discharge the obligation.

49. The Commission's submissions address the relevant legal principles governing the interpretation and application of s 38(1) of the Charter.

50. A useful roadmap for determining whether a particular act or decision of a public authority is unlawful under s 38(1) that has been endorsed by the Court of Appeal and the Trial Division[36] is to ask the following questions:

(a) is any human right relevant to the decision or action that a public authority has made, taken, proposed to take or failed to take (**the relevance or engagement question**);

(b) if so, has the public authority done or failed to do anything that limits that right? (**the limitation question**);

(c) if so, is that limit reasonable and is it demonstrably justified having regard to the matters set out in s 7(2) of the Charter? (**the proportionality or justification question**);

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35 *Baker v DPP* [2017] VSCA 58, 13 [48] (Tate JA) ('***Baker v DPP***'); *Bare v IBAC* (2015) 48 VR 129 ('***Bare v IBAC'***), 205 [245] (Tate JA).

36 *Baker v DPP,* [56] (Tate JA with whom Maxwell P and Beach JJA agreed); *Certain Children (No 2).*

(d) even if the limit is proportionate, if the public authority has made a decision, did it give proper consideration to the right? (**the proper consideration question**);

(e) was the act or decision made under an Act or instrument that gave the public authority no discretion in relation to the act or decision, or does the Act confer a discretion that cannot be interpreted under s 32 of the Charter in a way that is consistent with the protected right (**the inevitable infringement question**).

51. Some decisions of this Court have collapsed the engagement question and the limitation question. For example, in *De Bruyn*, Elliot J stated that a human right is engaged when a decision, without reference to s 7(2) factors has limited a right. This was also the approach taken by the Court in *Certain Children*.[37] Regardless of whether the engagement and limitation questions are collapsed, it is clear on all authorities that a Charter right is not only engaged where a human right is unreasonably limited. The assessment of whether a right has been reasonably limited involves a distinct inquiry requiring the application of a proportionality test. In the Commission's submission, this test is not applied before consideration is given to whether any Charter right is engaged by an act or decision.

(a) Acting in a way that is incompatible with human rights

52. The Charter makes it unlawful for a public authority to act in a way that is "incompatible" with human rights.

53. It is well established that s 7(2) of the Charter applies to the obligation on a public authority to "act compatibly" with Charter rights.[38] Where a public authority limits a right but the limit is justified, the human right is not breached and there is no contravention of the obligation on a public authority to act compatibly with human rights under s 38 of the Charter.[39]

The burden and standard of proof

54. Where a public authority's act is prima facie incompatible with a Charter right, it is for the Defendants to show that any limitation on the Plaintiffs' rights is reasonable and "demonstrably justified" in a free and democratic society, having regard to the specific matters identified in s 7(2) of the Charter.[40]

55. Not only is the burden of proof on the Defendants, but the "standard of proof is high".[41] It "requires a 'degree of probability which is commensurate with the occasion'".[42]

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37 *De Bruyn*, 683 [102]; *Certain Children by their Litigation Guardian Sister Marie Brigid Arthur v Minister for Families and Children* [2016] VSC 796 [143] ('***Certain Children'***).

38 *De Bruyn* 682 [100]; *Kracke v Mental Health Review Board* (2009) 29 VAR 1 [99]; *PJB v Melbourne Health (Patrick's Case)* (2011) 39 VR 373 [332].

39 *Baker v DPP*, 15 [57]; *Certain Children,* [206].

40 *Major Crimes*, 448 [147]; *R v Momcilovic* (2010) 25 VR 436 [143]-[146].

41 *Major Crimes*, 448 [147].

The content of the proportionality analysis

56. The justification question involves an assessment made by reference to the matters listed in 7(2) of the Charter, "including (a) the nature of the right; and (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".[43] Section 7(2) of the Charter embodies a proportionality test.[44]

57. Speaking of s 7(2) of the Charter in *DAS*, Warren CJ approved the decision of the Canadian Supreme Court in *R v Oakes*.[45] Warren CJ said:[46]

> The party seeking to justify the limitation must satisfy each of the factors in paragraphs (a)-(e), which broadly correspond to the proportionality test identified in *Oakes*. The notion of proportionality is a key principle embraced by the Charter and reflects the human rights jurisprudence of most comparable jurisdictions. *Oakes* appears to be an authoritative precedent in the field. In that case, it was said:
>
> > There are three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational consideration. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in the first sense, should impair "as little as possible" the right or freedom in question…. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of "sufficient importance".

58. That passage from *Oakes* was approved by the Court of Appeal in *Momcilovic*[47] and subsequently by French CJ in the High Court.[48]

59. The first factor in s 7(2) calls for an examination of the nature of the right. This involves considering the quality of the right and the importance of the values that underpin it.[49] The rights engaged in this proceeding protect important values including equality and freedom from discrimination, as well as the protection of culture in the administration of the law.

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42 *Major Crimes*, 448 [147] citing *Bater v Bater* [1950] 2 All ER 458, 459 (Lord Denning).

43 *Baker v DPP*, 15 [57] (Tate JA with whom Maxwell P and Beach JJA agreed).

44 *Momcilovic v R* (2011) 245 CLR 1, 39 [22] (French CJ).

45 *R v Oakes* [1986] 1 SCR 103, 139 (Dickson CJ).

46 *Major Crimes*, 449 [148].

47 *R v Momcilovic* (2010) 25 VR 436, 476 [147] (Maxwell P, Ashley and Neave JJA).

48 *Momcilovic v R* (2011) 245 CLR 1, 41 [26] (French CJ).

49 *Re Lifestyle Communities Ltd (No 3)* (2009) 31 VAR 286, 350 [328].

60. The second factor in s 7(2) requires the purpose of the limitation on a right to be identified. The purpose must both accord with the values of the Charter and be sufficiently important to warrant the limitation. As Bell J said in *Re Lifestyle Communities (No 3)*: "[t]he more important is the purpose so understood, the more the limitation is likely to be justified, and vice versa."[50]

61. The third factor identified in s 7(2)(c) is a critical step in the proportionality exercise. It is necessary to identify objectively how greatly the limitation constrains the rights. The greater the constraint, the more compelling must be the justification, and vice versa.

62. Finally, the fourth and fifth factors require that there is a rational connection between the limitation and its purpose[51] and the limitation should impair the right to the minimum extent possible.[52]

The standard of review required by proportionality analysis

63. Once the content of the proportionality assessment is understood, it is necessary to identify the required standard of review.

64. In enacting the substantive obligation in s 38(1) of the Charter, the Explanatory Memorandum for the Charter states (p 27) that s 38(1) "is modelled on section 6 of the United Kingdom Human Rights Act 1998 and is intended to ensure that public authorities make decisions and act compatibly with human rights".

65. This does not mean that the Court should import the principle of a "margin of appreciation" that has been recognised in the UK cases. That principle is an incident of the particular constitutional setting that the UK courts operate within.[53]

66. The standard of review required by proportionality analysis under s 6 of the Human Rights Act 1998 (**HRA**) was explained by Lord Steyn in *Daly*, in an opinion that the House of Lords has described as "justly-celebrated and much-quoted".[54] Lord Steyn said:[55]

> **Clearly, these criteria are more precise and more sophisticated than the traditional grounds of review. What is the difference for the disposal of concrete cases?** Academic public lawyers have in remarkably similar terms elucidated the difference between the traditional grounds of review and the proportionality approach ... The starting point is that there is an overlap between the traditional grounds of review and the approach of proportionality

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50 *Re Lifestyle Communities Ltd (No 3)* (2009) 31 VAR 286, 351 [329].

51 *Major Crimes*, 449 [148].

52 Ibid.

53 *PJB v Melbourne Health (Patrick's Case)* (2011) 39 VR 373 [320]-[321] (Bell J).

54 *Huang v Secretary of State for the Home Department* [2007] 2 AC 167, 184 [13].

55 *R v Secretary of State for the Home Department; Ex parte Daly* [2001] 2 AC 532 [28] (emphasis added).

> … **But the intensity of review is somewhat greater under the proportionality approach** ... I would mention three concrete differences without suggesting that my statement is exhaustive. **First**, **the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions**. **Secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations**. Thirdly, even the heightened scrutiny test developed in *R v Ministry of Defence, Ex p Smith* [1996] QB 517, 554 is not necessarily appropriate to the protection of human rights … [T]he intensity of the review, in similar cases, is guaranteed by the twin requirements that the limitation of the right was **necessary in a democratic society, in the sense of meeting a pressing social need**, and the question whether the interference was really proportionate to the legitimate aim being pursued.
>
> The differences in approach between the traditional grounds of review and the proportionality approach may therefore sometimes yield different results. It is therefore important that cases involving convention rights must be analysed in the correct way. **This does not mean that there has been a shift to merits review** … And Laws LJ rightly emphasised in *Mahmood,* at p 847, para 18, "that the intensity of review in a public law case will depend on the subject matter in hand". That is so even in cases involving Convention rights. In law context is everything.

67. In *Huang*, the House of Lords clarified Lord Steyn's comment in *Daly* that what was involved in the analysis was not "merits review". Their Lordships said:[56]

> This statement has, it seems, given rise to some misunderstanding ... The point which, as we understand, Lord Steyn wished to make was that, although the Convention calls for a more exacting standard of review, it remains the case that the judge is not the primary decision-maker. It is not for him to decide what the recruitment policy for the armed forces should be. **In proceedings under the Human Rights Act, of course, the court would have to scrutinise the policy and any justification advanced for it to see whether there was sufficient justification for the discriminatory treatment.**

68. In *R (SB) v Governors of Denbigh High School*[57] Lord Bingham re-stated the basic principles concerning proportionality review as follows:[58]

> [I]t is clear that the court's approach to an issue of proportionality under the Convention must go beyond that traditionally adopted to judicial review in a

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56 *Huang v Secretary of State for the Home Department* [2007] 2 AC 167 [13] (emphasis added).

57 [2007] 1 AC 100.

58 Ibid 116 [30]-[31].

> domestic setting ... [T]he new approach required under the 1998 Act was described by Lord Steyn in *R (Daly) v Secretary of State for the Home Department*,[59] in terms which have never to my knowledge been questioned. There is no shift to a merits review, but the intensity of review is greater than was previously appropriate, and greater even than the heightened scrutiny test adopted by the Court of Appeal in *R v Ministry of Defence ex p Smith*.[60] The domestic court must now make a value judgment, an evaluation, by reference to the circumstances prevailing at the relevant time ... **Proportionality must be judged objectively, by the court**: *R (Williamson) v Secretary of State for Education and Employment*.[61] As Davies observed in his article cited above, "The retreat to procedure is of course a way of avoiding difficult questions". **But it is in my view clear that the court must confront these questions, however difficult**. The school's action cannot properly be condemned as disproportionate, with an acknowledgement that on reconsideration the same action could very well be maintained and properly so.
>
> … If … it appears that such a body has conscientiously paid attention to all human rights considerations, no doubt a challenger's task will be the harder. **But what matters in any case is the practical outcome, not the quality of the decision-making process that led to it**.

69. In a similar vein, Lord Hoffman said: [62]

> In domestic judicial review the court is usually concerned with whether the decision maker reached his decision in the right way rather than whether he got what the court might think is the right answer. But Art 9 is concerned with substance, not procedure. It confers no right to have a decision in a particular way. What matters is the result: was the right to manifest a religious belief restricted in a way which is not justified under Art 9(2).

70. More recently, the House of Lords in *E v Chief Constable of the Royal Ulster Constabulary*[63] unanimously endorsed the approach in each of *Daly*, *Huang* and *Denbigh High School*, including endorsing Lord Bingham's observation in *Denbigh High School* that what matters "is the practical outcome, not the quality of the decision-making process that led to it."[64]

71. To the limited extent that the operation of the proportionality test has previously been considered in the context of the substantive obligation in s 38(1) of the Charter, the

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59 [2001] 2 AC 532 [25]-[28].

60 [1996] QB 556.

61 [2005] 2 AC 246 [51].

62 [2005] 2 AC 246 [68].

63 [2009] AC 536 [52]-[53].

64 *R (SB) v Governors of Denbigh High School* [2007] 1 AC 100, 116 [31].

approach outlined in the United Kingdom cases has been adopted. Thus, in *Director of Housing v Sudi*, Bell J said:[65]

> Although determining whether a public authority has behaved unlawfully by breaching human rights has some analytical similarities with judicial review, this is not what the tribunal would be doing in determining the issue in these proceedings. The tribunal would be determining whether the human rights standards in the Charter applied to the director, whether the standards were breached by his actions or decisions in this case and whether any breach was justified (unless this was conceded, as it effectively has been here). If the conclusion was that the director did breach the Charter, s 38(1) specifies the consequence that the actions or decisions were 'unlawful'.

72. Likewise, in *PJB*, Bell J relied upon *Daly* and said:

> It can be seen that, by its very nature as a standard of reivew, proportionality draws the Court more deeply into the facts, the balance which has been struck and the resolution of the competing interests than traditional judicial review.[66]

73. In *Certain Children (No 2)*, J Dixon J said:

> [216]. There is merit in VEOHRC's submission that the objective assessment by the court requires, in both fact-finding and evaluation of competing circumstances and considerations, an intensity of review that cannot be watered down by classification as impermissible merits review, for that is not what it is. That said, there is also force in the defendants' contention that a court may not be possessed of the necessary breadth of information, experience, or background that informed the decision maker's conclusion and great care must be exercised by a court in its objective assessment of Charter unlawfulness. Care in this respect may be exercised by affording some weight to or latitude in the deliberations of the decision maker.
>
> [217]. Precisely what 'intensity' is required and what that actually means is likely to depend on the particular circumstances before the court that will vary from case to case. Context and circumstances may include the experience and expertise of the primary decision-maker, the information that a decision-maker acts on and the extent to which a decision is supported and objectively justified by a transparent process of reasoning. A detailed brief that informed the decision or detailed reasons from the decision maker may be persuasive.

The relationship between the two limbs in s 38(1) of the Charter

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65 [2010] VCAT 328 [130].

66 *PJB v Melbourne Health (Patrick's Case)* (2011) 39 VR 373 [317] (Bell J).

74. When enacting s 38(1) of the Charter, Parliament intended to impose two obligations on a public authority.

75. As outlined in paragraph 50, even if a limitation on a human right is ultimately found to be proportionate, if the public authority has made a decision, it is still required to give proper consideration to relevant human rights. The obligation to give proper consideration to relevant human rights does not depend on any determination of compatibility. There is no textual warrant for conflating the two forms of obligation imposed by s 38(1) of the Charter.[67]

76. Accordingly, if the Court finds that there has not been any breach of the substantive obligation in s 38(1), it should still consider whether there has been a breach of the procedural obligation.

77. While the acting compatibly limb of s 38(1) of the Charter was modeled on s 6(1) of the HRA, the HRA does not contain the second limb in s 38(1) of the Charter. Caution should accordingly be exercised when applying decisions of the UK Courts on the obligation on a public authority to give proper consideration to relevant human rights. In that jurisdiction, the House of Lords has held that the HRA does not contain an express consideration obligation and is concerned with substance, not procedure.[68]

78. In many cases, the content of the higher standard required to give proper consideration to human rights will be the same as the proportionality analysis required by the substantive obligation. However, there may be some cases in which a range of possible decisions will interfere with rights in a way that would be demonstrably justifiable having regard to s 7(2) of the Charter. In a case of that kind, it is possible that a decision will be made that in fact falls within the range of justifiable outcomes, even though the public authority did not give any, or any adequate, consideration to the human rights issues that were involved. In that situation, the public authority will have acted unlawfully, because rights will not have been "properly considered" as part of the decision-making process. This is a matter of real practical significance even if the decision that was made involved a justifiable interference with rights, because if rights had been properly considered a different decision might have been made. If this were not so, the obligation to give proper consideration would be negated such that its utility would be diminished or void. The requirement for a public authority to give proper consideration to human rights must be given work to do.[69]

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67 *Certain Children (No 2)* at [225].

68 *R (SB) v Governors of Denbeigh High School* [2005] 1 WLR 3372. Section 6(1) of the HRA states: "It is unlawful for a public authority to act in a way which is incompatible with a Convention right."

69 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 382 [71]; *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 266 [39].

(b) Giving proper consideration to relevant human rights

79. The obligation on a public authority to give proper consideration to relevant human rights requires the Court to undertake an assessment of the public authority's decision-making process.

80. The language of the obligation in s 38(1) imposes a higher standard than the obligation to take into a consideration at common law or under statute.[70] This follows from the obligation to give "proper" consideration to human rights. As her Honour Justice of Appeal Tate said in *Bare v IBAC* (footnotes omitted) at [276]:

> The difference between the statutory language in s 38(1) and the manner in which the common law ground of review is expressed supports the view that s 38(1) is intended to impose a test that is more strict than that applicable at common law. The word proper must be given some work to do in accordance with the maxim that all words in a statutory provision must be given meaning and effect. This is particularly so given that the word "proper" describes the nature of the consideration that is to be given; it qualifies the exercise in which a decision-maker is obliged to engage.[71]

81. The test to be satisfied by a public authority is now well established.[72] The obligation requires a decision maker to:

(a) understand in general terms which rights would be affected by the decision and how they may be interfered with by the decision;

(b) seriously turn his or her mind to the possible impact of the decision on the person's human rights;

(c) identify the countervailing interests or obligations; and

(d) balance competing private and public interests.[73]

82. The Court recognized in *Castles* that there is "no formula" for the proper consideration exercise. It follows that the proper consideration obligation can be discharged in a manner suited to the particular circumstances.[74] However, consistent with a stringent approach, there is nothing in the language of s 38 of the Charter to indicate that, absent a statutory provision depriving a public authority from being able to reasonably act

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70 *Bare v IBAC*, 217-218 [275]-[276] (Tate JA), 198-199 [217]-[221] (Warren CJ).

71 Ibid 217-218 [275]-[276], 226 [299] (Tate JA).

72 *Castles v Secretary of Department of Justice* (2010) 28 VR 141, 184 [185]-[186] (Emerton J); *De Bruyn*, 669-701 [139]-[142]; *Bare v IBAC*, 198-199 [217]-[221] (Warren CJ), 218-219 [277]-[278] (Tate JA), 297 [534] (Santamaria JA) (each of the three Justices of Appeal applied the "Castles test" for proper consideration by way of *obiter dicta*).

73 *Castles v Secretary of Department of Justice* (2010) 28 VR 141, 184 [185]-[186] (Emerton J).

74 *PJB v Melbourne Health (Patrick's Case)* (2011) 39 VR 373 [311] (Bell J).

differently or making a different decision, the obligation to give proper consideration may be suspended or removed in particular circumstances such as an "emergency".

83. While assessing proper consideration should not be scrutinized "over-zealously" by the courts, the obligation would not be satisfied by merely invoking the Charter "like a mantra".[75] The review that is necessitated by the obligation of a decision-maker to give proper consideration is a review of the substance of the decision-makers consideration rather than form.[76]

VI. SECTIONS 8(3) AND 19 OF THE CHARTER ALSO APPLIED DIRECTLY TO THE COURT BY REASON OF SECTION 6(2)(b) OF THE CHARTER

84. In addition to s 38(1) of the Charter, a second way in which the Commission contends that s 8(3) and s 19 of the Charter applied to the Magistrates' Court proceedings is by reason of s 6(2)(b) of the Charter. Section 6(2)(b) states:

> This Charter applies to - …
>
> (b) courts and tribunals, to the extent that they have functions under Part 2 and Division 3 of Part 3;

85. There have now been a number of decisions of this Court on the proper construction of s 6(2)(b). The prevailing approach has been the "intermediate" approach, by which the function is to enforce directly the rights in Part 2 of the Charter that relate to Court proceedings.[77] The Commission accepts in this proceeding that the intermediate approach should be applied. However, contrary to the Defendants' submission, that approach is not as described. The functional approach focuses on the functions that are performed by a court or tribunal in legal proceedings in a given case.[78] The question is not whether the right "will be affected in a **direct way** by court's performance of their judicial (as opposed to administrative) functions during court proceedings" but whether the Court or tribunal has a relevant function for the purposes of the right. If so, the right will apply to the Court or tribunal "to the extent" of the function. The function may affect the right in a direct or indirect way. To the extent that his Honour Bell J referred to Charter rights applying to "those matters that are within their own direct control" in *Secretary, Department of Human Services v Sanding*, the Commission submits with respect that this is incorrect. The early reference to "direct control" that was made in *Secretary, Department of Human Services v Sanding* has not been a requirement described in subsequent decisions (including decisions of his Honour). The relevant question is broader than suggested by the Defendants. It is whether the Court has a relevant function

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75 *Castles v Secretary of Department of Justice* (2010) 28 VR 141, 144 (Emerton J).

76 *De Bruyn*, 701 [142].

77 *Victorian Police Toll Enforcement v* (2013) 49 VR 1, 80-81[246]-[248]; *Momcilovic v R* (2011) 245 CLR 1, 204 [525] (Crennan and Kiefel JJ); *Matsoukatidou v Yarra Ranges Council* [2017] VSC 61 [32] and cases cited in footnote 12 to that paragraph; *DPP v SL* [2016] VSC 714; *DPP v SE* [2017] VSC 13.

78 *Matsoukatidou v Yarra Ranges Council* [2017] VSC 61 [37].

that may affect the rights in s 8(3) and s 19 in legal proceedings. The Commission submits that the Court has such a function in respect of both rights.

86. The second and third limbs in the right protected in s 8(3) of the Charter have been recognised to impose procedural obligations on a Court.[79] In the proceedings before the Magistrates' Court, the second and third limb of s 8(3) were plainly engaged. The Plaintiff is an Aboriginal man with a protected attribute under s 6 of the Equal Opportunity Act. The proceedings before the Magistrates' Court were concerned with whether to transfer his case to the Koori Court. The question falling for determination by the Magistrates' Court was solely about Court proceedings and where they should occur: at Echuca or at the Koori Court at Shepparton. The decision of the Court not to transfer the proceeding to the Koori Court disadvantaged the Plaintiff by depriving him of the opportunity to have his charges dealt with by a Court specially designed for Aboriginal offenders and with culturally sensitive procedures involving Aboriginal elders and respected persons. Section 8(3) was also engaged by the process the Court undertook to determine the question. In conducting the hearing of the application, s 8(3) of the Charter required the Court to take into account the Plaintiff's race and cultural rights. The Commission joins with the Plaintiff's submissions in respect of the failures of the Magistrates' Court in this regard.[80]

87. Contrary to the Defendants' submission,[81] the right protected in s 19 also has application by reason of s 6(2)(b). Section 19 relates to the functions exercised by the Court when conducting a hearing of an application to transfer proceedings to the Koori Court and determining the Koori Court transfer application.[82] The function of the Court in deciding whether to transfer a proceeding to the Koori Court necessarily involves the Court examining whether the Koori Court has jurisdiction. If it does, and the Court considers it appropriate to transfer the proceeding to it, an Aboriginal person is able to exercise their cultural rights by accessing a Court created to ensure greater participation of the Aboriginal community in the sentencing process in the Magistrates' Court through the role to be played by Aboriginal elders and respected persons. If the proceedings are not transferred, the right protected in s 19(2) is denied. This follows because the availability of the Koori Court is denied. The right in s 19(2) is related to Court proceedings in so far as those proceedings involve an application to transfer a proceeding to the Koori Court.

88. If the Court finds that the rights in s 8(3) and s 19 directly applied to the Magistrates' Court directly by reason of s 6(2)(b) of the Charter, the Commission submits that it will be necessary for the Court to consider the application of s 7(2) of the Charter. This follows because the rights in s 8(3) and s 19 are not absolute, but may be subject to reasonable limitations that can be demonstrably justified in accordance with s 7(2) of the Charter.

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79 *Matsoukatidou v Yarra Ranges Council* [2017] VSC 61 [40].

80 Plaintiff's Submissions [86]-[87].

81 Submissions on behalf of the First to Eighth Defendants, [17].

82 In *DPP v SE* [2017] VSC 13 at [20] the Court found that s 19(2) operated with s 6(2)(b) in the same manner when the Court is conducting bail hearings and determining bail applications.

89. If the Court finds that the Magistrates' Court either breached s 38(1) of the Charter or failed to directly apply Charter rights, it will be necessary to consider the question of relief.

VII. RELIEF

90. Section 39(1) of the Charter states (emphasis added):

> 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.

91. Section 39(1) must be read together with s 38 of the Charter. Section 38 makes it unlawful for a public authority to act in a particular way, but does not establish the consequence of the unlawful act or decision. The question of what remedy or relief follows from the unlawfulness is answered by s 39(1). As Warren CJ described in *Bare v IBAC*: "[s]ection 38 classifies certain conduct of a public authority in connection with a human right as unlawful and section 39 describes the remedies available to a person claiming under the Charter."[83]

92. Section 39(1) both identifies the relief or remedy that is available for a breach of s 38(1) of the Charter, and confers jurisdiction on the Court to grant that relief.

93. Rather than creating any new remedy or cause of action for breach of any Charter right, s 39(1) of the Charter has an "operation which is both conditional and supplementary".[84] In *Director of Housing v Sudi*, Maxwell P said:

> The condition to be satisfied is that a person be able to seek, independently of the Charter, "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". If – but only if – that condition is satisfied, then s 39(1) enables that person to seek 'that relief or remedy' on a supplementary ground of unlawfulness, that is unlawfulness arising because of the Charter.[85]

94. The relief referred to in s 39(1) is the <u>same</u> relief or remedy that a person can seek if the person "may seek" any relief or remedy in respect of the act or decision on the ground that it was unlawful otherwise than because of the Charter.[86] It is well established that the non-Charter ground does not have to be successful for a person to be entitled to seek relief or remedy on the basis of unlawfulness under the Charter.[87]

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83 *Bare v IBAC*, 147 [40] (Warren CJ).

84 *Director of Housing v Sudi* (2011) 33 VR 559 [96] (Maxwell P).

85 Ibid.

86 *Sabet v Medical Practitioners Board of Victoria* (2008) 20 VR 414, 430 [104].

87 *Goode v Common Equity Housing Ltd* [2014] VSC 585 [28]-[30] (Bell J); *DPP v Debono* [2013] VSC 407 [82]; *PJB v Melbourne Health (Patrick's Case)* (2011) 39 VR 373 [303]; *Certain Children (No 2)*, [549].

95. The question of what relief is available in a case where an inferior Court has acted incompatibly with rights that are directly applicable by reason of s 6(2)(b) is uncertain in Victorian law. There is no decided case to the Commission's knowledge that has considered the availability of relief for breach of s 6(2)(b) and in particular, whether it might entitle the Court to independently quash a decision on the grounds of error of law on the face of the record or jurisdictional error.[88] Should the Court consider it is necessary to decide what relief is available for breach of s 6(2)(b) of the Charter, the Commission respectfully requests to be heard on this question.

96. In this proceeding, the relief sought by the Plaintiffs includes relief and remedies available under Order 56 of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic) including the quashing of the Magistrates' Court decision for error of law on the face of the record. The Plaintiffs are entitled to seek that *same relief* on the grounds of unlawfulness arising under the Charter, including for breach of either or both limbs in s 38(1) of the Charter.

97. The availability of relief under Order 56 for a breach of s 38(1) of the Charter where it constitutes an error of law on the face of the record is well established. In *Bare v IBAC*, all three Justices found that there had been a failure to give proper consideration to Charter rights.[89] Tate JA and Santamaria JA quashed the decision for error of law on the face of the record.[90] It was unnecessary for Warren CJ to decide this question since her Honour found that a privative clause in s 109 of the Police Integrity Act precluded review for non-jurisdictional error.[91]

98. Further or alternatively, in circumstances where a breach of s 38(1) is established, the Court should grant injunctive or declaratory relief. It is uncontroversial that prospective relief is available irrespective for a breach of s 38(1).[92]

99. In these proceedings, if the Court found that the decision was unlawful under s 38(1) of the Charter, the Court could <u>at least</u> make a declaration that the Magistrates' Court's decision is unlawful.

DATED: 8 November 2017

KYLIE M EVANS

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88 *Craig v South Australia* (1995) 184 CLR 531, 571-573; *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531; *Re Refuge Tribunal; Ex parte Aala* (2000) 204 CLR 82, 141.

89 *Bare v IBAC*, 199-200 [221]-[224] (Warren CJ, in obiter); 213 [235], 217-218 [275]-[276], 222-226 [287]-[301] (Tate JA); 298-299 [538]-[541], 306-307 [558]-[559] (Santamaria JA).

90 *Bare v IBAC*, 203 [236], 236-237 [328] (Tate JA), 307-309 [560]–[569] (Santamaria JA).

91 *Bare v IBAC*, 165 [102], 169 [114] (Warren CJ).

92 Ibid 180 [152], 171 [124] (Warren CJ); 255 [388] (Tate JA) citing *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355, 393 [100]; 330 [624] (Santamaria JA); *Certain Children (No 2)*, [556].

SCHEDULE OF PARTIES

BETWEEN:

ZAYDEN CEMINO	Plaintiff
- and -	
JASON TIMOTHY CANNAN	First Defendant
- and -	
BREE LOUISE GEORGE	Second Defendant
- and -	
ANTHONY GALE GALLAGHER	Third Defendant
- and -	
PETER ALAN COLLIVER	Fourth Defendant
- and -	
WAYNE LESLIE SPERLING	Fifth Defendant
- and -	
STEPHEN PETER TAYLOR	Sixth Defendant
- and -	
SIMON JOHN O'TOOLE	Seventh Defendant
- and -	
IAN FORBES CARFOOT	Eighth Defendant
- and -	
~~**RUSSELL ADCOCK**~~	~~Ninth Defendant~~
- and -	
MAGISTRATES' COURT OF VICTORIA	Tenth Defendant
- and -	
ATTORNEY-GENERAL FOR THE STATE OF VICTORIA	First Intervenor
- and -	
VICTORIAN EQUAL OPPORTUNITY AND HUMAN RIGHTS COMMISSIONER	Second Intervenor