

IN THE MAGISTRATES' COURT OF VICTORIA
AT MELBOURNE

CASE NO. [A10288537](#)

IN THE MATTER OF

CONSTABLE DELANEY

V.

KYLE MAGEE

DEFENCE SUBMISSIONS & AUTHORITIES

Date of Document:
Filed on behalf of:
Prepared by:
Victoria Legal Aid
350 Queen Street
Melbourne VIC 3000

28 October 2010
The accused
Ref: James Anderson
Solicitor's Code: 2134
Telephone: 9269 0283
Facsimile: 9269 0498

Table of Contents

- 1. Summary of Legal Argument**
- 2. Factual and Procedural Background of the Alleged Offending and Charges**
- 3. R v Momcilovic – Applying the Charter**
- 4. Determine the content of the right under consideration – Section 15 of the Charter**
 - 4.a *Motivation for Offending*
 - 4.b *Application of Section 15 of the Charter to Mr Magee’s Offending*
 - 4.c *Limitations on Section 15(2)*
 - 4.d *Limitation on Section 15(2): Section 15(3)(a)*
 - 4.e *Limitation on Section 15(2): Section 15(3)(b)*
 - 4.f *Conclusion*
- 5. Can Criminal Damage be Interpreted in accordance with Freedom of Expression?**
 - 5.a *How has section 32 been interpreted?*
 - 5.b *Interpretation of Criminal Damage*
 - 5.c *Why this Interpretation is Consistent with the Intention of Parliament*
- 6. If Criminal Damage cannot be interpreted consistently with Freedom of Expression, is the restriction on Freedom of Expression justified by Section 7(2) of the Charter**
- 7. Declaration of Incompatibility & referral to the Supreme Court**

1. Summary of Legal Argument

1. The accused, Mr Magee, pleads not guilty to the offence of criminal damage. He accepts, however, the allegations of fact made against him by the prosecution. He argues that, at law, they do not establish his guilt.
2. In summary, it is argued that:
 - a. Mr Magee holds a genuine belief that advertising in its current form is wrong and that intervention by the government to ban or regulate such advertising is required;
 - b. His action of painting over an advertisement in front of the County Court is a symbolic non-violent protest designed to express, in an artistic manner, his contempt for advertising;
 - c. section 15(2) of the Charter protects expression of ideas, even where the form of expression is abstract.
 - d. Section 32 of the Charter protects his right to freedom of expression by operating to interpret criminal laws “so far as it is possible to do so consistently with their purpose” in a manner compatible with human rights.
 - e. The offence of criminal damage can be interpreted in a manner compatible with Mr Magee’s human rights by expanding the meaning of *lawful excuse*, which is a defence to a charge of criminal damage. An inclusive definition of lawful excuse is found at section 201 of the *Crimes Act 1958*. It is proposed that section 32 of the Charter can achieve the object of interpreting lawful excuse to include Mr Magee’s conduct.
 - f. If the Court cannot interpret the law of criminal damage consistently with Mr Magee’s right to freedom of expression it must consider whether the restriction on freedom of expression created by the offence of criminal damage can be justified by reference to section 7(2) of the Charter. It is argued that this limitation cannot be justified within a free and democratic society.
3. It is accepted that this argument is unusual and is reliant upon development of jurisprudence through use of the Charter. In relation to the development of human rights jurisprudence, President Maxwell has stated the following:

I wish to emphasise, as follows:

- 1. The Court will encourage practitioners to develop human rights-based arguments where relevant to a question in the proceeding.*
- 2. Practitioners should be alert to the availability of such arguments, and should not be hesitant to advance them where relevant.*
- 3. Since the development of an Australian jurisprudence drawing on international human rights law is in its early stages, further progress will*

necessarily involve judges and practitioners working together to develop a common expertise.

That there is a proper place for human rights-based arguments in Australian law cannot be doubted.¹

2. Factual and Procedural Background of the Alleged Offending and Charges

4. The contents of the police brief are admitted, and the summary represents an agreed statement of facts. The defence wishes to make a few observations about the offending:
5. The damage alleged is painting over a single panel of a bus shelter located on Williams Street, near the corner of Lonsdale Street, outside the County Court.
 - a. That shelter consists of three glass panels in a row, which provide shelter to those waiting at the bus stop. The centre panel contains advertising on both sides (one facing pedestrians walking along Williams Street and the other facing onto Williams Street itself). The advertising on each side is protected by sheet glass. The other two panels are simply sheet glass with no advertising contained therein, and are see through.
 - b. The damage consists of painting over the advertising panels to effectively block out the advertising, leaving a white painted panel where there once was advertising.
 - c. Kyle put up a wet paint sign on the first panel he painted over. He had with him a second wet paint sign to put over the second panel he was painting over at the time of arrest.
 - d. The damage was fixed by the victim, Adshell, engaging a paint removal company who were able to fix the damage at a cost of \$40.17.
6. PSO Linda Joan KEMP was the initial arresting officer. She asked Kyle Magee why he painted over the bus shelter, to which he responded:
 - a. "I believe advertising should be illegal, it's just something I really hate, I know you probably don't understand but it's just something I feel strongly about and I want to do something about it. I paint over it to make my point."
 - b. This statement was made at the time of arrest. He also provided Constable Delaney with a preprepared statement which forms exhibit 7 in the brief of evidence. This explains his motive for the offending.
 - c. Mr Magee gave evidence as to his motivation for committing the offending the subject of the charge and his views about advertising.

¹ *Royal Women's Hospital v Medical Practitioners Board of Victoria* [2006] VSCA 85 (20 April 2006), paragraphs 70 - 71

7. Her Honour Magistrate Cameron bailed Mr Magee on the day he was charged on his own undertaking that he not attend the area bordered by King, Latrobe, Bourke and Queen Street except for the purpose of attending Court. Mr Magee has not breached his undertaking of bail.
8. Mr Magee has admitted his criminal history in his evidence in chief. Mr Magee has been found guilty of this offence 28 times before and has served a total of 157 days on sentence and an additional 30 days on remand (which have not been accounted for in sentences he has received) since September 2007.
9. Mr Magee has engaged in conduct which is bound to result in his arrest, by continuing to paint over advertising panels at the same sight, in full view of police and protective service officers, during office hours.

3. R v Momcilovic – Applying the Charter

10. The Charter protects the rights enumerated in it by, amongst other things, section 32. Section 32 provides as follows:

Interpretation

(1) 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.

(2) International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision.

11. On 17 March 2010 Maxwell P, Ashley & Neave JJA delivered the Court of Appeal's unanimous decision in *Momcilovic*². This decision clarifies the Court's interpretative function under section 32.
12. When interpreting legislation in accordance with section 32, the Court must:
 - a. Determine the content of the right under consideration.
 - b. The Court must then see if the relevant statutory provision can be interpreted in accordance with this right. If it can be, the enquiry stops here.
 - c. If the right cannot be interpreted consistently with the statutory provision, is the restriction of the right justifiable by reference to section 7(2) of the Charter? If the restriction can be justified, the enquiry stops here.
 - d. If the restriction cannot be justified by reference to section 7(2) of the Charter the Supreme Court must issue a declaration of incompatibility.

² *The Queen v Vera Momcilovic & Ors* [2010] VSCA 50.

13. This decision proposed a different approach to that previously enunciated by Chief Justice Warren in *Re an application under the Major Crime (Investigative Powers) Act 2004* [2009] VSC 381 (7 September 2009) and a number of judgments of Justice Bell when he was sitting as President of the VCAT.
14. These submissions follow the test set out in *Momcilovic*.

4. Determine the content of the right under consideration – Section 15 of the Charter

4.a Motivation for Offending

15. Mr Magee's motivation for the offending and his views about advertising are the subject of evidence. They consist of his statements to arresting officers at the time of arrest, his ROI, the preprepared statement he provided to police and evidence he gave at this hearing.
16. In a summary form, paraphrasing the evidence, Mr Magee's complaint about advertising can be expressed as follows:
 - Advertising seeks to expand and secure a market for a particular good or service by promoting that good or service to consumers.
 - This is not solely achieved through the provision of accurate information.
 - Advertising primarily seeks to persuade a consumer through a deceptive abuse of the science of psychology and the perversion of art. In doing so, it seeks to overbear the critical faculties of the observer.
 - Advertising affects, or attempts to affect, an observer's image of themselves, often to the observer's detriment, in order to encourage users to consume a particular product or service.
 - By way of example, a pair of jeans can be advertised to a consumer not just by providing information about the properties and qualities of the jeans, but by encouraging emotions in the consumer of inadequacy leading to low self esteem.
 - In doing so, advertising promotes consumerism and waste. People consume goods and services they don't rationally need or require.
 - Advertising also compromises the independence of commercial media, who are, or at least should be, the unofficial fourth institution of a democracy. Most television news networks and newspapers are dependent on advertising money for their profitability. A media outlet has an interest in publishing material that resonates with the messages of their advertisers. They are also interested in producing newspapers which will sell more product.
 - The dissemination of true and accurate knowledge makes the democratic process meaningful. Democratic decisions are undermined if the information they are based on is unreliable. If the freedom and integrity of the media is weakened it follows that

democracy must be weakened. Dependence on advertising revenue puts media in a continuing conflict of interest.

- Improved global democracy is the solution to extreme poverty, ecological disaster, constant violent conflict and all kinds of suffering and oppression. Improved global democracy is, at least in part, dependent on free media.
- Advertising occupies public space, and occupies that space because it can afford to buy the rights to that space. As the majority of people cannot afford to buy rights to use that space an inequality results, in which the views of few are overly represented in public space. The right to use a public space to convey a message should be distributed on a more egalitarian basis.

17. Mr Magee believes that advertising, at least in its current form, should be made illegal worldwide. He holds a genuine belief that the world would be a better place if this occurred.
18. His offending is symbolic. He uses white paint to effectively block out an advertising panel. No written message or slogan is left. He creates a barrier between the advertising and the public space, inviting the observer to reflect on whether the public space is better for the act. It is hoped the observer will appreciate the effect of the deletion of advertising from public space and foster within the public a consensus that advertising should be banned.
19. In its simplest form, by painting over the advertising Mr Magee demonstrates his contempt for advertising, expressing an idea that advertising is wrong and that it should be removed from our public space.
20. It is committed in circumstances which can only be said to almost certainly lead to apprehension. It is also done in a way designed to cause a minimum amount of damage. The scale of the offending is small. It is done with a water based paint, which Mr Magee believes can be more easily removed than other paints. In this case the paint could be removed through \$40.17 worth of cleaning.
21. It is a non violent political protest. Though damage is caused to property owned by AdShell, this is in stark contrast to more common forms of criminal political activism which, in modern society, range from violent protests and clashes with police to serious acts of terrorism.
22. The offending is rational and intentional.
23. Mr Magee has been found guilty of this offence 28 times before and has served a total of 157 days on sentence and an additional 30 days on remand (which have not been accounted for in sentences he has received) since September 2007.
24. Given the above facts, it is clear that Mr Magee's behaviour demonstrates a clear intention to express himself politically. He believes advertising in its current form should be abolished and criminalised. This is a political end, requiring legislative intervention.

25. Mr Magee does not enjoy prison. He would far rather avoid it. He finds it burdensome and a place of suffering. He exposes himself to the risk of incarceration because of the strength of his beliefs about advertising and the need to do something about it.

4.b Application of Section 15 of the Charter to Mr Magee's Offending

26. Section 15(2) of the Charter provides:

15. Freedom of expression

1. *Every person has the right to hold an opinion without interference.*
2. *Every person has the right to freedom of expression which includes the freedom to seek, receive and impart information and ideas of all kinds, whether within or outside Victoria and whether-*
 - a. *orally; or*
 - b. *in writing; or*
 - c. *in print; or*
 - d. *by way of art; or*
 - e. *in another medium chosen by him or her.*
3. *Special duties and responsibilities are attached to the right of freedom of expression and the right may be subject to lawful restrictions reasonably necessary-*
 - a. *to respect the rights and reputation of other persons; or*
 - b. *for the protection of national security, public order, public health or public morality.*

27. It is submitted that given the above explanation of the offending, Mr Magee clearly holds opinions and ideas. In this instance, he is attempting to impart those ideas by way of art³, or at least in another medium⁴. The purpose of imparting those ideas is to encourage other people to adopt similar ideas. By doing so he can create political pressure on the government to ban or regulate advertising. In this sense, he is engaging in political expression.

28. Section 32(2) of the Charter provides that "international law and the judgments of... foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision". The author's research did not uncover any cases relating to graffiti.

³ Section 15(2)(d)

⁴ Section 15(2)(e)

29. There is Canadian authority for the proposition that freedom of expression includes postering⁵, which is similar in many respects to graffiti.

30. In *Ramsden v Peterborough (City)*⁶ (the **Ramsden Case**) the Full Court of the Canadian Supreme Court in considered a municipal by-law prohibiting the placing of posters on any public property within the city of Peterborough. The defendant in that case had put up posters advertising an upcoming performance by his band on hydro poles within the city. He was charged with an offence under the by-law. He claimed the law was unconstitutional because it violated his right to freedom of expression. The offence created was a summary offence, punishable by a maximum fine of \$2,000.

31. Similar to graffiti, the Court found that postering has the potential to:

- damage public and private structures (through the application of adhesives);
- create litter; and
- denigrate the beauty of public spaces.

32. Similar to section 15 of the Charter, section 2(b) of the Canadian Charter provides that “Everyone has the following fundamental freedoms:… freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.”

33. Iacobucci J gave the judgment of the Court in the Ramsden Case. He considered whether postering constitutes expression under section 2(b). It was held that it did, as it is an activity which conveys or attempts to convey a meaning. He made the observation that

*“postering has historically been an effective and relatively inexpensive means of communication. Posters have communicated political, cultural and social information for centuries. Postering on public property including utility poles increases the availability of these messages, and thereby fosters social and political decision-making.”*⁷

34. He further referred to a decision of L'Heureux-Dubé J in *Committee for the Commonwealth of Canada v. Canada* (1992), 17 *Queen's L. J.* 489 that emphasised that for those with scant

⁵ Section 32(2) of the Charter provides that international law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision.

⁶ *Ramsden v. Peterborough (City)*, [1993] 2 S.C.R. 1084.

⁷ Ramsden Case, page 16

resources, the use of public property may be the only means of engaging in expressive activity⁸.

35. It is important to note that in this case the Court was considering expression that essentially constituted promotion of the accused's own band. Such expression is almost purely self interested. An analysis of cases related to freedom of expression demonstrates that political expression is generally to be afforded the greatest protection or all types of expression (see discussion at paragraphs -). Accordingly, the principles which were applied in *Ramsden's Case* should be applied with greater force here, because of the fact the expression is political.

36. Mr Magee's graffiti is essentially similar to the postering considered in *Ramsden's Case*, in that both:

- Can convey or attempt to convey meaning.
- Are relatively effective and inexpensive means of communication and a means for those with scant resources to engage in expressive activity.
- Have a long tradition in our society.
- Can increase the availability of messages to the public, thereby fostering social and political decision making.
- Can cause damage to public and private structures and denigrate the beauty of a public space.

37. It is submitted that the decision in *Ramsden's Case* should guide the Court's interpretation of the meaning of expression in this case.

38. That Mr Magee's ideas, opinions or expression may be seen as irrational, wrong or unpopular is not the question to be determined. In the case of *Sanders v Kingson* [2005] EWHC 1154 (Admin) the UK High Court quoted the following with approval:

*"[T]he court has to recall that freedom of expression... constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self fulfillment. Subject to paragraph 2 (similar to section 15(3) discussed below), it is applicable not only to "information or ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb"*⁹

39. At paragraph 84 of that judgment the Court states that political expression "attracts a higher level of protection" than other expression.

⁸ Ramsden Case, page 17

⁹ At paragraph 69

4.c Limitations on Section 15(2)

40. The Charter does not protect all types of expression, such a situation would be absurd.
41. The right of freedom of expression is limited by section 15(3), which limits the right to freedom of expression set out in section 15(2). Accordingly, the first hurdle when considering freedom of expression is to ensure the freedom in a specific instance is not limited by the operation of section 15(3).

4.d Restriction on Section 15(2): Section 15(3)(a)

42. Section 15(3)(a) provides that the right to freedom of expression may be limited subject to lawful restrictions reasonably necessary to “respect the rights and reputation of other persons” [emphasis added].
43. Section 3 of the Charter defines person to mean a *human being*. Section 6 of the Charter states that “only persons have human rights”.
44. While a corporation is a legal personality, it is not a human being. The victim in this matter, Adshell, is a corporation and not a human being. Section 15(3)(a) has no application in this case.

4.e Restriction on Section 15(2): Section 15(3)(b)

45. Section 15(3)(b) provides that the right to freedom of expression may be subject to “lawful restrictions *reasonably necessary* for the protection of national security, public order, public health or public morality” [emphasis added].
46. It is submitted that Mr Magee’s action does not place national security, public health or public morality at risk. Public morality may arguably be jeopardised by graffiti of a profane or obscene nature, however no profanity or obscenity attends Mr Magee’s actions. No violence or apprehension of violence is caused by Mr Magee at any stage. Mr Magee has 28 priors for criminal damage. He has no history of violence or of resisting police.
47. The only conceivable justification under section 15(3)(b) for restricting Mr Magee’s right to freedom of expression might be that the offence of criminal damage is a lawful restriction reasonably necessary for the protection of public order. Public order is not defined in the Charter.
48. In *Brooker v The Police* [2007] NZSC 30 (4 May 2007) (**Brooker’s Case**) the Supreme Court of New Zealand considered the meaning of public order in a human rights context.
49. Brooker was convicted of offensive behaviour or language by making a public protest outside the house of a police constable. This was done by Brooker standing outside the Constable’s address at 9:20pm (after the Constable had been on nightshift) and singing with a guitar accompaniment. The lyrics were not profane, but suggestive that the

constable had engaged in illegal searches and malicious prosecutions¹⁰. He continued to sing for 25 minutes before his arrest.

50. The Charge was “Offensive behaviour or language” and provides “every person is liable to a fine not exceeding \$1,000 who, in or within the view of any public place, behaves in an offensive or disorderly manner”.

51. The Court considered that this offence had to be interpreted in light of the right to Freedom of Expression contained in section 14 of the *New Zealand Bill of Rights Act* 1990 (NZ). The Court acknowledged that the right to expression was limited by the need to protect other important interests, including public order¹¹.

52. In this context, the New Zealand Supreme Court, composed of 5 separate Justices, gave five separate judgments. These judgments had a tendency to concur as to the question of what constituted a threat to public order.

- Elias CJ stated that behaviour threatening public order had to go beyond being disruptive or seriously annoying. Instead, it requires “an overtly manifested disturbance which constitutes an interference with the ordinary and customary use by the public of the place in question”¹².
- Blanchard J held that behaviour “must cause a disturbance of good order which in the particular circumstances of time and place any affected members of the public could not reasonably be expected to endure because of its intensity or its duration or a combination of both those factors”.¹³ Furthermore, “public order will less readily be seen to have been disturbed by conduct which is intended to convey information or express an opinion than by other forms of behaviour”¹⁴.
- Tipping J held that “conduct... is disorderly if, as a matter of time, place and circumstance, it causes anxiety or disturbance at a level which is beyond what a reasonable citizen should be expected to bear¹⁵” and went on to hold that “where, as here, the behaviour concerned involves a genuine exercise of the right to freedom of

¹⁰ Brooker’s Case, paragraph 13-15

¹¹ Brooker’s Case, paragraph 4

¹² Brooker’s Case, paragraph 42 - 47

¹³ Brooker’s Case, paragraph 56

¹⁴ Brooker’s Case, paragraph 59

¹⁵ Brooker’s Case, paragraph 90

expression, the reasonable member of the public may well be expected to bear a somewhat higher level of anxiety or disturbance than would otherwise be the case¹⁶.

53. It is submitted that this test should be followed in this case. When applying this test, each case should be judged on its merits. On any of the definitions provided above, it is submitted that Mr Magee's behaviour falls short of being a sufficient threat to public order to limit the right.
54. Mr Magee's conduct causes some interference to the ordinary and customary use of the bus shelter. Until the paint dries, the utility of the bus shelter is slightly reduced because it reduces the amount of useable space within the bus shelter (assuming people want to avoid the wet paint). However, this interference is not such that a person could not be reasonably expected to bear it.
55. The interference doesn't go beyond being disruptive or seriously annoying. It is a temporary one, lasting only until the paint dries. The bus shelter is as serviceable with or without paint on the advertising panel. A wet paint sign is even put up to reduce the risk of people inadvertently getting paint on themselves.
56. Importantly, there was no complaint made by the public either during or after the incident. The arrest was effected on the initiative of the protective services officers.
57. Furthermore, because Mr Magee's conduct is intended to convey information or express an opinion, public order should less readily be seen to be disturbed by his actions.
58. Protecting graffiti type offending by reference to section 15 of the Charter creates obvious concerns. However, all cases would have to be decided on their merits. Section 15(3)'s operation would likely prevent the protection of expression, political or otherwise, which for instance:

- Is of a profane or immoral nature;
- Incited hatred (eg fascist slogans);
- Involved significant destruction of property;
- Involved damage which creates a safety risk to the public;
- Was defamatory;
- Was an act of terrorism;
- Was an act conducive to the creation of fear; or
- Was an act of violence¹⁷.

4.f Conclusion

¹⁶ Brooker's Case, paragraph 92

¹⁷ Offences involving violence have been held not to constitute protected political expression in Canada, see *Irwin Toy Ltd v Quebec (Attorney-General)* [1989] 1 SCR 927 at 970

59. It is submitted that Mr Magee's "graffiti" constitutes political expression. Canadian Supreme Court authority supports the proposition that similar conduct, postering, can constitute protected expression.
60. Furthermore, it is submitted that section 15(3), which is a limit on the right to freedom of expression, doesn't operate in this case to restrict Mr Magee's freedom of expression. The only limit which could potentially apply, the need to preserve public order, does not apply because the disturbance to public order is minimal.

5. Can Criminal Damage be Interpreted in accordance with Freedom of Expression?

5.a How has section 32 been interpreted?

61. Section 32 of the Charter is set out at paragraph above. In *Momcilovic* the Court found that section 32(1) has the same status as the *Interpretation of Legislation Act 1984* (Vic):

It is a statutory directive, obliging courts (and tribunals) to carry out their task of statutory interpretation in a particular way. It is part of the body of rules governing the interpretive task.

*Compliance with the [s 32\(1\)](#) obligation means exploring all 'possible' interpretations of the provision(s) in question, and adopting that interpretation which least infringes Charter rights. What is 'possible' is determined by the existing framework of interpretive rules, including of course the presumption against interference with rights. That is a powerful presumption, as Gleeson CJ made clear in *Plaintiff S157/2002 v The Commonwealth*, for example:*

[C]ourts do not impute to the legislature an intention to abrogate or curtail fundamental rights or freedoms unless such an intention is clearly manifested by an unmistakable and unambiguous language. General words will rarely be sufficient for that purpose. What courts will look for is a clear indication that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment. ... [I]n the absence of express language or necessary implication, even the most general words are taken to be 'subject to the basic rights of the individual'.

As this passage makes clear, the presumption does not depend for its operation on the existence of any ambiguity in the statutory language.¹⁸

¹⁸ Momcilovic, paragraphs 102 - 103

5.b Interpretation of Criminal Damage

62. Having above determined the content of the right under consideration, being section 15 (2), the Court must then attempt to interpret relevant statutory provisions in accordance with it. The relevant statutory provisions are section 197 and 201 of the *Crimes Act 1958* (Vic).

63. Section 197(1) of the *Crimes Act 1958* (Vic) creates an offence entitled “Destroying or Damaging Property”, commonly referred to as **criminal damage**. It provides that:

A person who intentionally and without lawful excuse destroys or damages any property belonging to another or to himself and another shall be guilty of an indictable offence and liable to level 5 imprisonment. [emphasis added]

64. It is an indictable offence and punishable by a maximum penalty of 10 years imprisonment.

65. The offence provides a defence of lawful excuse. Section 201 provides a inclusive, non exhaustive, definition of lawful excuse:

201. Lawful excuse

- 1. This section applies to any offence under section 197(1), 198(a) or 199(a)(i).*
- 2. A person charged with an offence to which this section applies shall, whether or not he would be treated for the purposes of this subdivision as having a lawful excuse apart from this subsection, be treated for those purposes as having a lawful excuse-*
 - a. if at the time of the conduct alleged to constitute the offence he believed-*
 - i. that the property in question belonged solely to himself;*
 - ii. that he held a right or interest in the property in question which authorized him to engage in the conduct; or*
 - iii. that the person or persons whom he believed to be entitled to consent to the destruction or damage in question had so consented or would have so consented if he or they had known the circumstances of the destruction or damage; or*
 - b. if he engaged in the conduct alleged to constitute the offence in order to protect property belonging to himself or another or a right or interest in property which was or which he believed to be vested in himself or another, and at the time of such conduct he believed-*
 - i. that the property, right or interest which he sought to protect was in immediate need of protection; and*

ii. that the means of protection adopted or proposed to be adopted were or would be reasonable having regard to all the circumstances.

...

5. *This section shall not be construed as taking away or otherwise affecting any other defence recognized by law as a defence to criminal charges.*

66. Prima facie, Mr Magee's behaviour is captured by the offence provision in section 197. Furthermore, none of the defined categories of lawful excuse provided for in section 201 (2) are of any avail.
67. Lawful excuse is broader than those defined categories in section 201, as section 201 provides a non-exhaustive definition of lawful excuse. The wording of the legislation implicitly, if not expressly, indicates that the definition of lawful excuse is non-exhaustive in two ways.
68. First, section 201(2) refers to an accused being treated as having a lawful excuse if they fit one of the categories defined in section 201(2)(a) and 201(2)(b) "whether or not he would be treated for the purposes of this subdivision as having a lawful excuse apart from this subdivision". This anticipates that a lawful excuse exists independently of the categories created by section 201(2).
69. Second, section 201(5) expressly provides that section 201 "shall not be construed as taking away or otherwise affecting any other defence recognized by law as a defence to criminal charges." Given that section 201 only purports to deal with the definition of lawful excuse, this provision should be taken to have been included in the Act to make it abundantly clear that other categories of lawful excuse may exist.
70. Accordingly, the defence submits there are categories of lawful excuse which go beyond those specifically recognised in section 201. Due to the lack of an exhaustive definition of the term "lawful excuse", the term remains amenable to interpretation and the recognition of further categories.
71. That the specific examples of "lawful excuse" in the Act are not intended to cover the field is consistent with the view expressed in Bourke's Criminal Law (extract enclosed, see commentary on section 201). The burden is on the prosecution to rebut lawful excuse beyond reasonable doubt.
72. Although criminal damage has traditionally been used in Victoria to prosecute graffiti cases, the Charter allows the Court to revisit the interpretation of this offence and the meaning of lawful excuse. As stated above, *Momcilovic* is authority for the proposition that the Court must explore all 'possible' interpretations of the lawful excuse provision and adopt the interpretation which least infringes Charter rights.

73. In doing this the Court must adopt the interpretative rule that “Courts do not impute to the legislature an intention to abrogate or curtail fundamental rights or freedoms unless such an intention is clearly manifested by an unmistakable and unambiguous language¹⁹”.
74. The right to freedom of expression is an important and fundamental right, recognised by the Victorian Government, who has protected it by including it in the Charter. Nothing in the law of criminal damage expressly demonstrates an intention to abrogate the right to freedom of expression.
75. The defence of lawful excuse, which is left open to interpretation, allows for possible interpretations which exempt damage caused for the purpose of freedom of expression. This interpretation should be preferred, as it is the interpretation that least infringes Charter rights.
76. A new category of lawful excuse should be recognised as a result of the implementation of the Charter. The wording of that new category of lawful excuse may take on various forms, but on these facts it would be sufficient for the new category of lawful excuse to read something similar to:

“A person shall be treated as having a lawful excuse if he or she engaged in the conduct alleged for the primary purpose of political expression and that expression would ordinarily be protected under section 15(2) of the Charter, subject to the limitations imposed by section 15(3)²⁰.”

77. Alternatively, the new category of lawful excuse could simply read:

“A person shall be treated as having a lawful excuse if the conduct is protected by section 15 of the Charter”

78. In either event, the restrictions on the right to freedom of expression imposed by section 15(3) would continue to apply. This would significantly limit the number of graffiti type offences that would attract a lawful excuse defence.

5.c Why this Interpretation is Consistent with the Intention of Parliament

79. A legitimate concern is that this interpretation would open the flood gates to graffiti type offending that would be subsequently defended on the basis of section 15 of the Charter. It might be argued that this would subvert parliament’s intention, which is that graffiti offences be prevented.

¹⁹ Momcilovic, paragraph 103

²⁰ The initial wording of this is based on that found in section 201(2)(b)

80. First, there is no evidence that the intention of parliament in passing this law was to prevent damage caused by political graffiti, or even non-political graffiti. Criminal damage is an offence broad enough to deal with the demolition of a house and the shredding of a book. By using general words the offence provision has captured a very broad range of conduct, including conduct which constitutes political expression. If the parliament had intended that the offence of criminal damage abrogate human rights it should have used express language making it clear that the abrogation of rights was intended.
81. Second, a review of the statutory scheme covering property offences in Victoria clearly shows that such conduct can be adequately punished by summary offences. This suggests that it is parliament's intention that graffiti offences be dealt with by these summary offences and not the offence of criminal damage.
82. In addition to criminal damage, the statutory scheme preventing property damage offences includes:
- Wilful Damage;
 - Postering Bills Etc... and Property Damage; and
 - Marking Graffiti.

83. *Wilful Damage*

Section 9 of the *Summary Offences Act 1966 (Vic)* creates an offence commonly referred to as Wilful Damage. It creates a number of offences, but the relevant one is found at section 9(1)(c). It provides that

“any person who... wilfully injures or damages any property (whether private or public) the injury done being under the value of \$5000...shall be guilty of an offence.”

Penalty: 25 penalty units or imprisonment for six months.

84. *Posting Bills Etc... and Property Damage*

Section 10 of the *Summary Offences Act 1966 (Vic)* creates an offence of Posting Bills etc... and Defacing Property. Section 10(1) relevantly provides as follows:

Any person who posts any placard bill sticker or other document on or writes or *paints* on or otherwise defaces any road bridge or footpath or any house building hoarding wall fence gate tree tree-guard post pillar hydrant fire-alarm petrol pump or other structure whatsoever without the consent of the occupier

or owner of the premises concerned or of any person or body having authority to give such consent shall be guilty of an offence.

Penalty: 15 penalty units or imprisonment for three months.

85. *Marking Graffiti*

Section 5 of the *Graffiti Prevention Act 2007* (Vic) creates an offence of Marking Graffiti. This is a relatively recent Act and offences under this Act are seldom prosecuted, in the author's experience as a duty lawyer, for reasons unknown. The relevant parts of the *Graffiti Prevention Act 2007* (Vic) came into operation on 17 April 2008 by government proclamation.

Section 5 creates the offence of Marking Graffiti. It relevantly provides that:

A person must not mark graffiti on property if the graffiti is visible from a public place unless the person has first obtained the express consent of the owner, or an agent of the owner, of the property to do so.

The penalty for this offence is level 7 imprisonment, being a term of imprisonment of up to two years.

Section 3 provides that Marking Graffiti means:

Write, draw, mark, scratch or otherwise deface property by any means so that the defacement is not readily removable by wiping with a dry cloth.

Section 6 provides for an offence of Marking Offensive Graffiti. It relevantly provides that:

(1) A person must not mark graffiti that is visible from a public place if the graffiti, or any part of the graffiti, would offend a reasonable person.

Penalty: Level 7 imprisonment

(2) Subsection (1) does not apply to graffiti that is reasonable political comment.

86. The three property damage offences referred to above are summary offences, with maximum penalties ranging between three months imprisonment to two years imprisonment.

87. The offences of Posting Bills Etc..., Property Damage and Marking Graffiti specifically address offending characterised by the application of paint to public structures.
88. The offence of Marking Graffiti came into effect as recently as 2008. Section 1(a) provides that the purpose of the Act was to reduce the incidence of graffiti by creating graffiti related offences. The will of parliament appears to be that graffiti offences be dealt with under this law, not Criminal Damage. Accordingly, having reference to the statutory scheme of property offences it is apparent that a reinterpretation of criminal damage and lawful excuse is not inconsistent with the intention of parliament.
89. Furthermore, unlike the offence of criminal damage the *Graffiti Prevention Act 2007* specifically anticipates graffiti that constitutes “reasonable political comment”.

6. If Criminal Damage cannot be interpreted consistently with Freedom of Expression, is the restriction on Freedom of Expression justified by Section 7(2) of the Charter

90. This section is only relevant in the event that the Court finds that it cannot interpret the offence of criminal damage consistently with the Charter.
91. In *Momcilovic* the Court stated that if a right cannot be interpreted consistently with a statutory provision the Court should look to whether the restriction is justifiable by reference to section 7(2) of the Charter.
92. Section 7(2) provides as follows:

7(2) A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including—

- a. the nature of the right; and*
- 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.*

93. At this point, the onus falls upon the party seeking to limit a right, in this case the prosecution, to ‘demonstrably justify’ the restriction. Chief Justice Warran stated the following in *DAS v Victorian Human Rights & Equal Opportunity Commission* [2009] VSC 381:

The onus of ‘demonstrably justifying’ the limitation in accordance with s 7 resides with the party seeking to uphold the limitation. In light of what must be justified, the standard of proof is high. It requires a ‘degree of probability which is commensurate

with the occasion'. King J observed in Williams that the issue for the court is to balance the competing interests of society, including the public interest, and to determine what is required for the accused to receive a fair hearing. It follows that the evidence required to prove the elements contained in s 7 should be 'cogent and persuasive and make clear to the Court the consequences of imposing or not imposing the limit'

94. This was quoted with apparent approval in the case of *Momcilovic* at paragraph 144.
95. In this case, it is submitted that the prosecution would fail in this task for the following two reasons:
 96. First, it can't be said that there aren't less restrictive means reasonable available to achieve the purpose the limitation seeks to achieve. Summary offences with lower penalties are sufficient to protect against damage resulting from political graffiti. The summary offences have lesser maximum penalties and do not carry the status of indictable offences. This is relevant to section 7(2)(e).
 97. Second, there is no evidence that political graffiti constitutes a significant problem which needs to be addressed by the criminal justice system. Given the importance of freedom of political expression, the Court would need to be satisfied that absent laws preventing political graffiti that it would constitute a problem that required the intervention of the criminal law. Relevant to this is that civil remedies for property damage already exist and have a deterrent function. This is relevant generally to the considerations set out in section 7(2).
98. The prosecution is calling no evidence to establish that the prohibition on political graffiti created by the offence of criminal damage is "demonstrably justified in a free and democratic society". Absent this evidence, it is submitted that the court does not have the "cogent and persuasive" evidence necessary for it to agree to impose a limit on the right to freedom of expression by reference to section 7(2).

7. Declaration of Incompatibility & referral to the Supreme Court

99. This section is only relevant if the Court finds it cannot interpret the offence of criminal damage consistently with the Charter **and** that the limitation on freedom of expression is not justified by reference to section 7(2).
100. In this instance, the Supreme Court is empowered to make a declaration of inconsistent interpretation. The Magistrates' Court does not have this power. Should the Court reach this point the defence requests that the matter be referred to the Supreme Court pursuant to section 33 of the Charter for determination.
101. The leading case on this matter is *De Simone v Bevnol Constructions and Developments Pty Ltd & Ors* [2010] VSCA 231. This case suggests that section 33 referrals by

Court's should only be made in circumstances where findings of fact have been made.
This prevents the Court from dealing with theoretical questions.

102. The Court of Appeal also suggests that it would benefit from the reasons of a first instance decision maker.

103. Accordingly, prior to the referral being made the defence requests that the Court make findings of fact and law in relation to whether:

- a. Mr Magee's conduct constitutes expression under section 15(2) of the Charter
- b. Mr Magee's right to freedom expression is limited by section 15(3) of the Charter
- c. The law of criminal damage can be interpreted consistently with Mr Magee's right to freedom of expression
- d. If the answer to 3 is no, the offence of criminal damage justifiably limits Mr Magee's right to freedom of expression by reference to section 7(2)

104. Having made those findings, the defence would seek an order under section 33 to the effect that:

Given the preceeding findings, the following question is referred to the Supreme Court for determination pursuant to section 33 of the Charter of Human Rights and Responsibilities Act 2006:

"Is the offence of criminal damage incompatible with the right to freedom of expression protected by section 15(2) of the Charter of Human Rights and Responsibilities Act 2006 and, if so, should the Supreme Court issue a declaration of incompatibility"

James Anderson

Solicitor for the Accused

Victoria Legal Aid

28 October 2010