

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

No S CI 2011 01137

IN THE MATTER of an appeal on a question of law pursuant to section 272 of the *Criminal Procedure Act 2009*

BETWEEN

KYLE MAGEE

Appellant

and

CHRISTOPHER DELANEY

Respondent

AMENDED ATTORNEY-GENERAL'S SUBMISSIONS

Date of document: 10 August 2012

Filed on behalf of the Attorney-General for the
State of Victoria

Prepared by:

Victorian Government Solicitor's Office

Level 25, 121 Exhibition Street

Melbourne VIC 3000

Solicitor Code: 7977

DX: 300077, Melbourne

Tel: 03 8684 0444

Fax: 03 8684 0449

Ref: DOJLEO 1107747

Attn: Catherine Roberts

1. The Attorney-General for the State of Victoria intervenes pursuant to s 34 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**Charter Act**).

A. Summary of submissions

2. The Appellant has filed a Notice of Appeal dated 15 March 2011 against the final orders made by Magistrate Peter Mealy, in the Magistrates' Court of Victoria in Melbourne on 14 February 2011. The Appellant appeals against the finding that the Appellant was guilty of the offence of criminal damage contrary to section 197(1) of the *Crimes Act 1958* (**Crimes Act**) and possessing an article with intent to damage property contrary to s 199(a)(i) of the Crimes Act.
3. The Notice of Appeal sets out three questions of law:

- 3.1 For the purposes of ss 197 and 199 of the Crimes Act is it a "lawful excuse" if the act that would otherwise amount to an offence was an act of expression protected by s 15 of the Charter Act? (**Question 1**)
- 3.2 Was the act of the accused, as found by the learned Magistrate, an act of expression protected by s 15 of the Charter Act? (**Question 2**)
- 3.3 Is it unlawful for a police officer not to take into account the rights protected in the Charter Act when determining which of a number of available charges to prefer against an accused person? (**Question 3**)

The Appellant submits that the learned Magistrate erred on these three questions of law.

4. In summary, the Attorney-General submits:

- 4.1 On the facts, the Appellant's conduct does not fall within the scope of the right in s 15(2) of the Charter Act because the conduct did not impart any information or ideas. Accordingly, the question of whether the term "lawful excuse" includes acts of 'protected expression' under s 15 of the Charter Act does not arise for determination.
- 4.2 In the alternative, the defence of "lawful excuse" cannot and should not be interpreted as including 'protected expression' under s 15 of the Charter Act because:
 - (a) To do so would be inconsistent with the clear purpose of the provisions, which is to protect property.
 - (b) The criminal prohibition of property damage, including that which is politically motivated, is "compatible with human rights" for the purposes of s 32 of the Charter Act as:
 - (i) The right to free expression does not extend to expression by "violent" means, including means which damage property.
 - (ii) In the alternative, the restrictions on expression imposed by ss 197 and 199 of the Crimes Act:

- (A) are reasonably necessary to respect the rights of others or for the protection of public order (s 15(3) of the Charter Act); or
- (B) are reasonable and demonstrably justified under s 7(2) of the Charter Act.

4.3 The Charter Act does not expand the jurisdiction of the courts exercising criminal jurisdiction to review a prosecutor's or informant's decision to charge an accused with a particular offence.

B. Submissions

- 5. The Attorney-General submits that the appropriate starting point for a consideration of the Charter Act issues is the interpretation of ss 197 and 199 of the Crimes Act.
- 6. In the present case there is no dispute between the Appellant and Respondent as to the elements of the offences in ss 197 and 199. The issue raised by the Appellant relates to the interpretation of the defence of "lawful excuse" in each of ss 197 and 199.

Questions do not arise on the facts

- 7. Each of the questions posed by the Appellant is predicated upon an assumption that the Appellant's conduct falls within the scope of the right to free expression contained in s 15(2) of the Charter Act.
- 8. Section 15(2) provides:

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.

9. While conduct **can** fall within the scope of the right,¹ the Attorney-General submits that to do so the conduct must have some expressive content; it must "impart information or ideas".
10. The Attorney-General agrees with the submissions of the Respondent that the right to free expression is not engaged here.² The painting over of commercial signage imparted no information or ideas whatsoever. Rather, it prevented others from receiving information or ideas contained in the signage.³
11. Accordingly there is no basis upon which the Appellant could found a defence of "lawful excuse". Nor was there any relevant right for the purposes of s 38 of the Charter Act. Accordingly, none of the questions posed by the Appellant arises for determination in this proceeding.

Question 1

12. The Appellant submits that, interpreted in accordance with s 32 of the Charter Act, an accused has a "lawful excuse" where his or her actions amount to 'protected expression' under s 15 of the Charter Act.
13. The Attorney-General submits that the interpretation advanced by the Appellant is not open, having regard to the text and purpose of ss 197 and 199 of the Crimes Act. The purpose of these criminal offences is to protect property from damage. That purpose would be significantly undermined if individuals were able to avoid criminal liability for causing damage to property on the basis that their conduct was expressive.
14. The Court of Appeal in *Slaveski v Smith* recently summarised the principles to be drawn from the High Court's decision in *Momcilovic v R* (2011) 280 ALR 221 concerning the operation of s 32 of the Charter Act:⁴

[It] emerges from *Momcilovic* that the effect of s 32(1) is limited. It requires:

¹ See the discussion of the High Court in *Levy v Victoria* (1997) 189 CLR 579 at 594-595 per Brennan CJ; at 637-638 per Kirby J. See also the discussion by Barendt in *Freedom of Speech*, 2nd ed. at pp 78-83.

² Respondent's submissions at para [1].

³ The right in s 15(2) includes to a right to *receive* information.

⁴ *Slaveski v Smith* [2012] VSCA 25 at [24]; see also [20] and [45].

statutes to be construed against the background of human rights and freedoms set out in the Charter in the same way as the principle of legality requires the same statutes to be construed against the background of common law rights and freedoms. The human rights and freedoms set out in the Charter in significant measure incorporate or enhance rights and freedoms at common law. Section 32(1) [thus] applies to the interpretation of statutes in the same way as the principle of legality but with a wider field of application...⁵

Consequently, if the words of a statute are clear, the court must give them that meaning. If the words of a statute are capable of more than one meaning, the court should give them whichever of those meanings best accords with the human right in question. Exceptionally, a court may depart from grammatical rules to give an unusual or strained meaning to a provision if the grammatical construction would contradict the apparent purpose of the enactment. Even if, however, it is not otherwise possible to ensure that the enjoyment of the human right in question is not defeated or diminished, it is impermissible for a court to attribute a meaning to a provision which is inconsistent with both the grammatical meaning and apparent purpose of the enactment

15. The Attorney-General further submits that the interpretation required or authorised by s 32 is one that is "compatible with human rights", where the words of a statute are capable of more than one meaning and insofar as such an interpretation is consistent with the purpose of the legislation. For the reasons that follow, the Attorney-General submits that the criminal prohibition of property damage, including damage caused by purportedly expressive acts, is compatible with the right to free expression in s 15 of the Charter Act.
16. The Attorney-General submits that the question of compatibility with human rights, for the purposes of s 32, must be determined having regard to:
 - 16.1 the scope of expression protected by s 15(2);
 - 16.2 the express restrictions on expression that are permitted by s 15(3); and
 - 16.3 the general limitations provision in s 7(2).
17. Consistently with the submissions of the Respondent in relation to the interpretation and application of the Charter Act to this proceeding, the Attorney-General submits that the prohibition of criminal damage in ss 197 and 199 of the Crimes Act is

⁵ (2011) 280 ALR 221, [51] (French CJ).

“compatible” (to use the language of s 32 of the Charter Act) with the right to free expression in s 15 of the Charter Act. This is because:

17.1 Property damage, including that which is politically motivated, does not fall within the scope of expression, including the expression of "information and ideas" intended to be protected by s 15(2) of the Charter Act.

17.2 In any event, the restrictions imposed by ss 197 and 199 of the Crimes Act fall within the express restrictions permitted by s 15(3) of the Charter Act in that they are reasonably necessary:

- (a) to protect the rights of others, namely property rights; and/or
- (b) to protect public order.

17.3 In the alternative, any limit on free expression imposed by ss 197 and 199 of the Crimes Act is reasonable and demonstrably justified pursuant to s 7(2) of the Charter Act.

18. Each of these submissions is considered in more detail below.

Property damage does not fall within the scope of s 15(2)

19. The common law has long recognised property rights. Section 5 of the Charter Act expressly provides that:

A right or freedom not included in this Charter that arises or is recognised under any other law (including ... the common law ...) must not be taken to be abrogated or limited only because the right or freedom is not included in this Charter or is only partly included.

20. The Attorney-General submits that, properly interpreted, expression in s 15(2) of the Charter Act does not include conduct that takes the form of property damage.

21. The United Nations Human Rights Committee has interpreted the right to freedom of expression under the International Covenant on Civil and Political Rights (**ICCPR**), upon which the Charter Act is based, so as to deny any protection for acts of property damage. In *SG v France*⁶ and *GB v France*,⁷ the Human Rights Committee found

⁶ Human Rights Committee, *Views: Communication No 347/1988*, 43rd sess, UN Doc CCPR/C/43/D/347/1988 (15 November 1991) [5.2].

that the defacing of road signs as part of a campaign advocating for bilingual road signs 'does not raise issues' under the right to freedom of expression.

22. Moreover, in Canada, where the equivalent right does not set out permissible restrictions as per s 15(3) of the Charter Act, the Supreme Court has held that acts of property damage are not a form of protected expression. The Court has stated that the right to freedom of expression does not extend to protect threats of violence or acts of violence. "Violence" in this context means 'actual or threatened physical interference with the activities of others'.⁸ Thus, the right 'would not protect the destruction of property, or assaults, or other clearly unlawful conduct'.⁹ Rather, it 'ensures that we can convey our thoughts and feelings in non-violent ways without fear of censure'.¹⁰
23. Accordingly, in *R v Behrens*¹¹ the Ontario Court of Justice held that the pouring of fake blood onto a parliamentary building in protest was a form of vandalism, and not protected by the right to freedom of expression.¹² This was despite the defendant's claim that the materials used, similarly to what the Appellant asserts here, were water-soluble and did no real damage to property. The Court held that the issuing of bans on the defendants from entering the premises were justified.

Restrictions fall within s 15(3)

24. In any event, ss 197 and 199 of the Crimes Act fall within the permissible restrictions on expression under s 15(3) of the Charter Act. Section 15(3) provides:

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."

⁷ Human Rights Committee, *Views: Communication No 348/1989*, 43rd sess, UN Doc CCPR/C/43/D/348/1989 (15 November 1991) [5.2].

⁸ *R v Keegstra* [1990] 3 SCR 697, 830 per McLachlin J.

⁹ *RWDSU v Dolphin Delivery Ltd* [1986] 2 SCR 573, 588 per McIntyre J.

¹⁰ *Irwin Toy Ltd v Quebec (A.G.)* [1989] 1 SCR 927, 970 per Dickson CJ.
[2001] OJ No 245 (QL).

¹² *Ibid* [55]-[58], [64]-[65].

Rights of other persons under s 15(3)(a)

25. The Attorney-General submits that the restrictions in ss 197 and 199 of the Crimes Act are reasonably necessary to protect the rights of other persons. While the definition of "person" in s 4 of the Charter Act is limited to human beings, the fact that the provisions protect property of individuals is nevertheless relevant to the question of the interpretation of the provisions in a way that is "compatible with human rights" for the purposes of s 32.

"Public order" under s 15(3)(b)

26. In any event, the Attorney-General submits that ss 197 and 199 of the Crimes Act fall within the permissible restrictions on expression for the protection of public order under s 15(3)(b). The Court of Appeal judgment in *Noone v Operation Smile* makes clear that a restriction on freedom of expression that falls within s 15(3) is "compatible with human rights" for the purposes of s 32.¹³

27. As the Appellant submits, the phrase "public order" is not defined by the Charter Act or the International Covenant on Civil and Political Rights (**ICCPR**), upon which s 15 of the Charter Act is based. The Appellant contends that public order means the "prevention of disorder and crime".

28. The Attorney-General submits that the concept of "public order" in s 15 is not as narrow as the Appellant contends. The Attorney-General submits that the term "public order" in Article 19(3) of the ICCPR, on which s 15(3) of the Charter Act is based, is broader than the term "prevention of disorder and crime" used in the European Convention on Human Rights. Indeed, the *travaux preparatoires* of the ICCPR makes clear that this phrase was rejected in the course of drafting the ICCPR.¹⁴ The concept of "public order" in the ICCPR has been interpreted as including 'all of those universally accepted fundamental principles, consistent with respect for human rights, on which a democratic society is based',¹⁵ and may be

¹³ In applying s 32 to the interpretation of provisions of the Fair Trading Act, Nettle JA considered whether the restrictions on expression fell within s 15(3): *Noone v Operation Smile (Australia) Inc* [2012] VSCA 91 at [144]-[166]. Warren CJ and Cavanough J saw 'great for in his Honour's reasoning' on this point, but considered it unnecessary to determine that issue in the appeal: at [22].

¹⁴ Marc J Bossuyt, *Guide to the Travaux Preparatoires of the International Covenant on Civil and Political Rights* (1987) 390.

¹⁵ Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd rev ed, 2005) 464-5

defined as 'the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded. Respect for rights is part of public order ...'.¹⁶ As the Supreme Court of Canada has stated, acts of violence such as property damage are 'inimical to the rule of law on which all rights and freedoms depend'.¹⁷

29. In any event, even if a narrower meaning is given to "public order", the offences are reasonably necessary to prevent disorder and crime. In *N v Switzerland*,¹⁸ the European Commission of Human Rights found that the conviction and sentencing of a person for graffiti pursuant to the offence of 'damaging, destroying or rendering unfit for use the property of another person' under the Swiss Criminal Code was a measure necessary for the prevention of disorder under the equivalent right in the European Convention on Human Rights.¹⁹
30. The authorities upon which the Appellant relies are of little assistance. They do not involve the interpretation of the term "public order" in a rights instrument. Nor do they consider whether damage to property falls within restrictions necessary to protect public order. Rather, they consider the interpretation of public order offences where the conduct in question involved no violence or damage to property of others.²⁰
31. The Appellant also places reliance upon the existence of an exemption for 'reasonable political comment' in s 6 of the *Graffiti Prevention Act 2007*. The Appellant's submissions appear to misunderstand the effect of those provisions.

¹⁶ UN Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, 41st sess, UN Doc E/CN.4/1985/4 (1984) Principle 22.

¹⁷ *R v Keegstra* [1990] 3 SCR 697, 830 per McLachlin J.

¹⁸ Application No. 9870/82 (1983) (translated from French).

¹⁹ Article 10(2) of the European Convention on Human Rights, in contrast to s 15(3) of the Charter Act, provides that the right to freedom of expression may be subject to:

such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

²⁰ *Brooker v Police* [2007] 3 NZLR 91 involved an offence of "disorderly behaviour" where a member of the public protested loudly outside the home of an off duty police officer. *Morse v Police* [2012] 2 NZLR 1 involved a protester charged with "offensive behaviour" by burning the national flag. *Coleman v Power* (2004) 220 CLR 1 involved the use of "insulting words" toward police officers. *Ferguson v Walkley & Anor* (2008) 17 VR 647 and *Hammond v DPP* [2004] EWHC 69 (Admin) involved offences of 'insulting' language and signs.

Section 5 of the *Graffiti Prevention Act* provides an absolute prohibition upon graffiti on property, without the express consent of the owner. Section 6 provides for an offence of marking offensive graffiti in view of a public place that applies even where the property owner consents. It is only in this context that a person may have a defence of "reasonable political comment". Graffiti in the form of reasonable political comment remains an offence under s 5 if the owner of the property has not given consent.

32. The Appellant further relies upon the judgment of the Supreme Court of Canada in *Ramsden v Peterborough (City)*,²¹ in which the court considered the validity of a municipal by-law prohibiting 'postering'. The case is clearly distinguishable. Restricting expression in the form of 'postering', irrespective of whether it causes damage to property or occurs with the consent of the property owner, is quite different from an offence that only prohibits property damage.²²

Reasonable limits under s 7(2)

33. The Attorney-General submits that this issue need not be considered by the Court unless the Court finds that:
- 33.1 The conduct of the Appellant falls within the scope of the free expression right;
- 33.2 The conduct prohibited by ss 197 and 199 of the Crimes Act falls within the expression protected by s 15(2) of the Charter Act; and
- 33.3 The restrictions imposed by ss 197 and 199 of the Crimes Act do not fall within the restrictions on expression that are expressly permitted by s 15(3) of the Charter Act.
34. It is acknowledged that, following the decision of the High Court in *Momcilovic v The Queen*, there is some doubt as to the role of s 7(2) in assessing compatibility with human rights for the purposes of s 32.

²¹ [1993] 2 SCR 1084.

²² The Attorney-General notes that the Court did not make a finding, as the Appellant contends in his submissions at para [55], that postering had the potential to 'damage public and private structures (through the application of adhesives)'. Rather the Court considered whether the purposes of avoiding 'littering, aesthetic blight, traffic hazards, and hazards to persons engaged in the repair and maintenance of utility poles' were sufficient to justify an absolute ban on postering: judgment at p 1105-1107.

35. The High Court of Australia in *Momcilovic v The Queen*²³ was unable to reach a binding majority on the role of s 7(2) with respect to the interpretative task under s 32(1).²⁴ While four judges considered that s 7(2) plays a role in determining compatibility with human rights for the purposes of s 32, this includes Heydon J who found the whole Charter Act to be unconstitutional. The other three judges agreed with the Court of Appeal in *Momcilovic v The Queen*²⁵ that s 7(2) plays no role in the assessment of compatibility under s 32.
36. The Court of Appeal has since considered the effect of the High Court judgment and the standing of the Court of Appeal judgment in *Momcilovic*. While Nettle JA considered that the Court of Appeal approach must stand,²⁶ Warren CJ and Cavanough JA tentatively expressed the view that the Court of Appeal's judgment should be regarded as wrong.²⁷
37. The Attorney-General submits that the approach of the majority of the High Court, including Heydon J, should be adopted. Any limit imposed upon expression by ss 197 and 199 of the Crimes Act should be regarded as compatible with human rights because the limits are reasonable and justified under s 7(2) of the Charter Act.

Question 2

38. If the Court accepts that the defence of "lawful excuse" does not include acts of expression that fall within s 15 of the Charter Act, then Question 2 does not arise.
39. If it is necessary for the Court to consider this question then, for the same reasons as set out above, the Attorney-General submits that the Appellant's conduct is not protected by s 15.

Question 3

40. The Appellant submits that:

²³ (2011) 280 ALR 221.

²⁴ See (2011) 280 ALR 221, [168] per Gummow J, [280] per Hayne J agreeing, [427] per Heydon J (dissenting, but not on this point); [683] per Bell J; cf [34] per French CJ, [573]-[575] per Crennan and Kiefel JJ.

²⁵ (2010) 25 VR 436.

²⁶ *Noone v Operation Smile (Australia) Inc* [2012] VSCA 91 at [139]-[142].

²⁷ *Ibid* at [27]-[31] per Warren CJ and Cavanough AJA.

- 40.1 The police informant/Respondent, contrary to s 38(1) of the Charter Act, failed to give proper consideration to a relevant human right, namely, the right to freedom of expression under s 15 of the Charter Act.
- 40.2 Had the police informant/Respondent done so, he would have charged the Appellant with alternative offences which carried a lesser penalty.
- 40.3 The failure to charge an alternative offence was unlawful.
- 40.4 The appropriate remedy is a stay of proceedings on the grounds there has been an abuse of process.

New point on appeal

41. The Respondent has submitted that this matter does not arise for determination by this Court given the Appellant did not raise it before the Magistrate.
42. The Attorney-General agrees with the Respondent's submissions on this point. An Appellant cannot seek review of an uninvoked discretion.²⁸ The Attorney-General further submits that allegations of breach of s 38 are matters in respect of which evidence is likely to be required, and are not properly matters to be raised for the first time in the course of an appeal. Had this point been raised before the learned Magistrate, it 'could or might possibly have been met by rebutting evidence', thereby avoiding a 'sense of injustice' that would likely arise should the Appellant be permitted to raise this new point on appeal.²⁹

Jurisdiction to review prosecutorial discretion

43. Prosecutors are afforded a very broad discretion. A prosecutor has the discretion to decide, for example, whether or not to prosecute, to enter a nolle prosequi, to proceed *ex officio*, whether or not to present evidence, and the particular charge to be laid or prosecuted.³⁰ Such decisions are aspects of the concept of "prosecutorial discretion". Here, the charging of the Appellant with offences under the Crimes Act, rather than alternative offences raised by the Appellant, falls within the scope of prosecutorial discretion.

²⁸ *R v Roberts; R v Urbanec* (2004) 9 VR 295 at 399, [109].

²⁹ *Whisprun Pty Ltd v Dixon* (2003) 200 ALR 446, [51] per Gleeson CJ, McHugh and Gummow JJ

³⁰ *Maxwell v The Queen* (1996) 184 CLR 501, 534 per Gaudron and Gummow JJ.

44. The Australian authorities illustrate that the courts are generally reluctant to review prosecutorial discretion.³¹ This is reflected in other common law jurisdictions, such as New Zealand,³² Canada³³ and the United Kingdom.³⁴ The rationale for this was set out by the High Court of Australia in *Dupas v The Queen*.³⁵ In that case, the High Court cited with approval³⁶ the following passage by the Supreme Court of New Zealand in *Fox v Attorney-General (NZ)*:

In our system of government, the discretion to prosecute on behalf of the state and to determine the particular charges a defendant is to face is part of the function of Executive Government rather than the Courts. That allocation of the function recognises the government interest in seeing that justice is done and community expectations that criminal offenders are brought to justice are met.

...

The courts traditionally have been reluctant to interfere with decisions to initiate and continue prosecutions. In part this is because of the high content of judgment and discretion in the decisions that must be reached. But perhaps even more so it also reflects constitutional sensitivities in light of the court's own function of responsibility for conduct of criminal trials.³⁷

45. The Appellant is in effect seeking to review the police informant/Respondent's discretion. A decision as to the particular charges laid is a decision that is 'insusceptible of judicial review', subject to the court's power to prevent an abuse of process.³⁸ The facts of this proceeding do not materially distinguish it from

³¹ *Maxwell v The Queen* (1996) 184 CLR 501, 534 per Gaudron and Gummow JJ; *Barton v The Queen* (1980) 147 CLR 75, 95 per Gibbs ACJ and Mason J; see also Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (4th ed, 2009) 917.

³² See *Fox v Attorney-General (NZ)* [2002] 3 NZLR 62.

³³ See *R v Regan* [2002] 1 SCR 297 [166] where the Supreme Court of Canada per Binnie J (who was in dissent, but not on this point) stated: 'Courts are very slow to second-guess the exercise of [prosecutorial] discretion and do so only in narrow circumstances'; cited with approval in *Krieger v Law Society of Alberta* [2002] 3 SCR 372, [48].

³⁴ See *R (Corner House Research) v Director of the Serious Fraud Office* [2009] 1 AC 756, [30]-[31] where the House of Lords said that 'only in highly exceptional cases will the court disturb the decisions of an independent prosecutor and investigator'; see also *R v DPP ex parte Kebilene* [2000] 2 AC 326, 371 per Lord Steyn.

³⁵ (2010) 241 CLR 237.

³⁶ *Ibid* [17].

³⁷ [2002] 3 NZLR 62, [28], [31] per McGrath J (Gault P, Keith and Blanchard and Anderson JJ agreeing)

³⁸ *Maxwell v The Queen* (1996) 184 CLR 501, 534-5 per Gaudron and Gummow JJ.

authorities in which this principle has been applied, such as *R v McCready*,³⁹
*Kolalich v DPP (NSW)*⁴⁰ and *Ayles v The Queen*.⁴¹

46. Courts have jurisdiction apart from the Charter Act to find that the commencement and continuation of a prosecution constituted an abuse of process. The Charter Act does not operate to expand the jurisdiction of the courts so as to permit review of prosecutorial discretion on Charter Act grounds.⁴²

Dated: 10 August 2012

O.P. HOLDENSON
Aickin Chambers

J.M. DAVIDSON
Special Counsel
Victorian Government Solicitor's Office

³⁹ (1985) 20 A Crim R 32, 39-40 per Young CJ (McGarvie and Ormiston JJ agreeing). The Victorian Court of Criminal Appeal stated that: 'the mere choice of one section rather than another under which to prosecute, even though the section charged carries a higher penalty than the alternative section that might have been used, is not in my view an indication of an abuse of process'. This statement was applied in *Chung v R* (2007) 175 A Crim R 579 [59]-[61] per Spigelman CJ (Hislop and Harrison JJ agreeing).

⁴⁰ (1991) 173 CLR 222, 227-8 per Mason CJ, Dean, Gaudron and McHugh JJ, 229-30 per Brennan J.

⁴¹ (2008) 232 CLR 410, 432-3, 434 per Kiefel J (Gleeson CJ and Heydon J agreeing), 422 per Gummow and Kirby JJ (dissenting, but not on this point).

⁴² Applying *Director of Housing v Sudi* [2011] VSCA 266. The Court of Appeal [98] per Maxwell P, [281] per Weinberg JA, and [46]-[48] per Warren CJ held that the Charter Act did not confer upon or expand the jurisdiction of the Victorian Civil and Administrative Tribunal to engage in collateral review on Charter Act grounds of an application by the Director of Housing for an order for possession of premises, made pursuant to the *Residential Tenancies Act 1997* (Vic).