

**IN THE MAGISTRATES' COURT
AT MELBOURNE**

D13140768

LAUREN RICHARDS

-and-

KYLE MAGEE

REASONS FOR DECISION

1. On 9 October, 2013 Mr Magee was charged with posting bills on Adshell advertising boards between 3 October, 2012 and 31 March, 2013 without the consent of the occupier or owner or any person or body having authority to give consent contrary to s10(1) of the Summary Offences Act 1966 (**the Act**).
2. The accused bears the onus, under sub-section (2), of proving any consent.
3. Mr Magee pleads not guilty to the offence. Mr Magee appeared in person at the hearing before me on 22 April, 2014. On that date, Mr Magee did not dispute that he posted the bills on the Adshell advertising boards at bus shelters on the dates alleged by the prosecution¹. Mr Magee agrees he posted the bills, in the form of A4 posters tendered by him in evidence (Exhibit A), without the consent of Adshell or the occupier, owner or any person or body having authority to give consent.
4. Rather, Mr Magee defends the proceedings on the basis that the *Charter of Human Rights and Responsibilities Act 2006* (**the Charter**), insofar as it protects the right to freedom of expression, authorised his conduct. In his submissions, Mr Magee urges me to construe the Charter as a “body authorised to give consent” in the language of section 10(1) of the Act.
5. Mr Magee contends that by posting bills over advertising panels located at bus shelters in the Melbourne CBD he is exercising his right to express his views regarding the detrimental effect for-profit advertising has on the public, and indeed our democracy. Mr Magee says this activity is the only effective means by which he is able to agitate for a ban on such advertising in public spaces.
6. Mr Magee argues that his right to freedom of expression is protected by s15(2) of the Charter and that the lawful restrictions upon that right as set out in s15(3) have no application to the circumstances of this case. He submits that his right to freedom of expression under section 15(1) can

¹ See Exhibit 3: As per the offence table contained in Exhibit 5 to the statement of Lauren Richards dated 10 July, 2013. The prosecution does not rely on incident 16 which was denied by Mr Magee.

only be limited by s10(1) of the Act if the limitation can be “demonstrably justified” pursuant to s7(2) of the Charter. Mr Magee contends that such a limitation on his right to freedom of expression cannot be justified within a free and democratic society.

7. Many of these issues were raised before Justice Kyrou, albeit in the context of criminal damage charges, in *Magee v Delaney* [2012] VSC 407. In that case, Mr Magee also contended that his acts (there of painting over advertisements in bus shelters) engaged the freedom of expression protection contained in s15(2) of the Charter and that the exercise of that right constituted a “lawful excuse” for that purposes of the criminal damages offences under the *Crimes Act*.
8. In that decision, Justice Kyrou comprehensively dealt with each aspect of Mr Magee’s arguments pursuant to the Charter.

Section 15(2) of the Charter

9. Justice Kyrou first examined the question of whether Mr Magee’s conduct in painting over the advertisements was an act capable of imparting information or ideas for the purpose of s15(2) of the Charter. In broadly interpreting this expression, Justice Kyrou concluded that any act which was capable of conveying some kind of meaning falls within the term “impart information and ideas of all kinds”. As such, Justice Kyrou determined that the act of painting over the advertisements was capable of conveying, subjectively, a protest against such advertising, and accordingly fell within the phrase.
10. In this case, Mr Magee’s conduct in posting A4 bills setting out his objection to the advertising is more clearly a means of imparting information and ideas regarding his protest against advertising in public spaces. It too falls within the words “impart information and ideas of all kinds” found in s15(2).
11. However, on the authority of *Magee v Delaney*, a positive answer to this threshold question does not necessarily mean that Mr Magee’s conduct is protected by s15(2). In that case, Justice Kyrou having examined s15(2) in the context of other provisions of the Charter, its preamble and purposes, and having considered authorities from overseas jurisdictions, determined there were policy limits to the protected forms of expression. He stated:

“It is inconceivable that the Victorian Parliament intended to protect all forms of expressive conduct, no matter how egregious and inimical to the welfare of society, subject only to the specific restrictions recognised by s15(3) of the Victorian Charter.

...

*In my opinion, public policy considerations are inherent in s15(2) of the Victorian Charter and limit its application to some forms of expressive conduct, independently of s15(3)."*²

12. Justice Kyrou concluded that the exercise of the right in the form of damage to a third party's property or a threat of such damage is not protected by s15(2) of the Charter.
13. In his submissions to me, Mr Magee seeks to distinguish this *Magee v Delaney* on the basis that, presently, he is not charged with an offence of criminal damage, but rather of posting bills without consent, an offence that does not require proof of damage to be established.
14. However, in my view the conclusion of Justice Kyrou applies equally here, irrespective of the nature of the charge, where the exercise of the right of expression necessarily involves damage, in the form of posting over the advertisements using adhesive glue, to the property of another without their consent. Accordingly, s15(2) of the Charter has no application to this conduct.

Section 15(3) of the Charter

15. In *Magee v Delaney*, Justice Kyrou also considered the application of s15(3) of the Charter although in light of his finding under s15(2) it was not strictly necessary to do so.
16. Section 15(3) of the Charter provides:
 - (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 protect the rights and reputation of other persons; or*
 - (b) *for the protection of national security, public order, public health or public morality.*
17. As to the lawful restrictions necessary to protect the rights of other persons, Justice Kyrou found that an absolute prohibition on intentionally damaging another's property without lawful excuse under the *Crimes Act* was a restriction that was reasonably necessary to respect the rights of property owners.
18. Here the charge is different, however guidance may be found in the statement of compatibility with human rights for the Graffiti Protection Bill 2007 referred to in *Magee v Delaney*. In that statement, the relevant Minister confirmed that Clause 5 of the Bill interferes with a person's right to freedom of expression, but noted that the clause protects the property

² [2012] VSCA 407, paragraphs [87] and [89].