

IN THE MATTER OF an Appeal on a Question of Law pursuant to Section 272 Criminal Procedure Act 2009

BETWEEN

KYLE MAGEE

APPELLANT

v

CHRISTOPHER DELANEY

RESPONDENT

OUTLINE OF APPELLANT'S SUBMISSIONS

Date of document:	Solicitor Code: 2134
Filed on behalf of the Appellant Victoria Legal Aid	DX: 210646 Melbourne VIC Tel: 92690283
Lawyers 350 Queen Street Melbourne VIC 3000 GPO Box 4380, Melbourne, 3001	Fax: 9269 0498 Ref: 09C930515 Attention: James Anderson Email: jamesa@vla.vic.gov.au

INTRODUCTION

1. On 2 February 2010 the Appellant was charged with committing on that day the offences of “criminal damage” and “going equipped for the purpose of criminal damage” under sections 197 and 199 of the *Crimes Act 1958 (Crimes Act)* respectively. He had painted over an advertising sign on a bus stop in central Melbourne in white paint in protest against the pervasiveness of advertising and the resultant corporate control over the media and therefore over the nature and content of public debate.
2. In order to minimise the disruption that his actions caused he used a water-based paint, erected a “wet paint” sign and made no attempt to hide his activities. The cost of removing the paint and restoring the underlying advertising was \$40.17.
3. The preferred charges were the most serious available carrying a maximum penalty of 10 years imprisonment. The Informant chose not to charge the Appellant with any of three less serious offences that covered the same conduct: Wilful Damage (25 penalty units or 6 months imprisonment), Postering Bills/Property Damage (10 penalty units or 3 months imprisonment) or Marking Graffiti (2 years imprisonment).
4. The issues in this appeal are:

- a. Whether the Appellant's acts were protected expression under section 15 of the *Charter of Human Rights and Responsibilities Act 2006 (Charter)* and if so whether such protection provided a "lawful excuse" for those acts; and
- b. Whether the Informant was obliged, by virtue of section 38 of the *Charter*, to prefer the available less serious charges in order to properly fulfil his obligations as a public authority under the *Charter*.

FACTS

5. The Appellant was 27 years old at the time of the offence. At the time of the offence he was residing in Richmond and employed building and delivering trestle tables.
6. On 2 February 2010 at approximately 9:40am he went to the tram stop shelter outside the County Court on the corner of William St and Lonsdale St. He went there with a bucket of paint, a paint brush, wet paint signs and barrier tape. He painted over the advertising panel of the tram stop facing the County Court with white paint, effectively "whiting out" the advertising beneath¹. He then placed a wet paint sign on one of the adjacent panels.
7. At this stage the Appellant was peacefully arrested by Protective Service Officers stationed at the County Court who were acting on their own initiative. No complaint was made by the public in respect of the offence at any stage.
8. The Appellant's arrest prevented him from placing a further "wet paint" sign up and placing barrier tape around the wet paint. He had brought barrier tape and a further "wet paint" sign for this purpose.
9. At the time of initial arrest, in his record of interview, and in oral evidence at the hearing below the Appellant admitted his actions and explained that they were a political protest against advertising. He read to police a two page prepared statement during his record of interview outlining his motivation². In summary:
 - a. Advertising primarily seeks to manipulate the citizenry through abuse of the science of psychology and the perversion of art. It seeks to overbear the critical faculties of the observer.
 - b. The public media is, or at least should be, the unofficial fourth institution of a democracy. If the integrity of the media is weakened it follows that democracy must be weakened.
 - c. By being dependent upon advertising revenue and run for profit, the media is placed in a conflict of interest between democratic/social justice goals and the

¹ See Exhibit "JA-4" for photos of damage.

² Exhibit "JA-3"

goal of increased markets and profits for corporations (such as themselves and their advertisers).

- d. The advertising industry is damaging to democratic society in multiple ways and should be abolished. The current media ought be replaced by a free media equally accountable to all people and dedicated to the dissemination of vital information. This media must be constitutionally mandated, publically funded and protected sufficiently from improper government interference.
10. The Appellant describes his method of protest as a non-violent symbolic expression of objection, through the creation of a physical barrier between advertising and the public space it is normally allowed to project itself into.
 11. Through the protest the Appellant wishes to promote people thinking for themselves, and to trigger a serious public debate about advertising and how media should be provided.
 12. The protest is also about permission. The Appellant knew at the time of painting the shelter that it would later be said that he did not have permission to engage in the action. Likewise, he maintains the corporation advertising in that space did not seek permission of the public to do so. It simply bought the space.
 13. The Appellant intended to cause as little damage as possible to make his point. He used a water based paint because it is easier to clean off and causes less damage to the paint surface than an enamel paint.³ The owner of the advertising panel, Adshell, was able to remove the paint at a cost of \$40.17.
 14. The Appellant committed the protest in circumstances which were intended to result in his arrest. This served both to minimise the damage he caused (because it would not need to be repeated many times until detected).
 15. The Appellant's views regarding advertising are long standing and this action is part of an ongoing protest. Between September 2007 and the date of hearing below the Accused has been found guilty of 28 criminal damage type offences. He has received a number of penalties, resulting in 157 days in custody on sentence and an additional 30 days on remand. The four most recent convictions for criminal damage have all been for painting over the advertising at the same site in essentially identical circumstances.
 16. The Appellant does not enjoy prison. He would far rather avoid it. He exposes himself to the risk of incarceration only because of his belief that drastic measures must be taken to bring about public debate and change.
 17. The Appellant has never been found guilty of other types of offending. Since this act he

³ Exhibit "JA-8", T24, L 14-16

has refrained from further committing offences to await the decision of the Court.⁴

RELEVANT LEGISLATION

18. These submissions deal with the interplay between sections 197 and 199 of the *Crimes Act* and sections 7(2), 15, 32 and 38 of the *Charter*. In addition, the other offences available in relation to the Appellant's conduct are also relevant.

Offence Provisions – Crimes Act

197 Destroying or damaging property

- (1) 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 (10 years maximum).

199 Possessing anything with intent to destroy or damage property

A person who has anything in his custody or under his control—

- (a) with the purpose of using it, or causing or permitting another to use it, without lawful excuse—
 - (i) to destroy or damage any property belonging to some other person or to himself, the user or both of them and some other person; or
- ...

shall be guilty of an indictable offence and liable to level 6 imprisonment (5 years maximum).

Charter

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

⁴ Exhibit "JA-8", T25, L 12 - 24

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—what they are and when they may be limited

- (1) ...
- (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.

32 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.

38 Conduct of public authorities

- (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.

Available Offence Provisions – Summary Offences Act 1966

9 Wilful destruction, damage etc. of property

(1) Any person who—

...

- (c) wilfully injures or damages any property (public or private) the injury done being under the value of \$5000; or

...

shall be guilty of an offence.

Penalty: 25 penalty units or imprisonment for six months

10 Posting bills etc. and defacing property

(1) 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.

Available Offence Provisions – Graffiti Prevention Act 2007

3 ...*Mark Graffiti* means write, draw, mark scratch or otherwise deface property, by any means so that the defacement is not readily removal by wiping with a dry cloth.

5 Marking graffiti

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.

Penalty: Level 7 imprisonment

6 Marking offensive graffiti

(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.

SUMMARY OF THE MAGISTRATE’S DECISION

19. The Appellant’s actions were capable of being characterised as an act of protest and of coming within the protection of section 15(2)(e)⁵. The question is whether “lawful excuse” should be interpreted by virtue of section 32 of the *Charter* in a way that included the Appellant’s actions.

20. There is no linguistic or grammatical impediment to this interpretation, but this interpretation ought not be adopted because:

- a. Such an interpretation is inconsistent with the purpose of the Crimes Act.

⁵ Exhibit “JA-6” page 7, paragraph 2.

- b. The right to freedom of expression is, in this case, limited by operation of section 15(3).
- c. The limitation on the Appellant's right to freedom of expression is justified by reference to section 7(2).

PROTECTED EXPRESSION AS A LAWFUL EXCUSE – Questions of Law 1 and 2

21. The first two Questions of Law are linked. The Appellant would require favourable answers to both questions in order to make out the ultimate submission that the Appellant had a "lawful excuse" for his acts, and therefore a defence under sections 197 and 199 of the *Crimes Act*. The Magistrate's errors of law prevented that defence from being properly considered.

Summary of the Appellant's Submission

22. In summary, the Appellant's submission underlying both Questions 1 and 2 is:

- a. As a matter of statutory construction an accused person will have a "lawful excuse" under section 197 or 199 of the *Crimes Act* if his or her act is protected expression under section 15 of the *Charter*.
- b. The *Charter* does not create an absolute right to freedom of expression. An act will only be protected if it survives section 15(3) and section 7(2) of the *Charter*, each of which permit limits on expressive acts to be prescribed by law.
- c. Section 15(3) permits the limitation of the right by lawful restrictions reasonably necessary for the protection of, among other things, public order⁶.
- d. Sections 197 and 199 are not directed to the protection of public order, nor did the Appellant's act constitute a breach of public order.
- e. The right to freedom of expression can also be reasonably limited by law under section 7(2) of the *Charter*.
- f. The effect of sections 15(3) and 7(2) in this context is to require a balancing exercise on a case specific basis to determine whether criminalising an act that constitutes property damage is a reasonable limit on the right to freedom of expression. If not then an accused will have a lawful excuse for that act.
- g. Criminalising the Appellant's act through sections 197 and 199 is not a reasonable limitation on his freedom of expression given that:

⁶ There are others that do not apply in this case. Although section 15(3) refers to the protection of the "rights and reputation of other persons", "person" is defined in the *Charter* as "human being" thus excluding the rights and reputation of public and private corporations.

- ι. His act involved political expression, which is an intensely protected form of freedom of expression;
- υ. The damage caused was extremely small and intentionally reversible;
- ϋ. Public order was not impacted;
- Ϝ. There are, through alternative lesser offences or civil action, less restrictive means of achieving the purpose of the limitation, namely the protection of property rights.

A Coherent Framework

23. Before turning to the specific questions of law and the grounds of appeal, it is important to identify the legal framework that acceptance of these submissions would create. One of the concerns that the Magistrate had was that to recognise freedom of expression as a “lawful excuse” would “seriously erode the protection of property afforded by the [Crimes] Act”. This was the basis for his conclusion that section 15 protection could never amount to a “lawful excuse” for the purposes of section 197 and 199 or indeed for any offence under the *Crimes Act*.
24. However, as the following analysis is designed to demonstrate, accepting the Appellant’s construction of the interplay between freedom of expression and “lawful excuse” creates a coherent regime requiring a balancing of interests on a case-specific basis. It does not give *Carte Blanche* to property offending based on a claim to section 15 protection. The approach is analogous to that now taken in relation to public order offences in Australia following *Coleman v Power* (2004) 220 CLR 1 and in the United Kingdom and New Zealand based on the protection of freedom of expression.
25. The right to freedom of expression is not absolute and the *Charter* does not protect it absolutely. It follows that *prima facie* protection of an expressive act because it falls within section 15(2) will not necessarily amount to a “lawful excuse”. Before such an act can be a lawful excuse it must clear both the section 15(3) and the section 7(2) hurdles.
26. Section 15(3) permits lawful restrictions reasonably necessary to respect the rights of others and section 7(2) permits reasonable limits under law as can be demonstrably justified in a free and democratic society. Each hurdle has two features in common. First, the limitation must be prescribed in law. Secondly, the limitation must be justified in some way; under section 15(3) by being “reasonably necessary” and under section 7(2) by being “demonstrably justified”.
27. In many instances one may only need to look to the law that limits a right to determine if it is justified. This can be done when the law is specific and the conduct that it is intended to prevent or regulate is identifiable, as is the means of prevention or regulation. This is not simple when a statute is cast in general terms, where its impact on a protected right can only be assessed when it is applied. Generally drafted criminal statutes, particularly those designed to capture a broad spectrum of

behaviour, are good examples of this problem.

28. This issue is raised, albeit in a different context, in *Coleman v Power* (2004) 220 CLR 1. The High Court was dealing with a broadly drafted insulting language offence in a Queensland statute. It was conceded that the offence could in some circumstances restrict freedom of expression and, in particular, the constitutionally protected freedom of communication on political issues. The plurality (Gummow and Hayne JJ) noted that⁷:

[Section] 7(1)(d) creates a criminal offence. The offence which it creates restricts freedom of speech. That freedom is not, and never has been, absolute. But in confining the limits of the freedom, a legislature must mark the boundary it sets with clarity. Fundamental common law rights are not to be eroded or curtailed save by clear words.

29. In *Ferguson v Walkley & Anor* (2008) 17 VR 647 Harper J applied *Coleman* to offences under sections 17(1)(c) and 17(1)(d) of the *Summary Offences Act 1966* (Vic) (insulting words in a public place). In so doing His Honour adopted a case specific approach balancing legitimate interests:

The difficulty is compounded by the fact that insulting behaviour occurs in circumstances that are significantly variable. The context is therefore important, perhaps crucial. So, for example, freedom of communication may be an issue. It was not in the case of Mr Ferguson; it was in Coleman's case. As in the present case, insulting conduct, whether by words or otherwise, may be entirely free of any intellectual content, let alone value. It might therefore be argued that such conduct deserves no protection, because the only right involved is the right of those who are the victims of it to protection against it. One such might be a woman with young children, whose enjoyment of time spent with them in a park is ruined by the gratuitous insults of a group of youths who are complete strangers to her. In such a case, J S Mill's criteria for the rightful exercise of power over another (the group of youths) would be met.

As I have noted, Kirby, Gummow and Hayne JJ thought that the operation of s.7(1)(d) of the Vagrants Act should be so restricted as to confer criminality only upon words which were, in the circumstances in which they were used, so hurtful as either to be intended, or reasonably likely, to provoke unlawful retaliation. This would ensure that the sanctions of the criminal law would only be applied to activities readily characterised as criminal; and would, as Gummow and Hayne JJ thought, mark with clarity the boundary of the restriction imposed by the legislation on freedom of speech.

There is, with respect, much to be said for an approach which, consistently with the will of parliament, declines to impose the sanctions of the criminal

⁷ *Coleman* at [185].

law on behaviour that is not properly categorised as criminal, and which seeks to avoid unnecessary limits on the right to freedom of speech”.

30. The approach in the United Kingdom has also required a case specific justification of a limit on the right to freedom of expression. The *Human Rights Act 1998* (UK) (the *Human Rights Act*) protects the right to freedom of expression through Article 10 of Schedule 1 of the Act. It provides:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, 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 rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

31. The *Human Rights Act* does not limit the right to freedom of expression by reference to public order. However, the Act provides for formalities, conditions, restrictions or penalties... necessary for the “prevention of disorder or crime”.

32. *Hammond v DPP* [2004] EWHC 69 (Admin) (per Lord Justice May) concerned an appeal against a conviction under section 5 of the *Public Order Act 1986* (UK). The relevant parts of that section are as follows:

- (1) A person is guilty of an offence if he . . .
 - (b) displays any writing, sign or other visible representation which is threatening, abusive or insulting
within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby . . .
- (3) It is a defence for the accused to prove . . .
 - (c) that his conduct was reasonable.

33. The Appellant was a preacher who, in a public space, held up a large double sided sign made bearing the words: 'Stop Immorality', 'Stop Homosexuality' and 'Stop

Lesbianism'. The sign caused actual insult to a number of people and resulted in a actual breach of the peace. The Appellant resisted requests by the police to desist from the conduct, leading to his arrest.

34. Lord Justice May found that the Court must bear in mind Article 10 in interpreting section 5 of the Act, and held that a persons conduct will be reasonable for the purpose of the defence in section 5(3) if the Appellant "is exercising Convention rights in circumstances in which an interference with that exercise would not be justified under... Article 10(2)"⁸.

35. His Honour based this test on the judgment of Lord Justice Auld in *Norwood v DPP* [2003] EWCH Admin 1564. He also cited that decision as authority for the proposition that "restrictions in article 10.2 should be narrowly construed and convincingly established"⁹.

36. At paragraph [15] of the judgment Lord Justice May said:

We are reminded that in *Sunday Times v United Kingdom* (No 2) [1992] 14 EHRR 123, the European Court of Human Rights said that:

"Freedom of expression constitutes one of the essential foundations of a democratic society subject to paragraph (2) of Article 10. 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. Freedom of expression as enshrined in Article 10 is subject to a number of exceptions which, however, must be narrowly interpreted and the necessity for any restrictions must be convincingly established."

The need for the restriction must be convincingly established by a compelling countervailing consideration and the means employed must be proportionate to the end sought to be achieved.

37. The appeal against conviction was dismissed. Importantly, a finding was made that the Appellant's behaviour "went beyond legitimate protest and was provoking violence and disorder and it interfered with the rights of others"¹⁰.

38. A similar case specific approach is undertaken in New Zealand. In *Brooker v The Police* [2007] 3 NZLR 91 (Brooker's Case) (discussed in more detail below) Justice Tipping stated "No abstract guidance can be given as to when that level will be reached. That decision is a matter of judgment according to all the relevant circumstances of the individual case"¹¹.

⁸ At [22 – 23]

⁹ At [23]

¹⁰ At [28].

¹¹ At [91] – [92].

39. In this case, to look at the words of sections 197 and 199 in a vacuum and conclude that any limitation that they place on the right to freedom of expression is either justified or not under either section 15(3) or section 7(2) is meaningless. This was the Magistrate's approach and it was in error.
40. To properly apply the language of justification in the *Charter* requires an assessment of whether the particular act of expression in the context in which it occurred is a reasonable limitation on the right to freedom of expression. Only if the balance is struck in favour of protecting freedom of expression will the defence of "lawful excuse" apply. It may turn out to be rare that such a defence succeeds given the legitimate public value placed on the protection of property rights.
41. The remaining question is what criteria should be applied to determine whether an act of expression that constitutes property damage should be criminalised. The criteria in section 7(2) of the *Charter* provide the starting point for balancing the protection of a right against competing legitimate other interests. In the context of property damage as a form of free speech, additional relevant criteria would include:
- a. The intensity of the protection of the type of expression deployed (eg is the expression is political)
 - b. The nature and extent of the damage caused.
 - c. The impact of the expressive act on people other than the owner of the property.
 - d. The rationality of the connection between the damage and the purpose of the expression.

Section 7(2) Analysis - 'demonstrably justified in a free and democratic society'

42. A section 7(2) analysis is deployed in two ways in this submission. First, as part of applying the interpretative obligation in section 32 of the *Charter* and, secondly, in the ultimate assessment of whether conviction under section 197 and 199 is a reasonable limit on the Appellant's freedom of expression. Rather than repeat the analysis it is set out here with reference to the approach that the Magistrate took.

7(2)(a) – The nature of the right

43. The right in question is freedom of expression, which is a basic right in a free and democratic society. The Magistrate did not refer to is the fact that this expression was political in nature, and is often viewed as attracting "a higher level of protection" than other expression¹².
44. As Lord Justice Sedley put it in *Redmond-Bate v DPP* [1999] EWHC Admin 732:

Free speech includes not only the inoffensive but the irritating, the contentious, the eccentric, the heretical, the unwelcome and the provocative provided it does not tend to provoke violence. Freedom only to speak

¹² *Sanders v Kingson* [2005] EWHC 1154 (Admin) at [84]

inoffensively is not worth having.

45. The Appellant's views were accepted as honestly held. It can legitimately be said that his message contributes to the marketplace of ideas that underpins the protection of certain types of expression. Indeed, the articulated basis of the Appellant's opinion is that the prevalence of advertising concentrates media control in the hands of a small number of corporations thus stultifying freedom of expression and debate.
46. The Appellant chose to express his views in as non-invasive and reversible a way as possible while maintaining the integrity of the mode of communication that he chose.
47. Expression of views in public places through various techniques is part of the common history of western liberal democracies. As is discussed in more detail below, a common form of expression is the use of posters adhered to public spaces. The Appellant's act has more in common with those forms of expression than with true property damage. Both forms of expression obscure that which is underneath and require some, but not significant, effort to remove.

7(2)(b) – The Importance of the Purpose of the Limitation

48. His Honour identified the purpose of the limitation as being the protection of property. The importance of property rights cannot be disputed notwithstanding that the *Charter* does not specifically protect them.
49. However, the value to be placed on protection of property rights in this situation is less than may otherwise be the case. The property is a tram shelter situated in a public place. The space that was painted over is a vertical glass wall used for advertising. The Appellant used water-based paint and the cost of repair was minimal. No member of the public complained about the Appellant's actions. More considerate property damage is hard to imagine.

7(2)(c) – The nature and extent of the limitation

50. His Honour found that the limitation limited the Appellant's freedom of expression, but did not constitute a complete denial of the Appellant's freedom of expression. His Honour focused on other means the Appellant had open to him to express his opinions in ways that did not involve property damage.
51. With respect, this analysis diverts attention from the real issue. The nature of the limitation is a broad and necessarily blunt indictable criminal offence carrying a maximum penalty of ten years imprisonment. "[Criminal damage] is a crime which may be committed in a very wide range of circumstances. The property damaged may vary from a book to a mansion..."¹³ Within the limitation (i.e. sections 197 and 199) as designed there is, unless "lawful excuse" incorporates protected expression, no ability to take into account the intrusion on rights. It applies without discernment to any

¹³ Halden (1983) 9 A Crim R 30 (CCA Vic) per Murphy J at 38 – 39.

damage regardless of the expressive content of that damage. Far from being a reasonable limit on a right, it is a blanket denial of the right that forecloses argument regardless of the circumstances.

52. This contrasts, for example, with sections 5 and 6 of the *Graffiti Prevention Act* 2007. Section 10 creates the distinct offence of marking offensive graffiti but includes a defence if the graffiti is “reasonable political comment”. In this way, Parliament has sought to recognise the right to freedom of expression within an offence provision.
53. It is illustrative to consider the analogy with expression through the placing of posters or leaflets on public property. Historically, expression by “postering” has been an important way of communicating ideas. Where the means of adhesive requires more than a damp cloth to remove the true level of “damage” done is similar to the Appellant’s conduct in this case.
54. Sections 197 and 199, without the safety valve of “lawful excuse” based on protected expression, criminalise any level of damage, regardless of degree and motivation and including the Appellant’s acts and those of members of the community who “poster”.
55. In *Ramsden v Peterborough (City)*¹⁴ (the Ramsden Case) the Full Court of the Canadian Supreme Court 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. The Supreme Court in balancing the competing interests and determining (as is possible in Canada) the validity of the by-law found that postering had the potential to:
- a. Damage public and private structures (through the application of adhesives);
 - b. Create litter; and
 - c. Denigrate the beauty of public spaces.
56. Iacobucci J gave the judgment of the Court in the Ramsden Case. 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.¹⁵”

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

¹⁴ [1993] 2 S.C.R. 1084.

¹⁵ Ramsden Case, page 16

expressive activity¹⁶.

58. In Ramsden the Canadian Supreme Court found the by-law to be an unjustifiable restriction on the right of freedom of expression. Fundamental to the decision of the Supreme Court was the blanket nature of the prohibition on postering, providing for no exceptions. Here, the prohibition as interpreted by the Magistrate, is a blanket prohibition carrying with it potential criminal consequences of a high order.

7(d) The relationship between the limitation and its purpose

59. In this case, there is a clear relationship between the law of criminal damage and the purpose of protecting property. The problem is not with the existence of the relationship, but the blunt way in which the criminal sanction is necessarily applied if “lawful excuse” does not extend to protected expression.

7(e) Are there less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve?

60. His Honour considered that any lesser restriction would be a licence to cause damage to property, perhaps up to a specific value or for a particular purpose.

61. However, acceptance of a “lawful excuse” defence based on protected expression would not give such a licence. As is obvious, there are less onerous means of achieving the purpose of protecting property rights than an indictable offence punishable by a maximum period of 10 years.

62. A review of the statutory scheme covering property offences in Victoria demonstrates that the conduct of the Appellant can alternatively and adequately be dealt with by the existing summary offences set out above with maximum penalties ranging between three months imprisonment to two years imprisonment.

63. Indeed, the way in which those offences are constructed leads to inevitable conclusion that the Parliament intended them to be used in this type of situation. For example, the offences of Posting Bills, Property Damage and Marking Graffiti specifically address offending characterised by the application of paint to public structures.

64. 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. As noted above, sections 9 and 10 contemplate that politically expressive graffiti would be captured by section 9 (marking graffiti simpliciter) but not by section 10 (marking offensive graffiti).

65. Accordingly, the statutory scheme of property offences would continue to operate effectively as a means of achieving the purpose of protecting property through

¹⁶ Ramsden Case, page 17

criminal sanction. Recognising that protected expression can amount to a lawful excuse to a very serious offence enhances the statutory scheme by ensuring proportionality between the charges deployed and the gravity of the offending.

66. His Honour also considered that civil remedies were insufficient to achieve the purpose of property protection essentially because of the practical difficulties of recovering \$40.17 through the civil courts¹⁷. However, it is difficult to understand how the fact that the damage caused was of such a low value as to be effectively unrecoverable could be deployed to justify the proportionality of deploying a very serious criminal offence in its place.

67. In addition, the offence was committed in a manner that would lead to the Appellant's detection. This allows for the Appellant to be identified for the purpose of commencing civil proceedings.

QUESTIONS OF LAW AND GROUNDS OF APPEAL

68. Based on the above analysis, these submissions now address the questions and grounds in turn.

QUESTION OF LAW 1

For the purposes of section 197 and 199 of the *Crimes Act 1958* is it a "lawful excuse" if the act that would otherwise amount to an offence was an act of expression protected by section 15 of the *Charter of Human Rights and Responsibilities Act 2006*?

69. Sections 197 and 199 both contain the phrase "without lawful excuse". The onus of identifying an evidential narrative for the existence of a "lawful excuse" is with an accused person. However, once that narrative is identified it is for the prosecution to prove the absence of a "lawful excuse" beyond reasonable doubt.

70. Section 201 relevantly establishes an inclusive range of lawful excuses for damaging property, such as the belief that 'the property in question belonged' to the accused¹⁸ and the belief that the accused 'held a right or interest in the property in question which authorised him to engage in the conduct'.¹⁹ The express provision that 'this section shall not be construed as taking away or otherwise affecting any other defence recognised by law as a defence to criminal charges' in subsection (5) makes it clear that lawful excuses can be found outside the framework of the *Crimes Act*. That is, it is possible to recognise additional lawful excuses to otherwise criminal behaviour if the statute does not prohibit such recognition. This is best demonstrated by the frequent tendency of statutes to omit details about lawful excuses; several crimes are worded as specific behaviour 'without lawful excuse', despite an absence of elaboration about

¹⁷ At page 8, paragraphs 2 and 3.

¹⁸ s201(2)(a)(i).

¹⁹ s201(2)(a)(ii).

the nature of excuses in that context²⁰.

71. The primary reason to conclude that protection of an act as expression under section 15 of the *Charter* amounts to a “lawful excuse” is that it is consistent with the plain meaning of the phrase “lawful excuse” and the terms of section 15. An “excuse” is essentially the reason or justification for doing or omitting to do an act²¹. A “lawful excuse” will exist where that reason or justification is recognised by law.
72. The *Charter* is an ordinary statute and on its face section 15 protects expressive acts subject to reasonable limits. As well as declaring the right to freedom expression and providing the means to assess whether an act of expression is protected, the *Charter* also provides tools to enforce that protection, primarily the obligation on public authorities to act in a way that is compatible with human rights (section 38), the requirement that rights can only be limited by law and where reasonably justified in a free and democratic society (Section 7(2)) and in the statutory command to interpret statutes consistently with the rights protected by the *Charter* where it is possible to do so (section 32).
73. The *Charter* thus creates a statutory framework that articulates in section 15 a reason or justification for acting, requires public authorities to respect that reason or justification and provides for the interplay of the reason or justification with other statutes. In short, it creates the preconditions for a “lawful excuse”.
74. This approach is analogous to that discussed above in relation to Hammond’s case, where a defence of “reasonable conduct” incorporated conducted protected by Article 10(1) of the Human Rights Act (where that protection was not limited by Article 10(2)).
75. The Appellant’s proposed construction is also supported by applying the interpretative obligation in section 32 of the *Charter*.
76. Before undergoing the task required by section 32 it is important to understand the way in which the Magistrate approached this issue.
77. The Magistrate accepted that the phrase “lawful excuse” is capable of the interpretation that the Appellant supports:

Clearly the relevant provisions of the Crimes Act are capable of being interpreted such that ‘lawful excuse’ extends to any act in the exercise of the freedom of expression as identified in the *Charter*²².

78. His Honour declined to adopt the interpretation because:

To interpret the term ‘lawful excuse’ in that way would seriously erode the

²⁰ See, for example, the offence of threatening to kill under section 20 of the *Crimes Act*.

²¹ “**Excuse:** 1. Try or serve to justify (a fault or offence)” *Concise Oxford English Dictionary* (11th Ed, 2004) Oxford University Press.

²² Decision, page 7, para 5

protection of property afforded by the [Crimes] Act²³.

79. As is discussed above, the conclusion that protected expression can amount to a “lawful excuse” does not create a blanket defence for property damage offences.

Momcilovic

80. At the time this matter was argued at first instance, it was contended that the Court should adopt the method of interpreting legislation by reference to section 32(1) in accordance with the methodology set out in the Court of Appeal decision of *R v Momcilovic* (2010) 25 VR 436.

81. Most relevantly, the Court of Appeal found that no regard should be had to section 7(2) of the *Charter* in determining either the content of the human right or in the interpretive process under section 32. Section 7(2) analysis was instead limited to whether the Court should make a declaration of incompatibility (which it should do only if any limitation on the right was unjustified by reference to section 7(2)).

82. In *Momcilovic v The Queen* [2011] HCA 34 (8 September 2011) French CJ²⁴, Crennan & Kiefel JJ²⁵ took a position similar to that of the Court of Appeal. However, in three separate sets of reasoning, Gummow²⁶, Hayne, Heydon²⁷, & Bell²⁸ JJ took an alternate view.

83. They determined that 7(2) was to be applied in order to determine the content of the relevant right at the time of applying section 32(1).

84. Justice Bell expresses the relationship between section 7(2) and section 32 as follows:

If the literal or grammatical meaning of a provision appears to limit a *Charter* right, the court must consider whether the limitation is demonstrably justified by reference to the section 7(2) criteria... Consideration of the purpose of the limitation, its nature and extent, and the question of less restrictive means reasonably available to achieve the purpose are matters that commonly will be evidence from the legislation. If the ordinary meaning of the provision would place an unjustified limitation on a human right, the court is required to seek to resolve the apparent conflict between the language of the provision and the mandate of the *Charter* by giving the provision a meaning that is compatible with the human right if it is possible to do so consistently with the

²³ ibid

²⁴ At [34]

²⁵ Joint judgment of Crennan & Kiefel JJ at [574]

²⁶ Gummow J at [168] who Hayne J agreed with on this matter [280]

²⁷ At [427] – although notably Heydon J went on to find that this interpretation of section 7(2) had the effect of invalidating the *Charter* on Constitutional grounds.

²⁸ At [678] – [684]

purpose of the provision...²⁹

85. This approach is consistent with some Victorian judgments regarding the application of section 32(1) pre *Momcilovic*, such as Nettle JA in *RJE v Secretary, Department of Justice* (2008) 21 VR 526 and Warren CJ in *Application under Major Crime (Investigative Powers) Act 2004; DAS v Victorian Human Rights & Equal Opportunity Commission* (2009) 24 VR 415 (DAS) at [50] – [53].

86. The approach taken by the Chief Justice, referring to the decision of Nettle JA, was to:

- a. Ascertain the meaning of the legislation according to accepted common law principles of interpretation as supplemented by legislative provisions.
- b. Acknowledge that, in many instances, it may be possible to reach a human rights compliant conclusion without reference to the *Charter*. Much was made of this in the High Court. As stated by Chief Justice French the “common law principal of legality is expressed as a presumption that Parliament does not intend to interfere with common law rights and freedoms except by clear and unequivocal language for which Parliament may be accountable to the electorate. It requires that statutes be constructed, where constructional choices are open, to avoid or minimise their encroachment upon rights and freedoms at common law.”³⁰
- c. Determine whether the interpretation derogates from the *Charter* right in question.
- d. If so, consider whether the limitation can be demonstrably justified.
- e. If not, can the legislative provision be interpreted consistently with the purpose of the Act.

87. The onus falls upon the party seeking to limit a right, in this case the Respondent, to ‘demonstrably justify’ the restriction. Chief Justice Warren stated the following in DAS:

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

88. An interpretation of “lawful excuse”, which does not allow for conduct protected by section 15, derogates from the *Charter* right of freedom of expression because it criminalises acts that may otherwise be the legitimate exercise of that freedom. A similar conclusion was reached in *Coleman* in relation to the offence of insulting

²⁹ At [684]

³⁰ At [43]

language. This was accepted by the Magistrate.

89. The Magistrate also (correctly) accepted that the phrase “lawful excuse” is reasonably capable of bearing the *Charter* consistent interpretation contended for by the Appellant, the question then becomes one of whether the derogation from section 15 can be justified by reference to section 7(2). If not then section 32 requires that sections 197 and 199 be interpreted in the way submitted by the Appellant.

90. In terms of approach, His Honour first accepted that section 197 and 199 restricted the Appellant’s right to freedom of expression and then considered whether the restriction was within reasonable limits by reference to section 7(2). Although this approach was out of step with the decision of the Court of Appeal in *Momcilovic*, it was in keeping with the subsequent approach adopted by the majority in the High Court (decided subsequent to the decision below). His Honour’s analysis of the application of section 7(2) occurs at the second last paragraph of page 8 onwards.

91. The Appellant repeats and relies upon the above analysis of section 7(2) in the context of this case and submits that the limitation on freedom of expression represented by the Magistrate’s interpretation of “lawful excuse” cannot be demonstrably justified in a free and democratic society.

QUESTION OF LAW 2

Was the act of the accused, as found by the learned Magistrate, an act of expression protected by section 15 of the *Charter*?

Ground 2A: The learned Magistrate erred in his construction of the phrase “public order” in section 15(3)(b) of the *Charter*.

Ground 2B: On the correct construction of the phrase “public order”:

- α. it was not open to the learned Magistrate to find that the accused’s act was contrary to “public order” and therefore not protected by section 15 of the *Charter*; or**
- β. if the accused’s act was capable of being contrary to “public order”, it was not open to the learned Magistrate to find that the extent of the impact of the accused’s act on “public order” was sufficient to deny his act the protection of section 15 of the *Charter*.**

Summary

92. The Appellant relies on the submissions above in support of the conclusion that the Appellant’s act is protected under section 15 of the *Charter* because:

- a. His act falls within section 15(2)(e) in that it is the imparting of an idea through “any other medium”.
- b. His act is not subject to any lawful restriction based on section 15(3) of the

Charter.

- c. Section 197 and 199 are not demonstrably justifiable limits on the Appellant's right to express himself in the way that he chose to do.

93. The grounds of appeal under this Question of Law assert that the Magistrate erred in his treatment of the Appellant's act in the context of section 15(3).
94. Section 15(3) relevantly provides that a right may be subject to lawful restrictions reasonably necessary for the protection of national security, public order, public health or public morality.
95. Three related questions will determine whether section 15(3) applies. The first is whether the act of freedom of expression impacts on one of "national security, public order, public health or public morality". If the answer to the first question is yes then the second question is whether the "lawful restriction" is directed to the protection of one of those public interests. Finally, if both questions are answered yes then the final assessment is whether the restriction is "reasonably necessary" to protect the public interest against the effect of the particular expressive act.
96. The Magistrate answered each of the first two questions positively. He was in error in doing so.

The Magistrate's Reasons

97. His Honour held that the Appellant's act was capable of being characterised as an act of protest and of coming within section 15(2)(e)³¹. However, he also held that the right to expression in section 15(2) is limited by section 15(3)(b)³².
98. His Honour found that the offence of criminal damage "provide[s] a lawful restriction upon the Accused's freedom of expression reasonably necessary for the protection of public order"³³. In doing so, His Honour erred in the construction of the phrase "public order".
99. In paragraphs 2 & 3 of page 8 of His Honour's judgment, he considers the threat to public order constituted by the Appellant's actions. In summary, His Honour essentially found that:
 - a. The Crimes Act can be seen as placing restrictions on citizens with a purpose, amongst others, to ensure public order³⁴.
 - b. The right to freedom of expression is subject to lawful restrictions reasonably

³¹ Exhibit "JA-6" page 7, paragraph 2.

³² Section 15(3)(a) is not relevant here because the party effected, Adshell, is a corporation.

³³ Exhibit "JA-6" page 8, paragraph 1.

³⁴ Exhibit "JA-6" page 7

necessary for the protection of public order³⁵.

- c. It may be that the Appellant's specific individual act (the subject of the charge) has a limited affect upon public order³⁶.
- d. The Appellant's one isolated act may seem relatively trivial, but it is not so in the context of his other behaviour (his priors for similar conduct)³⁷.

The Appellant's Act Did Not Impact on Public Order

- 100. Section 15 of the *Charter* protects freedom of expression. It is modelled on Article 19 of the International Covenant on Civil and Political Rights (ICCPR). Article 19 is expressed in almost identical terms to Section 15.
- 101. The right to freedom of expression is not absolute. Section 15, like Article 19, provides that the right to freedom of expression may be subject to lawful restrictions reasonably necessary for the protection of, *inter alia*, public order.
- 102. A number of the rights recognised in the ICCPR are not absolute. For example, freedom of expression is just one of five rights in the ICCPR which may be limited by reference to the need to preserve public order³⁸.
- 103. Public order is not defined in the *Charter* or the ICCPR. In *Brooker's Case* the Supreme Court of New Zealand considered the meaning of public order in the context of freedom of expression.
- 104. *Brooker* was convicted of disorderly behaviour. The conduct consisted of making a public protest outside the house of a police constable. He was outside the house at 9:20pm after the constable had come off night shift, singing with a guitar accompaniment. The lyrics were not profane, but suggestive that the constable had engaged in illegal searches and malicious prosecutions³⁹. He continued to sing for 25 minutes before his arrest.
- 105. The offence provides that "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".
- 106. The New Zealand Supreme Court interpreted the offence provision by reference to the right to freedom of expression contained in section 14 of the *New Zealand Bill of Rights Act 1990* (NZ). Similarly to the Victorian position, the New Zealand right of

³⁵ Exhibit "JA-6" page 8

³⁶ Exhibit "JA-6" page 8

³⁷ Exhibit "JA-6" page 8

³⁸ The other rights so limited are the right of peaceful assembly (Article 21), the right to freedom of association (Article 22), The right to liberty of movement and freedom to choose residence (Article 12) and the right to a fair trial (Article 14).

³⁹ *Brooker's Case* at [13-15]

freedom of expression is limited by the need to protect public order⁴⁰.

107. Five separate judgments were given. Although expressed differently, they set a high bar for what constitutes a threat to public order:
- a. 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”⁴¹.
 - b. 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”.⁴² 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”⁴³.
 - c. 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 bear⁴⁴” and went on to hold that “where, as here, the behaviour concerned involves a genuine exercise of the right to freedom of 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 case⁴⁵”.
108. In a more recent decision, the New Zealand Supreme Court confirmed the approach in Brooker’s case and found that the burning of the New Zealand flag at an ANZAC day march was not sufficient to limit the right to freedom of expression by reference to the necessity to protect public order⁴⁶.
109. In *Coleman* the High Court considered a case where a man was distributing pamphlets alleging corruption against several police officers. He was convicted of using insulting words and behaving in an offensive manner. The conviction was overturned by the High Court. Chief Justice Gleeson stated:

It is impossible to state comprehensively and precisely the circumstances in which the use of defamatory language in a public place will involve such a disturbance of public order, or such an affront to contemporary standards of behaviour, as to constitute the offence of using insulting words to a person. An intention, or likelihood, of provoking violence may be one such

⁴⁰ Brooker’s Case at [4]

⁴¹ Brooker’s Case at [42 – 47]

⁴² Brooker’s Case at [56]

⁴³ Brooker’s Case at [59]

⁴⁴ Brooker’s Case at [90]

⁴⁵ Brooker’s Case at [92]

⁴⁶ *Valerie Morse v The Police* [2011] NZSC 45 (6 May 2011)

circumstance. The deliberate inflicting of serious and public offence or humiliation may be another. Intimidation and bullying may constitute forms of disorder just as serious as the provocation of physical violence. But where there is no threat to the peace, and no victimisation, then the use of personally offensive language in the course of a public statement of opinions on political and governmental issues would not of itself contravene the statute.⁴⁷

110. Later remarks of the Chief Justice clearly indicated that when he referred to public order he gave it the meaning intended by Article 19 of the ICCPR⁴⁸.
111. The review of cases demonstrates that the bar for limiting freedom of expression by reference to the need to preserve public order is set high. It is higher still where, as is here, the expression is political. Relevant factors include the risk of violence, intimidation, the causing of intolerable anxiety or disturbance that is sufficient to interfere with the ordinary or customary use of the public space.
112. All factors are absent in this case. There was no evidence of the public actually being disturbed. The arrest was initiated by Protective Services Officers acting on their own initiative. No complaint was made regarding the Appellant's actions.
113. His Honour characterises the behaviour the subject of the offence as relatively trivial, with limited affect upon public order. He found, however, that the restriction on this type of action is reasonably necessary because of the need to prevent such action happening on a wide scale.
114. In determining whether the right to freedom of expression should be limited by reference to public order, each case must turn on its own facts. His Honour erred by amplifying the disturbance caused by the Appellant to public order, by considering the impact of the Appellant repeatedly engaging in the behaviour or the impact of many people engaging in such behaviour. Only through this amplification could a material threat to public order conceivably be demonstrated. Although, if there is no threat to public order in a single act by the Appellant, no amount of repeating it day after day could create such a threat.
115. This approach of "amplification" is apt to lead to a conclusion that almost any act is a threat to public order. This is achieved by simply imagining the effect of tens, hundreds or thousands of people engaging in similar conduct.
116. The Magistrate erred in concluding that section 15(3) was engaged at all in relation to the Appellant's act because the act had no impact on public order.

Sections 197 and 199 are Not Directed at the Protection of Public Order

⁴⁷ at [15]

⁴⁸ at [23]

117. The Magistrate's error is illustrated by his reliance on the fact that the *Crimes Act* as a whole can be seen as placing restrictions on citizens with a purpose, amongst others, to ensure public order⁴⁹. The correct question should have been whether section 197 and 199 were directed to the preservation of public order. Those sections protect property rights. While it is clear that a scheme for the protection of property rights promotes an orderly community, it is not in any real sense directed at the protection of "public order" as that phrase is understood.
118. It follows that the Magistrate erred in concluding that section 15(3) was engaged with the effect that the Appellant's act was not protected expression and therefore could not constitute a lawful excuse.

QUESTION OF LAW 3

Is it unlawful for a Police Officer not to take into account the rights protected in the *Charter* when determining which of a number of available charges to prefer against an accused person?

Ground 3: The learned Magistrate erred in finding that the Informant was entitled to prefer charges pursuant to section 197 and 199 of the *Crimes Act 1958* rather than charges that carry a lower penalty but which cover the same conduct:

- a. **It was unlawful under section 38(1) of the *Charter* for the Informant to fail to give proper consideration to a relevant human right in deciding what charges to prefer against the accused.**
 - b. **Had the Informant properly done so he would have preferred charges carrying a lower maximum penalty which represent a lesser interference with the accused's right of freedom of expression.**
 - c. **To commence a prosecution based on an unlawful decision is an abuse of the Court's processes.**
119. Victoria Police is a public authority pursuant to section 5 of the *Charter*. It is defined in section 3 to include individual officers. It is beyond doubt that the informant in making a decision to charge the Appellant was a public authority for the purposes of the *Charter*. It follows that it was unlawful for him to make a charging decision in a way that is incompatible with a human right or, in making that decision, to fail to give proper consideration to a relevant human right.
120. In *Momcilovic* Gummow J (with whom Hayne J agreed) considered in *obiter* that the DPP is a public authority for the purpose of the *Charter* and that the filing of a presentment involved an act of a formal or public or official character.
121. Gummow J left open the question of what remedy the accused might have if the DPP had contravened section 38 of the *Charter* in the institution, preparation and conduct of a County Court prosecution. His Honour raised the possible consequences of a

⁴⁹ Exhibit "JA-6" page 7

common law remedy of a stay of prosecution for abuse of process or, potentially, a subsequent exercise of clemency by the Executive⁵⁰.

122. Gummow J footnotes the decision of *Barton v R* (1980) 147 CLR 75. There, the High Court considered a case where the AG filed an *ex officio* indictment, thereby circumventing the accused's right to committal proceedings, prejudicing the accused's right to a fair trial. Although it found the filling of the indictment was not amenable to judicial review, the Court retains the power to prevent an abuse of process or the prosecution of a criminal proceeding in a manner which will result in a trial which is unfair when judged by reference to acceptable criminal standards⁵¹.
123. From the Appellant's record of interview and the prepared statement regarding his motivation it was plain that the Appellant's actions were politically motivated and an act of political expression.
124. The informant failed to consider, or properly consider, the Appellant's human rights. Had he done so, he would have preferred one of the alternative summary charges available to prosecute the offence.
125. The failure of Constable Delaney to charge a alternative offence was therefore unlawful. The appropriate remedy is a stay of proceedings on the grounds that they constitute an abuse of process.
126. His Honour erred in finding that, in the presence of alternate summary offences, charges were capable of being laid under the Crimes Act, and that this was a decision open to the Informant⁵².

Saul Holt

Senior Public Defender

Victoria Legal Aid

James Anderson

Associate Public Defender

Victoria Legal Aid

⁵⁰ At [129]

⁵¹ At [31]

⁵² Exhibit "JA-6" page 5, paragraph 3