IN THE SUPREME COURT OF VICTORIA AT MELBOURNE
COMMON LAW DIVISION

No. 10333 2008

BETWEEN

DIRECTOR OF PUBLIC TRANSPORT

Applicant

AND

XFJ

Respondent

OUTLINE SUBMISSIONS ON BEHALF OF THE VICTORIAN EQUAL OPPORTUNITY & HUMAN RIGHTS COMMISSION, INTERVENING

A. INTRODUCTION AND SUMMARY OF ARGUMENT

1. The Victorian Equal Opportunity & Human Rights Commission (the **Commission**) intervenes in these proceedings to make submissions in relation to the application of the *Charter of Human Rights and Responsibilities 2006* (the **Charter**) to a decision by the Victorian Civil and Administrative Tribunal (**VCAT**) on an appeal by XFJ from a decision of the Director of Public Transport (the **Director**) to refuse XFJ accreditation to drive a commercial passenger vehicle under the *Transport Act 1983* (the **Act**). In particular, the Commission's submissions address the following issues:

   (1) the operation and effect of s 38 of the Charter on VCAT's decision; and

   (2) the operation and effect of s 32 of the Charter on VCAT's decision.

The Commission's role as intervener

2. The Commission was originally established under s 6 of the former *Equal Opportunity Act 1984* (Vic) and continues by virtue of s 160 of the current *Equal Opportunity Act 1995* (Vic).[1] Under the Charter, the Commission was given a range of new functions. Section 40 of the Charter provides the Commission with

[1] As amended by the *Equal Opportunity Amendment (Governance) Act 2009* that will commence operation on 1st October 2009.

the right to intervene in legal proceedings initiated by other parties. It is pursuant to this provision that the Commission intervenes in this matter.

3. The Commission's intervention in any proceedings will aim to advance the principles and objectives that underpin the enactment of the Charter, which are reflected in its preamble. In particular that:

   (1) human rights are essential in a democratic and inclusive society that respects the rule of law, human dignity, equality and freedom;

   (2) human rights belong to all people without discrimination, and the diversity of the people of Victoria enhances our community;

   (3) human rights come with responsibilities and must be exercised in a way that respects the human rights of others;

   (4) human rights have a special importance for the Aboriginal people of Victoria, as descendants of Australia's first people, with their diverse spiritual, social, cultural and economic relationship with their traditional lands and waters.

4. The Commission's role as intervener is to assist the Court in relation to the operation and effect of the Charter in these proceedings. The Commission considers that assistance is only provided if the Commission makes submissions as to the impact of the Charter on the particular case at hand. For that reason, the Commission's submissions are addressed to the application of the Charter in this case and not simply to the broad principles relevant to the Charter's operation.

Summary of Argument

5. VCAT is a public authority for the purposes of s 38 of the Charter and is obliged to give proper consideration to a relevant human right when making a decision.

6. In addition, s 32 of the Charter requires VCAT to interpret all applicable provisions of the Act in a way that is compatible with human rights, so far as it is possible to do so consistently with the purpose of the Act.

7. The Act requires that VCAT consider the safety, amenity, convenience and comfort of the public when determining whether to accredit a person to drive a taxi. XFJ's past mental illness and his conduct in killing his wife in 1990 (for which he was found not guilty by reason of insanity) are both relevant to this

consideration and were considered by VCAT. Consideration of those matters was consistent with the Charter as any limitation on XFJ's rights was demonstrably justified in a free and democratic society.

8. However, any further consideration by VCAT of XFJ's past mental illness or his conduct in 1990, pursuant to s 196(10(b)(ii) of the Act, engages and limits XFJ's right to equality before the law and protection from discrimination under s 8(3) of the Charter. This right is to be understood in light of relevant comparative jurisprudence and international law, pursuant to s 32(2) of the Charter, notwithstanding the Charter's incorporation by reference of certain provisions of the *Equal Opportunity Act*. In particular, the Commission contends that the approach of the majority in *Purvis v State of New South Wales (Department of Education and Training)*[2] ought not to be applied in the Charter context.

9. The limitation of XFJ's right to equality, pursuant to the interpretation of s 169(1)(b)(ii) of the Act for which the Director contends, is not demonstrably justifiable in a free and democratic society pursuant to s 7 of the Charter. The limitation serves no important or legitimate purpose. It is unrelated to the protection of the safety, comfort, amenity and convenience of the public. VCAT was entitled to (and did) consider XFJ's psychiatric history, past violence and current psychiatric assessment in relation to the safety element of the public care objective contained in the Act. However, any further consideration of XFJ's psychiatric history or the circumstances of his wife's death, pursuant to s 169(1)(b)(ii) of the Act and unconnected with the public care objective, would unreasonably limit XFJ's rights under the Charter.

10. Thus even if it be accepted that, on ordinary principles of construction the Director's construction of s 169(1)(b)(ii) is correct (which is not conceded), s 32 requires that the Director's construction not be adopted.

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[2] (2003) 217 CLR 92.

B. RELEVANT LEGISLATIVE PROVISIONS

B1. The *Transport Act 1983*

11. Part 6, Division 6 of the Act sets out an accreditation scheme for drivers of commercial passenger vehicles. The central provisions in issue are as follows:

> **164. Public care objective**
>
> (1) The public care objective is the objective that the services provided by drivers of commercial passenger vehicles and vehicles used for the operation of private bus services—
>
> (a) be provided—
>
> (i) with safety; and
>
> (ii) with comfort, amenity and convenience—
>
> to persons using the services and to other persons, particularly children and other vulnerable persons; and
>
> (b) be carried out in a manner that is not fraudulent or dishonest.
>
> (2) In this Division, a reference to the public care objective is a reference to the objective set out in sub-section (1).
>
> **169. Matters to be considered by the Director when issuing or renewing an accreditation**
>
> (1) If sub-section (2), (3) or (4) does not apply to an applicant for the issue or renewal of a driver accreditation, the Director may grant the application if the Director is satisfied—
>
> (a) that the issuing of accreditation is appropriate having regard to the public care objective; and
>
> (b) that the applicant—
>
> (i) is technically competent and sufficiently fit and healthy to be able to provide the service; and
>
> (ii) is suitable in other respects to provide the service; and
>
> (c) that the applicant has complied with the application requirements under this Division.

12. Under s 169(2)(b) the Director is prohibited from issuing an accreditation "if a person has been found guilty of a category 1 offence". Section 163 of the Act provided that a reference to a person who has been found guilty of an offence included a person in relation to whom a finding under s 17(1)(b) of the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (the **CMI Act)** has been made.[3] However, a refusal of accreditation by the Director pursuant to

[3] Amendments to the Act in December 2008 by the *Transport Legislation Amendment (Driver and Industry Standards) Act 2008*, amendments to s 163 of the Act commenced operation on 12

s 169(2)(b) is subject to review by VCAT under s 169N, so that a person denied accreditation by the Director on that basis could be accredited by VCAT notwithstanding their commission of the physical elements of a category 1 offence.

B2. The *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*

13. When XFJ was found not guilty of murder by reason of insanity in 1992 he was detained in custody at the Governor's pleasure. The introduction of the CMI Act reformed the law in relation to both the determination of matters involving defendants acting under a mental impairment, as well as the custodial and non-custodial supervision of individuals unfit to be tried or found not guilty because of mental impairment.

14. Individuals detained at the Governor's pleasure were 'transferred' to the regime under the CMI Act. XFJ was reviewed by the Supreme Court in 1998 at which time his custodial supervision order was made non-custodial. In 2003 XFJ was discharged from all forms of supervision.

B3. The *Charter of Human Rights and Responsibilities*

15. The Charter makes provision for the protection of human rights in Victoria. It commenced on 1 January 2007, with the exception of Divisions 3 and 4 of Part 3, which commenced on 1 January 2008. There is no issue as to the applicability of the Charter to the decision of VCAT.[4]

16. Part 2 of the Charter sets out the rights protected by the Charter. The right relevant to the current proceeding is that articulated in s 8(3) (the **equality right**):

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

December 2008 extended the category of being found guilty of an offence to include certain findings under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*. These amendments are not applicable to XFJ's application, which must be determined according to the criteria set down in s 169(1) read in conjunction with the definition of the public care objective in s 164.

[4] See Appellant's Outline of Submissions dated 25 June 2009 at [57].

17. Pursuant to the definition of discrimination contained in s 3 of the Charter, the Charter adopts the definition of discrimination used in the *Equal Opportunity Act 1995* (the **EO Act**). The relevant provisions of the EO Act are set out below.

18. Section 7 of the Charter sets out the circumstances in which a right protected by the Charter may be limited, namely:

> (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.

19. Section 38 provides that public authorities are to make decisions and act compatibly with the Charter, as follows:

> (1) Subject to this section, it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.
>
> (2) Subsection (1) does not apply if, as a result of a statutory provision or a provision made by or under an Act of the Commonwealth or otherwise under law, the public authority could not reasonably have acted differently or made a different decision.

20. Section 32(1) of the Charter provides that legislation is to be interpreted consistently with the Charter, as follows:

> 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.

21. Section 36 of the Charter provides that the Supreme Court may, if it is unable to interpret legislation consistently with the Charter, make a declaration of inconsistent interpretation.

B4. The *Equal Opportunity Act 1995*

22. Section 6 of the EO Act identifies a number of personal attributes on the basis of which discrimination is prohibited in a range of areas of public life (covered separately in Part 3 of the Act). One of those attributes is impairment, which is

defined in section 3 of the EO Act to include a *malfunction of a part of the body, including a mental or psychological disease or disorder*.

23. The EO Act – and in turn the Charter – prohibit both direct and indirect discrimination. For the purposes of these proceedings, only direct discrimination is relevant. Sections 7 and 8 of the EO Act provide as follows:

> **7. Meaning of discrimination**
>
> (1) Discrimination means direct or indirect discrimination on the basis of an attribute or a contravention of section 13A, 14A, 15A, 31A, 51 or 52.
>
> (2) Discrimination on the basis of an attribute includes discrimination on the basis—
>
> (a) that a person has that attribute or had it at any time, whether or not he or she had it at the time of the discrimination;
>
> (b) of a characteristic that a person with that attribute generally has;
>
> (c) of a characteristic that is generally imputed to a person with that attribute;
>
> (d) that a person is presumed to have that attribute or to have had it at any time.
>
> **8. Direct discrimination**
>
> (1) Direct discrimination occurs if a person treats, or proposes to treat, someone with an attribute less favourably than the person treats or would treat someone without that attribute, or with a different attribute, in the same or similar circumstances.
>
> (2) In determining whether a person directly discriminates it is irrelevant—
>
> (a) whether or not that person is aware of the discrimination or considers the treatment less favourable;
>
> (b) whether or not the attribute is the only or dominant reason for the treatment, as long as it is a substantial reason.

C. ARGUMENT

C1. Observations on the Director's grounds of appeal

24. The Director, in his Notice of Appeal, articulates two Questions of Law, as follows:

> (1) In determining whether an applicant is "suitable in other respects to provide the services" for the purposes of s 169(1)(b)(ii) of the *Transport Act 1983*, is it a relevant consideration that an applicant has carried out acts constituting the physical elements of a category 1 offence and the Act evidences a legislative policy that persons who have engaged in such conduct must be refused accreditation at first instance?

(The **physical elements consideration.**)

(2) In determining whether an applicant is "suitable in other respects to provide the services" for the purposes of s 169(1)(b)(ii) of the Transport Act 1983, is a relevant consideration the effect of granting the accreditation on community expectations about, and the need to maintain community confidence in, the taxi driver accreditation system and the provision of taxi services as part of public transport?

(The **community perceptions consideration.**)

25. Each of these questions asserts that VCAT failed to take into account a mandatory relevant consideration (collectively, **the asserted relevant considerations**) in determining whether XFJ was "otherwise suitable" to be accredited as a taxi driver.

26. While the Commission's submissions focus on the operation and effect of the Charter, in order to make such submissions it is necessary to first clarify certain aspects of the Director's Questions of Law.

27. The Commission observes that each of the asserted relevant considerations has been crafted so as not to expressly refer to issues of mental illness, past or present. However, the Commission contends that the formulation of each ground masks the fact that the real concern underpinning each question is XFJ's past mental illness.

28. In relation to the physical elements consideration, the Director contends that the Act "evinces a policy" that persons who have committed the physical elements of a category 1 offence are to be refused accreditation at first instance. The Commission contends that this contention cannot be sustained when the Act is examined; and that the only policy that the Act could be said to identify (and it is not conceded that the Act does identify any 'policy' in relation to these matters over and above the prescriptions it imposes) is a policy that persons who have committed the physical elements of a category 1 offence and *on the basis of mental impairment* not been convicted should not be accredited at first instance. This contention is made for the following reasons:

(1) The Act precludes accreditation at first instance only of those "found guilty" of a category 1 offence (s 169(2)(b)); it does not, in terms, preclude accreditation at first instance of those who have committed the physical elements of a category 1 offence.

(2) The Act then extends the concept of "found guilty of an offence" to include a person who was not found guilty but had certain findings made against him or her under the CMI Act (s 163(1)(d)). Such findings are predicated on the person in question having a mental impairment.

(3) The Act does not extend the concept of "found guilty of an offence" to persons who committed the physical elements of a category 1 offence such as murder, but were acquitted for some reason such as self defence, automatism, necessity etc. Nor does the Act elsewhere preclude the accreditation at first instance of such persons, or evince a policy that such persons should be refused accreditation, although they have committed the physical elements of a category 1 offence.

29. In relation to the community perceptions consideration, the Commission contends that this ground, too, avoids the real concern underpinning the ground; XFJ's past mental impairment. Given that public safety and comfort is taken into account under s 169(1)(a), by reason of the "public care objective", the only other way in which community perception would preclude accreditation would be because the community, it is asserted, is likely to be of the view that XFJ should not be accredited because, by reason of mental illness, he committed the elements of a category 1 offence.

30. Thus, the Commission contends that each of the asserted relevant considerations, when properly understood, in fact turns upon XFJ's past mental illness.

C2. Section 38 of the Charter

31. Section 38(1) of the Charter requires public authorities to act compatibly with human rights. There is no dispute that both the Director and VCAT are public authorities under the Charter and subject to the obligations the Charter imposes on public authorities.

32. Thus, subject to the operation of s 38(2), neither VCAT nor the Director may discriminate against XFJ on the basis of his mental impairment, including his

past mental impairment. The Commission does not understand this proposition to be contentious.[5]

33. Two questions then arise:

(1) first, would taking into account the asserted relevant considerations for which the Director contends constitute discrimination on the basis of mental impairment within the terms of the Charter (read with the relevant provisions of the EO Act)?

(2) second, if taking the asserted relevant considerations into account would constitute discrimination on the basis of mental impairment, would s 38(2) operate so as to render lawful the conduct of VCAT were it to take into account the asserted relevant considerations for which the Director contends?

34. The answer to the first question depends upon the scope and operation of the equality right; the answer to the second question depends upon the construction of the Act — that is, whether the Act requires VCAT to take into account the asserted relevant considerations — and requires consideration of s 32 of the Charter.

35. The Commission observes that if the Act is interpreted to require VCAT to take into account the asserted relevant considerations, and if to do so constituted a violation of the equality right, then it may be appropriate for the Court to make a declaration of inconsistent interpretation; however, the Commission contends that that step is unnecessary because, pursuant to s 32 of the Charter, the Act can and should be interpreted so as not to require VCAT to take into account the asserted relevant considerations, which would then remove the inconsistency between the Act and the Charter and leave no need for a declaration of inconsistent interpretation.

[5] See the Appellant's Outline of Submissions dated 25 June 2009 at [59].

C3. Would taking into account the asserted relevant considerations violate XFJ's equality right?

C3.1 The meaning and scope of the equality right

The equality right generally

36. The equality right, like other rights protected by the Charter, "should be construed in the broadest possible way" before consideration is given to whether it has been limited in accordance with s 7(2) of the Charter.[6] Furthermore, pursuant to s 32(2), regard should be had to relevant international and comparative jurisprudence in interpreting the equality right.

37. As Lord Wilberforce stated in *Minister of Home Affairs v Fisher*,[7] bills of rights call for "a generous interpretation avoiding what has been called 'the austerity of tabulated legalism', suitable to give individuals the full measure of the fundamental rights and freedoms referred to". Likewise, the Canadian Supreme Court has often stressed that rights under the *Canadian Charter of Rights and Freedoms* (the **Canadian Charter**) are to be interpreted "generously and purposively".[8]

38. In relation to the equality right, the Commission contends that significant guidance is to be found in the jurisprudence of the Supreme Court of Canada in relation to s 15(1) of the Canadian Charter. Before turning in detail to the way in which the Canadian Supreme Court has approached disability discrimination it is helpful to set out, by way of background, some general propositions as to the approach that Court has taken to s 15(1) more generally.

39. Section 15(1) is in very similar terms to s 8(3) of the Charter; it provides as follows:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular,

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[6] *Re an Application under the Major Crimes (Investigative Powers) Act 2004* [2009] VSC 381 at [80] (Warren CJ).

[7] [1980] AC 319 at 328 (footnote omitted).

[8] See, eg *Eldridge v British Columbia (Attorney General)* [1997] 3 SCR 624 at [53]; *R. v. Big M Drug Mart Ltd* [1985] 1 SCR 295, at 336, 344; *Andrews v. Law Society of British Columbia* [1989] 1 SCR 143 at 175.

> without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

40. The Canadian Supreme Court has stated that s 15(1) serves two distinct but related purposes:[9]

> First, it expresses a commitment -- deeply ingrained in our social, political and legal culture -- to the equal worth and human dignity of all persons. As McIntyre J. remarked in *Andrews*, at p. 171, s. 15(1) "entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration". Secondly, it instantiates a desire to rectify and prevent discrimination against particular groups "suffering social, political and legal disadvantage in our society"; see *R. v. Turpin*, [1989] 1 S.C.R. 1296, at p. 1333 (per Wilson J.) … While this Court has confirmed that it is not necessary to show membership in a historically disadvantaged group in order to establish a s. 15(1) violation, the fact that a law draws a distinction on such a ground is an important indicium of discrimination; see *Miron v. Trudel* [1995] 2 S.C.R. 418 ….

41. These two purposes have informed the approach of the Canadian Supreme Court to the scope and operation of s 15(1), producing an approach that is flexible and that takes into account not only the impugned legislation "but also the larger social, political and legal context".[10] As the Court said in *Law v Canada (Minister of Employment and Immigration*):[11]

> It is inappropriate to attempt to confine analysis under s. 15(1) of the Charter to a fixed and limited formula. A purposive and contextual approach to discrimination analysis is to be preferred, in order to permit the realization of the strong remedial purpose of the equality guarantee, and to avoid the pitfalls of a formalistic or mechanical approach.
>
> … [A] court that is called upon to determine a discrimination claim under s. 15(1) should make the following three broad inquiries:
>
> > (A) Does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics?
> >
> > (B) Is the claimant subject to differential treatment based on one or more enumerated and analogous grounds?
> >
> > and
> >
> > (C) Does the differential treatment discriminate, by imposing a burden upon or withholding a benefit from the claimant in a manner which reflects the

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[9] *Eldridge v British Columbia (Attorney General)* [1997] 3 SCR 624 at [54].

[10] *Eldridge v British Columbia (Attorney General)* [1997] 3 SCR 624 at [55].

[11] [1999] 1 SCR 497 at [88].

> stereotypical application of presumed group or personal characteristics, or which otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration?

The equality right and disability discrimination

42. Australia is a party to the Convention on the Rights of Persons with Disabilities.[12] That Convention affirms the importance of recognising the inherent dignity and worth of all persons and of guaranteeing persons with disabilities full enjoyment of their rights without discrimination.[13] Article 1 of the Convention sets out its purpose, as follows:

> [T]o promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities and to promote respect for their inherent dignity.

43. Article 2 defines "discrimination on the basis of disability" as meaning:

> Any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, cultural, civil or any other field. It includes all forms of discrimination, including denial of reasonable accommodation.

44. Article 3 sets out the general principles of the Convention, relevantly as follows:

> b. non-discrimination;
>
> c. full and effective participation and inclusion in society;
>
> d. respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;
>
> e. equality of opportunity

45. Article 5 deals with equality and non-discrimination, as follows:

> 1. States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.
>
> 2. States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.
>
> 3. In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.

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[12] Australia ratified the Convention on 17 July 2008.

[13] Preamble to the Convention, paras (b) and (c).

46. These obligations require effective protection against disability discrimination and support a generous and flexible construction of the equality right in the disability context, rather than a "thin and impoverished" approach.[14]

47. The Canadian Supreme Court has accepted that persons with a disability are subject to pre-existing disadvantage, stereotyping and prejudice. In *Eldridge* the Canadian Supreme Court observed that:[15]

> It is an unfortunate truth that the history of disabled persons in Canada is largely one of exclusion and marginalization. Persons with disabilities have too often been excluded from the labour force, denied access to opportunities for social interaction and advancement, subjected to invidious stereotyping and relegated to institutions; …. This historical disadvantage has to a great extent been shaped and perpetuated by the notion that disability is an abnormality or flaw. As a result, disabled persons have not generally been afforded the "equal concern, respect and consideration" that s. 15(1) of the Charter demands. Instead, they have been subjected to paternalistic attitudes of pity and charity, and their entrance into the social mainstream has been conditional upon their emulation of able-bodied norms …. One consequence of these attitudes is the persistent social and economic disadvantage faced by the disabled.

48. In relation to persons with a mental disability, the Canadian Supreme Court has acknowledged that, historically, mentally ill accused persons were subject to stereotyping and stigmatization. In *Winko v British Columbia (Forensic Psychiatric Institute)*, Lamer CJ, Cory J, McLachlin, Iacobucci, Major, Bastarache and Binnie JJ stated:[16]

> The stereotype of the "mad offender" too often led to the institutionalization of an acquitted accused or worse, incarceration in prisons where they were denied the medical attention they required and were subjected to abuse. By forcing an accused to face indefinite detention at the pleasure of the Lieutenant Governor in Council, on the assumption that such confinement was necessary for purposes of public safety, it encouraged the characterization of mentally ill people as quasi-criminal and contributed to the view that the mentally ill were always dangerous, a view we now know to be largely unfounded. In many cases, indeed, it treated people who had committed no crime and indeed were not capable of criminal responsibility worse than true criminals, sometimes using jails as the places of detention.

49. The Commission contends that these remarks are equally appropriate in Victoria; and that, historically, people with a disability generally, and in particular people who have a mental illness, have been subject to negative stereotyping,

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[14] *Eldridge v British Columbia (Attorney General)* [1997] 3 SCR 624 at [73].

[15] *Eldridge v British Columbia (Attorney General)* [1997] 3 SCR 624 at [56] (references omitted).

[16] [1999] 2 SCR 625 at [84].

stigmatization, disadvantage and prejudice; and that, notwithstanding legal change, these problems continue to confront disabled people generally, and mentally disabled people in particular, in contemporary Australian society.[17] The Court's task in considering the application of the Charter's equality right must take this broader social context into account.

50. As the Canadian Supreme Court accepted in *Novia Scotia (Workers' Compensation Board) v Martin*,[18] a flexible approach:

> allows the courts to take into account a fundamental and distinctive characteristic of disabilities when compared to other enumerated grounds of discrimination: their virtually infinite variety and the widely divergent needs, characteristics and circumstances of persons affected by them: see *Eaton v. Brant County Board of Education* …; *Granovsky* …. Due sensitivity to these differences is the key to achieving substantive equality for persons with disabilities. In many cases, drawing a single line between disabled persons and others is all but meaningless, as no single accommodation or adaptation can serve the needs of all. Rather, persons with disabilities encounter additional limits when confronted with systems and social situations which assume or require a different set of abilities than the ones they possess. The equal participation of persons with disabilities will require changing these situations in many different ways, depending on the abilities of the person. The question, in each case, will not be whether the state has excluded all disabled persons or failed to respond to their needs in some general sense, but rather whether it has been sufficiently responsive to the needs and circumstances of each person with a disability.

The need for a comparator

51. The Supreme Court of Canada has also observed that the exercise under s 15(1) of the Charter is comparative in nature; however, a flexible approach to the

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[17] See, eg, Human Rights and Equal Opportunity Commission, *Report of the National Inquiry into the Human Rights of People with Mental Illness*, 1993 at 441-452 (http://www.hreoc.gov.au/disability_rights/inquiries/mental/Volume%201.txt); John von Doussa, *National Mental Health Strategy - Future Challenges Meeting Broader Community Need*, keynote address delivered at the Mental Health Foundation of Australia Annual Conference, University of Melbourne, 27th November 2003; Sev Ozdowski, *The Human Rights of Mentally Ill People: The HREOC Inquiry and After*, paper delivered at the Mental Health, Criminal Justice and Corrections conference, 19 October 2001 (http://www.hreoc.gov.au/disability_rights/speeches/2001/mental01.htm); Mental Health Council of Australia, *The DDA As a Tool for Change*, paper presented at the Human Rights and Equal Opportunity Commission Summit for Peak Disability Organisations 2001 (http://www.hreoc.gov.au/disability_rights/consult/summit01.htm); Disability Discrimination Legal Service Inc, *Submission To The Human Rights Consultation Committee* (http://www.communitylaw.org.au/clc_ddls/ cb_pages/policy_submissions.php).

[18] [2003] 2 SCR 504 at [81] (references omitted).

question of the appropriate comparator has been adopted. In *Law* the Court stated:[19]

> The equality guarantee is a comparative concept, which ultimately requires a court to establish one or more relevant comparators. The claimant generally chooses the person, group, or groups with whom he or she wishes to be compared for the purpose of the discrimination inquiry. However, where the claimant's characterization of the comparison is insufficient, a court may, within the scope of the ground or grounds pleaded, refine the comparison presented by the claimant where warranted. Locating the relevant comparison group requires an examination of the subject-matter of the legislation and its effects, as well as a full appreciation of context.

52. The Commission contends that the same approach ought to be adopted in relation to the Charter's equality right; and that the incorporation by reference of some aspects of the EO Act (namely the definition of discrimination and the use of the same enumerated grounds) does not preclude such an approach.

53. On this basis, the Commission contends that, in relation to the Charter's equality right, the approach of a majority of the High Court in *Purvis*[20] to the identification of an appropriate comparator in relation to disability discrimination is inappropriate and ought not be adopted.[21]

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[19] [1999] 1 SCR 497 at [88].

[20] (2003) 217 CLR 92.

[21] Further, the Commission contends that the dissenting judgment of Baroness Hale of Richmond in *Mayor and Burgesses of the London Borough of Lewisham v Malcolm* [2008] UKHL 43 is to be preferred as consistent with the Canadian jurisprudence and with international law. Lord Lester of Herne Hill made the following observation in relation to the case in the House of Lords (Hansard, vol 703, 9 July 2008, WA 749):

> Does not the Law Lords' majority decision two weeks ago in the Malcolm case create real problems? In their wisdom, what the Law Lords have done is interpret our disability discrimination legislation more narrowly than sex and race discrimination legislation, with the following extraordinary effect. A blind person, or a person who is visually impaired, with a dog, will not be able to claim disability discrimination if a restaurant has a "no dogs" policy and applies the policy regardless of disability. It seems to us, looking at the convention, that that cannot be right in terms of the convention, and that it will need to be overruled.

54. *Purvis* concerned disability discrimination under the *Disability Discrimination Act 1992* (Cth) and can be distinguished on the following bases:

(1) First, *Purvis* concerned a different statutory regime and one that contained a significant drafting anomaly.[22]

(2) Second, interpretation of the Charter requires consideration of general human rights standards and jurisprudence (see s 32(2)) and not simply the application of domestic cases concerning different statutory regimes. International human rights law and comparative jurisprudence, as outlined above, supports a different, more flexible, approach to disability discrimination than that adopted by the majority in *Purvis*.

55. Rather, the approach of McHugh and Kirby JJ in *Purvis* is to be preferred when interpreting the Charter. Their Honours observed that:[23]

> Provisions that extend the definition of discrimination to cover the characteristics of a person have the purpose of ensuring that anti-discrimination legislation is not evaded by using such characteristics as "proxies" for discriminating on the basic grounds covered by the legislation. But the purpose of a disability discrimination Act would be defeated if the comparator issue was determined in a way that enabled the characteristics of the disabled person to be attributed to the comparator. If the functional limitations and consequences of being blind or an amputee were to be attributed to the comparator as part of the relevant circumstances, for example, persons suffering from those disabilities would lose the protection of the Act in many situations. They would certainly lose it in any case where a characteristic of the disability, rather than the underlying condition, was the ground of unequal treatment. And loss of the Act's protection would not be limited to such dramatic cases as the blind and amputees. Suppose a person suffering from dyslexia is refused employment on the ground of difficulties with spelling but the difficulties could be largely overcome by using a computer with a spell checker. The proper comparator is not a person without the disability who cannot spell. Section 5(2) of the [Disability Discrimination] Act requires the comparison to be between a comparator without the disability who can spell and the dyslexic person who can spell with the aid of a computer that has a spell checker.

C3.1 The physical elements consideration

56. The Commission contends that for VCAT to take into account the physical elements consideration would constitute discrimination on the basis of XFJ's past

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[22] Neither the Supreme Court nor the Court of Appeal have had occasion to consider whether *Purvis* should be applied in relation to discrimination under the EO Act or the Charter.

[23] (2003) 217 CLR 92 at 130-137 (footnote omitted).

mental impairment and would thus, on its face, unfairly limit XFJ's equality right.

57. The Charter incorporates by reference certain aspects of the EO Act, as outlined above. Under that Act, discrimination can be of two kinds: direct or indirect. The Commission contends that for VCAT to take into account the physical elements consideration would be direct discrimination.

58. Previously XFJ had a serious mental illness; such an illness constitutes an impairment for the purposes of the EO Act and while XFJ may no longer have that illness, he continues to be entitled to protection from discrimination on the basis of his past impairment (s 3 and 7 EO Act).

59. In the context of impairment discrimination related to a mental illness, it is critical to emphasise that the impairment is not confined to an individual's diagnosed condition, but includes the behavioural impact associated with it. Any other approach would render the prohibition of discrimination on the basis of impairments of a mental or psychological nature illusory. Such conditions are invisible and only become known to others when they are disclosed or manifest in particular behaviours. In turn this means discrimination is usually triggered by interpretations of and responses to that behaviour, rather than an awareness that an individual has been formally diagnosed as having a specific condition.

60. To establish a *prima facie* case of direct discrimination on the basis of impairment in these circumstances, it must be shown that the Director treated or proposes to treat XFJ less favourably than he would treat someone without XFJ's impairment in the same or similar circumstances. This requires the identification of a comparator – someone, albeit hypothetical, against whom XFJ's treatment can be compared in order to assess whether or not XFJ is being treated less favourably because of his past mental illness. As discussed above, the approach to the identification of a comparator should be flexible and contextual.

61. In this regard, the Commission makes two alternative submissions.

62. First, consistently with the approach of McHugh and Kirby JJ in *Purvis*, the Commission contends that the appropriate comparator should be identified in the following way:

(1) firstly, the comparator cannot have a past mental illness;

(2) secondly, the characteristics of the comparator cannot include having engaged in conduct similar to XFJ's conduct.

63. That is, because XFJ's conduct stemmed from, and was intimately connected with, his mental illness, the comparator must, as someone without a mental illness, be assumed not to have engaged in the behaviour that was caused by the mental illness.[24]

64. The physical elements consideration involves a *prima facie* exclusion of a person with a mental illness who has committed the physical elements of a category 1 offence. In contrast, a person without a mental illness who has never killed anyone is not *prima facie* excluded. This would constitute discrimination on the basis of disability because it would treat XFJ less favourably than the comparator.

65. In the alternative, if *Purvis* is accepted as the correct approach to the comparator question under the Charter, the comparator would be a person without a mental illness who has committed the same conduct as XFJ but not been convicted of an offence. The Commission contends that, even on this approach, the Director in substance seeks to have VCAT treat XFJ less favourably than a person who has committed a comparable offence and not been convicted for reasons other than mental illness (self-defence, necessity etc). That is, XFJ is to be treated less favourably than a similarly situated person who does not have a mental illness (or has not had one in the past). This constitutes discrimination on the basis of mental illness so as to constitute a *prima facie* violation of the equality right.

66. The Commission contends that, in either case, the construction of s 169(1)(b)(ii) in relation to the physical elements consideration urged by the Director would, if accepted, constitute discrimination within the terms of the equality right.

C3.2 The community perceptions consideration

67. Similar reasoning applies in relation to the community perceptions consideration. To take into account the public's perception of accrediting XFJ, a person who has committed the physical elements of a category 1 offence while subject to a

[24] See *Purvis* (2003) 217 CLR 92 at 130-137 (McHugh and Kirby JJ).

mental illness sufficient to exculpate criminal liability, where there is no rational basis for concluding that there is any threat to the public's safety, comfort, amenity or convenience, is to take into account public prejudice in relation to persons who have, or have had, a mental illness.

68. The Commission again contends that the community perceptions consideration, while framed in neutral terms, is in fact discriminatory in nature. In terms of identifying a comparator the Commission contends that:

(1) First, if the proper comparator is a person who has no mental impairment, and has not committed the physical elements of a category 1 offence, the Commission contends that the asserted community perceptions reflect prejudice, not rational concerns about safety. To allow community perceptions of this kind to override the equality right is to negate the very operation of that right; and it is precisely this kind of community prejudice that an equality right is designed to combat.

(2) Alternatively, if the proper comparator is someone without a mental illness who has committed the physical elements of a category 1 offence but not been convicted (for example, a person who has killed in self-defence), then there would likely be little community concern about such a person driving a taxi. The community perceptions that the Director asserts exist reflect prejudice, not rational assessment of risk to public safety (the latter factor being considered under the public care objective, and the Director does not contend that the public care objective offers any basis for refusing to accredit XFJ).

69. Reasoning to the effect that "my clients are prejudiced, therefore I cannot hire a black/gay/disabled person" is long discredited in anti-discrimination law. The Director's submission in effect seeks to reinstate this reasoning under the Act, in the more neutral language of "community perceptions". The Commission contends that to do so is contrary to the Charter, unless it can be justified pursuant to s 7.

70. Accordingly, as a starting point, and in order to ensure equal treatment to an appropriate comparator, XFJ's right to equality and protection from impairment

discrimination entitled his application for accreditation to be considered without reference to his past mental illness or the circumstances of the death of his wife, or community perceptions in relation to those matters. Any departure from this would *prima facie* amount to impairment discrimination of a type prohibited by the Charter, unless to do so could be justified in accordance with s 7.

71. Before turning to s 7, however, it is appropriate to consider whether the Act is to be interpreted in the manner for which the Director contends — that is, does the Act, interpreted in light of the Charter, require that VCAT take into account the asserted relevant considerations? This requires consideration of the operation and effect of s 32 of the Charter.

C4. The operation and effect of s 32

72. Section 32 of the Charter requires that the Court interpret legislation so as to be compatible with the Charter so far as it is possible to do so consistently with the purpose of the legislation. The only section of the legislation that the Director contends requires VCAT to consider the asserted relevant considerations is s 169(1)(b)(ii): the requirement that an applicant is "suitable in other respects to provide the service". The question for the Court, then, is whether in determining whether XFJ was suitable in other respects to provide the service, VCAT was required by the Act to take into account the asserted relevant considerations.

73. The Commission contends that there is no single, universal approach to the s 32 exercise. However, for the purposes of this matter the Commission accepts the approach to s 32 of the Charter set out by Bell J in *Kracke v Mental Health Review Board*[25] and by Warren CJ in *Re Application under the Major Crimes (Investigative Powers) Act 2004*.[26] That approach requires a Court to address the following questions:

    (1) Does the legislation, construed according to the ordinary principles of statutory construction and without reference to the Charter, limit human rights, having regard to its interpretation and their scope?

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[25] [2009] VCAT 646 at [65].

[26] [2009] VSC 381 at [51]-[53].

(2) If the answer is yes, is the limitation is justified under the general limitations provision in s 7(2)?

(3) If the answer is no, is it possible to interpret the legislation compatibly with human rights under the special interpretative obligation in s 32(1)?

(4) If the answer is no, should the Supreme Court exercise its power to make a declaration of inconsistent interpretation under s 36(2)?

74. This approach is consistent with the remarks of Nettle JA in *RJE v The Secretary to the Department of Justice*.[27] It is also consistent with comparative law jurisprudence on the approach to similar provisions in other rights regimes.[28]

C4.1 The first step in the *Kracke* approach

75. The first step requires that the legislation be construed in accordance with ordinary principles of construction; then the Court must determine whether, so construed, it limits any rights. The ordinary process of construction occurs without reference to s 32 of the Charter; but consideration of human rights is permissible, indeed, required, at this stage. As Bell J observed in *Kracke*:[29]

> The first stage of the interpretative analysis involves considering whether the statutory provision engages a human right specified in the Charter. The provision is interpreted according to the standard principles of interpretation, **including those calling up Australia's international obligations and the principle of legality**. The scope of the human right is identified broadly and not legalistically, focusing on its purpose and the interests it protects. The scope of the right is identified in a way that fulfils its purpose and secures for individuals the full benefit of its protection.

76. If the Court, on ordinary principles of construction, rejects the Director's contentions and concludes s 169(1)(b)(ii) does not require that the asserted relevant considerations be taken into account then the proceedings must be resolved in favour of the respondent, there is no limitation on his rights and there is no need to reach the Charter issue. The provision would be interpreted consistently with human rights. The Commission's intervention being limited to

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[27] [2008] VSCA 265 at 105.

[28] See, eg, *Hansen v The Queen* [2007] 3 NZLR 1; *HKSAR v Lam Wong Kwai* FACC No. 4 of 2005 (31 August 2006) at [29] (Mason NPJ); *Poplar Housing and Regeneration Community Assn Ltd v Donoghue* [2002] QB 48.

[29] [2009] VCAT 646 at [97].

Charter issues, the Commission makes no detailed submission on the ordinary construction point; the Commission simply notes that it supports XFJ's contention that the Act does not, on ordinary principles of construction, and understood in light of the Convention on the Rights of Persons with Disabilities, require that the asserted relevant considerations be taken into account by VCAT.

77. The Commission's submissions start from an assumption that the Director's contentions as to construction are accepted as reflecting the correct construction of the Act on ordinary principles. If that occurs, the Commission contends, on the basis of the analysis in Part C3 above, that that construction limits XFJ's equality right as it involves discrimination on the basis of mental illness.

C4.2 The second step in the *Kracke* approach

78. The second step in the *Kracke* approach is to assess whether the limitation is justified under the general limitations provision in s 7(2). This requires consideration of the factors set out in that section. The onus is on the Director to positively satisfy the Court that the limitation is justified; and that this requires relevant evidence, rather than mere assertion.

79. As Warren CJ observed in *Re Application under the Major Crimes (Investigative Powers) Act 2004*:[30]

> The onus of 'demonstrably justifying' the limitation in accordance with s 7 resides with the party seeking to uphold the limitation.[31] 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'.[32] 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.[33] 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.'[34]

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[30] [2009] VSC 381 at [147] (footnotes renumbered).

[31] *Kracke* [2009] VCAT 646, [108].

[32] See *Bater v Bater* [1950] 2 All ER 458, 459 (Lord Denning).

[33] [2007] VSC 2; (2007) 16 VR 168, 181; in reference to the decision of the Ontario Court of Appeal in *R v McCallen* (1999) 43 OR (3d) 56.

[34] *Oakes* [1986] 1 SCR 103, 42.

80. The factors set out in s 7(2) are similar to the factors the Supreme Court of Canada has articulated as relevant to the application of the justification provision in s 1 of the Canadian Charter in *Oakes* and other cases; for that reason, the Commission contends that particular assistance can be gained from the Canadian jurisprudence on s 1.

81. In relation to the s 7(2) factors, the Commission says as follows:

The nature of the right

82. The right to equality was described by the Supreme Court of Canada in *Law* as having an "exalted status" and expressing "some of humanity's highest ideals and aspirations".[35] It reflects and embodies the inherent dignity of all human persons,[36] as reflected in the Convention, and this underlying nature of the right must be considered when undertaking the proportionality analysis for which s 7(2) provides.[37]

83. While no rights protected by the Charter are absolute, the Commission contends that particularly cogent reasons must be demonstrated to justify a limitation on the equality right.

The importance of the purpose of the limitation

84. The Commission contends that, as under s 1 of the Canadian Charter, only limitations on rights that relate to societal concerns which are "pressing and substantial" in a free and democratic society can be justified under s 7. This was accepted by Bell J in *Kracke*:[38]

> This factor reflects the insistence in *R v Oakes* that limitations must relate to societal concerns which are "pressing and substantial." As the Attorney-General submitted, based on Evans & Evans, a limitation on a right will not be demonstrably justified if it is of insufficient importance or for an impermissible purpose. Put another way, proportionality under paragraphs (c)-(e) will only become an issue if the law or decision is seen to have a purpose which is sufficiently serious to justify limiting the right. It is therefore critical to understand how important that purpose is.

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[35] [1999] 1 SCR 497 at [2]. And see *Eldridge v British Columbia (Attorney General)* [1997] 3 SCR 624 at [54] (La Forest J, for the Court).

[36] See discussion in *Law* [1999] 1 SCR 497 at [42]-[54].

[37] See discussion in *Kracke* [2009] VCAT 646 at [137]-[142], [145], [153].

[38] [2009] VCAT 646 at [145] (footnotes omitted).

85. In *R v Oakes*, Dickson J stated:[39]

> To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom" …. The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection.

86. This test is not satisfied in this case; the purposes of the two asserted relevant considerations are not "pressing and substantial". To the contrary, the Commission contends that the apparent purposes of the limitation on XFJ's rights are, at their highest, relatively unimportant and, at their lowest, irrelevant or impermissible to a Charter analysis.

(1) The physical elements consideration appears to have as its purpose the fulfilment of an asserted legislative policy; but that legislative policy is itself discriminatory and is thus not a legitimate purpose under the s 7 analysis, let alone a "pressing and substantial" purpose.

(2) The purpose of the community perceptions consideration amounts to consideration of a perceived community concern, which can be regarded as discriminatory, if not otherwise justified. While XFJ's past mental illness will be relevant to considerations of public safety, comfort, amenity and convenience, these matters are **not** the basis of the Director's assertion that XFJ's mental illness is relevant to the "otherwise suitable criterion".

The nature and extent of the limitation

87. In *Kracke*, Bell J said of this aspect of s 7(2):[40]

> It is necessary to consider both the nature and the extent of the limitation. The greater the limitation of the right, the more compelling must be its justification.

88. In this case, the nature and the extent of the limitation are significant, particularly when understood in light of the Convention. XFJ will be treated unequally on the

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[39] [1986] 1 SCR 103 at [69].

[40] [2009] VCAT 646 at [150].

basis of his past mental illness and denied the opportunity to engage in the employment of his choice on that basis.

The relationship between the limitation and its purpose

89. Bell J explained this aspect of s 7(2) in *Kracke* as follows:[41]

> The focus here is on whether the limitation on the right, regardless of its importance, is reasonably related to its intended purpose. This is a means-ends assessment. The question is whether the limitation is "rationally connected to the objective." That was Dickson CJ in *R v Oakes*. Put another way, the question is whether the means are rationally connected to the ends. As the Attorney-General submitted, the harm done must be proportionate to the benefits achieved.

90. The limitation in issue here might be said to achieve its purposes; but as the asserted purposes are either unimportant or irrelevant, this factor adds little to the any attempt to justify the Director's asserted construction of s 169(1)(b)(ii). The harm imposed is disproportionate to the purposes in question; and there is little, if any, rational connection between the two.

Any less restrictive means to achieve the purpose

91. In *Kracke* Bell J described this aspect of s 7(2) as follows:[42]

> The minimum impairment principle was stated in *R v Oakes* in terms of the limitation impairing the right "as little as possible." That the impairment be as little as possible is the animating purpose of the principle. It is very important for this to be taken into account when a provision is drafted or a decision is taken. It is the best way to ensure the provision is a proportionate response to the pressing social need.
>
> When it comes to deciding whether a limitation in a provision or decision is justified, the principle is applied sensibly. Thus in Canada, South Africa and (probably) the United Kingdom it is recognised the Parliament or a public authority may legitimately choose between a number of reasonable means of achieving the permissible purpose. This is McLachlin J in *RJR-MacDonald v Canada*:
>
> > the government must show that the measures at issue impair the right of free expression as little as reasonably possible in order to achieve the legislative objective. The impairment must be "minimal", that is, the law must be carefully tailored so that rights are impaired no more than necessary. The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement.

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[41] [2009] VCAT 646 at [153] (footnote omitted).

[42] [2009] VCAT 646 at [157-8] (footnotes omitted).

92. In so far as the community perceptions consideration is concerned, the Commission contends that, if it is accepted to be, in substance, reliance on community concern which may be discriminatory, then it is inappropriate to take any steps to accommodate such discrimination. Rather, appropriate steps would be to seek to remove or reduce such discrimination through education, both generally and about XFJ's particular circumstances.

93. However, even if accepted at face value, the Commission contends that there are clearly less restrictive means to achieve the purpose of maintaining public confidence in the taxi driver accreditation system. The Director could take steps to properly inform the public of the basis for any decision to accredit a person in XFJ's position, so that rather than unfairly reacting to discriminatory community reactions lacking evidentiary foundation, the community could be educated about XFJ's situation and the fact that he poses no greater threat to public safety, comfort, amenity and convenience than any other accredited taxi driver.[43]

Conclusion on s 7(2)

94. Thus the Commission contends that the limitation that would be imposed on XFJ's equality right if the Director's contention as to the operation of s 169(1)(b)(ii) is accepted cannot be justified in a free and democratic society based on human dignity, equality and freedom. It is disproportionate to the ends sought to be achieved to discriminate on the basis of XFJ's past disability where that discrimination is not for the purpose of ensuring the safety, comfort, amenity and convenience of the public.

95. Importantly, it should be made clear that the Commission does not contend that XFJ's past mental illness and conduct are irrelevant to any consideration of his application for accreditation. Nor does the Commission contend that for the Act to require VCAT to take those matters into account would always fail the justification test in s 7. To the contrary: the s 7 justification will permit the Act to require those matters to be taken into account in relation to the public care objective; and XFJ's past mental illness and conduct were clearly relevant to an assessment of the public's safety, comfort, amenity and convenience. However,

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[43] *XFJ v Director of Public Transport (Occupational and Business Regulation)* [2008] VCAT 2303 at [18]-[19]; and see [12].

once the public care objective is satisfied, and VCAT is satisfied that accreditation of XFJ posed no threat to the public's safety, comfort, amenity and convenience, then there is no justification for further consideration of XFJ's past mental illness and conduct under s 169(1)(b)(ii) where such consideration would be unrelated to the public care objective.

C4.3 The third step in the *Kracke* approach

96. The Commission's contention so far is that, if s 169(1)(b)(ii) is interpreted in the manner for which the Director contends, it will limit XFJ's right to equality and such limitation will not be justified under s 7. The third step in the *Kracke* analysis then requires the Court to consider whether the legislation can be interpreted differently, so as not to limit XFJ's right to equality. The Commission contends that it can.

97. Section 169(1)(b)(ii) contains no express mandatory relevant considerations. To the extent that the Director's submissions in relation to the asserted relevant considerations are accepted as reflecting the ordinary construction of that section, this must be on the basis that these are impliedly mandatory relevant considerations, found in the general scheme of the Act. In those circumstances, the task of "reinterpretation" is straightforward, and requires no violence to the text of the Act: s 169(1)(b)(ii) is simply interpreted so not to require VCAT to have regard to the asserted relevant considerations.

98. The Commission contends that this approach to s 169(b)(ii) is consistent with the purpose of the legislation, which is concerned to ensure that the public's safety, amenity, convenience and comfort are protected and to regulate the taxi industry; but which does not require that the accreditation process take into account community prejudices, nor that persons be discriminated against on the basis of disability where such discrimination is not justified to protect public safety, comfort, amenity and convenience. It is not inconsistent with the purpose of the Act to interpret s 169(1)(b)(ii) in this way.

99. Thus s 32 requires that s 169(1)(b)(ii) be interpreted so as not to require VCAT to have regard to the asserted relevant considerations. Interpreted in this way, VCAT committed no error; its decision stands; XFJ's equality right is upheld;

and there is no need for the Court to consider making a declaration of inconsistent interpretation.

Dated: 18 September 2009

KRISTEN WALKER