IN THE SUPREME COURT OF VICTORIA **No. 10333 of 2008**
AT MELBOURNE
COMMON LAW DIVISION

BETWEEN:

PJB Appellant

- and -

MELBOURNE HEALTH First Respondent

- and -

STATE TRUSTEES LTD Second Respondent

OUTLINE OF SUBMISSIONS OF THE VICTORIAN EQUAL OPPORTUNITY AND HUMAN RIGHTS COMMISSION INTERVENING

INTRODUCTION

1. The Victorian Equal Opportunity and Human Rights Commission (**the Commission**) intervenes as of right under s 40(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**the Charter**), to make submissions in response to the questions posited in the notification under section 35 of the Charter, filed and served on the Commission on 23 March 2011 (the **Notice**).

2. The Commission will respond to the following questions posed in the Notice:

   (a) When exercising its jurisdiction under the *Guardianship and Administration Act* 1986 (**G & A Act**), and particularly its jurisdiction to appoint an Administrator under s.46(1), is the Tribunal acting as a public authority under the Charter within ss. 4(1) and ss.38(1)?

   (b) In an appeal under s.148(1) of the *Victorian Civil and Administrative Tribunal Act* 1998 (**VCAT Act**) raising human

rights issue of this kind, should the court afford what, if any, margin of appreciation to the decision of the Tribunal and does the decision of the Tribunal in the present case come within or exceed any such margin?

(c) Accepting the authority of *R v Momcilovic* (2010) 265 ALR 751, and given the requirement in s.32(1) of the Charter to interpret the provisions of the G & A Act so far as it is possible to do so, consistently with their purpose, in a manner that is compatible with human rights, what is the proper interpretation of ss.4(2) and ss.46(1) of the G & A Act and did the Tribunal so interpret those provisions?

(d) On the proper interpretation of those provisions, was the Tribunal required to exercise its discretion to appoint an Administrator in a manner that was compatible with the human rights of the person in terms of s.7(2) of the Charter?

(e) Did the Tribunal so exercise that discretion?

3. In summary, the Commission submits that:

(a) The Victorian Civil and Administrative Tribunal (**Tribunal**) is a public authority for the purposes of the Charter, as it is exercising administrative capacity when appointing an administrator pursuant to the G & A Act.

(b) In an appeal under s.148(1) of the VCAT Act raising human rights issue of this kind, in accordance with principles of international law, the court should afford a margin of appreciation to the decision of the Tribunal.

(c) The Commission does not make submissions on whether the Tribunal in the present case come within or exceeded any such margin.

(d) In accordance with s. 32 of the Charter, the proper interpretation of ss.4(2) and ss.46(1) of the G & A Act is one that gives primacy to the best interests of the person in respect of whom an application is sought.

(e) The Commission does not make submissions on whether the Tribunal so interpreted those provisions.

(f) The Tribunal was required to exercise its discretion to appoint an Administrator in a manner that was compatible with the human rights of the person in terms of s.7(2) of the Charter, having regard to its obligations as a public authority.

(g) The Commission does not make submissions on whether the Tribunal did so exercise that discretion.

IS THE TRIBUNAL A PUBLIC AUTHORITY?

4. The Commission submits that it is broadly accepted that the Tribunal is a public authority for the purposes of the Charter in some circumstances, having regard to the definition of a public authority in subsection 4(1)(b). That is, the Tribunal is an entity established by statute and has functions of a public nature.

5. However, subsection 4(1)(j) of the Charter provides that a court or tribunal is not a public authority "except when it is acting in an administrative capacity".

6. The question therefore becomes whether the Tribunal is acting in an administrative capacity when exercising its discretion to make an administration order pursuant to s 42 of the G & A Act.

7. The Commission notes that when determining the capacity in which a court or tribunal is acting for the purposes of determining whether it is a public authority in certain circumstances, one must have regard to the scope and nature of the power being exercised and the character of that power.

8. The Commission adopts those comments made by His Honour Justice Bell, sitting as President of VCAT in *Kracke v Mental Health Review Board & Ors* (***Kracke***)[2009] VCAT 646 at [289-290]:

> However, it is established that, when acting in an administrative capacity, tribunals can make final decisions between contending parties in ways that affect their legal rights and duties.[1] Moreover, certain powers may be administrative or judicial, depending on the repository (court or tribunal) and their purpose (judicial or administrative).[2]
>
> For example, it is an administrative function to exercise a discretionary authority to make orders creating new rights and imposing new liabilities, especially where policy considerations have an important part to play in the determination.[3] Similarly, a conciliation and arbitration tribunal can enquire into past events, and form views as to existing legal rights and obligations, when deciding whether and how to exercise a statutory power to create new industrial rights and obligations.[4]

9. The Commission contends that the nature and scope of the Tribunal's power to make an administration order is one that "imposes liabilities" and "affects the legal rights and duties" of the parties, having regard to policy considerations. Accordingly, the Commission submits that the Tribunal is exercising administrative capacity when making decisions under s 42 and is therefore a public authority for the purposes of the Charter.

10. Support for this proposition can be found in the Charter's definition of a public authority in subsection 4(1)(j), which includes a note, as follows:

> (j) a court or tribunal except when it is acting in an administrative capacity; …
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> Note: Committal proceedings and the issuing of warrants by a court or tribunal are examples of when a court or tribunal is acting in an administrative capacity. A court or tribunal also acts in an administrative capacity when,

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1 *Shell Company of Australia Ltd v Federal Commissioner of Taxation* (1930) 44 CLR 530, 544.
2 *The Queen v Kirby; ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 278.
3 *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167, 191.
4 *Re Ranger Uranium Mines Pty Ltd; ex parte Federated Miscellaneous Workers' Union of Australia* (1987) 163 CLR 656, 665-666.

> for example, listing cases or adopting practices and procedures.

11. Pursuant to section 36(3A) of the *Interpretation of Legislation Act 1984*, this note is part of the Charter, to the extent that it explains the provision. The provision and the note must therefore be interpreted together. The Commission commends to the Court, His Honour Justice Bell's findings in respect of the effect of the note at paragraphs [267-269] of *Kracke*:

> The note refers to a committal proceeding as an example of acting in an administrative capacity. A committal proceeding is an investigation, usually conducted by a magistrate, into criminal charges brought against an accused person to determine whether there is sufficient evidence to justify the charges being tried.[5] When conducting a committal, the magistrate (who usually exercises a judicial function) is undoubtedly acting in an administrative capacity in the public law sense.[6] The issuing of a warrant is likewise an exercise of administrative power in that sense, not an exercise of judicial power.[7]
>
> Another example given by the note is listing cases. Now it is possible to think of instances in which, in a judicial proceeding in a court or tribunal, the listing of a case by a judicial officer would be an exercise of judicial power,[8] just as it is possible to think of instances in which the judicial officer might be exercising administrative power. The character of the power in such instances would depend on the circumstances. But the note refers to those functions in the sense of what is normally done by the administrative or registry staff of courts or tribunals. As such it too is a good example of the exercise of administrative power in the public law sense.

12. Accordingly, the Commission contends that His Honour's conclusion that the note to s 4(1)(j) strongly suggests that "administrative capacity" refers to the exercise of administrative power, as against judicial power, in the public law sense, should be adopted in this case.

SECTION 6(2)(B)

13. In the event that the Court finds that the Tribunal is not exercising administrative capacity when making orders pursuant to section 42 of the G & A Act, the Commission draws to the attention of the Court the

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5 *Grassby v R* (1989) 168 CLR 1, 11-12; *Lamb v Moss* (1983) 76 FLR 296, 321.
6 Ibid; *Sankey v Whitlam* (1978) 142 CLR 1, 83.
7 *Hilton v Wells* (1985) 157 CLR 57, 78.
8 See *R v Williams* (2007) 16 VR 168, [50] per King J.

application of subsection 6(2)(b) of the Charter.

14. Subsection 6(2)(b) applies the Charter to courts and tribunals to the extent that they have functions under Part 2 and Division 3 of Part 3. Section 3(2)(a) of the Charter defines a 'function' as including powers, authorities and duties. Part 2 of the Charter sets out all the human rights that are protected by the Charter and Division 3 of Part 3 relates to the interpretation of laws (s 32) and the making of declarations of inconsistent interpretation (s 36).

15. Courts and tribunals may be given functions (that is – powers, authority or duties) under various sections in Part 2 and Division 3 of Part 3 in various circumstances. It is not possible or desirable to predetermine the circumstances in which courts and tribunals will have powers, authority or duties under the relevant parts and divisions of the Charter – each situation must be examined on its facts. However, it is clear that some sections clearly give functions to courts and tribunals. These sections are:

- s 8(3): right to equality before the law;
- s 21(5)(c): rights when arrested and detained on a criminal charge;
- s 21(6)-(8): rights when awaiting trial;
- s 23(2)-(3): rights of children in the criminal process;
- s 24: right to a fair hearing;
- s 25: rights in criminal proceedings;
- s 26: right not to be tried or punished more than once;
- s 27: prohibition on retrospective criminal laws;
- s 32: interpretation;
- s 33: referral to Supreme Court;
- s 36: declaration of inconsistent interpretation by Supreme Court.

16. The Commission submits that the Tribunal has "functions" in relation to two rights when making a decision about the order sought – the rights to equality before the law and to a fair hearing. The Tribunal also has a

"function" under s 32 – the interpretation requirement.

17. The Supreme Court has recently considered s 6(2)(b) in *Secretary to the Department of Human Services v Sanding* [2011] VSC 22:

> By excluding courts and tribunals from the definition of a public authority (except when acting administratively), while at the same time making the Charter apply directly to them in respect of the specified functions, the legislation has preserved the substantive legal foundation of the jurisdiction of courts and tribunals, while making it obligatory for them to act compatibly with the Charter in respect of those matters which are within their own direct control...[9]

18. The Commission submits that when the Tribunal is considering the an application for an administration order, s 6(2)(b) of the Charter requires the Tribunal to exercise its discretion in a manner that is consistent with the Charter rights in relation to which it has functions. In this way s 6(2)(b) bolsters the effect of s 32, which reaches a similar conclusion by limiting the scope of the discretion itself. PJB's enjoyment of the rights to equality before the law and to a fair hearing are within its direct control, and so should be protected by the Tribunal to the extent possible.

MARGIN OF APPRECIATION

19. The term "margin of appreciation" has a distinct meaning at international law. It refers to a doctrine developed by the Strasbourg organs in determining how much scrutiny should be imposed on public authorities in fulfilling their obligations under the European Convention on Human Rights (**Convention**). In particular, the margin of appreciation doctrine allows for the flexibility needed to avoid confrontations between the Court and the Member States and enables the Court to balance the sovereignty of Member States with their

[9] At [166]

obligations under the Convention[10]. The United Kingdom courts have held that the margin of appreciation principle does not apply to national courts when considering Convention issues arising within their own countries[11]. However, the UK jurisprudence recognises that there is a need for some doctrine of a "margin", otherwise the Court will risk appropriating to itself the role of primary decision-maker. To this end, the Commission notes the approach of the High Court of Australia, which recognises that[12]:

> The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.

20. The Commission submits that the High Court's approach to review of administrative decisions applies equally to review of a decision on the basis of lawfulness under section 38 of the Charter, however we contend that since the enactment of section 38 of the Charter, there is now a new standard of review required in relation to the legality of the conduct and decisions of public authorities in Victoria.

21. In particular, the Commission commends to the Court the oft-quoted decision of Lord Steyn in *Daly*, in an opinion that the House of Lords has described as "justly-celebrated and much-quoted". [13] Lord Steyn said, in relation to the proportionality requirement in s6(1) of the *Human Rights Act 1998* (UK):[14]

> Clearly, these criteria are more precise and more sophisticated than the traditional grounds of review. What is the difference for the disposal of concrete cases? Academic public lawyers have in remarkably similar terms elucidated the difference between the traditional grounds of review and the proportionality

[10] See generally *Handyside v The United Kingdom*, judgment of 7.12.1976, at [48-49].
[11] *R v Director of Public Prosecutions; ex parte Kebliene*. [2000] 2 AC 326, 380 (Lord Hope).
[12] *Corporation of the City of Enfield v Development Assessment Commission and Another* (2000) 199 CLR 135 at 153 per Gleeson CJ, Gummow, Kirby and Hayne JJ, citing *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 36 per Brennan J. The majority noted that Mason J spoke to similar effect when he observed: 'The limited role of a court [in] reviewing the exercise of an administrative discretion must constantly be borne in mind': at 153–154, citing *Minister for Aboriginal Affairs v Peko-Wallsend* (1986) 162 CLR 24 at 40 per Mason J.
[13] *Huang v Secretary of State for the Home Department* [2007] 2 AC 167, 184 [13].
[14] [2001] 2 AC 532, [28] (emphasis added).

> approach ... The starting point is that there is an overlap between the traditional grounds of review and the approach of proportionality … But the intensity of review is somewhat greater under the proportionality approach ... I would mention three concrete differences without suggesting that my statement is exhaustive. First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations. Thirdly, even the heightened scrutiny test developed in R v Ministry of Defence, Ex p Smith [1996] QB 517554 is not necessarily appropriate to the protection of human rights … [T]he intensity of the review, in similar cases, is guaranteed by the twin requirements that the limitation of the right was necessary in a democratic society, in the sense of meeting a pressing social need, and the question whether the interference was really proportionate to the legitimate aim being pursued.

22. Further, the Commission notes the comments of Lord Bingham of Cornhill in *Begum R v. Denbigh High School*[15] in relation to the Court's approach to an issue of proportionality[16]:

> …The Court's approach to an issue of proportionality under the Convention must go beyond that traditionally adopted to judicial review in a domestic setting… There is no shift to a merits review, but the intensity of review is greater than was previously appropriate, and greater even than the heightened scrutiny test adopted by the Court of Appeal in *R v Ministry of Defence, Ex p Smith* [1996] QB 517, 554. The domestic court must now make a value judgment, an evaluation, by reference to the circumstances

[15] [2006] UKHL 15.
[16] At paragraph [30].

prevailing at the relevant time (*Wilson v First County Trust Ltd (No. 2)* [2003] UKHL 40, [2004] 1 AC 816, paras 62-67). Proportionality must be judged objectively by the court".

23. The Commission submits that when assessing whether a public authority has acted compatibly with human rights, the court's role is different from that of the primary decision maker, and it must exercise an objective evaluation by reference to the facts and circumstances of the case.

24. As explained by Beatson et al in respect of the equivalent obligation on public authorities under the United Kingdom Human Rights Act: Beatson et al (eds)*, Human Rights: Judicial Protection in the United Kingdom* (Sweet & Maxwell, London, 2008) at 3-92:

> Proportionality is not treated as a pure question of law or fact. Therefore an appeal from a proportionality determination on a point of law will neither succeed simply because the appeal court would have taken a different view, nor will it fail simply because the lower court's determination cannot be shown to be perverse. It is necessary to examine the lower court's reasons and identify an error in analysis, such as whether it applied the wrong test or standard. *A v SSHD* [2005] 2 AC 68 at [44] per Lord Bingham. See also at [131] per Lord Scott, at [173] per Lord Rodger. The Court of Appeal had refused to overturn the assessment of Special Immigration Appeals Commission on the basis that it had made a finding of fact as to the necessity of detention powers which it could not easily reverse. *A v SSHD* [2004] QB 335 at [35] per Lord Woolf CJ, at [91] per Brook LJ, at [150] per Chadwick LJ. In *Huang v SSHD*, the House of Lords held that the task of the appellate immigration authority in immigration appeals
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> The appeal concerned section 65 of the *Immigration and Asylum Act 1999* (UK). The same reasoning applies to the 'one-stop' appeal under section 65 of the *Immigration and Asylum Act 1999* (UK). *Huang v SSHD* [2007] 2 AC 167, at 181–182. is neither that of a primary decision maker nor a secondary reviewing function. However, it was appropriate for the appellate court, in balancing the competing considerations, to give appropriate weight to judgments made by the Secretary of State as to the importance of countervailing public interest considerations. Ibid, at 185. The exercise of giving weight to an assessment or judgement made by a primary decision maker is an exercise that is also

> carried out in judicial review claims and ordinary civil (or indeed criminal) cases, although in these cases it has often attracted the label of "deference". For further discussion of weight and latitude in such cases see Beatson et al (eds) above n 7 at 3-182–3-247; Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge University Press, Cambridge, 2009) at 167 ff.

WHAT IS THE PROPER INTERPRETATION OF THE G & A ACT?

25. Section 32(1) of the Charter provides:

> 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.

26. The correct interpretive exercise required by s 32 is that set out in *R v Momcilovic*.[17] The Commission submits that the following principles may be drawn from *Momcilovic*:[18]

(a) The meaning of the statutory provision in question must be ascertained by applying s 32 of the Charter at the outset of the interpretive exercise, in conjunction with other relevant principles of statutory interpretation.

(b) "Compliance with the s 32(1) obligation means exploring all 'possible' interpretations of the provision(s) in question, and adopting that interpretation which least infringes Charter rights. What is 'possible' is determined by the existing framework of interpretive rules, including of course the presumption against interference with rights."

(c) The presumption against interference with fundamental rights must now be understood to extend to the protection and promotion of the human rights set out in the Charter.

(d) Whether it is "possible" to give a statutory provision a meaning

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17 [2010] VSCA 50.

18 [2010] VSCA 50 at [35], [103]-[110].

compatible with human rights does not depend on the presence of ambiguity in the language of the provision being interpreted.

(e) Where one "possible" statutory interpretation is more compliant with the protection and promotion of Charter rights, then that interpretation ought to be preferred.

(f) Justification under s 7(2) of the Charter becomes relevant only if the provision, so interpreted, breaches a right protected by the Charter. In the circumstances of this case, the Commission contends that a Charter-compliant interpretation was available, such that no s 7(2) analysis was required.

The G&A Act

27. The G&A Act is to be interpreted in accordance with its objects, set out in s 4(2) as follows:

> (2) jurisdiction and duty conferred or imposed by this Act is to be exercised or performed so that-
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> a. the means which is the least restrictive of a person's freedom of decision and action as is possible in the circumstances is adopted; and
>
> b. the best interests of a person with a disability are promoted; and
>
> c. the wishes of a person with a disability are wherever possible given effect to.

28. In the circumstances of this case, the relevant object of the G&A Act to which the Tribunal was required to have regard, was to ensure that "*the best interests of a person with a disability are promoted.*[19]" The Commission submits that this concept of "best interests" must be understood by reference to the CRPD and in particular, the guiding principles in Article 3, which provides:

[19] The G&A Act, s 4(2)(b).

(a) Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons;
(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;
(f) Accessibility;
(g) Equality between men and women;
(h) Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.[20]

29. Within this general framework, the effect of s 42(2) of the G&A Act requires that the Tribunal take into account a range of factors, including:

(a) whether the needs of the person in respect of whom the application is made could be met by other means less restrictive of the person's freedom of decision and action; and
(b) the wishes of the person in respect of whom the application is made, so far as they can be ascertained.

30. It has been recognised that "Just as each person is unique so is each proceeding under the *Guardianship and Administration Act* 1986 unique.[21]" This flexibility of approach is consistent with the recognition of the infinite variety of circumstance within which a Guardianship or Administration Order may be made.

31. Section 32(2) of the Charter provides that:

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

32. The CRPD informs the nature and scope of each relevant right in circumstances where the rights of persons with disabilities is in issue.

[20] CRPD, Article 3.
[21] *XYZ (Guardianship)* [2007] VCAT 1196 per Billings, DP at [47].

The CRPD is relevant to the operation of each of ss 32 and s 38 of the Charter.

33. In this regard, insofar as the approach of the *Supreme Court in WBM v Chief Commissioner of Police*[22] encouraged limited recourse to international jurisprudence, it should not be followed.

34. A proper construction of the relevant provisions involves the conclusion that:

(a) No presumption as to the identity of the administrator is warranted or "possible" applying ordinary rules of statutory interpretation, including the Charter;

(b) In the circumstances of this case, the guiding principle must be the best interests of the person in respect of whom the application for an administration order is made.

SECTION 38 OBLIGATIONS AND SECTION 7(2)

35. Section 38(1) of the Charter provides:

> 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.

36. The Commission submits that the interpretation of the statutory exercise of discretionary power conferred on the Tribunal in section 42 of the G & A Act, is governed by section 38 of the Charter in the circumstances of this case.

37. The interpretation of legislative discretions to accord with human rights protections has been the subject of judicial consideration in Victoria and overseas. The Victorian cases were decided pre-*Momcilovic* so they apply s 32 to legislative discretions in a manner that incorporates

[22] [2010] VSC 219, in particular at [48] - [57].

s 7(2), which is no longer appropriate. However, these cases are still a useful illustration of how legislative discretions should be shaped by s 32, albeit now without incorporating s 7(2).

38. It will normally be "possible" to interpret a statutory discretion so that it does not permit interference with the rights protected in Part 2 of the Charter unless that interference is demonstrably justifiable having regard to the factors in s 7(2) of the Charter. As Bell J said in *Kracke*:[23]

> Because s 32(1) requires all legislation to be interpreted compatibly with human rights if possible, it imposes a particular interpretation on provisions which confer open-ended discretions. If possible consistently with their purpose, the provision must be interpreted such that the discretion can only be exercised compatibly with human rights. Therefore, unless the very purpose of the provision is incompatible with human rights, which will surely be an exceptional case, the solution to legal problems concerning the exercise of an open-ended statutory discretion will depend on whether it has been exercised compatibly with human rights …

39. The consequence of the above approach is that "it is not the interpretation and compatibility with human rights of the authorising discretion that is in issue; it is the compatibility with human rights of the **exercise** of the discretion".[24]

40. In support of the above reasoning, Bell J referred[25] to the decision of the Supreme Court of Canada in *Slaight Communication Inc v Davidson*.[26] In that case Lamer J (as his Lordship then was), who dissented as to the result but whose analysis on this point was

[23] *Kracke v Mental Health Review Board* [2009] VCAT 646, [208]-[211]. See also *Lifestyle Communities Ltd (No 3) (Anti-Discrimination)* [2009] VCAT 1869, [77]-[78], [85], [90]-[91].
[24] *Kracke v Mental Health Review Board* [2009] VCAT 646, [209] (emphasis added)
[25] *Kracke v Mental Health Review Board* [2009] VCAT 646, [209].
[26] [1989] 1 SCR 1038.

accepted by the other members of the Court,[27] said:[28]

> Although this Court must not add anything to legislation or delete anything from it in order to make it consistent with the Charter, there is no doubt in my mind that it should also not interpret legislation that is open to more than one interpretation so as to make it inconsistent with the Charter and hence of no force or effect. Legislation conferring an imprecise discretion must therefore be interpreted as not allowing the Charter rights to be infringed.

41. In the *Lifestyle Communities Ltd (No 3)* (Anti-Discrimination) [2009] VCAT 1869 (22 September 2009) decision Justice Bell considered the exercise of the broad discretion in s 83 of the *Equal Opportunities Act 1995*. Again he held that broad discretions must be exercised compatibly with human rights unless that is contrary to the purpose of the legislation.[29]

42. The Court of Appeal in the United Kingdom in *R v Lord Saville ex p. A* [1999] 4 All ER 860 have taken a similar approach:

> [W]hen a fundamental right such as the right to life is engaged, the options available to the reasonable decision maker are curtailed. They are curtailed because it is unreasonable to reach a decision which contravenes or could contravene human rights unless there are sufficiently significant countervailing considerations. In other words it is not open to the decision maker to risk interfering with fundamental rights in the absence of a compelling justification. Even the broadest discretion is constrained by the need for there to be countervailing circumstances justifying interference with human rights. The courts will anxiously scrutinise the strength of the countervailing circumstances and the degree of the interference with the

[27] [1989] 1 SCR 1038, 1048, 1058.
[28] [1989] 1 SCR 1038, 1078 (emphasis added). See also *Michaud v. Quebec (Attorney General)* [1996] 3 SCR 3*; Quebec (C.D.P.D.J.) v Montreal (City)* [2000] 1 SCR 665.
[29] At [90]

human right involved and then apply the test accepted by the Lord Chief Justice in *Smith* which is not in issue.

43. In the United Kingdom this common law strand of human rights jurisprudence is referred to as "the principle of legality".[30] In Australia this principle can be seen in the jurisprudence of the High Court, exemplified in *Coco v The Queen*, which dealt with the judicial discretion to exclude evidence obtained in breach of criminal process rights:[31]

> In England, Lord Browne-Wilkinson has expressed the view that the presence of general words in a statute is insufficient to authorize interference with the basic immunities which are the foundation of our freedom; to constitute such authorization express words are required. That approach is consistent with statements of principle made by this court, ... An insistence on the necessity for express words is in conformity with earlier judicial statements in England which call for express authorization by statute of any abrogation or curtailment of the citizen's common law rights or immunities…
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> The insistence on express authorization of an abrogation or curtailment of a fundamental right, freedom or immunity must be understood as a requirement for some manifestation or indication that the legislature has not only directed its attention to the question of the abrogation or curtailment of such basic rights, freedoms or immunities but has also determined upon abrogation or curtailment of them. The courts should not impute into the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifested by unmistakable and unambiguous language.

[30] As to the principle of legality in Australian jurisprudence, see *Electrolux Home Products Pty Ltd v The Australian Workers' Union* (2004) 221 CLR 309 at 329 [21] (Gleeson CJ); *K-Generation* (2008) 237 CLR 501 at [47] (French CJ).

[31] (1994) 179 CLR 427, 436-7.

44. The interaction between this common law principle of interpretation and modern human rights legislation similar to the Charter has been considered in the United Kingdom. In *R v Secretary of State for the Home Department ex P Simms* Lord Hoffman commented:[32]

> The Human Rights Act 1998 will make three changes to the scheme of things. …. Secondly, the principle of legality will be expressly enacted as a rule of construction in section 3 and will gain further support from the obligation of the minister in charge of a Bill to make a statement of compatibility under section 19.

45. This approach is consistent with the approach adopted by the Victorian Court of Appeal in *Momcilovic*. As a result of the introduction of s 32, therefore, this interpretive principle has been elevated to a legislative command, required to be applied by Victorian Courts when construing Victorian legislation as a matter of course.

46. The Commission submits that, when exercising the discretion to make an administration order conferred by s 42 of the G & A Act, the Tribunal must exercise that discretion in a manner that is compatible with the rights to freedom of movement, the right to privacy, a fair hearing and equality before the law. The Commission further submits that such an interpretation of the scope of the discretion is not contrary to the purpose of the section. In particular, the right to a fair hearing and equality before the law are at the heart of Australia's common law and influence the courts' and tribunals' exercise of any discretion.

47. In relation to s 7 of the Charter, the Commission submits that s 7(2) is inextricably linked to the operation of s 38(1) of the Charter. That subsection has two limbs. The first limb makes it unlawful to act (defined in s 3 to include a failure to act or a proposal to act) in a way that is incompatible with a human right. The second limb, which is procedural in character, relates to "decisions" and requires public authorities to give "proper consideration" to relevant human rights.

[32] [1999] 3 WLR 328 at

48. The procedural limb of s 38(1) makes the human rights in Part 2 of the Charter a mandatory relevant consideration for all decisions made by public authorities.[33] That limb requires public authorities to consider both whether any of the human rights in Part 2 of the Charter will be limited if a particular decision is made and, if so, whether such a limitation is justified. It therefore subjects decisions of public authorities to a higher standard of scrutiny than under the traditional "relevant considerations" ground of judicial review.

49. The Report of the Human Rights Consultation Committee suggests that it was intended that the second limb of s 38(1) set out expressly what was already implicit in the first limb. Thus, having noted that it was important that public authorities not simply give lip service to human rights, the Committee said:[34]

> The obligation to observe Charter rights would establish the principle that human rights must be adequately considered by public authorities when making decisions and delivering services. The ability to apply for judicial review or a declaration of unlawfulness for failure to meet that obligation would mean that the traditionally narrow grounds of administrative law would be updated to give life to the enforcement of this new obligation. It would be better to set out clearly in the Charter that those two avenues are available than to allow it to develop in an ad hoc way over time.

50. The use of the word "proper" in the procedural limb of s 38(1) invites courts to apply the approach adopted by Gummow J in *Khan v Minister for Immigration and Ethnic Affairs*.[35]

51. It is possible for a public authority to decide to act in a manner incompatible with human rights without breaching the procedural limb.

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[33] *Rights Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005) 124.
[34] Rights Responsibilities and Respect: The Report of the Human Rights Consultation Committee (2005) at 124-125.
[35] (1987) 14 ALD 291 at 292.

Like the traditional requirement to take account of "relevant considerations", the procedural limb ensures that human rights are properly considered, but it does not mandate a particular outcome.[36] That said, the range of permissible outcomes will be constrained by s 38(1), because a decision that results in any act that is not "compatible with human rights" will be unlawful by reason of the first limb of s 38(1).

52. Section 38(2) of the Charter gives effect to parliamentary sovereignty by ensuring that administrative action that is reasonably required by a valid law is not rendered unlawful by s 38(1). The subsection is necessary in light of the fact that the Charter does not have any effect on the validity of legislation that is incompatible with human rights.

53. Where a public authority has a range of possible courses of action that are reasonably open, s 38(2) is irrelevant. In that situation, s 38(1) limits the available courses of action to those that are demonstrably justifiable having regard to the criteria in s 7(2) of the Charter.

54. In *Castles v Secretary to the Department of Justice*[37] Emerton J suggested that the proper consideration requirement could be satisfied as follows:

> While I accept that the requirement in s 38(1) to give proper consideration to a relevant human right requires a decision-maker to do more than merely invoke the Charter like a mantra, it will be sufficient in most circumstances that there is some evidence that shows the decision-maker seriously turned his or her mind to the possible impact of the decision on a person's human rights and the implications thereof for the affected person, and that the countervailing interests or obligations were identified.[38]

[36] As to which see *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 39-43, making it clear that under this ground of review there is little scope to consider the weight that a decision-maker gives to each consideration.
[37] [2010] VSC 310.
[38] *Castles* at [286].

55. With respect, the Commission submits that *proper* consideration must be interpreted in the context of the Charter as a whole, as requiring specific consideration of whether it is "reasonable" under s 7(2) of the Charter to limit the rights in the proposed manner. The 'countervailing interests or obligations' referred to by Emerton J may be a shorthand for the considerations introduced by s 7(2).

56. The actions and decisions of the Tribunal that may limit Charter rights, and therefore must be assessed for lawfulness under s 38 of the Charter, are:

    (a) all decisions about the appointment of an administrator in respect of PJB;

    (b) all actions taken when dealing with PJB's application.

57. The Charter rights engaged by each stage of the decision under s 42 of the G & A Act are those rights engaged in appointing an administrator (i.e. the right to freedom of movement – s 12, and the right to privacy – s 13) and the right of equality before the law (s 8) and the right to a fair hearing (s 24). These rights were engaged in PJB's case because the decision involved making an administration order in respect of PJB's financial affairs, which involved a reasonably foreseeable result that PJB's home would be sold.

CONCLUSION

58. The Tribunal is a public authority for the purposes of section 38 of the Charter. Accordingly, its decision to make an administration order in respect of PJB must comply with its obligations pursuant to section 38.

59. In accordance with the principle of "margin of appreciation", the Court must afford a certain "margin of appreciation" to the decision of the Tribunal with respect to the exercise of its discretion to appoint an administrator pursuant to section 42 of the G & A Act. The breadth of this margin depends on the nature of the rights that are restricted and

the purposes of the limitations, which must be determined by the Court on an objective basis.

60. The proper interpretation of the relevant provisions of the G & A Act is one that gives primacy to PJB's best interests, having regard to his rights protected in the Charter and the CRPD.

Victorian Equal Opportunity and Human Rights Commission

8 April 2011