

IN THE SUPREME COURT OF VICTORIA
COURT OF APPEAL
AT MELBOURNE
CRIMINAL JURISDICTION

No. S APCR 2013 0042

BETWEEN:

DIRECTOR OF PUBLIC PROSECUTIONS

Applicant

- and -

MATWALI CHAOUK

Respondent

SUMMARY OF CONTENTIONS OF THE VICTORIAN EQUAL OPPORTUNITY AND HUMAN RIGHTS
COMMISSION, INTERVENING

I INTRODUCTION

1. The Victorian Equal Opportunity and Human Rights Commission (**Commission**) intervenes as of right in these proceedings, pursuant to s40 of the *Charter of Human Rights and Responsibilities Act 2006* (**Charter**).

II SUMMARY¹

2. The Commission submits that:
 - a. Section 6(2)(b) of the Charter requires courts, in considering whether a trial is fair (including in the exercise of the court's inherent discretion to stay criminal proceedings) to act compatibly with ss24(1) and 25(2) of the Charter.
 - b. In determining whether a trial is unfair, the Charter requires regard to be had both to the existence of legal representation, and to the question of whether such representation is adequate and effective to ensure a fair trial. The absence of the assistance of an instructing solicitor is a factor relevant to be considered and may, in a particular case, create a trial which is not fair within the meaning of s24(1) and /or constitute a denial of the guarantees in s25(2)(b), (d) and (f).
 - c. The determination of uniform Guidelines concerning the legal aid funding to be allocated for instructing solicitors, may in the circumstances of a particular trial be irreconcilable with the rights provided by ss24(1) or 25(2)(b), (d) and (f) of the Charter.
 - d. Section 197(3) of the *Criminal Procedure Act* ought be interpreted pursuant to s32 of the Charter, in the manner most compatible with the protection of Charter rights. Such a construction requires regard to be had to the question of whether such legal representation is adequate and effective to ensure a fair trial within the meaning of s24(1) and the minimum guarantees in s25(2).

¹ The Respondent's Charter Notice raises ss24(1) and 25(2)(b)(d) and (f) of the Charter in the context of the exercise by a court of its inherent jurisdiction to grant a stay of criminal proceedings. By its Summary of Additional Contentions (dated 26 April 2013), the Respondent advances additional contentions in relation to the application of s38 of the Charter to the Victoria Legal Aid's New Criminal Law Guidelines and Procedures of January 2013 (**Guidelines**). By its Summary of Contentions (dated 26 April 2013), the LIV (if granted leave to intervene) has indicated its intention to contend that the stay granted by Lasry J ought be affirmed on an alternative basis under s197(3) of the *Criminal Procedure Act 2009*. The Commission's submissions address each of these issues.

III CONTENTIONS

OPERATION OF SECTION 6(2) OF THE CHARTER

3. Section 6(2) of the Charter defines the entities to which the Charter applies. In respect of courts and tribunals, it states: "This Charter applies to... (b) courts and tribunals, to the extent that they have functions under Part 2 and Division 3 of Part 3." In *Victoria Police Toll Enforcement v Taha*,² Tate JA considered that the language of the provision, "renders it susceptible to three alternative constructions": a broad, intermediate and narrow construction.³ The intermediate construction was described as importing an obligation to act compatibly with those rights that *relate to* court or tribunal proceedings (relevantly including ss24 and 25 of the Charter).⁴ Her Honour described it as "undeniable" that the right to a fair hearing "relates to the core functions that courts perform".⁵
4. It is submitted that the second intermediate construction should be preferred.⁶ The direct application of ss24 and 25 to the courts finds further support in the comments of Crennan and Kiefel JJ in *Momcilovic v The Queen*: "Some of the rights identified and described in Pt 2 may require courts or tribunals to ensure that processes are complied with, for example to ensure a fair hearing [under s24], and that the matters guaranteed by the Charter with respect to a criminal trial are provided [s25]."⁷
5. The effect of the direct application of Charter rights is to require courts to ensure that a defendant is afforded the right to a fair trial and minimum rights in criminal proceedings and to ensure proceedings are carried out compatibly with those rights. It may in a particular context require a court to exercise its powers, including its inherent power to stay or adjourn a criminal trial, if that course be necessary to prevent incompatibility with those Charter rights.

ORIGINS OF AND RELATIONSHIP BETWEEN SS 24 AND 25 OF THE CHARTER

6. The right to a fair hearing in s24(1) is modelled on Art 14(1) of the International Covenant on Civil and Political Rights (ICCPR)⁸ and finds its equivalent in Art 6(1) of the European Convention.⁹ The United Nations Human Rights Committee has described the right to a fair trial as a "key element" of human rights protection, which serves as a procedural means to safeguard the rule of law: see General Comment Number 32 at [2]. It has also stated:¹⁰

[10] The availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way.

...

² [2013] VSCA 37, [246].

³ In *Secretary, Department of Human Services v Sanding* [2011] VSC 42 at [165] – [167] per Bell J also considered the three competing approaches to interpretation. See also *Kracke v Mental Health Review Board* (2009) 29 VAR 1 at [241]–[254].

⁴ [2013] VSCA 37, [246] and fn 275–277 (Tate JA).

⁵ At [246] – [247].

⁶ See *De Simone v Bevnol Constructions and Developments Pty Ltd* [2009] VSCA 199 at [51] to [52] per Neave JA and Williams AJA; *Slaveski v Smith* [2012] VSCA 25 at [54] per Warren CJ, Nettle JA and Redlich JA approving *De Simone* at [52]; and *Secretary, Department of Human Services v Sanding* [2011] VSC 42 at [165] – [167] per Bell J.

⁷ (2011) 245 CLR 1 at [525]. See also Tate JA in *Taha* at fn 281 to para [248] that these comments "appear to implicitly support the intermediate approach".

⁸ Explanatory Memorandum, *Charter of Human Rights and Responsibilities Bill*, 18. Section 32(2) of the Charter allows reference to international sources relevant to a human right when interpreting a statutory provision, which includes the provisions of the Charter. See also *Momcilovic v The Queen* (2011) 245 CLR 1 at [19] per French CJ.

⁹ The similarities between s 24(1) of the Charter and Art 6(1) of the European Convention were noted in *Slaveski v Smith* [2012] VSCA 25 at [49]–[52]. See also s 21 of the *Human Rights Act* (ACT) and s 25(a) of the *New Zealand Bill of Rights Act 1990*.

¹⁰ United Nations Human Rights Committee, *General Comment No 32: Article 14 Right to Equality before courts and tribunals and to a fair trial*, 21 August 2007.

[13] The right to equality before courts and tribunals also ensures equality of arms. This means that the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant. ...

7. The guarantees in s25(2)(b),(d) and (f) of the Charter are modeled on Art 14(3) of the ICCPR.¹¹ Their equivalents are found in Art 6(3) of the European Convention.¹² General Comment 32 states in relation to Art 14(3)(b) of the ICCPR that:

[32] ... This provision is an important element of the guarantee of a fair trial and an application of the principle of equality of arms....¹³ What counts as “adequate time” depends on the circumstances of each case. ...

8. And in relation to Art 14(3)(d), General Comment 32 states that:

[38] ... [A]rticle 14, paragraph 3(d) guarantees the right to have legal assistance assigned to accused persons whenever the interests of justice so require ... The gravity of the offence is important in deciding whether counsel should be assigned “in the interest of justice” ... Counsel provided by the competent authorities on the basis of this provision must be effective in the representation of the accused. ... There is also a violation of this provision if the court or other relevant authorities hinder appointed lawyers from fulfilling their task effectively. [emphasis added]

9. The rights in ss24(1) and 25(2) are distinct, but closely related. The European Court of Human Rights regards the right to legal assistance as a particular aspect of the right to a fair trial guaranteed by Art 6(1).¹⁴ In contrast, the purpose of Art 6(3) has generally been regarded to ensure that a defendant has the opportunity of presenting an effective defence.¹⁵ In *Artico v Italy* (1981) 3 EHRR 1, the Court said of the relationship between Arts 6(1) and 6(3) that the latter contains an enumeration of specific applications of the general principle stated in the former. The various rights (of which a non-exhaustive list appears in paragraph (3)) reflect certain aspects of the notion of a fair trial in criminal proceedings. The Court also cautioned that when one is considering Art 6(3), one must not forget its basic purpose or sever it from its roots.
10. Consideration of whether or not a particular trial will be fair within the meaning of s24(1) of the Charter requires an analysis of all the circumstances.¹⁶ It does not necessarily follow that the fulfilment of the minimum guarantees in s25(2) will be sufficient to ensure the fairness of a hearing under s24(1).¹⁷ Conversely, the fact that one of the components of the right to a fair hearing in s25(2) has not been observed, does not automatically lead to the conclusion that a defendant will not receive a fair trial.¹⁸
11. In order to establish a breach of the minimum guarantees in s25(2) of the Charter, it need not be demonstrated that actual harm has been caused or suffered: see the discussion of Art 6(3)(c) in *McLean*

¹¹ Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill, 18.

¹² See also s22 of the *Human Rights Act 2004 (ACT)*, and s24(a), (c), (d) and s25(b) – (i) of the *Bill of Rights Act 1990 (NZ)*.

¹³ To the extent that “equality of arms” principle is derived from the introductory words to Art 14(1) (“All persons shall be equal before the courts and tribunals”) or the introductory words to Art 14(3) (namely that everyone “shall be entitled to the following minimum guarantees, in full equality”), it should be noted that the equivalent right to equality before the law resides in s8(3) of the Charter and thus would inform the interpretation of s24(1) and 25(2) in any event.

¹⁴ See *R v Condon* [2007] 1 NZLR 300 at [37], [73] and [79] referring to decisions including *Artico v Italy* (1980) 3 EHRR 1 at [32]; *Goddi v Italy* (1984) 6 EHRR 457 at [28].

¹⁵ *R v Condon* [2007] 1 NZLR 300 at [37] referring to decisions including *Artico v Italy* (1980) 3 EHRR 1; *Goddi v Italy* (1984) 6 EHRR 457 and *Pakelli v Germany* (1983) 6 EHRR 1 at [31].

¹⁶ *Tomasevic v Travaglini* (2007) 17 VR 100 at [88]; *Ragg v Magistrates’ Court of Victoria* (2008) 18 VR 300 at [65]; *Brown v Stott* [2003] 1 AC 681 per Lord Bingham at 693.

¹⁷ *Brown v Stott* [2003] 1 AC 681 per Lord Hope at 719.

¹⁸ See Pound and Evans, *An Annotated Guide to the Victorian Charter of Human Rights and Responsibilities* (2008) at 166.

*v Buchanan*¹⁹ and *Condon v The Queen*.²⁰ However, the question whether harm has been suffered may affect both the question of whether there has also been an unfair trial.

SECTION 24(1) OF THE CHARTER

12. The right to a fair trial in s24(1) of the Charter reflects a fundamental principle of the common law.²¹ The right to a fair trial under the Charter may be broader than the common law, being expressed as a positive right (rather than a right not to have an unfair trial).²²
13. Drawing on para [10] of General Comment No 32 (set out above at para 6 above), it is submitted that the availability of legal assistance may affect whether or not a person can access court proceedings or participate in them in a meaningful way. For example, the defence may be permitted an opportunity to call witnesses, but may fail to do so or to do so adequately because there is no instructing solicitor available to contact, proof and secure the attendance of such witnesses.
14. The principle of equality of arms inherent in the concept of a fair trial has primarily been developed in the context of procedural fairness.²³ But there are also cases which confirm a broader notion of equality of arms, focused on the quality and nature of the legal representation and resources available to litigants. In *Steel and Morris v United Kingdom* (2005) 41 EHRR 22, (which concerned the “McLibel” case), the Court observed that the adversarial system is based on the idea that justice can be achieved if the parties are able to adduce their evidence and test their opponent’s evidence in circumstances of “reasonable equality”.²⁴ The Court embarked on a comparative analysis of the quality of the legal representation and resources available, concluding that it is central to the concept of a fair trial that a “litigant is not denied the opportunity to present his or her case effectively before the court... and that he or she is able to enjoy equality of arms with the opposing side”.²⁵ The Court concluded that the denial of legal aid to the applicants had deprived them of the opportunity to present their case effectively and contributed to an unacceptable inequality of arms, and as a result, there had been a violation of Art 6(1). In that case, the Court considered matters including the inequality of resources and the matters at stake for the applicants. Here, the seriousness of the charge (and its possible consequences) are among the relevant considerations.

SECTION 25(2) OF THE CHARTER

26. There is little detailed commentary in relation to what constitutes “adequate facilities” (in the context of s25(2)(b) of the Charter). Whether there is adequate access to facilities (including evidence, witnesses, case law and other information a defendant requires to prepare a defence) must be answered in all the circumstances. It is submitted that “facilities” are not confined merely to witnesses, documents and evidence. In *Foucher v France* (1997) 25 EHRR 234 (which concerned access to a case file) it was held that Art 6(3)(b) implies that the substantive defence activity may comprise everything which is “necessary” to prepare for trial. The accused must have the opportunity to organise his defence

¹⁹ [2001] 1 WLR 2425 per Lord Clyde at [62].

²⁰ [2007] 1 NZLR 300 per the Court at [37], citing *Artico v Italy* (1980) 3 EHRR 1 at [35].

²¹ See *Re Application under the Major Crime (Investigative Powers) Act 2004* (2009) 24 VR 415 at [38] – [39], citing *Dietrich v The Queen* (1992) 177 CLR 292; *R v Thomas* (2006) 14 VR 475, 510; *R v McFarlane*; *ex parte O’Flanagan* (1923) 32 CLR 518 at 541 – 542.

²² The potential difference between the Charter right and the common law right was observed by Higgins CJ in *R v DA* [2008] ACTSC 26 at [7] – [8].

²³ See *Bonisch v Austria* (1985) 9 EHRR 191 (an expert witness appointed by the defence was not accorded the same facilities as one appointed by the prosecution); *Foucher v France* (1997) 25 EHRR 234 (denial of access to a criminal file and refusal to release documents). See also *Ragg v Magistrates’ Court of Victoria* (2008) 18 VR 300 at [45]–[48].

²⁴ (2005) 41 EHRR 22 at [50] to [52].

²⁵ (2005) 41 EHRR 22 at [59].

in an appropriate way and without restriction as to the possibility of putting all relevant defence arguments and thus of influencing the outcome of the proceedings.²⁶ The Commission submits that the assistance of a solicitor may be necessary in a particular case for a defendant to access the facilities required to prepare a defence so as to render this right effective.

27. In respect of s25(2)(d) and (f), decisions of the European Court of Human Rights confirm that the equivalent protections in Art 6(3)(c) ensure that an accused person is in a position to present his or her case at trial in an *effective* manner. In *Artico v Italy* (1981) 3 EHRR 1, it was held that the mere appointment of a lawyer is not necessarily sufficient to ensure “effective assistance”.²⁷ It was emphasised that the Convention is intended to guarantee rights that are practical and effective, and not “illusory” or “theoretical”. See also *Imbrioscia v Switzerland* (1994) 17 EHRR 441²⁸ and *Granger v United Kingdom* (1990) 12 EHRR 469.²⁹

LEGAL ASSISTANCE AND FAIR TRIALS

28. There is no obligation on VLA to provide legal aid by reason of the operation of ss25(2)(d) or (f) of the Charter.³⁰ The right to a fair trial in s24(1) does not otherwise give rise to a right to be represented at the State’s expense on a serious criminal offence.³¹ Any right to legal assistance derived from ss24(1) or 25(2)(d) or (f) is conditioned by the eligibility provisions of the Legal Aid Act. But the Court also acknowledged that: “Depending upon the circumstances of the particular case ...lack of representation may mean that the person is unable to receive a fair trial,”³² and confirmed the capacity of a judge to stay proceedings in such a case.³³ An assessment of whether a trial will be fair requires an analysis of all the circumstances, including whether the trial is before a judge alone.³⁴ It is submitted that an assessment of fairness also requires regard to be had to the adequacy and effectiveness of the legal representation afforded, both in comparison with the prosecution and per se.
29. In this context, see *Carmody v Minister for Justice Equality and Law Reform* [2009] IESC 71. The Appellant was denied legal aid funding for counsel by reason of s2(1) of the *Criminal Justice (Legal Aid) Act 1962* of Ireland, which (with one irrelevant exception) confined the grant of legal aid to representation by a solicitor. He argued a refusal to fund provision of counsel was a breach of his right to legal assistance in Art 6(3)(c) and the equivalent right in the Constitution of Ireland.³⁵ The Supreme Court considered that the denial of legal aid for counsel in the circumstances limited his constitutional right.³⁶ The Court was satisfied that: “in order to vindicate the constitutional right of an indigent

²⁶ *Foucher v France* (1997) 25 EHRR 234 at [39].

²⁷ The prejudice suffered in *Artico* was the total failure to act by the appointed defence lawyer. See also *Goddi v Italy* (1984) 6 EHRR 457, approving the reference in *Artico* to a “practical and effective” defence. See also the discussion in *McLean v Buchanan* [2001] 1 WLR 2425 at [60] – [61].

²⁸ At [38].

²⁹ At [44] – [47], where the Court accepted that it would have been in the interests of justice for free legal assistance to be given, as this would have enabled the applicant to “make an effective contribution to the proceedings”, referring also to *Pakelli v Germany* (1983) 6 EHRR 1 at [38] which refers to the capacity of a litigant to make “a useful contribution” in the context of complex legal issues.

³⁰ *Slaveski v Smith* [2012] VSCA at [26] – [29].

³¹ *Slaveski v Smith* [2012] VSCA 25 at [48] – [58].

³² *Slaveski v Smith* [2012] VSCA 25 at [52].

³³ It is of note also that s197(2) of the *Criminal Procedure Act* (which appears not to have arisen directly in *Slaveski*) provides that: “Subject to subsection (3) and despite any rule of law to the contrary (other than the Charter of Human Rights and Responsibilities), the fact that an accused has been refused legal assistance in respect of a trial is not a ground for an adjournment or stay of the trial” [emphasis added]. This appears to suggest that the infringement of Charter rights may constitute a ground for an adjournment or stay where legal assistance is refused.

³⁴ See the comments in *Slaveski v Smith* [2012] VSCA 25 at [57].

³⁵ See *R v Condon* [2007] 1 NZLR 300 at [43].

³⁶ See also at page 21: “Unless it could be assumed that no criminal case which comes before the district Court could ever require representation by counsel, in order to ensure that the trial was in accordance with the requirements of

defendant ... to a fair trial he or she must be entitled to legal aid with representation by counsel as well as solicitor where it is established that because of the particular gravity and complexity of the case or other exceptional circumstances such representation is essential in the interests of justice.”³⁷ Considering the equality of arms principle, the Court said that “the fact that the State prosecutor is represented by solicitor and counsel may be a relevant factor should a court or other body have to determine whether the defendant should also be represented by counsel as well as a solicitor.”³⁸

30. It is submitted that the absence of the assistance of an instructing solicitor during a criminal trial is a factor relevant to be considered both in the context of the right to a fair trial in s24(1) and the minimum guarantees in s25(2)(b),(d) and (f) of the Charter, because the absence of the assistance of an instructing solicitor may in a particular case, depending on all the circumstances:
 - a. Create a situation where a defendant is deprived of effective legal assistance, including by preventing a defendant from participating in the proceedings or an important aspect of them in a meaningful way;
 - b. Prevent a defendant from the effective realisation of the right to have adequate time and facilities to prepare his or her defence;
 - c. Give rise to an “inequality of arms” (as between the prosecution and the defence) such that the trial is unfair.

LIMITATIONS ON SECTIONS 24(1) AND 25(2) OF THE CHARTER

31. The rights in ss24(1) and 25(2) are not absolute and may be subject under law to ‘such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom’: Charter s7(2).³⁹ Limitations on rights are only permissible in accordance with s7(2), taking all relevant factors into account including those in s7(2)(a)-(d).
32. The nature of the right to a fair trial is recognised in the international and comparative jurisprudence as “absolute”.⁴⁰ As a result, limitations which produce the effect of making a trial *unfair* may not ever be capable of being “demonstrably justified” under s7(2). However, limits on the guarantees in ss25(2)(b),(d) or (f) may be demonstrably justified on an application of the proportionality test in s7(2) in certain circumstances. The onus of ‘demonstrably justifying’ the limitation resides with the party seeking to uphold the limitation.⁴¹

VLA GUIDELINES AND DECISION: SECTION 38 OF THE CHARTER

33. When VLA determines guidelines (pursuant to s9(a) of the Legal Aid Act) and makes a decision whether to provide assistance (see ss24, 27 and 28 of the Legal Aid Act) VLA is a public authority and is bound by the Charter.⁴² It is therefore bound not to act in a way that is incompatible with human rights and bound to give proper consideration to a relevant human right: s38(1) of the Charter. An act

constitutional justice, this limitation on a poor defendant’s right to apply for legal aid must be considered arbitrary.” Note that because a breach of the constitutional right was found, the Court did not need to consider whether Art 6(3)(c) of the European Convention was also breached.

³⁷ Page 19.

³⁸ Page 20.

³⁹ See Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill, 9.

⁴⁰ *Brown v Stott* [2003] 1 AC 681 per Lord Bingham at page 693; Lord Steyn at page 708; *Randall v R* [2002] 1 WLR 2237 at [28]; *R v Condon* [2007] 1 NZLR 300 at [77].

⁴¹ *Re Application under the Major Crime (Investigative Powers) Act 2004* (2009) 24 VR 415 at [147].

⁴² For the purposes of the Charter, a ‘public authority’ includes “an entity established by a statutory provision that has functions of a public nature” (s 4(1)(b)). VLA is an entity established by a statutory provision (s 3 of the *Legal Aid Act 1978*) and, pursuant to s 6 of the Legal Aid Act, performs functions of a public nature.

of a public authority is “incompatible” with human rights (and unlawful under s38(1)) if it limits the right and that limit is not reasonable and demonstrably justified under s7(2) of the Charter.⁴³

34. The determination of Guidelines which embody a uniform policy and which permit no regard to be had by the decision maker in respect of applications for legal assistance to the right to fair trial, may infringe the rights in ss24(1) and 25(2) in particular cases. Likewise, the making of a decision in a particular case pursuant to the Guidelines without regard being had to the impact the absence of an instructing solicitor may have on the Charter rights in ss24(1) and 25(2) may also be unlawful. Even if it be found that the Guidelines do not by their terms limit human rights unjustifiably, unlawfulness under the Charter may also result from a failure to give proper consideration to relevant human rights (either in determining the Guidelines or in making the Decision pursuant to the Guidelines).⁴⁴
35. As to the operation of a uniform policy, see by way of analogy *McLean v Buchanan* [2001] 1 WLR 2425. A fixed payment scheme applied to summary criminal proceedings where legal aid been approved.⁴⁵ Lord Hope said that a fixed fees scheme will not necessarily be incompatible with the Convention right to a fair trial in Art 6(3), but: *[T]he greater the inflexibility the greater is the risk that occasionally, especially in exceptional or unusual cases, the scheme will lead to injustice.*” Similarly, Lord Clyde said:⁴⁶

The most obvious, but perhaps not the only, risk may arise from the lack of flexibility in the present regulations. No allowance is made for any unusual or exceptional circumstances. The requirements of fairness in judicial proceedings are rarely, if ever, met by blanket measures of universal application. Universal policies which make no allowance for exceptional cases will not readily meet the standards required for fairness and justice.

36. Subsequently, the Scottish Legal Aid Board was empowered to grant exemptions from the fixed payments scheme.⁴⁷ The amendments were described as necessary to ensure that a person with exceptional circumstances was not prevented from receiving effective legal assistance in accordance with Art 6(3)(c).⁴⁸ The Legal Aid Board then issued Guidelines on “exceptional cases”:

[T]he Board can only make a determination where certain circumstances exist, namely that an assisted person would be deprived of the right to a fair trial because of the amount of the fixed payments payable for the criminal legal assistance to be provided by the solicitor. This test reflects the terms of Article 6 of the [Convention] and has been discussed in a number of cases in the context of fixed payments culminating in *Buchanan v McLean*.

...

As Lord Clyde pointed out at para [56] of the Judgment- “the particular rights set out in Article 6(3) are all facets or non exhaustive examples, of the overarching right to a fair trial set out in Article 6(1).

..

In short, although you require to take into account arguments based on these particular “facets” the test to be applied remains whether the individual will be denied the right to a fair trial, set out in Article 6(1). Crucial to

⁴³ This approach was adopted in *PJB v Melbourne Health (“Patrick’s Case”)* [2011] VSC 327 at [220], [304]-[306] and *Sabet v Medical Practitioners Board* (2008) 20 VR 414 at [108]. It is also supported by the judgments of Gummow, Hayne, Heydon and Bell JJ in *Momcilovic v The Queen* (2011) 245 CLR 1; see at [165]-[168], Heydon J at [416], and Bell J at [681]). French CJ rejected a role for s 7(2) in the assessment of compatibility under s 38(1) (at [32]-[34]) and Crennan and Kiefel JJ did not take a view on the issue.

⁴⁴ See *Castles v Secretary to the Department of Justice* (2010) 28 VR 141 at 184 [185]-[186].

⁴⁵ *The Criminal Legal Aid (Fixed Payments) (Scotland) Regulations 1999*

⁴⁶ At [71]. See also *Drew v A-G* [2002] 1 NZLR 58 (CA), where it was held that a prohibition on legal representation in relation to prison disciplinary offences irrespective of the capacity of the individual or the complexity of the issues, was found to be inconsistent with the natural justice right in the NZ BORA.

⁴⁷ *The Convention Rights (Compliance) (Scotland) Act 2001* was enacted. Thereafter, the *Criminal Legal Aid (Fixed Payments) Scotland Regulations 1999* were amended by the *Criminal Legal Aid (Fixed Payments) (Scotland) Amendment Regulations 2002* to insert a new regulation 4A setting out factors to be taken into account in deciding whether to determine that a solicitor should not receive fixed payments.

⁴⁸ *Policy Memorandum to the Convention Rights (Compliance) (Scotland) Bill* (as introduced in the Scottish Parliament on 10 January 2001), [99].

the determination of the requirement to have exceptional case status conferred is the solicitor's expressed opinion as to why, in the particular circumstances of the case, the client will be deprived of the right to a fair trial.

37. If the Court finds that the uniform policy embodied in the Guidelines limits human rights, the Court must then ask whether there is any limitation on human rights wrought by the determination of the Guidelines which is "justified" within the meaning of s7(2) of the Charter? The onus rests on the party invoking s7(2)⁴⁹ and that onus should ordinarily be discharged by reference to cogent and persuasive evidence.⁵⁰
38. If the Guidelines are not themselves found to be unlawful, arguably a decision maker who applies the Guidelines in a particular case (as he or she is obliged to do by s28 of the Legal Aid Act) and decides that the "nature and extent of the legal assistance to be provided" (see s28(b)) will not extend to an instructing solicitor other than for two half days, is not themselves acting unlawfully, by reason of the application of s38(2) of the Charter.

SECTION 197(3) OF THE CRIMINAL PROCEDURE ACT 2009

39. The Commission submits that s32 of the Charter requires the Court to ask itself which interpretation of s197(3) is most compatible with human rights, including the right to a fair trial in s24(1) and the guarantees in s25(2). Section 197(3) is directed at circumstances where there exists a stalemate in relation to the level of legal assistance to be provided. Consistently with this purpose, s32 of the Charter requires an interpretation of s197(3) which involves consideration of whether the legal representation supplied via a grant of legal aid is adequate or effective legal representation compatible with the right to a fair trial in s 24(1) and the minimum guarantees in s25(2).
40. In *Momcilovic v The Queen* (2011) 245 CLR 1, the High Court was divided as to whether s7(2) is relevant to the interpretative task in s32(1). This Court has left that question open.⁵¹ The Commission submits that the preferred view is that s7(2) forms part of the s32(1) analysis. However, in respect of interpreting the provision "compatibly" with s24(1), the approach taken to ss32(1) and 7(2) is unlikely to give rise to any practical difference by reason of the absolute nature of the right to a fair trial examined above at para 32.
41. The interpretation adopted in *MK v Victoria Legal Aid* [2013] VSC 49 would not permit an order to be made in circumstances where a person already has legal representation, but does not enjoy adequate or effective legal representation sufficient to ensure a fair trial within the meaning of s24(1) of the Charter or sufficient to meet the guarantees in s25(2). The interpretation suggested by the LIV would better serve the purpose of the provision as a "circuit breaker" in circumstances where the level of legal assistance afforded is not consistent with Charter rights. It would also guard against the unfairness which attaches to an indefinite adjournment of a trial in the absence of such adequate assistance.

Rachel Doyle

Dated: 29 April 2013

⁴⁹ *Re an Application under the Major Crime (Investigative Powers) Act 2004* (2009) 24 VR 415 at [147] cited with approval in *R v Momcilovic* (2010) 25 VR 436 at [144].

⁵⁰ *R v Momcilovic* (2010) 25 VR 436 at [146].

⁵¹ See *Slaveski v Smith* [2012] VSCA 25 at [20]; *Noone, Director v Consumer Affairs Victoria v Operation Smile* [2012] VSCA 91 at [24]-[31]; and *WBM v Chief Commissioner of Police* [2012] VSCA 159 at [122]