

IN THE SUPREME COURT OF VICTORIA AT MELBOURNE
COMMON LAW DIVISION
JUDICIAL REVIEW AND APPEALS LIST

No S CI 2012 04115

BETWEEN:

A (by her litigation guardian LEEANNE HURLSTON)

First Plaintiff

B (by her litigation guardian LEEANNE HURLSTON)

Second Plaintiff

and

CHILDREN'S COURT OF VICTORIA
(and others according to the Schedule of Parties)

First Defendant

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

A. INTRODUCTION

1. The Victorian Equal Opportunity and Human Rights Commission (**Commission**) intervenes in this proceeding pursuant to s 40 of the *Charter of Human Rights and Responsibilities Act 2006* (**Charter**).
2. The Commission makes submissions in relation to the two main ways in which the Charter applies to the legislative scheme in this proceeding.
3. First, s 32 of the Charter requires s 524 of the *Children, Youth and Families Act 2005* (**Act**) to be interpreted compatibly with human rights so far as is possible to do so consistently with its purpose. The Charter rights that are engaged and relevant to the interpretation of s 524 are those identified in the Plaintiffs' submissions:¹
 - a. the right to equality before the law (s 8(3));
 - b. the right of a child to protection as is in his or her best interests (s 17(2));
and
 - c. the right to a fair hearing (s 24(1)).
4. Second, s 6(2)(b) of the Charter places a direct obligation on the Children's Court requiring it to ensure that parties receive a fair hearing in accordance with s 24(1) of the Charter and have equal treatment of the law in accordance with the right to equality in s 8(3).

¹ Plaintiffs' Outline of Submissions dated 11 September 2012 ("Plaintiffs' Submissions") at [28].

The Commission's Position

5. In summary, the Commission submits that, in the circumstances of this case:
 - a. Section 524 of the Act, when interpreted as required by s 32 of the Charter, in conjunction with s 17(2), establishes that in any case where a child is mature enough to give instructions on any material issue, that child should be permitted to use direct instructions representation, even if the child is not able to give instructions on all issues. In particular, s 524(4) does not authorise the Court to effectively oust direct instructions representation in circumstances where the represented child is mature enough to give instructions on material issues. This conclusion is also confirmed by the Court's obligation to observe the children's right to a fair hearing in s 24(1) and their right to equality before the law in s 8(3) of the Charter.
 - b. The Court is required, by the terms of s 6(2)(b) of the Charter, to observe the rights of children to a fair hearing under s 24(1) of the Charter and to accord them equality before the law pursuant to s 8(3). The Plaintiffs' right to a fair hearing, as parties to the Interim Accommodation Order application proceeding in the Children's Court, has both substantive and procedural application in circumstances of this kind. The children have a right to be heard in the substantive proceeding. Both the scheme of the Act and the right to a fair hearing when properly understood identifies direct instruction representation as the way in which this is to be achieved in any case where the child is mature enough to give instructions (even if not on all issues). Secondly, and importantly in this case, the rights in ss 24(1) and 8(3), as well as the common law rules of natural justice, apply to the manner in which procedural decisions affecting the parties are made, including those under ss 524(4) and 525(5) of the Act.
6. The content of the rights in ss 17(2), 24(1) and 8(3) of the Charter has been elaborated by both domestic and international jurisprudence, which is discussed in more detail in Part D below. Before turning to the content and relevance of those rights, it is appropriate to commence with a consideration of the terms of the Act's provisions relating to the legal representation of children.

B THE COURT'S ORDERS AND RELEVANT PROVISIONS OF THE ACT

7. The Court's certified orders were, relevantly, as follows:
 - 1) S 524(4) Determination in relation to [A] and [B].
 - 2) ...
 - 3) Leave not granted pursuant to S. 524(5).

ADJOURNED FOR RELEASE CLINIC REPORT AT Melbourne ON
6/12/2012 at 10:00am.
8. The primary issue raised by the Court's orders is the scope and effect of s 524(4) of the Act, in context of the other provisions of s 524. The application of s 524(5) raises less complex issues and the Commission makes only a brief submission in relation to that subsection in Part E below.
9. In relation to the "S 524(4) determination" referred to in the Court's orders, it appears from the transcript that the Court determined that the Plaintiffs were

"not mature enough to give instructions on at least one of the really significant key issues in this case", being access with their uncle, given the allegations in relation to sexual abuse that had been made against him by the children's mother.² The Court did not express a specific view in relation to their maturity to give instructions in relation to living with and contact with their mother. This, for the reasons identified by the Plaintiffs in their submissions,³ was a central issue in the protection application proceeding. It may be inferred from the absence of the expression of any view on this central issue, and the focus on whether the Plaintiffs were mature enough to give instructions on the issue of their uncle, that the Court had *not* formed the opinion that the Plaintiffs were insufficiently mature to give instructions on the issues relating to their mother. A second relevant aspect of the Court's decision was the apparent starting point that children of the age of the Plaintiffs were necessarily not mature enough to give instructions.⁴

10. The Court's determination raises questions both in relation to:
 - a. the position where a child is, in the Court's opinion, not mature enough to give instructions on some, but not all material issues; and
 - b. how the Court determines the question of maturity.
11. These issues fall for consideration by reference to the terms of the statutory scheme.
12. Subsection 524(4) states:

If, in exceptional circumstances, the Court determines that it is in the best interests of a child who, in the opinion of the Court is not mature enough to give instructions, for the child to be legally represented in a proceeding in the Family Division, the Court must adjourn the hearing of the proceeding to enable that legal representation to be obtained.
13. The interpretation of s 524(4) is not free of difficulty.
14. The starting point is that the provision must be interpreted by reference to its ordinary meaning, having regard to its context and legislative purpose.⁵ The provision must also be interpreted in accordance with the interpretative requirements of s 32 of the Charter.
15. First, taking the ordinary meaning of the subsection, the Second Defendant notes that s 524(4) permits the Court to adjourn if three conditions are met.⁶ In the Commission's submission, the conditions are more usefully understood in a different sequence to that posited by the Second Defendant, which refers to "exceptional circumstances" as a starting point. The subsection has no application unless the factual determination is made by the Court that the

² Transcript of Proceedings (24 May 2012) ("Transcript") at 31.5-7. See also Transcript at 32.23-25: "The fact remains that the children can't participate in one of the two key issues in terms of instructing. They are not mature enough".

³ Plaintiffs' Submissions at [84].

⁴ Transcript at 30.23: Ms Green noted the age of the children as "ten and nine years and they are certainly of an age here they can give instructions as to what..." His Honour stated: "No they can't. They can express wishes."

⁵ See *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 255.

⁶ Second Defendant's Outline of Submissions ("Second Defendant's Submissions") at [26]-[28].

child is not mature enough to give instructions. It is only if this factual issue is resolved that the two discretionary considerations then arise, namely that it is in the best interests of the child to be legally represented, and there are exceptional circumstances.

16. The Second Defendant's submissions usefully set out the legislative history of the Act which supports the view that s 524(4), and the related s 524(11), were intended to introduce a form of representation for those children unable by reason of immaturity to give instructions, who under the antecedent legislation to the Act, the *Children and Young Persons Act 1989*, had no provision for representation. The Explanatory Memorandum to the Act, cited by the Plaintiff and the Second Defendant, affirms this view.⁷
17. Thus s 524(4) requires:
 - a. the Court's opinion that the child is not mature enough to give instructions;
 - b. a determination that it is in the best interests of the child to be represented; and
 - c. the existence of exceptional circumstances.
18. Section 524(4) on its terms only provides for an adjournment to be ordered to enable legal representation to be obtained. The Commission agrees with the Second Defendant that if the Court does form the opinion that the child is not mature enough to give instructions, it would be appropriate for the Court to express that opinion, even if the child is already represented by a direct instructions lawyer. Section 524(4) does not impart a power to require the dismissal of that direct instructions lawyer. However by reason of 524(11), that legal representative cannot continue on a direct instructions basis if the child is not mature enough to give instructions. Section 524(11) requires that such a child, if legally represented, must be represented on the best interests basis set out in that section.
19. Even having reached those conclusions as to the mechanics of the section, a central issue remains: the application of the first condition, that the child is in the opinion of the Court "not mature enough to give instructions". The Commission submits that the important issues for this purpose are:
 - a. How is the phrase "mature enough to give instructions" to be understood, in the context of ss 524(4) and 524(11)? The Commission submits that the phrase, in the context of the Act, interpreted as required by s 32 of the Charter, means mature enough to give instructions on material issues in the proceeding, as assessed by reference to the child's stage of development and individual circumstances. The fact that the child may not have sufficient maturity to give instructions which could be acted on by a legal representative on *all* issues which might arise in the case does not mean that the child is not mature enough to give instructions. In such a case, s 524(10) would require a legal representative to act on a direct instructions basis to the extent that the child is mature enough to give instructions. See Parts C and D below.

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Plaintiff's Submissions at [23]; Second Defendant's Submissions at [79]-[80].

- b. What are the Court's obligations when forming an opinion about the maturity of a child in a proceeding before it? The Commission submits that both the appropriate construction of the phrase (taking into account the context in the Act and s 32 of the Charter), in combination with the Court's obligations under s 6(2)(b) and s 24(1) of the Charter and the rules of natural justice, require the Court to ensure that it acts on relevant information and, where possible, hears from the child, in making this determination. See Part E below.

C SECTION 32 OF THE CHARTER

20. Section 32 of the Charter requires that statutory provisions must be interpreted in a way that is compatible with human rights, so far as it is possible to do so in accordance with its purpose.
21. The High Court's decision in *Momcilovic v R*,⁸ while leaving open some issues in relation to the application of s 32(1), establishes that, in interpreting a statutory provision, s 32 requires statutes to be construed
- ...against the background of human rights and freedoms set out in the Charter in the same way as the principle of legality requires the same statutes to be construed against the background of common law rights and freedoms. The human rights and freedoms set out in the Charter in significant measure incorporate or enhance rights and freedoms at common law. Section 32(1) applies to the interpretation of statutes in the same way as the principle of legality but with a wider field of application.⁹
22. In particular, as observed by the Court of Appeal in *Slaveski v Smith*:¹⁰
- If the words of a statute are capable of more than one meaning, the court should give them whichever of those meanings best accords with the human right in question.
23. In this case, as discussed above, there are key aspects of s 524 of the Act which are relevantly undefined, and capable of more than one meaning. They must, in accordance with s 32(1) of the Charter, be construed in accordance with the relevant rights in the Charter.
24. The Commission agrees with the Plaintiffs that the interplay between ss 32 and 7(2) of the Charter remains unresolved.¹¹ The Commission submits that in these proceedings, it is unnecessary to resolve this issue as there is no suggestion¹² of a justification under s 7(2) for a construction of s 524(4) that limits a child's rights under the Charter, particularly where the threshold question of the child's maturity to give instructions is properly resolved.

⁸ (2011) 280 ALR 221.

⁹ *Momcilovic v R* (2011) 280 ALR 221 at [51] per French CJ.

¹⁰ [2012] VSCA 25 at [24].

¹¹ Plaintiffs' Submissions at [29]-[30], noting the discussion of *Momcilovic v R* in *Noone v Operation Smile (Australia) Inc* [2012] VSCA 91 at [27]-[31] and [139]-[142].

¹² Whether in the reasoning of the Court or otherwise, the Second Defendant's Submissions do not raise any question of justification by reference to s 7(2).

D THE CHARTER RIGHTS AND RELEVANT INTERNATIONAL LAW

Relevance of international law and jurisprudence

25. 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'. In *Momcilovic v R*, French CJ accepted the utility of examining relevant international decisions when determining the scope of human rights that are protected by the Charter.¹³
26. In determining the nature and the meaning of the relevant human rights, international jurisprudence and General Comments on thematic issues published by the United Nations treaty monitoring bodies shed light on the interpretation of the rights. It is appropriate for a court to have regard to the views of such materials concerning the construction of a treaty,¹⁴ and, taken in context, to the scope of Charter rights based on international standards.

Section 17(2): The right to such protection as is in a child's best interests

27. Section 17 of the Charter provides for the protection of families and children. Section 17(1) provides that families are the fundamental group unit of the state and are entitled to protection. Section 17(2) provides that every child has the right, without discrimination, to such protection as is in his or her best interests and is needed by him or her by reason of being a child.
28. Section 17(2) is based on art 24(1) of the International Covenant on Civil and Political Rights (ICCPR),¹⁵ which provides:
- Every child shall have without discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.
29. Section 17(2) differs only from art 24(1) of the ICCPR by its inclusion of the "best interests" principle. The best interests principle is one that has entered and become widely accepted in international law since the ICCPR was drafted in the early 1950s and is enshrined in the primary international instrument on children's rights, the Convention on the Rights of the Child (CROC). The CROC elaborates on the measures of protection that will be required by a child's status as a minor. Four articles in the CROC have been identified as

¹³ (2011) ALR 221 at 234 [19]: observing that 'judgments of international and foreign domestic courts may be consulted in determining whether the right to be presumed innocent, declared in s 25(1), should be interpreted as congruent with the common law presumption of innocence or as extending beyond it.'

¹⁴ See, eg, *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (2003) 126 FCR 54, 91 [148]. See also reliance on the General Comments of the UN Human Rights Committee as providing guidance on the interpretation of the ICCPR in *Sabet v Medical Practitioners Board of Victoria* (2008) 20 VR 414 at [163]-[164]; *Castles v Secretary, Department of Justice* (2008) 28 VR 141 at [100] and [112]; *PJB v Melbourne Health (Patrick's Case)* [2011] VSC 327 at [72]-[80].

¹⁵ Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006, 14.

general principles of international law: art 2 (non-discrimination), art 3(1) (best interests), art 6 (right to life) and art 12 (the right to be heard).¹⁶

30. Art 3(1) of the CROC confirms that the right of the child requires that their best interests are a primary consideration in all actions concerning them:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

Meaning of "best interests"

31. Neither the Charter nor the CROC expressly define the best interests principle.

32. The High Court has observed in the context of the use of the phrase in the *Family Law Act 1975* (Cth) that 'It is true that the phrase "best interests of the child" is imprecise, but no more so than the "welfare of the child" and many other concepts with which courts must grapple.'¹⁷

33. It is at least clear that what "best interests" means for a particular child will depend on the individual circumstances of each case. As observed by the European Court of Human Rights, citing the UN High Commissioner for Refugees in its *"Guidelines on Determining the Best Interests of the Child"*.¹⁸

The term 'best interests' broadly describes the well-being of a child. Such well-being is determined by a variety of individual circumstances, such as the age, the level of maturity of the child, the presence or absence of parents, the child's environment and experiences.

34. While in ascertaining the best interests of the child there is plainly no 'pre-determined formula',¹⁹ jurisprudence and commentary confirm that the principle is one that turns the focus on the child or young person in matters concerning them.²⁰ Importantly, it is also clear that what is in a child's best

¹⁶ UN Committee on the Rights of the Child, *General Comment No 5: General measures of implementation of the Convention on the Rights of the Child* (2003), [12].

¹⁷ *Secretary, Department of Health and Community Services v JWB and SMB (Marion's Case)* (1992) 175 CLR 218, 259.

¹⁸ UNHCR Guidelines on Determining the Best Interests of the Child, May 2008, cited in *Neulinger v Switzerland* (2012) 54 EHRR 1087 ("**Neulinger**") at [52].

¹⁹ *State v M* [2008] 3 SA 232, Sachs J (Moseneke DCJ, Mokgoro, Ngcobo, O'Regan, Skweyiya and Van der Westhuizen JJ concurring) of the South African Constitutional Court considering the children's rights in s 28(2) of the South African Constitution (equivalent to s 17(2)).

²⁰ See *Neulinger* at [51]: "Neither the working group during the drafting of the convention nor the Committee on the Rights of the Child has developed the concept of the child's best interests or proposed criteria for their assessment, in general or in relation to specific circumstances. They have both confined themselves to stating that all values and principles of the convention should be applied to each particular case (see Rachel Hodgkin and Peter Newell (eds.), *Implementation Handbook for the Convention on the Rights of the Child*, United Nations Children's Fund 1998, p. 37)." In addition, the Committee has emphasised on various occasions that the convention must be considered as a whole, with the relationship between the various articles being taken into account. Any interpretation must be consistent with the spirit of that instrument and must focus on the child as an individual having civil and political rights and its own feelings and opinions (ibid, p. 40)." (Emphasis added)

interests must be informed by the other rights of the child that are relevant in the particular circumstance and ascertained with reference to the views of the child. This is expressly acknowledged in the *Children, Youth and Families Act* itself, in s 10(2):

When determining whether a decision or action is in the best interests of the child, the need to protect the child from harm, to protect his or her rights and to promote his or her development (taking into account his or her age and stage of development) must always be considered.

35. In recognising children as rights-bearers whose capacity to express their interests evolves with increasing maturity and as they pass through stages of development, this approach ensures that the best interests of the child are "assessed from the child's perspective, not that of the parents or the State".²¹

The right of the child to be heard

36. The Committee on the Rights of the Child (the treaty monitoring body of the CROC) has said that there can be no correct application of art 3 (best interests) without allowing the child to be heard in accordance with art 12 of the Convention.
37. Article 12 of the CROC provides that a child has a right to have an opinion, to have that opinion listened to, and to have it taken seriously; and specifically to be provided the opportunity to be heard in any judicial proceedings affecting him or her, directly or through a representative:
1. State Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or appropriate body, in a manner consistent with the procedural rules of national law.
38. The relationship between arts 3 and 12 of the CROC has been highlighted by the UN Human Rights Committee:²²

One establishes the objective of achieving the best interests of the child and the other provides the methodology for reaching the goal of hearing either the child or the children. In fact, there can be no correct application of article 3 if the components of article 12 are not respected. Likewise, article 3 reinforces the functionality of article 12, facilitating the essential role of children in all decisions affecting their lives.

²¹ Joseph, Schultz and Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (2004, 2nd ed), 624 [21.04].

²² UN Committee on the Rights of the Child, *General Comment No 12: The right of the child to be heard* (2009) at [74] (emphasis added). See also at [68], where the Committee states that compliance with art 12 is essential to the realisation of the rights in the Convention, which "cannot be fully implemented if the child is not respected as a subject with his or her own views on the rights enshrined in the respective articles."

39. The Plaintiffs' Submissions set out the requirements of art 12 with reference to the General Comment on the right from the Committee on the Rights of the Child. In summary it requires that:²³
- a. States are to presume that children have the capacity to form autonomous opinions and that children have a right to express those opinions.²⁴
 - b. The right to be heard should not be limited due to the age of a child and it is not necessary for a child to have a comprehensive understanding of all aspects of the matter impacting him or her but merely a sufficient understanding to be able to form their views on it.²⁵
 - c. Children must have the opportunity to be heard directly in proceedings.²⁶
 - d. Where the "hearing of the child is undertaken through a representative", the Committee emphasises that "it is of utmost importance that the child's views are transmitted correctly to the decision maker by the representative".²⁷
 - e. The child's views have an important status: "the representative must be aware that she or he represents exclusively the interests of the child and not the interest of other persons... Codes of conduct should be developed for representatives who are appointed to represent the child's views."²⁸
40. In *ZN v YH*, Nicholson CJ acknowledged that the Family Court of Australia needed to be mindful of art 12.²⁹ The decision highlights the significance of taking into account the wishes of the children as mandated by the *Family Law Act 1975* (Cth) as well as having regard to the maturity of the children, and the wishes of each of them. His Honour cited with approval the views of authors Doogue and Blackwell,³⁰ noting that they argue that:³¹

...much greater emphasis should be given to obtaining the views of the child and they discuss means as to how this can be achieved. In particular, they emphasise the dual requirements of Article 12 of the United Nations Convention on the Rights of the Child, namely that children have a right to be heard and also to have their views taken into account in the decision-making process. As they point out, there is nothing inconsistent between this Article and the law in both Australia and New Zealand.

They also stress that the views of quite young children should not be ignored and, cite the following conclusion from "Access and Other Post-Separation Issues – a Qualitative Study Research Report" Children's Issues Centre, University of Otago, July 1997:

²³ See Plaintiffs' Submissions at [35]-[67].

²⁴ UN Committee on the Rights of the Child, *General Comment No 12: The right of the child to be heard* (2009) at [20].

²⁵ Ibid at [21].

²⁶ Ibid at [35].

²⁷ Ibid at [36].

²⁸ Ibid at [36].

²⁹ *ZN v YH* [2002] FamCA 453; 167 FLR 366 at [112]-[113].

³⁰ J Doogue and S Blackwell "How do we best serve children in proceedings in the Family Court?" (2000) 3(8) *Family Law Journal* (New Zealand).

³¹ *ZN v YH* [2002] FamCA 453; 167 FLR 366 at [112]-[113].

"One of the most important conclusions to be drawn from our study is that children do have views about their lives after parental separation and that they are highly capable of expressing their views. Even children as young as five years' of age can talk about their feelings and what situations mean to them despite the complexity of the experiences . . . the view that children's capacities to understand and participate have been underestimated (Mayall, 1994; Simpson, 1989) is reinforced for us by this study." (footnotes omitted)

41. The United Kingdom Supreme Court in *ZH (Tanzania) v Home Secretary*³² recently confirmed the relationship between arts 3 and 12 of the CROC also highlighting the necessity for a child's views to inform what is in their best interests, in light of the risk of taking for granted that their interests may be the same as their parents or other representatives.³³
42. In addition to the relevance of art 12 of CROC in interpreting "best interests" in both the Act and the Charter, it is, as an established principle of international law, relevant of itself by reason of the presumption of statutory interpretation that provisions should be interpreted consistently with international law, given the presumption that Parliament intends to comply with Australia's international treaty obligations.³⁴

Effect of s 17(2) on the nature of legal representation which may be required

43. The right of a child in s 17(2) of the Charter to protection in their best interests requires the child's best interests to be taken into account in any action or decision concerning them. The above analysis demonstrates that Courts must recognise children as "moral actors in their own right"³⁵ and that assessment of a child's best interests involves a child centred focus.
44. Section 17(2) of the Charter, informed by art 12 of CROC, supports a construction of s 524 which favours direct instructions representation in any case where the child is mature enough to give instructions on material issues. This is assessed by reference to his or her stage of development and not simply age. Section 17(2) also favours a construction which ensures that a child will be permitted to have or retain direct instructions representations in all cases where they are mature enough to give instructions on material issues, even if there may be some issues on which it is not practicable.

³² [2011] 2 WLR 148.

³³ Ibid at [34]-[37].

³⁴ *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at 287; *Royal Women's Hospital v Medical Practitioners Board* (2006) 15 VR 22 at [75]; *Kracke v Mental Health Review Board* (2009) 29 VAR 1 at [38].

³⁵ See *Re D (a child)* [2006] 3 WLR 989, [57] (emphasis added): "There is now a growing understanding of the importance of listening to the children involved in children's cases. It is the child, more than anyone else, who will have to live with what the court decides. Those who do listen to children understand that they often have a point of view which is quite distinct from that of the person looking after them. They are quite capable of being moral actors in their own right. Just as the adults may have to do what the court decides whether they like it or not, so may the child. But that is no more a reason for failing to hear what the child has to say than it is for refusing to hear the parents' views."

45. Although a lawyer acting on a best interests basis pursuant to s 524(11) will be acting "*in what he or she believes to be in the best interests of the child*", this does not vindicate the child's best interests in the sense discussed above, of recognising their rights and maximising their participation in decision making which affects them. As stated in the Plaintiff's submissions, "best interests representation, from the perspective of a statutory scheme that promotes direct participation of children in decision making, is a diminished form of legal representation."³⁶
46. The diminished nature of best interests representation as a form of ensuring that children are heard has been recognised in other jurisdictions. The English Court of Appeal in *Mabon v Mabon*³⁷ highlighted the importance of preferring direct instructions representation over best interests representation in cases where children are mature enough to give instructions.
47. The Court considered that where a child has sufficient understanding and direct participation in proceedings would not pose an obvious risk of harm to the child, direct instructions representation is necessary to comply with art 12 of CROC. In particular, Lord Justice Wall commented on the impossibility of the guardian (whose representation would be akin to best interests representation) to advance the children's views sufficiently in the proceedings in a manner consistent with the requirements of art 12. The comments, although made in the context of a different statutory scheme, are relevant in this context.³⁸

The judge, it seems to me, was motivated by two particular considerations. The first was a laudable desire to protect the three children from the effects of the litigation. The second was his belief that the children were not, in reality, expressing their own views, but those of their father. In those circumstances, the strength and validity of their views were, in the judge's eyes, substantially if not entirely devalued, and could be advanced by a guardian.

My difficulty with that approach is that the judge seems to me, with all respect to him, to have perceived the case from the perspective of the adults. From the boys perspective it was simply impossible for the guardian to advance their views or represent them in the proceedings. He would, no doubt, faithfully report to the judge what the boys were saying, but the case he would be advancing to the judge on their behalf would be (or was likely to be) directly opposed to what the boys were actually saying.

I do not agree with the judge that the only advantage from independent representation was 'perhaps the more articulate and elegant expression of what I already know'. That analysis overlooks, in my judgment, the need for the boys on the facts of this particular case to emerge from the proceedings (whatever the result) with the knowledge that their position had been independently represented and their perspective fully advanced to the judge.

³⁶ Plaintiffs' Submissions at [25].

³⁷ [2005] 3 WLR 460.

³⁸ Ibid at [42]-[44].

48. Lord Justice Thorpe, with whom Latham and Wall LJJs agreed, acknowledged the greater appreciation and weight that must now be attached to children's autonomy and consequential right to meaningfully participate in decisions affecting their lives, stressing that "the right to freedom of expression and participation outweighed the paternalistic judgment of welfare."³⁹

Section 24(1): the right to a fair hearing

49. Section 24(1) of the Charter is also relevant to the interpretation of s 524 and the concept of "mature enough to give instructions". It relevantly provides that 'a party to a civil proceeding has the right to have the ... proceeding decided by a competent, independent and impartial court after a fair and public hearing.'
50. Section 24(1) is engaged in this matter because a protection proceeding in the Children's Court is a civil proceeding for the purposes of s 24(1) of the Charter, and children and their parents are parties.⁴⁰
51. The Commission agrees with the Plaintiffs' Submissions at [42] regarding the scope of the right in this context and that the right to a fair hearing requires a child who is party to the protection proceeding to be able to participate effectively in the proceeding.
52. Although "what will be required to afford a fair hearing to a child in a protection proceeding will depend on the capacity of the child, the nature of the proceeding, the issues at stake and the circumstances of the case",⁴¹ where children are parties to the proceeding, the right to a fair hearing requires the children's views to be heard and considered.⁴²
53. Where a child has "sufficient maturity to be able to express a view about what should happen to them", affording a fair hearing will ordinarily require a Court to hear and consider what the child has to say.⁴³
54. A fair hearing in this matter requires an interpretation of the concept of maturity to give instructions as used in s 524(4) that, in any case where a child has sufficient maturity to give instructions, even if not in relation to all issues, they should be permitted direct instructions representation. This is the optimal manner in which children can have their views heard and considered in the proceeding, and there is nothing in the scheme of the Act that would require that representation to be displaced by best interests representation on all issues.

Section 8(3): right to equality before the law

55. Section 8(3) of the Charter provides that 'Every person is equal before the law and is entitled to the equal protection of the law without discrimination.'
56. It is the requirement to equality before the law, directed to the administration rather than the content of the law, that is relevant in this matter.

³⁹ Ibid at [28].

⁴⁰ *Secretary, Department of Human Services v Sanding* [2011] VSC 42 (**Sanding**), [206].

⁴¹ Ibid at [211]

⁴² Ibid.

⁴³ Ibid at [212].

57. Justice Bell has analysed the scope and application of the s 8(3) equality right in *Lifestyle Communities Ltd (No 3)*⁴⁴ and in *Patrick's Case*.⁴⁵ *Lifestyle Communities* offered a clear description of the content of s 8(3).⁴⁶

Section 8(3) has two components which have distinct but overlapping meanings: equality before the law, and equal protection of the law without discrimination and equal and effective protection against discrimination.

Equality before the law is the principle of the general application of the law and the equal treatment of all persons who come before the law, whether that is before a court or tribunal applying the law or before someone administering the law. It is directed to the application and administration of the law, not to the content of the law. Equality before the law is procedural, not substantive, in character. It gives no entitlement to laws of a particular content. It is a principle of universal application. Unlike the other components of s 8(3), it is not limited to unequal treatment that constitutes discrimination. Equality before the law proscribes arbitrary treatment, ie treatment devoid of objective justification, in the application and administration of the law.

The human right to equality before the law requires the tribunal to apply and administer the laws within its responsibility equally towards every person. In doing so it must not treat people arbitrarily (without objective justification).

58. The Commission submits that this is relevant to the Act's provisions in relation to legal representation in that, to the extent there are competing interpretations open, it requires that decisions about maturity and opinions about whether a child is mature enough to instruct not be reached on an arbitrary basis such as reference only to their age. The Act requires that consideration of the children's age *and* maturity and any other relevant circumstances that may be relevant to their capacity to instruct.⁴⁷

D INTERPRETATION OF "MATURE ENOUGH TO GIVE INSTRUCTIONS" IN THE ACT

59. The phrase "mature enough to give instructions" is used in subsections (2), (4) and (11) of s 524. Subsections (9) and (10) refer to the concept of "maturity".
60. As noted above, the Court's reasoning appears to have been that if a child is not mature enough to give instructions on one topic, they are "not mature enough to give instructions" at all, for the purposes of ss 524(4) and s 524(11). Such a reading would mean that a decision that a child cannot give instructions on one topic means that direct instructions representation must be completely displaced by best interests representation. As noted above, an alternative construction is that if a child is mature enough to give instructions

⁴⁴ [2009] VCAT 1869.

⁴⁵ [2011] VSC 327 [42].

⁴⁶ See *Lifestyle Communities Ltd (No 3) (Anti-Discrimination)* [2009] VCAT 1869 at [284]-[286] (emphasis added).

⁴⁷ Ibid at [285]-[286].

on material issues in the proceeding, albeit not all of them, s 524(10) would mandate direct instructions representation to that extent.

61. "Maturity" and "mature enough to give instructions" are not concepts defined in the Act. It is first necessary to turn to their statutory context to determine what was intended in relation to children being "mature" enough to give direct instructions on which a legal representative must act in accordance with s 524(10).
62. The Act mandates the full participation of children in proceedings. Section 522(1)(c)(i) places a mandatory obligation on the Court that:

As far as practicable the Court must in any proceeding

...

(c) allow –

(i) the child ...

to participate fully in the proceeding.

63. In considering when a child is "mature enough to give instructions", it is also relevant that the Act creates a strong presumption in favour of direct instructions representation.⁴⁸ This is primarily, through the provisions on Procedure in Part 7.3 of the Act. Section 525(1) of the Act provides that a child "must be legally represented" in various Family Division proceedings, including proceedings of the kind in this case.⁴⁹ Section 524 makes various provisions in relation to legal representation. Subsections (1) to (4) are primarily adjournment provisions, dealing with the consequences if a child is not legally represented. The primary substantive provision is s 524(10), which provides that:

A legal practitioner representing a child in any proceeding in the Court *must* act in accordance with any instructions given or wishes expressed by the child so far as it is practicable to do so, having regard to the maturity of the child.⁵⁰

64. Section 524(10) is important for two reasons:
- a. It makes it *mandatory* for a legal practitioner representing a child in any proceeding in the Court to act in accordance with their instructions, subject to it being practicable to do so having regard to the maturity of the child;
 - b. It makes it clear that a child may be mature enough to give instructions which must be acted on, but not necessarily to give instructions on every issue. This is consistent with available relevant evidence relating to

⁴⁸ As submitted by the Plaintiffs. See Plaintiffs' Submissions at [12].

⁴⁹ Section 525(1) refers to interim accommodation orders (s 525(1)(a)), applications to vary interim accommodation orders (s 525(1)(g)) and protection applications (s 525(1)(b)).

⁵⁰ Emphasis added. This section applies to legal representation of children in *any* proceeding in the Court, unlike ss 524(11) which applies only to representation in Family Division proceedings.

children's capacity.⁵¹ As submitted by the Plaintiffs, "maturity to instruct is not a bright line but a continuum".⁵²

65. The Commission submits that a Charter compatible reading of s 524(10), in the context of s 524 and the Act as a whole, demonstrates that wherever a child may have sufficient maturity to instruct on material issues, they should be represented to that extent on a direct instructions basis. The legal representative must have regard to the child's maturity in determining the extent to which it is practicable to act in accordance with those instructions.⁵³
66. On that construction, in any case where there are matters on which an otherwise mature child is not sufficiently mature to instruct, this may have one of two consequences:
- a. It would leave the direct instructions legal representative in the situation of putting no position on a particular issue; it is not unrealistic to consider that this was the contemplated consequence, given that it was the position of the legal representative under the predecessor legislation: see the discussion in the Second Defendant's submissions at [69]-[73].
 - b. The legal representative, if taking the view that the child is not mature enough to instruct on a particular issue, advise the Court of the child's wishes on that issue, informing the Court that the representative took the view that it was not practicable to treat those particular views as instructions.

Maturity, not age alone

67. In relation to the concept of "maturity" itself, both the context of the Act, and relevant international jurisprudence and commentary above demonstrate that the concept does not involve assumptions based on age alone.⁵⁴ The concept of maturity was deliberately chosen as opposed to a reference to specific ages. The Act recognises the need to have reference to each individual child's development as well as age in determining that child's best interests (see s 10(2)).
68. This was further expressed in *Sanding*, where Bell J described that the best interests of the child principle recognises children as autonomous rights-bearers whose views are entitled to be given proper consideration.⁵⁵

Summary of effect of interpretation in accordance with of s 32 of the Charter

69. For the above reasons, to the extent that "mature enough to give instructions", and "maturity" in s 524(4) and other subsections of s 524 of the Act are open to differing interpretations, s 32 of the Charter requires that they be interpreted as:

⁵¹ See Akenson, 'Guidelines for Lawyers Acting for Children and Young People in the Children's Court' (Guidelines, Victoria Law Foundation, 1999) (Exhibit DB-2 to the Affidavit of David Benady), 14-15.

⁵² Plaintiffs' Submissions at [65].

⁵³ Conversely, the reference to a child who is "not mature enough to give instructions" for the purposes of s 524(4) and 524(11) would mean that they are not mature enough to give instructions on all material issues before the Court.

⁵⁴ See above at par [39]

⁵⁵ [2011] VSC 42 at [11].

- a. Requiring children to have direct instructions representation in every case in which they are mature enough to give instructions, even if they are not mature enough to give instructions on all issues on which it would be practicable for a legal representative to act, and
 - b. Requiring an assessment of maturity which is not simply limited to age but by reference to the stage of development and circumstances of the individual child.
70. In the present case, it appears that the Court did not approach s 524(4) in this way.
71. Firstly, by not taking into account the Plaintiffs' maturity to give instructions on a central issue in the case and acting on the basis of their incapacity to instruct on one issue, the Court misconstrued what the section required.
72. The Commission agrees with the Plaintiffs' submission⁵⁶ that the Court appeared to approach the issue on the reverse basis: that if the child is not mature enough to give instructions even on one topic, they are not "mature enough to give instructions" within the meaning of the legislation, and thus lose their right to any direct instruction representation. This would represent a new limitation on direct instruction representation which was not present in the predecessor Act, nor intended by the introduction of provisions providing for "best interests" representation in limited circumstances.
73. The Commission submits that the Court's construction of s 524 in this case is not open. To the extent that it posits a different meaning to the phrase "mature enough to give instructions", it is not the meaning that is most compatible with the human rights in the Charter discussed above and by reason of s 32 of the Charter should not be adopted.⁵⁷
74. As a practical matter, the Commission notes that in this matter there is no advantage for the Plaintiffs to be represented pursuant to s 524(11). This is because the Court found that the issue relating to their uncle was one which should not be raised with the Plaintiffs at all (whether by best interests model lawyer or otherwise) because he found that they were "adult issues"⁵⁸ and that they should not be aware of them.⁵⁹ Where no real advantage would be achieved by best interests representation under s 524(11), it is particularly important not to displace the Plaintiffs' right to direct instructions representation.
75. Secondly, by assessing the Plaintiffs' maturity based only on their age and not based on a proper assessment of the maturity of each individual Plaintiff, the Court interpreted the provision in an arbitrary manner not permitted by the Act.
76. If a child has been assessed by their lawyers as having capacity to provide instructions, in accordance with the Victorian Guidelines for Lawyers Representing Children and Young People, the Court should be expected to

⁵⁶ Plaintiffs' Submissions at [66].

⁵⁷ *Slaveski v Smith* [2012] VSCA 25 at [24]. See also pars [20]-[23] above.

⁵⁸ Transcript at 31.27-29.

⁵⁹ Transcript at 33.24.

require cogent and persuasive evidence on which it could form an opinion that the child does not have such capacity to provide instructions.

77. The Commission agrees with the Plaintiff's submissions at [71] that maturity should be "approached through a determination of whether a young person is able "to understand the nature of the proceedings and...an appreciation of the possible consequences of the court proceedings, both in the short-term and the long-term".⁶⁰ This approach to maturity outlined in the endorsed Guidelines is consistent with the text and purposes of the Act and s 524 construed in accordance with ss 17(2), 24(1) and 8(3) of the Charter.

E DIRECT APPLICATION OF CHARTER PROVISIONS TO THE COURT

78. The Commission submits that the Children's Court is bound by s 6(2)(b) of the Charter to accord the relevant rights in Part 2 of the Charter, in particular the right to a fair hearing in s 24(1) and the right to equality before the law in s 8(3).
79. The Commission submits that the above provisions require:
- a. that a determination under s 524(4) of the Act should be based on clear evidence as to the particular child's maturity; and
 - b. that the child's view should be heard before a determination under s 524(4), or a decision as to grant of leave under s 525(5), is made.

Court's Charter Obligations

80. There has been discussion in the authorities of the way in which the Charter may apply to the functions of Courts. This has focused on the apparent tension between s 4(1)(j), which provides that courts and tribunals are public authorities for the purposes of the Charter only when acting in an administrative capacity, and s 6(2)(b) which contemplates that courts and tribunals have functions under Part 2 of the Charter and that the Charter applies to them "to the extent that" they have those functions. It is, however, possible to reconcile that tension, as held by Bell J in *Kracke v Mental Health Review Board*.⁶¹ Accepting the submission of the Attorney-General, who intervened in the case, his Honour held that the correct interpretation of s 6(2)(b) was that:⁶²

The functions under Part 2 referred to in s 6(2)(b) are the functions of applying or enforcing those human rights that relate to court and tribunal proceedings. I think that is the correct interpretation because it respects the structure of the Charter, is most consistent with its purposes in the context of that structure and gives the opening words of s 6(2), and the words 'functions under Part 2' in s 6(2)(b), an appropriately general meaning.

81. His Honour held that the "*human rights that relate to court and tribunal proceedings*" included the fair hearing rights in ss 24 and 25 of the Charter

⁶⁰ Akenson, 'Guidelines for Lawyers Acting for Children and Young People in the Children's Court' (Guidelines, Victoria Law Foundation, 1999) (Exhibit DB-2 to the Affidavit of David Benady), 12.

⁶¹ (2009) 29 VAR 1.

⁶² Ibid at [250].

and that courts and tribunals were therefore bound by reason of s 6(2)(b) to act compatibly with those rights, even if they are not "acting in an administrative capacity".⁶³

82. The Court of Appeal has also held specifically that "ss 24 and 25 [of the Charter] apply directly to courts and tribunals, when they exercise their functions".⁶⁴
83. It has also been held in *Re Lifestyle Communities Ltd (No 3)*,⁶⁵ that s 8(3), in so far as it has procedural implications, is also directly applicable to courts and tribunals by reason of s 6(2)(b), thus supplementing the right to a fair hearing.
84. On this view, courts and tribunals are directly bound, by operation of s 6(2)(b), to act compatibly with the right to equality before the law in s 8(3) and the right to a fair hearing in s 24(1), irrespective of the capacity in which they are acting.
85. Whether the Court acted compatibly with ss 24(1) and s 8(3) of the Charter when exercising its powers under s 524 of the Act in this case is to be determined by examining whether its conduct of the hearing on this issue limited or interfered with the right in a manner that was not demonstrably justifiable having regard to s 7(2) of the Charter. In this context, involving the direct application of those rights rather than a question of statutory interpretation, the relationship between ss 32 and 7(2) does not have to be resolved.
86. The Commission submits that it is a limitation on the right to a fair hearing to make a determination of the Court's own motion that a represented child is not mature enough to give instructions:
 - a. without making any provision for the children to be heard on the issue, whether directly, or through other means of ensuring that the children's views on the issue were known. In the present case, although the children's lawyer was present in Court, it is unclear what, if any, value the Court could have given to the lawyer's submissions for the children as the Court had already made the determination that the Plaintiffs were not mature enough to instruct her before hearing any submissions on the issue.⁶⁶
 - b. act on an assumption based on age of the Plaintiffs, rather than evidence of their maturity and stage of development, and capacity to give instructions.

⁶³ Ibid at [251]. His Honour also considered, again accepting the Attorney-General's submission, that other provisions of Part 2 potentially capable of applying to courts and tribunals by reason of s 6(2)(b) included ss 21(5)(c), 21(6), 21(7), 21(8), 23(2), 23(3), 26 and 27. See also *Smeaton v Victorian WorkCover Authority* [2009] VCAT 1195 at [4], where Bell J reiterated his conclusion in relation to s 24.

⁶⁴ *De Simone v Bevnol Constructions & Developments Pty Ltd* (2009) 25 VR 237 at [52], noted with apparent approval in *Slaveski v Smith* [2012] VSCA 25 at [54] footnote 27. [2009] VCAT 1869 at [142].

⁶⁵ Transcript at 30.23: Ms Green noted the age of the children as "ten and nine years and they are certainly of an age here they can give instructions as to what...". His Honour stated: "No they can't. They can express wishes."

⁶⁶

87. It is also a limitation on the right to a fair hearing to make a determination that the existing legal representatives may not continue to represent the Plaintiffs in circumstances where the Plaintiffs are not heard on the question of whether there is a relevant conflict of interest. The Commission agrees with the Plaintiffs' submissions on the issue of when a conflict exists.⁶⁷ The Court needs to consider relevant information from the Plaintiffs on this issue even if it is not practicable for the Plaintiffs to instruct on the existence of a conflict. The information available to the Court on the issue was ambiguous.⁶⁸
88. Similarly, in applying the rules of natural justice, it is accepted that they do not impose absolute obligations in relation to how a person is heard, and that a reasonable hearing must be accommodated to the nature of the jurisdiction.⁶⁹ However, as discussed above, this statutory scheme, with its strong presumption in favour of direct instructions representation, does not disclose any need to limit the access by a child who is mature enough to give instructions on material issues to best interests representation.
89. In summary - by reason of s 6(2)(b) in conjunction with s 24(1) and 8(3) of the Charter - before making a determination that the Plaintiffs were not mature enough to give instructions, the Court was obliged to:
- a. Assess by reference to the child's specific circumstances, the child's development and capacity to give instructions before deciding that children who had been assessed by their lawyers as mature enough to give instructions were not mature enough to give instructions. This would entail having reference to clear evidence to the effect that each Plaintiff was not mature enough to give instructions (further to the age of the Plaintiffs and the nature of what their instructions were) before making a determination to that effect. There is no indication that any evidence on this specific issue was before the Court.
 - b. Ensure that the Plaintiffs were heard effectively before making the determination. It is not apparent that the presence of the Plaintiffs' legal representative had the necessary effect of enabling the Plaintiffs' effective participation on this issue.

C M Harris

Counsel for the Commission

5 October 2012

⁶⁷ Plaintiffs' Submissions at [107]-[109].

⁶⁸ Transcript at 41-42.

⁶⁹ *J v Lieschke* (1987) 162 CLR 447 at 457 per Brennan J.