

BETWEEN:

VERA MOMCILOVIC
Appellant

THE QUEEN
First Respondent

**THE ATTORNEY-GENERAL FOR THE STATE
OF VICTORIA**
Second Respondent

**THE VICTORIAN EQUAL OPPORTUNITY AND
HUMAN RIGHTS COMMISSION**
Third Respondent

THIRD RESPONDENT'S SUPPLEMENTARY SUBMISSIONS

**SUBMISSIONS ON THE COURT'S QUESTIONS CONCERNING SECTION 38 OF THE
CHARTER**

These supplementary submissions are filed pursuant to the leave granted by the Court on 9 February 2011.¹

**1 IS THE DIRECTOR OF PUBLIC PROSECUTIONS A PUBLIC AUTHORITY WITHIN
THE MEANING OF SECTION 4 OF THE CHARTER?**

1.1 The Third Respondent (the **Commission**) adopts the written submissions of the Appellant on this point, at paragraphs 1.1 – 1.8 of their additional written submissions dated 17 February 2011 (**Appellant's additional submissions**).

**2 DID SECTIONS 38(1) AND (2) APPLY TO THE DECISION OF THE DPP TO MAKE A
PRESENTMENT ALLEGING AN OFFENCE AGAINST S 71AC OF DPCSA?**

2.1 Provided that the "decision" referred to in this question is properly characterized as having been made at the time of the filing over of the new presentment in July 2008 (with the consequence that it was made after the commencement of s 38 on 1 January 2008) the Commission adopts paragraphs 2.1 – 2.4 of the Appellant's additional submissions.

2.2 Accordingly s 38(1) of the Charter did apply to that decision, and s 38(2) did not.

¹ *Momcilovic v The Queen* [2011] HCA Trans 16 at 175 (9 February 2011).

3 MATTERS RELEVANT TO THE “PROPER CONSIDERATION” OF A RELEVANT HUMAN RIGHT REFERRED TO IN S 38(1) OF THE CHARTER

- 3.1 The Commission adopts paragraphs 3.1, 3.2 and 3.3 of the Appellant’s additional submissions.
- 3.2 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. The Court’s question is framed by reference to the procedural limb.
- 3.3 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.² 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.
- 3.4 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:³

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.

- 3.5 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*.⁴
- 3.6 It is possible for a public authority to decide to act in a manner incompatible with human rights without breaching the procedural limb. Like the traditional requirement to take into account of “relevant considerations”, the procedural limb ensures that human rights are properly considered, but it does not mandate a particular outcome.⁵ 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).

² *Rights Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005) 124.

³ *Rights Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005) at 124-125.

⁴ (1987) 14 ALD 291 at 292.

⁵ 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.

- 3.7 It follows from the above that if the DPP or Crown Prosecutor is a “public authority” as defined in s 4 of the Charter, then “proper consideration” of human rights required them to have regard to whether any limitation on the presumption of innocence that occurred by reason of their decision to lay charges under s 71AC of the DPCSA was a reasonable limit that was demonstrably justifiable in a free and democratic society having regard to the matters identified in s 7(2) of the Charter.

4 IF YES TO THE PRECEDING QUESTION, COULD THE DPP REASONABLY HAVE ACTED DIFFERENTLY OR MADE A DIFFERENT DECISION WITHIN THE MEANING OF S 38(2) OF THE CHARTER?

- 4.1 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.
- 4.2 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.
- 4.3 In this case, the Crown Prosecutor had a range of possible courses of action available when exercising his power to make a presentment. Those options included prosecuting the Appellant under Part 9.1 of the *Criminal Code 1995* (Cth). In those circumstances, s 38(2) had no relevant operation, and the Crown Prosecutor was therefore required by s 38(1) of the Charter to give proper consideration to whether proceeding under s 71AC of the DPCSA involved an unjustifiable limitation on human rights.

5 COULD THE APPELLANT HAVE RAISED THE CHARTER POINT BY SEEKING A STAY OF THE PROCEEDINGS AT TRIAL ON THE BASIS THAT THE DPP HAD NOT COMPLIED WITH THE REQUIREMENTS OF SECTION 38 OF THE CHARTER?

- 5.1 The Commission adopts paragraphs 5.1 and 5.2 of the Appellant’s additional submissions.
- 5.2 Section 39(1) of the Charter did not prevent the Appellant from seeking such a stay. That subsection provides:

If, otherwise than because of this Charter, a person may seek any relief or remedy in respect of an act or decision of a public authority on the ground that the act or decision was unlawful, that person may seek that relief or remedy on a ground of unlawfulness arising because of this Charter.

- 5.3 The meaning of s 39(1) has been much debated.⁶ The better view is that s 39(1), like s 39(3), is intended to prevent new causes of action from being created by the Charter. That view is supported by both the Explanatory Memorandum and the Second Reading speech for the Charter. The Explanatory Memorandum states:⁷

⁶ See Jeremy Gans, “The Charter’s Irremediable Remedies Provision” (2009) 33 *University of Melbourne Law Review* 1.

⁷ Explanatory Memorandum, Charter of Human Rights and Opportunities Bill 2006 (Vic) 28.

This clause does not create any new or independent right to relief or a remedy if there is nothing more than a breach of a right protected under Part 2. In particular, the clause does not confer any entitlement to an award of damages arising from nothing more than a breach of a right protected under Part 2, nor are any damages to be awarded referable to the breach of a right protected under Part 2. The unavailability of damages is further reinforced by sub-clause (3).

- 5.4 In the Second Reading speech for the Charter, the Attorney-General said in relation to s 39:⁸

It is intended that there should be no new causes of action in respect of breaches of human rights and that damages should not be awarded for breaches of human rights.

This reflects the government's intention that any available remedies should focus on practical outcomes rather than monetary compensation. Public authorities will still be bound by the charter, and existing causes of action that are available to address unlawful actions by public sector bodies are still available in respect of breaches of the charter in the same way that they are available for breaches of other laws.

- 5.5 It is plain that a defendant in criminal proceedings can seek a stay of a prosecution on grounds of abuse of process quite independently of the Charter. In those circumstances, if the decision to file over the presentment was unlawful by reason of s 38(1) of the Charter, s 39(1) of the Charter does not prevent that unlawfulness from being relied upon as a ground for the stay application.

6 WHAT EFFECT, IF ANY, DOES THE ABSENCE OF ANY SUCH APPLICATION HAVE UPON THE OUTCOME OF THIS APPEAL?

- 6.1 The Commission does not seek to be heard on this question.

HAVING REGARD TO THE DECLARATION OF INCONSISTENT INTERPRETATION AND TO SECTION 38(1) OF THE CHARTER, COULD THE APPELLANT TAKE ACTION AGAINST THE PRISON AUTHORITIES IF SHE WERE IN CUSTODY, ON THE BASIS THAT KEEPING HER IN CUSTODY CONSTITUTED FALSE IMPRISONMENT OR MISFEASANCE IN PUBLIC OFFICE OR ANOTHER TORT?⁹

- 7 The declaration of inconsistent interpretation in relation to s 5 of the DPCSA did not have any effect on the legality of the Appellant's conviction or her subsequent sentence to a term of imprisonment. That is plain from s 36(5)(b) of the Charter, which provides that a declaration of inconsistent interpretation "does not create in any person any legal right or give rise to any civil cause of action".
- 8 The legal obligation of prison authorities to keep the Appellant in custody arose from the order of the court sentencing her to a term of imprisonment, when read together with Part 1A of the *Corrections Act 1986* (Vic). As a result, prison authorities "could not reasonably have acted differently" in detaining the appellant following her sentence to a term of imprisonment. It follows that s 38(2) of the Charter applied, with the result that s 38(1) of the Charter did not

⁸ Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2006, 1294 (Robert Hulls, Attorney-General).

⁹ This question was posed by Crennan J in oral argument: *Momcilovic v The Queen* [2011] HCA Trans 15 at 35-36.

render the conduct of prison authorities in detaining the Appellant unlawful notwithstanding the declaration of inconsistent interpretation.

- 9 On the facts of this case, there is therefore no basis upon which s 38(1) of the Charter could be relied upon to support a claim of false imprisonment or any other tort against prison authorities in relation to their detention of the Appellant.

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