IN THE COURT OF APPEAL (CIVIL DIVISION)
SUPREME COURT OF VICTORIA
AT MELBOURNE **No. S APCI 2012 0004**

BETWEEN:

VICTORIA POLICE TOLL ENFORCEMENT AND OTHERS

Applicants

AND

ZAKARIA TAHA AND OTHERS

Respondents

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

I. INTRODUCTION

1. The Victorian Equal Opportunity and Human Rights Commission (**the Commission**) intervened in this proceeding at first instance under s 40(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**the Charter**).

2. In summary, the Commission submits that the learned trial judge, Emerton J, was correct to conclude that s 160 of the *Infringements Act 1991* (Vic) (**the Act**), on its proper construction, requires the Magistrates' Court to consider whether any of the alternative orders in s 160(2) and (3) may be available and appropriate before making an imprisonment order under s 160(1) and that this may require the Court, in appropriate cases, to make reasonable enquiries of the infringement offender and of its own records aimed at ascertaining whether the offender answers one or more of the descriptions in s 160(2) or (3).[1] By failing to do so in this case, the Magistrates' Court misconstrued the statutory power which it purported to exercise and committed an error going to its jurisdiction.[2]

3. This construction of s 160 of the Act is informed, as her Honour held,[3] by the principle of legality and the interpretative mandate in s 32(1) of the Charter read with the relevant human rights in ss 8 (the right to equality), 21 (the right to liberty) and 24 (the right to a fair hearing). The Commission's submissions focus on the role of the Charter in the construction of s 160 of the Act.

4. Further or alternatively, the Commission submits that, in exercising the powers conferred on the Court by s 160 of the Act, the Court was bound by s 6(2)(b) of the Charter to act compatibly with the right to the equal protection of the law in s 8(3) and

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1 *Taha v Broadmeadows Magistrates Court* [2011] VSC 642 (***Taha***) at [66].

2 *Taha* at [79].

3 *Taha* at [59]-[65].

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the right to a fair hearing in s 24. By failing to consider the availability and appropriateness of the alternatives to imprisonment in s 160(2) and (3) and to inquire into the first respondent's particular circumstances for that purpose prior to making the imprisonment order under s 160(1), the Court acted incompatibly with those rights.

II. GROUND 1: CONSTRUCTION OF S 160 OF THE *INFRINGEMENTS ACT 1991* (VIC)

5. The construction of s 160 of the Act must begin with a consideration of the text having regard to its context and purpose.[4] A construction that would promote the purpose or object underlying the Act must be preferred to one that would not.[5]

6. Emerton J approached the construction of s 160 of the Act in this manner. Her Honour considered the text, context and purpose of s 160 and the purposes of the Act as a whole at [36]-[57]. The relevant purposes of the Act are set out in her Honour's reasons at [56] and in the submissions of the first respondent, Mr Taha, at paragraph 18. Her Honour concluded that s 160 must be read and construed as a whole as comprising a range of powers to which the Court must have regard when deciding how best to deal with an individual offender.[6]

7. One further element of the context of s 160 should be noted. Part 12 Div 2 of the Act, in which s 160 appears, replaced Pt 4 of Sch 7 to the *Magistrates' Court Act 1989*.[7] As it was in force immediately before the enactment of the *Infringements Act*, cl 25 in Pt 4 of Sch 7 provided that "*[a] person brought before the Court under this Part bears the onus of satisfying the Court with respect to any matter before the Court.*" That provision was not replicated in Pt 12 Div 2 of the Act.

8. This omission and the purposes of the Act as identified by Emerton J indicate that s 160 should not be construed so as to place on an infringement offender the burden of satisfying the Court of any of the matters set out in s 160(2) or (3). As her Honour held:[8]

> "while sub-ss (2) and (3) require the Court to be 'satisfied' of the matters described therein before making any of the alternative orders, that does not mean that it is left to the infringement offender to satisfy the Court of those matters. The Court may reach the requisite state of satisfaction as a result of its own inquiries and from information that emerges during the course of the s 160 hearing as a result."

The common law principle of legality and s 32(1) of the Charter

9. The powers conferred by s 160 of the Act to imprison an infringement offender plainly engage individual liberty. As discussed below, the construction of s 160 also

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4 *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27, 46-47 [47] per Hayne, Heydon, Crennan and Kiefel JJ; *Momcilovic v The Queen* (2011) 85 ALJR 957; 280 ALR 221; [2011] HCA 34 (***Momcilovic)*** at [56] per French CJ; *WBM v Chief Commissioner of Police* [2012] VSCA 159 (***WBM***) at [31], [39]-[42] per Warren CJ.

5 *Interpretation of Legislation Act 1984* (Vic).

6 *Taha* at [42].

7 Explanatory Memorandum to the Infringements Bill, page 32.

8 *Taha* at [65].

engages the right to a fair hearing and the right of all persons to equality before the law. The proper construction of s 160 must therefore be informed, as Emerton J held,[9] by the principle of legality and by s 32(1) of the Charter.

10. The appellants' submissions, however, make no reference to the principle of legality or to s 32(1). The appellants refer to the Charter only in response to the Commission's notice of contention. They submit that Charter rights can be taken into account under s 160(2) and (3) of the Act "but only if the jurisdiction of a Magistrate to contemplate making a decision under s 160(2) or s 160(3) is enlivened."[10] The same submission was made by the present appellants below[11] and was, with respect, correctly rejected. The submission fails to appreciate that relevant Charter rights must be taken into account, as part of the interpretative process mandated by s 32(1), in determining the antecedent question of the proper construction of s 160 as a whole. It also fails to appreciate that human rights can be affected not only by the substantive law but also by the procedures adopted by courts and tribunals when applying the substantive law, as explained below.

The principle of legality

11. The common law principle of legality operates as a presumption that Parliament does not intend to interfere with common law rights and freedoms unless it does so in clear and unequivocal language.[12] When applying the principle, "*one takes the right at its highest. It is not appropriate to consider whether any abrogation of a common law fundamental right or freedom is justified.*"[13]

The operation of s 32(1) of the Charter

12. The application of s 32(1) of the Charter to the interpretation of s 160 of the Act depends first upon whether any Charter rights are engaged and limited by the section. In determining this question, the rights potentially engaged should be construed in the broadest possible way.[14]

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9 *Taha* at [58]-[65].

10 Outline of Applicant/Appellant's Submissions, 3 August 2012, par 32.

11 *Taha* at [41].

12 There are many authorities to this effect. They include: *Potter v Minahan* (1908) 7 CLR 277 at 304; *Bropho v Western Australia* (1990) 171 CLR 1 at 18; *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 520, 523 and 532; *Coco v The Queen* (1994) 179 CLR 427 at 436-437; *Daniels Corporation International Pty Ltd v ACCC* (2002) 213 CLR 543 at 553 [11] per Gleeson CJ, Gaudron, Gummow and Hayne JJ; *Plaintiff S157 v The Commonwealth* (2003) 211 CLR 476 at 492 [30] per Gleeson CJ; *Al-Kateb v Godwin* (2004) 219 CLR 562 at 577 [19]-[20] per Gleeson CJ, 643 [241] per Hayne J; *Electrolux Home Products Pty Ltd v The Australian Workers' Union* (2004) 221 CLR 309 at 329 [21] per Gleeson CJ; *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at [47] per French CJ; *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 at [15], [58] per French CJ, Gummow, Hayne, Crennan and Kiefel JJ; *Momcilovic* at [43] per French CJ.

13 *WBM* [2012] VSCA 159 at [80] per Warren CJ; see also at [159] per Bell J.

14 *WBM* [2012] VSCA 159 at [201] per Bell J; *Castles v Secretary to the Department of Justice* (2010) 28 VR 141 at [45], [55]-[56] (Emerton J); *DPP v Ali (No 2)* [2010] VSC 503 at [29] (Hargrave J); *Re an Application under the Major Crimes (Investigative Powers) Act 2004* (2009) 24 VR 415 (***Major Crimes Act Case***) at [80] (Warren CJ); *Kracke v Mental Health*

13. Where it is engaged, s 32(1) operates in the manner described by the High Court in *Momcilovic v The Queen*.[15] In their joint judgment in *Slaveski v Smith*,[16] Warren CJ, Nettle and Redlich JJA said that, putting aside a disparity of views as to the application of s 7(2), six members of the High Court in *Momcilovic* held that, as explained by French CJ, s 32(1) required:

> "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) [thus] applies to the interpretation of statutes in the same way as the principle of legality but with a wider field of application..."[17]

14. As to the role of s 7(2), French CJ, Crennan and Kiefel JJ concluded that it did not form part of the interpretative process mandated by s 32(1).[18] Gummow, Hayne and Bell JJ concluded that it did.[19] Heydon J observed that, if s 7(2) were valid, it would inform the interpretative task, but concluded that both ss 7(2) and 32(1) were invalid.[20] As was the case in *Slaveski*, for the reasons discussed below it is unnecessary in this case to decide whether the Court of Appeal is bound to follow its own decision in *Momcilovic*[21] as to the role of s 7(2) in the interpretative process mandated by s 32(1) of the Charter.

15. In the present case, the following Charter rights are engaged:

(a) the right to the equal protection of the law without discrimination in s 8(3);

(b) the right to liberty and security of the person in s 21;

(c) the right to a fair hearing in s 24.

16. Emerton J's analysis drew together the effect of each of these rights on the construction of s 160 of the Act. Her Honour held:[22]

> "The right to liberty (including the right not to be arbitrarily detained) and the right to a fair hearing are reflected in the objects and purposes of the Act that have been identified. In the context of s 160 and the scheme of the Act generally, they require consideration of whether imprisonment is reasonable in all the circumstances, and a hearing in which regard is had to the infringement offender's particular circumstances...

Review Board [2009] VCAT 646 (***Kracke***) at [75]-[91] (Bell J).

15 (2011) 85 ALJR 957; 280 ALR 221; [2011] HCA 34.

16 [2012] VSCA 25 at [23].

17 *Momcilovic* at [51] per French CJ.

18 *Momcilovic* at [35] per French CJ, [572]-[574] per Crennan and Kiefel JJ.

19 *Momcilovic* at [166]-[168] per Gummow J (Hayne J agreeing), [683] per Bell J.

20 *Momcilovic* at [408]-[409], [439] per Heydon J.

21 *R v Momcilovic* (2010) 25 VR 436.

22 *Taha* at [61]-[64].

...

I accept that the interpretation of s 160 that least infringes the rights in ss 21 and 24(1) of the Charter is one that requires the Court to address the possibility that the alternative orders in sub-ss (2) or (3) may be available before making an imprisonment order under sub-s (1). This requires the Court to consider the individual circumstances of the infringement offender.

Furthermore, in undertaking this task in a manner that least infringes the right to the equal protection of the law in s 8(3) of the Charter, the Court may be required to make inquiries of the infringement offender aimed at ascertaining whether he or she answers one or more of the descriptions in sub-ss (2) or (3). It is in the nature of an intellectual disability or a mental illness that it may prevent the offender from triggering the operation of sub-ss (2) or (3) by raising the condition with the Court. It would defeat the purpose of sub-s (2), in particular, if it could only be enlivened by the actions of a person burdened by a condition that may disable them from forming and exercising the necessary judgement to do so."

17. The Commission submits, with respect, that this construction of s 160 of the Act is supported by further analysis of each of the relevant rights. It is convenient to consider first the right to liberty, as it is the right most obviously engaged by s 160.

The right to liberty (s 21)

18. The common law has long recognised liberty as one of the most fundamental of rights.[23] Justice Fullagar in *Trobridge v Hardy* described it as "*the most elementary and important of all common law rights*".[24] More recently, Gleeson CJ in *Al-Kateb v Godwin* described personal liberty as "*the most basic*"[25] of all the rights and freedoms protected by the common law. It follows that, as Maxwell P and Weinberg JA said in *RJE v Secretary to the Department of Justice*, the Court "*should favour that interpretation which produces the least infringement of common law rights — in this case, the right to be at liberty*".[26]

19. Section 21(1) of the Charter is the statutory equivalent of the common law right to be at liberty. It is engaged in any case in which a person is at risk of imprisonment.[27] It is clearly engaged in a proceeding under s 160(1) of the Act.

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23 See, eg, *Whittaker v The King* (1928) 41 CLR 230 at 248; *Trobridge v Hardy* (1955) 94 CLR 147 at 152; *Watson v Marshall and Cade* (1971) 124 CLR 621 at 632; *Williams v The Queen* (1986) 161 CLR 278 at 292; *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 520-523; *McGarry v The Queen* (2001) 207 CLR 121 at 140-142 [59]-[61]; *South Australia v Totani* (2010) 242 CLR 1 at 155-156 [423].

24 (1955) 94 CLR 147 at 152.

25 (2004) 219 CLR 562 at [19]; see also at [150] per Kirby J.

26 (2008) 21 VR 526 at [37], citing *Balog and Stait v Independent Commission Against Corruption* (1990) 169 CLR 625 at 635–6 per Mason CJ, Deane, Dawson, Toohey and Gaudron JJ. Emerton J adopted the same approach: *Taha* at [58].

27 See, eg, *R v Malmo-Levine* [2003] 3 SCR 571 at [84] ("*the availability of imprisonment for the offence ... is sufficient to trigger s 7 scrutiny*", section 7 being the equivalent in the *Canadian Charter of Rights and Freedoms* to s 21 of the Charter).

20. The right to liberty in s 21(1) may be limited in the circumstances set out in s 21(2) and (3); that is, s 21(1)-(3), taken together, provide protection against arbitrary or unlawful interferences with individual liberty. There can be no further diminution under s 7(2) of the protection against unlawful interference with individual liberty or, except perhaps in an exceptional case, with the protection against arbitrary interference with individual liberty.[28] This is not such a case. Any continuing uncertainty as to the role of s 7(2) in the application of s 32(1) of the Charter is therefore not relevant to this proceeding in so far as the right to liberty is concerned.

21. The lawful basis for the exercise of the power of imprisonment under s 160(1) of the Act is apparent from ss 158 and 160(1) itself: the person must be an "*infringement offender*" (ie, a person arrested under an infringement warrant) and be a person to whom Pt 12 Div 2 applies.

22. However, lawfulness and lack of arbitrariness are separate requirements: an otherwise lawful deprivation of liberty may nevertheless be "*arbitrary*". In *Minister for Immigration v Al Masri*, the Full Federal Court held that the concept of arbitrariness in Art 9 of the ICCPR is not to be equated with "against the law" but is to be interpreted more broadly to encompass circumstances which are, in the individual case, disproportionate or unjust.[29] The same approach should be applied to the concept of arbitrariness in s 21(2) of the Charter, which is modelled on Art 9 of the ICCPR.[30]

23. In any event, s 160 itself supplies the content of the concept of arbitrariness for the purposes of that section. Section 160(3), in particular, uses the language of proportionality. It empowers the Court to make any of a range of orders falling short of imprisonment for the full potential term if it is "*satisfied that, having regard to the infringement offender's situation, imprisonment would be excessive, disproportionate and unduly harsh*". That requires consideration of the individual circumstances of the case: of the offender's "*situation*" and the impact that an order for imprisonment would have on him or her. That may lead, in turn, to discovery of information relevant to the potential application of s 160(2).

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28 Police powers to stop motorists to conduct random breath testing might arguably be an example: *R v Hufsky* [1988] 1 SCR 621; *R v Ladoucer* [1990] 1 SCR 1257.

29 (2006) 126 FCR 54 at [143]-[152]. See also *Zaoui v Attorney-General (NZ)* [2005] 1 NZLR 577 at [85]-[86], [177]-[178], where the New Zealand Court of Appeal said in relation to s 22 of the *New Zealand Bill of Rights Act 1990* (the equivalent to s 21(2) of the Charter) that a deprivation of liberty may be arbitrary where it exhibits "*elements of inappropriateness, injustice, or lack of predictability or proportionality*"; and *Blundell v Sentence Administration Board* [2010] ACTSC 151, (2010) 5 ACTLR 88, 245 FLR 424 at [166]-[168].

30 In *WBM* [2012] VSCA 159, the Court of Appeal left open a difference of judicial opinion as to whether the word "*arbitrarily*" in s 13(a) of the Charter (freedom from arbitrary and unlawful interference with privacy etc) should be given its "*human rights meaning*" in the sense of "*unreasonable*" or "*disproportionate*" (see *PJB v Melbourne Health (Patrick's Case)* [2011] VSC 327 at [80]-[84]; *Kracke* [2009] VCAT 646 at [165]; and *Nolan v MBF Investments Pty Ltd* [2009] VSC 244 at [169] (overturned on appeal but not on this point)) or its narrower "*dictionary meaning*" in the sense of "*capricious and not based on any identifiable criterion or criteria*" (see *WBM v Chief Commissioner of Police* [2010] VSC 219 at [51]-[57]). If the same conflict were to arise in relation to the word "*arbitrary*" in s 21(2), the Commission submits that it should be resolved, consistently with *Al Masri*, in favour of the "*human rights meaning*", but it would not be necessary to resolve it here for the reason given in the following paragraph of the text.

24. Accordingly, a construction of s 160 of the Act that is compatible with the right not to be arbitrarily deprived of liberty in s 21(1)-(3) of the Charter is one which requires the Court to turn its mind, in every case, to whether the powers in s 160(2) and (3) are available and appropriate before exercising the power of imprisonment in s 160(1) and, in some cases, to make reasonable inquiries for that purpose.

The right to a fair hearing (s 24)

25. The right to a fair hearing in s 24(1) of the Charter reflects a fundamental principle of the common law,[31] one that is "*deeply ingrained in the law*" and "*inherent in the rule of law*" itself.[32] The right to a fair hearing is itself absolute: there can be no such thing as an unfair hearing that can nevertheless be justified as a reasonable limitation on the right under s 7(2). For this reason, as with s 21, the role of s 7(2) in the interpretative process required by s 32(1) of the Charter is not relevant to this proceeding in so far as the right to a fair hearing in s 24 is concerned.

26. However, what is required in a particular case to ensure a fair hearing will vary with the circumstances of the particular case.[33] It is submitted that, for the following reasons, the right to a fair hearing in s 24 of the Charter requires a Court exercising the powers conferred by s 160 of the Act to consider the availability and appropriateness of the alternatives to imprisonment in s 160(2) and (3) and may in certain cases impose on it a duty to inquire.

27. First, the fundamental principle is that the procedure adopted in every case must fairly reflect the nature of the interests at stake.[34] Here, as Emerton J recognised,[35] the liberty of the individual is at stake.

28. Secondly, the statutory framework is of critical importance.[36] The statutory framework in which s 160 appears has the purposes identified by Emerton J.[37] In particular, the purposes of the Act include that "*vulnerable people inappropriately caught up in the infringement system are to be filtered out of the system at various stages*" and "*imprisonment of the vulnerable offender ... is to be a measure of last resort*".[38] The administrative and "*highly automated*"[39] nature of the process leading

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31 *Major Crimes Act Case* (2009) 24 VR 415 at [38]-[39], citing *Dietrich v The Queen* (1992) 177 CLR 292. See also *R v Thomas* (2006) 14 VR 475, 510; *R v McFarlane; ex parte O'Flanagan* (1923) 32 CLR 518, 541-542.

32 *Tomasevic v Travaglini* (2007) 17 VR 100 at [68]; *R v McFarlane; ex parte O'Flanagan* (1923) 32 CLR 518, 541-542.

33 *Tomasevic* (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 at 693 per Lord Bingham; *R v A (No 2)* [2002] 1 AC 45 at [38] per Lord Steyn; *R v Hansen* [2007] 3 NZLR 1 at [65]-[66] per Blanchard J.

34 *R v Parole Board; ex parte West* [2005] UKHL 1, [2005] 1 WLR 350 at [30] per Lord Bingham.

35 *Taha* at [73].

36 Cf *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 238 CLR 152 (***SZBEL***) at [26] per Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ in relation to the principle of procedural fairness at common law.

37 *Taha* at [56].

38 *Taha* at [56](a).

39 *Taha* at [52], quoting the Second Reading Speech.

up to the s 160 hearing may result in people coming before the Court as "*infringement offenders*" without anyone having considered whether it would have been appropriate to exercise any of the mechanisms in the Act designed to filter them out of the system. This heightens the need for fair procedures to be observed at the hearing itself.

29. Thirdly, the nature of the hearing itself is relevant. The s 160 hearing is not a truly adversarial proceeding, as the Court's infringements registrar (a member of the Court[40]) appears before the Magistrate to tender the evidence necessary to establish that the defendant is an "infringement offender" and the amount of his or her outstanding fines.[41] The Court's involvement in this "quasi prosecutorial role"[42] tends strongly against the appellants' submission that the implication of a duty to inquire is precluded by the adversarial nature of the proceedings.[43] The Court has, in effect, already informed itself of the matters necessary to found its jurisdiction under s 160 and its power to imprison under s 160(1).

30. Fourthly, it is recognised both at common law[44] and in international human rights law[45] that one aspect of the right to a fair hearing in the ordinary setting of an adversarial criminal trial is the prosecution's duty to disclose material in its possession or available to it against the accused and which may assist the accused. In a case under s 160 of the Act, where, as noted above, the proceedings are not adversarial in the true sense, this duty of disclosure may in certain cases require the Court itself, through the Magistrate or the infringements registrar, to inquire into its own records and to disclose any relevant information to the infringement offender.[46]

31. Fifthly, the content of the right to a fair hearing also depends upon the facts and circumstances of the particular case.[47] Here, Emerton J identified a number of "'flags' that should have prompted the Court to ask questions directed to ascertaining whether he had an intellectual disability, a mental health problem or some other condition which prevented him from successfully negotiating both the pubic transport and infringement systems."[48]

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40 See s 4(2) of the *Magistrates Court Act 1989* (Vic) and the definition of "*infringement registrar*" in s 3(1) of the Act.

41 *Taha* at [11]-[12].

42 *Taha* at [13].

43 Outline of Applicant/Appellant's Submissions dated 3 August 2012, par 29.

44 See, eg, *Cannon v Tahche* (2002) 5 VR 317 at 339-340 [56]; and the authorities discussed by Kirby J in *Mallard v The Queen* (2005) 224 CLR 125 at 150-156 [64]-[84].

45 See the authorities discussed by Bell J in *Ragg v Magistrates' Court of Victoria* (2008) 18 VR 300 at [45]-[65] regarding the principle of "equality of arms".

46 In the present case, the Court had in its possession the information that the first respondent had previously been put on a Justice Plan, only available to persons certified by the Secretary to the Department of Human Services as suffering from an intellectual disability: see [2011] VSC 642 at [67].

47 Cf *SZBEL* (2006) 238 CLR 152 at [26] per Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ.

48 *Taha* at [64].

The right to equality (s 8(3))

32. Section 8(3) of the Charter relevantly provides that "*[e]very person is equal before the law and is entitled to the equal protection of the law without discrimination...*" "*Discrimination*" is defined in s 3(1) to mean "*discrimination (within the meaning of the Equal Opportunity Act 2010 on the basis of an attribute set out in section 6 of that Act*". The list of attributes in s 6 of the *Equal Opportunity Act* includes "*impairment*", which is defined in s 4 to include "*a mental or psychological disease or disorder*".

33. As Bell J explained in *Re Lifestyle Communities Ltd (No 3)*,[49] the second limb of s 8(3) – the right to the equal protection of the law without discrimination – protects substantive equality, which recognises that equality does not mean identical treatment in every case but may require disadvantaged persons to be treated differently to ensure they are treated equally. Bell J also held that the equality rights in s 8(3) have "*procedural implications*" in that "*they impact on the way people can be treated in court and tribunal proceedings*":[50] laws must be applied in such a manner that they operate fairly and equally to all. The procedural aspects of s 8(3) thus supplement the right to a fair hearing in s 24.

34. Section 160(2) of the Act recognises that people with "special circumstances" may require different treatment than a person without those characteristics. An interpretation of s 160 of the Act which relied upon infringement offenders to raise circumstances sufficient to "enliven" the Court's powers under s 160(2) before the Court is required to consider their applicability has the potential to infringe the principle of substantive equality, to result in indirect discrimination and, as Emerton J recognised,[51] to defeat the purpose of the subsection.[52] That is because an infringement offender's impairment may itself render them less capable than persons without such an impairment (and in some cases incapable) of informing the Court of their impairment. The right of intellectually impaired infringement offenders to the fair and equal operation of s 160(2) without discrimination may thereby be infringed.

35. Accordingly, s 32(1) of the Charter favours a construction of s 160 of the Act which requires the Court to consider the applicability of s 160(2) and (3) before making an imprisonment order under s 160(1). The procedural aspects of s 8(3) also favour the imposition, in an appropriate case, of a duty to make relevant inquiries directed to obtaining information relevant to the exercise of the power in s 160(2).

IV. CHARTER OBLIGATIONS OF THE MAGISTRATES' COURT UNDER SECTION 6(2)(b)

36. In addition to the interpretation of legislation, the Charter may be directly relevant to the exercise by a court or tribunal of its powers by reason of:

    (a) s 38 of the Charter, where the court or tribunal is acting in an administrative capacity and is therefore a public authority under s 4(1)(j); or

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49 [2009] VCAT 1869 at [137]. See also *South West Africa Cases (Second Phase)* [1966] ICJR 6, at 306 per Judge Tanaka: "the principle to treat equally what are equal and unequally what are unequal".

50 [2009] VCAT 1869 at [142].

51 *Taha* at [64].

52 See definition of "*indirect discrimination*" in s 8 of the *Equal Opportunity Act 2010*.

(b) s 6(2)(b) of the Charter, where the court or tribunal is applying or enforcing those human rights in Part 2 of the Charter that relate to court and tribunal proceedings, irrespective of whether it is acting as a public authority.

37. In the Brookes appeal, the first respondent contends that the power exercised by the Magistrates' Court under s 160 is administrative in nature.[53] The Commission has not intervened in the Brookes matter and makes no submissions on this point other than to observe that, if the Magistrates' Court is exercising administrative power on a s 160 hearing, it would follow that it was acting as a public authority for the purposes of the Charter[54] and was therefore bound by s 38 of the Charter.

The Commission's notice of contention

38. By the Commission's amended notice of contention in the Taha appeal, the Commission contends that the right to a fair hearing in s 24 and the right to equality in s 8(3) were directly applicable to the Magistrates' Court when exercising its powers under s 160 of the Act by operation of s 6(2)(b) of the Charter.

39. Section 6 is a pivotal provision of the Charter. It defines who has the human rights set out in Pt 2 of the Charter and the entities to whom the Charter is to apply and how it is to apply to them. In relation to courts and tribunals, s 6(2) provides:

> "*This Charter applies to –*
>
> ...
>
> *(b) courts and tribunals, to the extent that they have functions under Part 2 and Division 3 of Part 3; and*
>
> ..."[55]

40. There is an 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. Bell J considered this issue in *Kracke v Mental Health Review Board*[56] and in *Secretary to the Department of Human Services v Sanding*.[57] In *Sanding*, his Honour said:[58]

> "Although the matter is far from clear, in my view the functions of courts and tribunals under Part 2 referred to in s 6(2)(b) are the functions of applying and

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53 First Respondent's notice of contention dated 31 May 2012 [**AB F7**].

54 See s 4(1)(j) of the Charter and *Sabet v Medical Practitioner's Board of Victoria* (2008) 2 VR 414 at [119]-[127]; *Kracke* [2009] VCAT 646 at [270]; and *Re Lifestyle Communities (No 3)* [2009] VCAT 1869 at [39].

55 Section 3(2) provides that "*a reference to a function includes a reference to a power, authority and duty*" and that, where the function is a duty, it includes "*a reference to the performance of the duty*".

56 [2009] VCAT 646 at [250]-[251].

57 [2011] VSC 42.

58 [2011] VSC 42 at [166]-[167].

giving effect to those human rights which relate to court and tribunal proceedings. By excluding courts and tribunals from the definition of a public authority (except when acting administratively), while at the same time making the Charter apply directly to them in respect of the specified functions, the legislation has preserved the substantive legal foundation of the jurisdiction of courts and tribunals, while making it obligatory for them to act compatibly with the Charter in respect of those matters which are within their own direct control, including the conduct of proceedings in accordance with the right to a fair hearing under s 24(1) of the Charter.[59]"

41. To the same effect, in *Slaveski v Smith*,[60] the Court of Appeal noted that in *De Simone v Bevnol Constructions & Developments Pty Ltd*[61] the Court of Appeal held that "ss 24 and 25 [of the Charter] apply directly to courts and tribunals, when they exercise their functions".

42. In *Re Lifestyle Communities Ltd (No 3)*,[62] Bell J held that s 8(3), in so far as it has procedural implications, was also directly applicable to courts and tribunals by reason of s 6(2)(b), thus supplementing the right to a fair hearing.

43. 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 whether they are "*acting in an administrative capacity*". Whether the Magistrates' Court acted compatibly with those rights when exercising its powers under s 160 of the Act in this case is to be determined by examining whether its conduct of the hearing limited or interfered with the right in a manner that was not demonstrably justifiable having regard to s 7(2) of the Charter. The party invoking s 7(2) bears the onus of establishing that any limitations on rights are justified under that provision.[63]

44. In the present case, if the right to a fair hearing and the equality rights are construed, as the Commission submits they should be, so as to require the Court conducting a s 160 hearing to consider the availability and appropriateness of the alternatives to imprisonment in s 160(2) and (3) and, in appropriate cases, to make positive inquiries into relevant material to that end, prior to making the imprisonment order under s 160(1), the failure of the Court in this proceeding to do so constituted a prima facie limit on or interference with those rights. In the absence of any purported justification for that failure, the Court should be found to have acted incompatibly with the right to a fair hearing in s 24 and the right to equality before the law and the equal protection of the law without discrimination in s 8(3) of the Charter.

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59 On the same analysis, other human rights may be applicable because they also engage court and tribunal proceedings, such as equality before the law: *see Lifestyle Communities Ltd (No 3)* [2009] VCAT 1869, [142]

60 [2012] VSCA 25 at [54] footnote 27.

61 [2009] VSCA 199 at [52].

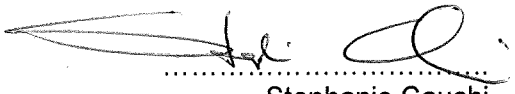
62 [2009] VCAT 1869 at [142].

63 *Major Crimes Act Case* (2009) 24 VR 415 at [115], [147]; *Kracke* [2009] VCAT 646 at [108]; *R v Oakes* [1986] 1 SCR 103, 136-137.

45. Where a public authority fails to act compatibly with a human right, it will have acted unlawfully: s 38 of the Charter. The same description should apply to a failure by a court or tribunal to act compatibly with a human right which applies to it directly by virtue of s 6(2)(b). In either case, the failure by a court or tribunal to act compatibly with a relevant and applicable human right should be understood as unlawful. It is not necessary that the Charter unlawfulness be capable of being characterised as jurisdictional error. It is sufficient that the person is entitled to seek relief in the nature of the prerogative writs for jurisdictional error on a non-Charter ground. Section 39 then entitles the person to seek the same relief on a ground of unlawfulness arising because of the Charter.[64]

Dated: 31 August 2012

A.D. POUND



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64 *Director of Housing v Sudi* [2011] VSCA 266 at [96] per Maxwell P.