ORIGINAL

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M134 of 2010

BETWEEN:

VERA MOMCILOVIC

Appellant

and

THE QUEEN

First Respondent

ATTORNEY-GENERAL FOR THE STATE OF VICTORIA

Second Respondent

VICTORIAN EQUAL OPPORTUNITY AND HUMAN RIGHTS COMMISSION

Third Respondent

SECOND RESPONDENT'S SUPPLEMENTARY WRITTEN SUBMISSIONS

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THE COURT'S QUESTIONS REGARDING SECTION 38 OF THE CHARTER ACT

Question 1. Is the Director of Public Prosecutions a public authority?

1. The Attorney-General does not make specific submissions in answer to this question. It is noted, however, that:

   (a) The making of presentment under s 36(1)(a) of the *Public Prosecutions Act 1994* (Vic), as it stood when presentment of the appellant was made, was a function of a Crown Prosecutor, rather than the Director of Public Prosecutions (**the DPP**), in whose name presentment was made.[1] Since the DPP did not personally make presentment, the following submissions are made by reference to a Crown Prosecutor rather than the DPP.

   (b) For the purposes of s 4(1)(a) of the Charter Act, a Crown Prosecutor ought not be regarded as a public official within the meaning of the *Public Administration Act 2004* (Vic). Although the definition of "public official" in s 4(1) of that statute is broad, s 106(1)(h) exempts both the DPP and any Crown Prosecutor from the entire operation of the legislation.

   (c) While a Crown Prosecutor is appointed pursuant to statute, namely s 31 of the *Public Prosecutions Act 1994* (Vic), being appointed to a position pursuant to statute is not the same as being "established" by statute.[2] Section 4(1)(b) of the Charter Act, therefore, ought not apply.

   (d) A Crown Prosecutor does not, when exercising the power to make presentment under s 36(1)(a) of the *Public Prosecutions Act 1994* (Vic), exercise that power "on behalf of" the State or a public authority, so as to come within s 4(1)(c) of the Charter Act. A Crown Prosecutor conducts proceedings, such as those here under consideration, in the name of the Queen, and on her behalf.[3] Furthermore, a Crown Prosecutor's conduct cannot be considered to be on behalf of a public authority because, to the extent he or she acts on behalf of the DPP,[4] the DPP is not a public authority. This is so because the DPP is not a public official within the meaning of the *Public Administration Act* 2004 (Vic), nor is the DPP "established" by statute.[5]

   (e) None of the other aspects of the definition of "public authority" in s 4 of the Charter Act has any relevance to a Crown Prosecutor.

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1 See *R v Parker* [1977] VR 22 at 29 per Young CJ, at 35 per Murphy J.

2 Cf. Appellant's Additional Written Submissions, paragraph 1.7.

3 See *Public Prosecutions Act 1994* (Vic), ss 22(1)(a), 36(1)(a), 36(1)(b); cf. *Crown Proceedings Act 1958* (Vic), s 22(2), which provides that civil proceedings taken by or against the Crown shall be under the title of the "State of Victoria".

4 It is noted that the DPP does not have power to give any direction to a Crown Prosecutor in relation to filing an indictment against any person: see s 36(5) of the *Public Prosecutions Act 1994* (Vic).

5 See, respectively, sub-paragraphs 1(b) and 1(c) above. The DPP is appointed pursuant to s 87AB of the *Constitution Act 1975* (Vic).

Question 2. Did s 38(1) and (2) apply to the decision of the Director of Public Prosecutions to make a presentment against the appellant alleging an offence against s 71AC of the *Drugs Poisons and Controlled Substances Act 1981* (Vic)?

2. Assuming a Crown Prosecutor is a public authority, then s 38 applied to the actions of the Crown Prosecutor when making presentment of the appellant under s 36(1)(a) of the *Public Prosecutions Act 1994* (Vic), as it then stood. However, it is submitted that the making of presentment fell within s 38(2) of the Charter Act.

3. It is a cardinal feature of the Charter Act that it preserves Parliamentary sovereignty. Courts are not permitted to strike down legislation that is incompatible with the human rights contained in it. This principle is reflected in a number of provisions including ss 32(3) and 36(5) and in s 38(2) itself.

4. Section 36(5)(a) provides that a declaration of inconsistent interpretation does not "affect in any way the validity, operation or enforcement of the statutory provision in respect of which the declaration was made".

5. Section 38 cannot be used so as effectively to render a statutory provision of no force or effect, and do indirectly what is expressly prohibited by s 36(5)(a).

6. Section 38 provides:

> (1) Subject to this section, it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right.
>
> (2) Subsection (1) does not apply if, as a result of a statutory provision or a provision made by or under an Act of the Commonwealth or otherwise under law, the public authority could not reasonably have acted differently or made a different decision.
>
> **Example**
> Where the public authority is acting to give effect to a statutory provision that is incompatible with a human right.

7. Where a statutory provision is incompatible with a human right, and the only way in which a public authority could avoid the incompatibility would be to decline to give effect to the provision, the test in s 38(2) is met because it is not "reasonable" for a public authority not to give effect to a lawful statutory provision. As a result, s 38(1) does not apply. The example to s 38(2) amply bears this out.[6]

8. A Crown Prosecutor's principal functions are to file indictments in the name of the DPP and to conduct, and appear in proceedings, on behalf of the DPP (primarily concerning offences against Victorian statutory provisions).[7] While a Crown Prosecutor may determine, in a particular case, not to prosecute or to discontinue a prosecution because that is in the public interest,[8] he or she cannot decide, as a matter of general policy, never to prosecute an offence that Parliament has enacted.

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6 The example is part of the statute: see s 36(3A) of the *Interpretation of Legislation Act 1984* (Vic).
7 Section 36 of the *Public Prosecutions Act 1994* (Vic).
8 See also, ss 24 and 25 of the *Public Prosecutions Act 1994* (Vic).

9. The Attorney-General submits this application of s 38(2) is consistent with the approach taken under the comparable provision in the *Human Rights Act 1998* (UK) (**UKHRA**).

10. Section 6 of the UKHRA provides:

> (1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.
>
> (2) Subsection (1) does not apply to an act if—
>
> (a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or
>
> (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.
>
> (3) In this section "public authority" includes—
>
> (a) a court or tribunal, and
>
> (b) any person certain of whose functions are functions of a public nature,
>
> but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.
>
> ...

11. The House of Lords has recognised that s 6(2) is intended to preserve the sovereignty of Parliament. Lord Scott has stated:[9]

> As my noble and learned friends have pointed out, subsection (2) is intended to preserve the supremacy of Parliament. A sovereign Parliament has power to legislate in a manner incompatible with Convention rights if it chooses to do so. If Parliament does do so, the legislation is effective and must take effect accordingly. There are not, under English domestic law, any fundamental constitutional rights that are immune from legislative change. So paragraph (a) says that if as a result of a provision of primary legislation the Secretary of State could not have acted differently, it is not unlawful for him to act in a way incompatible with a Convention right.

12. The effect of s 6(2) is that:[10]

> If legislation cannot be read compatibly with Convention rights, a public authority is not obliged to subvert the intention of Parliament by treating itself as under a duty to neutralise the effect of the legislation.

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9 *R (Hooper) v Secretary of State for Work and Pensions* [2005] 1 WLR 1681 at 1707 [92].

10 *R (Hooper) v Secretary of State for Work and Pensions* [2005] 1 WLR 1681 at 1696 [51] per Lord Hoffmann; see also, *Aston Cantlow and Wilmcote with Billesley PCC v Wallbank* [2004] 1 AC 546, [19], where Lord Bingham stated "a public authority is not obliged to neutralise primary legislation by treating it as a dead letter".

13. Section 6(2) has been applied to prosecutors' powers. *R v Kansal (No 2)*[11] concerned a prosecutor's power under s 433 of the *Insolvency Act 1986* (UK) to use evidence obtained from compulsory questioning. The only way that the prosecutor could act compatibly with the Convention would be never to exercise the power. Section 6(1) of the UKHRA was held not to apply. This was notwithstanding the fact that s 433 did not impose a duty on the prosecutor to lead such evidence. The argument is even stronger in circumstances where a Crown Prosecutor is under a duty to prosecute criminal offences.

14. While s 6(2) of the UKHRA has two distinct limbs,[12] the addition of the term "reasonably" into "could not reasonably have acted any differently", together with the inclusion of the Example confirms that s 38(2) has the same operation. Section 38(2) must be read so as to give effect to the purpose of preserving Parliamentary sovereignty, consistently with its own terms, the terms of ss 32(3) and 36(5), and the context of the Charter Act as a whole.

Question 3. Were any of the following matters relevant to the "proper consideration of a relevant human right"...

15. For the reasons set out above, a Crown Prosecutor is not under any obligation under s 38(1) in relation to the making of presentment in cases where s 5 of the Drugs Act may be relied upon, even if s 5 cannot be interpreted compatibly with human rights. None of the matters set out in 3.1 to 3.4 of the Court's letter were therefore required to be given consideration under s 38(1).

Question 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?

16. For the reasons set out above, the conduct of a Crown Prosecutor falls within s 38(2). This question therefore does not arise.

17. In any event, it is far from clear that, had it been necessary to consider the existence of the provisions of Part 9.1 of the *Criminal Code* (Cth), such consideration would have yielded the conclusion that proceeding under Commonwealth law was more compatible with human rights than proceeding under State law in reliance on s 5.[13] Apart from the inherent difficulty of making the suggested comparison between two extensive sets of provisions, it could not be predicted at the time of making presentment which particular onus provisions would ultimately become relevant in the course of the trial and their effect, if any, on the presumption of innocence in the particular case.

Question 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 s 38 of the Charter?

18. No. For the reasons set out above, the Crown Prosecutor was not required to comply with s 38(1).

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11 [2002] 2 AC 69.

12 There has been some disagreement between their Lordships as to whether particular cases fall within the first or second limb of s 6(2), or both: see, eg, *R (Hooper) v Secretary of State for Work and Pensions* [2005] 1 WLR 1681 at 1708 [94] per Lord Scott at 1716 [124] per Lord Brown, cf. at 1696 [47]-[49] per Lord Hoffmann.

13 See *Momcilovic v The Queen* [2010] HCA Trans 16 at 5051-5088.

19. In any event, by reason of s 32(3), on an application for a stay, the court would have been required to give ss 5 and 73 of the Drugs Act their full force and effect.

20. Section 39(1) also requires that for a person to seek a relief or remedy on the basis of unlawfulness under s 38(1), they must have another basis upon which to seek that remedy, such that the Charter Act provides the element of unlawfulness required to establish that other basis. In the absence of bad faith, there was no such other basis because the existence of prosecutorial immunity would have prevented the appellant from being able to seek a stay.[14]

Question 6. What effect, if any, does the absence of any such application have upon the outcome of this appeal?

21. This is not a matter upon which the Attorney-General wishes to make any submission.

FEDERAL JURISDICTION

22. In his oral submissions, the Attorney-General for Western Australia contended that both the County Court and the Court of Appeal were exercising federal jurisdiction in this matter because the matter was one "between a State and a resident of another State".

23. For the reasons set out below, there is no material difference in this case whether the matter was within federal jurisdiction or State jurisdiction when before the Court of Appeal because the relevant provisions of the Charter Act operate in the same way, irrespective of which jurisdiction was being exercised. This is so because, if the matter were indeed in federal jurisdiction in the Court of Appeal, s 32 and relevant provisions of s 36 of the Charter Act would be picked up and applied as federal law by that court pursuant to s 79 of the *Judiciary Act 1903* (Cth).

24. It is accepted that, if this matter were in federal jurisdiction in the County Court, s 36 of the Charter Act would not be picked up and applied as federal law; nothing, however, turns on this issue in this case because no declaration was made, or purported to be made, by that court, and nor could the County Court have done so.

25. The submissions below proceed on the assumption that the matter is in federal jurisdiction. Further submissions will be made, in response to the Court's letter dated 1 March 2011, as to whether this is so.

26. On that assumption, the question arises whether various provisions of the Charter Act (particularly ss 32 and 36) would be picked up and applied pursuant to s 79 of the *Judiciary Act 1903* (Cth).

27. Section 79 provides:

> The laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable.

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14 *Maxwell v The Queen* (1996) 184 CLR 501 at 534-535 per Gaudron and Gummow JJ; see also *R v Director of Public Prosecutions; ex parte Kebilene* [2000] 2 AC 326.

28. Inherent in this section are various limitations. As was identified in *Solomons v District Court of New South Wales* (***Solomons***):[15]

> First, the section operates only where there is already a court "exercising federal jurisdiction", "exercising" being used in the continuous sense. Secondly, s 79 is addressed to those courts; the laws in question "shall be ... binding" upon them. The section is not, for example, directed to the rights and liabilities of those engaged in non-curial procedures under State laws. Thirdly, the compulsive effect of the laws in question is limited to those "cases to which they are applicable". [F]ourthly, the binding operation of the State laws is "except as otherwise provided by the Constitution".

10 29. Accordingly, s 79 is not to change the meaning or expand the reach of State laws except to the extent required to enable those laws to apply to courts exercising federal jurisdiction where, on their terms, they might be otherwise inapplicable.[16] It is for this reason that s 79 would not enable a lower court (such as the County Court) exercising federal jurisdiction to make a declaration of inconsistent interpretation under s 36 even though it may be exercising federal jurisdiction; to do so would enlarge the reach of the provision beyond the court to which it is directed, namely the Supreme Court.

30. Furthermore, s 79 does not permit the "picking up" of State law which is insusceptible of exercise as part of the judicial power of the Commonwealth.[17] Accordingly, a State law could not be picked up and applied as federal law pursuant to s 79 if it would result in the
20 exercise of non-judicial power. For the reasons set out at, respectively, paragraphs 58-61 and 62-68 of the Attorney-General's written submissions, the powers conferred by ss 32 and 36 of the Charter Act involve the exercise of judicial power. There is, therefore, no obstacle to their application by the Court of Appeal in its exercise of federal jurisdiction.[18]

31. Turning first to s 32, there is no reason why this interpretive provision cannot be picked up and applied by s 79 of the *Judiciary Act* as a federal law in proceedings in which a Victorian court (including, relevantly, the County Court or the Court of Appeal) is exercising federal jurisdiction. It establishes a rule of interpretation according to which the rights and liabilities of the parties to any proceeding requiring interpretation of a Victorian statutory provision are to be determined. When engaged in this interpretive
30 exercise in a case in federal jurisdiction, the relevant court would be "exercising" that jurisdiction.[19] Furthermore, s 32 is addressed to the courts, in that it requires them to interpret all Victorian statutory provisions in a particular manner. There is nothing in the Constitution, nor the laws of the Commonwealth, that "otherwise provides", such that s 79 of the *Judiciary Act* would not be engaged.

32. In relation to the Supreme Court (and, relevantly, the Court of Appeal of the Supreme Court), there is no impediment to ss 36(1)-(5) being picked up and applied by s 79 of the *Judiciary Act*. The decision of this Court in *Solomons* does not prevent the picking up of

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15 (2002) 211 CLR 119 at 134 [23] per Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ.

16 *Australian Securities and Investments Commission v Edensor* (2001) 204 CLR 559 at 593 [72] per Gleeson CJ, Gaudron and Gummow JJ.

17 *Australian Securities and Investments Commission v Edensor* (2001) 204 CLR 559 at 593 [72]-[73] per Gleeson CJ, Gaudron and Gummow JJ; *Solomons* (2002) 211 CLR 119 at 136 [28] per Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ.

18 It is accepted that if, contrary to the Attorney-General's written submissions, s 36 confers a non-judicial function on the Supreme Court, that power would be incapable of exercise in federal jurisdiction.

19 *Solomons* (2002) 211 CLR 119 at 134 [23] per Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ.

each of the sub-sections of s 36. For the reasons that follow, s 36(6) and (7) and s 37 need not be picked up and applied as federal law.

33. In *Solomons*, the District Court of New South Wales was exercising federal jurisdiction because it was hearing charges brought against the appellant pursuant to the *Customs Act 1901* (Cth). The appellant was acquitted and sought a costs certificate under the *Costs in Criminal Cases Act 1967* (NSW) **(the Costs Act)**. Section 2 provided that a person acquitted of an offence could apply to the court for a certificate for the costs incurred in defending the proceedings. Section 4 provided that a person granted a certificate "pursuant to" the Costs Act could apply to the Director-General of the Attorney-General's Department **(the Director-General)** for payment of his or her costs out of Consolidated Revenue.

34. It was held that ss 2 and 4 could not be picked up and applied in federal jurisdiction. This was because s 79 of *Judiciary Act* did not permit the "picking up" of some, but not all, of a State legislative scheme, if to do so would give an altered meaning to that scheme. There would be no utility in picking up s 2, allowing a certificate to be granted, if that certificate could not then be used under s 4. It could not be so used because the authority to make an application to the Director-General for payment of costs under s 4 relied on there being a certificate granted "pursuant to this Act". As their Honours noted,[20] in a matter in federal jurisdiction a certificate would not have been granted under the Costs Act; rather, it would have be granted by operation of federal law.

35. As such, the non-application of s 4 in federal jurisdiction had the effect that the grant of a certificate under s 2 was futile and did not resolve any claim or controversy. It was, therefore, not an exercise of federal judicial power.

36. The operation of s 36 is different to the provisions in issue in *Solomons*. Relevantly, the section operates when a question arises with respect to the interpretation of a statutory provision in accordance with the Charter Act in an appeal before the Court of Appeal.[21]

37. Section 36(2) may be picked up and applied by s 79 of the *Judiciary Act*, such that, when exercising federal jurisdiction, the Court of Appeal is empowered to make a declaration of inconsistent interpretation. As part of that process, and in so exercising federal jurisdiction, other sub-sections of s 36 would also be picked up and applied as federal law, namely: (i) s 36(3), requiring the Court to give notice to the Attorney-General and the Commission if the Court is considering making a declaration of inconsistent interpretation; and (ii) s 36(4), providing that a declaration shall not be made unless the appropriate notice has been given and the Attorney-General and Commission have been given a reasonable opportunity to intervene or make submissions.

38. Section 36(5) sets out the effect of any declaration made under s 36(2).

39. Having undertaken the interpretive exercise, given the required notices, concluded that a declaration of inconsistent interpretation should be made in respect of a statutory provision and made such a declaration, the exercise of federal jurisdiction is at an end. That is to say, the Court has nothing further to do, and no further jurisdiction to exercise, in the proceeding.

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20 *Solomons* (2002) 211 CLR 119 at 136 [26] per Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ.

21 Section 36(1)(c) of the Charter Act.

40. Section 36(6) then provides that the Court, having made a declaration, must provide a copy to the Attorney-General within the prescribed period. That obligation operates by reference to the fact of a declaration having been made, irrespective of whether that declaration was made in federal jurisdiction or otherwise. Section 36(6) stands in contrast to s 4 of the Costs Act, because it does not apply only to declarations made "pursuant to" the Charter Act.[22] It is not to be read as if it contained the words "other than a declaration made in the exercise of federal jurisdiction".

41. The obligation imposed by s 36(6) arises only after jurisdiction has been exercised. As such, s 36(6) requires no federal law in order to have effect. In that respect, it resembles s 28(3) of the *Supreme Court Act 1986* (Vic), which requires the Judges of the Supreme Court to report annually to the Governor on the operation of the Court.

42. The exercise of federal jurisdiction being at an end, ss 36(7) and 37 likewise operate as imposing duties on, respectively, the Attorney-General and the Minister administering the statutory provision in question. It is again not necessary for s 79 of the *Judiciary Act* to pick up and apply ss 36(7) and 37 as federal law; to the contrary, they are applied as imposing statutory duties on members of the executive as part of State law. This is consistent with the fact recognised in *Solomons* that s 79 "is not addressed to officers of the executive governments of the States".[23] Furthermore, the full operation of all these provisions in State jurisdiction makes clear that, unlike in *Solomons*, the picking up of ss 36(1)-(5) is not productive of futility.[24]

43. Accordingly, when ss 36(1)-(5) of the Charter Act applies in federal jurisdiction by operation of s 79 of the *Judiciary Act* the legislative scheme is picked up and applied in federal jurisdiction in the same manner as in State jurisdiction.

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22 Cf. *Solomons* (2002) 211 CLR 119 at 136 [26] per Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ.

23 *Solomons* (2002) 211 CLR 119 at 136 [25] per Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ.

24 Cf. *Solomons* (2002) 211 CLR 119 at 136 [28] per Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ.