CEMINO v CANNAN and Others

Ginnane J
30 April, 1 May, 17 September 2018
[2018] VSC 535

Administrative law — Judicial review — Jurisdictional error — Magistrates' Court — 'Proper venue' — Application for transfer of criminal sentencing to Koori Court Division sitting at other location — Exercise of discretion — Relevant considerations — Relevance of Charter of Human Rights and Responsibilities — Magistrates' Court Act 1989 (Vic) ss 4D, 4E, 4F, 4G — Administrative Law Act 1978 (Vic) s 10.

Human rights — Charter of Human Rights and Responsibilities — Equal and effective protection against discrimination — Application for transfer to Koori Court Division — Whether Magistrates' Court acting in administrative or judicial capacity — Whether Magistrates' Court a public authority — Charter of Human Rights and Responsibilities Act 2006 (Vic) ss 4(1)(j), 38(1).

Human rights — Charter of Human Rights and Responsibilities — Application of Charter to judicial functions — Charter of Human Rights and Responsibilities Act 2006 (Vic) ss 6(2)(b), 8(3), 19(2)(a).

Section 4F of the *Magistrates' Court Act 1989* (Vic) (**the Act**) empowered a magistrate to transfer proceedings to the Koori Court Division of the Magistrates' Court in certain circumstances. Section 4F(3) provided that if a proceeding was transferred from one venue to another, 'the transferee venue is the proper venue of the Court for the purposes of this Act'.

The plaintiff was a Yorta Yorta man who lived in northern Victoria. He was charged with offences allegedly committed in and around Echuca. The Koori Court Division did not sit in Echuca. He applied to the Magistrates' Court at Echuca to have his matters transferred under s 4F of the Act to the Koori Court Division sitting at Shepparton. The magistrate refused the application on the basis that Echuca was the 'proper venue'.

The plaintiff sought judicial review on the basis that the decision was affected by jurisdictional error or error of law on the face of the record, and that it contravened the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**the Charter**). Section 8(3) of the Charter relevantly provided that every person 'has the right to equal and effective protection against discrimination'. Section 19(2)(a) provided that Aboriginal persons must not be denied the right to enjoy their identity and culture.

Section 38(1) of the Charter provided that it was unlawful for a public authority in making a decision to fail to give proper considertation to a relevant human right. Section 6(2)(b) provided that the Charter applied to courts to the extent that they had functions under pt 2 (Human Rights) and div 3 of pt 3 (Interpretation of laws).

Held, quashing the decision:

(1) The magistrate had not properly exercised the discretion under s 4F(2) of the Act. [8].

(a) In determining the matters relevant to the discretion, attention must primarily be given to the purpose, scope and objects of the Koori Court legislation. [8], [67]–[72].

R v Trebilco; Ex parte F S Falkiner & Sons Ltd (1936) 56 CLR 20, 32;

doi: 10.25291/VR/56-VR-480

Swan Hill Corporation v Bradbury (1937) 56 CLR 746, 757–8; *Minister for Aboriginal Affairs v Peko Wallsend Ltd* (1986) 162 CLR 24, 39–40 applied.

(b) The magistrate erred by not taking into account the purposes of the Koori Court in any meaningful way, by placing too much weight on his understanding of the concept of 'proper venue', and by not taking into account that the 'proper venue' could be altered by the transfer application. [8], [74]–[77].

Rossi v Martland (1994) 75 A Crim R 411 distinguished.

(2) For the purposes of judicial review, the record included not only the section of the transcript in which the magistrate described his decision and the various factors relevant to that decision but also something said in the course of the hearing of the argument, which was clearly a reason for decision. [26]–[28].

Harvey v County Court (2006) 164 A Crim R 62, 66 [17]; *Easwaralingam v DPP* [2010] 208 A Crim R 122, 127 [22] followed.

(3) In making the transfer decision, the magistrate was acting in a judicial, not administrative, capacity. Therefore s 38 of the Charter did not apply. [9]–[10], [95]–[99].

Slaveski v The Queen (2012) 40 VR 1, 31 followed.

R v Debono (2012) 268 FLR 261 [63]–[77] considered.

(4) The magistrate erred in failing to consider the functions of the Court under ss 8(3) and 19(2)(a) of the Charter in making the transfer decision. [11], [150].

(a) A construction of s 6(2)(b) of the Charter ('intermediate construction') should be adopted, under which the Court's function was to enforce directly only those rights that relate to court proceedings. [105]–[110].

De Simone v Bevnol Constructions and Developments Pty Ltd (2009) 25 VR 237, 247; *Victoria Police Toll Enforcement v Taha* (2013) 49 VR 1, 80–1 applied.

Secretary to the Department of Human Services v Sanding (2011) 36 VR 221, 258–9 referred to.

(b) The rights in ss 8(3) and 19(2)(a) of the Charter directly related to court proceedings. However, in this case, the Court was not required to take any action in respect of those rights other than to exercise its discretion properly under s 4F(2) of the Act. [139]–[148].

Gerhardy v Brown (1985) 159 CLR 70, 129–30; *Re Lifestyle Communities Ltd (No 3)* (2009) VAR 286 [114]; *DPP v SL* [2016] VSC 714 [6]; *DPP v SE* [2017] VSC 13 [15]; *Matsoukatidou v Yarra Ranges Council* (2017) 51 VR 624, 638, 683, 657–8 considered.

Consideration of s 32 of the Charter:

(a) The interpretative principle contained in s 32(1) of the Charter meant that the proper exercise of the discretion contained in s 4F(2) of the Act required consideration of relevant human rights, being, in this case, the third limb of s 8(3) and s 19(2)(a). [12], [78].

(b) Section 4F(2) of the Act could be interpreted compatibly with human rights by taking into account the purposes of the Koori Court legislation. [152].

(c) The Charter did not alter the nature of the power in s 4F(2). [153]–[154]. *Slaveski v Smith* (2012) 34 VR 206 referred to.

Decision of the Magistrates' Court quashed.

Application for judicial review

This was an application for judicial review of a magistrate's refusal to transfer criminal proceedings to the Koori Court Division of the Magistrates' Court at a different location. The facts are stated in the judgment.

E Nekvapil with *T Farhall* for the plaintiff.

C Boyce QC with *J Davidson* for the defendants.

S M C Fitzgerald for the Attorney-General, intervening.

K M Evans for the Victorian Equal Opportunity and Human Rights Commission, intervening.

Reserved judgment.

GINNANE J

1 The plaintiff, Mr Zayden Cemino, seeks judicial review of a decision made on 12 April 2017 by the Magistrates' Court of Victoria, sitting at Echuca, to refuse his application to transfer criminal proceedings commenced against him to the Koori Court Division of the Magistrates' Court at Shepparton. There was no such Court Division at Echuca. I will refer to the Koori Court Division as the Koori Court.

2 The plaintiff challenges the magistrate's decision on two grounds: ground 1 is that the decision was affected by jurisdictional error and an error of law on the face of the record, which are traditional grounds of review; and ground 2 is that the decision was made contrary to the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**the Charter**).

3 The plaintiff seeks a declaration that the magistrate's decision was invalid and of no force or effect, an order in the nature of certiorari quashing the decision, and an order in the nature of mandamus requiring the Magistrates' Court, differently constituted, to remake the decision according to law. The plaintiff also further seeks a declaration that the decision was unlawful within the meaning of s 38(1) or s 6(2)(b) of the Charter.

4 The Attorney-General[1] and the Victorian Equal Opportunity and Human Rights Commission (**the Commission**)[2] intervened after being served with notices under s 35 of the Charter and made submissions on the Charter issues.

5 When I refer hereafter to the defendants, I do not include the Magistrates' Court of Victoria, the tenth defendant, which made a *Hardiman* appearance.

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1 Pursuant to s 34 of the Charter.

2 Pursuant to s 40 of the Charter.

Summary of decision GINNANE J

6 The magistrate was required to exercise a discretion under s 4F(2) of the *Magistrates' Court Act 1989* (Vic) (**the Act**) in determining whether to transfer the proceeding to the Koori Court. As he had a discretion, he was not obliged to make such an order.

7 The valid exercise of the s 4F(2) discretion required the magistrate to give proper consideration to the purpose of the Koori Court legislation:

> To ensure greater participation of the aboriginal community in the sentencing process of the Magistrates' Court through the role to be played in that process by the Aboriginal elder or respected persons and others.[3]

8 While the magistrate referred to the benefits of the Koori Court, I do not consider, with respect, that he properly exercised the discretion contained in s 4F(2). A key basis of the magistrate's decision was his understanding of the importance of the 'proper venue' principle as discussed in *Rossi v Martland*.[4] His emphasis on the importance of the proper venue meant that he did not give appropriate consideration to the purposes of the Koori Court legislation. He therefore failed to properly exercise the discretion.

9 The Charter as a whole did not apply to the Magistrates' Court in this instance because the magistrate was acting in a judicial capacity.

10 The first part of ground 2 alleged a breach of s 38 of the Charter, but as I consider that the magistrate was acting in a judicial capacity rather than an administrative capacity in refusing the transfer application and that he and the Magistrates' Court were not a public authority, s 38 did not apply.

11 However, by reason of s 6(2)(b) of the Charter, when read in accordance with its 'intermediate construction', which is explained below, the Magistrates' Court had functions under the right contained in the third limb of s 8(3) of the Charter — the right to equal and effective protection against discrimination — but was not required to take any action in respect of that right other than to properly exercise the transfer discretion under s 4F(2), after having taken those functions into account. The Court similarly had functions in this case under the rights in s 19(2)(a) — that Aboriginal persons must not be denied the right, with other members of their community to enjoy their identity and culture — but again was not required to take any action in respect of that right other than to properly exercise its discretion under s 4F(2), after having taken those functions into account.

12 Finally, the interpretative principle contained in s 32(1) of the Charter meant that the proper exercise of the discretion contained in s 4F(2) required consideration of relevant human rights, which in this case, were the third limb of s 8(3) and s 19(2)(a). They were relevant to, or concerned, the performance of a function of the Magistrates' Court being the issue of whether to transfer

3 *Magistrates' Court (Koori Court) Act 2002* (Vic) s 1.

4 (1994) 75 A Crim R 411 (Mandie J) (***Rossi***).

a proceeding to the Koori Court. This matter was not a ground of the plaintiff's further amended originating motion, so I do not base my decision on it.

Background

13 The plaintiff is a 22-year-old Indigenous Yorta Yorta man who resides in Echuca. Shepparton is also part of Yorta Yorta land. He is charged with 25 offences, divided into eight 'sets' based on the particular police informant for each set, who are the first to eighth defendants. These offences were alleged to have been committed over a six month period from 27 July 2016 in or near Echuca. The plaintiff is also alleged to have contravened a Community Corrections Order (**CCO**) which had been imposed by the Magistrates' Court at Echuca on 3 May 2016 in respect of eight driving offences: namely five charges of driving an unregistered motor vehicle on a highway; one charge of driving a vehicle causing a loss of traction and failing an oral fluid test within three hours of driving. The plaintiff had been receiving supervision, treatment, rehabilitation and other support services in connection with the CCO from organisations in Echuca, including an Aboriginal organisation, until 19 October 2016. The plaintiff has an intellectual disability and has been referred to and waitlisted for Offender Behaviour Programs.

14 The first set of charges that the plaintiff faces relate to retaining stolen goods, dealing with property suspected of being the proceeds of crime, and possessing a controlled weapon without lawful excuse on 27 July 2016. The remaining sets of charges are driving offences which include speeding, driving while disqualified and careless driving. They are alleged to have occurred on 18 October 2016, 29 October 2016, 26 November 2016, 21 December 2016 and 10 January 2017. The hearing of these charges was adjourned pending the determination of these proceedings.

The decision under review

15 The plaintiff's solicitor made an application for all of the charges to be transferred to the Koori Court at Shepparton pursuant to s 4F of the Act.

16 Initially, the magistrate stated that he refused to transfer the application on the basis that the decision of Mandie J in *Rossi* determined that the 'proper venue' of a matter was where the action arose. As the plaintiff's alleged offending occurred in Echuca, the Echuca Magistrates' Court was then the proper venue, and the magistrate had no power to transfer the proceedings to the Koori Court sitting in Shepparton.

17 The plaintiff's solicitor then referred the magistrate to s 4F of the Act, stating that this provision was enacted after the decision in *Rossi* and that it conferred a discretion on the magistrate to transfer the proceedings to the Koori Court. The Koori Court would then be the 'proper venue' pursuant to s 4F(3). The plaintiff's solicitor also highlighted the importance that the

plaintiff placed on having his matter heard in a culturally sensitive forum. GINNANE J

18 The prosecution opposed the application and highlighted the plaintiff's recidivism despite previously having been sentenced in the Koori Court at Shepparton for earlier offences.

19 It is to be noted that in the course of the hearing, the magistrate appeared to consider that transfer applications were granted without adequate consideration being given to the issue of proper venue. For instance, the following exchange occurred during the course of submissions:

> HIS HONOUR: But I don't think anyone ever turns their mind to proper venue. That's what concerns me about it.
>
> SOLICITOR: I think they do. I think there has to — I mean, if a matter is being sent to Broadmeadows, there's probably a reason for it.
>
> HIS HONOUR: When was the last time a magistrate challenged you on proper venue, on any case?
>
> SOLICITOR: It has happened.
>
> HIS HONOUR: When? When? Apart from me?
>
> ...
>
> SOLICITOR: And your Honour is not the first to raise this concern with me.
>
> HIS HONOUR: Yes. Doesn't happen very often. Magistrates — once they hear 'the Koori Court', they just transfer it without any question, generally.

20 The magistrate gave the following reasons for decision:

> This is an application by Mr McKenna for Mr Cemino's matters to be transferred to the Koori Court sitting at Shepparton. And I've referred to — during the argument between both myself, Mr McKenna and the prosecution, I've raised the case of *Rossi v Magistrates' Court of Victoria* and the reasons behind why that's such a strong case for proper venue in respect to matters. Now, I appreciate that the Koori Court Division has been created, in about 2002, subsequent to *Rossi's* case. But the legislation in respect to 'proper venue' definition under the *Magistrates' Court Act*, both the preceding *Magistrates' Court Act* and the current *Magistrates' Court Act*, has never changed, along with the *Criminal Procedure Act*.
>
> Under section 4F of the *Magistrates' Court Act*, circumstances in which a Koori Court Division may deal with certain offences, it sets out the basis of the Koori Court and the type of offences to be heard before the Koori Court. It's clear that [Mr Cemino] intends to plead guilty. And he would obviously consent to the jurisdiction in that regard. And obviously consenting to the matter being dealt with by the Koori Court. The problem that is arising today is that ... Mr Cemino is a Yorta Yorta man. He lives in the Echuca area. And the Yorta Yorta people are spread far and wide as far as this particular area is concerned. And obviously they are captured within the Shepparton proper venue region as far as the Act is concerned, and it also sounds like they're caught within the Echuca proper region, but there is no proper venue direction that I can find in respect to catchments of Aboriginal people from different parts of the State of Victoria. And perhaps that's an anomaly or an issue that needs to be addressed by the Koori Court Senior Magistrates and Officers, to rectify that, to get some directions in respect of these types of matters.
>
> There is a discretion in respect of transferring matters to the Koori Court under

> subsection (2) of section 4F of the *Magistrates' Court Act*. And when taking those matters into account, along with subsection (3) of 4F of the *Magistrates' Court Act*, I look at the number of offences that Mr Cemino [has] before the Court — he has multiple driving-related offences. It has been conceded by Mr McKenna, at least for the purpose of this application, he's at serious risk as far as jail is concerned. I don't know his prior criminal history apart from seeing that he has a community corrections order which he received here at the Echuca Magistrates' Court, for which — he is also pleading guilty to a breach of that community corrections order. That was imposed here at Echuca on 3 May 2016. And as I say, there's the large number of offending in respect to further offences.
>
> I also take into account Mr Cemino is a Yorta Yorta man. I take into account that he resides in Echuca. I take into account the offending has occurred in Echuca. I take into account the fact that he is on a community corrections order that was imposed in Echuca. And I also take into account — without knowing what it is. But he has obviously — by accepting what Mr McKenna says, has appeared in the Koori Court in Shepparton in the past.
>
> The Koori Court is a wonderful concept of the Magistrates' Court. And as also — I think we all agree here in this courtroom that it would be nice to see more Koori Courts rolled out throughout the state. That's a matter for government policy. But in circumstances where — in this day and age, with the extensive education that Magistrates receive in respect to Aboriginal accused that come before the court, the therapeutic justice education we receive, the fact that the offending has occurred in Echuca — the corrections order is an Echuca corrections order and it's in the public interest to have matters heard locally, in accordance with the principles of *Rossi v Magistrates' Court* from 1994, the application to transfer to the Shepparton Koori Court is refused.

Features of the magistrate's reasons

21 The magistrate acknowledged the discretion granted by s 4F and then announced his decision refusing the application for transfer. He placed considerable weight on *Rossi* as providing a 'strong case' for the 'proper venue' being the Magistrates' Court at Echuca, being the locality in which the offences were alleged to have occurred.

22 The magistrate held that, despite the Act being amended in 2002 to introduce both the Koori Court and the s 4F discretion,[5] the principles of 'proper venue' remained the same as when *Rossi* was decided.

23 The magistrate referred to the seriousness and number of offences, the plaintiff's risk of jail, the plaintiff's Echuca-based CCO, the benefits of the Koori Court, the plaintiff's recidivism despite previous Koori Court appearances, the magistrate's understanding of therapeutic justice for Aboriginal offenders, the offending having occurred in Echuca and the public interest in having matters heard locally. The magistrate then stated that 'in accordance with the principles in *Rossi*', the transfer was refused.

24 Counsel for the plaintiff submitted that the magistrate's reasoning was in-

5 *Magistrates' Court (Koori Court) Act 2002*.

consistent with the scope of the discretion intended by s 4F(2) because the broad ranging consideration of discretionary considerations that he undertook defeated the purpose of the Koori Court legislation and the exercise of the discretion contained in s 4F(2). The magistrate applied the reasoning in *Rossi*, but it was not concerned with the proper exercise of the discretion conferred by s 4F(2). GINNANE J

The grounds of review

25 The grounds upon which the plaintiff relies, as outlined in the further amended originating motion dated 30 April 2018, are as follows:

Ground 1

By applying 'the principles of *Rossi*' in making the Decision, the Magistrates' Court made an error of law on the face of the record, or a jurisdictional error, in that it:

(a) wrongly considered that *Rossi* stood for 'principles' that governed the determination of the Application and the exercise of power under s 4F(2);

(b) in purporting to apply those 'principles', in effect applied cl 1 of sch 2 of the Act, which were repealed in 2009;

(c) wrongly assumed that the provisions of the [*Criminal Procedure*] Act that replaced cl 1 of sch 2 of the Act had identical effect, without reference to the terms of those provisions or the significant differences (including the matters referred to in para (b) above) between them and cl 1 of sch 2 of the Act;

(d) referred, but failed to give proper effect, to s 4F(3) of the Act; and

(e) failed to consider and apply s 4F(2), in circumstances where the conditions in s 4F(1) were met, by reference to the subject-matter, scope and purpose of that provision and the power it confers.

Ground 2

In making the Decision, the Magistrates' Court made an error of law on the face of the record, because it acted unlawfully under s 38(1) of the [Charter]), by:

(a) failing, in making the Decision, to give proper consideration to Mr Cemino's rights under s 8(3) and/or s 19(2)(a) of the Charter; or

(b) acting in a way that was incompatible with that right, in that it limited Mr Cemino's rights under s 8(3) and/or s 19(2)(a) of the Charter otherwise than in accordance with s 7(2) of the Charter.

Alternatively, the Magistrates' Court made an error of law on the face of the record because it contravened s 6(2)(b) of the Charter, by:

(a) failing, in making the Decision, to engage with Mr Cemino's rights under s 8(3) and/or s 19(2)(a) of the Charter; or

(b) limiting Mr Cemino's rights under s 8(3) and/or s 19(2)(a) of the Charter otherwise than in accordance with s 7(2) of the Charter.

The record

26 An initial issue is what constitutes 'the record' for the purposes of the plaintiff's claim for an order for certiorari for error of law on the face of the record, and whether the record extends to the entirety of the transcript or is limited to the section in which the formal reasons were given. The High Court decision in *Craig v South Australia*[6] establishes that, ordinarily, only the initiating documents, pleadings and final orders constitute 'the record'. However, in Victoria s 10 of the *Administrative Law Act 1978* (Vic) alters this position by stating:

> Any statement by a tribunal or inferior court whether made orally or in writing, and whether or not made pursuant to a request or order under section 8, of its reasons for a decision shall be taken to form part of the decision and accordingly to be incorporated in the record.

27 Thus, that section of the transcript in which the magistrate describes his decision under s 4F and the various factors relevant to that decision are clearly part of the record. Further, Hollingworth J in *Harvey v The County Court* said that s 10:

> is broad enough to include something said in the course of the hearing of the argument, as long as it was clear that it was 'a reason for decision' and not merely a point made for discussion purposes.[7]

28 Given the weight placed by the magistrate on 'the principles in *Rossi*', any explanation by his Honour of his understanding of those principles would seem to be part of his reasons, wherever that explanation occurs in the transcript. Such an approach is consistent with the Court's approach in *Easwaralingam v DPP*,[8] in which Tate JA stated:

> the reasons were transcribed. The applicant accepted that other matters in the transcript could be considered to the extent that reference to them was necessary to enable understanding of the Magistrate's reasons. Beyond those matters, only the charges, the oral application for the adjournment, and the oral decision of the Magistrate could be taken into account.[9]

The plaintiff's evidence in the Supreme Court proceeding

29 The plaintiff did not give evidence in the Magistrates' Court, but did give affidavit and oral evidence in this Court. Although new evidence is not normally relevant in judicial review proceedings, the additional Charter arguments based on the engagement of human rights contained in ground 2 provided a basis for its admission.

30 The plaintiff gave evidence about his culture, his experience in court proceedings, and his reasons for the transfer application. He emphasised the importance that he places on his identity as a Yorta Yorta man, evidenced

6 (1995) 184 CLR 163.
7 *Harvey v County Court (Vic)* (2006) 164 A Crim R 62, 66 [17].
8 [2010] 208 A Crim R 122.
9 Ibid 127 [22].

in his past participation in various school and extra-curricular activities focused on Indigenous culture. He has received indigenous support and rehabilitation services, which he says allow him to feel calm and understood and because they involve interaction with other Indigenous people are helpful and assist in his rehabilitation. GINNANE J

31 The plaintiff has appeared before both the Magistrates' Court and the Koori Court. He prefers the Koori Court principally because of the presence of elders and the layout of the Court. He feels more understood by elders, as he considers that they can readily relate to his feelings and the issues he faces. He said that the layout of the Koori Court allows him to better understand the proceedings as he is able to actively speak and tell his story. He also emphasised that the elders shame offenders for their wrong conduct, particularly in cases of reoffending and he anticipates that that will happen to him if his hearing is transferred to the Koori Court. By contrast, he stated that he feels uncomfortable and misunderstood in the Magistrates' Court. He cannot speak about his deceased mother in the ordinary Court. He stated that he wants his charges heard in the Koori Court irrespective of whether it will affect his sentence, as he believes that sentencing is 'not the point' of the Koori Court.

32 In cross-examination, the plaintiff conceded that he had participated in 'mainstream court' hearings on numerous occasions and had understood what was occurring. He had even raised his hand and discussed local support services with the magistrate who made the present decision to refuse the transfer application. He had previously been placed by the 'mainstream court' on CCOs that catered to his unique cultural needs; for instance he had been ordered to engage with 'Njernda' — a drug and alcohol support facility with an Indigenous cultural focus — and he had been assisted by an Indigenous Corrections Officer.

The statutory scheme

33 The relevant provisions of the Act are as follows:

> **3 Definitions**
>
> (1) In this Act—
>
> ...
>
> ***Aborigine*** means a person who—
>
> (a) is descended from an Aborigine or Torres Strait Islander; and
>
> (b) identifies as an Aborigine or Torres Strait Islander; and
>
> (c) is accepted as an Aborigine or Torres Strait Islander by an Aboriginal or Torres Strait Island community;
>
> ...
>
> ***Court*** means the Magistrates' Court of Victoria;
>
> ...
>
> ***Magistrates' Court*** means the Magistrates' Court of Victoria;

...

mention court means a venue of the Court that is nominated by the Chief Magistrate under section 5A as a mention court;

...

order includes judgment and conviction;

...

proper venue—

(a) subject to paragraphs (c), (ca), (dc) and (e), in relation to a criminal proceeding or a class of criminal proceeding, means the mention court that has been nominated by the Chief Magistrate under section 5A for the proceeding or class of proceeding, but in the absence of any such nomination is the mention court that is nearest to—

(i) the place where the offence is alleged to have been committed; or

(ii) the place of residence of the accused; and

...

4 Establishment of the Magistrates' Court

(1) There shall be a court to be known as the Magistrates' Court of Victoria.

(2) The Court shall consist of the magistrates, the judicial registrars of the court and the registrars of the Court.

...

4D Establishment of Koori Court Division

(1) The Court has a Koori Court Division.

(2) The Koori Court Division has such of the powers of the Court as are necessary to enable it to exercise its jurisdiction.

(3) Despite anything to the contrary in this Act, the Koori Court Division may only sit and act at a venue of the Court specified by the Chief Magistrate by notice published in the Government Gazette.

(4) The Koori Court Division must exercise its jurisdiction with as little formality and technicality, and with as much expedition, as the requirements of this Act and the **Sentencing Act 1991** and the proper consideration of the matters before the Court permit.

(5) The Koori Court Division must take steps to ensure that, so far as practicable, any proceeding before it is conducted in a way which it considers will make it comprehensible to—

(a) the accused; and

(b) a family member of the accused; and

(c) any member of the Aboriginal community who is present in court.

(6) Subject to this Act, the regulations and the rules, the Koori Court Division may regulate its own procedure.

GINNANE J

4E Jurisdiction of Koori Court Division

The Koori Court Division has—

(a) the jurisdiction to deal with a proceeding for an offence given to it by section 4F; and

(b) jurisdiction to deal with a contravention of a sentence imposed by it (including any offence constituted by such a contravention) or variation of such a sentence, in the circumstances set out in section 4EA; and

(ba) jurisdiction to deal with a contravention of a sentence imposed by the Magistrates' Court (including any offence constituted by such a contravention), or variation of such a sentence, in the circumstances set out in section 4EA; and

(c) any other jurisdiction given to it by or under this or any other Act.

...

4F Circumstances in which Koori Court Division may deal with certain offences

(1) The Koori Court Division only has jurisdiction to deal with a proceeding for an offence (other than an offence constituted by a contravention of a sentence imposed by it) if—

(a) the accused is Aboriginal; and

(b) the offence is within the jurisdiction of the Magistrates' Court, other than—

(i) a sexual offence as defined in section 6B(1) of the **Sentencing Act 1991**; and

(c) the accused—

(i) intends to plead guilty to the offence; or

(ii) pleads guilty to the offence; or

(iii) intends to consent to the adjournment, under section 59 of the **Criminal Procedure Act 2009**, of the proceeding to enable him or her to participate in a diversion program; and

(d) the accused consents to the proceeding being dealt with by the Koori Court Division.

(2) Subject to and in accordance with the rules—

(a) a proceeding may be transferred to the Koori Court Division, whether sitting at the same or a different venue; and

(b) the Koori Court Division may transfer a proceeding (including a proceeding transferred to it under paragraph (a)) to the Court, sitting other than as the Koori Court Division, at the same or a different venue.

(3) Despite anything to the contrary in this Act, if a proceeding is transferred from one venue of the Court to another, the transferee venue is the proper venue of the Court for the purposes of this Act.

...

4G Sentencing procedure in Koori Court Division

(1) This section applies to the Koori Court Division when it is considering which sentence to impose on an accused.

(2) The Koori Court Division may consider any oral statement made to it by an Aboriginal elder or respected person.

(3) The Koori Court Division may inform itself in any way it thinks fit, including by considering a report prepared by, or a statement or submission prepared or made to it by, or evidence given to it by—

(a) a Koori Court officer employed as an Aboriginal justice worker; or

(b) a community corrections officer appointed under Part 4 of the **Corrections Act 1986**; or

(c) a health service provider; or

(d) a victim of the offence; or

(e) a family member of the accused; or

(f) anyone else whom the Koori Court Division considers appropriate.

(4) Nothing in this section affects the requirement to observe the rules of natural justice.

(5) This section does not limit—

(a) any other power conferred on the Court by or under this or any other Act; or

(b) any other specific provision made by or under this or any other Act for the making of any report, statement or submission, or the giving of any evidence, to the Court for the purpose of assisting it in determining sentence.

(6) To avoid doubt, Part 3.10 of the **Evidence Act 2008** does not apply to the Koori Court Division in considering the sentence to impose under this section, unless the Koori Court Division directs, in accordance with section 4(2) of the **Evidence Act 2008**, that it applies.

...

17A Appointment of Aboriginal elders or respected persons

(1) The Chief Executive Officer may appoint a person who is a member of the Aboriginal community as an Aboriginal elder or respected person for the purpose of performing functions in relation to the Koori Court Division of the Court as set out in this Act.

(2) An Aboriginal elder or respected person holds office for the period, and on the terms and conditions, determined by the Chief Executive Officer and specified in the instrument of appointment.

(3) An Aboriginal elder or respected person may resign from office by writing signed by him or her and delivered to the Chief Executive Officer.

(4) In this section—

Chief Executive Officer means the Chief Executive Officer of Court Services Victoria appointed under section 22 of the **Court Services**

Victoria Act 2014. GINNANE J

34 The relevant provisions of the *Criminal Procedure Act 2009* (Vic) are:

11 Place of hearing

(1) A criminal proceeding in the Magistrates' Court is to be heard at the venue of the court that is nearest to—

(a) the place where the offence is alleged to have been committed; or

(b) the place of residence of the accused—

except where otherwise provided by this or any other Act or by a nomination under subsection (2).

Note

Part 2 of the **Magistrates' Court Act 1989** sets out the special requirements for matters that may be heard in the various Divisions of the Magistrates' Court: the Drug Court Division, the Koori Court Division, the Family Violence Court Division, the Specialist Family Violence Court Division and the Neighbourhood Justice Division.

(2) The Chief Magistrate may from time to time, by notice published in the Government Gazette, nominate a venue of the Magistrates' Court as a venue for the hearing of a specified criminal proceeding or a specified class of criminal proceeding.

(3) A criminal proceeding in the Magistrates' Court is not invalid only because it was conducted at a venue of the court other than the venue referred to in subsection (1) or nominated under subsection (2).

31 Court may change place of hearing

If the Magistrates' Court considers that—

(a) a fair hearing in a criminal proceeding cannot otherwise be had; or

(b) for any other reason it is appropriate to do so—

the court may order that the hearing be held at another place or venue of the court that the court considers appropriate.

169 Place of hearing of criminal trial

(1) A criminal trial in the Supreme Court or the County Court is to be held in the court sitting at the place that is nearest to the place where the offence is alleged to have been committed, unless an order is made under section 192.

(2) A criminal trial is not invalid only because it was conducted at a place other than the place referred to in subsection (1).

192 Power to change place of trial

If a court considers that—

(a) a fair trial in a criminal proceeding cannot otherwise be had; or

(b) for any other reason it is appropriate to do so—

the court may order that the trial be held at any other place that the court considers appropriate.

35 The relevant Charter provisions are as follows:

Preamble

On behalf of the people of Victoria the Parliament enacts this Charter, recognising that all people are born free and equal in dignity and rights.

This Charter is founded on the following principles—

- human rights are essential in a democratic and inclusive society that respects the rule of law, human dignity, equality and freedom;
- human rights belong to all people without discrimination, and the diversity of the people of Victoria enhances our community;
- human rights come with responsibilities and must be exercised in a way that respects the human rights of others;
- human rights have a special importance for the Aboriginal people of Victoria, as descendants of Australia's first people, with their diverse spiritual, social, cultural and economic relationship with their traditional lands and waters.

1 Purpose and citation

(1) This Act may be referred to as the Charter of Human Rights and Responsibilities and is so referred to in this Act.

(2) The main purpose of this Charter is to protect and promote human rights by—

(a) setting out the human rights that Parliament specifically seeks to protect and promote; and

(b) ensuring that all statutory provisions, whenever enacted, are interpreted so far as is possible in a way that is compatible with human rights; and

(c) imposing an obligation on all public authorities to act in a way that is compatible with human rights; and

....

4 What is a public authority?

(1) For the purposes of this Charter a public authority is—

...

but does not include—

...

(j) a court or tribunal except when it is acting in an administrative capacity; or

Note

Committal proceedings and the issuing of warrants by a court or tribunal are examples of when a court or tribunal is acting in an administrative capacity. A court or tribunal also acts in an administrative capacity when, for example, listing cases or adopting practices and procedures.

...

6 Application

...

GINNANE J

(2) 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

...

7 Human rights—what they are and when they may be limited

(1) This Part sets out the human rights that Parliament specifically seeks to protect and promote.

(2) A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including—

(a) the nature of the right; and

(b) the importance of the purpose of the limitation; and

(c) the nature and extent of the limitation; and

(d) the relationship between the limitation and its purpose; and

(e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.

(3) Nothing in this Charter gives a person, entity or public authority a right to limit (to a greater extent than is provided for in this Charter) or destroy the human rights of any person.

8 Recognition and equality before the law

(1) Every person has the right to recognition as a person before the law.

(2) Every person has the right to enjoy his or her human rights without discrimination.

(3) Every person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination.

(4) Measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination.

19 Cultural rights

(1) All persons with a particular cultural, religious, racial or linguistic background must not be denied the right, in community with other persons of that background, to enjoy his or her culture, to declare and practise his or her religion and to use his or her language.

(2) Aboriginal persons hold distinct cultural rights and must not be denied the right, with other members of their community—

(a) to enjoy their identity and culture; and

(b) to maintain and use their language; and

(c) to maintain their kinship ties; and

(d) to maintain their distinctive spiritual, material and economic relationship with the land and waters and other resources with which they have a connection under traditional laws and cus-

toms.

32 Interpretation

(1) So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.

(2) 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.

(3) This section does not affect the validity of—

(a) an Act or provision of an Act that is incompatible with a human right; or

(b) a subordinate instrument or provision of a subordinate instrument that is incompatible with a human right and is empowered to be so by the Act under which it is made.

38 Conduct of public authorities

(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.

...

39 Legal Proceedings

(1) 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.

(2) This section does not affect any right that a person has, otherwise than because of this Charter, to seek any relief or remedy in respect of an act or decision of a public authority, including a right—

(a) to seek judicial review under the **Administrative Law Act 1978** or under Order 56 of Chapter 1 of the Rules of the Supreme Court; and

(b) to seek a declaration of unlawfulness and associated relief including an injunction, a stay of proceedings or exclusion of evidence.

(3) A person is not entitled to be awarded any damages because of a breach of this Charter.

(4) Nothing in this section affects any right a person may have to damages apart from the operation of this section.

The Koori Court legislation GINNANE J

36 The Koori Court was introduced by the *Magistrates' Court (Koori Court) Act*, the purposes of which were:

> (a) to establish a Koori Court Division of the Magistrates' Court; and
>
> (b) to provide for the jurisdiction and procedure of that Division—
>
> with the objective of ensuring greater participation of the Aboriginal community in the sentencing process of the Magistrates' Court through the role to be played in that process by the Aboriginal elder or respected persons and others.

37 Prior to the enactment of the Koori Court legislation, the Royal Commission into Aboriginal Deaths in Custody had delivered its Regional Report of Inquiry in New South Wales, Victoria and Tasmania in 1991 to which the plaintiff's counsel referred. It reported that a large number of Aboriginals were dying in custody.[10] In Victoria an Aboriginal was 13 times more likely to be in custody than a non-Aboriginal and 12 times more likely to be in prison than a non-Aboriginal.[11] Aboriginal juveniles were 20 times more likely to be in a juvenile institution than a non-Aboriginal was.[12] The Commission stated:

> In all too many places, ... Aboriginals are 'criminalised' at an early age by a policing and justice system that is intolerant of cultural differences.[13]

38 The importance of these issues was recently again demonstrated by the information contained in the Australian Law Reform Commission Report of December 2017, *Pathways to Justice — An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*.[14] It reported that Aboriginal and Torres Strait Islander adults make up around 2% of the national population, and yet constitute 27% of the national prison population.[15] The Report noted the role of Koori Courts and stated:

> Specialist courts, aim to be culturally appropriate. They seek to directly engage people who appear before them, to provide individualised case management, and to address underlying issues in culturally appropriate ways, including by having elders participate in the sentencing discussion.[16]

39 The Recommendations of the *ALRC Report* included establishing specialist Aboriginal and Torres Strait Islander sentencing courts, where needed. They recommended that these courts should incorporate individualised case management and 'wraparound services'. They should be culturally competent, culturally safe and culturally appropriate, with relevant organisations playing a central role in their design, implementation and evalua-

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10 *Royal Commission into Aboriginal Deaths in Custody* (Regional Report of Inquiry in New South Wales, Victoria and Tasmania, March 1991) 20–1 (***Royal Commission Report***).

11 Ibid 21.

12 Ibid 22.

13 Ibid.

14 Australian Law Reform Commission, *Pathways to Justice — Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Report No 133, March 2018) (***ALRC Report***).

15 Ibid 90.

16 Ibid 330.

tion.[17]

40 The second reading speech for the Koori Court legislation included the following statements:

> Our Government recognises that it is not possible to address the over-representation of Aboriginal people in the criminal justice system without also tackling the disproportionately high levels of Aboriginal disadvantage caused by the dispossession of traditional lands and the separation of families.
>
> ...
>
> The Koori court represents a fundamental shift in the way in which we as a community deal with Aboriginal offenders.
>
> ...
>
> This initiative will give a clear message to the courts and the wider community that there is a genuine commitment by this government to have real and meaningful participation in the justice system by the Aboriginal communities.
>
> ...
>
> This initiative recognises that Koori communities acknowledge the need for sanctions for unacceptable conduct and rehabilitation in a culturally appropriate fashion.
>
> ...
>
> The opportunity to establish a Koori court acknowledges that it is essential to incorporate Aboriginal communities' cultural beliefs and practices. It is intended to produce fair and equitable treatment for Aboriginal people in the justice system.
>
> ...
>
> It focuses on the individual through close collaboration with family, community service providers and criminal justice agencies. This partnership approach aims to maximise rehabilitation prospects which benefits the whole community by assisting offenders to comply with the completion of sentencing orders and where appropriate to develop a case management plan designed to meet the needs of the individual offender in a culturally appropriate manner. In this way the Magistrates' Court considers and deals with the sentencing of Koori offenders in a more culturally appropriate and aware manner.
>
> ...
>
> Rather than being a new court, the Koori court is a fundamentally new way of approaching and dealing with Aboriginal offenders.
>
> ...
>
> Not all Aboriginal offenders will be suitable for the Koori court. Currently there is no specific target group of offenders except that the offender is adult and Aboriginal and would otherwise be subject to sentences imposed by the Magistrates' Court.
>
> ...
>
> It will be vital that Koori court participants reside in an area in the vicinity of the Koori court to enable them to be supervised whilst on their order and to allow ease of access as outlined in their order.[18]

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17 Ibid 328.

18 Victoria, *Parliamentary Debates*, Legislative Assembly, 24 April 2002, 1128–31 (Rob Hulls, Attorney-General) (**Second Reading Speech**).

41 The defendants made submissions explaining the history, background and operation of the Koori Court which were not contested. I set out and adopt these submissions in the following paragraphs [42]–[53]. GINNANE J

42 The Second Reading Speech sets out several operational and community building aims of the Koori Court, including; to further the ethos of reconciliation, reduce the overrepresentation of Koori offenders in the prison system, reduce the failure to appear rate at court, decrease the rate at which court orders are breached, and deter crime in the community generally.

43 Koori Courts only operate in a small number of courts in Victoria. Pursuant to s 4D(3), '*the Koori Court Division may only sit and act at a venue of the Court specified by the Chief Magistrate by notice published in the Government Gazette*.' Pursuant to the notice dated 12 September 2002 and published in the Government Gazette on 26 September 2002, the Koori Court was directed by the Chief Magistrate to 'sit and act at the following venues: Shepparton, Broadmeadows'. The Koori Court has since been authorised to sit and act at a number of other venues, namely Warrnambool (2003), Mildura (2005), Melbourne (2014) and Geelong (2016).

44 This reflects the fact that Shepparton and Broadmeadows were intended to be 'pilot' sites, with the possibility that if successful 'could be extended to further locations throughout Victoria'.[19] Shepparton was chosen, in consultation with the Aboriginal community, as the first regional location due to the 'alarming statistics from the Shepparton region' as well as the availability of services for Koori Court participants.[20] The Koori Courts have since expanded to include Children's Courts and County Court Divisions. The current Aboriginal Justice Agreement includes, as one of the strategies to meet the objective of diversion and strengthening alternatives to imprisonment:

> Progressively implement the Koori Courts Strategic Directions recommendations in line with priorities identified by the Aboriginal Justice Forum including:
>
> - expanding the Koori Children's Court to existing Magistrates' Koori Court locations, including at La Trobe Valley, Warrnambool, Swan Hill and Bairnsdale;
> - considering the introduction of circuit courts, sitting days or lists in locations whose populations do not support a permanent Koori Court.[21]

45 The jurisdiction of the Koori Court is relatively limited. In particular:

(a) It only has jurisdiction in respect of those persons who are 'aboriginal' and therefore meet the definition of 'aborigine' in s 3(1).

(b) It is limited to cases in which the accused does or intends to plead

19 Ibid 1129–32.
20 Ibid 1129.
21 Victorian Aboriginal Justice Agreement Phase 3, *A Partnership Between the Victorian Government and Koori Community* (2013) 103.

guilty or intends to consent to an adjournment to enable participation in a diversion program.

(c) Certain offences are excluded, namely sexual offences, contraventions of family violence intervention orders or safety notices, and contraventions of person safety intervention orders.

46 The Koori Court's procedures are intended to be less formal, and more accessible to the accused, their family and the aboriginal community.[22] Section 4G sets out the sentencing procedure, which includes the ability to have regard to oral statements of elders and respected persons, and to inform itself as it sees fit including receiving evidence from a range of support persons, including a Koori Court officer, as well as any victims. Section 17A enables the appointment of Aboriginal elders and respected persons for the purposes of performing the functions in relation to the Koori Court.

47 While the procedures of the Koori Court enable greater participation of the aboriginal community, decisions are ultimately made by magistrates and the same laws and sentencing principles apply as in other divisions of the Magistrates' Court.

48 The establishment of the Koori Court is not merely concerned with the processes adopted by the Magistrates' Court in hearings, but the ongoing supervision and case management of offenders. The Second Reading Speech identifies that:

> To achieve [its] goals, the Koori court requires coordination of services together with the input of community resources to help offenders, victims and the community to achieve successful outcomes.[23]

49 As the Second Reading Speech makes clear, the Koori Court is intended to:

> generate new and build upon old partnerships between judicial officers, lawyers, law enforcement agencies, correctional authorities, treatment providers and government departments.
>
> These organisations and individuals will need to adopt new roles and embrace a collaborative, team-oriented approach in working together to manage Koori court participants and reduce their offending.
>
> ...
>
> It is expected that successful completion of the Koori court program, with its supervision regime, treatment and support services, will prevent or delay the entry of the offender into prison.[24]

50 The sentencing procedures in s 4G contemplate that the Koori Court will involve and hear evidence from a range of persons including community corrections officers, health workers, victims and family members of the accused.

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22 *Magistrates' Court Act 1989* s 4D(4) and (5).
23 Second Reading Speech, 1131.
24 Ibid 1130.

51 As noted above, the availability of treatment and support services in Shepparton was one of the reasons it was chosen as the regional venue for the pilot program. The Second Reading Speech recognised that: GINNANE J

> It will be vital that Koori court participants reside in an area in the vicinity of the Koori court to enable them to be supervised whilst on their order and to allow ease of access as outlined in their order. This will facilitate participants' compliance with the order and therefore reflect a decrease in the number of breaches.[25]

52 Pursuant to a notice dated 28 September 1999 and published in the Government Gazette on 7 October 1999, the Magistrates' Court at Echuca is a mention court nominated pursuant to s 5A of the Act. However, Echuca is not a venue at which the Koori Court has been authorised to sit and act.

53 The boundaries of the Koori Court are those of the venue at which it is authorised to sit and act pursuant to s 4D(3) of the Act. While there are mechanisms that could conceivably be used to expand the boundaries of the Koori Courts, they have not been utilised.

54 It is important to note that participation in the Koori Court process can be more burdensome than a traditional plea hearing.[26] The Koori Court is not designed to be, nor is it actually, a soft avenue for offenders. This was discussed by Maxwell P and Buchanan JA in the Court of Appeal decision of *R v Morgan*.[27] They noted that, in contrast to a plea hearing in the mainstream Court, in the Koori Court offenders cannot 'hide behind counsel'.[28] Further, in *Honeysett v The Queen*, Priest, Beach and Hargrave JJA noted that in the Koori Court, offenders are required to engage in 'sentencing conversations' with elders that are 'challenging' and can involve 'firm admonishments'.[29] Offenders are often 'shamed' for their conduct during a hearing — a traditional punishment that is an important aspect of maintaining order in Aboriginal communities, and one that is considered to be effective when administered by elders.[30] This is reflected in the plaintiff's expectation that, if the proceedings are transferred to the Koori Court, he will be shamed and will have to explain why he re-offended despite promising the elders that he would not when last sentenced.

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25 Ibid 1131.

26 *R v Morgan* (2010) 24 VR 230; *Honeysett v The Queen* (2018) 56 VR 375.

27 (2010) 24 VR 230.

28 Ibid 237 [34].

29 (2018) 56 VR 375, 380 [20].

30 *R v Morgan* (2010) 24 VR 230, 237 [35]; Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws* (Report No 31, June 1986) [500]–[501].

Was the decision affected by jurisdictional error or an error of law on the face of the record?

The power to transfer proceedings to the Koori Court

55 The plaintiff's first ground of review is that the Magistrates' Court erred by having regard to the 'principles in *Rossi*' in exercising its discretion to transfer under s 4F.

56 Section 4F(1) allows proceedings to be transferred to the Koori Court if four conditions are met: the accused is Aboriginal; the offence is within the jurisdiction of the Magistrates' Court (except certain sexual offences); the accused intends to plead, or has pleaded, guilty to the offence; and the accused consents to the proceeding being dealt with by the Koori Court. If all of these conditions are met, as they were in this case, then the proceeding may be transferred under s 4F(2) to the Koori Court, whether sitting at the same venue or not. However, as mentioned, the magistrate declined to transfer the proceedings from the Echuca Magistrates' Court to the Koori Court in Shepparton because of 'the public interest to have the matters heard locally, in accordance with the principles of *Rossi* ...'. The question for this Court to determine is whether the magistrate validly exercised the s 4F discretion.

The decision in *Rossi*

57 In *Rossi*, Mandie J dismissed an application for judicial review of a magistrate's refusal to transfer proceedings from the Ballarat Magistrates' Court to the Melbourne Magistrates' Court. The defendant had applied to have the proceedings transferred in order to meet the convenience of a number of professional witnesses who would be called to give evidence, an application to which the prosecution did not object. The magistrate had a discretion to allow such a transfer under cl 1 of sch 2 of the Act. The magistrate refused the application to transfer the proceedings on the ground that 'generally speaking, serious indictable offences should be dealt with in the locality at which they occur, especially when the defendant's address was in that locality', to which I will refer to as 'the *Rossi* principle'. Mandie J, in the course of dismissing the proceeding, outlined the relevant statutory scheme and held that the locality consideration was not irrelevant. The relevant parts of His Honour's judgment are as follows:

> Cl 1 of sch 2 provides:
>
> 1. Venue of Court
>
> (1) A criminal proceeding is returnable at the proper venue of the Court ...
>
> (2) If, before any evidence in support of the charge—
>
> (a) the defendant objects to the venue of the Court; and
>
> (b) the Court is satisfied, having regard to the convenience of the parties, that the proceeding should be transferred to another venue—

GINNANE J

the Court may adjourn the proceeding to another venue of the Court.

(3) A proceeding is not void because it was returnable or heard and determined at a venue of the Court other than the proper venue.

Section 3(1) of the *Magistrates' Court Act* defines 'proper venue' in relation to a criminal proceeding to mean the mention court nearest to the place where the offence is alleged to have been committed or the place of residence of the defendant.

In my opinion the magistrate did not fail to properly exercise his discretion under cl 1 of sch 2. It is apparent that, although he did not expressly refer to the convenience of the defendant's witnesses, the magistrate considered that the factor which he did mention was of greater weight in the circumstances — namely, that generally speaking serious indictable offences should be dealt with in the locality at which they occur, especially when the defendant's address was in that locality. I do not consider that the magistrate took into account any irrelevant matters or ignored the convenience of the parties. Nor am I persuaded, had he done so, that the plaintiff would be entitled to, or should in the court's discretion be granted, relief in the nature of mandamus or any other form of relief.[31]

58 The amendments contained in the *Courts and Tribunals (General Amendment) Act 1996* (Vic) altered the definition of proper venue and inserted a new provision dealing with a charge filed at a venue of the Court other than a proper venue.

The parties' submissions

59 The plaintiff submitted that, in considering and applying the 'principles of *Rossi*', the magistrate in effect applied the legislative provisions that were considered in *Rossi* rather than considering the Koori Court legislation. Those legislative provisions have since been repealed and replaced by s 11 of the *Criminal Procedure Act*. That Act does not refer specifically to 'proper venue', but certainly in s 11 identifies the venue at which the criminal proceeding is to be heard as the court that is nearest to the place of the alleged offence or the place of residence of the accused. That venue might be regarded as the proper venue.

60 The plaintiff submitted that s 4F of the Act contains a specific power to transfer proceedings to the Koori Court and provides that the 'proper venue' may be whatever Court a proceeding is transferred to. Accordingly, the principles in *Rossi* were an irrelevant consideration for the purposes of the exercise of the discretion contained in s 4F(2). Rather, the magistrate should have identified the considerations relevant to exercising the discretion under s 4F after determining the subject-matter, scope and purposes of the Koori Court legislation. Section 4F confers a beneficial jurisdiction once the conditions in s 4F(1) are satisfied and not a general discretion requiring consideration of the broad range of factors that the magistrate took into

[31] *Rossi* (1994) 75 A Crim R 411, 414–15.

account. The magistrate did not have a broad unbridled discretion.[32] The plaintiff also argued that s 4F(2) was facultative of the jurisdiction already conferred by s 4F(1) and that ordinarily the Court, when the preconditions were satisfied, must transfer the proceeding.

61 No submission was made that s 4F did not contain a discretion. It was accepted as being facultative and not compulsive.[33]

62 The Commission in its submissions about the Charter submitted that in view of s 32 of the Charter, the transfer discretion needs to be interpreted in a manner consistent with the human rights in pt 2 of the Charter. The discretion to transfer the proceeding to the Koori Court in appropriate circumstances is not an 'unbridled' discretion, but must be exercised in accordance with common law principles and the Charter. The Commission did not submit that s 32 binds the Court, but rather that it forms part of the relevant circumstances to be considered in the exercise of the discretion. The Commission described s 32 as a free-standing rule of statutory construction. The Commission submitted that there was nothing in the words used by the magistrate to indicate that the rights in s 8(3) and s 19 of the Charter were taken into account and in particular the Court did not refer to the effective participation of an Aboriginal person in decisions affecting them.

63 In contrast, the defendants submitted that the *Rossi* principle was of continuing relevance to the determination of a s 4F transfer application, even though the definition of 'proper venue' may have altered. In support of this submission, they drew on a number of sources: the second reading speech to the *Magistrates' Court (Koori Court) Act*, which refers to the importance of Koori Court participants residing in the vicinity of the Koori Court;[34] s 11 of the *Criminal Procedure Act*, which establishes a presumption that proceedings will be heard in the Court closest to either the alleged offending or the defendant's residence; and the importance of the availability of local case management and support services when a defendant's charges are determined at a Court.

64 Similar principles have been applied in the application of s 359 of the *Crimes Act 1958* (Vic) (now repealed) and s 192 of the *Criminal Procedure Act*. Section 359 of the *Crimes Act 1958* gave Courts a general power to order that the place (or time) of a trial be changed, and s 192 gives Courts a general power to change the place of trial to ensure that the trial is fair. Thus, in *R v Vjestica*,[35] Maxwell P explained the principles and authority governing the discretion under s 192 of the *Criminal Procedure Act*, stating:[36]

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32 *Wootton v Queensland* (2012) 246 CLR 1, 10 [10].
33 See *Interpretation of Legislation Act 1984* (Vic) s 45; *Ex parte Goodwin; Re Carruthers* (1967) 86 WN (NSW) 313.
34 Second Reading Speech, 1131.
35 (2008) 182 A Crim R 350.
36 Ibid 352.

GINNANE J

> Ordinarily, a trial will proceed in the district in which the offence charged is alleged to have been committed. As Lush J explained in *Re Ratten*, this course is adopted —
>
> > so that justice will be seen to be done by those who are interested in seeing it and so that no feeling can arise that justice is done in a distant place and community.
>
> More recently, in *DPP v Bennett*, Cummins J expressed the view that there were
>
> > powerful reasons of public policy why the venue of offence should be the venue of trial. The local community is the community in which the alleged crime took place; it is concerned to have the law administered within it; and to remove a circuit trial to Melbourne can lead the vacated community to feel disenfranchised, marginalised or alienated. All this is common experience. This basal requirement should not be watered down by mere administrative convenience. This is the Supreme Court of Victoria, not the Supreme Court of Melbourne.[37]

65 The defendants also pointed out that: s 4F uses the word 'may'; s 31 of the *Criminal Procedure Act* contains a discretion that would permit transfer to the Koori Court; the CCO that the plaintiff breached was issued by Echuca Magistrates' Court and that the Court's interpretation of s 4F should be made bearing in mind the other provisions of the Act dealing with the Neighbourhood Justice Centre, the Drug Court and the Family Violence Division which might be affected by the interpretation of s 4F adopted in this proceeding.

Analysis in respect of ground 1

66 The magistrate was exercising a discretion conferred by s 4F(2) in determining the plaintiff's transfer application. His Honour mentioned that discretion in his reasons and his ex tempore reasons should not be examined too zealously for error.[38]

67 His Honour was not obliged to grant the plaintiff's application even if the statutory pre-conditions were satisfied. But, the Court's exercise of a statutory discretion must be in accordance with the scope, purpose and objects of the statute, having regard to its language and the context of the provision.[39] The onus was on the plaintiff to persuade the magistrate that the transfer to the Koori Court should occur.

68 The magistrate was not being asked to exercise the more general discretion conferred by s 31 of the *Criminal Procedure Act*, but to exercise the specific discretion conferred by s 4F(2) to transfer the proceedings to the Koori Court.[40]

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37 Ibid 352–3, citing *Director of Public Prosecutions v Bennett* (2004) 10 VR 355.

38 *Minister for Immigration and Ethnic Affairs v Wu San Liang* (1986) 185 CLR 259, 271–2.

39 *Ward v Williams* (1955) 92 CLR 496, 508; *Samad v District Court of New South Wales* (2002) 209 CLR 140, 153 (Gleeson CJ and McHugh J), 161 (Gaudron, Gummow and Callinan JJ).

40 *Anthony Horden & Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1, 7 (Gavan Duffy and Dixon JJ).

69 The proceedings against the plaintiff were commenced in the Magistrates' Court at Echuca because, as required by s 11 of the *Criminal Procedure Act*, that Court was nearest to the place where the offences were alleged to have been committed or the accused's place of residence. It is important to note that the discretion conferred by s 4F(2) is intended to be exercised once the proceedings have been so commenced, that is commenced under s 11 of the *Criminal Procedure Act* at the court closest to the place where the offences were committed or the accused's place of residence. But in those circumstances, an application can still be made under s 4F to transfer the proceeding, and if granted, the proper venue for the proceeding is altered. The s 4F(2) discretion is to be exercised in accordance with the scope, purposes and objects of the Koori Court legislation and the creation of the Koori Court as well as other relevant considerations. It is unwise to attempt any complete listing of relevant considerations. In *R v Trebilco; Ex parte F S Falkiner & Sons Ltd,*[41] Dixon J explained the difficulties of attempting such a listing when an unfettered discretion is conferred:

> Where no limits are expressly imposed by the legislature on an administrative discretion, the questions what are, and what are not, legitimate considerations for its exercise must always be disputable and open to wide differences of opinion. But, nevertheless, in theory a legal right exists to compel an exercise of the discretion on grounds which are not extraneous or irrelevant to its purpose.[42]

70 The following year, in *Swan Hill Corporation v Bradbury,*[43] Dixon J explained why an undefined administrative discretion might be conferred upon a decision-maker in the following passage:

> The reason for leaving the ambit of the discretion undefined may be that legislative foresight cannot trust itself to formulate in advance standards that will provide apt and sufficient in all the infinite variety of facts which may present themselves. On the other hand, it may be because no general principles or policy for governing the particular matter it is desired to control are discoverable, or, if discovered command general agreement … When a provision of this kind is made, it is incumbent upon the public authority in whom the discretion is vested not only to enter upon the consideration of applications for its exercise but to decide them bona fide and not with a view of achieving ends or objects outside the purpose for which the discretion is conferred. The duty may be enforced by mandamus. But courts of law have no source whence they may ascertain what is the purpose of the discretion except the terms and subject matter of the statutory instrument. They must, therefore, concede to the authority a discretion unlimited by anything but the scope and object of the instrument conferring it. This means that only a negative definition of the grounds governing the discretion may be given. It may be possible to say that this or that consideration is extraneous to the power, but it must always be impracticable in such cases to make more than the most general positive statement of the permissible limits within which the discretion is exercisable and is beyond legal control.[44]

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41 (1936) 56 CLR 20.
42 Ibid 32.
43 (1937) 56 CLR 746.
44 Ibid 757–8.

71 Mason J restated these principles in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd,*[45] in the following terms: GINNANE J

> What factors a decision-maker is bound to consider in making the decision is determined by construction of the statute conferring the discretion. If the statute expressly states the considerations to be taken into account, it will often be necessary for the court to decide whether those enumerated factors are exhaustive or merely inclusive. If the relevant factors — and in this context I use this expression to refer to the factors which the decision-maker is bound to consider — are not expressly stated, they must be determined by implication from the subject-matter, scope and purpose of the Act. In the context of judicial review on the ground of taking into account irrelevant considerations, this Court has held that, where a statute confers a discretion which in its terms is unconfined, the factors that may be taken into account in the exercise of the discretion are similarly unconfined, except in so far as there may be found in the subject-matter, scope and purpose of the statute some implied limitation on the factors to which the decision-maker may legitimately have regard.[46]

72 The result of these authorities is that in determining the matters relevant to the discretion that the magistrate exercised under s 4F, attention must primarily be given to the subject-matter, scope and purpose of the Koori Court legislation.

73 Without attempting an exhaustive list of relevant considerations to the proper exercise of the s 4F(2) discretion, a few potentially relevant matters can be identified. First is the greater participation of the Aboriginal community in the sentencing process through the role to be played by Aboriginal elders and respected persons in the Koori Court. Other relevant factors might be whether the elders or respected persons who are likely to participate in the proposed Koori Court hearing are from the same nation as the accused, in this case the Yorta Yorta nation, the distance of the Koori Court from the accused's residence and the location of the alleged offences. The nature of the offences may also be relevant, as may the previous sentencing of the accused by the Koori Court or the General Division of the Court and the accused's conduct after such sentence. The fact that the accused is said to have reoffended after having been previously sentenced by the Magistrates' Court is no reason by itself why the further offences cannot be determined by the Koori Court, it will all depend on the circumstances. I discuss elsewhere Charter rights that may also be relevant to the exercise of the discretion.

74 In my respectful opinion, the magistrate erred by giving primacy in his consideration of relevant factors to 'proper venue' and the principles in *Rossi*. As I have mentioned, in many if not most instances, an application for a criminal proceeding to be transferred to a Koori Court will be made, when proceedings have been commenced in the initial proper venue that is the closest court to the location of the alleged offences or the residence

45 (1986) 162 CLR 24.
46 Ibid 39–40 (citations omitted).

of the accused. Transfer applications to the Koori Court will only be made when that has occurred, so the traditional proper venue consideration and any public interest in the hearing of the charges in the locality of their commission, should generally be given less weight than the purpose of the creation of the Koori Court. That Court becomes the proper venue if the transfer application is successful.

75 The magistrate initially treated the decision in *Rossi* as removing his discretion, because he considered that it fixed the 'proper venue' as the Court closest to the offending/offender. Even after the plaintiff's lawyer's submissions that the transfer decision involved the exercise of a discretion, the magistrate still treated *Rossi* as being determinative of proper venue, and still treated 'proper venue' as at least a relevant consideration in exercising the discretion under s 4F. For example, at the beginning of his reasons, he stated that: 'I've raised the case of *Rossi v Magistrates' Court* and the reasons behind why that's such a strong case for proper venue in respect to matters'.

76 The magistrate's reasons suggest that he did not take the purposes of the Koori Court into account in any meaningful way. He was exercising the s 4F(2) discretion and not the discretion conferred by s 31 of the *Criminal Procedure Act*. He was incorrect to say that the definition of proper venue had not been altered. No express definition of proper venue was contained in the *Criminal Procedure Act* in 2017, although, as previously mentioned, it does refer to 'venue'. While the magistrate referred to the benefits of the Koori Court, he did not refer to its purposes. His reference to the education that magistrates receive about therapeutic justice for Aboriginal offenders is quite a different matter from taking into account the purposes of the Koori Court.

77 The magistrate referred to a number of possibly relevant considerations, but erred in placing such weight on the 'proper venue' as discussed in *Rossi* and not taking into account that under the Koori Court legislation that 'proper venue' may be of less importance and can be altered by the transfer application.

78 As well as taking into account the purposes, scope and objects of the Koori Court legislation, I also consider that in exercising the s 4F discretion, the magistrate should have had regard to the rights of the plaintiff contained in ss 8(3) and 19(2)(a) of the Charter. They were relevant considerations. I deal with this issue later in this judgment.

Charter grounds

79 Before considering the Charter grounds, I should record in fairness to the magistrate that they were not put to him and thus he did not have the opportunity to consider them. However, it was not submitted that that fact prevented the plaintiff relying on ground 2, which contains the Charter grounds.

In what capacity was the Magistrates' Court acting? GINNANE J

80 The question of whether the magistrate was acting in an administrative capacity determines whether the magistrate or Magistrates' Court was a public authority to whose actions or decisions the Charter applies. It determines whether, in deciding the transfer application to the Koori Court, the magistrate was required by s 38 of the Charter to act compatibly with, and to give proper consideration to, relevant human rights.

81 Section 38 only applies to 'public authorities', a term which is defined in s 4(1)(j) as not including a court 'except when it is acting in an administrative capacity'. The term 'administrative capacity' is not defined by the Charter, but s 4(1)(j) is accompanied by a legislative note,[47] which states that:

> Committal proceedings and the issuing of warrants by a court or tribunal are examples of when a court or tribunal is acting in an administrative capacity. A court or tribunal also acts in an administrative capacity when, for example, listing cases or adopting practices and procedures.

82 The terms 'administrative' and 'judicial' are used in many areas of public law, but with no fixed meaning. Much depends on the contexts in which the terms are used. The parties made detailed submissions about the capacity in which the magistrate was acting.

The parties' and interveners' submissions

83 The plaintiff submitted that the magistrate was acting in an administrative capacity and was thus a public authority for the purpose of s 38 of the Charter for the following reasons: the decision did not result in a binding determination of the parties' legal rights and liabilities, but rather determined the forum within which those rights and liabilities would be determined; the decision did not involve an adversarial court process; and there was no right to appeal from the magistrate's determination.

84 The plaintiff referred to precedents concerning the distinction between judicial and administrative court decisions.[48] Thus committal proceedings are considered to be an administrative function of a court,[49] and some authorities establish that deciding applications for adjournments or stays of proceedings are judicial inquiries.[50] The plaintiff also sought to contrast s 4F transfer applications with contested adjournment applications, which have been held to be judicial.[51] Unlike s 4F transfer applications, contested adjournment applications may involve the leading of evidence, adversarial party submissions, and directly impact upon the parties' rights and obliga-

47 This note forms part of the Charter by virtue of s 36(3A) of the *Interpretation of Legislation Act 1984*.

48 *Kennedy v Purser* (1898) 23 VLR 530; *Maxwell v Keun* [1928] 1 KB 645; *Burnham v Soloman* [1946] VLR 431; *Potter v Tural* (2000) 2 VR 612; *Onus v Sealey* (2004) 149 A Crim R 227.

49 *Kennedy v Purser* (1898) 23 VLR 530; *Potter v Tural* (2000) 2 VR 612.

50 *Maxwell v Keun* [1928] 1 KB 645; *Burnham v Soloman* [1946] VLR 431.

51 *Slaveski v The Queen* (2012) 40 VR 1 (***Slaveski***).

tions.

85 The plaintiff disagreed with the defendants' contention that the term 'may' in s 4F(2), and the accompanying wide discretion, indicates that the decision was of a judicial nature. The plaintiff emphasised that the exercise of the discretion should involve focusing upon the person for whose benefit the discretion is conferred, and not the interest of any other party, thus diminishing its adversarial nature.

86 The Commission too submitted that the decision was made in an administrative capacity. Section 31 of the *Criminal Procedure Act* grants the power to order a transfer to the Court, including Judicial Registrars and Registrars,[52] rather than only to the magistrates comprising the Court. However, s 31 also requires that an order be made to effect a transfer, and that can only be made by a magistrate. The Commission therefore submitted that, as s 31 was enacted subsequent to s 4F, the later in time clarifies the operation of the former in time. By contrast to s 31, s 4F does not require that an order be made, nor does it specify who must make the decision, and this supports an interpretation that the transfer power is an administrative one that need not be exercised by a magistrate.

87 The Commission relied on the decision in *R v Debono,*[53] in which this Court held that the exercise of coercive powers under the *Major Crime (Investigative Powers) Act 2004* (Vic) was an administrative function.[54] It described that power as another example of a court order that did not involve a dispute between parties, neither did it lead to a binding determination of existing rights or obligations between persons and it was not subject to an appeal. The outcome of the s 4F application only determined the forum for the purposes of the hearing of the charges, but that included determining the forum in which the accused person's right to determine their culture would be better accommodated.

88 The defendants and the Attorney-General submitted that the magistrate was acting in a judicial capacity in refusing the transfer application under s 4F and was therefore not bound by s 38 of the Charter. They pointed out that Parliament's decision not to make courts public authorities was in contrast to the United Kingdom *Human Rights Act 1998*, which in many respects was the model for the Charter.[55] They relied upon the Charter's Explanatory Memorandum,[56] which stipulates that 'administrative capacity' is in contrast to 'judicial or quasi-judicial capacity', and submitted that this distinction drew upon the common law principles of administrative power.

89 The defendants placed considerable weight upon the Victorian Court of

52 *Magistrates' Court Act 1989* s 4(2).
53 (2012) 268 FLR 261.
54 Ibid 276–8 [63]–[77] (Kyrou J).
55 Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2006, 1290 (Rob Hulls, Attorney-General); *Human Rights Act 1998* (UK) s 6.
56 In *Kracke v Mental Health Review Board* (2009) 29 VAR 1 [280] (Bell P) (***Kracke***).

Appeal's decision *Slaveski v The Queen*,[57] where the Court rejected the Commission's contention that a court was acting in an administrative capacity in refusing to grant an adjournment to an accused in a criminal proceeding. Justices Nettle and Redlich stated that: GINNANE J

> The function to grant or refuse an adjournment is one which takes its character from the tribunal or court in which the function is reposed. Where, therefore, the power to grant or refuse an adjournment of a trial is reposed in a trial judge, it is to be inferred that it is to be exercised judicially and thus that the character of the function is judicial. More precisely, when a trial judge determines to grant or refuse an adjournment of the trial, the judge exercises judicial power which involves the governance of a trial for the determination of criminal guilt and its punishment or, in a civil proceeding, the determination of a dispute *inter partes*. That is not an administrative function.[58]

90 The defendants submitted that the test, that 'judicial power involves the governance of a trial for the determination of criminal guilt and its punishment', unequivocally applied to the decision in question. The decision was made in an adversarial forum where the prosecution made submissions objecting to the plaintiff's transfer on the ground that he had reoffended after last being sentenced in the Koori Court.

91 The defendants also distinguished the magistrate's decision from the examples of decisions made in an administrative capacity contained in the note to s 4(1)(j) of the Charter, namely committal proceedings and the listing of cases. Committal proceedings are unique and their administrative character is supported by a long line of authorities, and therefore does not provide an analogy. The Court conducting a committal exercises executive power in order to test the strength of evidence in a criminal proceeding before the matter proceeds to trial.[59] Another example of administrative function referred to was the listing of cases: as a registry function, that is not the subject of a statutory discretion.

Analysis

92 The common law distinction between judicial and administrative power is nebulous, and provides no universal test of when such powers are being exercised.

93 As previously mentioned, in *Slaveski,*[60] Nettle and Redlich JJA stated that 'the function to grant or refuse an adjournment is one which takes its character from the tribunal or court in which the function reposed', and that judicial power 'involves the governance of a trial for the determination of criminal guilt and its punishment'.

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57 (2012) 40 VR 1.
58 Ibid 31 [107].
59 *Kracke* (2009) 29 VAR 1 [267].
60 (2012) 40 VR 1.

94 In *R v Debono,*[61] Kyrou J, while stating that there is 'no single combination of necessary or sufficient factors that identifies what is judicial power',[62] mentioned a number of matters that suggest that power is judicial. These included whether there is a dispute between defined persons or classes of persons that requires a legally binding resolution and whether it will determine for the future in a binding manner the existing rights or obligations or defined persons or classes of persons and result in a legally enforceable order *inter partes*; whether the exercise of the power involves the making of findings of fact and law and the application of the law to the facts; and whether there is a right of appeal from the exercise of the power.

95 I consider that for the reasons stated by Nettle and Redlich JJA in *Slaveski,*[63] the magistrate was acting in a judicial and not an administrative capacity. His Honour was determining a contested change of venue application and I consider that when such a determination is made by a judicial officer, he or she is acting in a judicial capacity and not an administrative capacity. *Rossi's* case itself was an instance of a magistrate determining a change of venue application and performing a judicial function.

96 The refusal of the transfer was a binding determination of the rights of the plaintiff. The exercise of the s 4F discretion is the gateway to unique 'sentencing procedures' outlined in s 4G, which are intended for the benefit of Indigenous accused persons. The decision affects the determination of the *punishment* that will be imposed. Section 4G permits the Court to consider the evidence of Aboriginal elders, Koori Court officers and family members of the accused. For an Indigenous person who desires his cultural circumstances to be properly considered, the exercise of the s 4F discretion is determinative of his rights.

97 The cases dealing with the exercise of administrative power in committals depend on the unique history of the power and the context of particular legislation, rather than revealing any general principle.

98 I also consider that the legislative intention of excluding courts from the definition of public authorities is of importance.

99 As the exercise of the s 4F discretion is a judicial power, the Magistrates' Court was not acting in an administrative capacity when making the decision. The Court was thus not a public authority and thereby not bound by Charter rights pursuant to s 38. It is therefore unnecessary to consider the first part of plaintiff's second question of whether the Court acted incompatibly with s 38 of the Charter.

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61 (2012) 268 FLR 261.
62 Ibid 275–6 [62].
63 (2012) 40 VR 1, 31 [107].

The effect of s 6(2)(b) of the Charter and the application of the rights contained in ss 8(3) and 19(2)(a) GINNANE J

100 By way of alternative submission, the plaintiff contended that if the court was not acting in a judicial capacity, it was still bound by the relevant Charter rights by virtue of s 6(2)(b). The Commission made similar submissions to the plaintiff.

101 As mentioned, s 6(2)(b) of the Charter states:

> **6 Application**
>
> ...
>
> (2) This Charter applies to—
>
> ...
>
> (b) courts and tribunals, to the extent that they have functions under Part 2 and Division 3 of Part 3.

102 Section 3(2) of the Charter gives meaning to the term 'function' in s 6(2)(b). It states:

> **3 Definitions**
>
> ...
>
> (2) In this Charter—
>
> (a) a reference to a function includes a reference to a power, authority and duty; and
>
> (b) a reference to the exercise of a function includes, where the function is a duty, a reference to the performance of the duty.

103 Part 2 of the Charter contains those human rights that are protected, as well as s 7, concerning the lawfulness of the limitations of these rights. Division 3 of pt 3 of the Charter is headed 'Interpretation of laws', and contains the interpretative provisions, including s 32.

104 The question is whether the court has functions under ss 8(3) and 19(2)(a) or whether they contain functions of courts. The plaintiff and Commission submitted that they do, whereas the defendants and Attorney-General submitted that they do not.

105 The parties, with one exception, accepted the intermediate construction of s 6(2)(b), which is that the court's function is to enforce directly only those rights that relate to court proceedings.[64]

106 Under that intermediate construction, the s 24 'fair hearing' right has been accepted as a right that applies to the functions of courts,[65] as has s 25, which concerns the rights of accused persons in criminal proceedings.

107 The one exception to the acceptance of the intermediate construction was

64 *Victoria Police Toll Enforcement v Taha* (2013) 49 VR 1, 80 [246], [250] (Tate JA) (***Taha***).

65 *Kracke* (2009) 29 VAR 1; *Secretary to the Department of Human Services v Sanding* (2011) 36 VR 221.

that the defendants submitted that under s 6(2)(b), pt 2 rights only apply to courts and tribunals to the extent that they have interpretative functions under div 3 of pt 3. They submitted that para (b) had been interpreted by the courts to mean '... to the extent that they have functions under Part 2 *or* Division 3 of Part 3', whereas the actual wording is 'to the extent that they have functions under Part 2 *and* Division 3 of Part 3'. This approach has been called 'the drafting error approach'.[66] This submission acknowledges that under div 3 of pt 3, the court will necessarily have regard to pt 2 rights as part of the process of interpretation. It argues that this is the maximum extent to which courts are bound by Charter rights under s 6(2)(b). It relies on the clear legislative intention not to apply Charter rights to courts and contends that if courts were bound like public authorities to apply all of the rights acknowledged by pt 2, Victoria's common law might diverge from the common law of Australia and that was not a likely Parliamentary intention.

Interpretation of s 6(2)(b)

108 In *Taha*, Tate JA accepted the submission that the s 24 'fair hearing' Charter right was 'one of the rights under pt 2 in respect of which the Court had functions', thereby holding that it directly bound a court.[67] Her Honour otherwise considered it 'unnecessary to determine if the intermediate construction is correct'.[68]

109 In *Secretary to the Department of Human Services v Sanding*, Bell J in applying the intermediate construction, stated that:

> Although the matter is far from clear, in my view the functions of courts and tribunals under pt 2 referred to in s 6(2)(b) are the functions of applying and giving effect to those human rights which relate to court and tribunals 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.[69]

110 In my opinion, the intermediate construction of s 6(2)(b) should be applied. There is little or no support for the alternative broad or narrower constructions discussed in *Taha*. The broad construction is that courts are to enforce directly all Charter rights, and the narrow construction is that courts are to only enforce directly those rights that are explicitly and exclusively addressed to the courts.[70] This Court has previously referred with approval to

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66 Timothy Lau, 'Section 6 (2)(b) of the Victorian Charter: A problematic provision' (2012) *23 Public Law Review* 181, 189.

67 (2013) 49 VR 1, 80 [247], citing *De Simone v Bevnol Constructions* (2009) 25 VR 237, 247 [52].

68 (2013) 49 VR 1, 80 [248].

69 (2011) 36 VR 221, 258 [166].

70 *Taha* (2013) 49 VR 1, 80 [246].

the intermediate approach.[71] The defendants' 'drafting error' interpretation of s 6(2)(b) is not supported by the words or the authorities. Section 32(1) requires courts to interpret statutory provisions, so far as it is possible to do so consistently with their purpose, in a way that is compatible with 'human rights'. The term 'human rights' is defined under s 3(1) to mean 'the civil and political rights set out in Part 2'. Therefore, the provisions of div 3 pt 3 already permit courts to take into account pt 2 rights in the execution of the interpretative functions. The intermediate construction is the only construction which reconciles s 6(2)(b) with ss 4(1)(j) and 38. GINNANE J

111 I next consider whether under the intermediate construction of s 6(2)(b), the Court has functions under or in respect of the rights contained in ss 19(2)(a) and 8(3). Putting the matter another way, do these rights relate to court proceedings? I will set out the parties' submissions in respect of those two provisions in turn before setting out my analysis.

Does the intermediate construction include s 19(2)(a)?

112 As mentioned, s 19(2)(a) protects the 'distinct cultural rights' of Aboriginal persons, including under paragraph (a) the right with other members of their community, to 'enjoy their identity and culture'.

The parties' and interveners' submissions

113 The plaintiff submitted that s 19 was unique to Victoria and must be construed against the backdrop of the creation of the Koori Court, which was intended to give effect to Aboriginal culture.

114 The Commission submitted that s 19, even though expressed as a negative, contains a positive right of an Aboriginal person to enjoy his or her culture and identity. That right extends to ensuring the survival of cultural identity. An aspect of the cultural right is effective participation of a person in decisions that affect them. Because the Koori Court existed at the time the Charter was enacted, Parliament should be taken to have understood its jurisdiction in enacting s 6(2)(b), and it should be interpreted accordingly. The Commission referred to the main purpose of the Charter being to protect and promote human rights (s 1(2)) and submitted that the rights protected by the Charter in pt 2 should be construed in the broadest possible way.[72]

115 The Commission submitted that s 19(2)(a) applies directly to the functions of the Magistrates' Court. The intermediate interpretation of s 6(2)(b) requires

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71 See *De Simone* (2009) 25 VR 237, 247 [52] (Neave JA and Williams AJA), cited with approval in *Slaveski v Smith* (2012) 34 VR 206, 221 [54] (Warren CJ, Nettle and Redlich JJA); *DPP v Mokbel (Orbital & Quills — Ruling No 1)* [2010] VSC 331 [159] (Whelan J); *Secretary, Department of Human Services v Sanding* (2011) 36 VR 221, 258–9 [166] (Bell J); *Taha* (2013) 49 VR 1, 80 [248] (Tate JA; Nettle and Osborn JJA not deciding); *DPP v SL* [2016] VSC 714 [6] (Bell J); *Application for bail by HL* [2016] VSC 750 [72] (Elliott J); *DPP v SE* [2017] VSC 13 [12] (Bell J); *Matsoukatidou v Yarra Ranges Council* (2017) 51 VR 624, 633–4 [32] (Bell J).

72 *Re Application under the Major Crimes (Investigative Powers) Act 2004* (2009) 24 VR 415 (Warren CJ).

focus to be placed on the specific functions that a court exercises. When those functions may affect rights described in pt 2 of the Charter, s 6(2)(b) can require the Court to comply with those rights. The Commission submitted that the functions in question can be either procedural or substantive relevant to the disposition of rights, and that the required effect on Charter rights can be either direct or indirect.

116 Applying this analysis, the Commission submitted that the right in s 19(2)(a) applied directly to, and was engaged by, the magistrate's determination of the transfer application. That determination affected or interfered with the right. The third Aboriginal Justice Agreement made with the Victorian Government recognised the role of the Koori Court, describing it as a 'model for inclusion and responsiveness'.[73] A focus of the Agreement was to 'increase responsiveness to Koori culture in the justice system and strengthen Koori inclusion at all levels'.[74] The exercise of the discretion conferred in s 4F affects the ability of the plaintiff as an Aboriginal person to enjoy his identity and cultural rights identified in s 19(2)(a) by having elders and Respected Persons from the Aboriginal community participate in the determination of the criminal charges against him. By his application under s 4F, the plaintiff, as an Aboriginal person, was asserting his Aboriginal identity and culture and the transfer of the proceeding enabled action to be taken to respond to that assertion. The functions of a court include its procedures as well as the determination of a matter before the court. If the proceedings are transferred, the plaintiff will be able to access a court whose purpose includes a high level of participation of elders and Respected Persons in the sentencing process. If the proceedings are not transferred, then those rights will be denied. The magistrate had to decide whether to open the gate to the Koori Court.

117 The Commission referred to decisions concerning art 27 of the *International Covenant on Civil and Political Rights*.[75]

118 The plaintiff and the Commission submitted that the direct application of s 19(2)(a) would not require every application under s 4F to be granted, but any limitation on the right must, in accordance with s 7(2), be a proportional limitation of those cultural rights. The matters that the magistrate took into account in deciding not to order the transfer of the proceeding did not satisfy the requirements of s 7(2)(b). There was no evidence to justify such a limitation.

119 The Commission referred to the decision in *DPP v SE*,[76] which concerned a bail application by an Aboriginal minor with an intellectual disability. The

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73 Victorian Aboriginal Justice Agreement Phase 3, *A Partnership Between the Victorian Government and Koori Community* (2013) 43.

74 Ibid 12.

75 UN OHCHR, *International Covenant on Civil and Political Rights*, GA Res 2200A (XXI) (23 March 1976, adopted 16 December 1966).

76 [2017] VSC 13.

GINNANE J

legislation provided that in deciding whether to grant bail, the Court was to consider issues arising from a person's Aboriginality, such as their cultural background, ties to extended family or place, and any other cultural issue or obligation. Bell J stated that:

> Section 19(2) operates with s 6(2)(b) of the Charter to supply an additional basis upon which the court should, when conducting bail hearings and determining bail applications, respect the cultural rights of Aboriginal persons.

120 The Commission also referred to the decision in *DPP v SL,*[77] which concerned a young person charged with serious criminal offences, to support its submission that s 6(2)(b) can be applied outside the rights set out in ss 24 and 25. The seriousness of SL's offending meant that he was charged in this Court instead of the Children's Court, but as this Court does not often hear criminal charges against children, modifications to normal court procedure needed to be considered. Bell J stated that:

> When hearing and determining criminal charges brought against children, this court clearly has functional responsibilities in relation to the procedures to be followed in relation to their hearings (see s 8(3) and 25(3)), their detention when at court and their trial and other treatment (see s 23(1), (2) and (3)). Under s 6(2)(b), when exercising those responsibilities the court must therefore apply the human rights specified in the Charter in relation to those matters. I am making this ruling in that light.[78]

121 The defendants' submissions were that the cultural rights recognised in s 19(2)(a) did not relate to a function of the court for the purposes of s 6(2)(b). Section 19(2)(a) did not independently confer upon an Aboriginal person a right to have their criminal proceedings dealt with by the Koori Court.

122 The Attorney-General accepted that, under the intermediate construction, s 6(2)(b) played a role distinct from and additional to a court's interpretative function under div 3 pt 3 and from the s 38 obligations on administrative decisions. He also submitted that the rights under ss 24 and 25 and 8(3), but not the cultural rights recognised by s 19(2)(a), concerned functions of the court. The issue requiring focus was not on whether the court proceedings relate to the right, but rather whether the right relates to court proceedings. Section 19(2)(a) does not relate to court proceedings, as there are no relevant 'functions' that a court has or may perform in connection with that right. The Magistrates' Court has no obligation to promote the enjoyment of Indigenous culture when making procedural decisions.

Does the intermediate construction include s 8(3)?

123 Section 8(3) states that every person is equal before the law, is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination. Discrimination is defined in s 3 of the Charter in the following terms:

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77 [2016] VSC 714.
78 Ibid [6].

> ***discrimination***, in relation to a person, means discrimination (within the meaning of the **Equal Opportunity Act 2010**) on the basis of an attribute set out in section 6 of that Act.

124 Section 6 of the *Equal Opportunity Act 2010* (Vic) sets out 18 attributes which can be the basis of discrimination, including race. That Act further stipulates that discrimination means 'direct or indirect discrimination on the basis of an attribute'.[79] Direct discrimination occurs when a person treats (or proposes to treat) another person with an attribute unfavourably because of that attribute,[80] and indirect discrimination occurs when a person imposes (or proposes to impose) an unreasonable requirement, condition or practice that will likely disadvantage a person with an attribute.[81] Section 12 allows a person to take a 'special measure for the purpose of promoting or realising substantive equality for members of a group with a particular attribute'. This provision allows for 'substantive equality' measures, which might include positive discrimination, special measures and affirmative action. Substantive equality is not defined, though in the context of tribunals, Bell J stated:

> Thus to achieve substantive equality, it may be necessary to take compensatory measures, especially to assist those who are victims of entrenched prejudice, or are unequal by reason of historical circumstances. Such measures do not constitute discrimination in international law.[82]

125 Bell J referred to the judgment of Brennan J in *Gerhardy v Brown,*[83] including the following statements:

> Human rights and fundamental freedoms may be nullified or impaired by political, economic, social, cultural or religious influences in a society as well as by the formal operation of its laws. Formal equality before the law is an engine of oppression destructive of human dignity if the law entrenches inequalities 'in the political, economic, social, cultural or any other field of public life' ...
>
> Formal inequalities must therefore yield to substantive equality when special measures are warranted.
>
> A means by which the injustice or unreasonableness of formal equality can be diminished or avoided is the taking of special measures. A special measure is, ex hypothesis, discriminatory in character; it denies formal equality before the law in order to achieve effective and genuine equality.[84]

126 Section 8(4) also deals with the question of substantive equality by providing:

> Measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination.

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79 *Equal Opportunity Act 2010* s 7.
80 Ibid s 8.
81 Ibid s 9.
82 *Re Lifestyle Communities Ltd (No 3)* (2009) 31 VAR 286 [114].
83 (1985) 159 CLR 70.
84 *Re Lifestyle Communities Ltd (No 3)* (2009) 31 VAR 286 [234], citing *Gerhardy v Brown* (1985) 159 CLR 70, 129–30.

127 In the context of s 8(3) of the Charter, the achievement of substantive equality means that protection from discrimination can occur by implementing special measures for people suffering special disadvantage to ensure that they are equal before the law. GINNANE J

128 The structure of s 8(3) contains three limbs or parts —

(a) every person is equal before the law;

(b) every person is entitled to the equal protection of the law without discrimination;

(c) every person is entitled to equal and effective protection against discrimination.[85]

129 The first limb enables formal but not substantive equality, it requires that courts treat people equally when applying the law and not apply the law in a discriminatory or arbitrary way without objective justification. The second limb is concerned with the content and substance of the law. It requires that the *content* of the law ensure protection from discrimination in substance. The third limb is that every person is entitled to equal and effective protection against discrimination.

130 The right to equality recognised in s 8(3) has also been held to apply to the procedures of courts. In that respect, I have previously referred to passages in *DPP v SL* and *DPP v SE.* In the latter case, Bell J stated that:

> the right to age-appropriate and rehabilitation-focussed procedures in bail applications by children also arises as an aspect of the right to equality in s 8(3) because failing to follow such procedures can lead to discriminatory exclusion.[86]

131 In *Matsoukatidou v Yarra Ranges Council,*[87] Bell J set aside orders made by a County Court judge for failing to apply the Charter rights contained in s 8(3) and s 24(1) in circumstances where one appellant had a learning disability, and both appellants were unrepresented. His Honour concluded that courts were bound to apply the s 8(3) right, because 'in procedural respects, the elements of the equality right that it enshrines relate to court and tribunals proceedings, including the conduct of hearings'.[88] His Honour stated that:

> [The plaintiff] is a person with a disability and a disability pensioner. Under s 8(3) of the Charter, the judge was obliged to ensure that she was equally and effectively protected against discrimination by reason of this disability. This required the judge to make certain adjustments and accommodations to the procedures that were adopted, which his Honour did not make. [The plaintiff's] inability effectively to participate in the hearing was substantially due to the judge's failure to do so. Therefore the judge did not apply her right to equality under s 8(3).[89]

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85 *Taha* (2013) 49 VR 1, 70 [209].
86 *DPP v SE* [2017] VSC 13 [15].
87 (2017) 51 VR 624.
88 Ibid 638 [45].
89 Ibid 683 [185].

132 Bell J considered that the first limb of s 8(3) obliged courts to treat people equally and not arbitrarily, but did not require procedural adjustments to accommodate disadvantaged parties.[90] The second limb was deemed not relevant to the conduct of court hearings as it concerns the substantive law, it may require that substantive law include positive adjustments to ensure the equal protection of the law.[91] However, his Honour stated in respect of the third limb:

> This goes beyond requiring that the law (in content) be equal in substance to requiring that, in the operation and administration of the law, people have equal and effective protection against discrimination. This element of the right may require that, in the conduct of hearings and procedures followed by courts and tribunals, positive adjustments and accommodations are made so that some parties are treated differently to other parties in order to ensure that they have equal and effective protection of the law. It is this element of the right that is most relevant in the present case.[92]

The parties' and interveners' submissions

133 The Commission, whose submissions the plaintiff adopted, submitted that s 6(2)(b) operated so as to apply the right in s 8(3) of the Charter to the operations of courts in the same way that it applies s 19(2)(a). The Court's function in deciding whether to transfer criminal proceedings under s 4F affects the rights recognised by s 8(3). Specifically, the Commission argued that the second and third limbs of s 8(3) are engaged in court proceedings and that they each guarantee the persons involved in the litigation substantive equality. In this case, if the transfer under s 4F was ordered, the Aboriginal person facing criminal proceedings would have access to a court whose procedures are specifically designed to improve the systemic disadvantage faced by Aboriginal offenders in the mainstream justice system. Therefore, the magistrate's hearing of the transfer application and exercise of the discretion contained in s 4F(2) were functions capable of affecting the rights recognised by s 8(3). Section 6(2)(b) binds any court exercising that discretion to grant the transfer application unless a decision to refuse it was justified pursuant to s 7(2). They submitted that the magistrate failed to take into account the plaintiff's cultural rights and the right to equal protection of the law without discrimination and the right to equal and effective protection against discrimination.

134 The plaintiff submitted that the Koori Court was Parliament's attempt to promote substantive equality.

135 On the other hand, as previously mentioned, the defendants argued that s 6(2)(b) did not apply to courts and that the intermediate interpretation should not be applied. But I have not accepted that submission. Their alternative argument was that the intermediate construction does not include

90 Ibid 657 [104].
91 Ibid 657 [105].
92 Ibid 657–8 [106].

substantive as opposed to procedural aspects of the s 8(3) right. GINNANE J

136 The defendants submitted that, at the most, the procedural aspects or requirements of s 8(3) did not apply to the magistrate's decision about transfer; it simply meant that when a magistrate heard the charges in the General Division of the Court, he or she would have to make reasonable adjustments and accommodations to the extent required to overcome any disadvantage to the plaintiff in participating in the hearing because he was an Aboriginal person. They submitted that the magistrate's statements made during the transfer application in the present case indicated that he had sufficient training and experience to consider the need for any such adjustments and accommodations.

137 The defendants argued that to apply s 8(3) to substantive court decisions would impose a range of unforeseen duties and obligations to different categories of persons. They cited a hypothetical example of a blind juror being empanelled and a court being obliged under s 8(3) to ensure that they could effectively participate.

138 Finally, they argued that no discrimination occurred when the magistrate was making a decision authorised by a provision of an Act, in this case s 4F, and relied on s 75 of the *Equal Opportunity Act.*

Analysis of the Charter ground based on ss 6(2)(b), 8(3) and 19(2)(a)

139 First, to repeat conclusions that I reached in determining the first ground: the critical feature of the transfer application is that s 4F(2) conferred a discretion on the Court. It was to be exercised taking into account the scope, purposes and objects of the Koori Court legislation, as well as any other relevant considerations.

140 The alternative contention in ground 2 was that the Magistrates' Court made an error of law on the face of the record because it contravened s 6(2)(b) of the Charter by failing to engage with the plaintiff's rights under ss 8(3) and 19(2)(a) of the Charter and limiting those rights otherwise than in accordance with s 7(2) of the Charter.

141 Under the intermediate construction of s 6(2)(b), the test is: does the right in question relate to court proceedings. Some, but not all, rights are connected with the operation of courts, for example ss 24 and 25.

142 Section 8(3) protects equality before the law. Within this context, the third limb states that every person has the right to equal and effective protection against discrimination. Discrimination can be direct or indirect. Courts have long sought to prevent indirect discrimination in their procedures. An example includes assisting self-represented litigants to the extent permissible, who would otherwise be disadvantaged by not understanding a court's procedures. Another example is making courts physically accessible for disabled people, who would otherwise not be able to enter a court and

seek justice. These are special measures and accommodations aimed at preventing indirect discrimination by promoting and protecting people's right to equal and effective protection against discrimination. This is a key feature of a fair legal system. Special measures and accommodations relate to courts, as courts are an essential component of the law which people are entitled to access without discrimination. The third limb of s 8(3) directly apples to a court's procedures to ensure that every person is equally able to access a court and justice. Courts have, and have always had, a function in ensuring that people have equal access to the law. These functions, however, do not extend to the substance of the law. Courts are not required to ensure that the substantive outcomes of cases guarantee equality.

143 The Koori Court was established for purposes that included addressing systemic disadvantage faced by Aboriginal people who have been over-represented in the criminal justice system, in imprisonment and in deaths in custody. The Koori Court seeks to reduce that systemic disadvantage by providing special measures and accommodations so that the procedure is less disadvantageous for Aboriginal offenders; it protects against indirect discrimination on the basis of race. It is a means through which systemic disadvantage in the justice system is mitigated in pursuance of the s 8(3) right.

144 For these reasons, the third limb of s 8(3) directly applies to functions of courts and relates to court proceedings. This is because of courts' traditional responsibilities to ensure that people are treated equally and fairly. But it must be kept in mind that those functions exist because of, and through, those responsibilities, and that where those responsibilities end so too does that function. That 'function' is not a broader free-standing concept, enlivened by specific instances of obligations relevant to it. That courts have some specific obligations to ensure equal protection from discrimination, and therefore have some specific functions under the third limb of s 8(3), does *not* mean that the Court has 'functions under s 8(3)' in a broader sense so that responsibilities not already incumbent on courts can be imposed on them by the Charter. Instead, those existing obligations are, in and of themselves, what constitutes that function.

145 Further, because s 6(2)(b) only applies the Charter to courts and tribunals 'to the extent that they have functions', where those functions end, so too does the Charter's application.

146 Therefore, I do not consider that the magistrate was required to take any steps in exercising the discretion given by s 4F(2) by way of special measures to ensure 'substantive equality' under the third limb of s 8(3). The creation of the Koori Court was itself such a measure which Parliament has enacted, but a measure that in respect of the transfer process gives the magistrate a discretion under s 4F to decide the cases that should be transferred to the Koori Court. When the Court so exercises the s 4F discretion, it is taking into account matters that are contemplated by the third limb of s 8(3). The

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Koori Court is a special measure which may enable Aboriginal persons to enjoy, in the sense of have the benefit of,[93] their identity and culture when they are charged with criminal offences and which may ensure their equal protection of the law without discrimination in accordance with s 8(3).

147 For the same reasons, s 6(2)(b) does apply s 19(2)(a) to courts to a certain extent. Section 4F(2) imposes certain obligations on the magistrate exercising the discretion under it, insofar as that discretion must be exercised taking into account the purpose, scope and objects of the Act. That obligation is relevant to the cultural rights contained in s 19(2)(a), as the proper exercise of the discretion will affect whether an Aboriginal person has access to the Koori Court, which in turn enables an Aboriginal person to enjoy, in the sense of have the benefit of, their identity and culture when they are charged with criminal offences. So, to that extent, the Court in this case had a function under s 19(2)(a) that related to court proceedings. However, that function did not extend beyond the obligation in s 4F which constitutes it. The 'function' under s 19(2)(a) is not a free-standing concept enlivened by the existence of relevant obligations in s 4F, but is rather constituted by, and limited to, those obligations. The application of s 19(2)(a) is, accordingly, equally limited. It cannot be used to override the discretion contained in s 4F(2), as it is through, and only through, the terms of s 4F(2) that the Court has a function which s 19(2)(a) then applies to. Accordingly, s 19(2)(a) applies to the extent that the magistrate was obliged to consider the content of s 19(2)(a) as part of the proper exercise of the discretion. But it does not impose any further obligations on a magistrate exercising that discretion.

148 The Court is given a discretion and provided it exercises the discretion validly, no limitation on the right has occurred. Section 19(2)(a) of the Charter does not alter the discretion to a mandatory obligation as the Court of Appeal decision in *Slaveski v Smith* established,[94] to which I refer to in greater detail below. No limitation on the exercise of the right occurs if the discretion is properly exercised and the transfer is refused.

149 I should record that my decision relates only to the facts of this case, I am not stating that s 19(2)(a) may not have any wider application to court proceedings under s 6(2)(b) in a particular fact situation.

Conclusion in respect of the second part of ground 2

150 The magistrate in this case did not consider the functions of the Court under ss 8(3) and 19(2)(a) in making the transfer decision and therefore made an error of law on the face of the record, so the alternative ground of ground 2 has been established.

93 *Macquarie Dictionary* (7th ed, 2017) 'enjoy' (def 2).
94 (2012) 34 VR 206.

Section 32(1) of the Charter

151 I next consider the role played by s 32(1) of the Charter. This point was not the basis of the plaintiff's grounds, but I consider that I should state my conclusion about it.

152 In my opinion, s 4F(2) can be interpreted in accordance with the requirements of s 32(1) of the Charter in a way that is compatible with human rights, so far as it is possible to do so consistently with its purpose, by the court taking into account the purposes of the Koori Court legislation and in particular the conferral of the discretion contained in s 4F(2) to determine transfer applications.

153 The authorities differ somewhat on how s 32(1) of the Charter should be applied to the exercise of a statutory discretion.[95] The interpretation that I have adopted does not turn the Court into a public authority bound by the Charter. Rather, it treats Parliament as requiring that a statutory provision be interpreted in a way that is compatible with human rights, where it is possible to do so consistently with its purpose. It deals with the interpretative function of the law, like provisions of the *Interpretation of Legislation Act*. It assists in understanding the meaning of the legislation. In *Slaveski v Smith,*[96] the Court of Appeal, when considering a provision of the *Victorian Legal Aid Act 1978* that contained discretionary power, decided that the Charter did not intend to alter the nature of the power and it remained a discretionary power. Similarly, I do not consider that the Charter intended to alter the nature of the discretionary power contained in s 4F(2).

154 I consider that the magistrate was required in exercising the s 4F(2) discretion to consider the purposes of the Koori Court legislation. I also consider that the magistrate should have taken into account the rights contained in ss 8(3) and 19(2)(a) because the protection and promotion of those rights, in the case of Aboriginal persons involved in criminal proceedings, are advanced by the operation of the Koori Court. But the magistrate was left with a discretion and he was not obliged to transfer the proceedings. As I have stated, as this point was not a ground contained in the further amended originating motion, I do not base my decision on it.

Remedies

155 The appropriate orders are orders in the nature of certiorari quashing the decision of the magistrate of 12 April 2017 refusing the plaintiff's application made under s 4F of the Act to transfer the criminal proceedings G12570510, G13160139, G13175586, G13266689, G13278195, H10308883, H10324566, H10540882 and 201602926 commenced against him to the Koori Court Division of the Magistrates' Court sitting at Shepparton for errors

95 Bruce Chen, 'Section 32(1) of the Charter: Confining Statutory Discretions Compatibly with Charter Rights?' (2016) 42 *Monash Law Review* 609.

96 (2012) 34 VR 206.

of law on the face of the record being the failure to properly exercise the discretion conferred by s 4F(2), both in respect of the terms of the provision itself and the effect of the Charter, pursuant to s 6(2)(b), on the proper exercise of the discretion contained in s 4F(2). I will also make an order in the nature of mandamus requiring the Magistrates' Court sitting at Echuca, differently constituted, to rehear the plaintiff's application for transfer of the proceedings to the Koori Court Division of the Magistrates' Court sitting at Shepparton according to law and these reasons. GINNANE J

156 I do not consider that it is necessary or appropriate to make any declaration.

Orders accordingly.

Solicitors for the plaintiff: *Victorian Aboriginal Legal Service*.

Solicitor for the first to eighth defendants: *John Cain*, Solicitor for Public Prosecutions.

Solicitor for the first intervener: *Marlo Baragwanath*, Victorian Government Solicitor.

Solicitor for the second intervener: *Solicitor for Victorian Equal Opportunity and Human Rights Commission.*

T FARHALL
BARRISTER-AT-LAW