BARE v INDEPENDENT BROAD-BASED ANTI-CORRUPTION COMMISSION and Others

Court of Appeal

Warren CJ, Tate and Santamaria JJA

19 May 2014, 29 July 2015

[2015] VSCA 197

Administrative law — Judicial review — Privative clause — Police Integrity Act 2008 (Vic) ss 40(4)(b)(i), 52, 109(1).

Human rights — Charter of Human Rights and Responsibilities — Equality before law — Equal protection of law without discrimination — Freedom from cruel, inhuman or degrading treatment — Complaint of assault by police — Whether implied procedural right to effective investigation of complaint — Charter of Human Rights and Responsibilities Act 2006 (Vic) ss 8(3), 10(b), 32, 38(1).

The appellant, an immigrant from Ethiopia, complained to the Director, Police Integrity that he had been seriously assaulted and racially vilified by police. He sought that his complaint be investigated independently of police by the Director (the first respondent's predecessor), pursuant to s 40(4)(b)(i) of the *Police Integrity Act 2008*, on the ground that the police conduct was of such a nature that the Director should consider such investigation was in the public interest. The request was refused, invalidly. A delegate of the Director then reviewed the file and made a second decision refusing to commence an investigation of the complaint and referring the matter to the Chief Commissioner of Police as warranting investigation.

The appellant brought proceedings in the Supreme Court by way of judicial review, seeking an order in the nature of certiorari to quash the second decision, and a declaration that the decision was contrary to s 38 of the *Charter of Human Rights and Responsibilities* and a declaration as to the operation of s 10(b) of the Charter. A judge dismissed the application and the appellant appealed.

Section 38(1) of the Charter relevantly provided that it was unlawful for a public authority to act in a way that was incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right. Under the Charter, human rights included (s 8(3)) that every person was equal before the law, was entitled to the equal protection of the law without discrimination on the basis of race and had the right to equal and effective protection against such discrimination; and (s 10(b)) that a person must not be treated in a cruel, inhuman or degrading way. Section 32(1) provided that so far as it was possible to do so consistently with their purpose, all statutory provisions were to be interpreted in a way that was compatible with human rights.

Section 52 of the *Police Integrity Act* provided to the effect that pt 4 of that Act applied for the purposes of an investigation by the Director under s 40(4). Section 109(1), within pt 4, provided to the effect that the Director and staff were not liable, whether on the ground of lack of jurisdiction or on any other ground, to any civil or criminal proceedings in respect of any act purported to be done under the Act unless the act was done in bad faith.*

Held:

Jurisdiction to review

(1) By Tate and Santamaria JJA, Warren CJ dissenting. Section 109 of the *Police Integrity Act 2008* did not preclude judicial review of the decision not to

* The terms of the section and related provisions are set out in full at paras [25]–[31].

conduct an investigation. [373], [495].

(a) An interpretation that preserves access to the courts should be adopted if it is available. [337]; [590].

(b) A narrow interpretation of s 109 was consistent with giving effect to specific immunities conferred by other sections of the *Police Integrity Act*. [347], [357], [373], [592], [596].

(c) A decision not to conduct an investigation was not an act 'for the purposes of an investigation' in s 109(1). [373], [598].

Bropho v Western Australia (1990) 197 CLR 1, 18; *Public Service Association (SA) v Federated Clerks' Union* (1991) 173 CLR 132, 160; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 505 [72]; *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531; *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 259 [15] applied.

Charter s 38(1) - Procedural limb

(2) By Tate and Santamaria JJA, Warren CJ agreeing. The decision maker had failed to give proper consideration to the complainant's relevant human rights. [221]–[224], [235], [275]–[276], [287]–[301], [538]–[541], [558]–[559].

Castles v Secretary of Department of Justice (2010) 28 VR 141, 184–5 [185]–[187] approved.

Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24; *Giotopoulos v Director of Housing* [2011] VSC 20; *PJB v Melbourne Health* (2011) 39 VR 373 referred to.

Per Tate JA. The 'proper' consideration to be given to human rights by those engaged in public administration required by s 38(1) of the Charter demands a higher standard of consideration than that generally applicable at common law to the taking into account of relevant considerations. What is required is a weighing up, or balancing, of human rights against countervailing public and private interests. To treat the obligation to give proper consideration to human rights as an obligation of some stringency is consistent with the model of the Charter as intended to have a normative effect on the conduct of public authorities. [235].

Per curiam. The requirement that the decision maker under s 40(4)(b)(i) of the *Police Integrity Act* consider the public interest was not coterminous with, nor did it exclude, the operation of s 38 of the Charter. [225]–[231], [310]–[327], [547]–[557].

(3) By Tate and Santamaria JJA, Warren CJ not deciding. The error was an error on the face of the record and should be quashed. [236], [328], [560]–[569].

Charter s 10(b) - Implied right to effective investigation

(4) By Tate and Santamaria JJA, Warren CJ agreeing. There was no implied procedural right under s 10(b) of the Charter to an independent effective investigation of the appellant's complaint. [179]–[214], [239], [425]–[457], [631], [665].

Assenov v Bulgaria (1998) 28 EHRR 652; *DSD v Commissioner of Police for the Metropolis* [2015] 1 WLR 1833 distinguished.

Momcilovic v The Queen (2011) 245 CLR 1, 36–7 [19]–[20], 90 [159] referred to.

Consideration of whether a decision made in breach of s 38(1) of the Charter was automatically jurisdictional error or an invalid decision. [139]–[153], [238], [378]–[397], [600], [617]–[626].

Project Blue Sky v Australian Broadcasting Authority (1998) 194 CLR 355 considered.

Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24; *Craig v South Australia* (1995) 184 CLR 163; *Attorney-General's Reference (No 2 of 2001)* [2004] 2 AC 72 referred to.

Decision of Williams J [2013] VSC 129 reversed.

Appeal

This was an appeal from a decision of the Trial Division dismissing an application for judicial review under the *Administrative Law Act 1978* and O 56 of the *Supreme Court (General Civil Procedure) Rules 2005*. Relevant facts are stated in the judgments.

J D Pizer QC with *E M Nekvapil* and *F C Spencer* for the applicant.

P R D Gary QC with *K M Evans* for the first respondent.

S P Donaghue QC with *S M C Fitzgerald* for the second respondent.

S G E McLeish SC, Solicitor-General, with *J Davidson* for the third respondent.

Cur adv vult.

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Introduction

1 The second defendant in the proceeding below,[1] the Office of Police Integrity (**OPI**), rejected an application by the appellant, Mr Bare (**the appel-**

[1] On 10 February 2013, pursuant to item 3 of the Schedule to the *Independent Broad-based Anti-corruption Commission Act 2011*, the OPI and the office of the Director were abolished, and, by force of item 4(c) of that Schedule, the respondent, the Independent Broad-based Anti-corruption Commission (**IBAC**) ('the respondent'), was substituted for the Director as the second defendant.

lant), to investigate an allegation of mistreatment by members of Victorian Police under s 40(4)(b)(i)[2] of the *Police Integrity Act 2008* (Vic) (**PIA**).

2 The decision not to investigate was made on 21 June 2010 by the first defendant, an employee of the OPI, Ms Small. By his originating motion, the appellant sought relief in the nature of certiorari and mandamus as well as declaratory relief. Following the filing of the originating motion, another employee, Mr Jevtovic, the third defendant, made a second decision not to investigate on 19 October 2010. The appellant filed an amended originating motion on 12 November 2010 seeking the same relief in relation to the first and second decision.

3 Following an eight day trial, a judge of the Trial Division dismissed the application for judicial review.[3]

4 The appellant appeals the decision and orders of her Honour.

Background

5 The appellant is of Ethiopian descent and migrated to Australia in 2004. The basis of the appellant's complaint surrounds an incident on 16 February 2009 when he was 17 years old. He claimed that the police stopped a car in which he was travelling. When he got out of the car, he alleged that a police officer pushed him up against the vehicle, handcuffed him and then kicked his legs out from under him so that he fell to the ground.

6 The appellant further claimed that, as he lay on the ground, the officer pushed his head to the ground so that his chin struck the gutter. The officer then grabbed him by the hair and repeatedly pushed his head into the gutter and four or five of his teeth were chipped. His jaw was cut, which resulted in scarring. The officer sprayed him in the face with 'OC' (capsicum) spray several times, forcibly raising his head to do so. This caused him difficulty breathing. During the alleged assault the appellant claimed that the officer said words to the effect 'you black people think you can come to this country and steal cars. We give you a second chance and you come and steal cars'. A second police officer allegedly kicked him in the ribs whilst he was on the ground and handcuffed.

7 The appellant complained that he was taken to a nearby house and the officers held his head under water for a long period and told him to wash his eyes or he would go blind. He was then told he was under arrest and taken to

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[2] That section provides:
The Director —
(b) may investigate a complaint if the conduct complained of —
(i) is of such a nature that the Director considers that investigation of the complaint by the Director is in the public interest; or
(ii) is in accordance with established practices or procedures of Victoria Police and the Director considers that those practices or procedures should be reviewed.

[3] *Bare v Small* [2013] VSC 129 (**Reasons**).

Williamstown Police Station in the back of a police van. While in the cells at Williamstown Police Station ambulance officers said he needed stiches but an officer said 'no he can go in his own time'. The appellant suffered pain, injury to his teeth and jaw, bruising and humiliation as a result of the alleged serious assault. WARREN CJ

8 On 3 February 2010, the appellant (by his lawyers) wrote to the OPI complaining that on 16 February 2009 he was seriously assaulted and racially abused by officers of Victoria Police. He said this constituted cruel, inhuman or degrading treatment under s 10(b) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**the Charter**).

9 Section 40 of the PIA sets out the way in which complaints were to be dealt with by the Director.[4] In particular, s 40(4)(b) authorised the Director to investigate complaints where her or she considered it is in the public interest to do so.

10 The appellant's complaint was written by his lawyer, Ms Davies from the Young People's Legal Rights Centre (**Youthlaw**). That letter set out the nature of the appellant's complaint and requested that the complaint be investigated by the OPI, rather than referred to Victoria Police for investigation. The letter outlined, pursuant to the test in s 40(4)(b)(i), the public interest in investigating the complaint:

> **2. Investigation of the complaint is in the public interest**
>
> 2.1 It is in the public interest the OPI conduct an independent investigation of the complaint, as it involves serious allegations of assault and cruel, inhuman and degrading treatment of a minor. Nassir was 17 years of age at the time of the incident.
>
> 2.2 Nassir is of Ethiopian descent and migrated with his family to Australia in 2000. he (sic) is a recent migrant, having arrived in Australia in 2004. Nassir alleges Constable ... made discriminatory remarks to him when he said 'You black people think you can come to this country and steal cars. We give you a second chance and you come and steal cars'. It is in the public interest this complaint be further investigated as it involves allegations of discriminatory treatment on the basis of race.[5]

11 The complaint also outlined the obligation of the State in relation to the Charter:

> 3. **Obligations under the Victorian Charter of Human Rights and Responsibilities 2006**
>
> 3.1 The Victorian Charter of Human Rights and Responsibilities 2006 (**the Charter**) states at s 10(b) that a person is not to be treated in a cruel, inhuman and degrading manner. At s 22, the Charter provides that when deprived of liberty all persons must be treated with humanity and with respect for the inherent dignity of the human person.

4 The Director is the head of the OPI. According to s 8 of the PIA he has certain powers and functions under the Act (see [25]), and is an independent officer of the Parliament.

5 Reasons [11].

3.2 Section 1 of the Charter imposes an obligation on public authorities to act in a way that is compatible with human rights. Section 38 of the Charter states that it is unlawful for public authorities to act incompatibly with human rights or to fail to give consideration to human rights in their decision making.

3.3 A stated objective of the Director of the OPI within the Police Integrity Act 2008 at s 8(1)(d) is to 'ensure that members of Victoria Police have regard to the human rights set out in the Charter of Human Rights and Responsibilities'.

3.4 As outlined above, we submit that the conduct of members of the police in relation to the use of OC spray during this incident amounts to cruel, inhuman and degrading treatment and is therefore a breach of s 10(b) of the Charter. Police conduct during this incident further amounted to a failure to respect the humanity and inherent dignity of a person deprived of liberty, as required by s 22 of the Charter.

3.5 It is our view that the right to freedom from cruel, inhuman, degrading treatment, as set out in s 10(b) and mirrored in s 22, places an obligation on the state to not only refrain from such treatment but to effectively investigate allegations of such treatment. This view is supported by international human rights jurisprudence (*Khan v United Kingdom*, Eur Ct HR (12 May 2000); House of Lords decision in *JL; R (on Application of) v Secretary of State for the Home Department* [2009] EWCA Civ 219 (17 March 2009).

3.6 It is our submission that for an investigation to be effective it should follow the guidelines set out by the European Commission of Human Rights Rapporteur on Police Complaints. The guidelines state that an effective investigation must be one that is 'independent', 'adequate and capable of resulting in discipline and prosecution of perpetrators', 'prompt' 'transparent and open to public scrutiny' and 'involves and protects the victim of the alleged abuse'. In our view, failure to carry out an effective investigation in accordance with those guidelines amounts to a breach of s 10(b) and s 22 of the Charter.

3.7 We submit that the Charter and the Police Integrity Act 2008 place an obligation on the OPI to carry out investigation of this complaint. Referral of this complaint to the Victoria Police risks compromising the standards of effective investigation outlined above, particularly with regard to the independence of the investigation. In our view, a decision by the OPI to refer the investigation of this matter to Victoria Police would amount to a failure to act compatibly with human rights as required by s 1 and s 38 of the Charter.[6]

12 Ms Small was the acting manager of the OPI's Professional Standards Assurance Unit (PSAU) at the time the complaint was lodged. A member of that unit made an initial assessment of the complaint and referred it to the OPI's Case Assessment Committee (CAC) on 1 March 2010. The preliminary assessment was described by the trial judge as an assessment of the 'check-box' variety.[7] It set out items that warranted the referral to the

6 Ibid [11].
7 Ibid [13].

CAC including the nature of the complaint and the possible need to review established practices or principles. WARREN CJ

13 In addition to the preliminary assessment an OPI officer prepared a memorandum dated 1 March 2010 which summarised the appellant's complaint. The officer recommended that the CAC consider the complaint for investigation and also listed a number of issues with the complaint:

> 1. Allegations are of serious assault and unnecessary use of force:
>
> While handcuffed: using OC spray, kicking legs from under BARE, repeatedly pushing BARE'S head into the gutter.
>
> Resulting injuries including chipped teeth and a cut to the jaw.
>
> Ambulance officers recommended BARE to go to hospital for stitches but police did not allow this.
>
> 2. Racial vilification by saying to BARE:
>
> 'You Black people think you can come to this country and steal cars'.
>
> 3. Const ... has two previous instances listed in Compass for inappropriate use of OC spray...
>
> 4. BARE does not want the compliant forwarded to Victoria Police.
>
> 5. BARE's lawyer has escalated the matter to be one of human rights.
>
> 6. Incident complained of is almost 12 [months] prior to complaint being lodged.[8]

14 Following the receipt of the memorandum and preliminary assessment, the PSAU wrote to Youthlaw acknowledging the complaint and explaining that the complaint would receive close examination. It also sought evidence of the appellant's medical treatment following the alleged incident.

15 In April 2010 the OPI abolished the CAC and replaced it with the Business Monitoring Committee (BMC). The BMC was made up of the OPI Deputy Director and managers of OPI's operational units, including Ms Small. On 28 April 2010, the Director delegated his power under s 40 of the PIA to Ms Small. The BMC met on 11 May 2010 to consider the appellant's complaint. Ms Small was absent from the meeting, though she prepared a briefing note which contained much of the same information set out in the PSAU memorandum. At that meeting, the BMC decided not to accept the appellant's complaint for investigation by the Director (**the first decision**). Importantly, as Ms Small was not in attendance, no delegate of the Director was present at the meeting.

16 On 21 June 2010, Ms Small wrote to Youthlaw and advised them of the decision not to investigate the appellant's complaint. The letter stated:

> The Director and his delegates prioritise matters relating to systemic issues where OPI considers it can make a long-term impact. An assessment committee has evaluated your client's matter against a priority matrix and has determined that your client's complaint is most appropriately investigated by Victoria Police. I

8 Ibid [15].

acknowledge receipt of the further material you provided, your reference to human rights issues associated with your client's complaint and your concerns about the independence of police investigators. However, the investigation of other matters currently before OPI has a greater public interest justification.

For all matters referred to Victoria Police for investigation, Victoria Police provides this office with a written report and the complete investigation file at the completion of the investigation. OPI independently reviews the investigation of the complaint and advises the complainant of the results of the investigation, any further investigation proposed and of the action taken (or proposed to be taken) following the investigation of the complaint.

If you wish OPI to refer this matter to Victoria Police for investigation, I request that you advise this office of this preference in writing within 30 days. Should this office receive no direction on this matter, the file will be closed and no further action will be taken by OPI.[9]

17 The trial judge in her reasons outlined the concept of the 'priority matrix' referred to in Ms Small's letter:

The OPI 'priority matrix', to which Ms Small referred, is set out in a document entitled 'OPI Priority Model' (**priority matrix**). Its function as a tool is described in the introduction in this way:

> This priority model is a tool to assist in establishing the priority of work undertaken to ensure OPI's limited resources are utilised in the most effective and efficient manner to achieve the outputs expected by Government.
>
> The Priority Model enables proposals for investigations/projects to be assessed considering a number of characteristics and determines a level of priority for special investigations/projects.
>
> The model is only one filter to assist in determining whether activity should be undertaken by OPI and resources allocated to particular activities. It may be appropriate for lower priority matters to be given precedent (sic) over other high priority matters, for example, to ensure a specific output requirement is achieved.
>
> The priority level attributable to a particular matter will assist members of the [BMC] to accept or reject proposals considering the priority of ongoing matters compared to new proposals.
>
> The 'Elements of Prioritisation' include:
>
> (a) the nature of the activity or proposed investigation or project;
>
> (b) the activity's importance to OPI 'including mandatory requirements, risk to OPI of not undertaking the activity and likelihood of achieving required outputs and corporate plan objectives';
>
> (c) the impact or perceived impact of the successful completion of the activity 'on OPI objects, OPI reputation, Victoria Police and the Victorian community';
>
> (d) the duration of the activity;
>
> (e) 'the estimated amount of OPI resources likely to be utilised; and
>
> (f) 'the likely outputs that may be achieved as a result of undertaking the

9 Ibid [23].

> proposed activity'.
>
> A numerical rating is given to each element. A proposal's 'Priority Rating' is to be calculated by reference to the 'Critical', 'High', 'Medium', 'Low' or 'Insignificant' range in which the total of those ratings fell.
>
> Mr Bare's solicitor, Ms Davis, had not heard of the priority matrix before receiving the letter advising of the first decision.[10]

18 On 20 August 2010, the appellant filed an originating motion seeking relief in the nature of certiorari and mandamus and declaratory relief, in respect of the first decision. The appellant alleged that the first decision was affected by jurisdictional error and that it was unlawful under s 38 of the Charter. Ms Small was the first defendant, the Director was the second defendant and the State of Victoria was the third defendant (but was removed as a party a few months later).

19 On 16 September 2010, the legal firm Maddocks filed a notice of change of solicitor replacing Youthlaw as the appellant's solicitors. Following this, on 20 September 2010, Maddocks filed an amended originating motion which added a declaration against the State of Victoria on the grounds that it had breached the appellant's rights to an effective independent investigation pursuant to s 10(b) of the Charter.

20 On 19 October 2010, the third defendant, Mr Jevtovic (acting as a delegate to the Director), purported to remake the first decision (**the second decision**). Mr Jevtovic reviewed the file and again rejected the request for the OPI to investigate. In a letter to the appellant's lawyers, he wrote:

> None of the matters in section 40(1) of the Police Integrity Act 2008 persuaded me that the complaint did not warrant investigation; therefore the complaint must be investigated.
>
> As part of my considerations I intentionally focussed on identifying all available evidence that would warrant consideration for deviating from our established legislated process. That is, I must refer a complaint warranting investigation to the Chief Commissioner subject to section 40(4).
>
> Section 40(4)(b)(i) allows the Director to investigate a complaint if the conduct complained of 'is of such a nature that the Director considers that investigation of the complaint by the Director is in the public interest'.
>
> I examined the available evidence including the OPI file and all correspondence received from the complainant.
>
> I also considered the seriousness of the allegations and the complainant's reference to section 10 of the *Charter of Human Rights and Responsibilities Act 2006*.
>
> I have also considered the interpretation by the complainant of OPI's obligations in the context of Human Rights Charter. Whilst not qualified to make judgments on the merits of that interpretation/argument, I have made the observation that the complainant appears to have arrived at a point which reflects a predisposition that Victoria Police Ethical Standards Department (ESD) will not investigate this matter effectively and with integrity. It was therefore prudent in my view to focus

[10] Ibid [24]–[26].

my review on identifying what, if any, evidence existed to support the merits of the position the complainant appears to have taken.

It should be noted that given the nature of the review and concerns raised by the complainant, I did not believe that it was necessary for me to refer to OPI's Priority Model and therefore did not do so in any manner. There were no OPI policies or procedures which raised any other issues for my consideration of this matter.

Conclusion

Having conducted the review I can confirm that I have not discovered nor has any evidence supporting the complainant's position been made available to me, other than of course the complainant's position as it relates to their interpretation of OPI's obligations under the Human Rights Charter.

In light of the above matters I have concluded the following:

First Issue I reaffirm OPI's original conclusion that the matter warrants investigation; and

Second Issue I do not consider that investigation by the Director is in the public interest, and I am satisfied that referral under s 40(2) of the Police Integrity Act is adequate for the investigation of this complaint.

I would however like to extend to the complainant (given the circumstances of this complaint and the position taken by the complainant) that OPI could appropriately undertake a more active oversight of the ESD investigation should the complainant be agreeable to that course of action.

21 Following the receipt of Mr Jevtovic's letter, the appellant filed a further amended originating motion to encompass a challenge to the second decision. The trial proceeded on the basis of a third further amended originating motion filed on 21 May 2012. That motion continued to seek the same relief on the same grounds on the first decision and added a claim for similar relief on similar grounds on the second decision.

22 In short, the appellant claimed the first decision was affected by jurisdictional error on the grounds that:

- he was not accorded procedural fairness because he had not been given notice about the 'priority matrix';
- the decision was made beyond power because no delegate of the Director was in attendance at the meeting;
- the assessment committee failed to have regard to a relevant consideration, namely the rights of the appellant to an effective investigation of a complaint under s 10(b) of the Charter; and
- the decision was unlawful under s 38(1) of the Charter.

23 Further, the third further amended originating motion claimed that the second decision was affected by jurisdictional error on the grounds that:

- the re-exercise of the discretion was beyond power;

- the decision was made for an improper purpose;
- the plaintiff was not accorded procedural fairness in that he was not given a reasonable opportunity to be heard before the second decision was made;
- Mr Jevtovic failed to have regard to a relevant consideration, namely the rights of the appellant to an effective investigation of a complaint under s 10(b) of the Charter, and to equal protection of the law without discrimination under s 8(3) of the Charter; and
- the decision was unlawful under s 38(1) of the Charter.

24 The third amended originating motion also claimed that Mr Jevtovic did not understand the nature of his jurisdiction under s 40(4) of the PIA and thus failed to recognise how the power should be exercised in relation to the requirements in s 32 of the Charter and therefore exceeded his statutory power.

Legislative scheme and the Charter

25 The PIA was introduced for the purpose of continuing the OPI and establishing a separate act for the entity outside the *Police Regulation Act 1958*. Section 8 of the PIA outlines the objects, functions and powers of the Director. Relevantly, s (1)(d) provides that one of the objects of the Director is to ensure the Victorian Police have regard to the human rights set out in the Charter:

> **8. Objects, functions and powers of the Director**
>
> (1) The objects of the Director are—
>
> (a) to ensure that the highest ethical and professional standards are maintained in Victoria Police; and
>
> (b) to ensure that police corruption and serious misconduct are detected, investigated and prevented; and
>
> (c) to educate Victoria Police and the general community regarding police corruption and serious misconduct, including the effect of police corruption and serious misconduct; and
>
> (d) to ensure that members of Victoria Police have regard to the human rights set out in the Charter of Human Rights and Responsibilities.
>
> (2) The Director has the functions conferred on the Director by this Act or any other Act.

26 Part 3 of the PIA outlines the role of the Director in relation to complaints against members of Victoria Police. Section 40 provides a number of options to the Director when the OPI receives a complaint. In particular, s 40(4)(b)(i) provides for the Director to investigate actions of Victoria Police if it is in the public interest:

40. Dealing with complaints

(1) The Director may determine that a complaint does not warrant investigation—

(a) if in the Director's opinion—

(i) the subject-matter of the complaint is trivial; or

(ii) the complaint is frivolous or vexatious or is not made in good faith; or

(b) if the complainant had had knowledge for more than a year of the conduct complained of and fails to give a satisfactory explanation for the delay in making the complaint.

(2) Subject to subsection (4), the Director must refer a complaint warranting investigation to the Chief Commissioner.

(3) If the Director refers a complaint to the Chief Commissioner under subsection (2), the Chief Commissioner must investigate the complaint under Division 2 of Part IVA of the Police Regulation Act 1958.

(4) The Director—

(a) must investigate a complaint if the conduct complained of is conduct of the Chief Commissioner or of a Deputy or Assistant Commissioner; and

(b) may investigate a complaint if the conduct complained of—

(i) is of such a nature that the Director considers that investigation of the complaint by the Director is in the public interest; or

(ii) is in accordance with established practices or procedures of Victoria Police and the Director considers that those practices or procedures should be reviewed.

(5) In a case to which subsection (4) applies, if the complaint was not first made to a member of Victoria Police, the Director may give the Chief Commissioner details of the complaint.

(6) The Director may attempt to resolve a complaint by conciliation and must—

(a) before commencing to conciliate, notify the Chief Commissioner of the proposed attempt; and

(b) notify the Chief Commissioner of the results of the attempt.

27 Part 4 of the PIA provides for the general investigatory powers of the Director. Section 52 is the opening provision of this Part and states:

52. Application of Part

This Part applies for the purposes of an investigation by the Director under Part 3.

28 Part 4 contains a number of powers given to the Director including the ability to summons witnesses (s 53), compel the provision of documents (s 54) and examine witnesses (s 61). The Director has the ability to conduct private or public examinations of witnesses and compel answers regardless of the privilege against self-incrimination (s 69).

29 Part 4 also provides the Director and the OPI with wide ranging investigatory powers, including the ability to carry out search warrants (s 93), enter

the premises of public authorities (s 88) and seize documents (s 89). WARREN CJ

30 In addition to these significant powers, div 10 of pt 4 of the PIA provides protection for the Director and officers of the OPI from judicial oversight. Section 106 prevents documents held by the OPI from being produced in legal proceedings other than a criminal proceeding. Section 107 provides for a process for resisting production of documents in a criminal proceeding. Importantly, s 109 of the PIA sets out what is commonly understood as a 'privative clause'. It provides:

> **109. General protection of protected persons**
>
> (1) A protected person is not liable, whether on the ground of lack of jurisdiction or on any other ground, to any civil or criminal proceedings to which they would have been liable apart from this section in respect of any act purported to be done under this Act unless the act was done in bad faith.
>
> (2) Subsection (1) does not apply to an act done in the course of, or that results in, a critical incident.
>
> (3) No civil or criminal proceedings may be brought against a protected person in respect of any act of a kind referred to in subsection (1) without the leave of the Supreme Court.
>
> (4) The Supreme Court may not give leave unless it is satisfied that there is substantial ground to believe that the person to be proceeded against has acted in bad faith.
>
> (5) Without limiting the generality of subsections (1) and (3), no civil or criminal proceeding may be brought against the Director in respect of the giving of a certificate by the Director under section 106, unless the certificate was given in bad faith.
>
> (6) Despite anything in this section—
>
> (a) an order cannot be issued restraining the Director from carrying out or compelling the Director to carry out any investigation; and
>
> (b) a proceeding cannot be brought against the Director seeking the issue of such an order.
>
> (7) A protected person cannot be called to give evidence in any court or in any legal proceedings or before the Appeals Board in respect of any matter coming to his or her knowledge in the exercise of functions under this Act.

31 Section 104 defines a 'protected person' as:

> **104. Who is a protected person?**
>
> For the purposes of this Division, a protected person is—
>
> (a) the Director;
>
> (b) the Acting Director;
>
> (c) a member of staff of the Office of Police Integrity;
>
> (c) a person who has taken an oath or made an affirmation under section 18(2);
>
> (d) a person (other than a natural person) engaged under section 17(1)(b), if any officer or employee of the person has taken an oath or made an affirmation under section 18(2);

(e) the members of a body engaged under section 17(1)(b), if any member, officer or employee of the body has taken an oath or made an affirmation under section 18(2).

32 Further, s 106 permits the Director to certify that a document is a protected document such that a protected person cannot be compelled to produce it in certain legal proceedings.

106. Protected documents and other things - legal proceedings other than criminal proceedings

(1) This section applies to any legal proceeding (other than a criminal proceeding) or to any proceeding before the Appeals Board.

(2) In any proceeding to which this section applies, a protected person cannot be compelled to produce any document or other thing that has come into his or her possession in the performance of functions under this Act, if the Director certifies in writing that, in the Director's opinion, the document or thing is a protected document or other thing.

(3) In this section a reference to a document or other thing includes a reference to part of a document or other thing.

33 In summary, the PIA provides the OPI with wide-ranging powers to investigate and prosecute police misconduct. Further, it provides the Director with powers and immunities to enable him to carry out his investigative and prosecutorial duties.

34 Turning to the Charter, it was enacted in 2006 following the report of a Consultation Committee into whether Victoria should have a legislative enactment to protect human rights. In *PJB v Austin Health*,[11] Bell J described the nature of the Charter as follows:

> The main purpose of the Charter of Human Rights and Responsibilities Act is 'to protect and promote human rights'. The Charter is based on the fundamental principle, expressed in the Preamble, that 'all people are born free and equal in dignity and rights' and 'human rights are essential in a democratic and inclusive society that respects the rule of law, human dignity, equality and freedom'.[12]

35 Section 1(2) of the Charter explicitly outlines its purpose:

(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

(d) requiring statements of compatibility with human rights to be pre-

[11] [2011] VSC 327.

[12] Ibid [31] (citations omitted).

pared in respect of all Bills introduced into Parliament and enabling the Scrutiny of Acts and Regulations Committee to report on such compatibility; and

(e) conferring jurisdiction on the Supreme Court to declare that a statutory provision cannot be interpreted consistently with a human right and requiring the relevant Minister to respond to that declaration.

36 The Charter places specific obligations on public authorities. Section 4 describes what a public authority is:

4. What is a public authority?

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

(a) a public official within the meaning of the *Public Administration Act 2004*; or

Note

A public official under the *Public Administration Act* 2004 includes employees of the public service, including the Head of a government department or an Administrative Office (such as the Secretary to the Department of Justice or the Chairman of the Environment Protection Authority) and the Victorian Public Sector Commissioner. It also includes the directors and staff of certain public entities, court staff, parliamentary officers and holders of certain statutory or prerogative offices.

(b) an entity established by a statutory provision that has functions of a public nature; or

...

(c) an entity whose functions are or include functions of a public nature, when it is exercising those functions on behalf of the State or a public authority (whether under contract or otherwise); or

...

(d) Victoria Police; or

(e) a Council within the meaning of the Local Government Act 1989 and Councillors and members of Council staff within the meaning of that Act; or

(f) a Minister; or

(g) members of a Parliamentary Committee when the Committee is acting in an administrative capacity; or

(h) an entity declared by the regulations to be a public authority for the purposes of this Charter—

but does not include—

(i) Parliament or a person exercising functions in connection with proceedings in Parliament; or

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

...

(k) an entity declared by the regulations not to be a public authority for the purposes of this Charter.

37 The two rights the appellant relies on in his submissions are set out in ss 8

and 10. They provide:

> **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.
>
> **10. Protection from torture and cruel, inhuman or degrading treatment**
>
> A person must not be—
>
> (a) subjected to torture; or
>
> (b) treated or punished in a cruel, inhuman or degrading way; or
>
> (c) subjected to medical or scientific experimentation or treatment without his or her full, free and informed consent.

38 Division 3 of the Charter provides for the interpretation of laws in ensuring they are compatible with human rights. Section 32 of the Charter is the interpretive clause. It states:

> **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.

39 In *Momcilovic v The Queen*,[13] Crennan and Kiefel JJ outlined the effect of s 32:

> Section 32 does not state a test of construction which differs from the approach ordinarily undertaken by courts towards statutes. Its terms identify an approach of interpretation which has regard to the terms and to the purpose of the statutory provision in question, as previously discussed. The statutory direction in s 32(1) ... seeks to ensure that Charter rights are kept in mind when a statute is construed. The direction is not, strictly speaking, necessary. In the ordinary course of construction regard should be had to other existing laws. The Charter forms part of the context in which a statute is to be construed. It will be recalled that Lord Hoffmann viewed the Convention in a similar way in *Wilkinson*. The

[13] *Momcilovic v The Queen* (2011) 245 CLR 1 (***Momcilovic***).

process of construction commences with an essential examination of the context of the provisions being construed. WARREN CJ

Where it is possible, consistently with a statute's purpose, s 32(1) requires that all statutory provisions are to be read conformably with Charter rights.[14]

40 Finally, div 4 contains the specific obligations of public authorities. Section 38 classifies certain conduct of a public authority in connection with a human right as unlawful and s 39 describes the remedies available to a person claiming under the Charter. Those sections provide:

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.

(3) This section does not apply to an act or decision of a private nature.

(4) Subsection (1) does not require a public authority to act in a way, or make a decision, that has the effect of impeding or preventing a religious body (including itself in the case of a public authority that is a religious body) from acting in conformity with the religious doctrines, beliefs or principles in accordance with which the religious body operates.

(5) In this section 'religious body' means—

(a) a body established for a religious purpose; or

(b) an entity that establishes, or directs, controls or administers, an educational or other charitable entity that is intended to be, and is, conducted in accordance with religious doctrines, beliefs or principles.

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 O 56 of Chapter I 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

14 *Momcilovic* (2011) 245 CLR 1, 217 [565]–[566] (citations omitted).

this Charter.

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

Trial judgment

41 In the hearing in the Trial Division, the Victorian Equal Opportunity and Human Rights Commission (**the Commission**) intervened as of right under s 40(1) of the Charter, as did the Solicitor-General on behalf of the Attorney-General. At trial, her Honour was asked to answer a number of questions identified by the appellant.

They were (including her Honour's answers):

1. Is there an implied procedural right under s 10(b) of the Charter to an 'effective' investigation of a claim of a breach of human rights stated in that section?

   No

2. Were the first decision and the second decision incompatible with the appellant's right to an effective investigation of his complaint?

   Not applicable, given the answer to question 1.

3. Did the relevant decision-maker in the case of each of the first decision and the second decision properly consider the appellant's human rights as required by s 38 of the Charter?

   Not applicable, given the answer to question 4. The relevant claims will be dismissed, stayed or struck out.

4. Does s 109 of the Police Integrity Act prevent the Court from hearing and determining the appellant's claims for declarations that the first decision and the second decision were contrary to s 38 of the Charter?

   Yes.

5. Was the first decision made by the Business Monitoring Committee tainted by jurisdictional error?

   Yes.

6. Was the second decision tainted by jurisdictional error?

   No.[15]

42 In rejecting the appellant's claim for judicial review, her Honour began with the fourth question. Her Honour answered the question by setting out and analysing the three contentions put by the appellant:

1. s 109 does not exclude judicial review proceedings, absent requisite words of 'irresistible clarity';
2. even if it does, s 109 does not apply to a decision *not* to investigate a complaint; and
3. a decision which is contrary to s 38 is thereby tainted by jurisdictional error and the privative clause cannot oust a challenge on that ground after the

[15] Reasons [57].

High Court's decision in *Kirk v Industrial Court (NSW)*.[16] WARREN CJ

43 Her Honour rejected the first contention on the basis that the words in the PIA reflected a clear intention of the legislature to remove judicial review of a decision of the Director, except where there is jurisdictional error.[17] The trial judge compared s 109 to other privative clauses that have come under judicial scrutiny. In particular her Honour considered s 12(3) of the *Witness Protection Act 1991* (***Witness Protection Act***) which was discussed in *Applicants A1 & A2 v Brouwer*.[18] That section provided:

> No action or proceedings can be brought against any person to whom this section applies in respect of any act, matter or thing done by that person in the course of his or her duties in accordance with this Act.

44 The Court of Appeal in *Brouwer* held that the section did not apply to a challenge to the validity of the relevant decision.[19] The trial judge noted that the Court of Appeal considered the Second Reading Speech and the s 85(5) of the *Constitution Act 1975* statement and held that if the legislature had intended to oust judicial review it would have used express language. The trial judge outlined the reasoning in *Brouwer* and compared the *Witness Protection Act* with s 35A of the *Ombudsman Act 1974* (NSW) (***Ombudsman Act***). Section 35A(1) of that Act, her Honour noted, was in similar terms to s 109 of the PIA:

> (1) The Ombudsman shall not, nor shall an officer of the Ombudsman, be liable, whether on the ground of want of jurisdiction or on any other ground, to any civil or criminal proceedings in respect of any act, matter or thing done or omitted to be done for the purpose of executing this or any other Act unless the act, matter or thing was done, or omitted to be done, in bad faith.

45 The Court of Appeal noted:

> Nor, more importantly, does s 12(3) of the Act contain any equivalent of the critical words in s 35A(1) ('whether on the ground of want of jurisdiction or on any other ground'). Those words clearly signified the intention of the New South Wales Parliament to oust judicial review.[20]

46 Drawing on that decision, the trial judge noted that the 'critical words' that the Court of Appeal had highlighted in *Brouwer* appear in s 109 of the Act. Further her Honour relied on the extrinsic material in interpreting the section.[21] She noted the Second Reading Speech by Mr Cameron, the Minister for Police and Emergency Services, in particular his statement regarding judicial review.[22]

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16 Ibid [60] (citation omitted).

17 The trial judge accepted that the decision of the High Court in *Kirk v Industrial Relations Court (NSW)* (2010) 239 CLR 531 meant that a state legislature could not oust judicial review for a decision which is affected by jurisdictional error.

18 (2007) 16 VR 612 (***Brouwer***).

19 Ibid 632.

20 Ibid 631.

21 Pursuant to s 35 of the *Interpretation of Legislation Act 1984;* see Reasons [72]–[75].

22 See [111].

47 The trial judge dismissed the second contention that s 109 did not apply to a decision not to investigate.

48 The appellant sought to argue that at the time the second decision was made there had been no past investigation and no ongoing or future investigation in relation to the appellant's complaint. Therefore there was no decision made 'for the purpose of an investigation' under s 52 of the PIA. In rejecting the contention, her Honour stated:

> I agree with the defendants that a decision about whether or not to investigate a complaint is a necessary step in the process of investigation by the Director. As they submit, before that determination is made there is clearly the prospect that an investigation may occur and that, consequently, the decision was made within the meaning of s 52 'for the purpose of' an investigation (an object which does not have to be in existence).[23]

49 Her Honour also pointed to the functions and objects of the PIA which supported the view that the protection offered by s 109 should not be narrowly construed. Her Honour further explained:

> I agree with the defendants that the extrinsic materials discussed are consistent with a broader immunity for protected persons under s 109, relevantly, to give effect to the statutory purposes of both the OPI and the Director under the Police Integrity Act by allowing them to carry out their functions without the impediment of legal proceedings challenging their decisions, with the exception of those alleging jurisdictional error.[24]

50 The trial judge then assessed the third contention, that an act which is classified by s 38(1) of the Charter as unlawful is a jurisdictional error and therefore cannot be ousted by a privative clause.[25] The trial judge set out the key question that had to be answered:

> Was it the legislative purpose of s 38(1) to take away a public authority's power to act in contravention of it?[26]

51 Her Honour noted the difficulty recognised by the High Court in *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs*[27] in determining whether the failure to comply with a procedural obligation amounted to jurisdictional error. Further, her Honour outlined the decision of the plurality in *Project Blue Sky Inc v Australian Broadcasting Authority*[28] who held:

> A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid ... In determining the question of purpose, regard must be had to 'the language of the relevant provision and the scope and object of the whole statute.'[29]

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23 Reasons [81].
24 Ibid [85].
25 See *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 (***Kirk***).
26 Reasons [97].
27 (2005) 228 CLR 294 (***SAAP***).
28 (1998) 194 CLR 355 (McHugh, Gummow, Kirby and Hayne JJ) (***Project Blue Sky***).
29 Ibid 391.

52 At the trial, the appellant contended that in the statutory context of the Charter, the term 'unlawful' meant 'invalid'. First, he argued that it was apparent that failure to take into account a consideration clearly amounted to jurisdictional error under general administrative principles. Furthermore, the appellant submitted that it would be incongruous for a breach of the procedural limb of s 38(1) to give rise to a jurisdictional error but a breach of the substantive limb would not. Her Honour rejected this argument as circular: WARREN CJ

> Under administrative law principles, whether a decision maker is bound to take a particular consideration into account and whether failure to do so will be significant enough to affect the validity of the outcome is to be ascertained having regard to the subject-matter, scope and purpose of the legislation requiring consideration of the matter, taking into account the nature of the repository of the power.
>
> It is common ground that Emerton J described what is required by the s 38(1) obligation under the procedural requirement to give proper consideration to a human right in *Castles v Secretary, Department of Justice*, when she said:
>
> > The requirement in s 38(1) to give proper consideration to human rights must be read in the context of the Charter as a whole, and its purposes. The Charter is intended to apply to the plethora of decisions made by public authorities of all kinds. The consideration of human rights is intended to become part of decision-making processes at all levels of government. It is therefore intended to become a 'common or garden' activity for persons working in the public sector, both senior and junior. In these circumstances, proper consideration of human rights should not be a sophisticated legal exercise. Proper consideration need not involve formally identifying the 'correct' rights or explaining their content by reference to legal principles or jurisprudence. Rather, proper consideration will involve understanding in general terms which of the rights of the person affected by the decision may be relevant and whether, and if so how, those rights will be interfered with by the decision that is made. As part of the exercise of justification, proper consideration will involve balancing competing private and public interests. There is no formula for such an exercise, and it should not be scrutinised over-zealously by the courts.
> >
> > While I accept that the requirement in s 38(1) to give proper consideration to a relevant human right requires a decision-maker to do more than merely invoke the Charter like a mantra, it will be sufficient in most circumstances that there is some evidence that shows the decision-maker seriously turned his or her mind to the possible impact of the decision on a person's human rights and the implications thereof for the affected person, and that the countervailing interests or obligations were identified.
>
> Mr Bare and the Commission argue that, by characterising as unlawful a failure to act in the manner described, s 38(1) makes it clear that a public authority is bound to take such a right into account, with the consequence that a failure to do so will render the decision it makes invalid.
>
> I agree with the Attorney-General's characterisation of this argument as 'circular'. As he submits, the Court should not take Parliament to have intended that a breach of the s 38(1) procedural obligation would necessarily involve jurisdictional

> error. It did not state expressly that a relevant human right must be considered, choosing rather to characterise both the failure to give a relevant right proper consideration and the breach of the obligation to act incompatibly with it, as 'unlawful'.[30]

53 Secondly, the appellant argued at trial that the legislative context of s 39 of the Charter favoured reading unlawfulness in s 38(1) as amounting to jurisdictional error. He contended that the remedies set out in s 39 contemplated jurisdictional error and therefore unlawfulness in s 38(1) should be interpreted as giving rise to such a cause of action. The trial judge considered the Court of Appeal's decision in *Sudi v Director of Housing*[31] which briefly assessed the meaning of s 39 of the Charter, though as the section was not in issue in the appeal the Court did not determine its purpose.[32] In rejecting this argument her Honour held:

> The meaning of s 39 is not directly in issue in this proceeding and it is not settled as to what is required, in terms of another claim or otherwise, before s 38(1) unlawfulness can supply a necessary element of a cause of action or defence. I am not, however, persuaded that the terms of s 39 are inconsistent with the view that s 38(1) unlawfulness does not per se amount to jurisdictional error. Any limitation of the availability of a remedy for breach of s 38(1), including the ruling out of compensation by way of damages by s 39(4), rather militates against acceptance of the argument that it does.
>
> I agree with the defendants that considerations relevant to the existence of invalidity, taken into account in *Project Blue Sky*, also suggest that an act done or decision made in breach of either of the requirements of s 38(1) would not amount to a jurisdictional error. The obligations to act compatibly with human rights and to give them proper consideration under s 38(1) lack the 'rule-like quality', easily identified and applied, thought indicative of requirements for validity. The criteria for lawfulness under s 38(1) might be open to different interpretations, given the nature of the judgment required under s 7(2). The definition of 'public authority' in s 4 is also 'open ended', in terms of the relevant criteria, and there is power to expand or reduce the number of bodies fitting the description for Charter purposes by characterising entities as public authorities or removing that character by regulation. In addition, the applicability of the exceptions in sub-ss 38(2), 39(2), 39(3) and 39(4) may not always be clear.[33]

54 After rejecting the appellant's argument in relation to the privative clause and the role of s 38(1), the trial judge then went on to consider the first question, whether there was an implied procedural right to an investigation under s 10(b) of the Charter. The appellant contended that s 10(b) contained an implied procedural right to an effective investigation of allegations of cruel, inhuman and degrading treatment. He did so by relying on the jurisprudence of the United Nations Human Rights Committee (**UNHRC**) and the European Court of Human Rights (**ECtHR**).

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30 Reasons [101]–[104] (citations omitted).
31 *Sudi v Director of Housing* (2011) 33 VR 559 (***Sudi***).
32 Ibid 569 [49] (Warren CJ); 580 [98] (Maxwell P); 596 [214] (Weinberg JA).
33 Reasons [116]–[117] (citations omitted).

55 While it was unnecessary to do so given her findings on question 4, her Honour began by noting the role of international jurisprudence in analysing the Charter. The trial judge noted that s 32 specifically allows for decisions of foreign courts and tribunals to be used in interpreting provisions of the Charter, though she noted the reluctance of several members of the High Court in *Momcilovic* on relying too heavily on such decisions.[34] WARREN CJ

56 The trial judge analysed a number of decisions of the UNHRC and the ECtHR in assessing the nature of the alleged implied right. Her Honour rejected the implication on two broad grounds. First, her Honour rejected the implied right on the grounds that international tribunals relied on a combination of rights in international instruments to find the implied right to an effective investigation. The trial judge initially examined the *International Covenant on Civil and Political Rights* (**ICCPR**) Article 7 of which provides:

> No-one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no-one shall be subjected without his free consent to medical or scientific experimentation.

57 The trial judge accepted that this article was in similar terms to s 10(b) of the Charter and thus decisions of the UNHRC may be of assistance. However, her Honour also noted the existence of a separate obligation on States to investigate breaches of the ICCPR found in art 2:

> 1. Each State Party to the present Covenant undertakes to respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, religion, political or other opinion, national or social origin, property, birth or other status.
> 2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other means as may be necessary to give effect to the rights recognised in the present Covenant.
> 3. Each State Party to the present Covenant undertakes:
>
> (a) to ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
>
> (b) to ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State and to develop the possibilities of judicial remedy;
>
> (c) to ensure that the competent authority shall enforce such remedies when granted.

34 See *Momcilovic* (2011) 245 CLR 1, 36–8 (French CJ).

58 The trial judge noted that the decisions of the UNHRC which found that a State had not established an effective investigation into a breach of art 7 relied on the interrelationship between that article and the State's obligations under art 2. In particular, her Honour noted *General Comment 20* which provides:

> Article 7 should be read in conjunction with art 2, para 3 of the [ICCPR]. In their reports, the States Parties should indicate how their legal systems effectively guarantee the immediate termination of all acts prohibited by Art 7 as well as appropriate redress. The right to lodge complaints about maltreatment prohibited by art 7 must be recognised in the domestic law. Complaints must be investigated promptly and impartially by competent authorities so as to make the remedy effective.[35]

59 The trial judge had a similar approach in analysing the applicability of decisions of the ECtHR. Her Honour set out the following provisions of the European Convention of Human Rights (ECHR):

> **Article 1**
>
> **Obligation to respect human rights**
>
> The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention.
>
> **Article 3**
>
> **Prohibition of Torture**
>
> No-one shall be subjected to torture or to inhuman or degrading treatment or punishment.
>
> **Article 13**
>
> **Right to an Effective Remedy**
>
> Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

60 Her Honour noted that in many of the decisions cited by the appellant, the ECtHR relied on either art 1 or art 13 in conjunction with the substantive prohibition in art 3 to find that a State had breached the right to an effective investigation into an allegation of torture or inhuman or degrading treatment.[36]

61 While the appellant sought to both distinguish these cases and note the obligation on the State of Victoria to comply with certain international instruments, her Honour rejected those arguments:

> In the case of s 10(b), it is the absence from the Charter of obligations to secure the enjoyment of a right or to remedy its breach which makes the international material as to the content of those rights under Art 7 of the ICCPR and Art 3 of the ECHR distinguishable. The content of those rights has been determined in

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35 Human Rights Committee, *General Comment No 20*: *Article 7 (Prohibition of torture and cruel treatment or punishment)* , 44th sess, UN Doc. HRI/GEN/1/Rev 9 (Vol I) p 202, (10 March 1992), [14].

36 See eg *Assenov v Bulgaria* (1998) 28 EHRRR 652, 107 [102].

the context of such obligations.

The statement of the purpose of protecting and promoting rights in s 1(2)(a), the recognition of rights in s 6(1), the reference to Parliament seeking to protect and promote rights in s 7(1) and the obligations on public authorities under s 38 do not make the statutory context sufficiently analogous for recognition of the alleged implied procedural right under s 10(b).[37]

62 Secondly, in the absence of applicable international jurisprudence, the trial judge looked at the words in the Charter to determine whether s 10(b) contained an implied right to an effective investigation. Her Honour rejected the appellant's contention that such a construction was warranted by the nature of the Charter in particular as informed by s 1(2)(a), which sets out the purpose of the Charter as being to protect and promote rights, and s 7(1), which outlines the legislature's role in seeking to protect and promote rights. The trial judge stated:

> The Charter remains to be construed according to its text, in its own constitutional context. When construing legislation, the Court must endeavour to discern the intention manifested by the words of the statute. The text of s 10(b) does not contain an express reference to the asserted procedural right. I am not persuaded that it would have been a statutory purpose of s 10(b) that it should include such a right by implication, in the context of the Charter as a whole. The relevant obligation to act compatibly with the right falls on a public authority and the Charter not only states exhaustively how such rights are to be protected, but also makes a number of procedural requirements relating to the protection of a number of other rights. Indeed, s 24(1) specifically refers to the right of a person charged with a criminal offence or party to a civil proceeding 'to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing'.[38]

63 Further the trial judge dismissed the appellant's argument that Australia's obligations under the ICCPR and the *Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment* ('Torture Convention') would compel a construction of s 10(b) that found an implied right to an effective investigation:

> The requirement to construe the Charter conformably with Australia's international obligations to investigate complaints of rights' violations under the ICCPR or the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment does not, in my opinion, compel a construction of s 10(b) which effectively imposes those obligations upon public authorities. The State's established criminal and civil justice systems would appear to supply the means for compliance with any investigative obligations the State might have in relation to a complaint of abuse of the right under s 10(b). A right to an investigation of a complaint of violation of a human right under s 10(b) might, on the other hand, be sourced in the duty of a public authority under s 38 or another statutory provision, when construed in accordance with s 32(1).[39]

37 Reasons [158]–[159].
38 Ibid [160] (citations omitted).
39 Ibid [162].

64 With regards to the second and third questions, namely whether the decisions were compatible with the appellant's right to an effective investigation and whether the decision maker took into account the appellant's Charter rights when making his decision, the trial judge held that it was unnecessary to answer them considering she had rejected the implied right to an investigation and found that the PIA had ousted judicial review except for jurisdictional error.

65 As to question 5, whether the first decision was tainted by jurisdictional error, the trial judge noted the defendants conceded the first decision was unlawful because the BMC was not authorised to make the decision.

66 Finally, the trial judge examined the sixth question, whether the second decision was tainted by jurisdictional error. The appellant submitted the following three contentions to support his case at trial:

> 1. By the first decision, the OPI said that [Mr Bare's] complaint had been assessed by reference to a 'priority matrix'. [Mr Bare] relevantly sought review of the first decision on the basis that he had not been given notice of, or the opportunity to be heard about, the priority matrix. Mr Jevtovic then made the second decision without reference to the priority matrix, and did so without giving [Mr Bare] notice that the priority matrix would not be applied or an opportunity to be heard on whether it should be. Did that failure constitute a denial of procedural fairness?
> 2. Does section 10(b) of the Charter provide a new dimension of the public interest that must be considered by the Director when a complaint is made of cruel, inhuman or degrading treatment at the hands of police officers?
> 3. Does section 40(4)(b)(i) of the [*Police Integrity Act*] authorise the making of a decision that is incompatible with [Mr Bare's] right to an effective investigation of his complaint of cruel, inhuman or degrading treatment?[40]

67 Her Honour rejected the first contention, holding that while there may have been an expectation that the priority matrix would not apply, or that the matrix should have been provided to the appellant in order to allow him to make submissions on it, there was no resulting procedural unfairness. Further, the trial judge stated that a decision maker is not generally obliged to give prior notice of their thinking before they make their decision. In this case, procedural fairness did not demand that Mr Jevtovic inform the appellant of his view as to the adequacy of the material presented to him. Her Honour stated:

> Nor am I satisfied that the Director departed from any policy enshrined in the priority matrix, causing procedural unfairness as a result of any failure to solicit submissions from Mr Bare. He stated in his 19 October 2010 letter that he had examined all the material on the OPI file including correspondence from Mr Bare. He had considered the seriousness of the allegations made and the reference to s 10 of the Charter. In other words, he had considered the nature of the proposed investigation of the claims of breaches of Mr Bare's human rights not to be discriminated against on the basis of his race, under s 8, and not to be subjected

[40] Ibid [171].

> to cruel inhuman or degrading treatment under s 10(b). The material on the OPI file included the internal various assessments and reports, such as the PSAU preliminary assessment which identified the issues for consideration in relation to the determination required by s 40(4)(b)(i) of the Police Integrity Act. In that context, Mr Jevtovic concluded that there were no OPI policies or procedures which raised other issues for his consideration and that it was not necessary for him to use the tool to assess the priority of the matter.[41]

68 The trial judge dismissed the second contention that the Charter provided a new dimension of the public interest that the Director had to take into account under s 40(4)(b)(i). Her Honour accepted that s 32(1) of the Charter does provide a new dimension to the question of what is in the public interest, but held that there was no evidence that Mr Jevtovic had not taken into account Charter rights when assessing the public interest under s 40(4)(b)(i). This was particularly so considering the trial judge had not accepted that s 10(b) of the Charter included an implied right to an effective investigation.

69 Her Honour rejected the final contention on the basis that she had not found an implied right to an effective investigation and therefore it was unnecessary for her to deal with it.

Notice of Appeal

70 On 10 April 2013, the appellant filed a Notice of Appeal against the decision of the trial judge. IBAC (the second respondent) sought leave to have the names of Ms Small and Mr Jevtovic removed from the proceeding. As this was not opposed the Court granted leave to have the names removed and allowed the appellant to file an Amended Notice of Appeal. This was filed on 21 May 2014.[42]

71 That Notice of Appeal set out seven grounds of appeal:

> *Section 109 of the Police Integrity Act 2008*
>
> 1. The learned trial judge erred in holding that section 109 of the Police Integrity Act 2008 (the **PI Act**) prevents the Court from hearing and determining the Appellant's claim for a declaration that the purported decision communicated to the Appellant by the Third Respondent by a letter dated 19 October 2010 (the **decision**) was contrary to section 38 of the Charter of Rights and Responsibilities Act 2006 (the **Charter**).
> 2. The learned trial judge erred in failing to hold that the Court could hear and determine the Appellant's claim on the basis that:
>
> (a) the decision was a decision not to investigate the Appellant's complaint; and

41 Ibid [185].

42 Hereafter, all references to the Notice of Appeal refer to the Amended Notice of Appeal dated 21 May 2014. As a consequence of the removal of Ms Small and Mr Jevtovic as respondents, IBAC became the first respondent to the appeal, the Commission became the second respondent and the Attorney-General became the third respondent. In what follows I refer to IBAC as 'the respondent' and I continue to refer to the Commission as 'the Commission' and the Attorney-General for Victoria as 'the Attorney-General'.

(b) section 109 of the PI Act, properly construed and applied in the context of section 52 of the PI Act, does not apply to a decision of that kind.

3. The learned trial judge erred in failing to hold that the Court could hear and determine the Appellant's claim on the basis that:

(a) section 109 of the PI Act does not apply to a decision tainted by jurisdictional error; and

(b) if the decision breached section 38 of the Charter in the manner alleged then it involved an error of that kind.

Section 10(b) of the Charter - Effective Investigation

4. The learned trial judge erred in holding that the human right in section 10(b) of the Charter read in light of the Charter as a whole, does not include the right to an effective investigation of a credible claim of cruel, inhuman or degrading treatment.

5. The learned trial judge erred in failing to hold:

(a) the right under s 10(b) of the Charter read in light of the Charter as a whole, includes the right to an effective investigation of a credible claim of cruel, inhuman or degrading treatment; and

(b) an 'effective investigation' of a credible claim that members of the Victoria Police have breached section 10(b) of the Charter relevantly requires an investigation by an organisation that does not have hierarchical or institutional connection to Victoria Police and that has practical independence from Victoria Police.

Section 38(1) of the Charter — the Substantive Obligation

6. The learned trial judge erred in failing to hold that the decision was incompatible with the Appellant's right to an effective investigation of his complaint of cruel, inhuman or degrading treatment.

Section 38(1) of the Charter — the Procedural Obligation

7. The learned trial judge erred in failing to hold that, contrary to s 38(1) of the Charter, in making the decision the Third Respondent did not give proper consideration to the Appellant's right under:

(a) section 10(b) of the Charter to an effective investigation of a complaint of cruel, inhuman or degrading treatment, as that right is to be properly understood; and

(b) section 8(3) of the Charter to equal protection of the law without discrimination and equal and effective protection against discrimination.

72 During oral argument, the appellant (along with the Commission) sought to advance four main questions (these were largely accepted by all parties one way or another in submissions):

1. Did the privative clause in s 109 of the PIA preclude judicial review of Mr Jevtovic's decision for non-jurisdictional error of law?

2. Whether an act or decision made in contravention of s 38(1) of the Charter is necessarily affected by jurisdictional error?

3. Whether s 10(b) of the Charter includes a procedural right to an effective investigation of a credible complaint of cruel, inhuman or degrading treatment? WARREN CJ

4. Whether, in making the decision under challenge, Mr Jevtovic failed to give proper consideration to the procedural right under s 10(b) of the Charter and the equality rights in s 8(3) of the Charter?

73 I adopt those four questions as the pivotal questions in this appeal and deal with them in turn.

1. Does s 109 of the PIA preclude judicial review of Mr Jevtovic's decision for non-jurisdictional error of law?

74 The first question is whether s 109 of the PIA limits judicial review of the decision of Mr Jevtovic (as the delegate of the Director) not to investigate the appellant's complaint.

75 The appellant's main contention[43] was that s 109 of the PIA cannot be read in isolation. He submitted that a number of contextual factors limit its operation. In particular, the appellant relied on s 52 of the PIA and s 32 of the Charter as operating to limit the protection offered by s 109 of the PIA.

76 First, to recapitulate, s 52 of the PIA provides:

> **Application of Part**
>
> This Part applies for the purposes of an investigation by the Director under Part 3.

77 The appellant submitted that this section applies to the privative clause in s 109 in a way that limits the protection from judicial review only to acts that are made for the purpose of an investigation as opposed to any act done under the PIA. The appellant pointed to a number of other provisions within the PIA that have similar limiting effects. These included ss 38 and 43 which respectively limit the type of complaints that can be investigated and restrict the ability of the Director to conduct an investigation.

78 To illustrate this point, the appellant outlined how s 52 limits other provisions within pt 4. For example, s 53 provides for the issuing of witness summonses by the Director. Section 53(1) specifically sets out the types of summonses the Director may issue:

> (1) The Director may issue the following witness summonses—
>
> (a) a summons to attend an examination before the Director to give evidence;
>
> (b) a summons to attend at a specified time and place to produce specified documents or other things to the Director;
>
> (c) a summons to attend an examination before the Director to give evidence and produce specified documents or other things.

43 The Commission and the Attorney-General did not make submissions on this point.

79 Section 61(1) of the PIA then limits the instances in which the Director may conduct an examination. It provides:

> **61. Director may conduct examinations**
>
> (1) The Director may conduct an examination for the purposes of an investigation.

80 The appellant noted that the first and third type of summons involve an examination and therefore fall under the limiting provision of s 61, in other words, the summonses must be for the purpose of the examination. The appellant argued therefore that s 52 has work to do in limiting the operation of s 53(1)(b), the issuing of a witness summons seeking the production of documents. This is because the second type of summons does not involve an examination and therefore is not limited by s 61(1).

81 In applying this analogy to s 109, the appellant posited that the operative words of s 109 concern the protection from judicial review of 'any acts' purported to be done by the Director under the PIA. The appellant argued that in interpreting the term 'any acts' purported to be done by the Director, the Court must be mindful of the privative clause's operation throughout pt 4. In particular, he pointed to how s 109 interacts with ss 51A and 51B of the PIA. These sections concern the Director instigating criminal prosecutions and an immunity conferred on the exercise of that discretion. They provide:

> **51A Director and staff may prosecute**
>
> (1) The Director or a member of staff of the Office of Police Integrity authorised under subsection (2) may commence criminal proceedings against a person for an offence in relation to any matter arising out of an investigation.
>
> (2) The Director may authorise in writing a member of staff of the Office of Police Integrity to exercise powers under subsection (1)—
>
> (a) in relation to a specified person or specified investigation; or
>
> (b) generally.
>
> (3) Nothing in this section—
>
> (a) affects or limits the ability of a person other than the Director or a person authorised under subsection (2) to commence criminal proceedings against a person for an offence in relation to any matter arising out of an investigation; or
>
> (b) affects or limits the ability of the Director or a member of staff of the Office of Police Integrity to bring criminal proceedings against a person for any other offence.
>
> **51B Immunity**
>
> (1) The Director or a member of staff of the Office of Police Integrity authorised under section 51A(2) is not personally liable for anything necessarily or reasonably done or omitted to be done in good faith—
>
> (a) in the exercise of a power under section 51A(1); or
>
> (b) in the reasonable belief that the act or omission was in the exercise of a power under section 51A(1).
>
> (2) Any liability resulting from an act or omission that, but for subsection (1),

would attach to the Director or a member of staff of the Office of Police Integrity authorised under section 51A(2) attaches instead to the State. WARREN CJ

82 The appellant contended that the immunity which s 51B provides to an act done under s 51A would be useless if s 109 covered all acts purported be done by the Director under the PIA. He argued that the only way to read these sections together is in the context of s 52. This is because s 51A is not an act done for the purpose of an investigation, it is an act taken for the purpose of a prosecution. The appellant submitted that this tension can only be explained by construing s 109 as being limited by the operation of 52 and covering only acts done *for* the purpose of an investigation.

83 Having argued that s 52 limits the operation of s 109, the appellant argued that the expression 'any act' purported to be under the PIA, in s 109, covers only certain acts and decisions made in the process of initiating or conducting an investigation and does not extend to a decision not to investigate. The appellant's primary position was that acts done for the purpose of an investigation include acts to be done:

(i) for the purpose of a current investigation; or

(ii) for the purpose of a completed investigation; or

(iii) for the purpose of investigations generally.

84 The appellant therefore submitted that the privative clause only protects acts purportedly done for the purposes of an investigation by the Director into a specific complaint. His alternative position would also include an act purportedly done for the purpose of an investigation that may be conducted by the Director in the future. There was some concern expressed from the Bench during oral argument that the examination of the question of whether to conduct an investigation was a necessary link in conducting an investigation, regardless of whether the investigation proceeded. Counsel for the appellant responded by submitting that the focus should not be on the lead up to the decision; it must be on the decision itself, and that decision was to not investigate the appellant's complaint. Therefore, according to the appellant, the decision could not have been for the purpose of an investigation.

85 The appellant also pointed to some extrinsic material to support the proposition that s 109 should not be construed as applying to a decision not to investigate a complaint. The appellant referred specifically to the Second Reading Speech of the Minister for Police and Emergency Services on the introduction of the bill for the PIA,[44] and submitted that the Minister was concerned in particular with litigation aimed to impede or delay an investigation by the Director. Judicial review of a decision not to investigate, therefore, was not a mischief contemplated by those drafting s 109.

44 See [111].

86 In addition to the role of s 52, the appellant relied on the limiting effect of s 32 of the Charter. As noted above, s 32 is the interpretation clause of the Charter and it provides that all statutes, as far as possible, should be interpreted in a way that is compatible with human rights. The appellant submitted that it would be consistent with the purpose of the PIA to interpret s 109 in a way that is consistent with human rights, specifically by construing s 109 as only ousting judicial review in a restricted number of circumstances.

87 The respondent accepted that s 109 must be construed in its context. However, it submitted that when analysed in the context of pt 4 and the purpose of the legislation, s 109 does not support the construction preferred by the appellant.

88 The respondent submitted that the trial judge had three main strands of reasoning in rejecting the s 52 argument of the appellant. First, it noted that her Honour found that s 52 must be broad enough to cater for investigations that might be conducted in the future. The respondent argued that such a finding was uncontroversial; the trial judge simply looked at what the act was and her Honour found that it was the making of a decision on the question of whether to conduct an investigation, regardless of whether an investigation was initiated.

89 The respondent rejected the appellant's contextual point regarding the limiting effect of s 52 and other provisions in the PIA. It argued that ss 51A and 51B do not indicate that s 109 should be read down in light of s 52. The respondent posited that ss 51A and 51B really confirm a specific scheme relating to vicarious liability, and observed that s 51B(2) provides such an immunity to the Director or a member of the OPI. Counsel for the respondent described the provision ss 51A and 51B as a 'bolts and braces' provision, and further the respondent argued that ss 51A and 51B, and s 109 do not need to be mutually exclusive. It submitted that while both sets of provisions only allow a decision to be reviewed where there is bad faith, s 109 requires leave from the Court, whereas s 51B does not.

90 The respondent also relied on the second strand of the trial judge's reasoning in rejecting the appellant's construction. It submitted that her Honour was correct in relying on the extensive powers of the Director set out in s 6 of the PIA to support a broad reading of s 109. The respondent contended that s 52 is therefore supplementary as opposed to exclusionary. It argued that s 52 simply clarifies that pt 4 applies for the purpose of investigations that are conducted under pt 3.

91 The third strand of her Honour's reasoning was relied upon by the respondent to reject the appellant's argument that s 32 of the Charter supports a strict construction of s 109 of the PIA. The respondent argued that this position was not developed by the appellant and that it is unclear what Charter rights are to be taken into account in the process of construing s 109 as being compliant with the rights set out in the Charter. Further,

the respondent relied on the arguments it had already advanced as to the broad purpose of the legislation to submit that s 32 cannot be invoked in this instance as a narrow reading of the privative clause would be inconsistent with the purpose of the PIA.

92 Finally, the respondent contended that a number of other provisions in the PIA indicated that s 109 should be broadly construed. It noted that s 109(6) prevents a court from ordering the Director to conduct an investigation. It submitted that that subsection is a strong indication that the privative clause was intended to apply to the function of deciding whether or not to investigate, regardless of the outcome of that decision.

93 As I have explained, the appellant sought to advance two interrelated propositions. First, that in reading s 109 the Court should read down its protection to only cover acts done for the purpose of an investigation. Secondly, the decision not to conduct an investigation was not covered by s 109 as it was not an act done for the purpose of an investigation. It is convenient to deal first with the second proposition, because in my view, the conclusion on that proposition resolves the question.

Decision not to investigate

94 Even if s 109 is limited, as the appellant argued, to acts done for the purpose of an investigation, in my view the decision of the Director not to investigate the complaint nevertheless falls within the scope of the privative clause. This is for two reasons.

95 First, if one looks at the whole of s 109, it contemplates a broad conception of an investigation. Section 109(6) sets out that a court cannot compel or restrain the Director from carrying out an investigation. Specifically it provides:

> (6) Despite anything in this section:
>
> (a) an order cannot be issued restraining the Director from carrying out or compelling the Director to carry out any investigation; and
>
> (b) a proceeding cannot be brought against the Director seeking the issue of such an order.

96 If one takes the appellant's contention and applies it to s 109(6), the protection can only apply in respect of an act done for the purpose of an investigation. The protection provided by s 109(6), however, comprehends a decision not to investigate as being part of the process of an investigation. The appellant submitted that this can be explained as s 109(6) has work to do in a situation where a decision has been made to investigate but it is not then carried out. Such an interpretation is strained. Other provisions of the PIA make a distinction between instigating an investigation and continuing an investigation.[45]

45 See, eg, s 46.

97 Secondly, I reject the submission of the appellant that a read down privative clause only protects acts done for:

(i) the purpose of a current investigation; or

(ii) the purpose of a completed investigation; or

(iii) the purpose of investigations generally.

98 The appellant's distinction between a decision not to investigate and an act done for the purpose of an investigation is artificial. If one looks at the procedure outlined by the PIA it is clear that the process of investigating entails the exercise of an important discretion at the beginning of the process. Section 40(4) states that the Director has a choice to investigate in certain circumstances ie if he considers that it is in the public interest or in accordance with established practices or procedures. The provision gives the Director a discretion as to whether to investigate; it does not mandate an investigation. Therefore, the Director must first consider whether to investigate. During that process, before a decision has been made, the possibility of beginning an investigation is open. The availability of that option, in my view, provides the sufficient nexus between a decision not to investigate and an act done for the purpose of an investigation. A decision to investigate a complaint cannot occur without the Director exercising his discretion to investigate. The exercise of that discretion is clearly an act done for the purpose of a potential investigation, whether or not an investigation is later commenced.

Privative clause

99 Given my conclusion, it is unnecessary for me to determine whether the private clause has the broader scope contended for by the respondent. In view of the way each party developed their arguments, it is appropriate that I make some observations as to the breadth of the privative clause in s 109 of the PIA.

100 There cannot be any doubt that privative clauses should be narrowly construed.[46] In *Plaintiff S157/2002 v Commonwealth*,[47] the High Court concisely outlined the doctrine:

> The second basic rule, which applies to privative clauses generally, is that it is presumed that the Parliament does not intend to cut down the jurisdiction of the courts save to the extent that the legislation in question expressly so states or necessarily implies. Accordingly, privative clauses are strictly construed.[48]

101 Moreover, there is, as Dawson and Gaudron JJ noted in *Public Service Associ-*

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46 *Darling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602, 631; *Public Service Association (SA) v Federated Clerks Union* (1991) 173 CLR 132, 160; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 505; *Herald v Weekly Times Pty Ltd v A* (2005) 160 A Crim R 299, 300.

47 (2003) 211 CLR 476.

48 Ibid 505 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

ation (SA) v Federated Clerks Union:[49] WARREN CJ

> A presumption that the legislature does not intend to deprive the citizen of access to the court, other than to the extent expressly stated or necessarily implied.[50]

102 Taking into account these principles, it appears to me that s 109 should not be construed so narrowly as to allow judicial review of decisions of the Director for non-jurisdictional errors.[51] In drafting this clause, the legislature has indicated its intention to oust judicial review of the actions and decision of the Director. I say this for the following reasons.

103 First, while a privative clause must be strictly interpreted, the authorities make it clear that the central test for the Court is to ascertain the intention of the legislature in drafting the applicable section. The terms of s 109 are not drawn in general terms; they speak clearly to the mischief the section seeks to prevent. The terms of the privative clause set out the specific persons afforded the protection and the precise proceedings that fall within it.

104 Secondly, the terms of the provision have previously been held to oust judicial review. The trial judge thoroughly explored similar provisions in Victoria and New South Wales. To reiterate, the Court of Appeal in *Brouwer*[52] was tasked with interpreting s 12(3) of the *Witness Protection Act*, a privative clause. In reading down the privative clause, the Court distinguished the New South Wales case of *Ainsworth v The Ombudsman*[53] which concerned a privative clause in s 35A of the *Ombudsman Act*. Section 35A of that Act, as the trial judge noted,[54] is in similar terms to s 109:

> **35A Immunity of Ombudsman and others**
>
> (1) The Ombudsman shall not, nor shall an officer of the Ombudsman, be liable, whether on the ground of want of jurisdiction or on any other ground, to any civil or criminal proceedings in respect of any act, matter or thing done or omitted to be done for the purpose of executing this or any other Act unless the act, matter or thing was done, or omitted to be done, in bad faith.
>
> (2) Civil or criminal proceedings in respect of any act or omission referred to in subsection (1) shall not be brought against the Ombudsman or an officer of the Ombudsman without the leave of the Supreme Court.
>
> (3) The Supreme Court shall not grant leave under subsection (2) unless it is satisfied that there is substantial ground for the contention that the person to be proceeded against has acted, or omitted to act, in bad faith.

105 In distinguishing the opinion of Enderby J in *Ainsworth*, the Victorian Court of Appeal in *Brouwer* held that s 12(3) of the *Witness Protection Act* did not contain the key words found in s 35A of the *Ombudsman Act* regarding want of jurisdiction. Their Honours held:

> Nor, more importantly, does s 12(3) of the Act contain any equivalent of the critical

49 (1991) 173 CLR 132.
50 Ibid 160
51 See *Kirk* (2010) 239 CLR 531.
52 (2007) 16 VR 612 (***A1 & A2***).
53 (1988) 17 NSWLR 276 (***Ainsworth***).
54 Reasons [68].

words in s 35A(l) ('whether on the ground of want of jurisdiction or on any other ground'). Those words clearly signified the intention of the New South Wales Parliament to oust judicial review.

106 Hence, their Honours in *Brouwer* held that the words found in s 35A of the *Ombudsman Act* evinced a clear legislative intention to oust judicial review, as opposed to the wording 12(3) of the *Witness Protection Act*. Applying the same principles here, it follows that a provision with similar terms such as s 109 of the PIA demonstrates a similar if not identical intention to oust judicial review, except on the grounds of jurisdictional error.

107 Thirdly, in assessing the legislative context, I would be reluctant to adopt the submission of the appellant that s 109 only covers acts that are done for the purpose of an investigation. While s 52 of the PIA notes that pt 4 applies for the purpose of an investigation by the Director under pt 3, there is no indication that that section is limiting. In fact, it appears to be supplementary. Section 52 on its face sets out that the provisions of pt 4 apply for the purpose of an investigation carried out under pt 3; it supplements the powers of the Director *when* he is conducting an investigation. Such an approach makes practical sense as pt 4 deals with specific powers of the Director such as seizing documents (s 89), search warrants (ss 93 and 94), and the authority to possess firearms (s 103).

108 Further, in my view, ss 51A and 51B do not assist the appellant's submission. While s 109 provides a general protection, s 51B, which sets out immunity for the Director for prosecutions, still has work to do. This is for two reasons. First, s 51B deals with the issue of vicarious liability for prosecutions carried on behalf of the Director. It deals with a specific situation of prosecutions done on behalf of the Director as opposed to any act purported to be done under the PIA. Secondly, the section differs as to the leave requirements to impugn an act done in bad faith. Section 109 sets out that a party must seek leave from the Court to question an act done under the PIA that was done in bad faith; s 51B does not set out such a requirement when seeking to impugn a prosecution that was initiated in bad faith. While there is some overlap in the provisions, it does not follow that s 109 should be read down so as to only cover acts for the purpose of an investigation. The provisions relied upon by the appellant do not advance his contention, and there are contrary provisions, that I set out below, which indicate that a broad protection is provided by s 109.

109 Fourthly, as the trial judge noted in her reasons, there are other sections in the PIA which indicate that s 109 should not be read down so as to give it a strained construction. In interpreting legislation it is important to turn to the preliminary sections which often set out the objects and purpose of both the Act and key bodies established by the Act.[55] In this case, ss 6 and 8 of the PIA helpfully set out the functions and powers of the Director:

55 See *Wacando v Commonwealth* (1981) 148 CLR 1, 15–16 (Gibbs CJ); *Russo v Aiello* (2003) 215 CLR 643, 645 (Gleeson CJ).

6 Functions and powers

(1) The Office of Police Integrity has the functions conferred on it by this Act or any other Act.

(2) Without limiting the functions of the Office, those functions include —

(a) analysing and using intelligence collected by the Director and members of staff of the Office in support of investigations into police corruption and serious misconduct;

(b) analysing systems used within Victoria Police to prevent police corruption and serious misconduct;

(c) providing information and advice to, and consulting with, Victoria Police to increase the capacity of Victoria Police to prevent police corruption and serious misconduct;

(d) publicly exposing police corruption and serious misconduct;

(e) providing information to the general community about the performance of the functions of the Office and of the Director.

(3) The Office has power to do all things that are necessary or convenient to be done for or in connection with the performance of its functions.

8 Objects, functions and powers of Director

(1) The objects of the Director are —

(a) to ensure that the highest ethical and professional standards are maintained in Victoria Police; and

(b) to ensure that police corruption and serious misconduct are detected, investigated and prevented; and

(c) to educate Victoria Police and the general community regarding police corruption and serious misconduct, including the effect of police corruption and serious misconduct; and

(d) to ensure that members of Victoria Police have regard to the human rights set out in the Charter of Human Rights and Responsibilities.

(2) The Director has the functions conferred on the Director by this Act or any other Act.

(3) The Director has power to do all things that are necessary or convenient to be done for or in connection with the performance of his or her functions.

110 The fact that the Director has a number of separate and distinct functions points away from the conclusion that the privative clause is limited to acts done for the purpose of an investigation. If the appellant's contention was upheld it may lead to a perverse result where the Director would only be protected by the privative clause for one of a number of key functions. Such an approach would undermine not just the function of the Director, but also the very purpose for the existence of the Director as envisaged by the legislature.

111 Fifthly, the legislative background suggests that s 109 was intended to oust judicial review proceedings for any purported act done under the PIA except for actions done in bad faith or where there is a critical incident. In his Second Reading Speech, the Minister for Police and Emergency Services outlined the role of judicial review in relation to the PIA:

> Under the Police Regulation Act 1958 the Supreme Court is able to review actions of the director and officers of the OPI that are performed in bad faith. The court is also able to determine whether the director has the jurisdiction to investigate a complaint. These provisions are retained in the bill. The narrow scope to review the OPI' s actions is comparable with arrangements for most similar bodies in other Australian jurisdictions.
>
> The Fitzgerald (Queensland) and Wood (New South Wales) royal commissions on police corruption found that review of the actions of investigatory bodies by the courts can lead to significant delays that prevent their effective operation and the conduct of their investigations. These royal commissions reported that judicial review should not be used to improperly reveal activities of anticorruption bodies.
>
> It is appropriate to retain the existing limitation on the courts' scope to review the OPI' s actions. This prevents legal actions designed to impede and delay OPI investigations. The proposed provision is consistent with the protection of the Ombudsman and his officers under the Ombudsman Act 1973. A re-enactment of the current provision is also consistent with the level of statutory protection given to the director's predecessors.[56]

112 While the appellant relies on the final paragraph in the quote above to support his argument, it does not appear to advance his case. The Minister was concerned with the potential for impediments to investigatory function of the Director; seeking to review a decision of the Director not to investigate would also impede the general process of investigations in which the Director is engaged. Further, in his s 85 statement under the *Constitution Act 1975* (Vic), the Minister outlined that the intention of s 109 was to limit challenges to protected persons to those concerning acts done in bad faith:

> The protection of these persons is required to prevent the director's investigations from being impeded by legal challenges and proceedings on grounds other than allegations of bad faith. The existing protection in the Police Regulation Act 1958 has been successful in allowing the director and OPI staff to perform their current functions, and the protection afforded to them under the current law should continue for that reason ...
>
> Both clause 109 and the proposed section 86KJ provide the protection necessary for the director and staff of the OPI to perform their significant public functions properly and efficiently, without the prospect of delay or interference by legal actions, on grounds other than allegations of bad faith.[57]

113 Finally I note that the appellant submitted that s 109 should be read down pursuant to s 32(1) of the Charter, which provides that all statutory provisions, as far as possible, should be interpreted in a way that is compatible with human rights. The appellant contended that the clause should be read down to allow claims brought under s 38(1) for non-jurisdictional errors of law. The respondent submitted that s 32(1) has no work to do in interpreting the privative clause as it does not enable a court to interpret legislation in a way that would defeat the intended purpose of the provision. In my view, the trial judge's findings on the applicability and effect of s 32(1) of the Charter

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56 Victoria, *Parliamentary Debates,* Legislative Assembly, 13 March 2008, 850 (Bob Cameron).

57 Ibid.

in interpreting the privative clause are unimpeachable.[58] The High Court made it clear in *Momcilovic* that s 32(1) does not require or authorise a court to depart from the ordinary meaning of a statutory provision: WARREN CJ

> Where it is possible, consistently with a statute's purpose, s 32(1) requires that all statutory provisions are to be read conformably with Charter rights. Section 32(3)(a) acknowledges that this may not be possible in all cases, by providing that s 32(1) does not affect the validity of an Act or a provision of an Act which is incompatible with a human right. It cannot therefore be said that s 32(1) requires the language of a section to be strained to effect consistency with the Charter. When a provision cannot be construed consistently with the Charter, the provision stands.[59]

114 In my view, s 109 of the PIA suggests a legislative intention to oust judicial review of decisions made by the Director of the OPI. Section 32(1) of the Charter is of no assistance to the appellant's submission on this point.

115 It follows, therefore, that I would answer yes to question 1. Her Honour did not err.

2. Is an act or decision made in contravention of s 38(1) of the Charter necessarily affected by jurisdictional error?

116 In light of the conclusions I have reached, for the appellant to succeed on this appeal, he must show that an unlawful act under s 38(1) amounts to jurisdictional error and is thus unaffected by the privative clause in s 109 of the PIA.[60]

Commission's submissions

117 The Commission advanced this area of the argument which was adopted by the appellant. The Commission's main contention was that the trial judge erred in using the *Project Blue Sky* invalidity test, instead of the appropriate test regarding failure to take into account a relevant consideration as outlined in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*[61] and *Craig v South Australia*.[62] The Commission argued that s 38(1) did not place a condition on the exercise of power by a public authority; instead it mandated a consideration that must be taken into account, and failure to do so meant that the decision was made without jurisdiction.

118 The Commission conceded that the test for ascertaining whether a statute is a mandatory consideration or whether it is a precondition to the exercise of power is similar.[63] In establishing invalidity, the High Court in both

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58 Reasons [88]; see also *Slaveski v Smith* [2012] VSCA 25 [20]; citing *Momcilovic* (2011) 245 CLR 1, 36 [18], 50 [51] (French CJ), 213 [554], 217 [565]–[566] (Crennan and Kiefel JJ), 92 [170] (Gummow J), 123 [280] (Hayne J), 250 [684].

59 *Momcilovic* (2011) 245 CLR 1, 217 [566] (Crennan and Keifel JJ).

60 See *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531.

61 (1986) 162 CLR 24, 40 (Mason J).

62 (1995) 184 CLR 163, 179 (Brennan, Deane Toohey, Gaudron and McHugh JJ)(***Craig***).

63 Citing *Project Blue Sky* (1998) 194 CLR 355, 391; *Peko-Wallsend* (1986) 162 CLR 24, 39–40.

Project Blue Sky and *Peko-Wallsend* point to the importance of understanding the purpose of the legislature, and its intention when drafting the specific statute. The Commission, however, argued that the trial judge failed to properly comprehend the nature of the requirement in s 38(1).

119 The Commission advanced this point in two ways. First, the Commission submitted that the term 'unlawful' is more appropriately understood as directing a decision maker to take into account human rights under the procedural limb of s 38(1). It relied on a number of cases that have considered the nature of jurisdictional error and submitted that these cases set out the applicable test.[64] In particular, the Commission referred to the decision of the High Court in *Craig*, where the Court held:

> If such an administrative tribunal falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it.[65]

120 Secondly, it contended that s 38(1) is written as a prohibition as opposed to regulating functions already conferred by statute. Therefore, it argued, it was unlike the legislation at issue in *Project Blue Sky* which provided that the relevant statutory authority should perform its functions in compliance with any agreement between Australia and a foreign country. In effect, the Commission submitted that the term unlawful is a clear concept used by the legislature to indicate its intention that acts done contrary to such a direction are without authorisation and therefore invalid. Thus, the Commission contended, a contrary interpretation would mean that a public authority may choose to do an unlawful act and it would not amount to invalidity in certain circumstances. The Commission relied on the decision of the House of Lords in *Attorney-General's Reference (No 2 of 2001)*[66] to support its point. In that case the House of Lords was interpreting the effect of a breach of a right under the ECHR (the right to a fair trial) and the United Kingdom's version of s 38(1), namely s 6(1) of the HRA. That section provides that '[i]t is unlawful for a public authority to act in a way which is incompatible with a Convention right'. In dismissing the proposition that an unlawful act could stand as valid, Lord Bingham held:

> I cannot accept that it can ever be proper for a court, whose purpose is to uphold, vindicate and apply the law, to act in a manner which a statute (here, section 6 of the Human Rights Act 1998) declared to be unlawful.[67]

121 The Commission objected to the trial judge's description of its argument

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64 See *Peko-Wallsend* (1986) 162 CLR 24, 39–40; *Craig* (1995) 184 CLR 163, 179; *Kirk* (2010) 239 CLR 531, 573–4; *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323, 351.

65 *Craig* (1995) 184 CLR 163, 179 (Brennan, Deane, Toohey, Gaudron, McHugh JJ).

66 [2004] 2 AC 72 (***AG's Reference***).

67 Ibid 92; see also 116–17 (Lord Hobhouse).

as circular. It argued that it is only circular if there is a difference between a legislature stating that human rights must be considered and stating that it is unlawful for a public authority to fail to give consideration to human rights. It is only different, according to the Commission, if a public authority can choose to elect to act 'unlawfully'. It submitted that such an interpretation was contrary to the rule of law and would be internally inconsistent with the objects of the Charter which seek to impose an obligation on all public authorities to act compatibly with human rights.[68] WARREN CJ

122 The Commission's final step in this argument sought to extend the analysis to include the substantive limb of s 38(1). The Commission argued that once one accepts that a breach of the procedural limb amounted to jurisdictional error, it follows that an act done in breach of a Charter right must also result in invalidity. This was for three reasons. First, the word 'unlawful' should have one meaning within s 38(1); secondly, the legislature is unlikely to have intended that failing to consider human rights results in invalidity but that an action that actually breaches those rights would not; and thirdly, the exceptions to the application of s 38(1) in sub-ss (2), (3) and (4) indicate that s 38(1) should be strictly complied with.

123 In the event that the Commission was wrong, and the test in *Craig* was not applicable, it contended that s 38(1) still contained the 'rule-like quality' that is so essential to the test in *Project Blue Sky*.[69] It relied on its submissions regarding the prohibitive nature of the term unlawful to substantiate this point.

124 Following the Commission's main submission, it pointed to a number of factors to indicate that a breach of s 38(1) amounted to jurisdictional error. First, it argued that to allow the government to be able to make unlawful decisions would lead to a perverse outcome and remove the normative power of the Charter. The Commission submitted that the prohibitive nature falls away when a breach of s 38(1) does not amount to jurisdictional error as a majority of the remedies available under s 39(1) of the Charter are generally only available for jurisdictional error. During oral argument, this Court noted that injunctions, declarations and certiorari for error on the face of the record would still be available under O 56 of the *Supreme Court (General Civil Procedure) Rules 2005* (**The Rules**). The Commission accepted these remedies were available for non-jurisdictional error, but submitted that they would only be relevant where either the breach had not yet occurred, or where there was a record of the decision maker's decision. It argued that those cases were limited.

125 Secondly, the Commission averred that the term 'unlawful' in s 39(1) should be viewed in a similar way as s 38(1). It submitted that while the meaning of s 39(1) is unsettled, it is logical to interpret it as giving rise to a clear and separate claim for a breach of s 38(1). The Commission relied upon

68 See s 1(2)(c) of the Charter.

69 *Project Blue Sky* (1998) 194 CLR 355, 391 [95].

the statement made in obiter by Weinberg JA in *Sudi* to support its case. In discussing the nature of s 39(1) in *Sudi*, Weinberg JA stated:

> It was anticipated by the drafters of the Charter that there would be some expansion in the field of existing administrative law remedies as the basis upon which human rights could be enforced. In this State, that effectively means that the supervisory jurisdiction of the Supreme Court, using the procedure in O 56 of the *Supreme Court (General Civil Procedure) Rules 2005*, as well as this Court's powers to grant declaratory and injunctive relief, can be invoked by way of Charter protection.[70]

126 The Commission argued that the Charter expanded administrative law remedies to allow a claimant to bring an action on the basis of a breach of s 38(1) without needing to rely on another cause of action. This outcome, it submitted, would bring consistency between ss 38(1) and 39(1). It contended that the legislature could not have intended that s 39(1) be exclusionary, to imply such a requirement would limit the availability of a remedy to instances where the decision maker happened to make another error that was reviewable on non-Charter grounds.

127 Thirdly, the Commission contended that if the Court were to find that s 38(1) gave rise to invalidity it would not, unlike the findings of the trial judge, impede the administration of justice within Victoria. The Commission noted that there were a number of jurisdictions around the world where courts adjudicate numerous challenges to decisions by public authorities to ensure their compatibility with human rights. It submitted that the Court should not be swayed by the arguments of the respondent and the Attorney-General regarding the supposed chaos that would ensue from finding that a breach of s 38(1) amounted to jurisdictional error.

IBAC and the Attorney-General's submissions

128 Both the respondent and the Attorney-General submitted that a breach of s 38(1) did not give rise to invalidity. The respondent's main argument focused on the intention of the legislature, and the words used in s 38(1). It argued that s 38(1) specifically uses the term 'unlawful' and does not state that an action done in breach of s 38(1) is invalid. It argued that if the legislature intended that such an action would be invalid it would have explicitly provided for that outcome. Furthermore, it argued that the terms of s 38(1) do not impose a duty on a decision maker, or in the words of the majority in *Project Blue Sky*, the statute does not impose 'essential preliminaries'[71] on the exercise of the functions of a public authority. Rather, the respondent submitted that s 38(1) properly construed, regulates the exercise of functions that are already conferred onto public authorities.[72] In support of this proposition the respondent noted that the majority in *Project Blue Sky*

70 *Sudi* (2011) 33 VR 559, 596.
71 *Project Blue Sky* (1998) 194 CLR 355, 391 [94].
72 Ibid.

expressly held that the term 'unlawful' did not necessarily mean invalid.[73] WARREN CJ

129 The Attorney-General made a similar submission and focused on the specific test laid down in *Project Blue Sky.* He relied on the fact that in that case, the High Court held that in determining whether an act done by a decision maker was invalid, regard must be had to 'the language of the relevant provision and the scope and object of the whole statute.'[74] In particular, the High Court focused on whether a relevant provision was a precondition to the exercise of power, or simply a condition regulating a power already conferred.[75] In making his submissions, the Attorney-General noted the decision of McHugh J in *SAAP v Minister for Immigration and Multicultural Affairs*,[76] which outlined the difficulty in ascertaining the intention of the legislature:

> The question is whether failure to comply with that section gives rise to jurisdictional error such that the decision of the Tribunal is invalidated. To answer this question, it is necessary to have regard to 'the language of the relevant provision and the scope and object of the whole statute' in order to ascertain whether the Parliament intended that an act done in breach of s 424A is invalid. The question is not easy to answer.[77]

130 The Attorney-General submitted that the Commission's argument on this question was an attempt to steer the Court away from the real issue. He contended that the key question in assessing whether 'unlawful' meant 'invalid' was to look at the intention of the legislature. The respondent supplemented this point by submitting that since *Project Blue Sky*, *Craig* must be understood as referring to considerations required by law to be taken into account as preconditions of validity. Thus, it was argued, the Commission's attempt to separate the two was misconceived.

131 In assessing the legislative purpose, the respondent and the Attorney-General pointed to a number of factors. First, the respondent submitted that the Court should not read language into the Charter that is plainly not there. It submitted that the legislature should be taken to have comprehended the decision in *Project Blue Sky* and to have decided not to use the term 'invalid'; instead it specifically chose a term that the High Court had held did not necessarily mean 'invalid'. Further the respondent argued that the text of s 38(1) should not be seen as negating statutory authority that is already conferred upon a public body, this is because the Court should not presume, without express intention, that the legislature sought to invalidate an action that would, without the Charter, be considered within power.

132 Secondly, the respondent argued that the obligations contained in s 38(1) do not contain the 'rule-like quality' which, according to *Project Blue Sky*, is a

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73 Ibid 393 [100].
74 Ibid 391 [93].
75 Ibid 391 [94].
76 (2005) 228 CLR 294.
77 Ibid 319 [73].

key factor relevant to whether a breach amounts to jurisdictional error. It contended that the requirements in s 38(1) and rights contained within the Charter are imprecise. This was strengthened, according to the respondent, by a number of provisions within the Charter that undermine the supposed prohibitive force of s 38(1). In particular, the respondent referred to the limiting provision in s 7(2), which provides that Charter rights may be limited in certain circumstances. Further, it argued that the exclusions set out in ss 38(2)–(4) indicate that the obligations within s 38(1) are limited. Therefore, the respondent submitted, the imprecise nature of the obligations under s 38(1) and the difficulty in ascertaining the nature of the rights protect by the Charter point against a legislative intention of invalidity.

133 Thirdly, both the respondent and the Attorney-General relied on s 39(1) to indicate that 'unlawful' should be read consistently between the provisions. The respondent submitted that there was even less indication that the term 'unlawful' in s 39(1) meant 'invalid' as the remedies provided for by that section include remedies for both jurisdictional and non-jurisdictional error.[78] In particular, the Attorney-General pointed to the fact that both injunctions and declarations are available remedies, as well as certiorari on the face of the record, which is a broad remedy available for non-jurisdictional error.[79]

134 The respondent supplemented this point by arguing that s 39(1) did not give rise to a separate claim for judicial review, but instead was a conditional provision which only allows review if a complainant could show another error by the public authority. The respondent referred to the decision of Bell J in *PJB v Melbourne Health*,[80] where his Honour recognised that s 39(1) does not give rise to a separate cause of action:

> Section 39(1) does not create a new cause of action or other proceeding for obtaining a relief or remedy in respect of unlawfulness arising under the Charter. It attaches unlawfulness arising under the Charter as a ground to existing causes of action or proceedings by which relief or remedy may be obtained in respect of the act or decision on a ground of unlawfulness arising otherwise than because of the Charter. It then operates to make that relief or remedy available in that cause of action or proceeding on the ground of unlawfulness arising under the Charter, whether or not that relief or remedy is granted on a ground of unlawfulness not arising in that way. The capacity of parties to rely on incompatibility with human rights in legal proceedings, the authority of courts and tribunals (having the jurisdiction) to grant relief or remedy where unlawfulness on that ground is established and the human rights protection of the community have been enhanced to that significant extent.[81]

135 Further, the Attorney-General noted that the Explanatory Memorandum when discussing s 39(1) specifically states that the section 'does not create any new or independent right to relief or a remedy if there is nothing more

78 See *Supreme Court (General Civil Procedure) Rules 2005*, O 56.
79 See s 10 of the *Administrative Law Act 1978* (Vic).
80 [2011] VSC 327.
81 Ibid [297].

than a breach of a right protected under Part 2'.[82]

136 Fourthly, the Attorney-General submitted that the construction supported by the Commission had the potential of 'creating havoc' for the administration of government across Victoria. For example, the Attorney-General noted that s 25(2) of the Charter provides for the right to be tried without delay. He argued that if the Court accepted the proposed interpretation supported by the appellant and the Commission, an unreasonable delay by the Director of Public Prosecutions, for example, would be invalid for want of jurisdiction. The Attorney-General submitted that such a dramatic consequence could not possibly be the intention of the legislature, especially without clear and specific language to that effect.

137 Fifthly, the respondent rejected the Commission's argument that a limited interpretation of s 38(1) would remove the normative benefits of the Charter. First, it noted that there were still a number of remedies available for breach of s 38(1) as outlined above. Secondly, the respondent contended that the normative influence of s 38(1) on government decision makers would still exist. It pointed to the decision of Spigelman CJ in *Smith v Wyong Shire Council*,[83] which looked at whether the failure to comply with certain conditions under residential planning regulations would invalidate the decision of a Minister to grant a planning permission authority. In responding to a similar argument regarding the normative force of a finding of jurisdiction error, Spigelman CJ stated:

> The purpose of the scheme of s117 Directions is to ensure that the policies reflected in the 'principles' contained in a Direction, or in the 'provisions' to give effect to such 'principles, aims, objectives or policies', are in fact implemented by councils, at the stage before public exhibition. I do not doubt that councils will, generally, comply with Directions. I do not, given the relationship in this State between the Minister and councils, believe that the threat of invalidating a council LEP [Local Environmental Plan] is required to ensure that councils are deterred from non-compliance. To use McHugh JA's formulation from *Woods v Bate*, this is not a case in which 'the purpose of a provision can only be achieved by invalidating the result'.[84]

138 Finally, the respondent submitted that the Commission's reliance on UK case law regarding invalidity is erroneous. It argued first that at its highest, *AG's Reference* is unclear and ambiguous as to the effect of the term 'unlawful' within the HRA. Secondly, it submitted that the administrative law context in the United Kingdom is fundamentally different to that in Australia. In particular it noted that any errors of law made by a decision maker renders a decision *ultra vires*,[85] a position that has not been followed in Australia.[86] Thirdly, the respondent noted a number of important differences between

82 Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 28.
83 [2003] NSWCA 322.
84 Ibid [45] (citation omitted).
85 *R v Hull University Visitor; Ex Parte Page* [1993] AC 628, 693, 702.
86 *Kirk* (2010) 239 CLR 531, 571 [65].

the HRA and the Charter, in particular the right to a standalone remedy in the HRA under s 7(1) and the limiting provision in the Charter under s 7(2). Those differences, it submitted, meant that the reliance on the UK cases describing 'unlawful' action as invalid was inappropriate.

Conclusion

139 In my view, the trial judge applied the appropriate test in finding that a breach of s 38(1) did not amount to jurisdictional error. There is no indication that it was the intention of the legislature in drafting the Charter, and specifically in drafting s 38(1), that a decision by a public authority that did not properly consider a Charter right, or that breached a Charter right would be invalid.

140 In coming to this conclusion, it is important to set out the appropriate test, and its interaction with other administrative law principles, in particular those set out in *Peko-Wallsend* and *Craig*. In *Project Blue Sky*, the High Court was concerned about the legislative regime regulating the Australian Broadcasting Authority (**ABA**), and its ability to issue minimum content standards regarding Australian programs. Section 122(1)(a) of the *Broadcasting Services Act 1992* (Cth) (**BSA**) required the ABA to determine standards to be applied to commercial broadcasting licences, while para (b) provided that those standards were to relate to Australian content. Section 122(4) provided that the standards must not be inconsistent with the BSA or the regulations. Further, s 160(d) of the BSA required that the ABA perform its functions in a manner consistent with Australia's obligations under any agreement between Australia and a foreign country. In January 1996 the ABA set a minimum standard for Australian content that breached Australia's obligations to New Zealand under the Australia New Zealand Closer Economic Relations Trade Agreement 1983. In determining whether a breach of s 160 gave rise to jurisdictional error the High Court eschewed the previous test, which focused on whether the language used in the statute was a directory or mandatory requirement. Instead the plurality held:

> That being so, a court, determining the validity of an act done in breach of a statutory provision, may easily focus on the wrong factors if it asks itself whether compliance with the provision is mandatory or directory and, if directory, whether there has been substantial compliance with the provision. A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid.[87]

141 In determining the purpose of the legislation their Honours stated:

> The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of the condition. Unfortunately, a finding of purpose or no purpose in this context often reflects a contestable judgment. The cases show various factors that have proved decisive in various contexts, but they do no more than provide guidance in analogous circumstances. There is no

87 *Project Blue Sky* (1998) 194 CLR 355, 390 [93].

> decisive rule that can be applied; there is not even a ranking of relevant factors or categories to give guidance on the issue.[88]

142 In finding that a breach of s 160 of the BSA did not amount to invalidity, the High Court looked at a number of factors, including whether the section regarded the exercise of functions already conferred or imposed an essential preliminary to the exercise of the function,[89] and whether s 160 had 'a rule-like quality which can be easily identified and applied.'[90]

143 I do not accept the Commission's submission that this process is inapplicable to the case currently before this Court. *Project Blue Sky* makes clear that the key consideration in assessing validity is whether it was the purpose of the legislation that the relevant requirement be an element of the conferral of the power. Regardless of whether the statute uses terms that are prohibitive or directory. In fact the High Court specifically rejected such an approach by dismissing the previous focus on whether a statutory requirement was directory or mandatory. Moreover, the language used in s 160 of the BSA is not so different from s 38(1) of the Charter as to render the *Project Blue Sky* test inapplicable. Both statutes seek to direct a repository of statutory power to act in a certain way.

144 Even if the trial judge applied the incorrect test, the authorities make it clear that in determining invalidity in an administrative law context the focus is on the intention of the legislature as to whether an act done in breach should result in invalidity.[91] This occurs whether or not one understands the issue as one involving mandatory consideration, or a statutory requirement that is a necessary precondition to the exercise of a function. This was usefully explained by one commentator:

> It is not a matter of identifying whether there is jurisdictional error and then asking if such error was intended to lead to invalidity. For they are two sides of the same coin. One could ask if there has been error or non-compliance with the express or implied requirements of the statute. If there has been, the question then is whether it was intended that such error lead to invalidity. If it was, then any error is jurisdictional. If it was not then, at least in general, any error will not be jurisdictional. The *Project Blue Sky* question thus arises whenever any statutory requirement has not been fulfilled, and it is inherent in identifying jurisdictional error.[92]

145 To my mind it is clear, in accordance with the arguments of the respondent and the Attorney-General, that the decisions in *Peko-Wallsend* and *Craig* must be understood in light of the High Court's decision in *Project Blue Sky*. The issue, therefore, is to determine whether the legislature intended that non-compliance with s 38(1) would lead to invalidity. For the reasons that

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88 Ibid 388–9 [91] (McHugh, Gummow, Kirby and Hayne JJ) (citation omitted).

89 Ibid 391 [94].

90 Ibid 391 [95].

91 See *Peko-Wallsend* (1986) 162 CLR 24, 39–42; *Project Blue Sky* (1998) 194 CLR 355, 390 [93].

92 Jeremy Kirk, 'The Concept of Jurisdictional Error' in Neil Williams (ed), *Key Issues in Judicial Review* (Federation Press, 2015) 11, 16–7.

follow, I do not reach that view.

146 First, if one looks at the language used in s 38(1), it not clear that the legislature intended that conduct in breach of the provision would be invalid. It has to be assumed that when enacting the Charter the legislature was cognisant of the decision in *Project Blue Sky* and the High Court's position in finding that 'unlawful' did not necessarily mean 'invalid'.[93] Moreover, the obligation contained in s 38(1) lacks the 'rule-like quality' that is central to identifying a breach and corresponding invalidity. This is evidenced in a number of ways throughout the Charter, namely in the balancing provision in s 7(2) of the Charter which enables Charter rights to be read down in specific circumstances, the limiting provisions in ss 38(2)–(4) which indicate the limited and imprecise nature of s 38(1), and in the restriction on the availability of remedies as set out in s 39(1). In addition, the test for when a breach will occur for failing to take into account a Charter right supports the view that s 38(1) lacks a 'rule-like quality'. In *Castles v Secretary, Department of Justice*,[94] Emerton J discussed the obligation to give proper consideration to a Charter right by a public authority, as follows:

> The requirement in s 38(1) to give proper consideration to human rights must be read in the context of the Charter as a whole, and its purposes. The Charter is intended to apply to the plethora of decisions made by public authorities of all kinds. The consideration of human rights is intended to become part of decision-making processes at all levels of government. It is therefore intended to become a 'common or garden' activity for persons working in the public sector, both senior and junior. In these circumstances, proper consideration of human rights should not be a sophisticated legal exercise. Proper consideration need not involve formally identifying the 'correct' rights or explaining their content by reference to legal principles or jurisprudence. Rather, proper consideration will involve understanding in general terms which of the rights of the person affected by the decision may be relevant and whether, and if so how, those rights will be interfered with by the decision that is made. As part of the exercise of justification, proper consideration will involve balancing competing private and public interests. There is no formula for such an exercise, and it should not be scrutinised over-zealously by the courts.[95]

147 The description of proper consideration being a 'common or garden' activity indicates the general nature of the requirement which points away from s 38(1) as having a 'rule-like quality'.

148 I accept, as the respondent and the Attorney-General argued, that the decision of the House of Lords in *AG's Reference* is of little relevance to the present matter. First, while the HRA and the Charter have a number of similarities, the Charter has significant distinguishing features. It has a limiting provision which allows courts to read down Charter rights and while the HRA provides a specific standalone cause of action, the Charter does not. Secondly, the distinction between jurisdictional and non-jurisdictional

93 *Project Blue Sky* (1998) 194 CLR 355, 393 [100].
94 (2010) 28 VR 141 (***Castles***).
95 Ibid 184 [185].

error in Australia is fundamentally different to the distinction in the United Kingdom.[96] Finally, the opinions in *AG's Reference* are not uniform in their conclusion that an unlawful act must be considered invalid. In fact both Lord Millett and Lord Rodger disagreed with that conclusion.[97] Lord Millet held: WARREN CJ

> My Lords, it is essential to keep in mind the difference between what the state authorities ought to do and what they are entitled to do. They *ought* to hold the trial within a reasonable time, and if they fail to do so they commit a breach of the defendant's Convention rights. But they remain *entitled* to hold the trial after the reasonable time has expired, though they must make adequate reparation for their failure to hold it sooner; and they do not act incompatibly with the defendant's Convention rights by doing so.
>
> It follows that it is not unlawful (in England) or ultra vires (in Scotland) to proceed to trial despite the unreasonable delay.[98]

149 Secondly, it appears that it was not the purpose of s 38(1) or the broader Charter to render invalid any act that breached it. As noted by the trial judge, the Attorney-General's Second Reading Speech seems to support the construction preferred by the respondent. The Attorney-General stated:

> This is a key provision of the charter. It seeks to ensure that human rights are observed in administrative practice and the development of policy within the public sector without the need for recourse to the courts. The experience in other jurisdictions which have used this model is that it is in the area of administrative compliance that the real success story of human rights lies. Many public sector bodies that already deal with difficult issues of balancing competing rights and obligations in carrying out their functions have welcomed the clarity and authority that a human rights bill provides in dealing with these issues. In conjunction with the general law, the charter provides a basic standard and a reference point for discussion and development of policy and practice in relation to these sensitive and often complex issues.[99]

150 Thirdly, the interpretation favoured by the respondent and the Attorney-General provides for consistency across the Charter. While the meaning of s 39(1) of the Charter is not settled,[100] it appears that the term 'unlawful' in that section does not mean 'invalid'. This is because the relief provided for by the Charter from an unlawful act includes a number of remedies available for non-jurisdictional error including injunctions, declarations and certiorari for error on the face of the record.[101] It is assumed that when the legislature uses the same term throughout a piece of legislation that it intends that term to have the same meaning.[102]

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96 See [138] above; Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Lawbook Co, 5th ed, 2013) 217–25.

97 *AG's Reference* [2004] 2 AC 72, 120, 132–3.

98 Ibid 120.

99 Victoria, *Parliamentary Debates,* Legislative Assembly 4 May 2006, 1293 (Attorney-General Rob Hulls).

100 See *Sudi* (2011) 33 VR 559.

101 See *Supreme Court (General Civil Procedure) Rules* 2005, O 56.

102 See *Craig Williamson Pty Ltd v Barrowcliff* [1915] VLR 450, 452 (Hodges J), *Registrar of Titles (WA) v Franzon* (1975) 132 CLR 611, 618 (Mason J).

151 Fourthly, I do not consider that the legislature intended that all acts done by a public authority in breach of s 38(1) would necessarily be invalid. Such an outcome would place a substantial burden on the State. In *Project Blue Sky*, the High Court noted that courts have accepted that it is unlikely for the legislature to intend that an act done in breach of a statutory provision should be invalid if it would result in public inconvenience.[103] It is well known that the existence of the Charter and its requirements have had an impact on the state public administration.[104] For example, all state legislation - bills, regulations and court rules - requires the relevant minister to provide a certificate of compliance with the Charter pursuant to s 28. The certificates are by no means a rubber stamp, rather the process requires careful consideration of the Charter and testing of the proposed enactment against it. If non-compliance is identified then the legislature must be informed, and it may expressly declare that an Act or provision of an Act is incompatible with human rights. These requirements under the Charter reflect not only its direct requirements, that is, manifests an express intention, but also sets constraints on the breadth of the obligations of the Charter on the public sector. Whether the Charter would amount to 'creating havoc' if construed in the wide obligatory sense is unproven but that is in many respects self-evident. If every decision of a public authority required Charter clearance in some form, government processes would be delayed.[105] While I accept that a number of courts around the common law world apply human rights statutes to government decisions on a daily basis, the impact on the operations of the State government would be so great that the words in the statute would have to be resolutely clear to infer such an outcome. In my view they are not.

152 Fifthly, I do not accept that the normative force of the Charter would be removed by a finding that a breach of s 38(1) does not of itself invalidate an exercise of power by a public authority. This is for two reasons. First, there are a number of remedies that are still available under O 56 of the Rules for a breach of s 38(1), such as an injunction or certiorari for error on the face of the record. The Commission's argument that these remedies are only available in limited circumstances is, with respect, misconceived. The remedy of a declaration is often the primary remedy that a complainant seeks as it is a vindication of a wrong done to them by a public authority. Moreover, as s 10 of the *Administrative Law Act 1978* (Vic) provides for a very broad definition of the term 'record', there are a number of instances where a record would be available, as in this case. Secondly, as noted by Spigelman CJ in *Wyong Shire Council*,[106] I do not consider that the threat of invalidating an act done in breach of s 38(1) is the only way to achieve compliance with the

103 *Project Blue Sky* (1998) 194 CLR 355, 392 [97].

104 See Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Review of the Charter of Human Rights and Responsibilities Act 2006* (2011) 101–6.

105 This argument highlights the interrelationship between the proportionality provisions in s 7(2) and the obligations under s 38(1). As this was not advanced by any of the parties, it is unnecessary for me to deal with it.

106 [2003] NSWCA 322.

Charter. The normative impact of the Charter is given force by the nature of the rights set out in the Charter, the interpretive clause in s 32 and the remedies available for non-jurisdictional error. WARREN CJ

153 It follows that I would answer no to question 2, the trial judge was not in error.

3. Does s 10(b) of the Charter include a procedural right to an effective investigation of a credible complaint of cruel, inhuman or degrading treatment?

154 In both written and oral submissions to this Court, the appellant adopted the submissions of the Commission on this issue. The Commission presented its argument in three steps. First, the Commission submitted that the Charter is concerned with recognising within Victoria the same rights as those embodied in international instruments such as the ICCPR and the ECHR. Secondly, the Commission contended that in applying the interpretive principles set out in a number of authorities including *Momcilovic*, it is open to the Court to interpret the right as including a right to an effective investigation. Thirdly, the Commission submitted that such an interpretation is open to the Court, but should be adopted on the basis that courts in other jurisdictions have given a similar interpretation to the international equivalents of s 10(b).

The Charter and its international equivalents

155 The Commission's starting point is that s 10(b) of the Charter may be traced through the ICCPR to the Universal Declaration of Human Rights (**the Declaration**). Article 5 of the Declaration states:

> No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

156 The Commission submitted that the Declaration was intended to be a statement of rights that would apply universally and not change from state to state. The Commission further noted that the Charter recognises the universality of the enumerated rights, in particular in the statement of purposes in s 1 and the interpretive provision in s 32(2):

> **1. Purpose and citation**
>
> ...
>
> (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.
>
> **32. Interpretation**
>
> ...
>
> (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.

157 The Commission also relied on a number of extracts from the Explanatory Memorandum of the Charter, including the following:

> The rights protected by the Charter are contained in clauses 8 to 27. These rights are based on fundamental human rights protected in international human rights law. The majority of these rights were codified in the *International Covenant on Civil and Political Rights 1966* (the Covenant) which the Commonwealth ratified in 1980. Although the rights appear in a different order to that of the Covenant, they are generally expressed in the same terms as the Covenant.[107]

158 The sections set out above, the Commission argued, assume the independent existence of the rights that are referred to in the Charter. Further, the Explanatory Memorandum specifically links the content of the Charter to international instruments. The Explanatory Memorandum also goes on to link s 10(b) with both the wording in the ICCPR and the Torture Convention.

159 Therefore, according to the Commission, the legislature is not creating or conferring rights, but is simply recognising the specific, already existing human rights that it seeks to protect and promote. Counsel for the Commission submitted that this approach indicates that the rights set out in the Charter are not given content solely by reference to Victorian law; rather, the Court must look to other jurisdictions to understand the true content of the rights.

The interpretive approach

160 In giving content to a Charter right, the Commission submitted that the starting point is the decision in *Re an Application under the Major Crimes Investigation Powers Act 2004*.[108] In that decision I discussed the interpretive role of courts when assessing rights under the Charter:

> [H]uman rights should be construed in the broadest possible way. The purpose and intention of Parliament in enacting the Charter was to give effect to well recognised and established rights in the criminal justice system... It should not be assumed that the Charter has narrowed traditional common law rights... The Charter supports the approach that rights should be construed in the broadest possible way before consideration is given to whether they should be limited in accordance with s 7(2) of the Charter. That section serves the purpose of mitigating any damage to society that may arise from upholding an individual's right.[109]

161 From this starting point, the Commission further submitted that international jurisprudence should be given serious consideration when interpreting the Charter. The Commission relied firstly on s 32 of the Charter which allows courts to use decisions of foreign and international courts when interpreting the Charter. Moreover, the Commission noted that the Explanatory Memorandum explicitly recognises the use of international jurisprudence:

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107 Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 8.
108 (2009) 24 VR 415.
109 Ibid 434.

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> Under sub-clause (2) a court or tribunal may examine international conventions, international customs as evidence of a general practice accepted as law, the general principles of law recognised by civilized nations... Decisions of the International Court of Justice, European Court of Justice, Inter-American Court of Human Rights and United Nations treaty monitoring bodies including the Human Rights Committee.[110]

162 The Commission's final point in this step rested on the decision of the High Court in *Momcilovic*. Specifically, the Commission pointed to the decision of French CJ to bolster its submission. In short, the decision concerned the reverse onus provision in the *Drugs, Poisons and Controlled Substances Act 1981* (Vic) and its possible incompatibility with s 25 of the Charter which enshrined the presumption of innocence. The High Court was tasked with ascertaining the content of s 25. In doing so the it discussed the role of international jurisprudence regarding the right to the presumption of innocence. French CJ stated:

> Judgments of international and foreign domestic courts may be consulted in determining whether the right to be presumed innocent, declared in s 25(1), should be interpreted as congruent with the common law presumption of innocence or as extending beyond it. The content of a human right will affect the potential application of the interpretive requirement in s 32(1) in relation to that right. Nevertheless, international and foreign domestic judgments should be consulted with discrimination and care. Such judgments are made in a variety of legal systems and constitutional settings which have to be taken into account when reading them.[111]

163 The Commission contended that his Honour's statement supports the proposition that rights in the Charter can be interpreted in light of international case law and be given a content that goes beyond the content that would normally be recognised under the common law. Counsel for the Commission accepted that French CJ indicated care in such a process, but it argued that his Honour's caution was directed at the application of the right as opposed to the content of that right. This was particularly noteworthy, according to the Commission, because of the constitutional limitations on Chapter III Courts in Australia.

164 Therefore, the Commission contended that in interpreting s 10(b) of the Charter as including a right to an effective investigation, the Court should engage in defining the content of the right on the basis of decisions from foreign and international courts. The Commission disagreed with the Attorney-General's submission that such an approach amounted to reading words into the section,[112] as the interpretive approach only seeks to define the nature and content of the right as opposed to implying or adding words.

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110 Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 23.

111 *Momcilovic* (2011) 245 CLR 1, 37.

112 Such a reading is only permitted in certain circumstances, see *Wentworth Securities Ltd v Jones* [1980] AC 74.

Application of international jurisprudence

165 The Commission's starting point is to note the commonality between s 10(b) and art 3 of the ECHR and art 7 of the ICCPR. These provisions mirror each other, and the Commission submitted that such a commonality gives significant weight to the decisions on these matters by the ECtHR, the UNHRC and courts of the United Kingdom interpreting the domestic equivalent of the ECHR, the *Human Rights Act 1998* (UK) (**HRA**).

166 The Commission first argued that decisions of the ECtHR have repeatedly found a right to an effective investigation where a breach of art 3 had been alleged. That proposition was not questioned by the respondent or the Attorney-General; the key submission for the Commission was that the trial judge erred in finding that the ECtHR had repeatedly ground such a procedural right on the basis of other provisions within the ECHR (art 1 or art 13).

167 The Commission first tackled the issue of art 3 being read with art 13. Article 13, as I have observed, recognised the right of an individual to an effective remedy of a breach of a substantive right in the ECHR. The Commission submitted that art 13 is rarely used in conjunction with art 3 to find an effective remedy. It noted that art 13 is normally relied upon when, despite there being an inadequate investigation, a court is able to conclude that an individual has been mistreated. The ECtHR, it submitted, is usually making a separate though related finding that there has been breach of art 13, as well as a breach of art 3.

168 In relation to art 1, the Commission accepted that many of the initial cases relied on both art 3 and art 1 to find a breach of the procedural right to an effective investigation.[113] However, it noted that in the 30 or so cases handed down in 2013 regarding the right to an effective investigation, half of them did so only in relation to art 3.[114] The Commission submitted that this represented a shift away from the early cases where the ECtHR was inclined to find the procedural right only where it could attach itself to either arts 1 or 13 read with art 3. Further, according to the Commission, many of the cases that still refer to both arts 1 and 3 do so in a particular set of circumstances, being where a non-State actor mistreats the complainant, as opposed to the State. In those situations, the Commission argued, it is logical for the ECtHR to use art 1 to bind the State to secure protection from such conduct to everybody who lives in the jurisdiction. The Commission relied on the decision in *Milanović v Serbia*[115] to support this proposition.

169 In *Milanović*, the complainant was of the Hare Krishna faith and had been targeted over a number of years, possibly by members of an extremist organisation. The ECtHR found that there had been a breach of the complainant's

113 See eg *Assenov v Bulgaria* (1998) 28 EHRRR 652, 107 [102].
114 See Appendix A to the Commission's submissions.
115 (2014) 58 EHRR 33.

rights to an effective investigation and it further discussed the relationship between arts 1 and 3 as follows: WARREN CJ

> In general, actions incompatible with Article 3 of the Convention primarily incur the liability of a Contracting State if they were inflicted by persons holding an official position. However, the obligation on the High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken in conjunction with Article 3, also requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to ill-treatment administered by other private persons.[116]

170 The Commission noted a growing number of cases where the ECtHR found a right to investigation independent of art 1 or art 13.[117] For example in *MC v Bulgaria*[118] the ECtHR noted:

> In a number of cases Article 3 of the Convention gives rise to a positive obligation to conduct an official investigation. Such positive obligations cannot be considered in principle to be limited solely to cases of ill-treatment by State agents.[119]

171 Further, the Commission submitted that the Council of Europe recognised this trend in 2009 in its report 'Effective Investigation of Ill-Treatment, Guidelines on European Standards':

> Across the Court's judgments are a variety of different approaches to the legal characterisation of the duty to investigate. It is either classified under a combination of Articles 3 and 13, or simply under Article 3. While suggesting that the appropriate characterisation depends on the facts of the case, it seems that the Court leans towards the Article 3 approach.[120]

172 The Commission also sought solace from a number of decisions of the United Kingdom courts enforcing the ECHR under the HRA. The Commission noted that decisions of the UK courts regarding the HRA were particularly persuasive as that Act contains the substantive rights that appear in the ECHR, but does not contain an equivalent to art 1. Counsel for the Commission placed heavy reliance on a recent decision from the Queen's Bench in *DSD & NBV v The Commissioner of Police for the Metropolis*.[121] The case involved two complainants who sought to impugn the investigatory processes of the police in relation to a number of rapes perpetrated by the 'black cab rapist'. The complainants argued that the police failed to provide an effective investigation of their complaints as required by art 3 of the Convention. Counsel for the police sought to argue that the procedural right to an investigation was found by reading arts 1 and 3 together, and because the HRA did not include art 1, domestic courts should not construe art 3 as encompassing a proactive duty to investigate.

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116 Ibid 916–7 [83].
117 See Appendix A of Commission's submissions.
118 (2005) 40 EHRR 20.
119 Ibid 486 [151].
120 Directorate General of Human Rights and Legal Affairs, Council of Europe, 'Effective Investigation of Ill-Treatment: Guidelines on European Standards' (2009), 27.
121 [2014] EWHC 436 (QB) (**DSD**).

173 In rejecting that submission, Green J set out a number of impediments. First, his Honour noted the consistency of Strasbourg jurisprudence regarding the importance of an investigation when a claim under art 3 is made and importantly, how that jurisprudence should be followed by domestic courts. Secondly, and critically according to the Commission, his Honour outlined the interaction between arts 1 and 3:

> I can see no reason why Article 1 can be said to create a pro-active duty whereas the same would not be said of Article 3 standing in complete isolation (including from Article 1). Article 3 is a clear and unequivocal prohibition which has been repeatedly described by the Strasbourg Court as 'fundamental'. In *MC v Bulgaria* the Court stated that there was a 'positive obligation inherent' in Article 3 to apply law prohibiting rape through 'effective investigation' and punishment. The Article prohibits without caveat or qualification torture and inhuman or degrading treatment. That prohibition exists quite regardless of Article 1; the message in Article 3 is that the State must preserve its citizens from such severe treatment. Section 6 HRA makes it 'unlawful' for a public authority to act in a way that is incompatible with, inter alia, Article 3. And sections 7 and 8 make such an unlawful failure justiciable. There is no point in having a prohibition if it is not accompanied by the commensurate obligation on the State to enforce the prohibition. That applies to the conduct of the State and its agents and actors but extends also to the preservation of citizens from severe violence perpetrated by private parties. Article 3 does not require turbo-charging from Article 1 to arrive at this conclusion and in any event sections 6–8 HRA plug any gap that might otherwise exist.[122]

174 The Commission submitted that his Honour's finding, arrived at after a lengthy discussion about the authorities on art 3, represents the correct approach regarding the source of the right to an effective investigation.[123]

175 Finally, the Commission relied upon guidance and decisions of the UNHRC which was, in the past, charged with supervising the implementation of the ICCPR. In General Comment 20, the UNHRC outlined that a violation of art 7 (s 10 in the Charter) required that '[c]omplaints must be investigated promptly and impartially by competent authorities so as to make the remedy effective'.[124] Further, the Commission relied on the decision of the UNHRC in *Maria Cruz Achabal Puertas v Spain*.[125] In that case, the complainant was an author who had been arrested by a group of 15 police officers and taken to a civil police compound. At the compound she was beaten and raped and threats were made against her and her daughter's life. The authorities commenced an investigation into the alleged assault, but it did not result in any findings. In its reasons, the UNHRC made a number of statements

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122 Ibid [233] (citations omitted).

123 The Commission made a similar argument in relation to the right to an effective investigation under art 2 of the ECHR. See *JL v Secretary of State for Justice* [2009] 1 AC 588, 610 (Lord Phillips).

124 Human Rights Committee, *General Comment No 20*: *Article 7 (Prohibition of torture and cruel treatment or punishment)* , 44th sess, UN Doc. HRI/GEN/1/Rev 9 (Vol I) p 202, (10 March 1992), [14].

125 Human Rights Committee, Views: Communication No 1945/2010, 107th sess, UN Doc CCPR/C/107/D/1945/2010 (27 March 2013) (***Maria Cruz***).

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regarding the role of art 7 and art 2(3) of the ICCPR. It stated:

> The Committee recalls its general comments No 20 (1992) and 21 (1992) regarding the relationship between articles 7 and 10, paragraph 1, of the Covenant and considers that the facts alleged by the author, fall within the scope of application of article 7, read independently and in conjunction with article 2, paragraph 3, of the Covenant.[126]

176 The UNHRC went on to find a breach of the procedural right to an effective investigation of a claim for inhuman and degrading treatment. The Commission contended that the UNHRC analysed the breach as either a breach of art 7 independently or in conjunction with art 2(3). The Committee relevantly stated:

> Given the difficulty of proving the existence of torture and ill-treatment when these do not leave physical marks, as in the case of the author, the investigation of such acts should be exhaustive. Furthermore, all physical or psychological damage inflicted on a person in detention — and particularly under the incommunicado regime — gives rise to an important presumption of fact, since the burden of proof must not rest on the presumed victim. In those circumstances, the Committee considers that the investigation conducted by the domestic courts was not sufficient to guarantee the author her right to an effective remedy and that the facts before it constitute a violation of article 7, read independently and in conjunction with article 2, paragraph 3, of the Covenant.[127]

177 In reliance on this judgment, the Commission contended that it was settled jurisprudence that an investigation is required, and that the requirement has an independent existence within art 7.

178 Although the Commission's submission carried some force, ultimately, I am unpersuaded by it. While it is clear that the Charter is modelled on a number of international instruments, it is misconceived to import an implied right to an investigation into s 10(b) by reference to instruments which materially differ from the Charter.

Interpretive approach

179 There are a number of factors which undermine the interpretive approach advanced by the Commission on behalf of the appellant.

180 First, as the Attorney-General argued, the text of the Charter provides for procedural rights in certain circumstances. Section 21, for example, guarantees the right to liberty and security as well as protection from arbitrary arrest. The subsequent subsections provide a number of procedural rights that inform the substantive right:

> (4) A person who is arrested or detained must be informed at the time of arrest or detention of the reason for the arrest or detention and must be promptly informed about any proceedings to be brought against him or her.
>
> (5) A person who is arrested or detained on a criminal charge—

126 Ibid [8.3] (citations omitted).

127 Ibid [8.6] (citations omitted).

(a) must be promptly brought before a court; and
(b) has the right to be brought to trial without unreasonable delay; and
(c) must be released if paragraph (a) or (b) is not complied with.

181 Sections 23, 24 and 25 follow a similar process of outlining the substantive right along with procedural protections that are aimed at protecting that right. I do not accept, as the Commission submitted, that if the Commission's position were accepted that this Court would be merely interpreting the content of the right as opposed to finding an additional procedural right within the text of s 10(b). The inclusion of procedural protections for some Charter rights and not for others (including s 10) leads to the inevitable conclusion that the legislature did not intend to provide procedural protections for all rights. Further, there is no indication in the text of the Charter or the Explanatory Memorandum that such a procedural right should be implied.

182 Secondly, as noted by the High Court in *Momcilovic* decisions of foreign and international judgments should be consulted with care. In his decision, French CJ specifically called for caution when using comparative law materials to define the nature and content of a right.[128] While his Honour was referring to the interpretive clause in s 32 of the Charter, in my view the sentiment expressed applies equally to the interpretation of the scope of rights within the Charter. His Honour stated:

> Despite our common legal heritage, that general proposition is relevant today in reading decisions of the courts of the United Kingdom, especially in relation to the *Human Rights Act* 1998 (UK) (the HRA). It is appropriate to take heed not only of Lord Bingham of Cornhill's remark about the need for caution 'in considering different enactments decided under different constitutional arrangements', but also his observation that 'the United Kingdom courts must take their lead from Strasbourg'.
>
> The same general caution applies to the use of comparative law materials in construing the interpretive principle in s 32(1). In this appeal what was said to be the strong or remedial approach taken by the House of Lords to the application of the United Kingdom counterpart to s 32(1) of the Charter, namely s 3 of the HRA, was at the forefront of the appellant's submissions. However, s 3 differs textually from s 32(1) and finds its place in a different constitutional setting.[129]

183 Gummow J in *Momcilovic* made similar statements regarding the use of foreign and international judgments in interpreting the Charter. His Honour made it plain that the Charter had to be interpreted in its own constitutional context.[130] The Commission failed, in my opinion, to comprehend the reservations of the Court in *Momcilovic*. It was a constrained approach. It was not directed simply at the application of the right. While I accept the High Court was concerned with engaging in a legislative process in its interpretation of Charter rights,[131] the Court actively engaged in the interpretation of the

128 *Momcilovic* (2011) 245 CLR 1, 36 [19], also see [162] above.
129 Ibid 36–7 [19]–[20] (citations omitted).
130 Ibid 90 [159].
131 Ibid 83–9, 90 [146], [159].

nature of a Charter right and not just its application. WARREN CJ

184 In light of these statements, there are a number of significant constitutional and structural differences that weaken the Commission's interpretive approach. In particular, decisions of the UK courts are influenced by the particular constitutional and legislative peculiarities in the HRA.[132] The HRA specifically sets out in s 2 that a court determining a question which has arisen under the ECHR *must* take into consideration decisions of the ECtHR. The link between international decisions and their domestic application is much closer and direct than the connection authorised by the Charter. Further, the application of rights under the ECHR is an expression of the obligation of a High Contracting Party[133] to the ECHR, unlike the State of Victoria which is not a contracting party to any of the instruments set out above. Finally, unlike the Charter, the HRA provides a standalone remedy (s 8) for breach of a Convention right, thus the HRA embodies the right to a remedy under art 13. Such a standalone remedy does not exist in the Charter.[134] It is clear, from reading the Charter as a whole, that it is only intended to deal with specific situations or an individual subject to an exercise of power by a public authority; it does not speak in the broad terms of protection that are outlined in art 1 of the ECHR. That is a fundamental difference which effects the way in which the Charter should be interpreted.

185 I accept, as the Attorney-General put it, that it must not be presumed that the legislature intended to incorporate the right to an effective investigation as it is applied in other jurisdictions in an environment where the legal framework in which the right is located is different from that which supports an application elsewhere. The Commission's interpretive positions rests upon that presumption and it should be rejected.

Application of international jurisprudence

186 While I acknowledge that there is a role for decisions from foreign and international jurisdictions to play in informing local courts, the decisions of foreign courts do not appear to assist the appellant in this case. Decisions of the ECtHR, the UK courts and the UNHRC are primarily based on the obligation of the State, as a contracting party to the relevant international instrument, to ensure the rights of its citizens or to provide an effective remedy for breaches. I will consider some of the foreign and international jurisprudence, but I do so with the caution urged by French CJ and Gummow J in *Momcilovic.*[135]

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132 See the discussion of the international character and its influences on decision of the UK courts by Lord Bingham in *R (Gentle) v Prime Minster* [2008] 1 AC 1356 [9].

133 A High Contracting Party is a State that has signed the ECHR.

134 See s 39 of the Charter.

135 See paras [182]–[183].

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187 It seems that the first case to find that the prohibition on torture and inhuman and degrading treatment included a procedural right to an effective investigation was *Assenov v Bulgaria*.[136] The case concerned a Bulgarian teenager of Roma descent who was allegedly arrested and beaten by police officers. The local and regional police bodies investigated but did not bring any charges and dismissed the complaints. Importantly, the ECtHR found that the failure to properly investigate amounted to a breach of both arts 3 and 13. In discussing the art 3 breach, the Court discussed the nature and source of the procedural right:

> The Court considers that, in these circumstances, where an individual raises an arguable claim that he has been seriously ill-treated by the police or other such agents of the State unlawfully and in breach of Article 3, that provision, *read in conjunction with the State's general duty under Article 1* of the Convention to 'secure to everyone within their jurisdiction the rights and freedoms in [the] Convention', requires by implication that there should be an effective official investigation. This obligation, as with that under Article 2, should be capable of leading to the identification and punishment of those responsible. If this were not the case, the general legal prohibition of torture and inhuman and degrading treatment and punishment, despite its fundamental importance, would be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity.[137]

188 The Court also assessed the role of art 13, in particular how it can be read with art 3 as giving rise to a right to an independent investigation:

> The Court recalls that Article 13 guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of this Article is thus to require the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision. The scope of the obligation under Article 13 varies depending on the nature of the applicant's complaint under the Convention. Where an individual has an arguable claim that he has been ill-treated in breach of Article 3, the notion of an effective remedy entails, in addition to a thorough and effective investigation of the kind also required by Article 3, effective access for the complainant to the investigatory process and the payment of compensation where appropriate.[138]

189 Therefore, the genus of the procedural right was the reading of art 3 together with either art 1 or art 13. I do not accept that the ECtHR has moved away from reading the procedural right in such a way. In a number of cases cited by the Commission as authority for the procedural right being read

136 (1998) 28 EHRR 652 (***Assenov***).
137 Ibid 702 [102] (emphasis added).
138 Ibid 704 [117].

independently of either art 1 or art 13, *Assenov* was cited as authority.[139] In *MC v Bulgaria* cited above, the Court did find a positive obligation to conduct an investigation in art 3, but in doing so it cited *Assenov* as its authority.[140] WARREN CJ

190 In *Z v United Kingdom*[141] (a decision cited by Green J in *DSD*) the case concerned siblings who had been subject to abuse and neglect at the hands of their parents. Complaints were made to the local authority which failed to properly investigate. At a domestic level the complainant's claim was struck out on the basis that it did not disclose a cause of action under the domestic law. In finding a violation of art 3, the ECtHR expressly referred to the role of art 1 in its interpretation:

> The Court re-iterates that Article 3 enshrines one of the most fundamental values of democratic society. It prohibits in absolute terms torture or inhuman or degrading treatment or punishment. The obligation on High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, *taken together with Article 3*, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including such ill-treatment administered by private individuals. These measures should provide effective protection, in particular, of children and other vulnerable persons and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge.[142]

191 In *Vitkovskiy v Ukraine*,[143] a decision handed down in 2013, the complainant was questioned by police regarding an investigation for a theft. During the questioning he was allegedly beaten, strangled and received electric shocks to his body. The complainant made a complaint to authorities, who did not prosecute because an internal investigation by the local police force concluded that the allegation was ill-founded. The Court held that there had been a breach of the complainant's procedural right to an effective investigation. Importantly in this context, the Court relied on *Assenov*:

> The Court emphasises that where an individual raises an arguable claim that he or she has been seriously ill-treated by police in breach of Article 3, that provision requires by implication that there should be an effective official investigation capable of leading to the identification and punishment of those responsible. Otherwise, the general legal prohibition of torture and inhuman and degrading treatment and punishment would, despite its fundamental importance, be ineffective in practice, and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity (see *Assenov v Bulgaria*...). The minimum standards of effectiveness defined by the Court's case-law include the requirements that the investigation must be independent, impartial and subject to public scrutiny, and that the competent authorities must

139 See eg *MC v Bulgaria* (2005) 40 EHRR 20, 486 f 33; *Athan v Turkey* (European Court of Human Rights, Second Section, Application no 36144/09, 3 September 2013) [29]; *Austrianu v Romania* (European Court of Human Rights, Third Section, Application no 16117/02, 12 February 2013, Final 12/05/2013) [28].

140 *MC v Bulgaria*, 486 f 33.

141 (2002) 34 EHRR 3.

142 Ibid 131 (citations omitted) (my emphasis).

143 European Court of Human Rights, Fifth section, Application No 24938/06, 26 September 2013.

act with exemplary diligence and promptness.[144]

192 There are, therefore, a number of recent cases that continue to rely on the use of art 1 in conjunction with art 3 to find an implied right to an effective investigation.[145] Even those that do not explicitly refer to art 1 still rely on *Assenov* as the foundation of a right to an investigation.[146]

193 In addition, commentators observe that the ECtHR continues to rely (although to a lesser extent) upon reading art 3 with art 13 as the basis for the procedural right to an effective investigation.[147] For example, in *Ilhan v Turkey*,[148] the ECtHR discussed the role of art 13 in finding a procedural right to an effective investigation for breaches of art 3:

> Article 3 however is phrased in substantive terms. Furthermore, though the victim of an alleged breach of this provision may be in a vulnerable position, the practical exigencies of the situation will often differ from cases of the use of lethal force or suspicious deaths. The Court considers that the requirement under Article 13 of the Convention for a person with an arguable claim of a violation of Article 3 to be provided with an effective remedy will generally provide both redress to the applicant and the necessary procedural safeguards against abuses by state officers. The Court's case law establishes that the notion of effective remedy in this context includes the duty to carry out a thorough and effective investigation capable of leading to the identification and punishment of those responsible for any ill treatment and permitting effective access for the complainant to the investigatory procedure. Whether it is appropriate or necessary to find a procedural breach of Article 3 will therefore depend on the circumstances of the particular case.[149]

194 The ECtHR has taken a similar approach in its decision regarding the procedural right to an effective investigation under art 2 of the ECHR.

195 Relevantly, art 2 of the ECHR provides:

> **Article 2 - Right to life**
>
> 1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

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144 Ibid [96] (some citations omitted).

145 See eg *Dimitar Shopov v Bulgaria* (European Court of Human Rights, Fourth Section, Application No 17253/07, 16 April 2013, Final 16/07/2013) [46]–[47]; *Gorea v Republic of Moldovia* (European Court of Human, Third Section, Application No 6343/11, 23 July 2013) [38]; *Milanovic v Serbia* (2014) 58 EHRR 33, 917 [85].

146 See eg *Athan v Turkey* (European Court of Human Rights, Second Section, Application No 36144/09, 3 September 2013); *Austrianu v Romania* (European Court of Human Rights, Third Section, Application No 16117/02, 12 February 2013, Final 12/05/2013) [28]; *Cosar v Turkey* (European Court of Human Rights, Second Section, Application no 22568/05, 26 March 2013, Final 26/06/2013) [37]; European Court of Human Rights, First Section, Application No 8810/05, 30 May 2013) [98].

147 See Richard Clayton and Hugh Tomlinson, *The Law of Human Rights*, (2nd ed, 2009, OUP), 495 [8.75]; Council of Europe, *Effective Investigation of Ill-Treatment: Guidelines on European Standards*, 26.

148 (2002) 34 EHRR 36.

149 Ibid 932 [92].

196 In *Ramsahi v Netherlands*,[150] the complainants were the grandparents of a deceased man who had been shot and killed by police. The complainants alleged that the investigation was unsatisfactory as it was carried out by members of the police force who were colleagues of those who shot the man. The Court outlined the principles that govern an effective investigation under art 2, and linked it to the obligation on High Contracting Parties in art 1: WARREN CJ

> The obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to 'secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention', requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force.[151]

197 The decisions of the ECtHR do not indicate that the right to an effective investigation can be found solely within art 3. There does not appear to be a consistent position within the jurisprudence to support such a proposition. While, as the respondent conceded, there has been less reliance on art 13, the ECtHR continues to find in both arts 2 and 3 cases that the procedural right to an investigation is found by reading the substantive right with the right attaching to High Contracting Parties to secure the rights and freedoms within the Convention. There is no equivalent of art 1 in the Charter. Moreover, a public authority (or even the State of Victoria) is not under a similar obligation to ensure the rights and freedoms outlined in the Charter are protected within Victoria.

198 The Commission also had an alternative argument. It pointed to decisions of the UK Courts under the HRA in a bid to demonstrate a consistent approach in finding an independent right to an investigation founded upon art 3 without reliance on art 1.

United Kingdom

199 Before dealing with the key cases relied upon by the parties, it is important to briefly outline the structure of the HRA. The HRA provides that legislation should be interpreted in light of certain rights attached to the HRA. Moreover, the HRA contains an obligation on public authorities to act in compliance with those attached rights. Importantly, the rights attached to the HRA originate from the ECHR, but the HRA does not include art 1 or art 13.

200 In *Morrison v Independent Police Complaints Commission* ,[152] the complainant alleged that he was subject to police brutality. He complained to the Independent Police Complaints Commission (**IPCC**), which decided that the matter should be investigated locally by police from the Metropolitan Divi-

150 (2008) 46 EHRR 43.

151 Ibid [321], quoting *Nachova v Bulgaria* (2006) 42 EHRR 43 [110]; see also *Ergi v Turkey* (2001) 32 EHRR 18, 432 [82].

152 [2009] EWHC 2589 (Admin).

sion. The complainant sought judicial review of the decision on the basis that the IPCC had made a premature decision regarding the severity of his injuries. Nicol J discussed the investigative obligation where a breach of art 3 has been alleged. While his Honour accepted that art 1 was not codified in the HRA, his Honour acknowledged its role in establishing the procedural right within domestic law:

> The European Court of Human Rights has implied a duty to investigate arguable breaches of Article 3. It has done so following a similar process of interpretation of the right in Article 2 which says 'Everyone's right to life shall be protected.' In both cases the Court has relied on the general duty under Article 1 of the Convention on Contracting States to 'secure to everyone within their jurisdiction the rights and freedoms defined in the Convention.' Although Article 1 is not one of the specified rights in Schedule 1 of the Human Rights Act 1998, a like investigative obligation is incorporated as part of domestic law though the 1998 Act.[153]

201 I accept, as the respondent contended, that while Nicol J acknowledged that art 1 was not codified in the HRA, the enactment of the HRA is the manifestation of the United Kingdom's obligations under art 1. With respect, it follows in my view that it would be inappropriate to rely on the absence of art 1 to support the conclusion that in the United Kingdom the right to an effective investigation arises solely from the text of art 3.[154]

202 In *OOO v Commissioner of Police for the Metropolis*,[155] the court was tasked with assessing whether the police had failed to comply with their obligations under the HRA to properly investigate human trafficking. The Commission relied on this case as the trial judge acknowledged that 'there was no dispute that an investigative duty may arise under Articles 3 and 4'.[156] However, Williams J was heavily reliant on ECtHR jurisprudence in assessing the scope of the right to an investigation. I have examined that jurisprudence above and it indicates the role of art 1 or art 13 in establishing the procedural right to an effective investigation.

203 In *Allen v Chief Constable of the Hampshire Constabulary*,[157] the complainant had been in a relationship with a member of the respondent's constabulary. Another member of that police force had harassed the complainant and damaged property, allegedly because of the relationship. The complainant contended that the respondent had failed in its duty to adequately investigate her complaint and thus it was in breach of art 3 (as well as art 8). In his decision, Gross LJ, delivering the judgement for the Court of Appeal, noted the positive obligation to investigate breaches of art 3. However, his Lordship grounded that positive obligation in the decision of the ECtHR in *Assenov*:

> Turning to matters of substance, the 'few words' of Art 3 give rise to a number of

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153 Ibid [31].
154 See *R (Al-Skeini) v Secretary of State for Defence* [2008] 1 AC 153, 181.
155 [2011] EWHC 1246 (QB).
156 Ibid [3].
157 [2013] EWCA Civ 967.

WARREN CJ

> duties on the part of the State, designed to render its general legal prohibitions (of fundamental importance) effective in practice … At least for present purposes, these duties may be summarised as follows:
>
> i) A general obligation to provide systems of law enforcement and for the punishment of criminal liability.
>
> ii) An implied positive obligation to conduct an effective investigation into allegations that treatment amounts to, or arguably amounts to, a violation of a person's art 3 rights; such an investigation should be capable of identifying and punishing those responsible: *Assenov v Bulgaria* [1999] 28 EHRR 652, [102].[158]

204 Finally, I turn to *DSD*. The Commission placed significant reliance on Green J's comments that art 3 does not require 'turbo-charging' from art 1 to find the right to an effective investigation. The problem with the Commission's argument is that his Honour was heavily reliant on decisions of the ECtHR in finding the procedural right. Immediately before he dealt with the art 1 point, his Honour noted the Strasbourg jurisprudence on the matter and held that it had consistently found the right to exist. His Honour earlier traversed many of the cases set out above that held that the right to an effective investigation arose by reading art 3 with arts 1 or 13.

205 Further, his Honour's statement that art 3 requires an effective investigation relied on both *MC v Bulgaria* and *Milanović*.[159] Both cases, as noted above, rely on the reading of art 3 together with art 1 to find the right to an effective investigation. Finally, his Honour appears to accept that the absence of art 1 from the HRA does not affect the interpretation of the rights protected within the Act. Green J explicitly cited the decision of Lord Rodger in *R (Al-Skeini) v Secretary of State for Defence*[160] in relation to a finding under art 2 of the ECHR, where his Lordship stated:

> Under Section 2(1)(a) of the 1998 Act, when determining any question in connection with a 'Convention Right', a Court in the country must take into account any judgment or decision of the European Court. While art 1 is not itself included in the Schedule, it affects the scope of art 2 in the Schedule, and that art embodies a 'Convention Right' as defined in s 1(1). It follows that, when interpreting that art 2 right, courts must take account of any relevant judgment or decision of the European Court on art 1.[161]

206 After the hearing of this appeal, the Court of Appeal of England and Wales dismissed an appeal by the Commissioner of Police of the Metropolis.[162] In rejecting the appeal, Laws LJ (Lord Dyson MR and Kitchen LJ agreeing) discussed the nature of the right to an effective investigation. At first glance it may appear that his Lordship embraced the proposition put to this Court by the Commission:

> In my judgment neither the contrasting language of Articles 2 and 3 nor the

158 Ibid [42].
159 *DSD* [2014] EWHC 436 (QB).
160 [2008] 1 AC 153.
161 Ibid 198 [66].
162 *Commissioner of Police for the Metropolis v DSD* [2015] 3 WLR 966.

> learning demonstrates that the duty to investigate ill-treatment of the gravity stipulated in Article 3 is to any extent derived from Article 1. First, Article 1 is silent as to the content of any of the substantive rights. It requires that they be secured; but they are defined, or described, elsewhere. Thus the language of Article 1 lends no support to Mr Johnson's submission that it expands the scope of Article 3.[163]

207 However, Laws LJ also accepted the fact that the HRA is the manifestation of art 1:

> Thirdly, the omission of Article 1 from the catalogue of Convention rights in the HRA is readily explained. Article 1 is the provision by which the States Parties are obliged to secure the rights stipulated in the ECHR. s 6(1) of the HRA is in my judgment analogous ... It obliges public authorities in the United Kingdom to respect the Convention rights. As is well known s 6(1) provides:
>
> > 'It is unlawful for a public authority to act in a way which is incompatible with a Convention right.'
>
> There are ancillary provisions concerning proceedings and remedies (together with the process for a declaration of incompatibility - ss.4 and 10), but s.6(1) imposes the primary obligation to secure the Convention rights. The scheme of the Act is clear: those ECHR measures which state substantive rights are named as the Convention rights; other measures in the ECHR, which give the Convention effect but do not state its substance, are not. Thus Article 13 (right to an effective remedy) is omitted, as is Article 1. Mr Johnson's argument ignores this distinction. Nothing in the cases, here or in Strasbourg, supports such an approach; the repeated references to Article 1 on which Mr Johnson relies, from paragraph 102 of Assenov onwards, do no more than identify the medium through which Article 3 has effect on the international plane.[164]

208 Regardless of how one interprets the decision, it amplifies my earlier point that there is a fundamental constitutional difference between the HRA and the Charter which means the decisions of the United Kingdom are of limited application.

United Nations

209 The Commission's final recourse was to the UN jurisprudence.

210 The starting point for the UN's jurisprudence on the matter can be found in General Comment 20 and General Comment 31. General Comment 20, set out above,[165] provides that art 7 of the ICCPR should be read with art 2(3) in order to establish a breach of the procedural right to an effective investigation. Further, General Comment 31 from the UNHRC re-enforces this approach:

> Article 2, paragraph 3, requires that in addition to effective protection of Covenant rights States Parties must ensure that individuals also have accessible and effective remedies to vindicate those rights ... The Committee attaches importance to States Parties' establishing appropriate judicial and administrative mechanisms for addressing claims of rights violations under domestic law.

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163 Ibid [15].
164 Ibid [17].
165 See [58] above.

WARREN CJ

> The Committee notes that the enjoyment of the rights recognized under the Covenant can be effectively assured by the judiciary in many different ways, including direct applicability of the Covenant, application of comparable constitutional or other provisions of law, or the interpretive effect of the Covenant in the application of national law. Administrative mechanisms are particularly required to give effect to the general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies. … A failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant.[166]

211 It is apparent from these documents that the right to an effective investigation is found by reading art 7, the right to not be subject to torture or inhuman and degrading treatment, with art 2(3), the obligation on State parties to ensure an effective remedy for any breaches in the ICCPR. The Commission sought to rely on the decision of the UNHRC in *Maria Cruz*. In my opinion, that decision does not assist the Commission's submissions. First, the UNHRC specifically relied on General Comment 20 when concluding that art 7 gave rise to a right to an effective investigation both independently and in conjunction with art 2(3). Secondly, when one reads the full paragraph, it is apparent that the UNHRC is making two separate determinations, one is that the complainant was subject to inhuman and degrading treatment, and the other is that the failure to investigate was also a breach. The breach of the investigationary requirement arises from the reading of the articles together:

> In those circumstances, the Committee considers that the investigation conducted by the domestic courts was not sufficient to guarantee the author her right to an effective remedy *and that* the facts before it constitute a violation of article 7, read independently and in conjunction with article 2, paragraph 3, of the Covenant.[167]

212 Thirdly, the Committee goes on to describe the complainant's right to an effective remedy as set out in art 2(3):

> In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy which should include: (a) an impartial, effective and thorough investigation of the facts and the prosecution and punishment of those responsible; (b) full reparation, including appropriate compensation; (c) provision of free, specialized medical assistance.[168]

213 To reiterate, the decisions of the ECtHR ground the right to an independent investigation for a breach of art 3 in either art 1 or art 13. This is made clear by the continued reliance on the decisions of the ECtHR to *Assenov* and *MC v Bulgaria*. The right to an independent investigation under the HRA is also founded upon the jurisprudence of the ECtHR and its reliance

166 Human Rights Committee, *General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant,* 80th sess, UN Doc CCPR/C/21/Rev.1/Add. 13 (26 May 2004) [15].

167 *Maria Cruz*, Human Rights Committee, *Views: Communication No 1945/2010*, 107th sess, UN Doc CCPR/C/107/D/1945/2010, (27 March 2013) [8.6] (emphasis added).

168 Ibid [10].

on the right to an effective remedy set out in art 13 and the obligation of High Contracting Parties to ensure the proper exercise and protection of the rights set out in the ECHR art 1. Similarly, the decisions of the UNHRC base the right to an effective investigation of a breach of art 7 (the right not to be subject to torture or inhuman and degrading treatment) with duty of a State under art 2(3) to ensure an effective remedy of breaches of the ICCPR. In light of these significant differences, the caution espoused in *Momcilovic* becomes very relevant.

214 In summary, while foreign and international jurisprudence has a role to play in the interpretation of Charter rights, I do not accept that such jurisprudence indicates that there is a right to an effective investigation to be found within s 10(b). The constitutional and statutory context of international instruments and foreign courts fundamentally differ from the Charter in relation to the right against torture and inhuman and degrading treatment. In any event, those decisions do not indicate that there is a standalone substantive right to an effective investigation that is found in s 10(b) of the Charter.

215 It follows that I would answer question 3 in the negative. No error is made out.

4. In making the decision under challenge, did Mr Jevtovic fail to give proper consideration to the procedural right under s 10(b) of the Charter and the equality rights in s 8(3) of the Charter?

216 In light of my findings on Questions 1 and 2, it is unnecessary for me to address this point. However, as all parties made submissions on this point and in the event it was necessary, I will outline my views on the matter.

217 The appellant contended that the requirement under the procedural limb of s 38(1) to give 'proper' consideration to human rights requires a higher standard of review than the position set out by Mason J in *Peko-Wallsend* or under statute.[169] The appellant relied on the decision of Emerton J in *Castles* with respect to the nature of the procedural obligation under s 38(1).[170] In short, the appellant submitted that a decision maker must: (a) understand in general terms which rights would be affected by the decision and how they may be interfered with by the decision; (b) seriously turn his or her mind to the possible impact of the decision on the person's human rights; (c) identify the countervailing interests or obligations; and (d) balance the competing private and public interests.

218 The appellant contended that Mr Jevtovic freely admitted he was not qualified to make a judgment on the appellant's rights, and only turned his mind to the evidence (or lack thereof) concerning why Victoria Police was not in a position to effectively investigate. In relation to acting incompatibly with

169 See (1986) 162 CLR 24, 40 (Mason J).
170 See [146] above; *Castles* (2010) 28 VR 141, 184 [185]–[186].

the appellant's human rights, the appellant first submitted that the decision limited his rights. He argued that the failure to investigate undermined his implied right, since Victoria Police was not an independent organisation that could have conducted an independent inquiry. Secondly, the appellant argued that the limitation was not justified under s 7(2) of the Charter. The main thrust of this submission was that there was a less restrictive option available to the decision maker, that being an OPI investigation. This is further reinforced, according to the appellant, by the seriousness of the complaint and the racial factors at play. Thirdly, the appellant submitted that the decision of Mr Jevtovic did not fall into one of the exceptions in s 38(2) or (3). WARREN CJ

219 The respondent contended that Mr Jevtovic's decision complied with the requirements set out in *Castles*. It argued that 'proper consideration' simply required the decision maker to have an understanding in general terms of the rights in question and how that would be interfered with by the decision to be made. It contended that it would be sufficient, in most cases, to show that the decision maker seriously turned his or her mind to the impact of the decision on human rights and the countervailing interests or obligations.

220 While it accepted that Mr Jevtovic's notes were brief, the respondent submitted that Mr Jevtovic's letter outlined that he had examined all the evidence and taken note of the Charter arguments put to him. Further, it argued that while Mr Jevtovic had not referenced the appellant's claim that his treatment was also in breach on the grounds of discriminatory treatment, the OPI had identified racial vilification in the case file.

221 In my view, Mr Jevtovic did not comply with his obligations under s 38(1). First, the respondent's submissions fail to take into account the important evaluative nature of the test in *Castles*.[171] There is no indication that Mr Jevtovic, in assessing the appellant's claim, weighed the serious nature of the complaint with any countervailing interests or obligations of the State. Moreover, there appears to be no consideration of how the decision to not investigate would continue to interfere with the appellant's rights. This is amplified by the fact that the police officer who allegedly assaulted the appellant had already been noted by the OPI as someone who had previously engaged in aggressive conduct. In my view, Mr Jevtovic had to also consider the potential for a continued threat to the community that could flow from a decision not to investigate when engaging in the evaluative process under s 38(1).

222 Secondly, the reasons of Mr Jevtovic do not suggest that he gave any real consideration to the relevant human rights of the appellant. The letter stated that he had taken into account 'the seriousness of the allegations' and relied on the OPI file and correspondence entered into between the OPI and the appellant. In my view, such a limited process does not comply with

[171] See *Castles* (2010) 28 VR 141, 184 [185]–[186].

the requirements of s 38(1) as understood in *Castles*. The appellant made a number of serious allegations about his treatment by a member of Victoria Police, a person in whom the community has placed significant trust. The appellant alleged that the officers physically and verbally abused him, and denied him treatment from the injuries they had inflicted. At no point do the reasons given by Mr Jevtovic indicate that he had given more than a cursory review of the allegation, nor does he indicate that if proven, these actions would amount to a breach of s 10 of the Charter.

223 Thirdly, Mr Jevtovic did not indicate that he had taken into account the appellant's right to equal protection from the law without discrimination under s 8(3). I am unpersuaded that the reference to the racial nature of the attack in the OPI file and the statement by Mr Jevtovic that he had reviewed the file and the correspondence is sufficient to show that he gave proper consideration to the appellant's rights under s 8(3). This is particularly important as the allegations by the appellant suggested that the attack was in some way racially motivated. The police officer allegedly stated 'you black people think you can come to this country and steal cars. We give you a second chance and you come and steal cars'. This factor was even more pertinent given the information on the OPI file raising the possibility of a systemic issue and previous misconduct by the police officer.

224 Fourthly, the reasons given by Mr Jevtovic stated explicitly that he was not qualified to make a judgment on the arguments put to him by the appellant. Regardless of whether there is a right to an effective investigation under s 10, Mr Jevtovic did not engage with the nature of the alleged right, nor did he balance it against any other countervailing interests or obligations. Instead, he looked at whether there was any evidence to substantiate the claim that the Ethical Standards Department could not effectively investigate the complaint. The obligation on Mr Jevtovic to give proper consideration to the appellant's right was not satisfied by merely looking at whatever evidence indicated the right had been breached.

225 The Attorney-General sought to advance an alternative argument. He submitted that there was no need to engage s 38(1) in determining whether Mr Jevtovic's action was lawful. The Attorney-General noted that under s 40(4)(b)(i) of the PIA, the Director is obliged to investigate a complaint if he considers it in the public interest to do so and that if he does not think it would be in the public interest, the Director must refer it to Victoria Police. The Attorney-General argued that because the appellant did not argue that Mr Jevtovic did not misconstrue the public interest, s 38(1) has no work to do. He substantiated this point by noting that once the powers of a public authority are properly understood, including by using interpretive principles set out in s 32 of the Charter, s 38(1) cannot be used to give the Director an additional power to investigate the matter if it breaches a complainant's Charter rights. In effect, the Attorney-General argued that the appellant sought to inject into the question of whether investigating a complaint is in

the public interest, an overriding or additional obligation to consider human rights. WARREN CJ

226 The Attorney-General provided four reasons to support this argument. First, the process of determining whether human rights considerations influence the exercise of a power by a public authority was said to be answered by the interpretative clause in s 32 of the Charter. Secondly, s 38(1) only requires that a decision maker give consideration to relevant human rights, and relevance cannot be understood without referring to the statutory context in which the action takes place. As s 40(4)(b)(i) does not make any human rights relevant, even after s 32 of the Charter has been engaged, it was said that there is no work to be done by s 38(1). Thirdly, s 38(1) does not allow a public authority to act contrary to its powers, therefore consideration as to whether a decision is made compatibly with human rights can only arise within a statutory context which is ascertained by interpreting the provision, this again includes the use of s 32(1). Fourthly, s 38(2) provides that a public authority does not breach s 38(1) where in giving effect to the statutory provision the public authority must act incompatibly with human rights. The Attorney-General submitted that this section indicates that the process of statutory interpretation must occur before s 38(1) is engaged.

227 In my view, this submission should be rejected. First, it misconceives the nature of ss 32 and 38. As the appellant noted, when a public authority is called upon to exercise a statutory power it must do two things: it must first construe the power, and then exercise that power. In the process of construction there is no doubt that s 32 has work to do in ensuring that the relevant provision, as far as possible, is construed in a way that is compatible with human rights. In some instances the only possible way to construe the provision would require the public authority to act in breach of s 38(1), hence the exception in s 38(2). However, in most cases, as in this one, once the construction process has occurred s 38(1) will act as a constraint on the exercise of the power to ensure that proper consideration is given to human rights and that the authority does not act incompatibly with human rights.

228 Secondly, the discretion given by s 40(4) is broad; the power to investigate is conferred on the Director if he or she believes it to be in the public interest.[172] There was no suggestion from the Attorney-General that in exercising this discretion other requirements of aspects of administrative law would not apply; for example, that the decision maker must provide procedural fairness and could not act in bad faith. In my view, s 38(1) provides a similar protection and it clearly has work to do.

229 Thirdly, the nature of the term 'public interest' is undoubtedly a broad concept, incapable of universal application.[173] In *O'Sullivan v Farrer*,[174] the

[172] *Plaintiff M76–2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322, 357.

[173] *Osland v Secretary, Department of Justice* (2008) 234 CLR 275, 315.

[174] (1989) 168 CLR 210.

High Court outlined the discretionary nature imported in the term 'public interest':

> Indeed, the expression 'in the public interest', when used in a statute, classically imports a discretionary value judgment to be made by reference to undefined factual matters, confined only 'in so far as the subject matter and the scope and purpose of the statutory enactments may enable ... given reasons to be [pronounced] definitely extraneous to any objects the legislature could have had in view.'[175]

230 Moreover in *McKinnon v Secretary, Department of Treasury*,[176] Hayne J noted the broad nature of the term while rejecting the contention that it is liable to be viewed as a singular concept:

> It may readily be accepted that most questions about what is in 'the public interest' will require consideration of a number of competing arguments about, or features or 'facets' of, the public interest.[177]

231 In my view, the use of the term 'public interest' in the PIA indicates that the legislature intended that the Director (or his delegate) take into account all matters that are relevant to the decision at hand. This may include, among other things, the nature of the complaint, whether the complaint was of a systemic nature, the resources available to the OPI, and the various roles and functions of the OPI, including ensuring the ethical standards of the police and providing information to Victoria Police regarding misconduct. Importantly, when they are relevant, the Director should also take into account the rights set out in the Charter. Section 38(1) does not oust or replace the public interest test; it is an acknowledgment that when human rights are engaged they are among the considerations that should be taken into account by the Director. Any contrary conclusion would undermine the very purpose of the Charter.

Conclusion

232 For the reasons outlined above, I would dismiss the appeal.

TATE JA

Introduction and Summary

233 Nassir Bare (**Bare**), an immigrant from Ethiopia, complains that he was viciously assaulted by Victoria Police. He sought an investigation of his complaint that was independent of Victoria Police. His request was refused. Under the *Charter of Human Rights and Responsibilities Act 2006* (**the Charter**),[178] a person has a right not to be treated or punished in a cruel,

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175 Ibid 216 (citation omitted) (Mason CJ, Brennan, Dawson and Gaudron JJ).

176 (2006) 228 CLR 243.

177 Ibid [55].

178 Section 1(1) of the *Charter of Human Rights and Responsibilities Act (2006)* provides: 'This Act may be referred to as the Charter of Human Rights and Responsibilities and is so referred to in this Act'. The convention is to refer to an Act by its short title (as expressed in the Charter

inhuman or degrading way.[179] This appeal from a judge of the Trial Division of this Court[180] raises the question of whether the decision not to conduct an independent investigation into a credible allegation of such treatment failed to give proper consideration to the human right Bare has not to be subjected to that treatment or his right to equal protection of the law without discrimination.[181] It also raises the question whether the right not to be treated in a cruel, inhuman or degrading way gives rise to a positive duty on behalf of the State to conduct an independent investigation into a credible complaint of such treatment. It raises the further question of whether a failure to give proper consideration to the human rights of someone who complains of cruel, inhuman or degrading conduct in deciding not to conduct an independent investigation invalidates that decision as a species of jurisdictional error. TATE JA

234 For the reasons that follow, I would allow the appeal.

235 In my view, the decision maker failed to give proper consideration to Bare's human rights the consequence of which is that the decision taken was unlawful. The 'proper' consideration to be given to human rights by those engaged in public administration demands a higher standard of consideration than that generally applicable at common law to the taking into account of relevant considerations. What is required is a weighing up, or balancing, of human rights against countervailing public and private interests. To treat the obligation to give proper consideration to human rights as an obligation of some stringency is consistent with the model of the Charter as intended to have a normative effect on the conduct of public authorities.

236 The failure was an error of law on the face of the record and the decision to refuse to conduct an independent investigation should be quashed.

237 I consider that the Court was not precluded from judicially reviewing the decision not to investigate Bare's complaint.

238 It is unnecessary to determine whether the unlawfulness is a species of jurisdictional error.

239 I consider that the right under s 10(b) of the Charter not to be subjected to cruel, inhuman or degrading treatment does not impliedly give rise to a duty independently to investigate.

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by s 1(1)) and there is thus no need to refer to the Charter as the '*Charter of Human Rights and Responsibilities Act*': see *Interpretation of Legislation Act 1984* s 10(1)(e); *Deming No 456 Pty Ltd v Brisbane Unit Development Corporation Pty Ltd* (1983) 155 CLR 129, 162 (Wilson J).

179 Section 10(b).

180 *Bare v Small* [2013] VSC 129 (**Reasons**).

181 The Charter s 8(3).

The decision not to independently investigate the assault

240 Bare made a complaint to the Office of Police Integrity (**the OPI**) alleging that he had been assaulted by officers of Victoria Police. In summary, he claimed that on 16 February 2009, when he was aged 17, police stopped the car in which he was travelling. An officer then handcuffed him and kicked his legs, causing him to fall. As he lay on the ground, the officer pushed his head repeatedly into the gutter and four or five of his teeth were chipped in the process. His jaw was cut, with resultant scarring. The officer sprayed him in the face with 'OC' (capsicum) spray several times, forcibly raising his head to do so. This caused him difficulty in breathing. The applicant claimed that during the assault the officer said words to the effect: 'you black people think you can come to this country and steal cars. We give you a second chance and you come and steal cars'. A second police officer kicked him in the ribs, while he was on the ground. Bare suffered pain and humiliation as a result of this alleged serious assault.

241 On 3 February 2010 Bare's solicitor, Ms Davis (**Davis**) of the Young People's Legal Rights Centre (**Youthlaw**), wrote to the OPI complaining about the assault. She argued that it would be in the public interest for the Director of the OPI (**the Director**) to investigate Bare's complaint.

242 Ms Small (**Small**), the acting manager of the OPI's Professional Standards Assurance Unit (**PSAU**), advised Davis[182] that the complaint had not been accepted by the OPI for investigation and should be referred to the Ethical Standards Division of Victoria Police (**ESD**). Mr Jevtovic, a delegate of the Director,[183] (**the delegate**), later reviewed the OPI file,[184] and confirmed the conclusion that the matter not be investigated by the OPI but should be referred to Victoria Police (**the decision**).[185] The OPI was abolished before the judge delivered judgment. The Independent Broad-based Anti-corruption Commission (**IBAC**)[186] has succeeded the OPI and has had vested in it all the rights and obligations of the OPI.[187] It is now the first respondent to the appeal.[188]

243 Bare brought proceedings for judicial review in the Trial Division of this Court seeking orders in the nature of certiorari and mandamus, as well as declarations that the decision was unlawful and in contravention of the

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182 By letter dated 21 June 2010.

183 The Director delegated his powers as Director under the *Police Integrity Act 2008* to Jevtovic on 12 January 2010.

184 This was after Bare commenced this proceeding in the Trial Division of the Supreme Court.

185 This was communicated by letter dated 19 October 2010 to Davis. See [273] below.

186 The OPI was abolished on 10 February 2013. IBAC was established by s 12 of the *Independent Broad-based Anti-corruption Act 2011* (**the IBAC Act**).

187 Pursuant to cls 4(a) and (b) of the Schedule to the IBAC Act. By force of cl 4(c) of the Schedule to the IBAC Act, IBAC was substituted as a respondent in the proceeding below in place of the Director, Police Integrity.

188 This is in substitution of Small as the first respondent, IBAC as the second respondent, and the delegate as the third respondent.

Charter.[189] At the heart of the judicial review proceedings was Bare's claim that he had a right under s 10(b) of the Charter to have his complaint investigated by a body independently of Victoria Police. By 'independent' Bare intended that the investigation would be conducted by an organization that had no hierarchical or institutional connection to Victoria Police and that had practical independence from Victoria Police. TATE JA

244 Bare submitted that the right not to be treated or punished in a cruel, inhuman or degrading way generated a positive duty on behalf of the State to conduct effective independent investigations into complaints of such treatment. He submitted that the decision was unlawful because it was taken in contravention of s 38(1) of the Charter which relevantly provides:

> [I]t 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.

245 Section 38(1) contains both a substantive and a procedural limb, the former being concerned with whether an act of a public authority is substantively incompatible with a human right and the latter addressed to the decision-making process undertaken.

246 Victoria Police is expressly included within the nominated list of 'public authorities' under the Charter.[190]

247 Section 38(2) creates an exception to the obligations imposed under s 38(1):

> Sub-section (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.

248 The judge held that although a decision by a public authority that had been arrived at without giving proper consideration to a relevant human right would be unlawful, by reason of s 38(1) of the Charter, this did not mean that it involved jurisdictional error or was thereby invalid. This had the consequence that the decision, even if it was not Charter-compliant, did not fall outside the scope of the privative clause in s 109(1) of the *Police Integrity Act 2008* (the **PI Act**)) as construed by her Honour. Her Honour considered that the decision was thereby ousted from judicial review.[191] Her Honour

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189 The application for judicial review initially challenged the refusal to investigate communicated to Davis by letter dated 21 June 2010. After the decision, the originating motion was further amended to include a challenge to the decision. It is only the decision which is challenged on the appeal.

190 Section 4(1)(d).

191 Her Honour answered 'yes' to the question formulated as question 4: 'Does s 109 of the *Police Integrity Act* prevent the Court from hearing and determining Mr Bare's claims for declarations that the ... decision ... [was] contrary to s 38 of the Charter?'.

found that it was unnecessary to determine if the decision complied with the Charter.[192]

249 Section 109 of the PI Act relevantly provided: [193]

(1) A protected person[194] is not liable, whether on the ground of lack of jurisdiction or on any other ground, to any civil or criminal proceedings to which they would have been liable apart from this section in respect of any act purported to be done under this Act unless the act was done in bad faith.

(2) Subsection (1) does not apply to an act done in the course of, or that results in, a critical incident.

(3) No civil or criminal proceedings may be brought against a protected person in respect of any act of a kind referred to in subsection (1) without the leave of the Supreme Court.

(4) The Supreme Court may not give leave unless it is satisfied that there is substantial ground to believe that the person to be proceeded against has acted in bad faith.

(5) Without limiting the generality of subsections (1) and (3), no civil or criminal proceeding may be brought against the Director in respect of the giving of a certificate by the Director under section 106,[195] unless the certificate was given in bad faith.

(6) Despite anything in this section —

(a) an order cannot be issued restraining the Director from carrying out or compelling the Director to carry out any investigation; and

(b) a proceeding cannot be brought against the Director seeking the issue of such an order.

250 Her Honour acknowledged that if the decision had involved jurisdictional error it would have been reviewable, in accordance with the principle in *Kirk v Industrial Court (NSW)*[196] that it is beyond the power of a State Parliament to preclude judicial review of a decision affected by jurisdictional error.[197] She held that s 109 of the PI Act prevented the Court from determining the claim for a declaration of unlawfulness in respect of the decision.

251 Her Honour rejected the argument that s 109 had no application because it was contained within those provisions concerned with general investigatory powers, pt 4, and the decision was effectively a decision *not* to investigate. This argument relied on s 52 of the PI Act which provided:

This Part [Part 4] applies for the purposes of an investigation by the Director under

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192 Her Honour responded to a question formulated as question 3, namely: 'Did the relevant decision-maker in the case of ... the ... decision properly consider Mr Bare's human rights as required by s 38 of the Charter?' in the following way: 'Not applicable, given the answer to question 4. The relevant claims will be dismissed, stayed or struck out'.

193 The PI Act was repealed on 10 February 2013, pursuant to s 16 of the IBAC Act.

194 The expression 'protected person' is defined in s 104 of the PI Act to include, relevantly, the Director and a member of staff of the OPI. The status of Small and the delegate as protected persons was not in doubt.

195 The terms of s 106 are set out at [351] below.

196 (2010) 239 CLR 531 (***Kirk***).

197 This implication from the principle in *Kirk* was common ground between the parties.

Part 3. TATE JA

252 It will later be necessary to describe other sections of the PI Act in more detail.

253 Her Honour also held that, in any event, there was no implied procedural right under s 10(b) of the Charter to an effective independent investigation of a claim of a breach of that right.

254 The amended notice of appeal identifies seven grounds of appeal, as follows:[198]

Section 109 of the PI Act

1. The trial judge erred in holding that s 109 of the PI Act prevents the Court from hearing and determining Bare's claim for a declaration that the decision was contrary to s 38 of the Charter.
2. The trial judge erred in failing to hold that the Court could hear and determine Bare's claim on the basis that:
   (i) the decision was a decision not to investigate Bare's complaint; and
   (ii) s 109 of the PI Act, properly construed and applied in the context of s 52 of the PI Act, does not apply to a decision of that kind.
3. The trial judge erred in failing to hold that the Court could hear and determine Bare's claim on the basis that:
   (i) s 109 of the PI Act does not apply to a decision tainted by jurisdictional error; and
   (ii) if the decision breached s 38 of the Charter in the manner alleged, then it involved an error of that kind.

Section 10(b) of the Charter — Effective investigation

4. The trial judge erred in holding that the human right in s 10(b) of the Charter, read in light of the Charter as a whole, does not include the right to an effective investigation of a credible claim of cruel, inhuman or degrading treatment.
5. The trial judge erred in failing to hold that:
   (i) the right under s 10(b) of the Charter, read in light of the Charter as a whole, includes the right to an effective investigation of a credible claim of cruel, inhuman or degrading treatment; and
   (ii) an 'effective investigation' of a credible claim that members of Victoria Police have breached s 10(b) of the Charter relevantly requires an investigation by an organization that does not have a hierarchical or institutional connection to Victoria Police and that has practical independence from Victoria Police.

Section 38(1) of the Charter — the Substantive Obligation

6. The trial judge erred in failing to hold that the decision was incompatible with Bare's right to an effective investigation of his complaint of cruel, inhuman or degrading treatment.

Section 38(1) of the Charter — the Procedural Obligation

198 The wording has been adapted to reflect terms already defined.

7. The trial judge erred in failing to hold that, contrary to s 38(1) of the Charter, in making the decision the delegate did not give proper consideration to Bare's right under:
   (a) s 10(b) of the Charter to:
      (i) not be treated in a cruel, inhuman or degrading way; and
      (ii) an effective investigation of a complaint of cruel, inhuman or degrading treatment, as that right is to be properly understood; [199] and
   (b) s 8(3) of the Charter to equal protection of the law without discrimination and equal and effective protection against discrimination.

255 Grounds 1 and 2 of the grounds of appeal raise the issue of the construction of s 109 of the PI Act, in light of s 52. Ground 3 raises the question of whether 'unlawfulness' under s 38 amounts to jurisdictional error. This is a significant question, made more important by the implications of the High Court's decision in *Kirk* which could not have been anticipated at the time the Charter was enacted. Grounds 4 and 5 concern the scope of the right under s 10(b) of the Charter. Grounds 6 and 7 raise the question of whether there was a breach of s 38(1) of the Charter, either a breach of the substantive limb, or a breach of the procedural limb, respectively. Within the context of the procedural limb, the claim is made that there was a failure to give proper consideration to the right under s 10(b), both insofar as it expressly provides that a person must not be treated or punished in a cruel, inhuman or degrading way and also insofar as the right impliedly incorporates a right to an effective investigation of a credible complaint. Ground 7 also alleges a failure to give proper consideration to the equality right provided for under s 8(3) of the Charter, which provides that:

> 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.

256 The Victorian Equal Opportunity and Human Rights Commission (**the Commission**) intervened in support of Bare.[200] It focused its submissions on matters of principle, including the scope of the right under s 10(b), and on the construction and operation of s 38(1) of the Charter (including whether the consequence of a breach of s 38(1) is jurisdictional error), which submissions Bare adopted.

257 The Attorney-General for the State of Victoria also intervened[201] and made submissions on the construction and application of s 40(4)(b)(i) of the PI Act, under which the decision was made,[202] and on the scope of the right

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199 Leave was granted at the hearing of the appeal to extend the seventh ground of appeal to allege that there was a failure to take into account the right of Bare not to be treated in a cruel, inhuman or degrading way and not only a failure to take into account the implied right to an effective investigation into such alleged treatment.

200 Pursuant to s 40 of the Charter.

201 Pursuant to s 34 of the Charter.

202 The terms of s 40 are set out at [272] below.

under s 10(b), in opposition to the submissions made by Bare. He also made submissions in support of the judge's conclusions that unlawfulness under s 38(1) does not constitute jurisdictional error and that therefore s 109 of the PI Act applies to exclude the relief sought under s 39(1) of the Charter.[203] TATE JA

258 It is useful to understand the nature of the decision, and the decision-making process, before examining the competing submissions on whether the decision is reviewable. This will involve considering first whether there was a breach of the procedural limb of s 38(1) of the Charter before turning to the construction of s 109 of the PI Act. It is also useful to examine the scope of the right under s 10(b) before considering whether the decision taken was incompatible with that right and there was therefore a breach of the substantive limb of s 38(1). Approached in this way, there are five separate issues raised by the grounds of appeal that can be examined in turn: (1) Was there a breach of the procedural limb of s 38(1) of the Charter? (2) Does s 109 of the PI Act preclude judicial review of a decision not to investigate? (3) Does 'unlawfulness' under s 38 of the Charter amount to jurisdictional error? (4) Does the right not to be punished or treated in a cruel, inhuman or degrading way give rise to an implied right to an effective independent investigation of a credible complaint? and (5) Was the failure to undertake an independent investigation a breach of the substantive limb of s 38(1) of the Charter?

(1) Was there a breach of the procedural limb of s 38(1) of the Charter?

259 The details of the complaint are relevant to a determination of whether there was a breach of the procedural limb of s 38(1) of the Charter.

(i) The complaint

260 The complaint was made on 3 February 2010. Bare was entitled to complain to the Director under s 86L of the *Police Regulation Act 1958*.[204] Bare

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203 Section 39(1) of the Charter is set out at [391] below.

204 Such complaints were governed by div 1 of pt 3 of the PI Act including s 40(4)(b)(i) under which the decision was made. As the judge noted, alternatively Bare could have complained to a member of the Victoria Police Force under s 86L (in div 2 of pt IVA) of the *Police Regulation Act*. If a complaint was made about a member's 'serious misconduct' the Chief Commissioner of Police would be required to investigate it under s 86M of that Act. The judge noted that there was no dispute that the behaviour alleged might be regarded as 'serious misconduct' in accordance with the definition under s 86A: 'serious misconduct' in relation to a member of the police force means — (a) conduct which constitutes an offence punishable by imprisonment; or (b) conduct which is likely to bring the force into disrepute or diminish public confidence in it; or (c) disgraceful or improper conduct (whether in the member's official capacity or otherwise)': Reasons [5]–[6]. Had this path been taken, there would also have been an obligation on the Chief Commissioner to give to the Director in writing the prescribed details of the complaint and the prescribed details of the investigation once commenced. In addition, under s 86O(1), the Chief Commissioner would have been obliged to report in writing to the Director on the progress of an investigation as often as requested by the Director, and, under s 86O(3), after completing the investigation, to have reported to the Director on the results of the investigation and the action, if any, taken or proposed to be taken. The same regime applies if the Director refers a complaint to the Chief Commissioner of Police under s 40(2) of the PI Act: see PI Act s 40(3). The Director,

described the incident that occurred on 16 February 2009 in detail:

> I was travelling in a car with three other boys at night on Sunday 15 February 2009. At about 12:30 am as we were driving along Mason Street, Altona North, we came across a police car blocking our path. We stopped the car. I opened the car door to get out of the car but as soon as I opened the door a plain-clothes policeman grabbed me. I had not seen the policeman before but his name is [XY].
>
> This policeman then pushed me against the car, handcuffed me and then kicked my legs from under me so I fell to my knees. As he was doing this, I could see two other police officers — one male and one female — come towards me. The first policeman who had grabbed me then pushed my head to the ground and my chin struck the gutter. He then grabbed me by the hair and pushed my head back into the gutter so that my chin struck the gutter about 3 times in a row. I could feel teeth coming out and I had to spit them out. While he was doing this he said 'You black people think you can come to this country and steal cars. We give you a second chance and you come and steal cars'.
>
> Another officer came along and kicked me in the ribs. I am not sure of this policeman's name or details but I believe he is also based at Williamstown Police Station.
>
> The first policeman ([XY]) then sprayed me in the face with pepper spray. At this point I was bleeding and I couldn't move. I tried to keep my head down but he kept pulling my head back up and spraying me. He kept spraying me for 5–10 seconds. Then they took me to a house nearby which had a tap outside. They told me to wash my eyes out with water or I'll go blind. They held my head under the water for approximately 10 minutes. Then they said I was under arrest and took me to the Williamstown Police Station in a divvy van. I was by myself in the back of the van.
>
> I was then put in a cell in the Williamstown Police Station. Some ambulance officers came to the police station and came to see me in the cells. They put something on my jaw to stop the bleeding. They said I needed 4–5 stitches and said that I would have to go with them to get the stitches put in. A male police officer who I think was the sergeant there said 'no, he can go in his own time'. The ambulance officers then left the room and were talking outside with the police. I could see the officer who had beaten me up standing in the doorway so I felt like I could not tell the ambulance officers what had happened.
>
> A ... volunteer was called in to the cells to be with me during the police interview. I did not tell this person about what happened because I wasn't sure what their role was exactly and I didn't know if I could trust them.
>
> I gave a no comment record of interview.
>
> I was released from the cells at about 4:30–5:30 am. I walked home. My mum was home when I got there and she saw that I was bleeding.
>
> My teeth were damaged by this assault. 4 of my bottom teeth are chipped and 2 of my top teeth are damaged. I had a cut on my jaw measuring about 2 cm long. I went to a clinic in Footscray a few days after it happened to see a doctor and then to Williamstown Hospital a few days after that. My ribs were also bruised.

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on the receipt of a report from the Chief Commissioner on a complaint he has referred, can request the Chief Commissioner to conduct a further investigation or investigate the matter himself: see PI Act s 48(1). The Director can also request that the Chief Commissioner take appropriate action: see s 48(3). Small gave evidence that a re-investigation by the Director was rare.

> The police charged me with theft of a motor vehicle. [XY] was the informant. A finding of guilt was not made against me because I completed the ROPES program.[205] TATE JA

261 Davis of Youthlaw urged that the OPI investigate the matter independently. She said 'Nassir's instructions at this stage are that this complaint should not be referred to Victoria Police Ethical Standards'.[206] She then identified multiple reasons in support of the need for an investigation to be conducted that was independent of Victoria police. She said:

> We submit this incident warrants independent investigation by the OPI and not Victoria Police Ethical Standards on the following grounds:
>
> ***1. The seriousness of the misconduct***
>
> 1.1 Nassir's complaint details a serious assault by the police member Constable [XY]. Nassir alleges this police member pushed his head into a gutter deliberately and repeatedly. Nassir states that this occurred after he was handcuffed and had his legs kicked out from under him and no use of force by police was necessary. As a result of this assault, Nassir sustained injuries including 4–5 chipped teeth and a cut under his jaw leaving a scar measuring approximately 2cm long.
>
> 1.2 Nassir further complains of an assault by another police member he cannot identify but believes to be based at Williamstown Police Station. Nassir alleges this member kicked him in the ribs whilst he was lying on the ground and use of force by police was not necessary.
>
> 1.3 The manner in which OC spray was deployed amounts to cruel, inhuman and degrading treatment. Nassir alleges Constable [XY] sprayed him in the face once he was already handcuffed and not presenting any risk to himself, police or other persons present. Nassir alleges this member forcibly raised Nassir's head whilst deploying the OC spray to his face area. The complainant experienced pain, difficulty breathing and humiliation during this incident.
>
> 1.4 The conduct of members of police described in the complaint contravenes several operating procedures within the Victoria Police Manual (VPM). The deployment of OC spray after the complainant was effectively restrained by handcuffs and no longer resisting arrest fails to meet the criteria for use set out in s 7.2.1 of the VPM. During transportation, the complainant was not kept under constant observation and he should not have been transported alone in the divisional van, according to 7.4.1 and 7.4.2 of the VPM. In our submission, the deployment of OC spray and the use of excessive force during this incident failed to give priority to the VPM operational principles of 'Safety first' and 'Minimal force'.
>
> ***2. Investigation of the complaint is in the public interest***
>
> 2.1 It is in the public interest the OPI conduct an independent investigation of the complaint, as it involves serious allegations of assault and cruel, inhuman and degrading treatment of a minor. Nassir was 17 years of age at the time of the incident.

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205 ROPES was a Magistrates' Court diversionary program for young offenders.

206 Emphasis in original.

2.2 Nassir is of Ethiopian descent and migrated with his family to Australia in 2000. He is a recent migrant, having arrived in Australia in 2004. Nassir alleges Constable [XY] made discriminatory remarks to him when he said 'You black people think you can come to this country and steal cars. We give you a second chance and you come and steal cars'. It is in the public interest this complaint be further investigated as it involves allegations of discriminatory treatment on the basis of race.

3. Obligations under the Victorian Charter of Human Rights and Responsibilities 2006

3.1 The Victorian Charter of Human Rights and Responsibilities 2006 (**the Charter**) states at s 10(b) that a person is not to be treated in a cruel, inhuman and degrading manner. At s 22, the Charter provides that when deprived of liberty all persons must be treated with humanity and with respect for the inherent dignity of the human person.

3.2 Section 1 of the Charter imposes an obligation on public authorities to act in a way that is compatible with human rights. Section 38 of the Charter states that it is unlawful for public authorities to act incompatibly with human rights or to fail to give consideration to human rights in their decision making.

3.3 A stated objective of the Director of the OPI within the *Police Integrity Act 2008* at s 8(1)(d) is to 'ensure that members of Victoria Police have regard to the human rights set out in the Charter of Human Rights and Responsibilities'.

3.4 As outlined above, we submit that the conduct of members of the police in relation to the use of OC spray during this incident amounts to cruel, inhuman and degrading treatment and is therefore a breach of s 10(b) of the Charter. Police conduct during this incident further amounted to a failure to respect the humanity and inherent dignity of a person deprived of liberty, as required by s 22 of the Charter.

3.5 It is our view that the right to freedom from cruel, inhuman, degrading treatment, as set out in s 10(b) and mirrored in s 22, places an obligation on the state to not only refrain from such treatment but to effectively investigate allegations of such treatment. This view is supported by international human rights jurisprudence (*Khan v United Kingdom*, Eur Ct HR (12 May 2000); House of Lords decision in *JL; R (on Application of) v Secretary of State for Justice* [2008] UKHL 68 (26 November 2008) *AM, R (on the application of) v Secretary of State for the Home Department* [2009] EWCA Civ 219 (17 March 2009).

3.6 It is our submission that for an investigation to be effective it should follow the guidelines set out by the European Commission of Human Rights Rapporteur on Police Complaints. The guidelines state that an effective investigation must be one that is 'independent', 'adequate and capable of resulting in discipline and prosecution of perpetrators', 'prompt' 'transparent and open to public scrutiny' and 'involves and protects the victim of the alleged abuse'. In our view, failure to carry out an effective investigation in accordance with those guidelines amounts to a breach of s 10(b) and s 22 of the Charter.

3.7 We submit that the Charter and the *Police Integrity Act 2008* place an

> obligation on the OPI to carry out an investigation of this complaint. Referral of this complaint to the Victoria Police risks compromising the standards of effective investigation outlined above, particularly with regard to the independence of the investigation. In our view, a decision by the OPI to refer the investigation of this matter to Victoria Police would amount to a failure to act compatibly with human rights as required by s 1 and s 38 of the Charter. TATE JA

262 It is apparent that Davis identified not only the right under s 10(b) of the Charter, but also explained how it has been interpreted by some courts to give rise to a positive duty to investigate, including by the European Court of Human Rights, the House of Lords and the Court of Appeal for England and Wales. She also relied on s 22 of the Charter which provides in sub-s (1) that '[a]ll persons deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person'. She referred not only to the general duty on all public authorities to give proper consideration to human rights, under s 38 of the Charter, but also to the specific duty on the Director, under s 8(1)(d) of the PI Act, to ensure that Victoria Police have regard to the human rights protected by the Charter. Given that the complaint alleged a denial of human rights (as mentioned, the infliction of cruel, inhuman or degrading treatment, in contravention of s 10(b) of the Charter, and the failure to treat Bare, when deprived of his liberty, with humanity and respect, in contravention of s 22(1)) it is explicable why Davis, in urging that an investigation should be conducted by the OPI, would point to the specific supervisory obligation imposed on the Director to ensure that Victoria Police have regard to human rights. An investigation by the Director into Bare's complaint would surely assist him to discharge his obligation under s 8(1)(d) of the PI Act.[207]

263 A preliminary assessment of the complaint was made by a staff member of the PSAU, and the complaint was referred to a Case Assessment Committee of OPI (**CAC**) on the basis of a 'check-box' evaluation. The referral recommended that a 'public interest' investigation may be warranted because the complaint met the description that it: (1) 'relates to conduct that has affected a large number of persons or the rights of persons generally or a group of persons within society (may include specific reference to human rights, discrimination etc)'; and (2) 'relates to a Victoria Police member or station with a significant complaint history or intelligence indicates that the member or station is of concern to OPI'. The preliminary assessment also suggested that a '[r]eview of "established practices or procedures" may be warranted' because the complaint: (1) 'relates to training issues that impact on the capacity of police to respond to the needs of the Victorian community'; (2) 'relates to a systemic flaw or issue'; and (3) involves 'OC spray usage'.

264 The CAC was advised, by means of a memorandum from an OPI officer,

207 Section 8(1)(a) of the PI Act also identified as an object of the Director that of 'ensur[ing] that the highest ethical and professional standards are maintained in Victoria Police'.

dated 1 March 2010, that it should consider an investigation by the OPI:

> ISSUES
>
> 1. Allegations are of serious assault and unnecessary use of force:
>   - while handcuffed: using OC spray, kicking legs from under BARE, repeatedly pushing BARE's head into the gutter;
>   - resulting injuries include chipped teeth and a cut to the jaw;
>   - ambulance officers recommended BARE go to hospital for stitches but police did not allow this.
> 2. Racial vilification by saying to BARE: 'You Black people think you can come to this country and steal cars.'
> 3. Const [XY] has two previous instances listed in Compass for inappropriate use of OC spray (08/156[208] and Ref 4751).
> 4. BARE does not want the complaint forwarded to Victoria Police.
> 5. BARE's lawyer has escalated the matter to be one of human rights.
> 6. Incident complained of is almost 12 [months] prior to complaint being lodged.
>
> RECOMMENDATIONS
>
> That CAC consider for OPI investigation.

265 The CAC deferred assessment and sought further information. It was replaced by a new Business Monitoring Committee (**BMC**). Small, as acting manager of PSAU, referred the complaint to the BMC.[209] The briefing note Small prepared for the BMC identified the issues for consideration as they were recorded in the memorandum of 1 March 2010. On 11 May 2010, the BMC held a meeting, considered the complaint and determined that it not be accepted for OPI investigation but referred to the ESD. No delegate of the Director attended the meeting.

266 On 28 May 2010 Small received relevant medical records from Youthlaw. They were placed on the case file relating to the complaint. On 21 June 2010 Small wrote to Davis and informed her that she had 'determined that Mr Bare's complaint appears to relate to allegations warranting investigation'. She thus implicitly accepted that the complaint was of a credible nature.

267 However, despite accepting that the complaint warranted investigation, Small went on to explain to Davis that:

> An assessment committee has evaluated your client's matter against a priority matrix and has determined that your client's complaint is most appropriately investigated by Victoria Police. I acknowledge receipt of the further material you provided, your reference to human rights issues associated with your client's complaint and your concerns about the independence of police investigators.

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208 In cross-examination at trial, Small clarified that she considered that the first allegation of the misuse of OC spray referred to (File 08/156) may have been against another police officer, not XY, and that, in that incident, the allegation against XY may have been an allegation of assault (causing minor injury) while the person detained was handcuffed.

209 On 6 May 2010.

TATE JA

> However, the investigation of other matters currently before OPI has a greater public interest justification.

268 Small then closed the file relating to Bare's complaint.[210] The file included, amongst other things, the complaint, the memorandum of 1 March 2010, and the briefing note.

269 The 'priority matrix' referred to in Small's letter was a tool used by the OPI aimed at prioritising its work in an effective and efficient manner. It included such matters as the amount of likely resources that would be needed and the likely impact on the objects of OPI, its reputation, and Victoria Police.[211]

270 Bare then commenced proceedings in the Supreme Court for judicial review.[212]

271 In light of the proceedings brought by Bare, the delegate reviewed the file and, as mentioned above,[213] reaffirmed the view that although the complaint required investigation, there was no need for the OPI to investigate. Victoria Police could conduct an investigation, if a request was made by Bare for such an investigation. There has been no such request from Bare and the complaint has not been referred to Victoria Police for investigation.

272 The decision was made under s 40(4)(b)(i) of the PI Act. Section 40 relevantly provided:

> Dealing with complaints
>
> (1) The Director may determine that a complaint does not warrant investigation—
>
> (a) if in the Director's opinion—
>
> (i) the subject-matter of the complaint is trivial; or
>
> (ii) the complaint is frivolous or vexatious or is not made in good

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210 The file was closed on 30 July 2010.

211 One of the grounds of challenge to the BMC's decision of 11 May 2010 before the judge was that Bare had not been afforded procedural fairness because he had not been given notice of the priority matrix, or that his claim would be evaluated against it, or given an opportunity to be heard about how his claim should be evaluated against it. Ultimately, the judge held that the decision of the BMC of 11 May 2010 was unlawful and of no force and effect (order 1 of the judge's orders of 25 March 2013). The defendants conceded that the decision of the BMC was unlawful because the members of the BMC lacked power to make it: Reasons [40]. Because the BMC was not authorized to make the decision it did, her Honour determined that the decision of the BMC was tainted by jurisdictional error: Reasons [168]. At trial there was also a challenge to the decision on the basis that there was a breach of procedural fairness because by then Bare had a legitimate expectation that the priority matrix would be used by the delegate in arriving at the decision when it was not so used and Bare ought to have been given an opportunity to file material in support of his submission that the policy of the priority matrix should be applied in his favour, including evidence of the alleged 'over-policing' of African youths. The judge dismissed this challenge. The lack of the use of the priority matrix by the delegate in arriving at the decision was not re-asserted on appeal.

212 As mentioned at [243] n 189 above, the proceedings for judicial review initially included a challenge to the determination of the BMC of 11 May 2010 communicated to Davis by letter dated 21 June 2010.

213 See [242] above.

faith; or

(b) if the complainant had had knowledge for more than a year of the conduct complained of and fails to give a satisfactory explanation for the delay in making the complaint.

(2) Subject to subsection (4), the Director must refer a complaint warranting investigation to the Chief Commissioner.

(3) If the Director refers a complaint to the Chief Commissioner under subsection (2), the Chief Commissioner must investigate the complaint under Division 2 of Part IVA of the Police Regulation Act 1958.

(4) The Director—

(a) must investigate a complaint if the conduct complained of is conduct of the Chief Commissioner or of a Deputy or Assistant Commissioner; and

(b) may investigate a complaint if the conduct complained of—

(i) is of such a nature that the Director considers that investigation of the complaint by the Director is in the public interest;[214] or

(ii) is in accordance with established practices or procedures of Victoria Police and the Director considers that those practices or procedures should be reviewed.

(5) In a case to which subsection (4) applies, if the complaint was not first made to a member of Victoria Police, the Director may give the Chief Commissioner details of the complaint.

273 In his letter to Davis dated 19 October 2010 (**the delegate's letter**), the delegate said:

> As a result of proceedings brought against a decision to not investigate a complaint made by Youthlaw — Young Peoples Legal Rights Centre on behalf of Mr Nassir Bare ... I determined that it was appropriate to conduct a reconsideration of your client's complaint. ...
>
> In doing so I divided my review into two categories. The first being the complaint itself, and the second being the issue of who should investigate.
>
> None of the matters in section 40(1) of the *Police Integrity Act 2008* persuaded me that the complaint did not warrant investigation; therefore the complaint must be investigated.
>
> As part of my considerations I intentionally focussed on identifying all available evidence that would warrant consideration for deviating from our established legislated process. That is, I must refer a complaint warranting investigation to the Chief Commissioner subject to section 40(4).
>
> Section 40(4)(b)(i) allows the Director to investigate a complaint if the conduct complained of 'is of such a nature that the Director considers that investigation of the complaint by the Director is in the public interest'.
>
> I examined the available evidence including the OPI file and all correspondence received from the complainant.
>
> I also considered the seriousness of the allegations and the complainant's reference to section 10 of the *Charter of Human Rights and Responsibilities Act 2006*.

[214] The Attorney-General's submission with respect to the construction and operation of s 40(4)(b)(i) of the PI Act is discussed at [302]–[327] below.

TATE JA

> I have also considered the interpretation by the complainant of OPI's obligations in the context of Human Rights Charter. Whilst not qualified to make judgments on the merits of that interpretation/argument, I have made the observation that the complainant appears to have arrived at a point which reflects a predisposition that Victoria Police Ethical Standards Department (ESD) will not investigate this matter effectively and with integrity. It was therefore prudent in my view to focus my review on identifying what, if any, evidence existed to support the merits of the position the complainant appears to have taken.
>
> It should be noted that given the nature of the review and concerns raised by the complainant, I did not believe that it was necessary for me to refer to OPI's Priority Model and therefore did not do so in any manner. There were no OPI policies or procedures which raised any other issues for my consideration of this matter.
>
> *Conclusion*
>
> Having conducted the review I can confirm that I have not discovered nor has any evidence supporting the complainant's position been made available to me, other than of course the complainant's position as it relates to their interpretation of OPI's obligations under the Human Rights Charter.
>
> In light of the above matters I have concluded the following:
>
> First Issue I reaffirm OPI's original conclusion that the matter warrants investigation; and
>
> Second Issue I do not consider that investigation by the Director is in the public interest, and I am satisfied that referral under s 40(2) of the Police Integrity Act is adequate for the investigation of this complaint.
>
> I would however like to extend to the complainant (given the circumstances of this complaint and the position taken by the complainant) that OPI could appropriately undertake a more active oversight of the ESD investigation should the complainant be agreeable to that course of action.

(ii) The Castles test for 'proper' consideration

274 Bare submitted that the delegate's letter revealed that there had been a failure by the OPI to give proper consideration to relevant human rights, especially the right not to be subjected to cruel, inhuman or degrading treatment and the right to the equal protection of the law without discrimination. It was conceded by IBAC that if the assault had occurred as alleged by Bare, the assault could reasonably be described as a breach of the right to be free from cruel, inhuman or degrading treatment recognised in s 10(b) of the Charter.[215]

275 Bare submitted that the obligation to give 'proper' consideration to human rights imposes a higher standard than does the obligation recognised at common law, or under statutory forms of judicial review,[216] to take relevant considerations into account. In *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*,[217] Mason J described what was required to discharge the

215 Second Respondent's Outline of Submissions (dated 28 November 2013) [6].
216 See, eg, s 5(1)(e), s 5(2)(b) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth).
217 (1986) 162 CLR 24 (***Peko-Wallsend***).

common law obligation in terms that suggested only that the decision maker 'must call his own attention to the matters which he is bound to consider'.[218] At least where the factors to be taken into account are only implied by an Act, the obligation to take into account a relevant consideration is unlikely to entail the giving of 'proper, genuine and realistic' consideration to the relevant factors.[219] Where an Act expressly directs a decision maker to have regard to particular facts and matters, those facts and matters must become a fundamental and focal point in the decision-making process.[220] Bare submitted that the statutory language in s 38(1) is significant, and the requirement to give 'proper' consideration to a human right elevates the obligation beyond that required under the common law, even where the factors are expressly identified.[221]

276 I agree. The difference between the statutory language in s 38(1) and the manner in which the common law ground of review is expressed supports the view that s 38(1) is intended to impose a test that is more strict than that applicable at common law. The word 'proper' must be given work to do in accordance with the maxim that all words in a statute must be given meaning and effect.[222] This is particularly so given that the word 'proper' describes the nature of the consideration that is to be given; it qualifies the exercise in which a decision maker is obliged to engage.

277 In *Castles v Secretary of the Department of Justice*[223] Emerton J spelt out clearly what it is that the procedural obligation under s 38(1) requires a decision maker to do.

278 In *Castles* the plaintiff was a prisoner in a minimum-security prison who, before her conviction, had been receiving in vitro fertilisation (**IVF**) treatment for more than one year. For each cycle of IVF, the treatment involved self-administration of a number of drugs and three or four visits to the Melbourne IVF clinic. The treating doctor considered that the plaintiff needed to have the treatment without delay because she would become ineligible for treatment at the clinic at the age of 46 and she was 45 at the

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218 Ibid 39 referring to the statement made by Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, 228.

219 *Minister for Immigration and Multicultural Affairs v Anthonypillai* (2001) 106 FCR 426, 440–2 [59]–[66].

220 *Insurance Australia Ltd t/as NRMA Insurance v Motor Accidents Authority of New South Wales* [2007] NSWCA 314 [40] (Spigelman CJ, with whom Beazley and Giles JJA agreed). See *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611; *Minister for Immigration and Citizenship v SZJSS* (2010) 243 CLR 164. See also Melanie Schleiger, 'One size fits all: The obligation of public authorities to consider human rights under the Victorian Charter' (2011) 19 *Australian Journal of Administrative Law* 17, 18. See also Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Law Book Co, 5th ed, 2013) 5.140.

221 See Carolyn Evans and Simon Evans, *Australian Bills of Rights: The Law of the Victorian Charter and ACT Human Rights Act* (LexisNexis Butterworths, 2008) 137–8 [4.58]–[4.59].

222 *Commonwealth v Baume* (1905) 2 CLR 405, 414; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 382 [71] (***Project Blue Sky***); *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 266 [39].

223 (2010) 28 VR 141 (***Castles***).

time of the litigation. By the time she was due to become eligible for home detention it would be too late for her to undergo a cycle of IVF treatment at the clinic. Due to the nature of the prison and her classification as a low-security prison she was able to go on trips outside of the prison with an accompanying officer and she was entitled to leave the prison on unaccompanied trips. From the time she started serving her term of imprisonment, the plaintiff made numerous requests for the approvals and permits needed to continue her IVF treatment while she was in prison, at her own expense. The Secretary of the Department of Justice decided not to issue the permits required by the plaintiff to leave the prison to obtain the treatment. Emerton J found that the right under s 22 of the Charter for persons deprived of liberty to be treated with humanity and with respect for the inherent dignity of the human person, which she described as 'the dignity right', encompassed access to health services available to the wider community without discrimination on the ground of their legal situation. This was so because the dignity right entailed that prisoners should not be subjected to hardship or constraint other than the hardship or constraint that resulted from their deprivation of liberty. Although the enjoyment of those rights might necessarily be compromised by the fact of incarceration, s 47(1)(f) of the *Corrections Act 1986* provided that every prisoner had the right to have access to reasonable medical care and treatment necessary for the preservation of health. Emerton J held that, in the circumstances of the case, access to IVF treatment was both reasonable and necessary for the plaintiff's reproductive health, although this might not necessarily involve access to the Melbourne IVF clinic if the IVF treatment could be provided closer to the prison at an alternative location. TATE JA

279 Relevantly, Emerton J examined the formal statement of reasons given by the Secretary, upon request under s 8 of the *Administrative Law Act 1978* (**the ALA**), to determine if the procedural limb of s 38(1) was satisfied. Her Honour said:

> The requirement in s 38(1) to give proper consideration to human rights must be read in the context of the Charter as a whole, and its purposes. The Charter is intended to apply to the plethora of decisions made by public authorities of all kinds. The consideration of human rights is intended to become part of decision-making processes at all levels of government. It is therefore intended to become a 'common or garden' activity for persons working in the public sector, both senior and junior. In these circumstances, proper consideration of human rights should not be a sophisticated legal exercise. Proper consideration need not involve formally identifying the 'correct' rights or explaining their content by reference to legal principles or jurisprudence. Rather, proper consideration will involve understanding in general terms which of the rights of the person affected by the decision may be relevant and whether, and if so how, those rights will be interfered with by the decision that is made. As part of the exercise of justification, proper consideration will involve balancing competing private and public interests. There is no formula for such an exercise, and it should not be scrutinised over-zealously by the courts.
>
> While I accept that the requirement in s 38(1) to give proper consideration to a

> relevant human right requires a decision maker to do more than merely invoke the Charter like a mantra, it will be sufficient in most circumstances that there is some evidence that shows the decision maker seriously turned his or her mind to the possible impact of the decision on a person's human rights and the implications thereof for the affected person, and that the countervailing interests or obligations were identified.[224]

280 She was satisfied that the Secretary had given proper consideration to the plaintiff's human rights by the detailed manner in which the briefings to the Secretary described, and weighed up, the plaintiff's interests and the competing public interests, and the Secretary's own statement that, in making her decision, she considered the plaintiff's human rights and weighed them against the rights and obligations imposed by the *Corrections Act*:

> It is unfortunate that the relevant parts of the briefings to the secretary are redacted. However, I am satisfied that the secretary gave proper consideration to Ms Castles' human rights from the detailed manner in which the competing interests of Ms Castles and what could be described as public interests are weighed up in the briefings and were sent to her, along with the secretary's own statement that she considered Ms Castles' human rights and weighed them against the rights and obligations imposed by the Corrections Act in making her decision.[225]

281 Both Justice Victoria and Corrections Victoria had provided briefings to the Secretary with each agency taking into account in its respective briefing the plaintiff's rights, especially the plaintiff's right to non-interference with her privacy and her family. In addition, advice had been obtained from the Victorian Government Solicitor on human rights issues. Although the substance of the advice had been redacted in the copy provided to the Court, on the ground of legal professional privilege, the headings alone indicated that the privileged material contained advice on human rights issues. In the formal statement of reasons the Secretary set out the rights which she considered relevant to the plaintiff's application, the right to privacy and non-interference with one's family,[226] the right to the protection of families and children,[227] and the dignity right. Reference was made in the formal statement of reasons to the balancing of those human rights with the rights and obligations under the *Corrections Act*. The proper consideration extended by the Secretary was based on the Secretary's recognition of the competing rights and obligations at stake, some sourced in the Charter and others sourced in the *Corrections Act*, and the need to weigh them against each other in an evaluative exercise before arriving at a decision. This took place as part of the general evaluation, including the weighing up of policy considerations, that the Secretary, as an administrative decision maker, was obliged to undertake.

282 In *PJB v Melbourne Health,*[228] a matter concerning the *Guardianship and*

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224 Ibid 184 [185]–[186].
225 Ibid 184–5 [187].
226 The Charter s 13.
227 Ibid s 17.
228 (2011) 39 VR 373 (**PJB**).

Administration Act 1986, Bell J referred approvingly to the test applied in *Castles*: TATE JA

> The so-called 'procedural' limb of s 38(1) that 'proper consideration' be given to relevant human rights requires public authorities to do so in a practical and common-sense manner. As Emerton J said in *Castles v Secretary of Department of Justice*, there is 'no formula' and the authority must 'seriously turn his or her mind' to the human rights impact of what is proposed and identify 'the countervailing interests or obligations'. That can be done in a variety of ways which may be suited to particulars circumstances. Decision-makers are not expected to approach the application of human rights like a judge 'with textbooks on human rights at their elbows', said Lord Hoffmann in *R (SB) v Denbigh High School*.[229]

283 Emerton J reaffirmed what is required to satisfy the need to give 'proper' consideration to a human right in *Giotopoulos v Director of Housing*.[230] Her Honour found that the Victorian Civil and Administrative Tribunal (**VCAT**) had given proper consideration to the human rights of a man who had come to be occupying a public housing flat through unorthodox means when it refused to make an order requiring the Director of Housing to enter into a tenancy agreement with him. She found that VCAT had erred in wrongly concluding that the right to non-interference in one's home and family could not be engaged by VCAT's discretionary power to make a tenancy order. However, VCAT, despite considering that the relevant right was not engaged, had proceeded to compare the competing rights and obligations at stake to determine if a refusal to grant a tenancy order could be justified in the circumstances of the case. Its weighing up of the competing considerations went beyond the invocation of the Charter as a mantra and satisfied the requirement to give proper consideration to relevant Charter rights. Her Honour said:

> The Tribunal ... purported to carry out a proportionality analysis in relation to interference in home and family in the penultimate paragraph of its reasons. This analysis, which consists almost entirely of a recitation of the terms of s 7(2) of the Charter would, if taken in isolation, have been insufficient to satisfy the requirements of s 38(1) of the Charter. As this Court said in *Castles v Secretary to the Department of Justice*, 'the requirement in s 38(1) to give proper consideration to a relevant human right requires a decision-maker to do more than merely invoke the Charter like a mantra'. I note, however, that there was considerable material before the Tribunal to enable the proportionality analysis to be undertaken and that the Tribunal, in identifying and comparing the respective hardships of Mr Giotopoulos and the Director, went some way to analysing whether the refusal to grant a tenancy order and give Mr Giotopoulos security of tenure would be 'justified' in the relevant sense in the circumstances of this case.[231]

284 As her Honour explained, what was critical to the discharge of the obligation to give proper consideration to the relevant human right was the exercise

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229 Ibid 442 [311] (citations omitted). For a description of the positions taken in *PJB* by the Attorney-General and the Commission on the procedural limb of s 38(1), see (2011) 39 VR 373, 421 [221], 423 [229].

230 [2011] VSC 20 (***Giotopoulos***).

231 *Giotopoulos* [2011] VSC 20 [90].

which VCAT engaged in of identifying and comparing rights and obligations to determine whether any limit placed on Mr Giotopoulos' rights could be justified. VCAT had made mention of the factors in s 7(2) of the Charter, which indicate what matters are relevant to the question of justification. Section 7(2) provides as follows:

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

285 The mere recitation of the factors under s 7(2), however, was not sufficient to demonstrate that the required consideration had been given to the relevant rights. (Nor is such a recitation necessary, as is apparent from *Castles*.) What was important was whether VCAT had engaged in the exercise of weighing up countervailing considerations, including the effect of the decision on the relevant rights, the exercise which s 7(2) invites.[232]

286 The task engaged in by her Honour was to investigate whether this balancing exercise had been undertaken by VCAT. In determining whether the procedural obligation had been discharged by VCAT, her Honour was not required herself to balance the competing rights and obligations; rather, she was required to determine if the balancing exercise had been engaged in by VCAT. A cursory reference to a relevant factor would not be sufficient. As explained by Justice Emilios Kyrou, speaking extra-judicially:

> The requirement that the consideration that public authorities give to human rights must be 'proper' is likely to have the practical effect of enhancing the standard of reasons for decision that public authorities provide, whether voluntarily or pursuant to a request under s 8 of the *Administrative Law Act 1978* (Vic). Where an impugned decision appears on its face to be incompatible with a human right, a perfunctory explanation of how that right has been identified and what weight was given to it in reaching the decision may make it easier for the court to conclude that 'proper consideration' was not given to the right.[233]

287 In other words, the evaluative exercise inherent in the procedural obligation

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232 In this sense, s 7(2) provides, as Evans and Evans put it, a 'standard of "propriety" ' not available at common law against which a decision-making process can be judged: see Evans and Evans, above n 221, 138 [4.59]. See also Schleiger, above n 220, 18 who describes s 7(2) as providing a 'decision-making structure'.

233 'Obligations of Public Authorities under section 38 of the Victorian Charter of Human Rights and Responsibilities' (2014) 2 *Judicial College of Victoria On-Line Journal* 77, 87 (presentations from the conference, *Human Rights under the Charter: The Development of Human Rights Law in Victoria*, convened by the Supreme Court of Victoria, the Faculty of Law of Monash University, the Judicial College of Victoria, Victoria Law Foundation, and the Human Rights Law Centre, Melbourne, 7 and 8 August 2014). See also Schleiger, above n 220, 29–30.

demands more from a decision maker than the bringing of human rights to one's attention; as Justice Kyrou observed, s 38(1) should enhance the standard of reasons for decision given by decision makers. TATE JA

288 Bare relied upon the statement of Emerton J which I have extracted from *Castles* above[234] in support of the proposition that for a decision maker to give 'proper' consideration to a relevant human right, he or she must: (1) understand in general terms which of the rights of the person affected by the decision may be relevant and whether, and if so how, those rights will be interfered with by the decision; (2) seriously turn his or her mind to the possible impact of the decision on a person's human rights and the implications thereof for the affected person; (3) identify the countervailing interests or obligations; and (4) balance competing private and public interests as part of the exercise of justification.

289 I agree that these elements must be present for the procedural obligation under s 38(1) to be satisfied.

290 IBAC appeared not to contest the first three elements of the *Castles* approach as appropriately expressing the requirements of the procedural obligation under s 38(1) but rather maintained that the requirements were met. In its written submissions IBAC said:

> The test under the 'proper consideration' limb of s 38(1) of the Charter is whether the decision maker had an understanding in general terms of the rights of the person that may be relevant and how they would be interfered with by the decision to be made. In most cases, it will be sufficient if there is some evidence to show that the decision maker seriously turned his or her mind to the possible impact on human rights and that the countervailing interests or obligations were identified.[235]

291 What IBAC's submissions omitted to mention in this statement of general principles was that the procedural limb of s 38(1) requires also that the decision maker engage in weighing up, or balancing, the countervailing rights and obligations. Indeed, it was this very evaluative exercise that was the foundation of Emerton J's conclusion in both *Castles* and *Giotopoulos* that the procedural obligation had been met.[236] This was implicitly acknowledged by IBAC when it went on to say:

> In *Castles v Secretary to the Department of Justice*, identification of the relevant points was inferred from briefing papers, together with a brief statement in the Secretary's reasons that the rights had been considered *and weighed against other matters*.[237]

292 With respect to the application of the *Castles* test to the delegate's reasons, IBAC submitted:

> Although [the delegate's] written records of his decision were very brief and did

234 See [279] above.
235 Respondent's Outline of Submissions, dated 28 November 2013 [46].
236 See [280]–[281], [283]–[285] above, respectively.
237 Respondent's Outline of Submissions, dated 28 November 2013 [46] (emphasis added).

> not expressly grapple with all of the incidents of rights implied by s 10(b) as propounded in these proceedings, he said that he examined the appellant's correspondence and all of the documents on the OPI file and had noted the Charter 'interpretation/argument' advanced. As for s 8 of the Charter, this provision was not expressly identified in the appellant's complaint ..., however, discriminatory treatment was referred to and can thus be taken to have been given attention by [the delegate]. Further, the OPI had identified racial vilification as an issue in its analysis of the case on the file, which was examined by [the delegate].[238]

293 I do not accept that it was sufficient for the delegate to give 'proper' consideration to Bare's human rights that he stated that he had examined the OPI file and all the correspondence. The complaint by Bare alleged not only repeated instances of violent behaviour by the police but also multiple instances of behaviour that may have been intended to humiliate (Bare's legs being kicked so that he fell to his knees; Bare's head being pushed into the gutter multiple times so that he had to spit his teeth out; Bare's head being pulled up when he was bleeding to be sprayed with pepper spray) and intended to cause pain (being kicked in the ribs; being sprayed with OC capsicum spray while bleeding) yet there was no reference by the delegate as to whether he understood that the behaviour alleged, if true, would amount to cruel, inhuman or degrading treatment, the express and substantive component of s 10(b) of the Charter. There was no assessment of whether Bare's right not to be subjected to cruel, inhuman or degrading treatment had been interfered with, or limited, if the complaint was true. In my view, the stark statement by the delegate that he 'considered the seriousness of the allegations' gives no indication whether the delegate had considered whether, or how, Bare's right not to be subjected to cruel, inhuman or degrading treatment had been interfered with. His reference to having considered 'the complainant's reference to section 10' of the Charter amounted to nothing more than a recitation of the Charter as a mantra, precisely that which, under the *Castles* test, is insufficient to amount to 'proper' consideration.

294 Nor do the reasons suggest that the delegate understood, even in general terms, that Bare alleged that he had a procedural right to an effective investigation that included the right to have an investigation conducted by an organisation that was hierarchically, institutionally and practically independent from those implicated in the events.

295 Furthermore, as IBAC conceded, the delegate made no mention of Bare's right under s 8(3) to equal protection of the law without discrimination. This was despite the complaint alleging that a statement was made by a police officer, when he was allegedly pushing Bare's head into the gutter, that indicated that the violence being perpetrated was motivated by racial bigotry. This was also despite the OPI file containing material that indicated that the incident related to a systemic issue, including the previous inappropriate use of OC spray by XY.[239] I do not accept that the fact that

238 Ibid [47].

239 See [263]–[264] above.

the delegate said he read the complaint and the file and that discriminatory treatment was referred to in the complaint, or that racial vilification was identified as an issue in the OPI's analysis of the case file, supports the conclusion that the delegate understood in general terms that the right to equal protection of the law without discrimination was a relevant right or supports the conclusion that the delegate understood how that right would be impacted upon by his decision to refuse to conduct an OPI investigation. TATE JA

296 Moreover, there is no evidence that supports the proposition that the delegate seriously turned his mind to the possible impact of his decision upon any of Bare's rights or the implications of that decision, or that he identified countervailing interests or obligations, or, and this is a critical omission, that he engaged in an exercise of weighing up or balancing the competing private and public interests to assess whether refusing to conduct an independent OPI investigation would further aggravate the interference with Bare's rights, as alleged.

297 Indeed, the reasons suggest that the delegate deliberately avoided engaging in the exercise of giving proper consideration to the relevant rights on the basis that he was not qualified to make judgment on the merits of Bare's interpretation or arguments based on the Charter. Far from engaging in the *Castles* exercise, or making an attempt to do so, he turned instead to deal with a different matter, namely, whether there was any evidence to support what he took to be a predisposition or belief on Bare's part that the ESD would not investigate his complaint effectively and with integrity. The delegate approached the complaint as if there was an onus on Bare to substantiate an implicit belief that an investigation by the ESD would not be impartial and effective. Having failed to discover any such evidence in his review of all the available evidence including the OPI file and correspondence, the delegate concluded that referral to the Chief Commissioner of Police was 'adequate' for investigation of Bare's complaint. However, the obligation on the delegate to give proper consideration to Bare's rights could not be discharged by an examination of whether there was evidence that an investigation by ESD would not be performed effectively and with integrity.

298 In my view, for the delegate to have satisfied the *Castles* test, it was necessary for him to consider whether, if what Bare alleged was true, Bare had been treated by Victoria Police in a cruel, inhuman or degrading way (in breach of s 10(b) of the Charter)[240] and had been discriminated against (in breach of s 8(3) of the Charter). The gravity of the treatment alleged was relevant to the decision whether an independent investigation should be held. It was then necessary for the delegate to have considered what public interest considerations weighed against an independent OPI investigation, within the context of a discussion of Bare's human rights. This was not a matter of sifting through material to find evidence that an ESD investigation would

240 As noted, it was conceded by IBAC that if what Bare alleged was true, it was a breach of his right under s 10(b): see [274] above.

not be impartial or effective. Far from eschewing any discussion of human rights, there ought to have been a balancing up of any countervailing considerations against the relevant rights. It was also necessary for the delegate at least to consider (and, if necessary, to have obtained some assistance to consider) whether Bare's complaint may have given rise to an implied duty on behalf of the State to conduct an independent investigation.

299 To treat the obligation under s 38(1) to give proper consideration to relevant human rights as an obligation of some stringency is consistent with the model of the Charter as intended to have a normative effect on the conduct of public authorities.[241] This model finds expression in the extrinsic materials. As the Attorney-General observed in his Second Reading Speech, s 38 of the Charter was intended to impose a standard or reference-point for public administration:

> This is a key provision of the charter. It seeks to ensure that human rights are observed in administrative practice and the development of policy within the public sector without the need for recourse to the courts. The experience in other jurisdictions that have used this model is that it is in the area of administrative compliance that the real success story of human rights lies. Many public sector bodies that already deal with difficult issues of balancing competing rights and obligations in carrying out their functions have welcomed the clarity and authority that a human rights bill provides in dealing with these issues. In conjunction with the general law, the charter provides a basic standard and a reference point for discussion and development of policy and practice in relation to these often sensitive and complex issues.[242]

300 Furthermore, as mentioned above,[243] the OPI has a specific duty in relation to human rights. The Director has a duty, imposed by s 8(1)(d) of the PI Act, to ensure that members of Victoria Police have regard to the human rights set out in the Charter. Given the nature and seriousness of the allegations, and the likelihood that, if true, the perpetrators of the violence against Bare had paid no regard to his human rights, and indeed had infringed Bare's human rights, it was especially incumbent upon the delegate to give proper consideration to Bare's human rights in carrying out the decision-making process entrusted to him.

301 This exercise was not engaged in and the *Castles* test was not satisfied. In my opinion, there was a clear breach of the procedural obligation under s 38(1) of the Charter.

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241 Her Honour recognised the normative effect of the Charter: Reasons [119].

242 Victoria, *Parliamentary Debates,* Legislative Assembly, 4 May 2006, 1293 (Rob Hulls, Attorney-General).

243 See [262] above.

(iii) The 'public interest' test in s 40 of the PI Act TATE JA

302 The Attorney-General sought to meet the allegation that there was a breach of the procedural limb of s 38(1) by submitting that no issue arose under s 38(1) for the Court's determination. His submission turned on the meaning of the 'public interest' under s 40(4)(b)(i) of the PI Act. He emphasised that a critical feature of the statutory context was that here the Director had no power to investigate Bare's complaint unless the Director considered that such an investigation was 'in the public interest' under s 40(4)(b)(i) of the PI Act.[244] Section 40(2) required the Director to refer a complaint warranting investigation to the Chief Commissioner of Police with the exception under s 40(4)(b)(i) which obliged the Director to investigate a complaint if he considered that it was in the public interest for the Director to do so.

303 The Attorney-General submitted that Bare did not contend that the delegate had misconstrued the 'public interest'. He argued that the challenge based on a breach of s 38(1) did not affect the meaning of 'public interest'; that is, he submitted once the powers of a public authority are defined by a process of statutory construction, including by reference to s 32(1) of the Charter, s 38(1) does not rewrite the relevant statutory provision or confer any additional power. Section 32(1) of the Charter requires the adoption of an interpretation of statutory provisions that is compatible with human rights. It provides:

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

304 The Attorney-General submitted that, as there was no challenge to the delegate's understanding of the 'public interest' under s 40(4)(b)(i) of the PI Act, based on s 32(1) of the Charter, or otherwise, his determination on that issue must be taken to have been made in accordance with s 40(4)(b)(i) and the Director was therefore obliged to refer the complaint to the Chief Commissioner of Police. It was argued that therefore no issue arose under s 38(1) of the Charter for the Court's determination.[245]

305 The Attorney-General relied upon paragraph [191] of her Honour's reasons[246] as supporting the view that it was sufficient that the delegate appreciated the 'dimension' that human rights gave to the public interest, by reason of the Charter. It was argued that the judge's conclusion that the delegate did not misconstrue the concept of the 'public interest', by reason of s 32(1) of the Charter, or at all, was not challenged on appeal.

306 It was further submitted that Bare, by seeking to inject into the task of considering the public interest question under s 40(4)(b)(i) overriding obli-

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244 See [272] above.

245 In the alternative, the Attorney-General submitted that no question of unlawfulness under s 38(1) arose because the implied right to an independent investigation does not exist on a proper interpretation of s 10(b) of the Charter. The issue of the scope of the right under s 10(b) is considered at [398]–[457] below.

246 See below at [308]. See Reasons [186]–[191].

gations said to arise under s 38(1) of the Charter, namely to give proper consideration to a relevant human right and to act compatibly with human rights, was disregarding the public interest test and substituting a human rights test. The Attorney-General contended that this would be to use s 38(1) impermissibly, in effect, to give s 40(4)(b)(i) a meaning different from that which s 32(1) would give to it. It was argued that this is not the effect of s 38(1) and to construe the operation of s 38(1) in this way would be to purport to give a public authority a power that it does not otherwise have. That this was not the intended operation of s 38(1) was submitted to be apparent from the following features of the Charter, as outlined in the Attorney-General's written submissions:

(a) the question whether human rights considerations operate to give a public authority a particular power is answered by the Charter through the process of statutory interpretation under s 32;

(b) s 38(1) addresses the consideration only of 'relevant' human rights. Relevance cannot be decided without reference to the statutory context in which the action in question takes place or the decision is made. The provision does not make 'relevant' any human rights consideration that is not, by force of s 32, relevant to the action or decision in question as a matter of statutory interpretation';

(c) s 38(1) does not require, or permit, a public authority to act contrary to its powers, including by exceeding those powers. The evaluation whether a decision is taken 'compatibly with human rights' again only arises with a statutory context ascertained by processes of interpretation (including by s 32);

(d) s 38(2) (including the Example)[247] makes it clear that s 38(1) applies after statutory interpretation is complete, and that it does not supplant (or supplement) that process. A public authority cannot 'reasonably' act otherwise than in accordance with its powers as determined by statute, properly construed.[248]

307 The distinction was drawn between how a statutory power is to be defined, in which s 32(1) plays a part, and how a power, once construed, is to be exercised, a matter addressed by s 38(1). It was submitted that what Bare was seeking to do was improperly to use s 38(1) to insert an additional gloss into the meaning of 'public interest'. This would improperly expand what was required of a decision maker before he or she could form a view as to whether an investigation by the Director was in the public interest. To adopt this approach, it was argued, would go beyond accepting that there was a human rights dimension to the public interest, alongside questions of the priorities of the OPI, its resources, the proper operation of Victoria Police, and so on. It would wrongly change the way in which the test under s 40(4)(b)(i) was to be read and understood, from a public interest test to a test based on human rights and resolved by reference to the considerations in s 7(2) of the Charter. It was submitted that this would be impermissibly to

247 See [247] above.
248 Outline of Submissions of the Attorney-General, dated 28 November 2013 [5].

achieve a result indirectly by s 38(1) that was not supported directly by s 32(1). The notion of 'public interest' was argued to have a single construction and a delegate, who had properly construed the public interest and formed his or her opinion, was obliged to arrive at a decision based upon that opinion. There was no discretion for the delegate to exercise. Section 38(1) had no role to play. TATE JA

308 Paragraph [191] of her Honour's reasons, relied on by the Attorney-General as providing the unchallenged finding on which his submissions were based, was in the following terms:

> I am not satisfied that Mr Jevtovic misdirected himself as to the scope of the public interest under s 40(4)(b)(i) in relation to the need to have regard to Mr Bare's rights under s 10(b) (or s 8 for that matter). There is no evidence to contradict his assertion in his 19 October 2010 letter to the effect that he had considered the complaint in all its aspects as they were identified in the documents on the OPI file. Those documents indicated the nature of the incident and the allegations as to the breach of Mr Bare's rights under both s 8 and s 10(b). Mr Jevtovic's letter established, in the absence of evidence to the contrary, that he understood that the concept of the 'public interest' under s 40(4)(b)(i) incorporated the requirement for compatibly with Mr Bare's identified relevant human rights.

309 It may first be observed that her Honour's conclusion on the delegate's construction of 'public interest' was not tantamount to a conclusion that the delegate had met his obligation under s 38(1). Rather, it was in response to the following question: 'Does s 10(b) of the Charter provide a new dimension of the public interest that must be considered by the Director when a complaint is made of cruel, inhuman or degrading treatment at the hands of police officers?'[249] Despite her Honour's reference in para [191] to the delegate's consideration of the complaint and the documents in the OPI file, the observations she made were not in response to the question of whether the procedural limb of s 38(1) was satisfied. On that issue, her Honour made no finding.[250]

310 The question whether the delegate had satisfied the obligation upon him under the procedural limb of s 38(1) was very much the subject of challenge both at trial and on the appeal. Thus, although on appeal Bare did not persist with a ground relied on at trial contending that the delegate had failed to interpret 'public interest' consistently with s 32 of the Charter,[251] it was clear

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249 Question 6.2.

250 As mentioned at [248] above. As noted, question 3 was in these terms: 'Did the relevant decision-maker in the case of ... the ... decision properly consider Mr Bare's human rights as required by s 38 of the Charter?' Relevantly her Honour said: '... This question is premised upon a finding that s 109 of the *Police Integrity Act* does not apply to the proceedings relating to alleged breaches of s 38 of the Charter. Whilst I have concluded that it does, I have dealt with [the] question ... [Is there an implied procedural right under s 10(b) of the Charter to an 'effective' investigation of a claim of a breach of human rights stated in that section?] on the basis that I might be wrong [about question 4, Does s 109 of the *Police Integrity Act* prevent the Court from determining the claims for declarations of s 38 unlawfulness?]. There is no call to do the same with regard to question 3 and I am not asked to do so': Reasons [167].

251 This ground appeared as ground 21 of the third further amended originating motion: see Rea-

that the role to be played by human rights considerations in the context of the public interest test under s 40(4)(b)(i) was a live issue on the appeal. It was accepted at the hearing of the appeal that the matter of the extent to which human rights considerations inform the public interest test was 'in one sense' 'pressed under a different rubric'. In my view, there was thus no significance to be attached to the absence of challenge to her Honour's finding that the delegate had not misconstrued the public interest.

311 More importantly, the substance of the Attorney-General's submissions was aimed at establishing that her Honour properly concluded that the delegate had correctly construed the public interest test; that he was therefore obliged to refer the complaint to the Chief Commissioner; and that no issue then arose under s 38(1). In my view, the submissions should be rejected for three reasons: (1) the premise that 'public interest' has a single fixed meaning should be rejected; (2) the premise that the only source of identifying relevant human rights is via the meaning of the statutory provisions that confer power should be rejected; and (3) the submissions lead to the manifestly absurd consequence that the exception under s 38(2) could apply in almost all cases of administrative decision-making, contrary to legislative intention. More generally, the submissions fail to reflect the proper relationship between s 32(1) and s 38(1) and fail to reflect faithfully the force of s 38(1) as a constraint upon the exercise of power.

312 First, it was accepted at the hearing of the appeal that the proposition that the meaning of 'public interest' admits of a single construction could only be true at a very high level of abstraction. In my view, the choice by the legislature of such a broad expression as 'public interest', which is not susceptible to a precise definition, was clearly intended to permit the administrative decision maker, when construing the public interest, to take account of all matters that arose as relevant in the circumstances of each individual case. No doubt, in the context of s 40(4)(b)(i), there would be core concerns such as the priorities of the OPI and the other matters identified in s 6(2) of the PI Act, including whether an investigation by the Director would assist in the performance of the OPI's function of publicly exposing serious misconduct of Victoria Police[252] or the function of providing information and advice to Victoria Police to increase its capacity to prevent serious misconduct. Sometimes an assessment of the public interest would involve, as here, the impact of the conduct of Victoria Police upon someone's human rights while, on other occasions it would not. The sheer breadth of the expression 'public interest' used in the context of the conferral of a statutory power on a public official to determine whether the Director should investigate a complaint must have been intended as reflecting a malleable and not a fixed meaning, at any level below that of the highly generalised understanding that the decision to investigate must be, on balance, to the benefit of the public.

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sons [38].

252 Section 6(2)(d).

313 The High Court has recognised that there is an inherent breadth to the concept of 'public interest' when used in legislation. A 'public interest' test calls for a discretionary evaluative judgment to be made undefined by factual matters and limited only by the scope and purpose of the relevant statute. In *O'Sullivan v Farrer*[253] Mason CJ, Brennan, Dawson and Gaudron JJ said: TATE JA

> Indeed, the expression 'in the public interest', when used in a statute, classically imports a discretionary value judgment to be made by reference to undefined factual matters, confined only 'in so far as the subject matter and the scope and purpose of the statutory enactments may enable ... given reasons to be [pronounced] definitely extraneous to any objects the legislature could have had in view': *Water Conservation and Irrigation Commission (NSW) v Browning*, per Dixon J.[254]

314 *O'Sullivan v Farrer* was concerned with legislation that permitted objections to be made to the granting or removal of a liquor licence on 'public interest' grounds. In *McKinnon v Secretary, Department of Treasury*[255] Hayne J acknowledged that the public interest is multi-factorial and not susceptible to a single fixed dimension:

> It may readily be accepted that most questions about what is in 'the public interest' will require consideration of a number of competing arguments about, or features or 'facets' of, the public interest.
> ...
> That is why a question about 'the public interest' will seldom be properly seen as having only one dimension. ...[256]

315 While the observations were made in the context of the *Freedom of Information Act 1982* (Cth), their application was not limited to that context.

316 So too in *Osland v Secretary, Department of Justice*[257] the plurality of the High Court, in considering s 50(4) of Victoria's *Freedom of Information Act 1982,*[258] which permits the disclosure of documents that are otherwise protected under various exemptions where the public interest requires it, remarked that: 'There are obvious difficulties in giving the phrase "public interest" as it appears in s 50(4) a fixed and precise content'.[259] Hayne J relied on both *O'Sullivan v Farrer* and *McKinnon v Secretary, Department of Treasury* in concluding that there is no singular construction to be afforded to a public interest test.[260] Kirby J said: 'I certainly agree with Hayne J that it

253 (1989) 168 CLR 210.
254 Ibid 216 (citation omitted).
255 (2006) 228 CLR 423.
256 Ibid 443–4 [55].
257 (2008) 234 CLR 275 (***Osland***).
258 Section 50(4) provides: 'On the hearing of an application for review the Tribunal shall have, in addition to any other power, the same powers as an agency or a Minister in respect of a request, including power to decide that access should be granted to an exempt document ... where the Tribunal is of opinion that the public interest requires that access to the document should be granted under this Act'.
259 *Osland* (2008) 234 CLR 275, 300 [57] (Gleeson, Gummow, Heydon and Kiefel JJ). This was reaffirmed by French CJ, Gummow and Bell JJ in *Osland v Secretary, Department of Justice [No 2]* (2010) 241 CLR 320, 329 [13].
260 *Osland* (2008) 234 CLR 275, 323 [137].

is impossible to define the "public interest" precisely, in language that will have universal application'.[261]

317 In my view, the public interest test in s 40(4)(b)(i) is not susceptible to a fixed and precise content beyond the need to consider the subject-matter, scope and purpose of the PI Act and the core concerns mentioned above.[262] That being so, for human rights considerations to be incorporated into the meaning of 'public interest' in s 40(4)(b)(i) is not to substitute a human rights test for a public interest test; rather, it is properly to acknowledge that the broad category of public interest considerations can extend to human rights when human rights are, as here, engaged.

318 Secondly, the Attorney-General's submission treats the meaning of a statutory provision (construed in accordance with the ordinary principles of statutory interpretation and s 32(1) of the Charter) as the sole source by which relevant human rights are to be identified. This is erroneous. It may readily be accepted that '[r]elevance cannot be decided without reference to the statutory context in which the action in question takes place or the decision is made'.[263] Indeed the statutory context may make it plain which rights are relevant. For example, s 15(6)(b) of the *Serious Sex Offenders (Detention and Supervision) Act 2009* provides that a court making a supervision order for a serious sex offender must ensure that the conditions imposed, other than the core conditions, 'constitute the minimum interference with the offender's liberty, privacy or freedom of movement necessary to ensure the purposes of the conditions'. Clearly, the rights under ss 21, 13(a) and 12 of the Charter,[264] respectively, are relevant to any supervision order to be made.

319 Section 32(1) of the Charter may also reveal, as it did in *Hogan v Hinch*,[265] that a statutory expression such as 'contravention' should be construed to take account of an accused's right to freedom of expression in any chosen medium.[266] There the High Court concluded that the phrase 'publish or cause to be published [the name of a serious sex offender] ... in contravention of a [suppression order]' should be construed as containing a requirement that the accused have knowledge of the order in contravention of which the publication was made. The Court held that 'contravention' was used 'in the sense of disputation or denial rather than mere failure to comply with an unknown requirement'.[267] As they put it, '[s]uch a construction ... better accommodates the provision in s 15(3) of the [Charter] respecting reasonably necessary restrictions upon the right to freedom of expression'.[268]

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261 Ibid 315 [110].
262 See [312] above.
263 See [306] above.
264 These are, respectively, the right to liberty and security of the person; the right to privacy; and the right to freedom of movement.
265 (2011) 243 CLR 506.
266 Section 15(2) of the Charter.
267 (2011) 243 CLR 506, 550 [78].
268 Ibid 550–1 [78].

320 But it would be wrong to conclude that identifying what rights are relevant must be exhausted by ascertaining the meaning of the particular statutory provision at issue. Section 38(1), in obliging a public authority to give proper consideration to relevant human rights, is to be understood as inviting a decision maker to consider what rights are pertinent in the circumstances of the case. For example, in *Sabet v Medical Practitioners Board of Victoria*[269] the Court recognised that a medical practitioner, when charged with three counts of rape and five counts of indecent assault against a former patient, relevantly had a right to the presumption of innocence under s 25(1) of the Charter at least in criminal proceedings. The Medical Practitioners Board (**the Board**) had a power to suspend a medical practitioner, which was conferred by s 40(1)(c) of the *Health Professions Registration Act 2005*, if the Board was of the opinion that it was necessary to suspend the practitioner because there was a serious risk that the health and safety of the public would be endangered. The Court assumed without deciding that the right to the presumption of innocence had direct application to a disciplinary hearing before the Board[270] but held that the Board had not unjustifiably limited that right.[271] Importantly, it was not, or not only, the *meaning* of s 40(1)(c) that made the presumption of innocence a candidate as a relevant right. It was the factual circumstances of the case that arguably gave relevance to that right, most particularly, the fact that the medical practitioner had been charged with multiple criminal offences. TATE JA

321 More recently, it was held in *Burgess v Director of Housing*[272] that the Director of Housing was in breach of s 38(1) of the Charter because he failed to give proper consideration to the right of the plaintiff to the protection of her family and children[273] when exercising the power to issue a notice to vacate rented public housing premises. It was also held that the application by the Director of Housing for a warrant of possession was unlawful as there had been a failure to give proper consideration to the child's best interests.[274] The relevant rights were identified, not as derived from the meaning of the statutory provisions conferring the power to issue a notice to vacate or apply for a warrant of possession, but from the individual circumstances of the case.

322 Thus, it is quite wrong to assert that s 38(1) 'does not make "relevant" any human rights consideration that is not, by force of s 32, relevant to the action or decision in question as a matter of statutory interpretation'.[275] The operation of s 38(1), in the circumstances of a case, may well make 'relevant' consideration of particular human rights that do not arise as relevant as

269 (2008) 20 VR 414 (Hollingworth J).
270 It had been argued that the presumption applied only to criminal proceedings.
271 The Court rejected Dr Sabet's submission that the Board breached s 38 of the Charter in failing to give proper consideration to his right to the presumption of innocence.
272 [2014] VSC 648 (Macaulay J).
273 Ibid [217]–[218]. The relevant right was protected under s 17 of the Charter.
274 Ibid [243]–[244]. See s 17(2) of the Charter.
275 See [306] above.

a matter of statutory interpretation. In doing so s 38(1) does not permit a public authority to act contrary to its powers, or to exceed its powers. Rather, the procedural limb of s 38(1) operates as a constraint on the exercise of public power; it constrains the power a public authority exercises by requiring that, in the exercise of the power, the public authority give proper consideration to the relevant human rights that arise in the circumstances of the case. The public authority is bound to consider the relevant rights, not by virtue of the meaning or scope of the statutory power to be exercised, but by virtue of the supervening obligation imposed on public authorities by s 38(1) of the Charter.

323 Thirdly, the Attorney-General's approach focuses upon the meaning of statutory provisions as defining the limits of the authorised exercise of power. On this approach, providing a public authority acts in accordance with a statutory power, properly construed, the exercise of the power is unimpeachable regardless of the obligation under s 38(1). As it was put, a 'public authority cannot "reasonably" act otherwise than in accordance with its powers as defined by statute, properly construed'.[276] On this approach, a public authority could rely on the exception under s 38(2) whenever it sought to exercise any statutory power, properly construed, regardless of the extent to which it ignored the human rights of a person affected by the power. The exception would become a universal rule. Such an absurd outcome tells directly against the approach adopted, for it would render the obligation under s 38(1) of little legal force or effect. It also fails to appreciate that, since the enactment of the Charter, s 38(1) is part of the broader statutory context in which public authorities operate. For a public authority to act in accordance with its powers as determined by statute requires that the public authority engage in its decision-making processes in accordance with s 38(1) of the Charter. A failure to do so renders the decision unlawful. Section 38(1) imposes an additional, or supplementary obligation, upon public authorities in the exercise of their statutory powers.[277] While s 38(1) is not part of the primary source of a public authority's powers it is analogous to the myriad requirements a public authority may need to meet to ensure the legality of its decisions and actions. It is necessary for a public authority to act consistently with the scope of its power and in accordance with all of its obligations.

324 The exception under s 38(2) allows for those circumstances where, after a relevant statutory power has been construed, it is clear that the power could not be exercised consistently with the performance of the obligation under s 38(1). This is apparent from the operation of the exception in the United Kingdom to the obligation on public authorities under the United Kingdom

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276 Ibid.

277 While it may be correct to say that s 38(2) 'makes it clear that s 38(1) applies after statutory interpretation is complete' it is quite wrong to say that s 38(1) 'does not supplant (or supplement) that process'. Section 38(1) does impose a supplementary obligation on public authorities. See [306] above.

Human Rights Act 1998 (**the UK HRA**) not to act incompatibly with human rights. While the legal and constitutional setting between Victoria and the United Kingdom are markedly different,[278] in this respect the wording of the relevant statutory provisions are substantially similar. Section 6 of the UK HRA provides: TATE JA

> (1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.[279]
>
> (2) Subsection (1) does not apply to an act if —
>
> (a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or
>
> (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.

325 The exception, or defence, under s 6(2)(a) has been interpreted as excusing conduct of a public authority where 'the legislation in issue *required* the authority to act or abstain in the way that it did. In such a case, the authority "could not have acted differently" '.[280] The rationale for this exception lies with the recognition in the UK HRA[281] (reflected in the Charter)[282] that legislation that is incompatible with human rights is nevertheless valid and enforceable:

> [I]nsofar as legislation cannot be read compatibly with the Convention, it continues to be valid and enforceable … Legislation that cannot be read compatibly with the Convention would therefore provide a defence of statutory authority where it required or authorized a public authority to act in a manner that was incompatible with Convention rights … legislation that cannot be cured must be applied.
>
> …
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> It is not hard to see why s 6(1) does not apply in such cases. Since s 6(1) imposes a duty to act compatibly with Convention rights, there would be a conflict of duties (ie a duty to act compatibly (under s 6(1)) and a duty to act incompatibly (under the primary legislation in issue) with Convention rights). Section 6(2)(a) resolves this conflict in favour of the duty expressed in the primary legislation pursuant to which the public authority has acted.[283]

326 The exception under s 38(2) is thus directed to contexts where a public authority is under a conflict of duties,[284] namely, the duty to give proper

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278 See [387] below.

279 'Convention rights' are those rights which are set out in Schedule 1 to the UK HRA. They are drawn from the European Convention on Human Rights.

280 Sir Jack Beatson et al, *Human Rights: Judicial Protection in the United Kingdom* (Sweet & Maxwell, 2008) 541 [6–13] (emphasis in original), citing *R (on the application of Hooper) v Secretary of State for Work and Pensions* [2005] 1 WLR 1681, 1716 [124].

281 Section 3(2)(b).

282 Section 29.

283 Beatson et al, above n 280, 540–1 [6–11], [6–13].

284 See, further Beatson et al, above n 280 'It can now be said with some certainty that s 6(2)(a) is confined to cases where, after a process of statutory interpretation, including the operation of s 3 of the HRA [the obligation to read and give effect to legislation in a way which is compatible

consideration to a relevant human right or to act compatibly with human rights on the one hand, and on the other hand, the conflicting duty to act in accordance with the statutory power which authorises or requires conduct that is incompatible with a human right. It would be to turn the exception on its head to say that it was available whenever a statutory power, properly construed, did not itself require compliance with human rights. The purpose of s 38(1) is precisely to impose an additional or supplementary obligation upon public authorities beyond that imposed under the primary legislation under which they act; it acts as a constraint upon the exercise of power. It would be to fail to give effect to the purpose of s 38(1)[285] to construe s 38(2) in the manner proposed by the Attorney-General.

327 I reject the submissions of the Attorney-General with respect to the construction of s 40(4)(b)(i) of the PI Act.

(iv) Conclusion on the procedural limb of s 38(1)

328 I have concluded that there was a breach of the procedural limb of s 38(1). A breach of s 38(1) is an error of law. If an error of law appears on the face of the record, certiorari will lie. The error of law may be jurisdictional or non-jurisdictional. The extended definition of 'the record', which applies in Victoria by virtue of s 10 of the ALA, includes the reasons of a 'tribunal' or an inferior court.[286] A 'tribunal' for the purposes of the ALA is any decision maker who is bound to observe one or more of the rules of natural justice.[287] In my view, the delegate was a 'tribunal' for the purposes of the ALA because he was bound to accord Bare an opportunity to be heard.[288] The error of

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with Convention rights], *legislation imposes a duty* on a public authority to act (or not act) *in a manner in that is incompatible with Convention rights'*. 543–4 [6–18] (emphasis added).

285 Contrary to s 35(a) of the *Interpretation of Legislation Act 1984*.

286 Section 10 of the ALA provides: '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.' The extended definition of 'the record' applies whether or not an application for judicial review was brought under the ALA or under O 56 of the *Supreme Court (General Civil Procedure) Rules 2005*.

287 Section 2 of the ALA defines 'tribunal' to mean 'a person or body of persons [not being a court of law or a tribunal constituted or presided over by a Judge of the Supreme Court] who, in arriving at the decision in question, is or are by law required, whether by express direction or not, to act in a judicial manner to the extent of observing one or more of the rules of natural justice.'

288 Indeed, Bare alleged at trial that there was a breach of procedural fairness. The judge determined that there was no breach and this was not challenged on appeal. It does not appear to have been disputed that a duty was owed; in this context the focus was on whether the duty had been breached. See [269] n 211 above. The statutory scheme was a complaints-based scheme aimed at providing a proper process for the determination of individual complaints. The scheme appears to be premised on the Director (or the Director's delegate) engaging with the complainant on matters that would adversely affect the Director's decision to investigate. For example, s 40(1)(b) of the PI Act provides that the Director may determine that a complaint does not warrant investigation if the complainant had knowledge of the conduct complained of for more than a year and fails to provide a satisfactory explanation for the delay. More importantly, it is clear that the interests of a complainant may be adversely affected by a decision of the Director not to investigate a complaint and there is nothing in the statutory scheme to displace the common law presumption that natural justice would apply: *Kioa v West* (1985)

law manifest in the delegate's reasons is an error of law on the face of the record[289] which ought be quashed.[290] TATE JA

329 As I take the view that s 109 of the PI Act does not preclude review of the decision (which I will now proceed to explain) I consider that the appeal should be allowed; orders 2 and 3 of the orders of 23 March 2013 made by the judge should be set aside;[291] a declaration made that the decision is unlawful and of no force or effect and was contrary to s 38(1) of the Charter; an order made in the nature of certiorari quashing the decision; and an order made remitting the matter to IBAC for it to make a fresh decision in relation to the correct course for dealing with Bare's complaint under s 58 of the IBAC Act.

(2) Does s 109 of the PI Act preclude judicial review of a decision not to investigate?

(i) The basic rule that privative clauses are to be strictly construed

330 Bare urged the adoption of a narrow construction of s 109[292] in accordance with the principle that privative or ouster clauses ought be strictly construed and given a narrow field of operation. The High Court reaffirmed this traditional approach to the statutory construction of ouster clauses in *Plaintiff S157/2002 v Commonwealth* and described it as 'the basic rule' of such construction:[293]

> The ... basic rule, which applies to privative clauses generally, is that it is presumed that the Parliament does not intend to cut down the jurisdiction of the courts save to the extent that the legislation in question expressly so states or necessarily implied. Accordingly, privative clauses are strictly construed.[294]

331 As Maxwell P and Nettle JA said in *Herald & Weekly Times v A*:[295]

> We think ... that a privative clause ... should be strictly construed and that where — as here — there is a choice between a broader and narrower interpretation, the narrower should be preferred.[296]

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159 CLR 550; *Annetts v McCann* (1990) 170 CLR 596, 598; *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 258–9 [11]–[15].

289 *Wingfoot Australia v Kocak* (2013) 252 CLR 480, 493 [28].

290 It follows that I would allow ground 7 of the grounds of appeal. As mentioned, the judge made no finding as to whether there was a failure to give proper consideration to a relevant right as she had already found that s 109 of the PI Act precluded review for non-jurisdictional errors of law and she held that a breach of s 38(1) of the Charter was a non-jurisdictional error of law; see Reasons [89], [121]–[122], [167].

291 Order 2 was that the relevant parts of Bare's further amended originating motion be dismissed and order 3 was that Bare, as plaintiff, pay the defendant's costs fixed at $4,750.00.

292 The terms of s 109 are set out at [249] above.

293 (2003) 211 CLR 476.

294 Ibid 505 [72] (citations omitted).

295 (2005) 160 A Crim R 299.

296 Ibid 304 [18]. The privative clause in question (s 17A(3) of the *Supreme Court Act 1986*) if construed literally, would have rendered the determination in issue (the grant of a suppression order) wholly immune from appeal. The Court held that it should be read narrowly so as not to preclude an appeal from the grant of the suppression order that had been made. Section 17A(3) provided: 'Except as provided in Part VI of the Crimes Act 1958, an appeal does not lie from a

332 The basic rule is informed by the assumption that Parliament does not intend to restrict access to the courts. This was affirmed by Dawson and Gaudron JJ in *Public Service Association (SA) v Federated Clerks' Union*[297] where they said:

> Privative clauses ... are construed by reference to a presumption that the legislature does not intend to deprive the citizens of access to the courts, other than to the extent expressly stated or necessarily to be implied.[298]

333 The basic rule is thus an aspect of what has come to be known as the principle of legality. As French CJ, Gummow, Hayne, Crennan and Kiefel JJ said in *Saeed v Minister for Immigration and Citizenship*:[299]

> The presumption that it is highly improbable that Parliament would overthrow fundamental principles or depart from the general system of law, without expressing its intention with irresistible clearness, derives from the principle of legality which, as Gleeson CJ observed in *Electrolux Home Products Pty Ltd v Australian Workers' Union* 'governs the relations between Parliament, the executive and the courts'. His Honour said:
>
> > 'The presumption is not merely a common sense guide to what a Parliament in a liberal democracy is likely to have intended; it is a working hypothesis, the existence of which is known both to Parliament and the courts, upon which statutory language will be interpreted. The hypothesis is an aspect of the rule of law.'[300]

334 Speaking extra-judicially, Chief Justice French has described the principle of legality as a strong presumption guiding the interpretation of statutes:

> That principle has the form of a strong presumption that broadly expressed official discretions are to be subject to rights and freedoms recognised by the common law. It has been explained in the House of Lords as requiring that Parliament 'squarely confront what it is doing and accept the political cost'. Parliament cannot override fundamental rights by general or ambiguous words. The underlying rationale is the risk that, absent clear words, the full implications of a proposed statute law may pass unnoticed:
>
> > In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.[301]

335 Amongst the common law rights to which the principle of legality extends

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determination of the Trial Division constituted by a Judge made on or in relation to the trial or proposed trial of a person on indictment or presentment'.

297 (1991) 173 CLR 132.

298 (2013) 252 CLR 480, 493 [28]. See also *Clancy v Butchers' Shop Employees Union* (1904) 1 CLR 181, 204 (O'Connor J); *Hockey v Yelland* (1984) 157 CLR 124, 130 (Gibbs CJ), 142 (Wilson J); *Darling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602, 633 (Gaudron and Gummow JJ).

299 (2010) 241 CLR 252.

300 Ibid 259 [15] (citations omitted). See Stephen Gageler SC, 'Common Law Statutes and Judicial Legislation: Statutory Interpretation as a Common Law Process' (2012) 37 *Monash University Law Review* 1, 13–15. See also *Potter v Minahan* (1908) 7 CLR 277, 304; *DPP v Kaba* (2014) 44 VR 526, 573–7 [165]–[176]; *R (Evans) v Attorney-General* [2015] UKSC 21 [56]–[58] (Lord Neuberger, with whom Lord Kerr and Lord Reed agreed).

301 'The Common Law and the Protection of Human Rights' (Speech delivered to Anglo Australian Lawyers Society, Sydney, 4 September 2009) [12] (citations omitted).

is, as Chief Justice French acknowledged, in the list of common law rights he identified, the 'right of access to the courts'.[302] TATE JA

336 The basic rule of construction of privative or ouster clauses is thus an illustration of the principle that it is to be assumed that even the most general words used were intended by the Parliament to be subject to the right of access to the courts in the absence of express language or necessary implication to the contrary.

337 Bare submitted that, despite the general words of s 109, and the immunity from liability it sought to confer with respect to 'any act purported to be done under this Act', if an interpretation is available that is guided by the basic rule and that would preserve access to the courts, that construction should be adopted. I agree.

(ii) Literal construction would produce anomalies

338 Bare submitted that the general words of s 109, read literally, would produce anomalies in the PI Act. More specifically, he submitted that if s 109 is read as conferring a general immunity from liability on protected persons in any civil or criminal proceedings (including judicial review),[303] then the specific immunity conferred on protected persons under s 51B would have no work to do. Section 51B confers an immunity with respect to the commencement of criminal prosecutions for offences in relation to any matter arising out of an investigation by the Director.

339 Section 50 provides that the Director, after completing an investigation, may make a written report on the results of an investigation to the Chief Commissioner of Police, the Minister or the Premier. Section 51A empowers the OPI to commence criminal prosecutions against a person for an offence in relation to any matter arising out of an investigation. Section 51B confers an immunity from criminal prosecution for things done, or omitted to be done, in exercising the power to bring criminal prosecutions. Bare submitted that if s 109 precluded review in respect of acts carried out under *any* of the powers or functions of the OPI under the PI Act, as a literal reading would suggest, there would be no need for a specific immunity to be conferred under s 51B in respect of acts done in the course of criminal prosecutions.

340 Section 51A provides:

Director and staff may prosecute

(1) The Director or a member of staff of the Office of Police Integrity authorised under subsection (2) may commence criminal proceedings against a person

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302 Ibid [7]. The list of common law rights identified also included legal professional privilege; privilege against self-incrimination; immunity from deprivation of property without compensation; the right to procedural fairness when affected by the exercise of public power; and no deprivation of liberty, except by law.

303 On the appeal, it was common ground that the expression 'civil proceedings' to which s 109 referred was capable of applying to proceedings for judicial review, for example, of decisions relating to investigations. See Reasons [62]–[77].

for an offence in relation to any matter arising out of an investigation.

(2) The Director may authorise in writing a member of staff of the Office of Police Integrity to exercise powers under subsection (1) —

(a) in relation to a specified person or specified investigation; or

(b) generally.

(3) Nothing in this section —

(a) affects or limits the ability of a person other than the Director or a person authorised under subsection (2) to commence criminal proceedings against a person for an offence in relation to any matter arising out of an investigation; or

(b) affects or limits the ability of the Director or a member of staff of the Office of Police Integrity to bring criminal proceedings against a person for any other offence.

341 Section 51B provides:

Immunity

(1) The Director or a member of staff of the Office of Police Integrity authorised under section 51A(2) is not personally liable for anything necessarily or reasonably done or omitted to be done in good faith —

(a) in the exercise of a power under section 51A(1); or

(b) in the reasonable belief that the act or omission was in the exercise of a power under section 51A(1).

(2) Any liability resulting from an act or omission that, but for subsection (1), would attach to the Director or a member of staff of the Office of Police Integrity authorised under section 51A(2) attaches instead to the State.

342 It was submitted that it is necessary to give all words in a statute some meaning and effect[304] and the specific immunity conferred by s 51B(1) with respect to exercises of power under s 51A(1) would be redundant if s 109 was read literally in an unrestricted fashion as precluding review of the exercise of any power or any function under the PI Act, as IBAC contended and as the judge held. Bare submitted that the inclusion of s 51B(1) in the PI Act demonstrates that s 109 should be read down to reflect the statutory context in which it appears, namely, pt 4 of the PI Act relating to general investigatory powers, and as limited by s 52, with which pt 4 commences, to any act purported to be done, 'for the purposes of an investigation by the Director under pt 3'.

343 IBAC responded by identifying the purpose for which s 51B was enacted as apparent in sub-s (2) of s 51B. It was to provide that the State would have vicarious liability in the event that, but for the specific immunity conferred by s 51B(1), liability would attach to the Director or a member of staff of the OPI. It was submitted that this was in effect the primary reason for the enactment of s 51B. It was also submitted that there was no need to ensure that s 109, and ss 51A and 51B, had a mutually exclusive operation and nor was there any inconsistency generated between them. Rather,

304 *Commonwealth v Baume* (1905) 2 CLR 405, 414; *Project Blue Sky* (1998) 194 CLR 355, 382 [71].

ss 51A and 51B dealt with a specific situation, namely the commencement of criminal prosecutions in relation to offences on matters arising from an investigation, while s 109 dealt more generally with 'any acts purported to be done' under the PI Act. IBAC argued that the enactment of ss 51A and 51B may have been aimed at confirming that an immunity existed in this specific situation, as a 'belt and braces' approach. This was in addition to the more important function of ensuring that vicarious liability was sheeted home to the State, a function that, it was argued, was not performed by s 109. TATE JA

344 To this Bare replied that the purpose of s 51B was to confer a specific immunity in circumstances not covered by s 109 because the criminal prosecutions commenced under s 51A(2) were acts that were not done 'for the purposes of an investigation'. This was the basis for the separate spheres of operation of s 51B and s 109. Furthermore, Bare submitted, there was already provision for vicarious liability to be sheeted home to the State in respect of any liability imposed for which protected persons were not granted an immunity under s 109. Section 109 did not grant an immunity with respect to acts done in the course of, or that result in, a critical incident: s 109(2).[305] The vicarious liability that attached to these acts was to be found in s 110(2). Section 110 provided:

Protection of protected persons in relation to critical incidents

(1) A protected person is not personally liable for anything done or omitted to be done in good faith —

(a) in the performance of a function or exercise of a power under this Act; or

(b) in the reasonable belief that the act or omission was in the performance of a function or exercise of a power under this Act —

if the thing was done or omitted to be done in the course of, or resulted in, a critical incident.

(2) Any liability resulting from the act or omission that, but for subsection (1), would attach to a protected person attaches instead to the State.

345 Bare submitted that there is a perfect symmetry between s 110 and s 51B. While s 51B(1) excludes personal liability for acts done in good faith, so too s 110(1) excludes personal liability for acts done in good faith where the acts do not attract the immunity under s 109 (because s 109(2) creates an exception for critical incidents). Similarly, while s 51B(2) provides for the State to be vicariously liable in certain circumstances, so too s 110(2) renders

305 See [249] above. A 'critical incident' is relevantly defined to mean 'an incident involving a member of OPI personnel while that member was on duty which (a) resulted in the death of, or serious injury to, a person; and (b) also involved any one or more of the following — ... (ii) the use of force by the member'; while 'serious injury' is relevantly defined as including an injury that '(b) is likely to result in permanent impairment'; or '(d) is, in the opinion of the Director, of such nature, or occurred in such circumstances, that the infliction of it is likely to bring the Office of Police Integrity into disrepute or diminish public confidence in it'. (see ss 3, 30). It may have been arguable that Bare's loss of several teeth, together with a cut on his jaw 2 cm long, amounted to a permanent impairment rendering the event involving the use of force against him by members of Victoria Police a 'critical incident'. However, no reliance was placed on this exception.

the State vicariously liable for any liability that, but for sub-s (1) of s 110, would attach to a protected person. The circumstances in which vicarious liability will arise by reason of s 51B(2) and s 110(2) are different, and the provision for vicarious liability in both sections indicates, Bare submitted, that they operate in different spheres. Most importantly, they indicate that s 109 does not extend to confer an unrestricted immunity from liability in civil proceedings so as to preclude review of decisions not to investigate.

346 In my view, it is important to read the PI Act as a whole and to strive to give practical effect to all its provisions. As Gummow J said in *Minister for Resources v Dover Fisheries Pty Ltd*:[306]

> In dealing with an apparent conundrum ... the Court should strive to avoid a capricious or irrational result and seek to give each provision a field of operation. In *AMP Inc v Utilux Pty Ltd* ... Lord Reid said that, it being improbable that the framers of legislation could have intended to insert a provision which has virtually no practical effect, one should look to see whether any other meaning produces a more reasonable result. See also *Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation (Cth)* and *Occidental Life lnsurance Co of Australia Ltd v Life Style Planners Pty Ltd.*[307]

347 I consider that it is improbable that the specific immunity conferred by s 51B(1) can have been intended to have virtually no practical effect. Yet this is the consequence of interpreting s 109 as conferring an almost unrestricted general immunity. This suggests that one should look to see whether any other meaning produces a more reasonable result and, in accordance with the basic rule, a result that preserves the capacity of the courts to review administrative action.

348 Bare submitted that the scheme of the PI Act supported an interpretation of s 109 which had a restrictive operation by reason of s 52[308] that purported, in accordance with its heading,[309] to define the 'Application of Part [4]'; that is, s 52 limited Part 4 of the PI Act, the Part concerned with general investigatory powers (including s 109), to acts done for 'the purposes of an investigation under Part 3', subject to a contrary intention. Specifically, he submitted, s 109 did not apply to conduct that had taken place, or a decision that had been made, where that conduct or decision was *not* for the purposes of an investigation under pt 3. Here, the decision was a decision *not* to conduct an investigation under pt 3. The decision, it was submitted, was thus not made 'for the purposes of an investigation under Part 3' and accordingly, s 109 had no application.

349 Bare submitted that the judge was wrong to conclude that deciding whether or not to investigate a complaint is an essential step in an investigation and

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306 (1993) 43 FCR 565.

307 Ibid 574 (citations omitted). Gummow J (with whom Hill and Cooper JJ agreed) was dealing with concurrent conflicting obligations, to suspend and revoke, in the context of regulations made under the *Export Control Act 1982* (Cth).

308 The terms of s 52 are set out at [251] above.

309 Headings to sections form part of the Act: see *Interpretation of Legislation Act 1984*, s 36(2A).

thus something done for the purpose of an investigation under pt 3. The judge said: TATE JA

> I agree with the defendants that a decision about whether or not to investigate a complaint is a necessary step in the process of investigation by the Director. As they submit, before that determination is made there is clearly the prospect that an investigation may occur and that, consequently, the decision was made within the meaning of s 52 'for the purpose of' an investigation (an object which does not have to be in existence).[310]

350 Bare submitted that the process of investigation cannot start until a decision to investigate has been made. Here, the decision sought to be impugned was a decision not to investigate. It was submitted that, as a matter of logic, such a decision is not a part of, or a necessary step in the process of an investigation, or made for the purposes of an investigation. On this approach, although a decision to investigate may be a necessary step to the conduct of an investigation, a decision *not* to investigate is not, and cannot be, a necessary step to an investigation because there is no investigation to which it relates. A decision *not* to investigate is thus not made for 'the purposes of an investigation'. The judge's assumption that the 'investigation' referred to in s 52 is 'an object which does not have to be in existence' is denied by Bare as, in effect, begging the question.

351 The judge also relied on other statutory indicia, as did IBAC on appeal.[311] In particular, her Honour relied on ss 106 and 107 of the PI Act that prevent compulsory production of a document or thing in legal proceedings in a manner not confined to investigations. Sections 106 and 107 also occur in pt 4 of the PI Act and are thus also governed in their application by s 52. This was taken to suggest that s 52 is not to be read strictly; that is, it is not to be read as indicating that the whole of pt 4, and all its provisions (including s 109), are confined to conduct relevant to investigations. Section 106 relevantly provided:

> (2) In any proceeding to which this section applies, a protected person cannot be compelled to produce any document or other thing that has come into his or her possession in the performance of functions under this Act, if the Director certifies in writing that, in the Director's opinion, the document or thing is a protected document or other thing.

352 Section 107 relevantly provided:

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310 Reasons [81].

311 Her Honour also relied on the extrinsic materials for the OPI Act which she considered were 'consistent with a broader immunity for protected persons under s 109, relevantly, to give effect to the statutory purposes of both the OPI and the Director under the *Police Integrity Act* by allowing them to carry out their functions without the impediment of legal proceedings challenging their decisions, with the exception of those alleging jurisdictional error': Reasons [85]. However, it is noteworthy that in the statement made by the Minister under s 85 of the *Constitution Act 1975* (referred to by the judge at [74]) he emphasised the nexus with investigations when explaining the justification for excluding protected persons from liability. He said: 'The protection of these persons is required *to prevent the director's investigations from being impeded by legal challenges* and proceedings on grounds other than allegations of bad faith' (emphasis added).

(1) This section applies if, in a criminal proceeding —

(a) a subpoena is issued for a protected person to produce any document or other thing that has come into his or her possession in the performance of functions under the Act; and

(b) the protected person objects to the production of the document or other thing in the proceeding, or to the inspection of the document by one or more parties to the proceeding, on the basis that the document or other thing is a protected document or other thing.

(2) The protected person must give notice of the objection to each party to the proceeding, indicating the category of the document or other thing, and apply to the court to determine the application ... [by various methods]

...

(4) In deciding which method to determine the application, the court must take into account -

(a) the public interest in protecting the confidentiality of the Director's investigative techniques and documents and other things in the Director's possession; and

(b) the extent to which the method of determining the objection may disclose information that —

(i) reveals the identity of an informer or puts an informer's safety at risk; or

(ii) reveals the identity of a person who has been called, or who has appeared, as a witness in an examination, or put such a person's safety at risk; or

(iii) reveals the identity of a person who has provided the Director with information relating to an investigation, or put such a person's safety at risk; or

(iv) reveals the identity of a person whose name appears in any evidence given or information provided to the Director relating to an investigation, or put such a person's safety at risk; or

(v) reveals the identity of a person who is or has been the subject of an investigation, or put such a person's safety at risk; or

(vi) places at risk an ongoing investigation —

(A) under this Act by the Director; or

(B) by Victoria Police; or

(vii) places at risk the disclosure of any investigative method used by the Director or by Victoria Police; or

(viii) it would otherwise not be in the public interest to disclose.

353 The relationship between investigations and legal proceedings is governed by s 46 which provided:

Investigation when other proceedings on foot

(1) The Director may commence or continue to conduct an investigation despite the fact that any proceedings are on foot, or are instituted, in any court or tribunal that relate to or are otherwise connected with the subject-matter of the investigation.

(2) If the Director is or becomes aware that proceedings referred to in subsection (1) are on foot or have been instituted, the Director must take all reasonable

steps to ensure that the conduct of the investigation does not prejudice those proceedings. TATE JA

354 The judge emphasised that ss 106 and 107 applied broadly to include documents or things that had come into a protected person's possession through the performance of functions under the Act that were not restricted to actions taken in the context of an investigation. Her Honour said:

> As the defendants point out, there are indications in the language of Part 4 itself that it is not a purpose of s 52 or s 109(1) that the operation of the latter sub-section is to be restricted to actions *in the context of an investigation*. For example, ss 106 and 107 prevent compulsory production of a document or thing that has come into a protected person's possession 'in the performance of functions under this Act', in civil and criminal proceedings, respectively.[312]

355 She pointed to the functions and powers of the OPI that included such matters as 'analysing systems used within Victoria Police to prevent police corruption and serious misconduct' and 'providing information and advice to, and consulting with, Victoria Police to increase the capacity of Victoria Police to prevent police corruption and serious misconduct'.[313] These functions and powers are not premised on the conduct of an investigation.

356 Bare submitted that his approach to s 109 was not to confine its operation to acts that occurred within the *context* of an investigation.[314] The submission was not that the privative clause in s 109 only applied, by reason of s 52, to acts relating to a specific investigation nor was it submitted that it was confined to preclude review of acts done in the context of, or in the course of, an investigation. Rather, it was accepted that s 109 applied, by reason of s 52, to acts done in investigations that have been concluded, that were being conducted, possibly to investigations that may be conducted in the future, and to investigative methods, including the use of firearms and defensive equipment. The proposed nexus was not that the acts referred to in s 52 must have occurred within the context of a particular investigation; rather, the nexus reflected the statutory language, namely that the acts were carried out 'for the purposes of an investigation'. It was submitted that a decision to refuse a request to conduct an investigation did not satisfy that statutory test.

357 Moreover, it is telling, in my view, that although ss 106 and 107 refer to documents and things obtained in the exercise of functions and powers that are not expressly restricted to investigations, the evident purpose of those sections is to confer an immunity from production in civil and criminal proceedings on 'protected documents or things'. A 'protected document or thing' is defined in s 105 and, as Bare submitted, the operation of ss 106 and 107 is limited by the definition in s 105. This definition, it was submitted, links protected documents or things to those documents or things that

312 Reasons [82] (emphasis added). See especially s 106(2) and s 107(1)(a).
313 Section 6(2)(b) and (c) of the PI Act respectively.
314 See her Honour's view at [354] above.

are relevant, by one means or another, to an investigation. Section 105 provided:

> For the purposes of this Division, a protected document or other thing is a document or other thing the production of which (as the case requires) —
>
> (a) is likely to —
>
> (i) reveal the identity of an informer or put an informer's safety at risk; or
>
> (ii) reveal the identity of a person who has been called, or who has appeared, as a witness in an examination, or put such a person's safety at risk; or
>
> (iii) reveal the identity of a person who has provided the Director with information relating to an investigation, or put such a person's safety at risk; or
>
> (iv) reveal the identity of a person whose name appears in any evidence given or information provided to the Director relating to an investigation, or put such a person's safety at risk; or
>
> (v) reveal the identity of a person who is or has been the subject of an investigation, or put such a person's safety at risk; or
>
> (b) is likely to place at risk an ongoing investigation —
>
> (i) under this Act by the Director; or
>
> (ii) by Victoria Police; or
>
> (c) is likely to risk the disclosure of any investigative method used by the Director or by Victoria Police; or
>
> (d) is otherwise not in the public interest.

358 An 'investigation' is defined under s 3 of the PI Act to mean an investigation under pt 3. Part 4 contains a list of general investigatory powers including provisions for the issuing of witness summonses,[315] the carrying out of examinations, provisions regulating privileges, secrecy provisions, provisions regulating legal assistance for witnesses; contempt provisions; the arrest of recalcitrant witnesses; provisions governing powers of entry, search and seizure, the conferral of authority to possess, carry and use defensive equipment and firearms, the protection from disclosure of persons, documents and things[316] and the matter of offences.

359 Within this context, it is clear that for a document or thing to be a protected

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[315] The example of witness summonses also illustrates the restrictive operation of s 52. Section 53(1)(a) empowers the Director to issue a witness summons to attend at an examination before the Director to give evidence. Section 53(1)(c) empowers the Director to issue a witness summons to attend an examination before the Director to give evidence and produce specified documents or things. On Bare's approach, the power is limited to those issued for the purposes of an investigation because of s 52 and, because both types of summons relate to an examination, s 61 is engaged, and the power is expressly limited to a summons issued for the purposes of an investigation: see [359] below. Section 53(1)(b) empowers the Director to issue a witness summons to attend at a specified time and place to produce specified documents or other things to the Director. While it is not expressly restricted to examinations, and thus s 61 is not engaged, on Bare's approach it would be implicitly restricted by s 52 to the issuing of summons for the purposes of an investigation by the Director.

[316] Sections 105–7.

document under s 105(a)(iii)-(v), there must be a nexus to an investigation. So too in s 105(a)(ii) in relation to witness examinations. Section 61[317] empowers the Director to conduct examinations[318] and it is expressly linked to investigations: TATE JA

> The Director may conduct an examination *for the purposes of an investigation.*[319]

360 Section 105(a)(i) may have most work to do in relation to investigations although the sub-paragraph could be applied to protect the identity of an informer whose information was never acted upon to commence or continue an investigation. The fact that an informer gave information to the Director, if known, may be sufficient, without more, to place his or her identity at risk. On Bare's view it would be sufficient that the information was given, or received, 'for the purposes of an investigation', although an investigation never took place. It would be difficult to imagine that an informer would give information for any other purpose.

361 In s 105(b) and in s 105(c) there is a nexus to investigations although it extends also to an ongoing investigation undertaken by Victoria Police. To this extent there is a field of operation beyond that prescribed by s 52 that speaks only of an investigation by the Director.

362 Section 105(d) appears to be general and unlimited, and invokes the notion of 'public interest' that, as earlier discussed, is an expression of inherent breadth. Nevertheless, an interpretation ejusdem generis might be thought to confine the considerations applicable in this context to those relating to investigations or investigative methods used, or it might reveal a contrary intention to an operation restricted by s 52.

363 It remains the case that the tenor of s 105 is to limit the protection afforded in criminal proceedings (by s 107) and non-criminal proceedings (by s 106) to documents and things relating to investigations. Section 107(4)(b)(iii)-(v) makes this nexus express, while s 107(4)(b)(vi) extends the sphere of operation to an ongoing investigation by Victoria Police in addition to that undertaken by the Director. Sections 107(4)(b)(i) and (4)(b)(viii) raise similar considerations to those raised by s 105(a)(i) and s 105(d) respectively. Section 107(4)(b)(ii) relates also to witness examinations which, in turn, are linked to investigations and s 107(4)(vii) relates to investigative methods used by the Director or by Victoria Police. Under s 107(4)(a) the court, in deciding what method to use to determine the application to refuse production of a document or thing in a criminal proceeding, is to consider the public interest in protecting the confidentiality of the Director's investigative techniques and documents and other things in the Director's possession.

364 IBAC, and the Attorney-General, relied specifically on s 109(6)[320] which, for

317 Section 61 appears in div 3 of pt 4.
318 An 'examination' is defined in s 3 to mean 'an examination under Part 4'.
319 Section 61(1)(emphasis added).
320 See [249] above.

convenience, can be set out again:

> Despite anything in this section —
>
> (a) an order cannot be issued restraining the Director from carrying out or compelling the Director to carry out any investigation; and
>
> (b) a proceeding cannot be brought against the Director seeking the issue of such an order.

365 Her Honour commented that:

> [S]ection 109(6), which prohibits an order compelling the Director to conduct an investigation, must contemplate a situation where no investigation has commenced.[321]

366 Bare responded by pointing to s 46 of the PI Act[322] which confers a discretion on the Director to commence, or continue, an investigation despite legal proceedings occurring relevant to the subject-matter of the investigation. The discretion would extend to suspending an investigation in the light of related legal proceedings. Bare submitted that s 109(6) would prevent a court from ordering the Director to conduct an investigation he had chosen to suspend. In this way, s 109(6) would still have work to do consistently with the restrictive effect of s 52(1).

367 In my view, this construction is reinforced by the language of s 109(6) which first prohibits the making of an order restraining the Director from carrying out any investigation and secondly prohibits an order compelling the Director to carry out any investigation. The second limb, set against the first, most naturally appears to envisage there being an investigation on foot which the Director can neither be restrained from carrying out nor compelled to carry out, if suspended. It is difficult to envisage otherwise why it would be that there was a need for an express prohibition against a court from making an order compelling an investigation to be carried out. If no investigation had been on foot, a court compelling an investigation (absent the prohibition) would need to define prospectively what the purpose and scope of the proposed investigation would be. That is an executive function that would sit uneasily with the adjudicative role of a court, even under State law. For the legislature to have created an express prohibition on a court compelling the Director to carry out an investigation indicates that the subject-matter of the proceeding before the court was much more likely to have been an existing investigation, properly defined as to its scope, that the Director had determined to put on hold.

368 More importantly, however, even if s 109(6) is construed as having a more general operation, s 109(6) is addressed to courts and not to the protected persons whose liability is the subject-matter of s 109(1) which IBAC submitted precludes review of the decision. Section 109(1) is concerned with 'acts done' by protected persons. The orders that a court can make (whether or not they extend to circumstances where no investigation has taken place)

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321 Reasons [82].

322 See [353] above.

cannot enlarge or restrict the scope of protection to the 'acts done' by protected persons under s 109(1). Bare's submission is that the 'acts done' that are protected from liability are acts done 'for the purposes of an investigation' and that submission is not rebutted by pointing to the range of orders a court is prohibited from making. TATE JA

369 Bare pointed to the structure of the PI Act as containing two other analogous provisions to s 52 (that is, provisions which operated so as to limit the application of other provisions of the Act): s 38 defining the application of div 1 of pt 3, and s 43 defining the application of div 2 of pt 1. Part 3 of the PI Act is concerned with 'Police Complaints and Investigations' and is separated into div 1, headed 'Complaints', and div 2, headed 'Investigations'. Section 38 of the PI Act, the first section in div 1, was headed 'Application of Division' and provided:

> This Division applies to a complaint made to the Director under section 86L of the Police Regulation Act 1958.

370 Division 1 then sets out how complaints were to be dealt with, advice to complainants, jurisdiction and so on. Section 38 thus operated so as to define the scope of the provisions that followed.

371 Section 43 of the PI Act, the first section in div 2, was also headed 'Application of Division' and provided:

> This Division applies to —
>
> (a) an investigation by the Director of a complaint referred to in section 38; or
>
> (b) an investigation initiated by the Director under section 44.[323]

372 Bare submitted that these provisions supported the proposition that the scheme of the PI Act was carefully to identify the scope of application of its operative provisions, pts 3 and 4,[324] and that, in particular, s 52, the first section in pt 4, was intended to restrict the application of the provisions in pt 4 to investigations and not refusals to investigate. What was emphasised was that s 52 was one of many provisions that sought, within the PI Act, to target precisely a sphere of application. In confining the provisions of pt 4 to an application 'for the purposes of an investigation by the Director' it limited pt 4 to acts done for the purposes of investigations and not decisions refusing to carry out an investigation.

(iii) A restrictive construction should be adopted

373 In my view, s 109 should be read as having a narrow operation which does not extend to preclude review of the decision. The presence of the specific immunity in s 51B(1) indicates that s 109(1) should not be read as being of unlimited or general application. The basic rule guiding the statutory con-

323 Section 44 provided for the Director to make 'own motion' investigations.

324 Part 1 of the PI Act was concerned with preliminary matters; pt 2 with institutional aspects of the OPI; pt 5 with oversight by the Special Investigations Monitor; pt 6 with some general provisions (including the receipt of letters by persons in custody); pt 7 with transitional provisions and pt 8 with the amendment of the *Police Regulation Act 1958* and other Acts.

struction of ouster clauses, supported by the principle of legality, dictates that, where available, a narrow construction should be adopted. Section 52, on its terms, appears to indicate that the provisions of pt 4 (including s 109) apply only for 'the purposes of an investigation by the Director under pt 3'. This would restrict the application of the immunity under s 109 to acts done for the purposes of an investigation. A refusal to investigate is not an act done for the purposes of an investigation. Nor is it an essential step taken for the purposes of an investigation. It rather prevents, and is aimed at preventing, an investigation taking place. Its purpose is to impede or exclude an investigation. As the decision was not an act done for the purpose of an investigation, it falls outside s 109 and is susceptible to judicial review. The decision is subject to the supervisory jurisdiction of this Court.

374 It should also be noted that Bare relied on an additional and independent source of support for a narrow construction of s 109 that preserved his right to seek judicial review of the decision, namely, s 32(1) of the Charter.[325]

375 This submission was made before the judge and rejected.[326] It was referred to on the appeal but was not wholly developed.[327] Suffice it to say that the interpretation at which I have arrived, based on the ordinary principles of statutory construction, including the principle of legality, and the basic rule with respect to privative or ouster clauses, is one that I consider to be compatible with human rights, most especially the right to a fair hearing under s 24(1)[328] which includes the right of access to the courts.[329] It is therefore unnecessary to examine further whether s 32 would provide additional support for the preferred interpretation.[330]

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325 Section 32(1) is set out at [303] above.This submission related to the application of s 32(1) of the Charter to the construction of s 109 of the PI Act which is quite distinct from the submission considered earlier in relation to the application of s 32(1) to the construction of the 'public interest' in s 40(4)(b)(i) of the PI Act.

326 Reasons [86]–[88].

327 No specific right was identified but it would seem that the right to a fair hearing would be the most relevant right in this context.

328 Section 24(1) of the Charter provides: 'A person charged with a criminal offence or a party to a civil proceeding has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing'. It is not in contest that Bare is a party to a civil proceeding in this Court between himself and a public authority and thus the right under s 24(1) is engaged. The right to a fair hearing reflects that protected by the common law: *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146; *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 363 [81], 373 [116]; *Dietrich v The Queen* (1992) 177 CLR 292.

329 *Wilson v First Country Trust Ltd (No 2)* [2004] 1 AC 816, 834 [32], 835 [35].

330 See Justice Pamela Tate, 'Statutory Interpretive Techniques under the Charter: Three Stages of the Charter — Has the Original Conception and Early Technique Survived the Twists of the High Court's Reasoning in *Momcilovic*?' (2014) 2 *Judicial College of Victoria On-Line Journal* 43. See *R v Hansen* [2007] 3 NZLR 1, 36–7 [88]–[92] (Tipping J), 27–8 [57]–[60] (Blanchard J), 66 [192] (McGrath J), 83 [266] (Anderson J).

(iv) Conclusion on s 109 TATE JA

376 In my view, s 109 of the PI Act does not operate to preclude judicial review of the decision.

377 As I indicated earlier in these reasons, I have concluded that the decision was unlawful as the delegate breached the procedural limb of s 38(1) of the Charter because he failed to give proper consideration to Bare's right not to be subjected to cruel, inhuman or degrading treatment or to his right to equal protection of the law without discrimination. I determined that the decision ought be quashed as an error of law on the face of the record unless the privative clause precluded review of such errors.[331] I have concluded that s 109 of the PI Act does not operate so as to preclude review of the decision for error of law on the face of the record. The decision is thus amenable to a remedy in the nature of certiorari. I would quash the decision and allow the appeal.[332]

(3) Does 'unlawfulness' under s 38 of the Charter amount to jurisdictional error?

(i) The implications of Kirk

378 As the decision should be quashed[333] and is of no force or effect for the reasons I have given, it is unnecessary to determine the question of whether the unlawfulness attaching to a decision taken in breach of the procedural limb of s 38(1) amounts to jurisdictional error. However, it is important to note that a conclusion that the relevant unlawfulness amounted to a species of jurisdictional error would carry the implication that it is beyond the legislative power of the Victorian Parliament to enact an ouster clause that precludes judicial review of such unlawfulness. This implication would follow from *Kirk,*[334] which was decided by the High Court some years after the Charter (including s 38) was enacted.[335] The serious nature of such an implication gives rise to the complex question of whether the statutory language in which s 38(1) is cast can bear the meaning sought to be placed upon it by Bare and the Commission.

379 The question is especially complex, post-*Kirk*, in that it would be necessary to reconcile the Parliament's inability to oust judicial review for breaches of the Charter, if those breaches amount to jurisdictional error, with s 31 of the Charter which entitles the Victorian Parliament to declare expressly that an Act or a provision of an Act has effect despite being incompatible with one or more of the human rights in the Charter or despite anything else set out in the Charter. These declarations are 'override declarations'. Section 31(6) provides that if an override declaration is made in respect of a

331 See [328]–[329] above.
332 See [329] above for the orders that I consider should be made.
333 As mentioned at [328] above, an error of law on the face of the record can be quashed whether it is a jurisdictional or non-jurisdictional error.
334 As mentioned at [250] above.
335 The Charter was enacted in 2006. *Kirk* (2010) 239 CLR 531 was decided in 2010.

statutory provision, then to the extent of the declaration the Charter has no application to that provision. Section 31 reflects the concern, expressed in the extrinsic materials at the time the Charter was enacted, that the Charter should not diminish the 'Parliamentary sovereignty'[336] or supremacy of the Parliament. If a breach of s 38(1) of the Charter gave rise to jurisdictional error, this would mean that although the Parliament could not enact an ouster clause that precluded judicial review of conduct that was in contravention of s 38(1), because of *Kirk*, it could make an override declaration with respect to the enabling statutory power under which the decision was made (here, s 40(4)(b)(i) of the PI Act) so as to ensure that the Charter, including s 38, had no application to that provision. This would mean that by a different path, the use of override declarations, the Parliament was able to preclude review of decisions taken by public authorities for compliance with the Charter, despite their resulting in jurisdictional error, which it had no power to do, for constitutional reasons, through the use of an ouster clause. With respect to the limits of State legislative power, this might seem to be an anomalous result.

380 On the basis that it is necessary to read the Charter as a whole,[337] and to read its provisions so that, as far as possible, they are consistent with one another,[338] it might seem that an appropriate reading of s 38(1), one that reconciled s 38(1) and s 31, would be to treat the unlawfulness that arises as a consequence of a breach of s 38(1) as not giving rise to jurisdictional error, but as giving rise to non-jurisdictional error. This would allow for all forms of relief, including certiorari to quash the decision, if, as here, the error appeared on the face of the record and was not precluded by an ouster clause.

381 The question of whether the unlawfulness that flows as a consequence of a breach of s 38(1) amounts to jurisdictional error is an important and significant question that, in my opinion, ought not be determined before the resolution of a case requires it. The question was left open in *Sudi*.[339] The question should remain open until such a case arises.

382 Nevertheless, as the matter was fully argued in this appeal, it may be useful to make some observations.

383 There are powerful considerations on both sides of the argument as to whether the unlawfulness that flows as a consequence of a breach of the procedural limb of s 38(1) amounts to jurisdictional error.

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336 Victoria, *Parliamentary Debates,* Legislative Assembly, 4 May 2006, 1293 (Rob Hulls, Attorney-General). See Jeffrey Goldsworthy, *Parliamentary Sovereignty — Contemporary Debates* (Cambridge University Press, 2010).

337 *Metropolitan Gas Co v Federated Gas Employees' Industrial Union* (1924) 35 CLR 449, 455; *Cooper Brookes (Wollongong) Pty Ltd v FCT* (1981) 147 CLR 297, 321.

338 *Taylor v Public Service Board (NSW)* (1976) 137 CLR 208, 213; *Comm'r of Stamps (SA) v Telegraph Investment Co Pty Ltd* (1995) 184 CLR 453, 479.

339 (2011) 33 VR 559, 569 [49] (Warren CJ), 571–2 [59]–[63] (Maxwell P), 596 [214] (Weinberg JA).

(ii) The significance of 'unlawfulness' TATE JA

384 On the one hand, the fact that the Charter stipulates that the consequence of such a breach is 'unlawfulness' may be significant. It has been accepted as a principle of judicial review that a failure to take account of a relevant consideration (considerations that the decision maker is bound to take into account) will not necessarily justify the setting aside of the decision. Mason CJ noted in *Peko-Wallsend* that a failure to take account of a relevant consideration will not necessarily justify an order that the power be re-exercised according to law if the outcome is not materially affected. He said:

> Not every consideration that a decision-maker is bound to take into account but fails to take into account will justify the court setting aside the impugned decision and ordering that the discretion be re-exercised according to law. A factor might be so insignificant that the failure to take it into account could not have materially affected the decision: see, eg, the various expressions in *Baldwin & Francis Ltd. v Patents Appeal Tribunal*; *Hanks v Minister of Housing and Local Government*; *Reg v Chief Registrar of Friendly Societies*; *Ex parte New Cross Building Society*. A similar principle has been enunciated in cases where regard has been had to irrelevant considerations in the making of an administrative decision: *Reg v Bishop of London*; *Reg v Rochdale Metropolitan Borough Council*; *Ex parte Cromer Ring Mill Ltd*.[340]

385 In *Minister for Immigration and Multicultural Affairs v Yusuf*[341] it was observed that if a decision maker ignores relevant material in a way that affects the exercise of the power this results in jurisdictional error. It was acknowledged that the categories of jurisdictional error are not closed. McHugh, Gummow and Hayne JJ said:

> It is necessary … to understand what is meant by 'jurisdictional error' under the general law and the consequences that follow from a decision-maker making such an error. As was said in *Craig v South Australia*, if an administrative tribunal (like the [Refugee Review] Tribunal)
>
> > 'falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it.'
>
> 'Jurisdictional error' can thus be seen to embrace a number of different kinds of error, the list of which, in the passage cited from *Craig*, is not exhaustive. Those different kinds of error may well overlap. The circumstances of a particular case may permit more than one characterisation of the error identified, for example, as the decision maker both asking the wrong question and ignoring relevant material. *What is important, however, is that identifying a wrong issue, asking a wrong question, ignoring relevant material or relying on irrelevant material in a way that affects the exercise of power is to make an error of law.* Further, doing so results in the decision maker exceeding the authority or powers given by the relevant

340 *Peko-Wallsend* (1986) 162 CLR 24, 40 (citations omitted).

341 (2001) 206 CLR 323.

> statute. In other words, if an error of those types is made, the decision maker did not have authority to make the decision that was made; he or she did not have jurisdiction to make it. ...
>
> ... it is important to recognise that, if the Tribunal identifies a wrong issue, asks a wrong question, ignores relevant material or relies on irrelevant material, it 'exceeds its authority or powers'. If that is so, the person who purported to make the decision 'did not have jurisdiction' to make the decision he or she made, and the decision 'was not authorised' by the Act.[342]

386 Thus, under the general law, if a decision maker ignores relevant considerations in a manner that is material to the outcome the failure amounts to an error of law and that unlawfulness is a species of jurisdictional error. For s 38(1) of the Charter to stipulate in effect that a public authority is bound to give proper consideration to relevant human rights, thus rendering those human rights 'relevant considerations' in the required sense and stipulating that a breach results in 'unlawfulness', might suggest that the legislature intended that a failure to give proper consideration to a human right was deemed to be material to the decision arrived at, resulting in jurisdictional error.

387 In this context, the Commission sought to rely upon authority drawn from the United Kingdom to the effect that a decision that was 'unlawful', that is, not authorised by law, is beyond power.[343] It then sought to characterise decisions made beyond power as tainted by jurisdictional error. The difficulty with this submission is that the United Kingdom does not distinguish between jurisdictional and non-jurisdictional errors in the manner maintained in Australia nor does the United Kingdom attribute the significance Australia attributes to the distinction.[344] It is thus precisely that type of area of legal discussion where reliance upon United Kingdom authority may be of little utility in Australia because of the different constitutional settings that apply. For this reason there is a need for caution, as expressed by French CJ in *Momcilovic v The Queen*:[345]

> [I]nternational and foreign domestic judgments should be consulted with discrimination and care. Such judgments are made in a variety of legal systems and constitutional settings which have to be taken into account when reading them. What McHugh J said in *Theophanous v Herald & Weekly Times Ltd* is applicable in this context:

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342 Ibid 351–2 [82]–[83] (emphasis added).

343 *Attorney-General's Reference (No 2 of 2001)* [2004] 2 AC 72, 116 [122], 117 [126] (Lord Hobhouse); see also 91–2 [30] (Lord Bingham), 92 [32] and 93 [35] (Lord Nicholls), 118 [130] Lord Millett; 103–104 [73]–[79] (Lord Hope) and 129–132 [169]–[176] (Lord Rodger).

344 As French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ said in *Kirk*: 'In England, the difficulties presented by classification of some errors as jurisdictional and others as not were ultimately understood as requiring the conclusion that *any* error of law by a decision-maker (whether an inferior court or a tribunal) rendered the decision ultra vires. But that is a step which this Court has not taken': (2010) 239 CLR 531, 571 [65] (citations omitted). See also *Craig v South Australia* (1995) 184 CLR 163, 177–180 where the High Court acknowledged the difficulties in distinguishing between jurisdictional and non-jurisdictional errors of law but nevertheless maintained the distinction.

345 (2011) 245 CLR 1.

TATE JA

> 'The true meaning of a legal text almost always depends on a background of concepts, principles, practices, facts, rights and duties which the authors of the text took for granted or understood, without conscious advertence, by reason of their common language or culture.'
>
> Despite our common legal heritage, that general proposition is relevant today in reading decisions of the courts of the United Kingdom, especially in relation to the *Human Rights Act 1998* (UK) (the HRA). It is appropriate to take heed not only of Lord Bingham of Cornhill's remark about the need for caution 'in considering different enactments decided under different constitutional arrangements', but also his observation that 'the United Kingdom courts must take their lead from Strasbourg'.[346]

388 On the other hand, in support of the view that a breach of s 38(1) does not give rise to jurisdictional error, it may be significant, as IBAC contended, that the obligation on a public authority, in making a decision, to give proper consideration to a relevant human right does not have its source in the legislation which confers power on the public authority to make a decision.[347] The Charter does not, and does not purport to, confer power or authority on public authorities to make decisions affecting the myriad range of matters that are subject to public administration.[348] It is not the source of authority to act. In this sense, it may be thought to regulate the performance of functions already conferred rather than imposing essential preliminaries to the exercise of those functions.[349] On the test enunciated in *Project Blue Sky,*[350] a breach of such a condition, while unlawful, does not result in invalidity.[351] An appropriate remedy may lie in declaratory and injunctive relief to restrain future conduct incompatible with Charter rights.[352] Contrary to the submissions made by the Commission, this would not, in my view, deprive one of the key provisions of the Charter of a meaningful operation.

389 Relevantly, the power to decide whether to investigate a complaint against Victoria Police was conferred by the PI Act, not by the Charter. So too in *Castles* the power to grant, or refuse to grant, a request to leave the prison for treatment was conferred on the Secretary by the *Corrections Act*,[353] not the Charter; in *PJB* the power to appoint an unlimited administrator was conferred under the *Guardianship and Administration Act*,[354] not the Charter; in *Giotopoulos* the power to grant, or refuse to grant, a tenancy

346 Ibid 37–8 [19] (citations omitted). See also 83–4 [146](i) (Gummow J).
347 This is why the obligation imposed under s 38(1) is a supplementary obligation. See [323] above.
348 For a discussion of the growth of public administration see Sir William Wade and Christopher Forsyth, *Administrative Law* (Oxford University Press, 11th ed, 2014).
349 See Reasons [97].
350 (1998) 194 CLR 355, 389 [92]. On the relationship between the *Project Blue Sky* test and jurisdictional error see *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294, 319 [72]–[73], 345–5 [173], 353–4 [205]; J K Kirk, 'The Concept of Jurisdictional Error' in Neil Williams (ed), *Key Issues in Judicial Review* (Federation Press, 2014) 11, 14.
351 (1998) 194 CLR 355, 393 [100].
352 Ibid.
353 Section 57A.
354 Section 46.

order was conferred on VCAT, by the *Residential Tenancies Act 1997*,[355] not the Charter. It may be that, because the Charter is not the source of power to decide questions of public administration, a decision maker who breaches the procedural obligation under s 38(1) to give proper consideration to a relevant human right does not exceed his or her powers. As the jurisdiction a decision maker has is primarily conceived of as the 'authority to decide',[356] which springs from the empowering statute and not from the Charter, it may be that a failure to give proper consideration to a relevant human right would not exceed the authority to decide. If so, it could not be concluded that the decision maker 'was not authorised' or 'did not have not jurisdiction' to arrive at the decision made. The unlawfulness consequent upon a breach of the procedural limb of s 38(1) would not amount to jurisdictional error: it would be an error of law, but a non-jurisdictional error of law that would not invalidate the decision.

390 In *Minister for Immigration and Citizenship v SZMDS*[357] Gummow A-CJ and Kiefel J reaffirmed the distinction between jurisdictional and non-jurisdictional errors of law by referring to observations of Selway J:

> Of the distinction between jurisdictional and non-jurisdictional error in the setting of the *Australian Constitution*, Justice Selway, writing extrajudicially, said:
>
> > 'Notwithstanding the difficulty, indeed often apparent artificiality, of the distinction, it is a distinction between errors that are authorised and errors that are not; between acts that are unauthorised by law and acts that are authorised. Such a distinction is inherent in any analysis based upon separation of powers principles.'[358]

391 There is an additional reason in support of the view that a breach of s 38(1) does not give rise to jurisdictional error, urged upon the Court by the Attorney-General. In accordance with the maxim that the same word ought bear the same meaning consistently within an Act,[359] subject to a contrary intention, the meaning and significance of 'unlawful' in s 38 ought be construed uniformly with the meaning and significance of 'unlawful' in s 39 of the Charter. Section 39 provides:

> 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 —

355 Section 233.

356 Mark Leeming, *Authority to Decide: The Law of Jurisdiction in Australia* (Federation Press, 2012) 1 [1.1].

357 (2010) 240 CLR 611.

358 Ibid 618 [16], citing Justice Selway, 'The Principle Behind Common Law Judicial Review of Administrative Action — The Search Continues' (2002) 30 *Federal Law Review* 217, 234.

359 *Craig Williamson Pty Ltd v Barrowcliff* [1915] VLR 450, 452; *Registrar of Titles (WA) v Franzon* (1975) 132 CLR 611, 618.

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

(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.

392 On one view of the operation of s 39, before relief can be sought on the ground of unlawfulness under the Charter, it is necessary for a litigant also to be able to seek relief[360] on a non-Charter ground of unlawfulness. The non-Charter grounds may include, for example, in the context of judicial review, breach of procedural fairness, unreasonableness, or improper purpose. On this view, Charter unlawfulness can only be invoked as a supplementary ground of challenge.[361] The Attorney-General submitted that the supplementary approach was correct and that it had implications for the meaning of 'unlawful' in s 38(1). If the unlawfulness flowing from a breach of s 38(1) was a species of jurisdictional error it invalidated the decision or action taken. It was argued that this result was difficult to reconcile with the apparent requirement imposed by s 39(1) that no relief could be sought in respect of a Charter breach unless this was supplementary to the seeking of relief based on a non-Charter ground of unlawfulness. It would be difficult to treat the meaning of 'unlawful' under s 38(1) as giving rise to jurisdictional

360 It is not required that a litigant be successful on the non-Charter grounds: *Goode v Common Equity Housing Ltd* [2014] VSC 585 [28]–[29].

361 See *Sudi* (2011) 33 VR 559, 580 [96] (Maxwell P): 'Plainly enough, s 39(1) has an operation which is both conditional and supplementary. The condition to be satisfied is that a person be able to seek, independently of the Charter, "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". If — but only if — that condition is satisfied, then s 39(1) enables that person to seek "that relief or remedy" on a supplementary ground of unlawfulness, that is, unlawfulness arising because of the Charter.' (citations omitted). See also *PJB* (2011) 39 VR 373, 438–9 [297] (Bell J): 'Section 39(1) does not create a new cause of action or other proceeding for obtaining a relief or remedy in respect of unlawfulness arising under the Charter. It attaches unlawfulness arising under the Charter as a ground to existing causes of action or proceedings by which relief or remedy may be obtained in respect of the act or decision on a ground of unlawfulness arising otherwise than because of the Charter. It then operates to make that relief or remedy available in that cause of action or proceeding on the ground of unlawfulness arising under the Charter, whether or not that relief or remedy is granted on a ground of unlawfulness not arising in that way. The capacity of parties to rely on incompatibility with human rights in legal proceedings, the authority of courts and tribunals (having the jurisdiction) to grant relief or remedy where unlawfulness on that ground is established and the human rights protection of the community have been enhanced to that significant extent.' (citations omitted). See also *Goode v Common Equity Housing Ltd* [2014] VSC 585 [25]. See further *R v Debono* [2013] VSC 407 [77]–[81] where Kyrou J acknowledged that although the Charter does not itself create any new remedy, the scope and reach of the Charter provisions can influence the outcome of pre-existing forms of action by being invoked to supply new and broader bases of unlawfulness. Here, Bare alleged, in his third amended originating motion, in addition to Charter unlawfulness that the decision was invalid, as infected by jurisdictional error, because it was made for an improper purpose (to weaken his prospects of success in the proceeding, the decision being made after the proceeding had commenced) and in breach of procedural fairness: see n 211.

error, with all the importance attached to that conclusion, while at the same time envisaging that the Parliament considered that a breach of s 38(1) would not warrant relief unless some other ground of unlawfulness could be found. This would suggest, the Attorney-General submitted, that the effect of unlawfulness flowing from a breach of s 38(1) did not give rise to jurisdictional error.[362]

393 The judge described this submission as in effect suggesting that s 39(1) would itself operate as 'a privative clause ousting the Court's judicial review jurisdiction where no other ground of unlawfulness was alleged (if that were the effect of s 39)'.[363] Three responses can be made to this: first, if s 39(1) was treated as a privative clause it would be subject to the principle in *Kirk* and could not be interpreted validly as ousting the Court's jurisdiction to review for jurisdictional error;[364] second, s 6 of the *Interpretation of Legislation Act* requires that legislation 'shall be construed as operating ... so as not to exceed, the legislative power of the State of Victoria'; third, a construction of s 39(1) that was compatible with *Kirk* would be to read the unlawfulness that flows from a breach of s 38(1) as not giving rise to jurisdictional error.

394 Section 39(1) is a difficult section.[365] There are two competing constructions, the 'factual availability' interpretation, which reflects the supplementary approach, the need for a litigant relying on the Charter also to seek relief on a non-Charter ground, and the 'abstract availability' interpretation which requires only the use of an existing process and procedure to ventilate a claim based on an alleged breach of s 38(1) seeking a traditional remedy. This interpretational issue has been the subject of commentary:

> An interpretational issue that arises in relation to this provision [s 39(1)] is as follows. Taking as an example a case where the non-*Charter* relief or remedy is based on judicial review, does s 39 require that the plaintiff must *in fact* have a non-*Charter* ground for seeking judicial review, or does it merely require that the act or decision in question is amenable to judicial review in the *abstract*, that is, without regard to the facts of the particular case? I will call the first interpretation the 'factual availability' interpretation and the second interpretation the 'abstract availability' interpretation. On the 'abstract availability' approach, it would be sufficient if the relief or remedy that the plaintiff seeks is, in principle, available

362 The Attorney-General also relied on the Second Reading Speech of the Charter of Human Rights and Responsibilities Bill, referred to at [299] above, where s 38 was described as a 'key provision of the Charter. It seeks to ensure that human rights are observed in administrative practice and the development of policy within the public sector without the need for recourse to the courts'. The Attorney-General submitted that it would be a bizarre result if Parliament intended to create invalidity without providing recourse to the courts.

363 Reasons [107]. Her Honour ultimately did not decide the matter, it being unnecessary for her to do so, but she considered that '[a]ny limitation of the availability of a remedy for breach of s 38(1), including the ruling out of compensation by way of damages by s 39(4), rather militates against the argument' that unlawfulness does per se amount to jurisdictional error: Reasons, [116].

364 Although on the supplementary approach s 39(1) would impose requirements on the seeking of relief rather than purporting completely to oust the jurisdiction of the Court. It is unclear precisely how the principle in *Kirk* would apply to s 39(1).

365 See *Sudi* (2011) 33 VR 559, 596 [214] (Weinberg JA).

TATE JA

> in respect of the particular act or decision, and the plaintiff has the right process, the right court and is within time to seek the relief or remedy. On the 'factual availability' approach, the plaintiff would also need to rely on a non-*Charter* ground in seeking the relief or remedy in the proceeding.
>
> In my opinion, both interpretations are open on the words of the provision, construed in the context of the *Charter* as a whole and in light of its purposes.[366]

395 The Commission contended that the need for a person to find another independent cause of action before being entitled to seek relief on a Charter ground of unlawfulness may be thought to lead to arbitrary results and thus the supplementary or 'factual availability' approach was unlikely to have been intended by Parliament.[367] It may be relevant that s 39(1) departs from the terms of the draft Bill[368] which arguably adopted more clearly the 'abstract availability' approach.[369] The Bill ultimately introduced was 'based on the model recommended in the committee's report, but modified in light of responses to the report'.[370]

396 The question of the proper construction of s 39(1), and its implications for the question of whether a breach of s 38(1) is a species of jurisdictional error, while important, should await resolution for another day when the issues in a case require its resolution.

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366 Mark Moshinsky QC, 'Bringing Legal Proceedings Against Public Authorities for Breach of the *Charter of Human Rights and Responsibilities*', (2014) 2 *Judicial College of Victoria On-Line Journal* 91, 96 (emphasis in original).

367 See also Moshinsky n 366.

368 The relevant clause (cl 40(1)) of the draft Bill read as follows: 'If an act or decision of a public authority is made unlawful by this Charter, a person aggrieved by that act or decision may seek any relief or remedy, including (a) judicial review under the *Administrative Law Act 1978* or under O 56 of Chapter 1 of the Rules of the Supreme Court; and (b) a declaration of unlawfulness and associated relief including an injunction, a stay of proceedings or exclusion of evidence — where that relief or remedy would have been available had the act or decision been unlawful apart from this Charter'. Weinberg JA has observed of s 39: 'It is fair to say that, as enacted, the section bears little resemblance to either recommendation 30 of the Consultation Committee's Report, or cl 40 of the draft Bill appended to that report': *Sudi* (2011) 33 VR 559, 606 [277].

369 Moshinsky, above n 366, 97: '[A] comparison between the draft Bill attached to the report of the Consultation Committee that led to the enactment of the *Charter*, and the *Charter* as enacted, perhaps suggests that the "factual availability" interpretation is what was intended. The wording of the corresponding provision in the draft Bill reflects what I have called the "abstract availability" interpretation. Clearly, a change was made to the drafting of the provision, which perhaps suggests an intention to depart from the "abstract availability" approach and to confine the provision to the "factual availability" approach. Also, the wording of the explanatory memorandum is arguably more in line with the "factual availability" approach than the "abstract availability" approach.' (citations omitted).

370 In the Second Reading Speech the Attorney-General said: 'After giving detailed consideration to the human rights consultation committee's report and the views of the Victorian community, the government has decided to introduce a bill based on the model recommended in the committee's report, but modified in light of responses to the report': Victoria, *Parliamentary Debates,* Legislative Assembly, 4 May 2006, 1290 (Rob Hulls, Attorney-General).

(iii) Conclusion on unlawfulness and jurisdictional error

397 It is unnecessary in this appeal to decide whether the unlawfulness that flows from a breach of s 38(1) amounts to jurisdictional error.

(4) Does the right not to be punished or treated in a cruel, inhuman or degrading way give rise to an implied right to an effective independent investigation of a credible complaint?

398 Bare submitted that it is recognised internationally that the right not to be treated or punished in a cruel, inhuman or degrading way carries with it an implied right to an effective investigation of a credible allegation of such treatment. For this proposition he relied on the submissions made by the Commission. The Commission drew on its extensive and helpful research of cases from the European Court of Human Rights (**the ECtHR**);[371] from the United Kingdom; and General Comments from the United National Human Rights Committee. The international material was relevant given that s 10(b) of the Charter is modelled upon art 7 of the *International Covenant on Civil and Political Rights* (**the ICCPR**).[372] Nevertheless, identifying the scope of the right was difficult because the relevant right was only implied. It thus stood in contrast to those express rights under the Charter which squarely have a counterpart not only in the ICCPR but in other international instruments or comparative legislation where the meaning and scope of the right can be much more readily and convincingly ascertained by reference to those materials.[373]

399 IBAC accepted that where a right in the Charter is identified by the same words as those used in the ICCPR or other relevant international instrument, or comparative legislation, the governing principle is that the same content is intended. It submitted, however, that the principle did not extend to drawing an implication from the words of s 10(b) because it was necessary to recognize the differences in legal setting. IBAC also made it clear that it was not making a submission about implications generally with respect to the rights under the Charter. The Attorney-General also accepted that the content of the express right articulated under s 10(b) will be very significantly influenced by international jurisprudence.[374]

400 The judge below concluded that the recognition that had been given internationally to an implied duty on the State to conduct an effective investigation was not based solely on the right not to be treated or punished in a cruel, inhuman or degrading way, or its equivalent under various international Conventions, but rather was based on the right to an effective remedy and

371 In what follows the abbreviation 'ECtHR' is not used in citations.

372 Article 7 relevantly reads: 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.'

373 See eg *Re Lifestyles Communities Ltd (No 3)* [2009] VCAT 1869 [135], [139] (Bell J). See the Charter s 32(2).

374 The Attorney-General submitted that it was unnecessary for the Court to determine if the content of the express right would be identical.

the obligation to secure rights and freedoms, neither of which was present in the Charter. Her Honour considered that this rendered the international material distinguishable[375] and held that the right under s 10(b) should be given a construction which did not extend to an implied right to an effective investigation of a credible complaint. TATE JA

401 On appeal, the Commission argued that the judge failed to appreciate that the prevailing approach, especially of the ECtHR, was to treat the implied duty to investigate as arising solely from the equivalent of the right not to be subjected to cruel, inhuman or degrading treatment. This was denied by both IBAC and the Attorney-General.

(i) European Court of Human Rights

402 In 2013 the ECtHR in *Vitkovskiy v Ukraine*,[376] considered art 3 of the European Convention of Human Rights (**the Convention**) which is substantially similar to s 10(b) of the Charter. Article 3 reads:

> Prohibition of torture
>
> No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

403 In addition to asserting a substantive violation of art 3, by being beaten and given electric shocks to his fingers and testicles by the police after he had been arrested for burglary, Vitkovskiy claimed that his allegations had not been effectively investigated. The ECtHR held that art 3 implicitly requires that credible complaints should be effectively investigated.

404 The ECtHR said:

> The Court emphasises that where an individual raises an arguable claim that he or she has been seriously ill-treated by police in breach of art 3, that provision requires by implication that there should be an effective official investigation capable of leading to the identification and punishment of those responsible. Otherwise, the general legal prohibition of torture and inhuman and degrading treatment and punishment would, despite its fundamental importance, be ineffective in practice, and it would be possible for some agents of the State to abuse the rights of those within their control with virtual impunity (see *Assenov v Bulgaria*, 28 October 1998, § 102, *Reports* 1998-VIII and *Labita v Italy* [GC], No 26772/95, § 131, ECHR 2000-IV). The minimum standards of effectiveness defined by the Court's case-law include the requirements that the investigation must be independent, impartial and subject to public scrutiny, and that the competent authorities must act with exemplary diligence and promptness (see, for example, *Menesheva v Russia*, No 59261/00, § 67, ECHR 2006-III).
>
> In the present case the Court has found that the respondent State is responsible under art 3 for the applicant's ill-treatment ... The authorities therefore had an obligation to investigate it in compliance with the aforementioned effectiveness standards.[377]

375 Reasons [158].
376 European Court of Human Rights, Fifth Section, Application No 24938/06, 26 September 2013.
377 Ibid [96]–[97].

405 *Assenov v Bulgaria,*[378] referred to by the Court, was the authority which first recognised the implied duty to investigate arising from art 3.[379]

406 Assenov alleged ill-treatment by police officers. He was arrested by an off-duty policeman when he was aged 14 while gambling in the market square. He was taken to a nearby bus station and it was alleged that there his father, as a way of showing that he would administer the necessary punishment, publicly hit him with a strip of plywood. It was also alleged that two other policemen arrived who hit the boy with truncheons. The boy and his father were forced into a police car, taken to a police station and detained for about two hours before being released without charge. Assenov alleged that he was there beaten with a toy pistol and with truncheons and pummelled in the stomach by police officers. The first working day after the incident, Assenov obtained a forensic medical expert opinion that concluded that his injuries could have been inflicted as described by him. He alleged that the ill-treatment gave rise to a violation of art 3 of the Convention, and that there had been a failure by the domestic authorities to carry out a prompt and impartial investigation which, in itself, constituted a violation of art 3.

407 The Court said:

> [W]here an individual raises an arguable claim that he has been seriously ill-treated by the police or other such agents of the State unlawfully and in breach of art 3, that provision, *read in conjunction with the State's general duty under art 1 of the Convention to 'secure to everyone within their jurisdiction the rights and freedoms in [the] Convention'*, requires by implication that there should be an effective official investigation. This obligation, as with that under art 2[380] should be capable of leading to the identification and punishment of those responsible. If this were not the case, the general legal prohibition of torture and inhuman and degrading treatment and punishment, despite its fundamental importance, would be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity.[381]

408 An investigator had been prepared to conclude that Assenov's injuries had been caused by his father, and a statement was only taken by one independent witness who could not recall the events. The investigation by the prosecuting authorities was even more cursory. The Court held that there had been no violation of art 3 based on Assenov's allegations of ill treatment by the police but that there had been a violation of art 3 based on the failure to carry out an effective official investigation.

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378 (1998) 28 EHRR 652 (***Assenov***). In particular *Vitkovskiy v Ukraine* relied on [102] from the reasons of the ECtHR in *Assenov* which is the very paragraph that identifies the source of the procedural obligation as lying with art 3, read in conjunction with art 1. See [407] below.

379 See *Morrison v Independent Police Complaints Commission* [2009] EWHC 2589 [34] where Nicol J referred to those cases of the European Court of Human Rights that had implied a duty to investigate under art 2 (the right to life) and then said, with respect to art 3: 'The implication of a comparable investigative duty was first made in *Assenov v Bulgaria*'.

380 Article 2 of the Convention relevantly provides: 'Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law'.

381 *Assenov* (1998) 28 EHRR 652, 701 [102] (emphasis added) (citations omitted).

409 It is apparent that in *Assenov* the ECtHR recognised the implied duty to investigate as having its source in the combined operation of art 3 and art 1. TATE JA

410 Article 1 reads:

> Obligation to respect human rights
>
> The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms described in Section I[382] of this Convention.

411 As mentioned above,[383] art 1 has no counterpart in the Charter.

412 Article 1 has also been relied upon as giving rise to an implied duty to investigate in the context of art 2 which provides that everyone's right to life shall be protected by law.[384] As the Grand Chamber of the ECtHR said in *Ramsahai v Netherlands*:

> The obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to 'secure everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention', requires by implication that there should be some form of effective official investigation when individuals have been killed by the use of force ...[385]

413 Many subsequent cases have expressly recognised the link between art 3 and art 1 in jointly giving rise to an implied duty to investigate,[386] or have more generally relied on *Assenov* in discussion of the obligation to investigate.[387]

414 The Court in *Assenov* also held that there had been a violation of art 13 which reads:

> Right to an effective remedy
>
> Everyone whose rights and freedoms set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation had been committed by persons acting in an official capacity.

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382 Section I contains the rights and freedoms protected by the Convention. Section II relates to the establishment of the European Court of Human Rights.

383 See [400] above.

384 See above n 380.

385 (2008) 46 EHRR 43 [321] (emphasis added) citing the principles drawn from *Nachova v Bulgaria* (2006) 42 EHRR 43 [110]. On the implied duty to investigate arising from art 2 in the context of art 1 see also *Ergi v Turkey* (2001) 32 EHRR 18, especially [82], [98].

386 See, eg, *Caloc v France* (2002) 35 EHRR 14 [87]–[89]; *Kmetty v Hungary* (2005) 40 EHRR 6 [38]; *Matko v Slovenia* (2009) 48 EHRR 46 [84]; *Stojnsek v Slovenia* (European Court of Human Rights, Third Section, Application No 1926/03, 23 June 2009) [99]; *Iurcu v Moldova* (European Court of Human Rights, Third Section, Application No 33759/10, 9 April 2013) [32]; *Shopov v Bulgaria* (European Court of Human Rights, Fourth Section, Application No 17253/07, 16 April 2013) [46]–[47]; *Grimailovs v Latvia* (European Court of Human Rights, Fourth Section, Application No 6087/03, 25 June 2013) [102]; *Gorea v Moldova* (European Court of Human Rights, Third Section, Application No 6343/11, 23 July 2013) [38]; *Kummer v Czech Republic* (European Court of Human Rights, Fifth Section, Application No 32133/11, 25 July 2013) [80].

387 See, eg, *Secic v Croatia* (2009) 49 EHRR 18 [52]–[53]; *Davitidze v Russia* (European Court of Human Rights, First Section, Application No 8810/05, 30 May 2013) [98]; *Athan v Turkey* (European Court of Human Rights, Second Section, Application No 36144/09, 3 September 2013) [29] (an allegation was made of a breach of art 1 and art 13 and, in response, the Court 'consider[ed] that these complaints should be examined from the standpoint of Article 3 alone' but then went on, in its discussion of art 3, to cite *Assenov* and those paras [101]–[102] that link art 3 and art 1).

415 There is also no counterpart of art 13 in the Charter.[388]

416 The art 13 violation was dealt with separately from the breach of art 3. The content of art 13 was described by the Court in these terms:

> The Court recalls that Article 13 guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of this Article is thus to require the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision. The scope of the obligation under Article 13 varies depending on the nature of the applicant's complaint under the Convention. Where an individual has an arguable claim that he has been ill-treated in breach of Article 3, the notion of an effective remedy entails, in addition to a thorough and effective investigation of the kind also required by Article 3, effective access for the complainant to the investigatory process and the payment of compensation where appropriate.[389]

417 Article 13 had previously been relied on in *Aksoy v Turkey*[390] to support an implication of a duty to investigate allegations of torture in the context of art 3. While *Aksoy v Turkey* was concerned primarily with the substantive obligation under art 3, it explored the link between the right to an effective remedy and the implied duty to investigate credible complaints. The ECtHR said:

> The nature of the right safeguarded under Article 3 of the Convention ... has implications for Article 13 ... Given the fundamental importance of the prohibition of torture ... and the especially vulnerable position of torture victims, Article 13 ... imposes, without prejudice to any other remedy available under the domestic system, an obligation on States to carry out a thorough and effective investigation of incidents of torture.
>
> Accordingly, as regards Article 13 ..., where an individual has an arguable claim that he has been tortured by agents of the State, the notion of an 'effective remedy' entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure. It is true that no express provision exists in the Convention such as can be found in Article 12 of the 1984 United Nations Convention Against Torture ... which imposes a duty to proceed to a 'prompt and impartial' investigation whenever there is a reasonable ground to believe that an act of torture has been committed. However, *in the Court's view, such a requirement is implicit in the notion of an 'effective remedy' under Article 13 ...* .[391]

418 The link made between the implied duty to investigate and the right to an

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388 See [400] above.

389 *Assenov* (1998) 28 EHRR 652, 704 [117].

390 (1997) 23 EHRR 553.

391 Ibid 593 [98] (emphasis added). The Court concluded (at [100]) that 'in view in particular of the lack of any investigation' ... the 'applicant was denied an effective remedy' in breach of art 13.

effective remedy was made also in *Ilhan v Turkey.*[392] There the applicant claimed that his brother had been tortured by security forces. He argued that there was no effective remedy with respect to his brother's injuries and that, therefore, art 3 and art 13 had been violated. The Court concluded that the applicant's brother had been tortured and that was thus a violation of art 3. With respect to the need for an effective investigation, it looked to the jurisprudence on art 2 (the right to life) and the duty it implied to investigate death caused by the security forces of the State and observed that the basis for implying the duty was because it had been: TATE JA

> perceived as necessary to ensure that the right guaranteed under the Convention are not theoretical or illusory but practical and effective.[393]

419 In considering art 3, the Court in *Ilhan v Turkey* also tied the implied duty to investigate under art 3 to the need to ensure proper redress:

> Article 3 however is phrased in substantive terms ... The Court considers that the requirement under Article 13 of the Convention for a person with an arguable claim of a violation of Article 3 to be provided with an effective remedy will generally provide both redress to the applicant and the necessary procedural safeguards against abuses by state officers. The Court's case law establishes that *the notion of effective remedy in this context includes the duty to carry out a thorough and effective investigation capable of leading to the identification and punishment of those responsible for any ill treatment and permitting effective access for the complainant to the investigatory procedure*. Whether it is appropriate or necessary to find a procedural breach of Article 3 will therefore depend on the circumstances of the particular case.[394]

420 Other cases have recognised the role art 13 may play in the context of an implied duty to investigate breaches of art 3.[395] The Commission emphasised that, historically, the ECtHR is most likely to rely upon a combination of arts 3 and 13 in circumstances where it is able to conclude, notwithstanding an ineffective investigation, that a person did suffer cruel, inhuman or degrading treatment. In such a case, the Court typically finds first that a substantive breach of art 3 occurred but then goes on to characterise the ineffective investigation as a breach of art 13.[396] For example, in *Bati v Turkey*,[397] the ECtHR found that the ill-treatment experienced by a number of individuals at the hands of the Istanbul police when arrested and held for questioning was a violation of art 3 and constituted torture. The Court then considered the right to an effective remedy under art 13 and said that such a right entails that an investigation should take place; that is, where an individual has:

> an arguable claim that he has been tortured while in the hands of agents of the state, the notion of an 'effective remedy' entails, in addition to the payment of compensation where appropriate and without prejudice to any other remedy

392 (2002) 34 EHRR 36.
393 Ibid [91].
394 *Ilhan v Turkey* (2002) 34 EHRR 36 [92] (emphasis added) (citations omitted).
395 See, eg, *Bati v Turkey* (2006) 42 EHRR 37 [126]–[127], [133], [138].
396 *Ilhan v Turkey* (2002) 34 EHRR 36, [90], [93].
397 (2006) 42 EHRR 37.

available in domestic law, a thorough and effective investigation.[398]

421 In *Banks v United Kingdom*[399] the ECtHR acknowledged that, as art 13 requires an effective remedy to be provided for arguable substantive breaches of art 3,[400] it will not always be necessary, or appropriate, to examine a procedural complaint under art 3. The procedural limb of art 3 may have greater relevance when the Court is unable to determine whether an applicant has been subjected to cruel, inhuman or degrading treatment. The Court said:

> Procedural obligations have been implied in varying contexts under the Convention, where this has been perceived as necessary to ensure the rights guaranteed under the Convention are not theoretical or illusory but practical and effective. Such obligations requiring an effective investigation into allegations of unlawful use of force and serious ill-treatment have been interpreted as arising under Arts 2 and 3 of the Convention respectively …
>
> The Court would emphasise that these obligations are not identical … either in content or as regards their applicability. … In the context of art 3, where the victim of any alleged ill-treatment is, generally, able to act on his own behalf and give evidence as to what occurred, there is a different emphasis [to Article 2 cases] and, as stated in … *Ilhan* … since art 13 of the Convention requires an effective remedy to be provided for arguable breaches of art 3, it will not always be necessary, or appropriate, to examine the procedural complaints under the latter provision. The procedural limb of art 3 principally comes into play where the Court is unable to reach any conclusions as to whether there has been treatment prohibited by art 3 of the Convention, deriving, at least in part, from the failure of the authorities to react effectively to such complaints at the relevant time.[401]

422 The Commission contended that the recent approach by the ECtHR had been to recognise that where it is *not* possible to determine whether a person has suffered cruel, inhuman or degrading treatment, perhaps because no effective investigation has occurred, art 13 cannot provide the source of the right to an effective investigation, because it is not known whether any breach of rights occurred that requires an 'effective remedy'. In such cases, the ECtHR holds that the failure to undertake an effective investigation is *itself* a contravention of the procedural limb of art 3. It was submitted that recent cases concerning a failure to conduct an effective investigation into allegations of torture or ill-treatment at the hands of police have consistently found a breach of the procedural limb of art 3 independently of art 13, either because the Court did not consider it necessary to make a finding on art 13, [402] or because neither the applicant nor the Court found it

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398 Ibid [133]. As a result of shortcomings in the investigation, the Court concluded that the investigation had been ineffective and there was a violation of art 13.

399 (2007) 45 EHRR SE2.

400 Citing *Ilhan v Turkey* (2002) 34 EHRR 36 [92].

401 *Banks v United Kingdom* (2007) 45 EHRR SE2, 21–2. This was an admissibility decision. The Court found the alleged breach of Article 3 to be 'manifestly ill-founded' (at 24). The claim was held to be inadmissible.

402 The cases the Commission cited included *Athan v Turkey* (European Court of Human Rights, Second Section, Application No 36144/09, 3 September 2013); *Beresnev v Russia* (European Court of Human Rights, First Section, Application No 37975/02, 18 April 2013); *Cosar v Turkey* (European Court of Human Rights, Second Section, Application No 22568/05, 26 March 2013);

necessary even to assert the lack of an effective investigation as a violation of art 13. The Commission submitted that there had been multiple cases in 2013 relating to allegations of torture or ill-treatment where the ECtHR has found a breach of the implied procedural element of art 3 because of a lack of an effective investigation without linking that finding to any other article in the Convention.[403] It acknowledged, however, that there were also multiple cases in 2013 where a violation of art 3 had been found in conjunction with art 1.[404] TATE JA

423 IBAC did not deny that a procedural right to an effective investigation of alleged cruel, inhuman and degrading treatment in breach of art 3 has been found in numerous cases of the ECtHR. However, it contended that the judge was correct in recognising that the procedural right arises by implication from obligations that have not been imposed on public authorities under the Charter. IBAC submitted that this was apparent particularly with respect to those cases which have followed *Assenov*, including *Vitkovskiy v Ukraine*, mentioned above,[405] where the source of the procedural right depends upon art 3, read in conjunction with art 1, because art 1 is an obligation assumed by the member States who are parties to the Convention. The obligation of a party to an international Convention to secure within its jurisdiction the rights and freedoms defined in the Convention has no analogue in the Charter because, it was argued by IBAC, it is not an obligation that could logically be imposed on public authorities.

424 I agree. Public authorities under the Charter are not to be equated to member States who are contracting with other governments to ensure that

Popa v Moldova (European Court of Human Rights, Third Section, Application No 17008/07, 12 February 2013).

403 The Commission contended that there had been 14 such cases including *Athan v Turkey* (European Court of Human Rights, Second Section, Application No 36144/09, 3 September 2013); *Austrianu v Romania* (European Court of Human Rights, Third Section, Application No 16117/02, 12 February 2013); *Beresnev v Russia* (European Court of Human Rights, First Section, Application No 37975/02, 18 April 2013; *Coşar v Turkey* (European Court of Human Rights, Second Section, Application No 22568/05, 26 March 2013); *Davitidze v Russia* (European Court of Human Rights, Frist Section, Application No 8810/05, 30 May 2013) [98]; *Shopov v Bulgaria* (European Court of Human Rights, Fourth Section, Application No 17253/07, 16 April 2013); *Popa v Moldova* (European Court of Human Rights, Third Section, Application No 17008/07, 12 February 2013); *Holodenko v Latvia* (European Court of Human Rights, Fourth Section, Application No 17215/07, 2 July 2013); *Izci v Turkey* (European Court of Human Rights, Second Section, Application No 42606/05, 23 July 2013); *Bas v Turkey* (European Court of Human Rights, Second Section, Application No 38291/07, 19 February 2013); *Sizarev v Ukraine* (European Court of Human Rights, Fifth Section, Application No 17116/04, 17 January 2013,); *Sorokins and Sorokina v Latvia* (European Court of Human Rights, Fourth Section, Application No 45476/04, 28 May 2013); *Subasi and Coban v Turkey* (European Court of Human Rights, Second Section, Application No 20129/07, 9 July 2013); *Yazici v Turkey (No 2)* (European Court of Human Rights, Second Section, Application No 45046/05, 23 April 2013).

404 There were 15 such cases referred to by the Commission including *Bober v Turkey* (European Court of Human Rights, Second Section, Application No 62590/09, 9 April 2013); *Gorea v Moldova* (European Court of Human Rights, Third Section, Application no 6343/11, 23 July 2013); *Korobov v Estonia* (European Court of Human Rights, First Section, Application No 10195/08, 28 March 2013).

405 See [402]–[404] above.

rights and freedoms are protected within their jurisdiction. The notion of 'jurisdiction' is inapt to describe the functions and powers of a public authority. It follows that the jurisprudence supporting an implied right to an independent investigation, insofar as it is based on art 1, does not provide a convincing basis from which an implied right under s 10(b) of the Charter can be found.

425 In response to the submission that the prevailing approach of the ECtHR was of sourcing the origin of the implied right to an investigation to art 3 alone, IBAC pointed out that, as mentioned above,[406] many of the recent cases that purport to rely on art 3 alone continued to refer to *Assenov* and thus to the principle for which it stands. With respect to the particular cases relied upon by the Commission, IBAC contended that they almost invariably either expressly referred to *Assenov* or relied on other cases that in turn referred to *Assenov*.[407]

426 With respect to the dependence on art 13, IBAC accepted that there may have been some decreasing reliance on the right to an effective remedy in

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406 See [413] above.

407 Thus, with respect to the 14 cases in 2013 relied upon by the Commission as involving a violation of the duty to investigate under art 3 alone, IBAC identified that in 11 of those cases reliance was placed on *Assenov*, and the principle for which it stands, directly or indirectly. In *Athan v Turkey* (European Court of Human Rights, Second Section, Application No 36144/09, 3 September 2013), the Court, in referring to the general principles underlying the implied right to an investigation under art 3, referred to the central paragraphs of *Assenov* ([101-[102]) at [29]; in *Austrianu v Romania* (European Court of Human Rights, Third Section, Application No 16117/02, 12 February 2013) the Court (at [66]) referred to *Krastanov v Bulgaria* (2005) 41 EHRR 50; *Camdereli v Turkey* (European Court of Human Rights, Second Section, Application No 28433/02, 17 July 2008); *Romanov v Russia* (European Court of Human Rights, First Section, Application No 41461/02, 24 July 2008), each of which referred to *Assenov*; in *Beresnev v Russia* (European Court of Human Rights, First Section, Application No 37975/02, 18 April 2013 the Court referred (at [83]) to *Artyomov v Russia* (European Court of Human Rights, First Section, Application No 14146/02, 27 May 2010) which refers to *Assenov*; *Coşar v Turkey* (European Court of Human Rights, Second Section, Application No 22568/05, 26 March 2013) expressly refers to *Assenov* at [37]; *Davitidze v Russia* (European Court of Human Rights, First Section, Application No 8810/05, 30 May 2013) expressly refers to *Assenov* at [98]; *Popa v Moldova* (European Court of Human Rights, Third Section, Application No 17008/07, 12 February 2013) refers at [47] to *McKerr v United Kingdom* (European Court of Human Rights, Third Section, Application No 28883/95, 4 May 2001) which in turn at [111] refers, in the context of art 2, to principles similar to that espoused in *Assenov*; *Holodenko v Latvia* (European Court of Human Rights, Fourth Section, Application No 17215/07, 2 July 2013) refers at [56] to *Gäfgen v Germany* (European Court of Human Rights, Grand Chamber, Application No 22978/05, 1 June 2010) which in turn at [117] refers to *Assenov*; *Baş v Turkey* (European Court of Human Rights, Second Section, Application No 38291/07, 19 February 2013) refers at [32] to *Ay v Turkey* (European Court of Human Rights, Second Section, Application No 30951/96, 22 March 2005) which in turn refers at [59] to *Assenov*; *Sizarev v Ukraine* (European Court of Human Rights, Fifth Section, Application No 17116/04, 17 January 2013) refers at [119] to *Okkali v Turkey* (European Court of Human Rights, Second Section, Application No 52067/99, 17 October 2006) which in turn refers at [65] to *Assenov*; *Subaşi and Çoban v Turkey* (European Court of Human Rights, Second Section, Application No 20129/07, 9 July 2013) also refers at [43] to *Ay v Turkey* which in turn refers at [59] to *Assenov*; and *Yazici v Turkey (No 2)* (European Court of Human Rights, Second Section, Application No 45046/05, 23 April 2013) refers at [27] to *Tamer v Turkey* (European Court of Human Rights, Second Section, Application No 19028/02, 24 July 2007) which in turn refers at [91] to *Assenov*.

this context but this did not mean that the role played by this right in the development of the European jurisprudence could be ignored. TATE JA

427 The problem for the Commission is that it cannot deny the historical development of the origin of the implied right to an effective investigation as resting on articles of the Convention that are not replicated in the Charter. The cases cited are steeped in that history and although in many cases there may be only an allusion to *Assenov*, that allusion is sufficient to recognise the source of the implied right as lying, in part, in art 1. So too, while there may not be an express reliance on art 13, the reasoning of the cases is tied to notions of providing proper and effective enforcement of rights. This is apparent also from the manner in which the cases rely upon the decisions with respect to art 2 (right to life) and the importance, in that context, of the right to an effective remedy, under art 13. Although there is a view of art 3 as itself sufficient to give rise to the implied right to investigate,[408] there are difficulties in basing a conclusion about the scope of s 10(b) as being so sufficient upon the jurisprudence of the ECtHR without consistent and repeated statements from the ECtHR eschewing dependence on either art 1 or art 13, and consistent pronouncements that art 3 alone is all that is necessary to found the implied right. The authorities from the ECtHR relied upon do not reach that threshold.

428 The Commission submitted that the United Kingdom authorities do exhibit the necessary consistency.

(ii) United Kingdom

429 The Commission emphasised that neither art 1 nor art 13 is included in the Convention rights set out in sch 1 to the UK HRA yet it has been held in domestic courts that a failure to undertake an independent investigation is a breach of the procedural limb of art 3. It relied particularly upon *R (Mousa)*

408 The Commission relied on a statement by the Council of Europe in 2009 which stated: 'Across the Court's judgments are a variety of different approaches to the legal characterization of the duty to investigate. It is either classified under a combination of Articles 3 and 13, or simply under art 3. While suggesting that the appropriate characterisation depends on the facts of the case, *it seems that the Court leans towards the art 3 approach*': Eric Svanidze, *Effective Investigation of Ill-Treatment: Guidelines on European Standards* (Directorate General of Human Rights and Legal Affairs, Council of Europe, 2009) 27 (emphasis added, footnotes omitted). The Commission emphasized that the position was clear even by 2009 for such a statement to be made. It should be noted, however, that the footnote omitted at the end of this quotation is to *Assenov* [106] and [118]. Moreover, that same publication earlier stated: 'Despite the lack of express wording, art 3 contains not only an obligation to refrain from ill-treatment but also imposes obligations to take positive action. The concept of positive obligations has evolved as part of the art 1 duty to secure the rights and freedoms enshrined in the ECHR. The word "secure" raises the inference of the existence of positive obligations to take measures to ensure that rights are adequately protected, both in theory and in practice. This existence of a positive duty to investigate ill-treatment has been clearly set out by the Court, which "recalls that art 3 of the Convention creates a positive obligation to investigate effectively allegations of ill-treatment (*Assenov* ... §§ 101–106)." '(ibid 23–4).

v Secretary of State for Defence;[409] *OOO v Metropolitan Police;*[410] *Morrison v Independent Police Complaints Commission*;[411] *Allen v Chief Constable of Hampshire*;[412] and *DSD & NBV v Commissioner of Police for the Metropolis*.[413]

430 In *R (Mousa) v Secretary of State for Defence* the question before the Court of Appeal of England and Wales was whether the duty to conduct an independent and effective investigation into credible allegations of systemic abuse, brought by the complainant after he was arrested and detained in Iraq by British soldiers in 2006, required the Secretary of State for Defence to exercise his powers to order a public inquiry. The focus for the Court was on what would constitute an adequate investigation, not on whether a right to an investigation should be implied. Although the Court did not refer to arts 1 or 13, it referred to *Jordan v United Kingdom*[414] and *R (Amin) v Secretary of State for the Home Department*[415] in setting out the basic principles.[416] In *Jordan v United Kingdom* the ECtHR recognised the link between the right to life (art 2) and art 1 as a source of the implication that there should be some form of effective official investigation into an alleged violation.[417] In *Amin*[418] Lord Bingham expressly approved the reasoning of the Court of Appeal that tied the implied right to an independent investigation to the need to render the substantive rights effective:

> [I]t is useful … to make some general observations about the nature of the procedural duty to investigate. Plainly there is *no* duty on the face of the Convention to investigate a death. It is clear that such a duty has been constructed or developed by the court at Strasbourg out of a perception that, without it, the substantive rights conferred by article 2 would or might in some cases be rendered nugatory

409 [2011] EWCA Civ 1334.
410 [2011] EWHC 1246 (QB).
411 [2009] EWHC 2589 (QB).
412 [2013] EWCA Civ 967.
413 [2014] EWHC 436 (QB).
414 (2003) 37 EHRR 2.
415 [2004] 1 AC 653 (***Amin***).
416 [2011] EWHC Civ 1334 [12], [13].
417 The applicant successfully alleged that his unarmed son had been unjustifiably shot and killed by an officer of the Royal Ulster Constabulary and there had been no effective investigation into, or redress for, his death. The ECtHR at [105] recognised the link between art 2 and art 1: 'The obligation to protect the right to life under art 2 of the Convention, *read in conjunction with the State's general duty under art 1 of the Convention* to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", also requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force' (emphasis added). It held there had been no violation of art 13 (at [165]).
418 This case arose following the murder of an inmate at a young offender institution by his cellmate, who had a history of violent and racist behaviour. A number of investigations had commenced, including an inquest which was adjourned after the cellmate was charged with murder and not resumed after his conviction. The claimant (the deceased's uncle) sought judicial review of the Secretary of State's decision not to hold a public inquiry. The trial judge declared that, in order to satisfy the state's procedural duty to investigate under art 2, a public enquiry should be held in which the family should be given the opportunity to participate. However, the Court of Appeal held that the inquiries which had been already conducted satisfied the investigative duty. Although the members of the House of Lords endorsed the general principles laid down by the Court of Appeal in relation to such an investigation, they disagreed with their application by the court below and allowed the appeal.

> or ineffective. ... The duty is in every instance fashioned to support and made good the substantive article 2 rights. ... this approach sits with the Strasbourg jurisprudence, whose character has always been essentially pragmatic.[419] TATE JA

431 There was no statement in *R (Mousa)* to the effect that the implied right arose from art 3 alone, independently of art 1 or art 13.

432 In *OOO v Metropolitan Police* Wyn Williams J of the High Court was concerned with whether there was a breach of the procedural limb of art 3 by the manner in which the Metropolitan Police dealt with complaints brought by three young Nigerian women, who said that they had been brought illegally to the United Kingdom and then made to work for no pay in households in and around London, and were subject to physical and emotional abuse by the householders. There was no dispute that an investigative duty may arise under art 3;[420] the issue was one of the scope of the duty, including how prompt and efficacious the police should be.[421] There was no examination of the source of the duty.

433 In *Morrison v Independent Police Complaints Commission* the issue was whether a complaint against the police was required to be investigated by the Independent Police Complaints Commission or could be referred to the police to investigate. Nicol J referred to the process of interpretation used by the ECtHR in finding that the implied duty to investigate under art 3 arises from the general duty under art 1, as recognised in *Amin*,[422] and noting that the implication of the investigative duty under art 3 was first made in *Assenov*.[423] He stated that: 'It is important to remember from the outset that the investigative obligation under art 3 is cast on the UK as a Contracting State to the [Convention].'[424]

434 Nicol J considered that the omission of art 1 from the Convention rights specified in the UK HRA was irrelevant:

> The European Court of Human Rights has implied a duty to investigate arguable breaches of Article 3. It has done so following a similar process of interpretation of the right in Article 2 which says 'Everyone's right to life shall be protected.' In both cases the Court has relied on the general duty under Article 1 of the Convention on Contracting States to 'secure to everyone within their jurisdiction the rights and freedoms defined in the Convention.' Although Article 1 is not one of the specified rights in Schedule 1 of the *Human Rights Act 1998*, a like investigative obligation is incorporated as part of domestic law though the 1998 Act.[425]

435 The Commission submitted that the irrelevance of the omission of art 1

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419 [2004] 1 AC 653, 669 [27]; see generally 663–7 [18]–[22].

420 [2011] EWHC 1246 (QB) [3], [147]. The investigative duty may also arise under art 4 (the right not to be held in slavery or servitude, or to be required to perform forced or compulsory labour). The Court held that there had been a breach of the investigative duty: (at [171]).

421 Ibid [147].

422 [2009] EWHC 2589 [32].

423 Ibid [34].

424 Ibid [37].

425 Ibid [31].

from sch 1 to the UK HRA supported its approach. IBAC and the Attorney-General responded by submitting that, rather, Nicol J was observing that the enactment of the UK HRA was the principal means by which the United Kingdom implemented the Convention in fulfilment of its obligation under art 1. In other words, the UK HRA was enacted in observance of its obligations under the Convention, in particular, it was enacted *to fulfil* its obligation under art 1. There was thus no need for art 1 to be repeated in the UK HRA. This is supported by the remarks of Lord Bingham in *R (Al-Skeini) v Secretary of State for Defence*[426] when he said:

> The Secretary of State points out that article 1 is not one of the articles to which domestic effect is given by section 1 of and Schedule 1 to the HRA. Therefore, he argues, the scope of the Act is to be found in construction of the Act and not construction of article 1 of the Convention. The claimants reject this argument, pointing out that article 1 confers and defines no right, like the other articles specified in section 1 of the Act and the Schedule. Article 1 of the Convention is omitted because, like article 13 (also omitted), it is provided for in the Act. I would for my part accept that Parliament intended the effect of the Act to be governed by its terms and not, save by reference, the Convention … Thus there was no need to include article 1 in section 1 of the Act and the Schedule, nor article 13 since the Act contains its own provisions as to remedies in sections 4 and 8.[427]

436 The significance of the stream of authority following *Assenov* is apparent also from the obligation under s 2(1)(a) of the UK HRA by which courts and tribunals 'must take into account' the jurisprudence of the ECtHR. This is an important obligation as observed by Lord Bingham in *R (Ullah) v Special Adjudicator.*[428] He noted that although the jurisprudence of the ECtHR was not strictly binding on the UK courts, they should follow any clear and constant jurisprudence in the absence of special circumstances, and were obliged not to dilute or weaken the effect of the principles arrived at by the ECtHR. He said:

> This reflects the fact that the Convention is an international instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg court. From this it follows that a national court subject to a duty such that as that imposed by section 2 should not without strong reason dilute or weaken the effect of the Strasbourg court law. … It is of course open to member States to provide for rights more generous that those guaranteed by the Convention, but such provision should not be the product of interpretation of the Convention by national courts, since the meaning of the Convention should

426 [2008] 1 AC 153.

427 Ibid 181 [14]. Section 4 of the UK HRA provides for a declaration of incompatibility, in certain circumstances, and s 8 provides: '(1) In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate. (2) But damages may be awarded only by a court which has power to award damages, or to order the payment of compensation, in civil proceedings. (3) No award of damages is to be made unless, taking account of all the circumstances of the case, including — (a) any other relief or remedy granted, or order made, in relation to the act in question (by that or any other court), and (b) the consequences of any decision (or that of any other court) in respect of that act, the court is satisfied that the award is necessary to afford just satisfaction to the person in whose favour it is made'.

428 [2004] 2 AC 323. See also *Manchester City Council v Pinnock (Nos 1 and 2)* [2011] 2 AC 104, 125 [48].

> be uniform throughout the states party to it. The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less.[429] TATE JA

437 There is no comparable obligation on Victorian courts. Moreover, the lack of clarity with respect to the enforcement of rights under the Charter, and the failure of the Charter to identify specific remedies for breaches of Charter rights, comparable to those under the UK HRA, diminishes the reliance that can be placed on authorities from the United Kingdom in this context.

438 In *Allen v Chief Constable of Hampshire* the claimant alleged that the respondent was liable for failing properly to investigate a campaign of wrongdoing and harassment waged against her by a person who was a police officer after the claimant entered into a relationship with the former partner of the officer. She also alleged that the respondent was vicariously liable for the police officer's actions. On an appeal in relation to a strike out of the claim, the Court found that the actions were a personal vendetta by a person who happened to be a police officer, and that the court below was right to strike out the claim based on vicarious liability. The Court also agreed that the claim for relief under the Convention was properly struck out because the avenues open to the claimant for relief (none of which she pursued) such as seeking an injunction under the *Protection from Harassment Act 1997* (UK), or seeking judicial review of the decision by the Crown Prosecution Service not to prosecute, or bringing a complaint to the Independent Police Complaints Commission, amply satisfied the respondent's investigative obligation under art 3.[430] The Court relied upon *Assenov* for the source of the obligation to investigate.[431]

439 The Commission submitted that the best case in support of its approach is a 2014 decision of Green J in *DSD & NBV v Commissioner of Police for the Metropolis*.[432] The two complainants were victims of the 'black cab rapist', who committed in excess of 105 rapes and sexual assaults on women passengers between 2002 and 2008. His modus operandi involved using drugs and alcohol to reduce the likelihood of arrest and apprehension. The victims of these drug-facilitated sexual assaults were usually left so affected that they had little or no recollection of the attack on them, and often presented as being drunk or drug addicted, while the perpetrator assumed the guise of the Good Samaritan taxi driver helping out his incapacitated passenger. In the case of DSD, the assailant drove her to the police station after assaulting her, where the police assumed she was a drunk. They did not take any details

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429 Ibid 350 [20]. See also Baroness Hale in *R (Al-Skeini) v Secretary of State for Defence* [2008] 1 AC 153, 204 [90] who said that 'it was the task of the English courts to keep in step with Strasbourg neither lagging behind nor leaping ahead'.

430 [2013] EWCA Civ 967 [51]–[52]. See also *R (on the application of M) v Secretary of State for the Home Department* [2010] EWHC 3541 (Admin) (QB) [17]–[20], [54], [56] with respect to the flexibility in satisfying the procedural obligation and the importance of the availability of civil and criminal proceedings.

431 [2013] EWCA Civ 967 [42](ii).

432 [2014] EWHC 436 (QB) (***DSD***).

from the driver or regard him as anything but a model citizen.

440 Despite guidelines being in place to deal with circumstances such as these, the police failed to follow them, with the result that they did not identify victims or collect evidence or take complaints seriously at an early stage. They also failed to record data and the progress of investigations that would have allowed for the earlier identification of the modus operandi. Indeed, it was only as a result of a routine search for key words on the police database in 2008 that a series of sexual assault allegations showing similar hallmarks were detected. Within eight days the offender had been arrested and remanded in custody.

441 DSD and NBV brought actions against the Metropolitan Police Service for failure to conduct an effective investigation into their allegations of serious sexual assault in breach of art 3 of the Convention. This was a test case, with the assault on DSD occurring in 2003 and that on NBV in 2007. The issue before the Court was whether the UK HRA imposed a duty on the police in relation to the investigation of such crimes, and if so, whether it had been breached. The defendant argued that the UK HRA did not provide a remedy to victims of crimes committed by private parties where it was alleged that the police had failed properly to investigate. In particular, the defendant submitted that the proactive duty to investigate under art 3 of the Convention was due to the conjunctive effect of art 1 and art 3, but as art 1 was not incorporated into domestic law, there was no requirement to construe art 3 as giving rise to a duty to investigate. Green J rejected these submissions and said:

> I can see no reason why Article 1 can be said to create a pro-active duty whereas the same would not be said of Article 3 standing in complete isolation (including from Article 1). Article 3 is a clear and unequivocal prohibition which has been repeatedly described by the Strasbourg Court as 'fundamental'. In *MC v Bulgaria* the Court stated that there was a 'positive obligation inherent' in Article 3 to apply law prohibiting rape through 'effective investigation' and punishment. … see also *Milanovic* … . The Article prohibits without caveat or qualification torture and inhuman or degrading treatment. That prohibition exists quite regardless of Article 1; the message in Article 3 is that the State must preserve its citizens from such severe treatment. Section 6 HRA makes it 'unlawful' for a public authority to act in a way that is incompatible with, *inter alia*, Article 3. And sections 7 and 8 make such an unlawful failure justiciable. There is no point in having a prohibition if it is not accompanied by the commensurate obligation on the State to enforce the prohibition. That applies to the conduct of the State and its agents and actors but extends also to the preservation of citizens from severe violence perpetrated by private parties. *Article 3 does not require turbo-charging from Article 1 to arrive at this conclusion and in any event sections 6–8 HRA plug any gap that might otherwise exist*.[433]

433 *DSD* [2014] EWHC 436 (QB) [233] (emphasis added). Section 6 of the UK HRA renders unlawful acts of public authorities that are incompatible with a Convention right; s 7(1)(a) confers on a victim of the unlawful act a right to bring proceedings for a breach of s 6 and s 7(1)(b) permits a victim of the unlawful act to rely on the relevant Convention right in any proceedings; s 8 confers an entitlement to a remedy. Under the Charter there is no equivalent to s 7(1)(a) or, as

442 However, read in context, Green J appears to accept that the omission of art 1 from the UK HRA is unimportant because, in any event, under s 2(1)(a) of the UK HRA, the Court must take account of the jurisprudence of the ECtHR on art 3 as affected by art 1. He relied[434] on the statement of Lord Rodger in *R (Al-Skeini) v Secretary of State for Defence*: TATE JA

> *Under Section 2(1)(a) of the 1998 Act, when determining any question in connection with a 'Convention Right', a Court in the country must take into account any judgment or decision of the European Court.* While Article 1 is not itself included in the Schedule, it affects the scope of Article 2 in the Schedule, and that Article embodies a 'Convention Right' as defined in Section 1(1). It follows that, when interpreting that Article 2 right, courts must take account of any relevant judgment or decision of the European Court on Article 1.[435]

443 As noted,[436] there is no obligation in the Charter comparable to s 2(1)(a) of the UK HRA and no identification of specific remedies for breaches of Charter rights.

444 Moreover, Green J relied on *MC v Bulgaria*[437] and *Milanovic v Serbia,*[438] both of which base their reasoning upon the principle expressed in *Assenov*.[439]

445 Since the hearing of Bare's appeal, the Court of Appeal of England and Wales has delivered judgment in the appeal from Green J, *Commissioner of Police of the Metropolis v DSD and NBV*.[440] The Court dismissed the appeal from Green J and held that a positive duty to investigate is part of domestic law that has its source in art 3 of the Convention. It rejected the view that there is no duty to investigate alleged substantive breaches of art 3 because the duty springs from the positive obligation imposed by art 1 and art 1 forms no part of the domestic law. The rejection was based, in part, upon the silence in art 1 as to the substantive content of any of the rights, it 'requires that they be secured, but they are defined, or described, elsewhere … the language of art 1 lends no support to [the] submission that it expands the scope of art 3'.[441] The principal source of rejection, however, was the concern about a potential mismatch between domestic law and European jurisprudence. Laws LJ (with whom Dyson MR and Kitchin LJ) said:

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noted, s 8.

434 *DSD* [2014] EWHC 436 (QB) [235].

435 [2008] 1 AC 153, 198 [66] (emphasis added). While this concerned the construction of art 2 analogous reasoning could apply to the construction of art 3.

436 See [437] above.

437 (2005) 40 EHRR 20.

438 (2014) 58 EHRR 33.

439 *MC v Bulgaria* (2005) 40 EHRR 20, 486–7 [148]–[153]; *Milanovic v Serbia* (2014) 58 EHRR 33, 916–7 [83], 917 [85]. The Commission also relied upon *R (L) v Secretary of State for Justice* [2009] 1 AC 588, 610 [26] and *R (Gentle) v Prime Minister* [2008] 1 AC 1356, 1366 [5]. However, each of these cases rely upon *R (Middleton) v West Somerset Coroner* [2004] 2 AC 182 as well as *McCann v United Kingdom* (1996) 21 EHRR 97 [161] and *Jordan v United Kingdom* (2001) 37 EHRR 52 [105] that refer to the underlying proposition that the implied procedural obligation arises by reading the substantive right in art 3 in conjunction with the obligation under art 1.

440 [2015] 3 WLR 966 (***DSD EWCA***).

441 Ibid [15].

> [O]n [the appellant's] argument there is a substantial mismatch between the scope of Article 3 guaranteed by the Convention and the scope of Article 3 enforceable, by means of the HRA, in the UK courts. The first includes an investigative duty but the second does not. In the course of argument [counsel for the appellant] accepted that the HRA gives effect 'lock, stock and barrel' to the substantive rights guaranteed by the ECHR, and that is surely right: in *Quark Fishing Ltd* (cited by Lord Rodger in *Al-Skeini*) Lord Nicholls stated that '[t]he [HRA] was intended to provide a domestic remedy where a remedy would have been available in Strasbourg'. This contradicts the mismatch which [the appellant's] argument implies. The effect of such a mismatch would anyway be bizarre. It would mean that a complaint of violation of Article 3 in the UK constituted by actual ill-treatment could be litigated here; but a complaint that the self-same Article was violated by an investigative failure would have to go to Strasbourg.[442]

446 By contrast, the enactment of the Charter did not take place in a context in which local courts were to seek to ensure consistency with Strasbourg. The High Court made it plain in *Momcilovic* that reasoning based upon a wholesale application of English law, without an appreciation of the differences in legal systems and constitutional settings, would be likely to mislead.[443] The concern based upon a mismatch between domestic and Strasbourg jurisprudence, or a failure of domestic courts to provide relief that could be obtained in Strasbourg, has no equivalent here.

447 It would be to flout the caution expressed by the High Court to countenance the recognition of a positive duty to investigate under s 10(b) based upon considerations relating to art 3 of the Convention that are suffused with considerations drawn from the European context.[444]

(iii) United Nations

448 Article 7 of the ICCPR, upon which, as mentioned, s 10(b) of the Charter is based,[445] does not expressly require credible allegations of cruel, inhuman or degrading treatment to be effectively and independently investigated. However, General Comment No 20 of the United Nations Human Rights Committee (**the UN HR Committee**) (1992)[446] noted in [14] that complaints against treatment prohibited by art 7 'must be investigated promptly and impartially by competent authorities so as to make the remedy effective'.

449 General Comments of the UN HR Committee provide guidance as to the proper interpretation and application of the ICCPR, and Australian courts

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442 Ibid [16] (citations omitted).

443 See [387] above.

444 The same response can be given in respect of the third reason relied upon by Laws LJ for rejecting the submission that the investigative obligation has its source in art 1, namely, that 'the repeated references to art 1 ... from paragraph 102 of *Assenov* onwards, do no more than identify the medium through which art 3 has effect on the international plane': *DSD EWCA* [2015] 3 WLR 966 [17]. The fourth reason concerned the decision of the House of Lords in *Al-Skeini* (see [435] above) that Laws LJ saw as irrelevant.

445 See [398] above.

446 Human Rights Committee, *General Comment No 20: Article 7* (*Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment*), 44th sess (10 March 1992).

have referred to them when examining the meaning and scope of the rights under the ICCPR.[447] TATE JA

450 The Commission submitted that the UN HR Committee does not consider that the right to an effective investigation of a credible allegation of a breach of art 7 of the ICCPR depends upon the separate obligation to provide effective remedies under art 2(3).[448] It relied upon the case of *Maria Cruz Achabal Puertas v Spain*[449] in which the UN HR Committee referred to 'its settled jurisprudence, according to which complaints alleging a violation of article 7 must be investigated promptly, thoroughly and impartially by the competent authorities and appropriate action must be taken against those found guilty'.[450] There, the UN HR Committee found (at [8.6]) that 'the facts before it constitute a violation of article 7, *read independently*, and in conjunction with article 2, paragraph 3 of the Covenant'.[451]

451 The Attorney-General relied on the language of [14] in General Comment No 20 as demonstrating that the implied right to an investigation was tied to the right to an effective remedy (not present in the Charter). This was reinforced by General Comment No 31 (2004)[452] which at [15] states:

> Article 2, paragraph 3, requires that in addition to effective protection of Covenant rights States Parties must ensure that individuals also have accessible and effective remedies to vindicate those rights. ... Administrative mechanisms are particularly required to give effect to the general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies. ... A failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant.

452 Moreover, the 'settled jurisprudence' to which the UN HR Committee referred in *Maria Cruz* relies upon both General Comment No 20 and *No 31*.[453]

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447 For example, *Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri* (2003) 126 FCR 54, 91 [148]; *Sabet v Medical Practitioners Board* (2008) 20 VR 414, 439 [163]–[164].

448 Article 2(3) reads: 'Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted'.

449 Human Rights Committee, *Views: Communication No 1945/2010*, 107th sess, UN Doc CCPR/C/107/D/1945/2010 (27 March 2013) (***Maria Cruz***).

450 Ibid 13–14 [8.6].

451 Ibid (emphasis added).

452 Human Rights Committee, General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 80th sess, UN Doc CCPR/C/21/Rev1/Add 13 (29 March 2004).

453 See *Gamarra v Paraguay*, Human Rights Committee, *Views: Communication No 1829/2008*, 104th sess, UN Doc CCPR/C/104/D/1829/2008 (22 March 2012) 10 [7.5]. The UN HR Committee in that case referred to two further cases as illustrative of its 'settled jurisprudence', namely, *Sathasivam/Saraswathi v Sri Lanka*, Human Rights Committee, *Views: Communication No 1436/2005*, 93rd sess, UN Doc CCPR/C/93/D/1436/2005 (8 July 2008) 11 [6.3], [6.4]; *McCallum v South Africa*, Human Rights Committee, *Views: Communication No 1818/2008*, 100th sess, UN

453 Furthermore, and importantly, the extract from *Maria Cruz*, when expanded, is capable of carrying a shift in meaning. The extended version of [8.6] reads:

> The Committee recalls its general comments No 20 (1992) and No 31 (2004) as well as its settled jurisprudence, according to which complaints alleging a violation of article 7 must be investigated promptly, thoroughly and impartially by the competent authorities and appropriate action must be taken against those found guilty. In the present case, the Committee considers that the closure of the case at the examination stage, which prevented the holding of the oral trial does not meet the requirements or thoroughness that should be applied to all reports of acts of torture, and that the only inquiries conducted at the examination stage were not sufficient to examine the facts with the rigour required by the severity of the author's illness and the reports of the doctors who treated and diagnosed her. Given the difficulty of proving the existence of torture and ill-treatment when these do not leave physical marks, as in the case of the author, the investigation of such acts should be exhaustive. Furthermore, all physical or psychological damage inflicted on a person in detention — and particularly under the incommunicado regime — gives rise to an important presumption of fact, since the burden of proof must not rest on the presumed victim. In those circumstances, the Committee considers that the investigation conducted by the domestic courts was not sufficient to guarantee the author her right to an effective remedy *and that* the facts before it constitute a violation of article 7, read independently and in conjunction with article 2, paragraph 3, of the Covenant.[454]

454 The Attorney-General submitted, and I agree, that read in context the UN HR Committee considered the question of the investigation separately (and tied it to the right to an effective remedy) from that of the substantive complaint of torture under art 7. It found that the substantive complaint was made out when art 7 was read independently of art 2(3), and the procedural complaint was made out when art 7 was read in conjunction with art 2(3).

455 The UN HR Committee went on to emphasise the link between the right to an investigation and the right to an effective remedy when it said:

> In accordance with article 2, paragraph 3 (a), of the Covenant, the State party is under an obligation to provide the author with an effective remedy which should include: (a) an impartial, effective and thorough investigation of the facts and the prosecution and punishment of those responsible; (b) full reparation, including appropriate compensation; (c) provision of free, specialized medical assistance.[455]

456 The proposition that the UN HR Committee does not consider that the implied right to an independent investigation depends upon the right to an effective remedy should be rejected.

Doc CCPR/C/100/D/1818/2008 (25 October 2010) 9–10 [6.7], both of which refer to General Comment No 31.

454 *Maria Cruz*, Human Rights Committee, *Views: Communication No 1945/2010*, 107th sess, UN Doc CCPR/C/107/D/1945/2010 (27 March 2013) 13–14 [8.6] (emphasis added) (citations omitted).

455 Ibid [10].

(iv) Conclusion on the scope of the right under s 10(b) TATE JA

457 In my view, the right under s 10(b) of the Charter not to be subjected to cruel, inhuman or degrading treatment does not give rise to an implied right to an investigation by the State, independently of Victoria Police, of credible complaints of such treatment. The contexts in which an implied right to an investigation has been recognised are insufficiently analogous to the legal setting in which the Charter operates, and to its terms, to provide a proper basis for the recognition of such a right. Whether there should be an express right to an independent investigation under the Charter is a matter for the legislature to decide.

(5) Was the failure to undertake an independent investigation a breach of the substantive limb of s 38 of the Charter?

458 In my view, the failure to undertake an independent investigation was not a breach of s 38 of the Charter as the scope of the right under s 10(b) does not extend to an implied right to such an investigation.[456]

Conclusion on a breach of the substantive limb of s 38

459 There was no breach of the substantive limb of s 38.

Conclusion on the appeal

460 I would allow the appeal.

461 I would make a declaration that the decision is unlawful and of no force or effect and contrary to s 38(1) of the Charter.

462 I would set aside Os 2 and 3 of the orders of 23 March 2013 and make an order in the nature of certiorari quashing the decision.

463 I would remit the matter to IBAC for it to make a fresh decision in relation to the correct course for dealing with Bare's complaint, under s 58 of the IBAC Act.

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456 IBAC conceded that if s 10(b) included a right to an independent investigation of a credible claim of cruel, inhuman or degrading treatment by members of Victoria Police, and that right requires there to be no hierarchical or institutional connection to Victoria Police, then the investigation proposed by the delegate, to the ESD, with an offer of 'active oversight' by the OPI (see [273] above) could not meet the standard: Second Respondent's Outline of Submissions, dated 28 November 2013 [41]. Given the linkages between the OPI and Victoria Police (including secondment of members of Victoria Police to the OPI) there was doubt expressed by IBAC as to whether even an OPI investigation would have been sufficient to meet the standard Bare demanded. However, IBAC emphasised (with support from the Attorney-General) that what is required to fulfil the implied right is flexible and multi-faceted and does not require complete institutional and hierarchical separation. See *Morrison v Independent Police Complaints Commission* [2009] EWHC 2589 [52], [53], [71].

SANTAMARIA JA

Introduction and summary

464 The appellant (**Bare**) is of Ethiopian extraction; he came to Australia in 2004. He produced credible evidence that he had suffered degrading treatment at the hands of members of the Victorian Police: he said that he had been handcuffed, had his feet kicked out from underneath him, was sprayed in the face with 'OC' (capsicum) spray, kicked in the ribs and racially abused. He said that he suffered pain and humiliation as a result of this serious assault.

465 Bare had a statutory right to complain and to have his complaint investigated under s 86L of the *Police Regulation Act 1958*. Pursuant to s 38 of *Police Integrity Act 2008* (**the PI Act**), investigations under s 86L are regulated by pt 3 of the PI Act. Generally speaking, s 40, which is in pt 3, provides that the Director, Police Integrity (**Director**) must refer complaints to the Chief Commissioner of Police. However, pursuant to s 40(4)(b), he may himself conduct an investigation 'if the conduct complained of - (i) is of such a nature that the Director considers that investigation of the complaint by the Director is in the public interest'.

(* there is no [466], [467] or [468])

469 On 3 February 2010, the Young People's Legal Rights Centre (**Youthlaw**), which was Bare's solicitor, wrote to the Office of Police Integrity (**OPI**) complaining about the assault. Bare asked for the investigation to be carried out by the Director himself and for his complaint not to be referred by the Director to the Chief Commissioner. The letter was treated as a complaint under s 86L.

470 Section 8 of the *Charter of Human Rights and Responsibilities Act 2006* (**the Charter**) provides for the recognition of each person as a person before the law and the right to enjoy his or her human rights without discrimination. In particular, s 8(3) provides: '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'. Section 10(b) of the Charter provides that a person must not be 'treated or punished in a cruel, inhuman or degrading way'. Section 32(1) provides: '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'. Section 32(2) provides that: 'International law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right may be considered in interpreting a statutory provision'. Section 38(1) provides that: '... 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'.[457]

457 Victoria Police is a 'public authority' for the purposes of the Charter; see s 4(1)(d).

471 Bare said that, apart from the express substantive right, s 10(b) includes an implied procedural right to an effective examination of a credible allegation that a person has been treated or punished in a cruel, inhuman or degrading way. In saying that, Bare relied upon the jurisprudence developed in Europe and the UK, where courts have been required to interpret and apply provisions corresponding to s 10(b). Section 10(b) could be traced back to art 5 of the *Universal Declaration of Human Rights 1948* (**UNDHR**).[458] That provision had been incorporated into art 3 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms 1950* (**European Convention**) which provides: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment'. Article 3 has been interpreted by the European Court of Human Rights (**ECtHR**) as including the implied procedural right to an effective investigation where credible evidence had been adduced of a torture or degrading treatment (**Strasbourg jurisprudence**). SANTAMARIA JA

472 Article 5 of the UNDHR has similarly been incorporated as art 7 of the *International Covenant on Civil and Political Rights 1966* (**ICCPR**). In fact, art 7 of the ICCPR is the proximate source of s 10(b) of the Charter. Article 7 of the ICCPR has been interpreted by the United Nations Human Rights Committee. The Human Rights Committee has similarly held that art 7 contains an implied right to an effective investigation of a credible complaint.

473 Further, the *Human Rights Act 1998* (UK) (**UK HRA**) gave effect to the European Convention rights that it identifies in its schedule. Subsequently, there have been several decisions by English courts that have accepted the Strasbourg jurisprudence that there is an implied procedural duty under art 3 to investigate a credible claim of torture or inhuman or degrading treatment or punishment.

474 Following those decisions, Bare said that, for an investigation to be effective, it must be conducted by someone who had no hierarchical or institutional connexion with, and practical independence from, those alleged to be responsible for the way he had been treated.

475 On 11 May 2010, an OPI Business Monitoring Committee considered Bare's complaint. It decided not to accept it for investigation and resolved that it should be referred to the Ethical Standards Division of Victoria Police (**ESD**) for action (**the first decision**). By letter dated 21 June 2010, Ms Rai Small (**Ms Small**), who was the acting manager of the OPI's Professional Standards Assurance Unit (**PSAU**), notified Youthlaw of the first decision.

476 On 20 August 2010, Bare sought judicial review of the first decision in the Supreme Court.

477 At some stage in or about September 2010, Paul Jevtovic (**Jevtovic** or **the delegate**), a delegate of the Director, reviewed the OPI file. On 11 October

458 Article 5 provides: No one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment.

2010, he sent a memo to Ms Small saying that he had reviewed the file and had made a fresh decision in which he purported to exercise the powers conferred by s 40(4).[459] Having done so, Jevtovic confirmed the first decision. He decided to refer Bare's complaint to the Chief Commissioner of Police (**the second decision**). By letter dated 19 October 2010, Jevtovic wrote to Youthlaw and communicated the second decision.

478 Jevtovic was not required to give reasons for his decision. However, he wrote to Bare's solicitor and explained why he had refused Bare's request that he not refer the investigation of his complaint to the Chief Commissioner of Police. In that letter, he said he had 'examined the available evidence including the OPI file and all correspondence received from [Bare]'.

479 Bare amended his proceedings to seek judicial review of the second decision. In particular, he sought certiorari to quash the second decision, a declaration that it was contrary to s 38 of the Charter and, finally, a declaration that he had a right to an effective investigation by the State of Victoria by reason of s 10(b) of the Charter and that such an 'effective investigation' comprised 'an investigation by an organisation that has not only a lack of hierarchical or institutional connection to, but also practical independence from, Victoria Police'. He referred to *Castles v Secretary of the Department of Justice*.[460]

480 The defendants to the proceeding were, originally, Ms Small, the Director, and Jevtovic. The Victorian Equal Opportunities and Human Rights Commission (**the Commission**) and the Attorney-General intervened in the proceeding and were joined as defendants. Upon the coming into operation of the *Independent Broad-based Anti-corruption Commission Act 2011*, the office of the Director, Police Integrity was abolished and, by force of the provisions of that Act, all proceedings against the Director were continued against the Independent Broad-based Anti-corruption Commission (**IBAC**). IBAC was added as a defendant.

481 A judge in the trial division of the Court dismissed Bare's application.[461]

482 Bare appealed the decision to dismiss his application for judicial review. The appeal related solely to the second decision. At the hearing of the appeal, Bare was given leave to file an amended notice of appeal. As part of that amendment, Ms Small, Jevtovic and the Director were removed as respondents: the appeal continued only against IBAC, the Commission and the Attorney-General.

483 In his amended notice of appeal, Bare said that, in deciding under s 40(4)(b) of the PI Act whether to investigate the complaint himself or to refer it to the Chief Commissioner of Police, Jevtovic had failed to give proper consideration, as he was required to do pursuant to s 38 of the Charter, to:

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459 It was conceded by the Director that, in so far as the first decision had been made by the Committee, it had not been made according to law.

460 (2010) 28 VR 141 (***Castles***).

461 *Bare v Small* [2013] VSC 129 (**Reasons**).

SANTAMARIA JA

(a) the express substantive rights described in both s 8(3) and s 10(b) of the Charter;

(b) the implied procedural right contained in s 10(b) of the Charter that he was entitled to an investigation of his complaint by an organisation that did not have any hierarchical or institutional connexion with and that enjoyed practical independence from Victoria Police.

484 The Commission supported Bare's contention as to the existence and scope of the implied procedural right. IBAC and the Attorney-General said that the Charter contained no such implied right: the jurisprudence of the Human Rights Committee on art 7 of the ICCPR, the Strasbourg jurisprudence on art 3 of the European Convention and the English jurisprudence on the UK HRA did not apply. The Human Rights Committee jurisprudence did not apply because it was based upon art 3 of the ICCPR. The Strasbourg jurisprudence did not apply because it was based upon articles in the European Convention, particularly art 1 (the obligation on the 'High Contracting Parties [to] secure to everyone within their jurisdiction the rights and freedoms' defined in the European Convention) and art 13 (the right of everyone whose rights and freedoms are violated to 'have an effective remedy before a national authority') which had no equivalents in the Charter.

485 The Commission contended that the English jurisprudence did apply in Victoria; the English courts had interpreted the right not to be 'subjected to torture or to inhuman or degrading treatment or punishment', which was included in the rights to which the UK HRA had given effect, as including a right to an effective investigation of credible evidence of a breach of that right notwithstanding that the UK HRA had not given effect to art 1 and art 13 of the European Convention. For their part, IBAC and the Attorney-General said that the English jurisprudence did not apply in Victoria. They referred to the caution given in *Momcilovic v The Queen*[462] that needs to be taken with the use of authorities in other jurisdictions, notwithstanding that the relevant rights are expressed in identical terms and are drawn from a common source.

486 Bare contended that Jevtovic, in making his decision under s 40(4)(b)(i) of the PI Act and, in particular, his evaluation of the 'public interest' in that provision, had failed to give proper consideration to the *express* content of s 8(3) and s 10(b) of the Charter. Bare referred to the tests set out in *Castles*[463] and said that, although the delegate had not published formal reasons for his decision, he had revealed sufficient material to show that it had not been open to the trial judge to find that the delegate had complied with the *Castles* standard.

487 Similarly, in contending that the delegate had failed to take into account the implied procedural right, Bare said that the delegate had not given proper consideration either to the way in which the decision had affected the s 10(b)

462 (2011) 245 CLR 1 (***Momcilovic***).

463 (2010) 28 VR 141, 184 [185]–[186] (Emerton J).

right or to the manner in which s 10(b) affected the decision that had to be made.

488 The Attorney-General said that, (a) as the reference to the 'public interest' in s 40(4)(b)(i) necessarily included the dimension of human rights under the Charter and (b) as it had not been suggested that the delegate had improperly applied the 'public interest' test in that provision, s 38 had no role to play in the making of the second decision.

489 In addition to denying the existence of the implied procedural right, IBAC contended, with the support of the Attorney-General, that s 109 of the PI Act was a privative clause that immunised decisions under s 40(4)(b) from judicial review. Section 109(1) provided that the Director 'is not liable, whether on the ground of lack of jurisdiction or on any other ground, to any civil or criminal proceedings to which they would have been liable apart from this section in respect of any act purported to be done under this Act unless the act was done in bad faith'.

490 In *Kirk v Industrial Court (NSW)*,[464] the High Court held that, by reason of ch III of the *Constitution*, a privative clause may not validly deprive a State Supreme Court of jurisdiction to grant judicial review of acts and decisions of parliamentary delegates (such as the Director) on the grounds of jurisdictional error. In *Director of Housing v Sudi*,[465] the question whether a contravention of s 38 of the Charter involved jurisdictional error had been left open. Bare said that a contravention of s 38 involved in failing to give proper consideration either to s 8(3) or s 10(b) (either under its express substantive or its implied procedural aspects) was a jurisdictional error with the consequence that s 109(1) could not lawfully operate to prevent his application for judicial review from being heard and determined. In support of Bare, the Commission said that a failure by a delegate to take into account relevant considerations necessarily involved jurisdictional error. Both the Director and the Attorney-General argued that a breach of s 38 did not involve a jurisdictional error and that, therefore, even if the delegate had failed to observe s 38, his decision was not reviewable.

491 If any such error did not deprive the decision maker of jurisdiction, Bare had an alternative argument that depended on the interpretation of s 109(1) itself. Section 109(1), he said, did not operate to exclude review of the particular decision in this case: a decision by the delegate of the Director *not* to investigate the complaint and to refer it to the police. Briefly, Bare said that s 109 excluded review of decisions taken *within* an investigation commenced or regulated under pt 4 of the PI Act; it did not apply to bar the review of a decision *not* to commence an inquiry under pt 4.

492 Finally, the Director and the Attorney-General argued that, if s 10(b) did contain the implied procedural right to an independent investigation, the

464 (2010) 239 CLR 531 (***Kirk***).
465 (2011) 33 VR 559.

right was satisfied by the provisions of pt 4 itself. SANTAMARIA JA

493 The trial judge summarised the issues that had arisen before her and gave answers as follows:

> 1. Is there an implied procedural right under s 10(b) of the Charter to an 'effective' investigation of a claim of a breach of human rights stated in that section?
>
> No.
>
> 2. [was] ... the second decision incompatible with Mr Bare's right to an effective investigation of his complaint?
>
> Not applicable, given the answer to question 1.
>
> 3. Did the relevant decision-maker in the case of ... the second decision properly consider Mr Bare's human rights as required by s 38 of the Charter?
>
> Not applicable, given the answer to question 4. The relevant claims will be dismissed, stayed or struck out.
>
> 4. Does s 109 of the *Police Integrity Act* prevent the Court from hearing and determining Mr Bare's claims for declarations that the first decision and the second decision were contrary to s 38 of the Charter?
>
> Yes.
>
> 5. ...
>
> 6. Was the second decision tainted by jurisdictional error?
>
> No.[466]

494 As is plain, the issues as formulated by the trial judge did not include a question whether, in making his decision under s 40(4)(b)(i) of the PI Act, the delegate contravened s 38 in failing to give proper consideration to s 8(3) and to the *express* substantive right contained in s 10(b) of the Charter. In his notice of appeal, Bare said that the delegate had contravened s 38 in failing to give proper consideration to s 8(3). On the first day of the hearing of the appeal, Bare applied to amend his notice of appeal to contend that the delegate had also contravened s 38 in failing to give proper consideration to the *express* substantive right contained in s 10(b) of the Charter. The application to amend was allowed; it was not opposed by IBAC.

495 In my opinion, the delegate erred in law in failing to give proper consideration to Bare's express substantive right recognised in s 10(b) of the Charter as he was required to do so by s 38(1). In reaching that conclusion, the contention that s 38 has no operation with respect to s 40(4)(b) of that Act is rejected. Further, s 109 of the PI Act did not prevent the Court from hearing Bare's claims that the second decision was unlawful.

496 Given that there was such an error of law and that relief in respect of it was not barred by s 109, it will not be strictly necessary to classify the error involved in the making of the second decision as jurisdictional or non-

466 Reasons [57]. Amendments have been made to account for the removal of any reference to the first decision.

jurisdictional. Similarly, it will not be necessary to determine whether s 10(b) has the implied procedural right that Bare was entitled to an investigation of his complaint by an organisation that did not have any hierarchical or institutional connexion with and that enjoyed practical independence from Victoria Police. However, as much of the argument before the Court was addressed to those issues, it may be useful to express some preliminary observations with respect to them.

The complaint

497 On 3 February 2010, Youthlaw (Annie Frances Davis) wrote to the OPI on behalf of Bare enclosing a complaint form regarding an incident on 16 February 2009.[467] In its letter, Youthlaw requested that 'the Office of Police integrity investigate this matter independently'. They said that Bare's instructions 'at this stage are that this complaint should not be referred to Victoria Police Ethical Standards.' In making that submission, Youthlaw referred to (a) the seriousness of the misconduct, (b) the fact that the investigation of the complaint was in the public interest and (c) the obligations arising under the Charter. In referring to the seriousness of the misconduct, Youthlaw identified a police officer by name and said that he pushed Bare's head into the gutter repeatedly and, after Bare was handcuffed, kicked his feet out from underneath him. It said that Bare sustained injuries including chipped teeth and scarring under his chin. Further, it said that, after Bare was handcuffed, the police officer forcibly raised Bare's head and deployed OC spray in his face area causing him to experience 'pain, difficulty in breathing and humiliation'. Finally, Youthlaw said that another unidentified police officer had kicked Bare in the ribs whilst he was lying on the ground. In submitting that an independent investigation was in the public interest, Youthlaw referred to the facts that Bare was of Ethiopian descent, that his family had migrated to Australia in 2000 and that he had himself migrated in 2004. At the time of the incident, he was 17 years of age. Youthlaw referred to the seriousness of the allegations and to the fact that, at the time of the incident, the identified police officer made several discriminatory remarks to Bare on the basis of his race. In addition, Youthlaw said that the conduct complained of was a breach of various sections of the Charter.[468] It pointed out that s 38(1) made it unlawful for public authorities to act incompatibly with or to fail to give consideration to human rights in their decision making and to s 8(1)(d) of the PI Act which provided that it was an objective of the Director of the OPI 'to ensure that members of Victoria Police have regard to the human rights' set out in the Charter. Finally, Youthlaw contended that s 10(b) of the Charter places an obligation on the State not only to refrain from cruel inhuman and degrading treatment but also 'to effectively investigate allegations of such treatment'. In making that contention, Youthlaw referred to 'international human rights jurisprudence'. It cited decisions in the United Kingdom. Youthlaw said that, for an investigation to be effective,

467 The text of Bare's complaint is included in the reasons of Tate JA at [260] above.
468 It referred to s 10(b) and s 22.

it should be one that was 'independent' and 'capable of resulting in discipline and prosecution of perpetrators'. It cited the European Commission of Human Rights' Rapporteur on Police Complaints. SANTAMARIA JA

498 Youthlaw submitted that both the Charter and the PI Act placed an obligation on the OPI to investigate the complaint. A referral of it back to the Police would be conduct incompatible with human rights and, thus, a contravention of s 38(1) of the Charter.

The content of the OPI file

499 It is necessary to identify the contents of the OPI file. It was referred to by Jevtovic when he made the second decision and he purported to base his decision on it. The OPI file was admitted into evidence before the trial judge. Some parts of it were exhibited to an affidavit sworn by Ms Small on 15 November 2011.

500 On 8 February 2010, the OPI received the written complaint from Youthlaw.

501 On 1 March 2010, Angela Brown prepared a memorandum to the Complaints Assessment Committee. The memorandum provides the same factual background as is recounted elsewhere. However, under the heading 'Issues', the memo reads, inter alia:

> Allegations are of serious assault and unnecessary use of force:
>
> - while handcuffed: using OC spray, kicking legs from under BARE, repeatedly pushing BARE's head into the gutter;
> - resulting injuries included chipped teeth and a cut to the jaw;
> - ambulance officers recommended BARE to go to hospital for stitches but police did not allow this.
>
> Racial vilification by saying to BARE: 'You Black people think you can come to this country and steal cars.'
>
> [The named police officer] has two previous instances listed in Compass[469] for inappropriate use of OC spray ... .
>
> BARE does not want the complaint forwarded to Victoria Police.

Under the heading 'Recommendations', the Memo reads 'that CAC consider for OPI investigation'.

502 On or about 6 March 2010, a 'Case Log Report' was entered. The entry was made by John Nolan, Assistant Director, Operations, which said:

> Graeme
>
> Can you please have a ROCSID profile created for [the named police officer].
>
> I have seen this complaint before (I'm not sure if it was on our own CAC report)
>
> ...

503 In her affidavit, Ms Small said:

> There appears to have been an internal request made within OPI for a 'ROCSID'

469 'Compass' is an electronic case management system.

> profile to be created. ROCSID stands for Record of Complaints, Serious Incidents and Discipline and is the Victoria Police complaint management system.

Ms Small goes on to say that a later Case Log Report suggests that a ROCSID enquiry was conducted, but that '[n]o ... profile was placed on the file'.

504 On 30 March 2010, Peter Murphy, who was then the acting manager of the Professional Standards Assurance Unit (**PSAU**) wrote to Youthlaw. In that letter, it was acknowledged that the complaint which had been submitted to the OPI 'is one of an extremely serious nature and one which requires consideration'. It also contained the following:

> Every complaint submitted to this office is first assessed by a Case Assessment Team within the Professional Standards Assurance Unit. Those cases such as mandatory investigations, public interest matters and possible reviews of practices are submitted to the Case Assessment Committee. Each case is assessed on its own merits, and that will include our capacity to deal with the investigation, the appropriateness of this office to deal with the matter and the realistic opportunity of this office being able to conduct an investigation, based on the information it has been provided with.
>
> I note your submissions for an investigation to be 'independent, adequate and capable of resulting in discipline and prosecution of perpetrators'. I also note your observations for an investigation to be 'prompt, transparent and open to public scrutiny'. Whilst I agree, I would also submit that nothing should abrogate the responsibility of Victoria Police to ensure that it maintains the highest possible standards of discipline and service delivery and that would include identifying, investigating and resolving any matters that fall below the accepted standard.

505 The file also contained an incomplete 'Case Assessment Committee Determination'.

506 In her affidavit, Ms Small notes that 'the Case File indicates that the Case Assessment Committee did not make a determination in this matter but deferred assessment of the Complaint and sought further information'.

507 In the incomplete determination under the heading 'Grounds upon which PSAU has referred matter to CAC', the following boxes have been ticked:

> 'Public interest' investigation may be warranted:
>
> Complaint relates to conduct that has affected a large number of persons or the rights of persons generally or a group of persons within society (may include specific reference to human rights, discrimination etc).
>
> Complaint relates to a Victoria Police member or station with a significant complaint history or intelligence indicates that the member or station is of concern to OPI.
>
> Review of 'Established practices or procedures' may be warranted.
>
> Complaint relates to training issues that impact on the capacity of police to respond to the needs of the Victorian community.
>
> Complaint relates to a systemic flaw or issue.

Under these tick-boxes, in a section marked 'Other', the words 'OC spray

usage' have been written.[470] SANTAMARIA JA

508 At the trial, further contents of the OPI file were admitted into evidence. Included was a folio which involved a print of a record made on the COMPASS system which demonstrates that prior complaints had been made in relation to the named police officer.

509 On 15 April 2010, a new Business Monitoring Committee commenced at the OPI. It replaced the Case Assessment Committee.

510 On 10 May 2010, Ms Small, who had become the acting manager of the PSAU, prepared a briefing note on the complaint for the acting team leader of the Assurance Team within the PSAU. In her note, Ms Small gave a short summary of the background to the complaint. She wrote:

> [Youthlaw] says Victoria Police members involved in the incident did not comply with Victoria Police procedures and breached BARE's human rights.
>
> [Youthlaw] wants OPI to investigate BARE's complaint as 'a decision by the OPI to refer investigation of this matter to Victoria Police would amount to a failure to act compatibly with human rights as required by s 1 and s 38 of the Charter;' and that it would not be an effective investigation as set out by the European Commission of Human Rights Rapporteur on Police Complaints, which requires 'independent ... transparent' investigations which 'protect the victim of the alleged abuse.'
>
> ISSUES
>
> 1. Allegations are of serious assault and unnecessary use of force:
>   - while handcuffed: using OC spray, kicking legs from under BARE, repeatedly pushing BARE's head into the gutter
>   - resulting injuries included chipped teeth and a cut to the jaw
>   - ambulance officers recommended BARE go to hospital for stitches but police did not allow this.
> 2. Racial vilification by saying to BARE: 'You Black people think you can come to this country and steal cars.'
> 3. [The named police officer] has two previous instances listed in Compass for inappropriate use of OC spray ...
> 4. BARE does not want the complaint forwarded to Victoria Police.
> 5. BARE's lawyer has escalated the matter to be one of human rights.
> 6. Incident complained of is almost 12 [sic] prior to complaint being lodged.
>
> UPDATE
>
> On 30 March 2010, Peter Murphy wrote to Bare's representative and explained the investigative difficulties caused by the delay in reporting. He offered to discuss strategies for dealing with matters like these in the future and asked for details of medical treatment and witnesses. OPI is still awaiting a response.

511 On 12 May 2010, Youthlaw wrote to OPI. In that letter, Youthlaw said that it was requesting copies of medical reports from the clinic Bare attended for treatment for injuries incurred during the incident and indicated that

470 Reasons [13].

his youth worker had taken photographs of his injuries and that she was attempting to locate them.

512 On 26 May 2010, Youthlaw wrote to OPI (Ms Small) and provided information whereby the injuries suffered by Bare were able to be corroborated by his youth worker who had taken photos of them (since lost) the day after the incident. There was also a reference to access to dental records.

513 On 4 June 2010, Youthlaw wrote to the OPI to inform Ms Small that Bare was seeking dental treatment.

514 In her cross-examination, Ms Small said that there had been other complaints made to the OPI that 'related to assault allegations against young men of African descent and that, in some of those cases, there was racially vilifying language used'. She said that she believed that such complaints had been against 'the same member a number of times'. Other witnesses gave evidence of their experience of OPI investigations and their understanding of community disquiet with respect to racism among officers of Victoria Police.

515 Taken together, the material before the OPI, when it came to make the first decision, made it clear that:

(a) the assault alleged by Bare was of a serious nature;

(b) Bare's complaint included allegations of discriminatory or racist remarks;

(c) the named police officer implicated in the complaint had a 'significant complaint history' or was 'of concern to OPI'; and

(d) other complaints had been made that police officers had made racist remarks directed at young African men.

The first decision

516 On 21 June 2010, Ms Small wrote to Youthlaw and said that the complaint warranted investigation. However, she also gave notification that the decision had been made that the investigation would be referred to the ESD of the Victorian Police, and not conducted by the OPI itself. Ms Small wrote:

> The Director and his delegates prioritise matters relating to systemic issues where OPI considers it can make a long-term impact. An assessment committee has evaluated your client's matter against a priority matrix and has determined that your client's complaint is most appropriately investigated by Victoria Police. I acknowledge receipt of the further material you provided, your reference to human rights issues associated with your client's complaint and your concerns about the independence of police investigators. However, the investigation of other matters currently before OPI has a greater public interest justification.
>
> For all matters referred to Victoria Police for investigation, Victoria Police provides this office with a written report and the complete investigation file at the

> completion of the investigation. OPI independently reviews the investigation of the complaint and advises the complainant of the results of the investigation, any further investigation proposed, and of the action taken (or proposed to be taken) following the investigation of the complaint.
>
> If you wish OPI to refer this matter to Victoria Police for investigation, I request that you advise this office of this preference in writing within 30 days. Should this office receive no direction on this matter, the file will be closed and no further action will be taken by OPI.[471]

517 Youthlaw did not seek an investigation by the Police and, on 30 June 2010, the file was closed.

Commencement of proceedings

518 On 20 August 2010, Bare commenced proceedings in the Supreme Court in which he sought an order in the nature of certiorari quashing the decision communicated to him by Ms Small in her letter dated 21 June 2010. He named Ms Small, the Director, and the State of Victoria as defendants. He also sought an order in the nature of mandamus compelling Ms Small or, alternatively, the Director to make a decision about the appropriate course for the investigation of his complaint according to law. In addition, he sought a declaration that the decision was contrary to s 38 of the Charter together with declarations that he had a right under s 10(b) of the Charter to an 'effective investigation' by the State into his complaint and that such an investigation 'comprises an investigation by an organisation that has not only a lack of hierarchical or institutional connection to, but also practical independence from, Victoria Police'.

The second decision

519 On 16 September 2010, the OPI wrote to Youthlaw requesting an adjournment of the Supreme Court proceeding in order that the complaint could be reconsidered.[472]

520 Thereafter, the complaint and the file associated with it were reviewed by Jevtovic.[473] He decided to confirm the first decision.

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471 It will be noticed that, in giving notice of the first decision, Ms Small made reference to the assessment committee having evaluated the appellant's matter 'against a priority matrix'. At trial, the appellant maintained that there was a policy enshrined in the priority matrix. He complained that the second decision had been made without reference to it and that, for that reason, the second decision was invalid as having involved a denial of procedural fairness: he said that he had a legitimate expectation that the matrix would be applied and that he had not been given the opportunity to make submissions about the failure to refer to it in the making of the second decision. The trial judge rejected that argument: Reasons [172]–[185]. The appellant did not pursue this argument on appeal.

472 At trial, counsel for the defendants, other than the Commission and the Attorney-General, conceded that the first decision was not a valid decision: Reasons [40], [168]. Although several persons authorised to make the decision attended the meeting of the Business Monitoring Committee, it could not be said that any one of them had made the relevant decision.

473 By instrument dated 12 January 2010, the Director, Police Integrity (Michael Strong) delegated to Jevtovic the powers of the Director, Police Integrity subject to some irrelevant exceptions.

521 Jevtovic did not publish formal reasons for his decision not to investigate the complaint pursuant to s 40(4)(b)(i) of the PI Act. However, on 15 November 2011, Ms Small affirmed an affidavit which addressed his decision. Ms Small exhibited two documents which attested to his state of knowledge and reasoning process with respect to the decision. Ms Small said that, on 11 October 2010, she received a file note from Jevtovic which stated in part: 'Conclusion: That the Complainant is advised of my decision and that the OPI are prepared to refer the matter to [Victoria] Police ESD.'

522 Ms Small exhibited the file note to her affidavit. In the file note (which spans less than a page and a half), Jevtovic said:

> As agreed I have reviewed the above OPI file.
>
> In doing so I have examined all available material which I have divided into two categories. The first being the complaint itself and the second being the issue of who should investigate.
>
> **First Issue**: I re-affirm our original conclusion that the matter warrants investigation.
>
> **Second Issue**: The Police Integrity Act and OPI policies and procedures are quite clear on the options available to the Director in relation to the investigation of a complaint.
>
> I have therefore intentionally focussed on identifying all available evidence that would warrant consideration for OPI deviating from our established legislated process. *Unfortunately I have found no such evidence at all.*
>
> I have also considered the interpretation by the complainant of OPI's obligations in the context of [the *Charter*]. Whilst not qualified to make judgment on the merits of that interpretation/argument, I have made the observation that we appear to move to this point on the basis of a predisposition that Victoria Police ESD will not investigate this matter effectively and with integrity. *Again, I reiterate that no evidence supporting that position has been made available to me.*
>
> **Conclusion:**
>
> That the Complainant is advised of my decision and that the OPI are prepared to refer the matter to [Victoria] Police ESD.
>
> I believe given the circumstances of this complaint and the position taken by the complainant that OPI could appropriately undertake a more active oversight of the ESD investigation should the complainant agree to that course of action.[474]

523 On 19 October 2010, Jevtovic wrote to Youthlaw (Ms Davis). In that letter (which incorporates much of the language of the file note of 11 October 2010), Jevtovic said:

> I divided my review into two categories. The first being the complaint itself, and the second being the issue of who should investigate.
>
> None of the matters in section 40(1) of the *Police Integrity Act 2008* persuaded me that the complaint did not warrant investigation; therefore the complaint must be investigated.
>
> As part of my considerations [sic] I intentionally focussed on identifying all available evidence that would warrant consideration for deviating from our estab-

474 Emphasis added.

SANTAMARIA JA

lished legislated process. That is, I must refer a complaint warranting investigation to the Chief Commissioner subject to section 40(4).

...

I examined the available evidence including the OPI file and all correspondence received from the complainant.

I also considered the seriousness of the allegations and the complainant's reference to section 10 of the *Charter of Human Rights and Responsibilities Act 2006*.

I have also considered the interpretation by the complainant of OPI's obligations in the context of the Human Rights Charter. Whilst not qualified to make judgment on the merits of that interpretation/argument, I have made the observation that the complainant appears to have arrived at a point which reflects a predisposition that Victoria Police Ethical Standards Department (ESD) will not investigate this matter effectively and with integrity. It was therefore prudent in my view to focus my review on identifying what, if any, evidence existed to support the merits of the position the complainant appears to have taken.

It should be noted that given the nature of the review and concerns raised by the complainant, I did not believe that it was necessary for me to refer to OPI's Priority Model and therefore did not do so in any manner. There were no OPI policies or procedures which raised any other issues for my consideration of this matter.

Conclusion

Having conducted the review I can confirm that I have not discovered nor has any evidence supporting the complainant's position been made available to me, other than of course the complainant's position as it relates to their interpretation of OPI's obligations under the Human Rights Charter.

In light of the above matters I have concluded the following:

First issue I re-affirm OPI's original conclusion that the matter warrants investigation; and

Second issue I do not consider that investigation by the Director is in the public interest, and I am satisfied that referral under s 40(2) of the Police Integrity Act is adequate for the investigation of this complaint.

I would however like to extend to the complainant (given the circumstances of this complaint and the position taken by the complainant) that OPI could appropriately undertake a more active oversight of the ESD investigation should the complainant be agreeable to that course of action.

524 As is evident, these documents do not themselves betray any failure by Jevtovic to consider s 10(b) of the Charter. On the contrary, they are consistent with his having considered the express substantive right as well as the implied procedural right.

Relevant provisions of the Police Integrity Act 2008 and the Charter

525 The *Police Integrity Act 2008* provided:

8 Objects, functions and powers of Director

(1) The objects of the Director are —

...

(d) to ensure that members of Victoria Police have regard to the human rights set out in the Charter of Human Rights and Responsibilities.

...

40 Dealing with complaints

(1) The Director may determine that a complaint does not warrant investigation —

(a) if in the Director's opinion —

(i) the subject-matter of the complaint is trivial; or

(ii) the complaint is frivolous or vexatious or is not made in good faith; or

(b) if the complainant had had knowledge for more than a year of the conduct complained of and fails to give a satisfactory explanation for the delay in making the complaint.

(2) Subject to subsection (4), the Director must refer a complaint warranting investigation to the Chief Commissioner.

(3) If the Director refers a complaint to the Chief Commissioner under subsection (2), the Chief Commissioner must investigate the complaint under Division 2 of Part IVA of the **Police Regulation Act 1958.**

(4) The Director —

(a) must investigate a complaint if the conduct complained of is conduct of the Chief Commissioner or of a Deputy or Assistant Commissioner; and

(b) may investigate a complaint if the conduct complained of—

(i) is of such a nature that the Director considers that investigation of the complaint by the Director is in the public interest; or

(ii) is in accordance with established practices or procedures of Victoria Police and the Director considers that those practices or procedures should be reviewed.

526 In making his decision, the delegate must, in addition to the matters mandated by s 40(4)(b) itself and the PI Act more generally, abide by the procedural requirement in s 38 of the Charter.[475] Section 38(1) of the Charter provides:

> [I]t 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.

The express substantive right

527 Before the hearing of the appeal commenced, the thrust of Bare's argument was that the express right recognised by s 10(b) of the Charter, when properly understood, includes an implied procedural right to an effective examination of a credible allegation that a person has been treated or punished in a cruel, inhuman or degrading way and that the delegate, when he came to exercise the powers conferred on him by s 40(4)(b)(i) of the PI Act, failed to give any consideration to that implied procedural right and, thus, had contravened s 38 of the Charter.

475 The Attorney-General contested this proposition. See [542]–[557] below.

528 However, at the hearing of the appeal, Bare expanded his argument and contended that the delegate, in exercising the powers conferred on him by s 40(4)(b)(i) of the PI Act, had contravened s 38 of the Charter in failing to give consideration to his express substantive right recognised in s 10(b) of the Charter that he not be treated or punished in a cruel, inhuman or degrading way.[476] In the circumstances, it is desirable to consider this question before considering whether there is an implied procedural right. SANTAMARIA JA

Reasons of trial judge

529 At Reasons [186]–[191], the trial judge specifically addressed the issue of whether 's 10(b) of the Charter provide[s] a new dimension of the public interest that must be considered by the Director when a complaint is made of cruel, inhuman or degrading treatment at the hands of police officers'. Her reasons suggest that she dismissed the contention that s 10(b) created an implied procedural right and that, therefore, she did not have to consider whether such a right had been properly considered. However, it also seems that she considered whether the express substantive right had been properly considered. In relevant part, she said:

> Insofar as the argument in relation to this question was premised upon the recognition of the implied ancillary right under s 10(b) to an effective and independent investigation of a complaint of breach of the express right to which the sub-section refers, I need not answer it.
>
> Otherwise, if the issue is raised under this question, I am not satisfied that Mr Jevtovic misdirected himself as to the scope of the public interest under s 40(4)(b)(i) in relation to the need to have regard to Mr Bare's rights under s 10(b) (or s 8 for that matter). *There is no evidence to contradict his assertion in his 19 October 2010 letter to the effect that he had considered the complaint in all its aspects as they were identified in the documents on the OPI file.* Those documents indicated the nature of the incident and the allegations as to the breach of Mr Bare's rights under both s 8 and s 10(b). Mr Jevtovic's letter established, in the absence of evidence to the contrary, that he understood that the concept of the 'public interest' under s 40(4)(b)(i) incorporated the requirement for compatibly with Mr Bare's identified relevant human rights.[477]

Contentions of the parties

530 Bare referred to the procedural limb of s 38(1) of the Charter which makes it unlawful for a public authority to 'fail to give proper consideration to a relevant human right'. He said that the use of the word 'proper' imposed a higher standard than the normal obligation to take relevant considerations into account.[478] He referred to *Castles*.[479] In giving 'proper consideration' to

476 Amended notice of appeal: Ground 7(a)(i).

477 Reasons [190]–[191] (emphasis added).

478 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 40–1 (Mason J) (**Peko-Wallsend**).

479 (2010) 28 VR 141, 184 [185]–[186] (Emerton J). He also referred to *PJB v Melbourne Health* (2011) 39 VR 373, 421 [221], 423 [229] and 442 [311] (Bell J) and *Giotopoulos v Director of Housing* [2011] VSC 20 [89]–[90] (Emerton J).

a relevant human right, a decision maker must:

> (at least): (a) understand in general terms which of the rights of the person affected by the decision may be relevant and whether, and if so how, those rights will be interfered with by that decision; (b) seriously turn his or her mind to the possible impact of the decision on a person's human rights and the implications thereof for the affected person; (c) identify the countervailing interests or obligations; and (d) balance competing private and public interests as part of the exercise of justification.

Bare said that all Jevtovic had done was to review the evidence to see whether or not there was any support for (what he took to be) Bare's assumption that ESD would not investigate the matter 'effectively and with integrity'. Because he found no such evidence, he concluded that a referral to the ESD was adequate for the investigation of the complaint. Bare said that this approach involved a failure to give a proper consideration to his rights in ss 8 and 10 of the Charter. It involved a failure (a) to understand the existence of the procedural right for an investigation conducted by an organisation that was hierarchically, institutionally and practically independent from those implicated in the events; (b) to seriously turn his mind to the possible impact of his decision on Bare's rights, and the implications thereof for him; (c) to identify any countervailing interests or obligations; or (d) to embark on any justification exercise involving the balancing of competing private and public interests.

531 For its part, IBAC said:

> The test under the 'proper consideration' limb of s 38(1) of the Charter is whether the decision maker had an understanding in general terms of the rights of the person that may be relevant and how they would be interfered with by the decision to be made. In most cases, it will be sufficient if there is some evidence to show that the decision maker seriously turned his or her mind to the possible impact on the human rights and that the countervailing interests or obligations were identified. In *Castles v Secretary to the Department of Justice*, identification of the relevant points was inferred from briefing papers, together with a brief statement in the Secretary's reasons that the rights had been considered and weighed against other matters. As in *Castles,* Mr Jevtovic was not required to give a statement of reasons.

532 IBAC conceded that Jevtovic's written records of his decision 'were very brief and did not expressly grapple with all of the incidents of rights implied by s 10(b)' as had been argued for in the proceedings; nevertheless, he had said that he had examined Bare's correspondence and all of the documents on the OPI file and had noted the Charter 'interpretation/argument' advanced. Further, it should also be taken to be the case that he had considered s 8 of the Charter. Bare had not expressly identified that provision in his complaint; however, he had complained about 'discriminatory treatment'. And, Jevtovic had examined the analysis of the case contained on the OPI file; that file had itself identified the issue of racial vilification.

Analysis SANTAMARIA JA

533 Section 8(1)(d) of the PI Act itself stipulated that one of the objects of the Director was 'to ensure that members of Victoria Police have regard to the human rights set out in the Charter of Human Rights and Responsibilities'. The 'public interest' referred to in s 40(4)(b)(i) of the PI Act obviously includes ensuring that members of the public are not treated in a 'cruel, inhuman or degrading way'. Further, s 38(1) of the Charter required the delegate to give proper consideration to Bare's Charter rights, which, of course, include his right not be 'treated or punished in a cruel, inhuman or degrading way'.[480]

534 In *Castles*,[481] the appellant was a prisoner in a low security country gaol. She wanted permission to attend a clinic in Melbourne to have assisted reproductive treatment in the form of IVF. Under s 57A of the *Corrections Act 1986*, the Secretary was empowered to issue permits for a prisoner to leave prison on a temporary basis for specific purposes of medical care or treatment. Emerton J rejected the appellant's contention that the certain provisions of the Charter should be construed as giving her the right to form a family. However, she held that s 47(1)(f) of the *Corrections Act 1986* conferred on prisoners 'a right to certain medical care and treatment, which includes a right to such medical care and treatment provided by a private medical practitioner, if approval is given by the chief medical officer and the prisoner covers the costs of the private treatment'.[482] Emerton J also concluded that 'that IVF treatment is necessary for the preservation of [the appellant's] reproductive health'.[483] As a result, the appellant had

> a right to such treatment pursuant to s 47(1)(f) of the *Corrections Act* and the secretary, who has legal of custody (sic) [the appellant], has a corresponding duty to provide the necessary approval to enable that treatment to take place.[484]

535 Emerton J referred to s 22(1) of the Charter which provides that all persons deprived of their liberty are entitled to be treated with humanity and with respect for their human dignity. Section 38(1) of the Charter meant that that right was engaged by the decision whether to grant the appellant a permit to leave her place of imprisonment. The question became whether the Secretary had given proper consideration to the appellant's rights under

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480 Section 38(1) of the Charter provides: '[I]t 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.' It is unnecessary to decide whether the use of the adjective 'proper' imposes a higher standard of review than might otherwise be the case. The express stipulation that 'proper consideration' be given 'to a relevant human right' must at least require that the decision maker give 'proper, genuine and realistic' consideration to the right. See *Minister for Immigration and Citizenship v SZJSS* (2010) 243 CLR 164, 174–5. However, the form of review will be in the nature of judicial review and not merits review.

481 (2010) 28 VR 141.

482 Ibid 153 [36].

483 Ibid 173 [125]. The judge did not consider that such treatment was necessary for the preservation of the appellant's mental health; 174 [131].

484 Ibid 177 [147].

s 22(1) of the Charter in determining whether to grant her a permit under s 57A of the *Corrections Act 1986*. Emerton J said:

> The requirement in s 38(1) to give proper consideration to human rights must be read in the context of the Charter as a whole, and its purposes. The Charter is intended to apply to the plethora of decisions made by public authorities of all kinds. The consideration of human rights is intended to become part of decision-making processes at all levels of government. It is therefore intended to become a 'common or garden' activity for persons working in the public sector, both senior and junior. In these circumstances, proper consideration of human rights should not be a sophisticated legal exercise. Proper consideration need not involve formally identifying the 'correct' rights or explaining their content by reference to legal principles or jurisprudence. Rather, proper consideration will involve understanding in general terms which of the rights of the person affected by the decision may be relevant and whether, and if so how, those rights will be interfered with by the decision that is made. As part of the exercise of justification, proper consideration will involve balancing competing private and public interests. There is no formula for such an exercise, and it should not be scrutinised over-zealously by the courts.
>
> While I accept that the requirement in s 38(1) to give proper consideration to a relevant human right requires a decision-maker to do more than merely invoke the Charter like a mantra, it will be sufficient in most circumstances that there is some evidence that shows the decision maker seriously turned his or her mind to the possible impact of the decision on a person's human rights and the implications thereof for the affected person, and that the countervailing interests or obligations were identified.[485]

536 Plainly, the 'countervailing interests or obligations' will include those made relevant by the legislation that authorises the public authority to make the relevant decision. They must be identified, as must any relevant human rights of the individual affected by the decision.

Did the decision maker give proper consideration to relevant human rights?

537 It is well to recall some of the elements of the complaint: Bare said that his head was pushed into the gutter repeatedly; that, after he was handcuffed, his feet were kicked out from under him; that he fell and chipped his teeth and his neck was gashed; that his head was forcibly raised and his face was sprayed with OC spray causing him to experience 'pain, difficulty in breathing and humiliation'; and that he was kicked in the ribs when he was on the lying on the ground and subjected to racial vilification.

538 Under s 40(4)(b)(i) of the PI Act, Jevtovic had to decide whether the investigation of Bare's complaint was to be made by the OPI itself or whether to

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485 Ibid 184 [185]–[186]. It has been observed that the approach of Emerton J in *Castles* to the interpretation of the phrase 'proper consideration' in s 38(1) of the Charter is 'little different from conventional judicial review doctrine'. In that respect it has been contrasted with the more intensive approach described by Bell J in *PJB v Melbourne Health* (2011) 39 VR 373. See Justice Emilios Kyrou, 'Obligations of Public Authorities Under Section 38 of the Victorian Charter of Human Rights and Responsibilities' (2014) 2 *Judicial College of Victoria On-Line Journal* 43, 77, 87.

refer the complaint to the Chief Commissioner pursuant to s 40(2). That decision was to be informed by s 38(1) of the Charter. It was necessary for Jevtovic to 'give proper consideration to a relevant human right'. In order to do that, he had, first, to identify any relevant human right. The rights contained in s 8(3) of the Charter (the right to equal protection of the law without discrimination) and in s 10(b) (the right not to be treated in a cruel, inhuman or degrading way) were rights relevant to the decision he had to make. So much was obvious; those rights had also been identified in the complaint and in preliminary documentation prepared by the OPI. Having identified those rights as relevant, it was then necessary for Jevtovic seriously to turn his mind to the possible impact of his decision on those rights and the implications thereof for Bare, and to identify and weigh any countervailing interests or obligations. Those countervailing interests and obligations were for him to identify: they would include matters of priorities, resources and whether there was reason to withhold a particular investigation from the ESD. SANTAMARIA JA

539 Jevtovic did not identify either of the human rights made relevant by the complaint and the need to make a decision with respect to where it would be investigated. He did not identify any other interest and obligations that would need to be 'weighed' with the rights of Bare. His reasons show that he was aware of his need to consider the Charter. However, it seems that as much as he did was to address the contention made by Youthlaw that s 10(b) contained an implied procedural right to an independent investigation of credible evidence of there having been a breach of the express substantive right. Notwithstanding that the complaint itself had referred to it, Jevtovic did not himself address the express substantive right itself which was plainly relevant to the decision he had to make. Nor, did he address the right recognised by s 8(3).

540 As for the implied procedural right, Jevtovic said that he was 'not qualified to make a judgment on the merits of that interpretation/argument'. That might have been so; and, the interpretation/argument might not have been one that should have been accepted. But, that still left outstanding the need to consider s 10(b) itself, as well as s 8(3) of the Charter.

541 It appears to have been the case that Jevtovic rejected Bare's submission that the Director investigate his complaint on account of his conclusion that, in his opinion, there was no evidence to support Bare 'predisposition that Victoria Police Ethical Standards Department (ESD) will not investigate this matter effectively and with integrity'. It was entirely proper for Jevtovic to consider whether the ESD was in a position to investigate the matter 'effectively and with integrity'. That consideration, however, had to be 'weighed' together with Bare's human rights and with the impact of any decision as to who should conduct the investigation. It is not necessary to decide whether his conclusion that there was such a disposition could be justified. But, his interest in that question may have diverted him from the task that s 38(1) of

the Charter placed on him.

Whether there is scope for the operation of s 38(1)

542 The Attorney-General contended that, given the words of the provision (particularly in its reference to 'the public interest'), s 38 of the Charter had no role to play in the decision whether the Director should investigate a complaint pursuant to s 40(4)(b)(i) of the PI Act. In advancing this contention, he drew attention to the interaction between the provisions of the PI Act and the *Police Regulation Act 1958*.[486] There was, he said, no general principle that an investigation had to be conducted by someone with hierarchical independence from the Chief Commissioner. In fact, it was an exception to the general rule that the Director himself would conduct an investigation.[487] The power of the Director to conduct an investigation was conditional upon the establishment of the jurisdictional fact: the conduct complained of was of such a nature that the Director considered that investigation of the complaint by him is in the public interest. Given the presence of that jurisdictional fact, there was a duty upon the Director to investigate such complaints as it was inconceivable that, having formed the opinion that it was in the public interest that he conduct the investigation, the Director would remit the investigation to the Chief Commissioner.[488]

543 Further, the reference to 'the public interest' in s 40(4)(b)(i) of the PI Act is informed by human rights considerations. Section 32 of the Charter defines the way in which human rights considerations inform the proper construction of a statutory provision such as s 40(4)(b)(i).[489] The concept of the 'public interest' was also informed by s 8(1)(d) of the PI Act which stipulated as one of the objects of the Director being 'to ensure that members of Victoria Police have regard to the human rights set out in' the Charter. In the present case, there had been no appeal from the trial judge's conclusion that the delegate had not misdirected himself on the meaning of 'public interest' in that provision.[490] Section 38(1) of the Charter had no operation where it is common ground that the delegate had considered it was not in the public interest for the Director to investigate the appellant's complaint.

544 Section 38 of the Charter addresses the way in which public authorities exercise statutory powers once they are construed pursuant to s 32. The Attorney-General contended that the appellant was seeking to go beyond the question of construction that s 32 mandates and to inject 'an additional gloss' on to what was required of a decision maker (here the delegate) in the formation of 'public interest' in the section. The contention that the

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486 He referred to the *Police Integrity Act 2008* ss 6, 7, 8, 38, 40, and to the *Police Regulation Act 1958* s 86L.

487 The Attorney-General also pointed out that any investigation by the Chief Commissioner is itself closely superintended by the Director.

488 The Attorney-General said that, if there was a discretion, it would be 'at most a residual, an unusual, discretion'.

489 He referred to *Hogan v Hinch* (2011) 243 CLR 506, 548 [68].

490 Reasons [191].

delegate, in breach of s 38, had failed to give proper consideration to relevant human rights or that he had acted incompatibly with human rights implied 'something additional' in the meaning of 'public interest' over and above the content required by s 32. In essence, he said, 'the submission is that s 38 affects how powers are exercised, but not the content of those powers ... that is a matter for s 32'. SANTAMARIA JA

545 The Attorney-General contended that the appellant was seeking to substitute a 'human rights test' for the 'public interest' test in s 40(4)(b)(i). In other words, when the Director was forming a view of the public interest, he would be required to import the analysis mandated by s 7(2) of the Charter. When the High Court referred to the 'human rights dimension' in *Hogan v Hinch*,[491] it was not seeking to substitute the s 7(2) analysis for the public interest test. He said that the very concept of the public interest necessarily involved more than human rights. In s 40(4) of the PI Act, it was informed by priorities and resources, and the proper operation of the police force. Accordingly, s 38(1) of the Charter had no operation in circumstances where it was common ground that the delegate had considered that it was not in the public interest for him to investigate the appellant's complaint.[492]

546 Finally, the Attorney-General referred to s 38(2) of the Charter. He accepted that whether a public authority could not reasonably have acted differently or made a different decision was not an expression that sat easily with the concept of the public interest where 'multiple different decisions are available'.

Analysis

547 The contention that, by reason of the need to consider the public interest, the decision made under s 40(4)(b)(i) of the PI Act is, in effect, exempt from the operation of s 38 of the Charter should be rejected. In making a decision whether an investigation of a complaint should be investigated, the Director must take into account the human rights of any person affected by the decision. Section 38 of the Charter is a constraint upon the exercise of the power conferred by s 40(4)(b)(i) of the PI Act.

548 Legislation frequently expressly requires decision makers to take into account the 'public interest'. The term has no fixed meaning; generally speaking, it will take its colour from the context in which it is used.[493] Questions

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491 (2011) 243 CLR 506.

492 He referred to the unchallenged finding of the trial judge: Reasons [191].

493 In *O'Sullivan v Farrer* (1989) 168 CLR 210, the Court considered various provisions of the *Liquor Act 1982* (NSW) that governed the granting and removal of a liquor licence. In particular, s 45(1)(c) permitted objections to the grant of an application for the removal of a hotelier's licence from one location to another on the ground that 'for reasons other than the grounds specified in paragraphs (a) and (b) of subsections (2) and (3), it would not be in the public interest to grant the application'. Mason CJ, Brennan, Dawson and Gaudron JJ said (at 216) (citations omitted):

> Where a power to decide is conferred by statute, a general discretion, confined only by the scope and purposes of the legislation, will ordinarily be implied if the context (including

involving the public interest 'will seldom be properly seen as having only one dimension'.[494] Such questions 'will require consideration of a number of competing arguments about, or features or "facets" of, the public interest'.[495] The concept of the 'public interest' cannot be defined within precise boundaries; opinions have differed and will always differ as to what is within the public interest; the categories of public interest are not closed.[496]

549 The concept is protean;[497] but, it is not at large. The injunction that the 'public interest' be considered requires a decision maker to step aside from the immediate circumstances that prompted or required the decision to be made and to consider a range of circumstances broader than those that are of immediate consequence to persons directly affected by the decision. What satisfies consideration of the public interest will be determined, in the first place, by the legislation that requires reference to it. The *Serious Sex Offenders Monitoring Act 2005* empowered Victorian courts to make extended supervision orders by which persons convicted of certain sexual offences for which custodial sentences had been imposed could be subject to post-custodial supervision. Section 42(1) provided that, in any proceeding before a court under the Act, the court, 'if satisfied that it is in the public interest to do so', might order that any information that might enable an offender or another person who had appeared or given evidence in the proceeding to be identified must not be published except in the manner and, to the extent, if any, specified in the order.[498] In *Hogan v Hinch*,[499] French CJ said that the making of orders under the relevant section 'requires consideration by the court of the public interest in light of the purposes of the Act, the

the subject-matter to be decided) provides no positive indication of the considerations by reference to which a decision is be made. See *Water Conservation and Irrigation Commission (NSW) v Browning*; *Reg v Australian Broadcasting Tribunal; Ex parte 2HD Pty Ltd*; *Murphyores Incorporated Pty Ltd v Commonwealth*; *Re Coldham; Ex parte Brideson*. The public interest considerations which may ground an objection under s 45(1)(c) are, in terms, confined to considerations 'other than the grounds specified in paragraphs (a) and (b) and subsections (2) and (3)'. But, these limits aside, the Act provides no positive indication of the considerations by reference to which a decision is to be made as to whether the grant of an application would or would not be in the public interest. Indeed, the expression 'in the public interest', when used in a statute, classically imports a discretionary value judgment to be made by reference to undefined factual matters, confined only 'in so far as the subject matter and the scope and purpose of the statutory enactments may enable … given reasons to be [pronounced] definitely extraneous to any objects the legislature could have had in view: *Water Conservation and Irrigation Commission (NSW)*.

494 *McKinnon v Department of Treasury* (2006) 228 CLR 423, 444 [55] (Hayne J).

495 Ibid 443 [55].

496 Ibid 455 [93] (Callinan and Heydon JJ quoting Lockhart J in *Right to Life Association (NSW) Inc v Secretary, Department of Human Services and Health* (1995) 56 FCR 50, 59).

497 *A v Corruption and Crime Commissioner* (2013) 306 ALR 491, 514 (Martin CJ and Murphy JA).

498 Section 42 is headed 'Suppression orders'. It provided:

(1) In any proceeding before a court under this Act, the court, if satisfied that it is in the public interest to do so, may order — (a) that any evidence given in the proceeding; or (b) that the content of any report or other document put before the court in the proceeding; or (c) that any information that might enable an offender or another person who has appeared or given evidence in the proceeding to be identified — must not be published except in the manner and to the extent (if any) specified in the order.

499 (2011) 243 CLR 506.

SANTAMARIA JA

open-court principle, the common law freedom of speech and the freedom of expression referred to in the Charter'.[500] For their part, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ said:

> The expression 'that it is in the public interest' imports a judgment to be made by reference to the subject, scope and purpose of the Act. The main purpose of the Act disclosed by s 1(1) is enhancement of community protection by supervision of certain offenders who have served custodial sentences. But, as will now appear, the question of what is in the public interest has more than one dimension.
>
> That additional dimension is supplied by the requirement that the Act, '[s]o far as it is possible to do so consistently with [its] purpose', must be interpreted in a way that is compatible with the civil and political rights set out in Pt 2 (ss 7–27) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the *Human Rights Act*). This method of interpretation is enjoined by s 32(1) of the *Human Rights Act*.
>
> Section 6(1) of the *Human Rights Act* states that '[a]ll persons have the human rights set out in [Pt] 2'. The rights listed in Pt 2 relevantly include that of offenders the subject of supervision orders not to have their privacy arbitrarily interfered with (s 13), and the right of the defendant to freedom of expression in any chosen medium, but subject to lawful restrictions 'reasonably necessary' to respect the rights and reputation of other persons (s 15). Those rights of other persons include those of offenders identified in s 13.[501]

550 Matters germane to the public interest in one enactment may be of little relevance when it is to be considered in another statutory context. The *Working with Children Act 2005* conferred power on the Victorian Civil and Administrative Tribunal to give assessment notices that indicated that a person was not unsuitable to work with children. Section 26(2) provided that VCAT must not make an order for the giving of an assessment notice unless it is satisfied that giving the notice would not pose an unjustifiable risk to the safety of children having regard to a series of relevant matters. Section 26(3) provided:

> Subject to subsection (2), VCAT may by order direct the Secretary to give an assessment notice to an applicant if it is satisfied that, in all the circumstances, it is in the public interest to do so.

The Tribunal had made orders for the giving of assessment notices to two individuals convicted of sex offences against a child. In doing so, the Tribunal found that the giving of the notices would 'not pose an unjustifiable risk to the safety of children', and, as required by s 26(3), 'in all the circumstances' it was in the 'public interest' to make the orders. In *Secretary, Department of Justice v LMB*,[502] this Court upheld the decision of the Tribunal. In doing so it said:

> The Tribunal stated at [35]:
>
> 35 Firstly, the notion of 'public interest' is broad. It includes the central consideration which is the need to protect children from sexual or physical harm. But it also embraces other considerations, including, for example,

[500] Ibid 544 [50].
[501] Ibid 548–9 [69]–[71] (citations omitted).
[502] [2012] VSCA 143 (Warren CJ, Osborn JA and Cavanough AJA).

> the right of a person to engage in work or in community affairs or the right of person who has rehabilitated himself to be permitted to re-enter the work force in an area in which they have qualifications and experience. In the circumstances of this case, this does not mean a return to a profession involving working with children; but it may involve a return to training activities which may involve the training of apprentices in the hospitality industry. The public interest may also include the interest in not unnecessarily restricting the employment prospects of older workers, such as the applicant, who have considerable experience in their chosen occupations.
>
> 36 Usually, one would expect that it will be in the public interest to direct the Secretary to give an assessment notice to an applicant if the Tribunal is satisfied that the giving of the notice would not pose an unjustifiable risk to the safety of children.
>
> We do not accept that the Tribunal refused or failed to take into account the severity of the respondent's offence in considering the public interest. The Tribunal made clear that in its view the notion of 'public interest' included the central consideration which is the need to protect children from sexual or physical harm. It had previously addressed the gravity of the offence in this connection. Insofar as this ground is intended to agitate the question of public perceptions, that argument was not raised for the consideration of the Tribunal. For the reasons we have already given, we do not accept that the consideration of such perceptions was mandatory.
>
> Insofar as the Tribunal expressed an expectation as to the usual consequence of the conclusion that giving an assessment notice would not pose an unjustifiable risk to the safety of children, we do not accept that the Tribunal's observations demonstrate an error of law. As we have explained, such a conclusion is, in effect, one that the giving of an assessment notice would accord with the stated purpose of the working with children check procedure. It follows that usually it will be in the public interest in these circumstances to give an assessment notice. The Tribunal's reasons make clear, however, that it accepted that the notion of 'public interest' is broad and that it did not close out the possibility that, despite a positive finding pursuant to s 26(2), it might not be satisfied that the giving of an assessment notice was in the public interest.[503]

551 The various aspects of public interest may need to be weighed against each other. Section 31 of the *Independent Commission Against Corruption Act 1988* (NSW) stipulated a list of mandatory considerations that the Commission was to take into account in determining whether it was in the public interest to conduct a public enquiry. Without limiting the factors that could be taken into account in determining what was in the public interest, the Commission was to consider the benefit of making the public aware of corrupt conduct, the seriousness of the allegation or complaint, any risk of undue prejudice to a person's reputation including the risk that could result from not holding an inquiry and whether the public interest in exposing the matter was outweighed by the public interest in preserving the privacy of concerned persons.[504] In *Cunneen v Independent Commission Against*

503 Ibid [85]–[87] (citation omitted).

504 *Cunneen v Independent Commission Against Corruption* [2014] NSWCA 421 [98]. See now *Independent Commission Against Corruption v Cunneen* (2015) 256 CLR 1.

Corruption,[505] Basten JA discussed the latter consideration. He described it as requiring 'what will usually be obvious, namely the need to weigh the public interest in exposing the matter, against the competing public interest of protecting the privacy and reputations of those who may be adversely affected by public exposure of their affairs.'[506] The statement that such a balancing exercise will 'usually be obvious' suggests that even when the various public interest considerations are not explicitly outlined by statute, it will often be necessary to consider and weigh various different public interests when making a decision 'in the public interest'.[507] SANTAMARIA JA

552 It is difficult to imagine a statutory power or discretion that may be exercised lawfully without regard to the public interest. Express reference to the requirement that it be considered certainly reflects what would always be implied. In such cases, the express reference may be designed to do little more than to remind the decision maker that there are interests that need to be considered in the making of the decision other than those of the persons immediately affected by it. In the case of s 40(4)(b)(i) of the PI Act, the public interest will require the Director to consider a variety of matters of no immediate relevance to the person who made a complaint about a member of the force under s 86L of the *Police Regulation Act 1958*. The obligation to consider the public interest will require the Director to consider, for example, the availability of public resources, the proper and most effective appropriation of those resources, the deployment of personnel in the office of the Director and, above all, the integrity of Victoria Police as an organisation and the integrity of individual members of the force.

553 The so-called 'principle of legality'[508] is deployed as a canon of statutory construction: '[i]t is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness.'[509] The 'principle' is but a corollary of the circumstance that, in our system of law, rights are anterior to statutes, a circumstance which is itself a reflection of the 'subsidiary' nature of law and public policy: they exist to give assistance to individuals and the associations that they choose to form and to provide an environment in which they can flourish.[510]

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505 [2014] NSWCA 421.

506 Ibid [103].

507 See *Plaintiff S10/2011 v Minister For Immigration and Citizenship* (2012) 246 CLR 636. In that case, the Court held that the obligation to consider the public interest in the exercise of certain powers meant that the Minister was not required to give procedural fairness to various interested persons: at 668 (Gummow, Hayne, Crennan and Bell JJ): at 671–72 (Heydon J).

508 See *R v Secretary of State for the Home Department; Ex parte Pierson* [1998] AC 539, 587–8 where Lord Steyn uses the expression, and discusses its antecedents.

509 *Potter v Minahan* (1908) 7 CLR 277, 304 (O'Connor J). It is unnecessary to determine the relationship between s 32(1) of the Charter and the principle of legality. See, in particular, Justice Pamela Tate, 'Statutory Interpretive Techniques under the Charter: Three Stages of the Charter — Has the Original Conception and Early Technique Survived the Twists of the High Court's Reasoning in *Momcilovic*?' (2014) 2 *Judicial College of Victoria On-Line Journal* 43, 66–7.

510 The associated principle of parliamentary sovereignty means that, in the absence of unanim-

554 As there are 'rights, freedoms, immunities, principles and values that are important within our system of representative and responsible government under the rule of law',[511] then, even in the absence of the Charter, a statutory requirement that the public interest be considered will require consideration of the human rights of members of the community as a whole and of particular individuals.

555 While it may be accepted that the reference to the 'public interest' in s 40(4)(b)(i) of the PI Act necessarily includes a human rights dimension, the application of s 38(1) of the Charter to decisions made under that provision does not have the effect of exaggerating or augmenting the role of human rights within the concept of the 'public interest'. In so far as the public interest will always be relevant to the exercise of statutory powers, the argument of the Attorney-General has, on the contrary, the tendency to reduce the significance of the Charter in the exercise of statutory powers.

556 The fact that a matter must be considered does not mean that it will prevail over other matters that must also have to be considered. Usually, the weight that is to be attached to such considerations is a matter for the decision maker.[512]

557 For these reasons, the contention that s 40(4)(b)(i) of the PI Act may be transformed from a public interest provision into a human rights provision should be rejected. The contention is premised upon a false opposition between the public interest and human rights.

Was there an error of law?

558 For the reasons given above, in my opinion, in deciding that the complaint was not to be investigated by the Director, the delegate contravened s 38 of the Charter by failing to give proper consideration to the express rights recognised by s 8(3) of the Charter (that Bare is entitled to equal and effective protection against discrimination) and s 10(b) of the Charter (that Bare is not to be treated or punished in a cruel, inhuman or degrading way).

559 It will be for the public authority to determine how the human rights of an individual are to be weighed with other considerations made relevant by the statute authorizing the particular decision. However, there is no justification for discounting those rights or for treating them as velleities without immediate application. The circumstances of the case will make some rights more relevant than others: the right to a fair hearing, for example, will have its greater significance in the context of a trial. But, public authorities need to be alert to the possibility that circumstances not immediately connected

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ity, it is for Parliament to resolve disputed questions of the common good. See *Independent Commission Against Corruption v Cunneen* (2015) 256 CLR 1, 35–6 [88] (Gageler J (dissenting)).

[511] *Lee v New South Wales Crime Commission* (2013) 251 CLR 196, 310 [313] (Gageler and Keane JJ), 249 [126] (Crennan J agreeing).

[512] *Peko-Wallsend* (1986) 162 CLR 24, 41 (Mason J).

with the present conduct of a trial may result in the right being subverted.[513] SANTAMARIA JA
On many occasions, authorities whose task it is to ensure public order or to restore justice will be required to use force or to administer punishment.[514] On each of those occasions, the right recognised by s 10(b) of the Charter becomes relevant. Although the historical enormities that prompted the explicit recognition of art 5 of the UNDHR[515] may have no obvious parallels in our society, it remains the case that the necessary use of force must not be associated with, or degenerate into, cruelty, inhumanity or degradation. Moreover, when a public authority has the task of investigating an allegation that such a thing has happened (or has the task of determining who should conduct such an investigation), the need to weigh s 10(b) remains just as relevant.

If there was an error of law, did it appear on the face of the record?

560 An error of law which does not deprive a decision maker of jurisdiction may be reviewed by way of certiorari only if it appears 'on the face of the record'.

561 In *O'Connor v County Court of Victoria*,[516] Kaye J, after considering *Craig v South Australia*,[517] said:

> [T]he court held that, ordinarily, in the absence of statutory prescription, the record of the court is confined to the documentation that initiated the proceedings, the pleadings (if any), and the formal adjudication.[518]

562 However, in *Craig*, the Court held that, notwithstanding that the transcript and reasons do not of themselves form part of the 'record', they can nonetheless be incorporated by reference.[519] In the present case, there was no 'formal adjudication'. Rather, there was the letter of 19 October 2010.

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513 See eg *Dietrich v The Queen* (1992) 177 CLR 292.

514 The reference is to those required to administer the punishment imposed by courts. Generally speaking, courts are not 'public authorities' under the Charter. However, the values and principles which are the foundation of s 10(b) apply, as a matter of law, to courts when they impose punishment.

515 Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (Random House New York, 2001).

516 [2014] VSC 295.

517 (1995) 184 CLR 163 (***Craig***).

518 [2014] VSC 295 [24] (citation omitted).

519 In *Craig* (1995) 184 CLR 163, 182 the Court said of 'incorporation by reference' in this context:

> The qualification should be understood as referring only to so much of the reasons or transcript of proceedings as is referred to in the formal order in a way which brings about its incorporation as an integral part of that order and 'the record'. If, for example, the formal order incorporates undertakings given by a party 'as set out in' a particular designated document or is said to be made 'in terms of proposed orders set out in the reasons for judgment', the order and the record will incorporate only those parts of the particular document or the reasons for judgment which set out, qualify or otherwise affect the content of those undertakings or proposed orders. Conversely, a merely introductory or incidental reference will not suffice to incorporate, in either the formal order or the record, reasons given for making the formal order which do not in fact constitute part of it. Thus, for example, an introductory remark such as the phrase 'for the reasons given' or the word 'accordingly' will not, of itself, have the effect of incorporating the whole or any part of the reasons for decision in either the formal order or 'the record' (citations omitted).

563 However, it is open to Parliament to expand the nature of the 'record'. Section 10 of the *Administrative Law Act 1978* (**the ALA**) gives an extended definition of 'the record' which includes reasons. At the relevant time,[520] s 2 of the ALA provided:

> ***tribunal*** means a person or body of persons (not being a court of law or a tribunal constituted or presided over by a Judge of the Supreme Court) who, in arriving at the decision in question, is or are by law required, whether by express direction or not, to act in a judicial manner to the extent of observing one or more of the rules of natural justice.

Section 10 provided:

> **Reasons to be part of record**
>
> 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.

564 In my opinion, in making a decision under s 40(4)(b)(i) of the PI Act, the Director is a 'tribunal' for the purposes of s 10 of the ALA. Plainly, he or she is not a court of law.

565 It will be noticed that the definition of 'tribunal' refers to the obligation to act 'in a judicial manner to the extent of observing one or more of the rules of natural justice'. Writ large, there are two rules of natural justice: (1) the obligation to give a hearing and (2) the obligation to proceed without bias. The Director is plainly required to give a complainant a hearing before exercising the discretion conferred by s 40(4)(b)(i) of the PI Act.[521]

566 In considering the first rule, it must be borne in mind that the satisfaction of the 'hearing' requirement will depend upon a variety of circumstances. In some cases, it will require something comparable to a hearing in court; at the other end of the spectrum, circumstances may be such that it will be satisfied by providing a person with the right to make written submissions without the need to accord the person with an oral hearing in the presence of the decision maker. Further, the Director must proceed without bias. The application of either of the rules was sufficient to make the delegate here a 'tribunal' for the purposes of the ALA.

567 In *Easwaralingam v Director of Public Prosecutions*,[522] Tate JA (with whom Buchanan JA agreed) referred to *The Returned & Services League of Australia*

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520 *Administrative Law Act 1978* (as at 1 July 2012).

521 As is observed in Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Thomson Reuters, 5th ed, 2013) 491 [8.1] the issue of the content of the hearing rule

> has become more prominent by two ... simultaneous trends ..., namely the greater willingness of the courts to imply a duty to observe procedural fairness and a greater reluctance to accept its exclusion by the legislature. The result is that the crucial question is now usually one of precisely what the hearing rule requires rather than whether it applies.

522 (2010) 208 A Crim R 122.

(*Vic Branch) Inc v Liquor Licensing Commission*[523] and *Kuek v Victoria Legal Aid*[524] and said: SANTAMARIA JA

> By reason of s 10 of the *Administrative Law Act 1978* (Vic), in Victoria the 'record' includes a court's reasons, whether the application for judicial review is brought under the *Administrative Law Act* or under O 56. The strictures of *Craig v South Australia* in this respect are thus avoided. The transcript of proceedings may be incorporated into the record by reference.[525]

568 The present application was brought under both the ALA and O 56 of the *Supreme Court (General Civil Procedure) Rules 2005*. The reasons of Jevtovic form part of the record.

Conclusion

569 Accordingly, unless the present claim is barred by s 109 of the PI Act, the appeal should be allowed as Bare was entitled to the relief he sought.

Does s 109 of the Police Integrity Act 2008 preclude review of a decision under s 40(4)(b) not to conduct an investigation?

570 In his amended notice of appeal, Bare contended that the trial judge had erred in holding that s 109 of the PI Act prevented the Court from hearing and determining his claim for a declaration that the decision communicated to him by letter dated 19 October 2010 was contrary to s 38 of the Charter.[526] Bare said the trial judge erred in failing to hold that the Court could hear and determine his claim on the basis that (a) the decision was a decision not to investigate his complaint and that s 109 of the PI Act, properly construed and applied in the context of s 52 of the Act, did not apply to a decision not to investigate.[527] He also contended that the trial judge erred in failing to hold that s 109 of the PI Act did not apply to a decision 'tainted by jurisdictional error' and that, in the present case, if the decision breached s 38 of the Charter, involved an error of that kind.[528]

571 In dealing with the question whether s 109 of the PI Act ousted the jurisdiction of the Court to review the decision of the delegate not to conduct an investigation into Bare's complaint, it is preferable to proceed on the basis that the error in the making of the decision under s 40(4)(b) was not one that deprived the delegate of jurisdiction and that his error is otherwise amenable to review.

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523 [1999] 2 VR 203.
524 (2001) 3 VR 289, 292 (Phillips JA with whom Winneke P and Buchanan JA agreed).
525 (2010) 208 A Crim R 122, 127 [21] (citations omitted).
526 Ground 1.
527 Ground 2.
528 Ground 3.

Relevant provisions

572 At trial and on the hearing of the appeal, the parties gave particular attention to ss 51A and 51B of the PI Act (which are found in pt 3) and s 52 and s 109 (which are found in pt 4).

573 Part 3 of the Act was entitled 'Police Complaints and Investigations'. Division 2 was entitled 'Investigations'. Sections 51A and 51B provided as follows:

> **51A Director and staff may prosecute**
>
> (1) The Director or a member of staff of the Office of Police Integrity authorised under subsection (2) may commence criminal proceedings against a person for an offence in relation to any matter arising out of an investigation.
>
> (2) The Director may authorise in writing a member of staff of the Office of Police Integrity to exercise powers under subsection (1)—
>
> (a) in relation to a specified person or specified investigation; or
>
> (b) generally.
>
> (3) Nothing in this section —
>
> (a) affects or limits the ability of a person other than the Director or a person authorised under subsection (2) to commence criminal proceedings against a person for an offence in relation to any matter arising out of an investigation; or
>
> (b) affects or limits the ability of the Director or a member of staff of the Office of Police Integrity to bring criminal proceedings against a person for any other offence.
>
> **51B Immunity**
>
> (1) The Director or a member of staff of the Office of Police Integrity authorised under section 51A(2) is not personally liable for anything necessarily or reasonably done or omitted to be done in good faith —
>
> (a) in the exercise of a power under section 51A(1); or
>
> (b) in the reasonable belief that the act or omission was in the exercise of a power under section 51A(1).
>
> (2) Any liability resulting from an act or omission that, but for subsection (1), would attach to the Director or a member of staff of the Office of Police Integrity authorised under section 51A(2) attaches instead to the State.

574 Part 4 of the PI Act was entitled 'General Investigatory Powers'. It contained 11 Divisions. Division 1 was entitled 'Preliminary'. It comprised only s 52 which provided:

> **Application of Part**
>
> This Part applies for the purposes of an investigation by the Director under Part 3.

Division 10 of pt 4 was entitled 'Protection of persons, documents and other things'. It included s 109 which provided:

> **General protection of protected persons**
>
> (1) A protected person is not liable, whether on the ground of lack of jurisdiction or on any other ground, to any civil or criminal proceedings to which they would have been liable apart from this section in respect of any act purported to be done under this Act unless the act was done in bad faith.

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(2) Subsection (1) does not apply to an act done in the course of, or that results in, a critical incident.

(3) No civil or criminal proceedings may be brought against a protected person in respect of any act of a kind referred to in subsection (1) without the leave of the Supreme Court.

(4) The Supreme Court may not give leave unless it is satisfied that there is substantial ground to believe that the person to be proceeded against has acted in bad faith.

(5) Without limiting the generality of subsections (1) and (3), no civil or criminal proceeding may be brought against the Director in respect of the giving of a certificate by the Director under section 106, unless the certificate was given in bad faith.

(6) Despite anything in this section —

(a) an order cannot be issued restraining the Director from carrying out or compelling the Director to carry out any investigation; and

(b) a proceeding cannot be brought against the Director seeking the issue of such an order.

Reasons of trial judge

575 The trial judge held that s 109 of the PI Act applied (a) to proceedings by way of judicial review; and (b) to a decision by the Director whether or not to investigate a complaint personally; a decision that was 'a preliminary determination upon which the discretionary power to investigate a complaint is contingent'.[529]

576 In holding that s 109 extended to proceedings for judicial review and was not confined to barring claims in damages, the judge referred to *Applicants A1 & A2 v Brouwer*.[530] In that case, the Court of Appeal[531] decided that s 12(3) of the *Witness Protection Act 1991* did not prevent a plaintiff from claiming certiorari on the grounds of non-jurisdictional error.[532] In doing so, the Court compared s 12(3) with s 35A of the *Ombudsman Act 1974* (NSW).[533]

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529 Reasons [89]. 'It is common ground that Ms Small and Mr Jevtovic were "protected persons" as defined by s 104(1) of the *Police Integrity Act* when the impugned decisions were made. No "critical incident" within the meaning of s 109(2) is said to have occurred'; Reasons [63].

530 (2007) 16 VR 612.

531 Maxwell P, Neave and Redlich JJA.

532 Section 12(3) of the *Witness Protection Act 1991* provided: 'No action or proceedings can be brought against any person to whom this section applies in respect of any act, matter or thing done by that person in the course of his or her duties in accordance with this Act.'

533 Section 35A of the *Ombudsman Act 1974* (NSW) provided:

Immunity of Ombudsman and others

(1) The Ombudsman shall not, nor shall an officer of the Ombudsman, be liable, whether on the ground of want of jurisdiction or on any other ground, to any civil or criminal proceedings in respect of any act, matter or thing done or omitted to be done for the purpose of executing this or any other Act unless the act, matter or thing was done, or omitted to be done, in bad faith.

(2) Civil or criminal proceedings in respect of any act or omission referred to in subsection (1) shall not be brought against the Ombudsman or an officer of the Ombudsman without the leave of the Supreme Court.

(3) The Supreme Court shall not grant leave under subsection (2) unless it is satisfied that

In *Ainsworth v The Ombudsman*,[534] Enderby J had considered s 35A and had held that the inclusion of the words 'whether on the ground of want of jurisdiction or on any other ground' were apt to exclude judicial review. The trial judge observed that practically the same words were contained in s 109 of the PI Act. Accordingly, she held that s 109 operated to exclude claims for judicial review.[535]

577 In holding that 'a decision about whether or not to investigate a complaint is a necessary step in the process of investigation by the Director',[536] the judge rejected a contention that s 52 limited the reach of s 109. She said that 'before that determination is made there is clearly the prospect that an investigation may occur and that, consequently, the decision was made within the meaning of s 52 "for the purpose of" an investigation (an object which does not have to be in existence)'.[537] There were 'indications in the language of pt 4 itself that it is not a purpose of s 52 or s 109(1) that the operation of the latter sub-section is to be restricted to actions in the context of an investigation.'[538] She referred to s 106 and s 107. Those sections prevented the compulsory production of a document or thing that had come into a protected person's possession 'in the performance of functions under this Act', in civil and criminal proceedings, respectively. The language of those sections prevented their being confined by s 52 to documents or things that had come into the possession of the OPI simply within the confines of an investigation. She then referred to s 109(6); she said that, as it prohibited an order compelling the Director to conduct an investigation, it 'must contemplate a situation where no investigation has commenced'.[539] Finally, the 'breadth of the OPI's functions and powers under s 6 and the objects, functions and powers of the Director under s 8 also supports the view that the protection offered by s 109 is not to be limited as contended by s 52; the investigation of complaints not being the paramount purpose of either the OPI or the Director'.[540] The judge also considered that the extrinsic materials were consistent with 'a broader immunity for protected persons under s 109'.[541]

578 The trial judge also considered, and rejected, a contention that s 32(1) of the Charter[542] required her to favour a construction of s 52 and s 109 that would not prevent a proceeding for alleged breach of s 38(1) of the Charter.

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there is substantial ground for the contention that the person to be proceeded against has acted, or omitted to act, in bad faith.

534 (1988) 17 NSWLR 276.

535 The holding that s 109 of the PI Act applied to proceedings for judicial review was not challenged on appeal.

536 Reasons [81].

537 Ibid.

538 Reasons [82].

539 Ibid.

540 Reasons [83].

541 Reasons [85].

542 Section 32(1) provides: '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.'

SANTAMARIA JA

Section 32 does 'not require or authorise a court to depart from the ordinary meaning of a statutory provision, or the intention of Parliament in enacting the provision, but in effect requires the court to discern the purpose of the provision in question in accordance with the ordinary techniques of statutory construction essayed in *Project Blue Sky Inc v Australian Broadcasting Authority*'.[543] Section 109 contained no express exemption for proceedings alleging unlawfulness under s 38(1) of the Charter; s 32(1) could not be used to affect the underlying statutory purpose of s 109.[544]

Contentions of appellant

579 Bare advanced three arguments in support of his contention that, despite the generality of its language, s 109 did not oust the jurisdiction of the Court to review a decision by the Director *not* to commence an investigation under s 40(4)(b).

580 First, he said that, as s 52 and s 109 were contained in the same Part of the PI Act (pt 4), albeit in different Divisions of that Part, it was necessary to give them a harmonious interpretation. In order to conform to the role identified for pt 4 in s 52 (the Part applies 'for the purposes of an investigation by the Director under Part 3'),[545] it is reasonable to read the words in s 109 ('in respect of any act purported to be done under this Act') as referring to acts done by a protected person for the purposes of an investigation (or for the purposes of investigations) by the Director under pt 3. The provisions in pt 4 were concerned with investigations and decisions 'for the purposes of an investigation'. Those provisions will apply where an investigation has been conducted or is being conducted or may (in the future) possibly be conducted. However, the provisions of pt 4 do not apply to conduct that has taken place or a decision that has been made where that conduct or decision is not for the purposes of an investigation of that kind. In so far as the decision of the delegate was a decision *not* to investigate, it could not be a decision made 'for the purposes of the investigation'.[546] In outlining the relevant provisions of the PI Act, Bare drew attention to s 38 (which provided for the application of div 1 ('Complaints') in pt 3 of the Act) and s 43 (which provided for the application of div 2 ('Investigations') in pt 3 of the Act). Each of these provisions was a 'limiting provision' analogous to s 52. Section 38 limits the operation of div 1 to complaints under s 86L of the

543 Reasons [87]. The trial judge cited the judgment of the Court in *Slaveski v Smith* (2012) 34 VR 206, 214 [20] (Warren CJ, Nettle and Redlich JJA) which involved an application of *Momcilovic v The Queen* (2011) 245 CLR 1, 36 [18], 50 [51] (French CJ), 92 [170] (Gummow J), 123 [280] (Hayne J), 213 [554], 217 [565]–[566] (Crennan and Kiefel JJ), 250 [684] (Bell J); *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 (***Project Blue Sky***).

544 Reasons [87]–[88].

545 Part 3 of the PI Act is entitled: 'Police Complaints and Investigations'.

546 There are other provisions in pt 4 which, unless constrained by s 52, might be thought to apply more generally. For example, div 2 is entitled 'Witness summonses'. Section 53 (which is in div 2) empowers the Director to issue summonses. While certain summonses are expressed to be for 'an examination before the Director', other summonses, which do not contain that express limitation, would nonetheless be subject to it.

Police Regulation Act 1958. Section 43 limits the application of div 2 to two types of investigations: (a) the investigation of a complaint or (b) an 'own motion' investigation.

581 Secondly, s 109 was not the only privative clause in the PI Act. Division 2 of pt 3 is entitled: 'Investigations'. Section 51A empowered the Director or a member of the staff of the Office of Police Integrity to commence 'criminal proceedings against a person for an offence in relation to any matter arising out of an investigation'. Section 51B conferred an immunity on the Director or a member of the staff of the Office of Police Integrity 'for anything necessarily or reasonably done or omitted to be done in good faith' in exercise of the powers conferred by s 51A(1) or in the reasonable belief that the act or omission was in the exercise of a power under s 51A(1). Had it been the case that Parliament intended s 109 to confer immunity in respect of all acts and omissions occasioned by the PI Act s 51B would have been unnecessary. Its presence in the legislation suggested that s 109 should be given an operation confined to acts and omissions that arose by reason of there being an investigation under pt 3.

582 Third, Bare addressed the other provisions adjacent to s 109 which the judge had held confirmed her understanding that s 109 was not confined to investigations and was capable of applying where no investigation had commenced. The judge had found, it seems, an indication in s 109(6) that s 52 was not intended to limit s 109 to the exercise of powers within the context of an investigation: it ousted the jurisdiction of the courts to restrain an investigation or to compel the Director to carry out an investigation. Bare pointed out that, by reason of the existence of proceedings in a court, the Director may choose to suspend an investigation notwithstanding s 46 which authorises the continuation of an investigation in those circumstances. Such a suspension would be an act for the purposes of an investigation (within s 52), and s 109(6) would applying to prevent the court from ordering the continuation of what the Director had chosen to suspend. As for ss 106 and 107, Bare said that those provisions related to the circumstances in which the Director could object to the production of what was defined as a 'protected document'. Bare said that both the definition and an examination of the circumstances were, generally speaking, related to investigations. To the extent they were not, they were specific provisions that contained an express intention that the general provision in s 52 does not have complete work to do. But, Bare said, there is no such express or implied limiting feature in s 109 that would compel the conclusion that s 109(1) is not confined by s 52 in the way that he had contended.

583 Finally, Bare said that consideration of the extrinsic materials confirmed that the purpose of s 109 was not to immunise all decisions of the Director from challenge; rather, its purpose was to prevent legal proceedings being taken that would impede or obstruct investigations by the OPI. He referred to the Second Reading Speech in relation to the bill for the PI Act, in which

the Minister for Police and Emergency Services made specific reference to judicial review, saying: SANTAMARIA JA

> ***Judicial review and redress***
>
> The level of judicial review available for actions of the director and OPI is maintained, not reduced, by this bill.
>
> Furthermore, additional provisions are included in this bill to increase the circumstances in which legal redress is available in relation to OPI personnel. The existing protections from legal proceedings will no longer extend to liability arising from the involvement of OPI staff in a critical incident, such as a car accident.
>
> Under the Police Regulation Act 1958, the Supreme Court is able to review actions of the director and officers of the OPI that are performed in bad faith. The court is also able to determine whether the director has the jurisdiction to investigate a complaint. These provisions are retained in the bill.
>
> The narrow scope to review the OPI's actions is comparable with arrangements for most similar bodies in other Australian jurisdictions. The Fitzgerald (Queensland) and Wood (New South Wales) royal commissions on police corruption found that review of the actions of investigatory bodies by the courts can lead to significant delays that prevent their effective operation and the conduct of their investigations. These royal commissions reported that judicial review should not be used to improperly reveal activities of anticorruption bodies.
>
> *It is appropriate to retain the existing limitation on the courts' scope to review the OPI's actions. This prevents legal actions designed to impede and delay OPI investigations.* The proposed provision is consistent with the protection of the Ombudsman and his officers under the Ombudsman Act 1973.[547] A re-enactment of the current provision is also consistent with the level of statutory protection given to the director's predecessors.[548]

Similarly, in his statement under s 85 of the *Constitution Act 1975*, the Minister said that s 109 replaced s 86J of the *Police Regulation Act 1958*.[549] He explained the need for 'protected persons' to be protected:

> The protection of these persons is required to prevent the director's investigations from being impeded by legal challenges and proceedings on grounds other than allegations of bad faith. The existing protection in the Police Regulation Act 1958 has been successful in allowing the director and OPI staff to perform their current functions, and the protection afforded to them under the current law should continue for that reason.
>
> ...
>
> Both clause 109 and the proposed section 86KJ provide the protection necessary for the director and staff of the OPI to perform their significant public functions properly and efficiently, without the prospect of delay or interference by legal actions, on grounds other than allegations of bad faith.[550]

547 Section 29 of the *Ombudsman Act 1973* was to much the same effect as s 109(1).

548 Victoria, *Parliamentary Debates*, Legislative Assembly, 13 March 2008, 850 (Bob Cameron, Minister for Police and Emergency Services) (emphasis added).

549 Section 86J(1) was inserted into the *Police Regulation Act 1958* by s 10 of the *Police Regulation (Amendment) Act 1985*. It was to much the same effect as s 109(1) of the Act.

550 Victoria, *Parliamentary Debates*, Legislative Assembly, 13 March 2008, 853 (Bob Cameron, Minister for Police and Emergency Services).

Contentions of IBAC

584 In its written submissions, IBAC said that the judge was correct in concluding that s 109 applied to decisions *not* to investigate. Bare's contentions to the contrary ignore aspects of pt 4 of the PI Act that informed the proper meaning of the expression in s 52, *'for the purposes of an investigation by the Director under Part 3'*. IBAC referred to div 9 in its entirety, and to ss 105(a), (c), (d),[551] 106,[552] 107 (save for (4)(b)(iii)-(vi)),[553] 109(6)(a),[554] 109A[555] and 110[556] of the PI Act, together with the definition of 'critical incident' in s 30. It also said that s 109(6) provided that an order could not be made by a court, and a proceeding could not be brought seeking an order, compelling the Director to carry out any investigation. Section 52, when read in context with pt 4 as a whole, clearly extended to requested, proposed or otherwise potential future investigations and not only to investigations actually undertaken.

585 On the hearing of the appeal, IBAC said that the references in the judgment to extrinsic materials was in support of the proposition that s 109 applied to oust proceedings by way of judicial review, and not whether review of a decision not to commence an investigation fell within s 109. Next, IBAC said that s 51A and s 51B were inserted into the PI Act after s 109 had been enacted, and that those provisions dealt with the specific empowering of the Director or a member of staff duly authorised, to commence criminal proceedings in relation to a particular matter.[557] The sections, it was said, were, in effect, vicarious liability provisions. Their true purpose was to shift any liability that may have been incurred by the Director or by a member of staff onto the State; the fact that the provisions covered some of the same ground as s 109 was just 'belts and braces confirming that an immunity exists in that specific situation'. There was no need to give the provisions an operation such that the work to be done by the one was mutually exclusive of that to be done by the other. That said, IBAC contended that there was a difference between them: the immunity conferred by s 51B was subject only to a 'good faith' requirement whereas the immunity in s 109 was subject not only to an absence of 'bad faith' requirement but that proceedings could not be commenced without the leave of the court. IBAC supported what it

551 Section 105 defined 'a protected document or other thing'.

552 Section 106 applied to civil proceedings. It provided that, in certain circumstances, a protected person cannot be compelled to produce a protected document or other thing.

553 Section 107 applied to criminal proceedings. It provided that, where a subpoena had been issued to a protected person to produce a protected document or other thing, the court could, in certain circumstances, make orders restricting access to the document or thing.

554 Section 109(6)(a) provided that a court could not order either that (a) the Director be restrained from carrying out an investigation or (b) that he be compelled to carry out an investigation.

555 Section 109A placed limitations upon the compellability of protected persons as witnesses in any legal proceeding.

556 Section 110 provided an immunity for protected persons, inter alia, for things done in good faith in the performance of a function or exercise of a power under the Act. It also provided that the State was to be liable for any conduct in respect of which a protected person would have been liable but for the immunity created by the section.

557 Sections 51A and 51B were introduced by s 4 of the *Major Crime (Investigative Powers) and Other Acts Amendment Act 2008* (No 60 of 2008).

described as the three 'strands' in the reasons of the trial judge. First, s 52 should be interpreted so that it includes investigations that might be conducted in the future; thus: 'the act of deciding or the function of deciding whether or not to investigate is an act within the meaning of 109(1)'. Given that s 109 focuses on the 'act of deciding' that must include the decision not to investigate. Second, s 51B is supplementary, and not exclusionary: 's 52 on that view is simply making it clear that the Part applies for the purposes of an investigation under pt 3 and not only on the terms for which pt 4 makes express provision'. Finally, the judge rejected an argument which sought to use the interpretative principle in s 32(1) of the Charter in combination with the usual principles about giving a restrictive operation or interpretation to privative clauses, to support the proposition that s 52B and s 109 should be construed as not applying to proceedings for a contravention of s 38(1) of the Charter. SANTAMARIA JA

586 IBAC also referred to s 109(6) of the PI Act. It said that it was a very strong indication that s 109(1) was intended to apply to the function of deciding whether or not to investigate irrespective of the outcome. It said that it was a 'very strained reading' to confine its operation to situations where a decision has been made to investigate but the investigation was not being carried out because, for example, a proceeding was on foot, notwithstanding that s 46 confers power to continue with the investigation.

Appellant's submissions in reply

587 Bare said that s 51B(2) of the PI Act was not inserted because of some desire to fix vicarious liability on the State in a limited circumstance; rather, Parliament recognised that s 109 did not apply to acts covered by s 51A. It is clear from a reading of the PI Act as a whole. Section 109(2) expressly provided a carve out for acts done in the course of or that result in a 'critical incident'. Such an act is not covered by s 109(1). Section 110 of the PI Act contained a mirror provision to s 51B.[558] It is a no liability clause for the protected person and, then, a vicarious liability under sub-s (2) of that section. Accordingly, there was a perfect symmetry between s 109(2) and s 110 the one hand, and s 109(1) read in conjunction with ss 52, 51A and 51B on the other. Just as there was an express exclusion for acts covered by s 109(2) (which takes one to s 110), s 109(1), read with s 52, contained an exclusion other than acts done purportedly for the purpose of an investigation under pt 3.

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[558] Section 110 provided:

Protection of protected persons in relation to critical incidents

(1) A protected person is not personally liable for anything done or omitted to be done in good faith —
  (a) in the performance of a function or exercise of a power under this Act; or
  (b) in the reasonable belief that the act or omission was in the performance of a function or exercise of a power under this Act — if the thing was done or omitted to be done in the course of, or resulted in, a critical incident.

(2) Any liability resulting from the act or omission that, but for subsection (1), would attach to a protected person attaches instead to the State.

588 Secondly, Bare said that IBAC was in error when it had sought to characterise the act for the purposes of s 109(1) as being the act of making the decision. Bare said the act is the decision itself. In the present case, the decision itself was not to investigate his complaint. That decision is not covered by s 109(1).

589 Finally, Bare referred to IBAC's contention that it was not clear, in the case of ambiguity, which Charter rights were to be taken into account for the purposes of reading down s 109. Bare responded: it was 'any relevant human right'. He said that the effect of IBAC's broad construction was that a person cannot seek relief for any breach of any human right of the Charter in respect of any act purportedly done by a protected person under the Act. Bare submitted that, on his narrow construction, a person could seek relief for a breach of any human right that was engaged if the act was not purportedly done for the purpose of an investigation by the Director under pt 3. If the Court was to find that there is ambiguity in the provision, the adoption of the narrow construction was more compatible with human rights. It would leave it open to someone such as Bare to contend that his human rights were interfered with by an act that was not done for the purposes of an investigation under pt 3 of the PI Act.

Analysis

590 Under our constitution (broadly conceived), the right of access to the courts is fundamental. Courts do not impute an intention to Parliament to abrogate or curtail such rights in the absence of express words or necessary intendment. The intention to modify or abrogate fundamental rights must be expressed with 'with irresistible clearness'.[559] Consistently with the principle of legality, 'privative clauses are construed "by reference to a presumption that the legislature does not intend to deprive the citizen of access to the courts, other than to the extent expressly stated or necessarily to be implied" '.[560] Such clauses are to be 'strictly construed'.[561] Thus, does s 109 make it irresistibly clear that the decision by the Director, pursuant to s 40(4)(b) of the PI Act, not to conduct an investigation may not be reviewed by the court? In my opinion, it does not do so.

591 Part 3 of the PI Act was entitled 'Police Complaints and Investigations'. Division 1 related to the handling of complaints made under s 86L of the *Police Regulation Act 1958*. Division 2 related to the conduct of investigations. Part 4 of the Act was entitled 'General Investigatory Powers'. Section 52 provided that pt 4 applied for the purposes of an investigation by the Director under pt 3. Apart from anything else, it seems plain that pt 4 has no operation in respect of the handling of complaints under div 1 of pt 3.

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559 *Bropho v Western Australia* (1990) 171 CLR 1, 18 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ) quoting *Potter v Minahan* (1908) 7 CLR 277, 304.

560 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 493 [32] (Gleeson CJ) citing *Public Service Association (SA) v Federated Clerks' Union* (1991) 173 CLR 132, 160 (Dawson and Gaudron JJ).

561 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 505 [72] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ). See also *Herald & Weekly Times v A* (2005) 160 A Crim R 299, 304 [18].

592 Further, s 51B conferred an immunity on the Director or a member of staff of the OPI 'for anything necessarily or reasonably done or omitted to be done in good faith' under s 51A(1). If the words 'in respect of any act purported to be done under this Act' in s 109 is to be construed to apply to every power exercised or every decision made under the PI Act s 51B would seem to be redundant. 'A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals'.[562] A distinction can be drawn between the decision to conduct an investigation and what is done in the course of or pursuant to an investigation. An even clearer distinction can be drawn between a decision *not* to conduct an investigation and, a decision to conduct an investigation having been taken, decisions that are taken in the course of that investigation. A way of reconciling s 51B with s 109 is to give full force to s 51B (which with s 109 is in pt 4) and to hold that s 109 related to powers exercised and things done 'for the purposes of an investigation'. That limitation naturally excludes the decision *not* to conduct an investigation. On the assumption that s 109 was confined to the purposes of an investigation under pt 3, it was necessary, if an immunity was to be included with respect to a decision to prosecute under s 51A (which, ex hypothesi, was not a decision for the purpose of an investigation) to include an immunity that was proper to the power exercised under s 51A, as s 109 did not confer that immunity. The extrinsic materials confirm that this is the purpose of s 109. As indicated above, in his statement under s 85 of the *Constitution Act 1975*, the Minister said that s 109 replaced s 86J of the *Police Regulation Act 1958*.[563] He explained the need for the protection of 'protected persons'. As indicated above, he said: 'The protection of these persons is required to prevent the director's investigations from being impeded by legal challenges and proceedings on grounds other than allegations of bad faith.' Proceedings to review a decision not to conduct an investigation do not impede an investigation. SANTAMARIA JA

593 The trial judge referred to several other provisions closely adjacent to it in support of the broad interpretation that she gave to s 109. As indicated above, IBAC relied on these provisions in support of that interpretation.

594 Section 109(2) provided that s 109(1) 'does not apply to an act done in the course of, or that results in, a critical incident'.[564] It seems plain that s 51B

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562 *Project Blue Sky* (1998) 194 CLR 355, 381–2 [70] (McHugh, Gummow, Kirby and Hayne JJ) (citation omitted).

563 Section 86J(1) of the *Police Regulation Act 1958* was to much the same effect as s 109(1) of the Act.

564 Section 30 of the Act contains the following definition:

> **critical incident** means an incident involving a member of OPI personnel while that member was on duty which —
>
> (a) resulted in the death of, or serious injury to, a person; and
>
> (b) also involved any one or more of the following —
>
> (i) the discharge of a firearm by the member;
>
> (ii) the use of force by the member;
>
> (iii) the use of a motor vehicle by the member (including as a passenger) in the course of the member's duties;
>
> (iv) the death of, or serious injury to, the person while the person was in the

mirrors s 110. The former grants statutory immunity in respect of the decision to prosecute, the latter with respect to involvement in a critical incident. In both cases, provision had been made that any liability which would have otherwise accrued (in the former case to the Director or member of staff of the OPI and in the latter case to a protected person) is shifted to and is to attach to the State. The fact similar provisions have been made in separate Parts of the PI Act suggest that each Part is to be treated as separate from the other.

595 As indicated above, the trial judge also pointed out that the text of ss 106 and 107 also suggested that s 52 should not be permitted to confine s 109 solely to acts done in the context of an investigation.

596 There were indications in the language of pt 4 itself that it is not a purpose of s 52 or s 109(1) that the operation of the latter subsection is to be restricted to actions in the context of an investigation. For example, ss 106 and 107 prevent compulsory production of a document or thing that has come into a protected person's possession 'in the performance of functions under this Act', in civil and criminal proceedings, respectively. However, as Tate JA has explained in her reasons, both s 106 and s 107 operate in respect of 'protected documents'.[565] Section 105 defined 'a protected document or other thing' in a manner that either required a direct connexion with an investigation (past present of in the future) or was closely related to such investigations. The matter is made clearer when attention is focussed upon the considerations that a court must take into account in deciding which method should be used in determining whether the objection to production should be upheld.

597 The question then becomes: is a decision not to conduct an investigation a decision 'for the purposes of an investigation by the Director' as that term is used in s 52 of the PI Act? The appellant had alternative contentions. Its primary contention was that any action taken before any decision to investigate is made 'would not be for the purposes of an investigation'. Under this contention, an act will be purportedly done for the purposes of an investigation only when the Director has made a decision to investigate a specific complaint or complaints. Until you get to that point, there is no action that is protected by s 109(1). Alternatively, it said that an act would purportedly be done for the purposes of an investigation if it is purported to be done (1) for the purpose of a current investigation or (2) for the purpose of a completed investigation or (3) for the purpose of investigations generally or (4) for the purpose of an investigation that may be conducted by the Director in the future. Unlike the primary contention, the alternative contention accepts that s 109(1) applies to acts done for the purpose of a prospective investigation.

598 In my opinion, a decision not to conduct an investigation cannot, as a matter of logic, answer the description as an act 'for the purposes of an investiga-

custody of the member.

565 See [592] above.

tion'. Accordingly, the second decision is not immunised from review by s 109(1). SANTAMARIA JA

Does a contravention of s 38(1) of the Charter result in invalidity?

599 In his amended notice of appeal, Bare said that the trial judge had erred in failing to hold that the Court could hear and determine his claim on the basis that, in so far as the second decision involved a breach of s 38 of the Charter, it was tainted by jurisdictional error and that s 109 could not operate to oust review of such decisions.[566]

600 Given my opinion that s 109 of the PI Act does not preclude the judicial review of acts that were not done for the purposes of an investigation, it is unnecessary to determine whether a contravention of s 38 of the Charter is a form of jurisdictional error. However, as much of the argument before the Court addressed that issue, it may be useful to explain how the parties approached it and to offer some observations on their contentions.

601 Part 3 of the Charter is entitled 'Application of Human Rights in Victoria'. Division 4 of pt 3 is entitled 'Obligations on public authorities'. It contains the following provisions:

> **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.
>
> ...
>
> **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.

602 At trial, Bare had said that, as his claim for judicial review on the ground of s 38(1) unlawfulness was grounded in jurisdictional error, a privative provision, such as s 109 could not operate to oust the jurisdiction of the Court in respect of such a claim. He referred to *Kirk*,[567] in which it was held that it was beyond the power of a State legislature to enact legislation which would take from a State Supreme Court power to grant relief for jurisdictional error on the part of inferior courts and tribunals. In *Kirk*, the majority said:

> [t]he observations made about the constitutional significance of the supervisory jurisdiction of the State Supreme Courts point to the continued need for, and utility of, the distinction between jurisdictional and non-jurisdictional error in the Australian constitutional context. The distinction marks the relevant limit on State legislative power. Legislation which would take from a State Supreme Court power to grant relief on account of jurisdictional error is beyond State legislative power. Legislation which denies the availability of relief for non-jurisdictional

566 Ground 3.

567 (2010) 239 CLR 531 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ; Heydon J dissenting).

> error of law appearing on the face of the record is not beyond power.[568]

603 The trial judge framed the issue as follows: was it a legislative purpose of s 38(1) to take away a public authority's power to act in contravention of it? In seeking to resolve that question, she said:

> Under administrative law principles, whether a decision maker is bound to take a particular consideration into account and whether failure to do so will be significant enough to affect the validity of the outcome is to be ascertained having regard to the subject-matter, scope and purpose of the legislation requiring consideration of the matter, taking into account the nature of the repository of the power.[569]

The judge held that s 38(1) unlawfulness 'does not per se amount to jurisdictional error'.[570] She identified three reasons for reaching this conclusion. First, 'obligations to act compatibly with human rights and to give them proper consideration under s 38(1) lack the "rule-like quality", easily identified and applied, thought indicative of requirements for validity'.[571] Second, the possible range of invalidity would result in public inconvenience.[572] Third, the extrinsic materials suggest that 'the Charter's purpose was to have a normative effect and not to result in the automatic invalidity of administrative action'.[573]

604 The judge briefly considered s 39(1). She was not persuaded that the terms of that provision were inconsistent with her view that not all unlawful acts or omission under s 38(1) amounted to jurisdictional error.

Submissions of Bare and the Commission

605 At the hearing of the appeal, Bare renewed his contention that an act or decision of a public authority made in contravention of s 38(1) of the Charter is necessarily affected by jurisdictional error.[574] In support of that contention, he advanced three arguments: (a) textual; (b) contextual; and (c) (what might be termed) 'pragmatic'. First, he pointed to the use of the word 'unlawful' in s 38(1). It meant 'not authorised by law'; thus, a decision that was not authorised by law is a decision 'tainted by jurisdictional error'. Second, in so far as s 38(1) made it 'unlawful' for a public authority not to give proper consideration to relevant Charter rights, in effect, s 38 required a decision maker to give proper consideration to human rights. Jurisdictional error resulted where a decision maker had failed to take into consideration what

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568 Ibid 581 [100]. Heydon J did not dissent from this part of the decision of the majority.

569 Reasons [101] (citation omitted). She referred to *Project Blue Sky* (1998) 194 CLR 355, 390–1 [93] (McHugh, Gummow, Kirby and Hayne JJ) and *Peko-Wallsend* (1986) 162 CLR 24, 39–40 (Mason J).

570 Reasons [116].

571 Reasons [117] (citation omitted). The term 'rule-like quality' is taken from the judgment of McHugh, Gummow, Kirby and Hayne JJ in *Project Blue Sky* (1998) 194 CLR 355, 391 [95].

572 Reasons [118].

573 Reasons [119]. The judge referred to statements in the Second Reading Speech.

574 Bare's written submission addressed this subject. At the hearing of the appeal, he made no oral submissions, choosing to adopt the oral submissions of the Commission.

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it was required to do. He referred to *Craig*.[575] Further, he said that, if conduct which was 'unlawful' was not tainted by jurisdictional error, Parliament had sanctioned the surprising result: a public authority may make valid decisions that are unlawful. Bare said that the notion that s 38(1) lacked a 'rule-like' quality sat 'uncomfortably with the fact that in many countries the same rights contained in the Charter are identified, ruled upon and applied by courts on a daily basis, and constitute a limit on the power of public authorities.' Finally, Bare denied that his construction would lead to 'public inconvenience'. He said that any such inconvenience was no different from the inconvenience that attends acts or decisions 'impugned for jurisdictional error on any other basis'.

606 For its part, the Commission said that the trial judge had misconceived the effect of *Project Blue Sky*[576] and that her decision was one that 'would deprive one of the principal operative provisions of the Charter of any practical utility'. The Commission drew a distinction between the two limbs of s 38(1): (a) the obligation cast on a public authority to act in a way that is compatible with human rights (the substantive obligation) and (b) the obligation to take into account human rights (the procedural obligation). It said that the substantive obligation was one of the most important ways in which the Charter sought to achieve its main purpose: the protection and promotion of human rights in Victoria. In holding that acts incompatible with human rights were not invalid, the judge erred in holding that it was necessary for the Charter to reveal a clear intention that public authorities were to be deprived of power to act in contravention of the Charter.

607 The Commission identified two reasons for holding that any act or conduct in contravention of s 38(1) was invalid: (a) general principles of administrative law; and (b) s 39. It was a principle of administrative law that a decision maker who fails to take into account a relevant consideration makes a jurisdictional error and the resulting act or decision is therefore invalid.[577] After *Craig*[578] and *Kirk*,[579] the current approach of the High Court was to treat any error of law made by a tribunal as 'presumptively jurisdictional'.[580] The second limb of s 38(1) required all public authorities give 'proper consideration to a relevant human right'. Therefore, the failure to take into account any 'relevant human right', just like the failure to take into account any other relevant consideration, meant that the act or conduct was invalid.

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575 (1995) 184 CLR 163, 179.

576 (1998) 194 CLR 355.

577 The Commission referred to *Craig v South Australia* (1995) 184 CLR 163, 179; *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323, 351 [82].

578 (1995) 184 CLR 163, 179.

579 (2010) 239 CLR 531.

580 The description of the effect of *Craig v South Australia* (1995) 184 CLR 163 is taken from Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Thomson Reuters, 5th ed, 2013) 221 [4.330]. See also Carolyn Evans and Simon Evans, *Australian Bills of Rights: The Law of the Victorian Charter and the ACT Human Rights Act* (LexisNexis, 2008) [4.50].

608 *Project Blue Sky*[581] did not displace that basic principle of administrative law. In that case, the Court said that '[a] better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid'.[582] In that context, the question is whether the legislation either expressly, or by implication arising from its 'subject-matter, scope and purpose',[583] requires a particular matter to be taken into account. If it does, then a failure to take that matter into account results in invalidity. *Project Blue Sky* requires critical analysis of the legislation to determine whether a consideration is relevant or not. However, once a consideration has been deemed relevant and has not been taken into account, the authorities are to the effect that the decision is invalid. *Project Blue Sky* was to be applied to identify the procedural conditions that had to be satisfied before a power could be lawfully exercised; it formulated a test for determining what matters had to be considered before a power could be lawfully exercised. *Pace* the trial judge, that case did not address what was to be the consequence if a relevant matter had not been considered. By its use of the word 'unlawful', s 38(1) had made the proper consideration of the rights identified in the Charter relevant to the exercise of every power and the making of every decision; and, if they had not been considered the exercise of the power was tainted by jurisdictional error and the decision invalid.[584]

609 The trial judge had characterised that argument as circular. The Commission said that such a conclusion could only be drawn if there was some relevant difference between a statutory requirement that 'human rights must be considered' and the statutory description that it is 'unlawful for a public authority to fail to give consideration to human rights'. Such a difference could only be drawn if public authorities could choose to act unlawfully. Such a construction of the Charter would (a) be inconsistent with the rule of law; and (b) would fail to have due regard to s 1(2)(c) of the Charter, which identifies one of the purposes of the Charter as being to impose 'an obligation on all public authorities to act in a way that is compatible with human rights'.

610 Section 38 had been modelled on s 6(1) of the UK HRA. In *Attorney-General's Reference (No 2 of 2001)*,[585] Lord Nicholls of Birkenhead had said of s 6(1):

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581 (1998) 194 CLR 355.

582 Ibid 390 [93] (McHugh, Gummow, Kirby and Hayne JJ).

583 *Peko Wallsend* (1986) 162 CLR 24, 40. Mason J added:

> Not every consideration that a decision-maker is bound to take into account but fails to take into account will justify the court setting aside the impugned decision and ordering that the discretion be re-exercised according to law. A factor might be so insignificant that the failure to take it into account could not have materially affected the decision.

The Commission said that s 38(1) made each relevant human right a material consideration within Mason J's taxonomy.

584 Later the Commission said: 'a breach of s 38 is to engage in action that is not authorised, because Parliament has declared it unlawful, rather than there being some condition precedent to an exercise of power, which is the kind of thing that usually attracts a *Project Blue Sky* analysis'.

585 [2004] 2 AC 72.

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> The object of this provision ... is plain: such conduct should not occur. Public authorities cannot lawfully, that is, properly, conduct themselves in a way which is incompatible with a Convention right.[586]

Counsel for the Commission said that, in that case, the House of Lords 'would certainly regard an unlawful decision as one made without power and absolutely rejects the idea that a public authority has a choice to act unlawfully'.[587] Thus, when Parliament described the failure to take into account a human right as 'unlawful', it thereby created an obligation of the very kind that engages traditional administrative law principles concerning failure to take account of relevant considerations,[588] breach of which involves jurisdictional error.

611 As that was the effect of a contravention of the second limb of s 38(1), the same consequence must attach to a contravention of the first limb: acting in a way that was incompatible with a human right. Both forms of contravention were described as 'unlawful'; the same consequence should attach to both forms of unlawfulness. If failure to give proper consideration to a relevant human right leads to invalidity so must acting in a way that is incompatible with such rights. The Commission referred to *Sudi v Director of Housing*[589] in which Bell J had said that administrative action that was unlawful under s 38 of the Charter was void and of no effect.[590]

612 When that case was taken on appeal,[591] the Court of Appeal did not directly address the consequences of a contravention of s 38(1). However, Maxwell P and Weinberg JA had accepted that such contraventions would ground judicial review which, the Commission said, in the case of prohibition and mandamus required the establishment of jurisdictional error.[592]

613 The Commission said that the judge had also erred in holding that issues of inconvenience should weigh in the determination whether contraventions of s 38(1) led to invalidity. On the contrary, it argued that 'all incentive for public authorities to comply with' the section would be removed if a

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586 Ibid 92 [32].

587 Counsel referred to [2004] 2 AC 72, 92 [30] (Lord Bingham with whom Lords Steyn, Hoffmann, Hobhouse and Millett agreed).

588 The Commission referred to Victoria, *Parliamentary Debates,* Legislative Assembly, 4 May 2006, 1294 (Rob Hulls, Attorney-General) (quoted in Reasons [115]); Consultation Committee, Department of Justice, Victoria, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005) 124–5, stating by reference to s 38 that: 'The ability to apply for judicial review or a declaration of unlawfulness for failure to meet that obligation would mean that the traditionally narrow grounds of administrative law would be updated to give life to the enforcement of this new obligation.'

589 [2010] VCAT 328. The Commission also referred to *PJB V Melbourne Health* (2011) 39 VR 373 (Bell J).

590 Ibid [121].

591 *Director of Housing v Sudi* (2014) 33 VR 559.

592 The Commission said that the customary basis for judicial review, such as an application for judicial review pursuant to O 56 of the *Supreme Court (General Civil Procedure) Rules 2005* was jurisdictional error. That circumstance supported the proposition that contraventions of s 38(1) resulted in invalidity.

breach of s 38(1) did not affect validity. Further, the fact that the nature and extent of a statutory power were unclear did not deny the availability of remedies where the power was exceeded: in current times it has become common to focus on highly contestable questions of interpretation and difficult questions about the identification of the boundaries of a power. Those circumstances have not prevented the High Court from determining that there had been jurisdictional error.

614 Finally, the Commission contended that s 39(1) itself prohibited nothing; it was facultative. It permitted a person who may seek any relief or remedy with respect to an act or decision of a public authority on the ground that it was 'unlawful' to seek that relief or remedy on a ground of unlawfulness arising because of the Charter. As judicial review 'is ordinarily available only when jurisdictional error is established', the presence of the word 'unlawful' in both sections supports the proposition that any contravention of s 38(1) results in invalidity.

Submissions of IBAC and the Attorney-General

615 IBAC said that a contravention of s 38(1) of the Charter did not necessarily result in invalidity; unlawful decisions are not necessarily invalid. It referred to *Project Blue Sky*.[593] In so far as decisions made in contravention of s 38(1) are unlawful, their operation can be restrained without the disruptive effect of declaring past decisions invalid.[594] The language of s 38(1) does not negate authority conferred under another statute, especially a statute, such as the PI Act, that was enacted after the Charter. Clear language was needed to achieve the result that a breach of s 38(1) involved the invalid exercise of powers conferred under other legislation. IBAC noted that the appellant had not contended that the decision not to investigate his complaint was a breach of s 40 of the PI Act. Particularly when read with s 7(2) of the Charter, the requirements of s 38(1) are imprecise suggesting that incompatibility does not entail invalidity. The lack of precision in a legal requirement is an indication that a breach of it was not intended to result in invalidity. Given the decision in *Project Blue Sky*, it was erroneous to engage in *a priori* reasoning to the effect that the requirement of s 38(1) was (a) mandatory so that a failure to comply with it resulted in invalidity or (b) made certain conditions relevant such that a failure to have regard to them necessarily resulted in invalidity. Further, the exceptions to s 38(1) contained in the other subsections of s 38 compounded the impression that s 38(1) lacks the 'rule-like quality' spoken of in *Project Blue Sky*. Finally, the jurisdiction to restrain unlawful conduct in the future meant that it was not necessary to the normative character of the Charter to predicate invalidity of a contravention of s 38(1).

616 The Attorney-General said that, following *Project Blue Sky*, the enquiry whether Parliament intended that an error of law would result in invalidity

593 (1998) 194 CLR 355, 388–9 [91], 393 [100].
594 Ibid 392–3 [97]–[100].

could be characterised 'as an enquiry into whether or not Parliament intended that the error is of such significance as to lie altogether outside the powers of the decision-maker'. The Attorney-General adopted the reasons of the trial judge for answering that question in the negative.[595] He added that, as the word 'unlawful' had been used in both s 38 and s 39, it should be given the same meaning in both provisions. In s 39, the word was used to describe actions which were not invalid such as errors of law which appear on the face of the record. Finally, the appellant and the Commission had argued that a failure to take into account a relevant consideration necessarily connoted invalidity. The Attorney-General said the trial judge was right to dismiss this argument as circular: '[a] consideration is only a "relevant consideration", so as to give rise to jurisdictional error if not taken into account, if the decision-maker is bound by the relevant statute to consider it.' He referred to *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*.[596]

Analysis

617 The use of the term 'unlawful' does not necessarily connote invalidity: that every invalid act is an 'unlawful' act does not entail that every unlawful act is invalid.[597] In *Project Blue Sky,*[598] McHugh, Gummow, Kirby and Hayne JJ said:

> An act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it is depends upon whether there

595 He referred to Reasons [92]–[121].

596 (1986) 162 CLR 24, 39–40 (Mason J).

597 As with all other foreign human rights legislation, caution needs to be exercised in resorting to authorities on the UK HRA; see *Momcilovic v The Queen* (2011) 245 CLR 1, 37–8 [19] (French CJ) and 88–90 [151]–[159] (Gummow J) (Hayne J agreeing at 123 [280]). In the UK, the distinction between jurisdictional error and other legal error is almost non-existent. See the comments in *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 571 [65]. See also Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Thomson Reuters, 5th ed, 2013) 216–21 [4.280–4.330]. Of course, the constitutional reasons identified in *Kirk* which make the distinction between jurisdictional error and other error of significance do not exist in the UK. Next, it is not clear that the English courts have held that unlawfulness amounts to invalidity. See *Attorney-General's Reference (No 2 of 2001)* [2004] 2 AC 72. In that case, the House of Lords did not decide that a breach of the provisions of the European Convention scheduled to the *Human Rights Act* resulted in invalidity. Compare Lord Hobhouse at 117 [124]–[126] with Lord Millett at 118 [130]: 'Whatever the position in relation to past acts, in relation to proposed future acts there is no difference between the position in in Scotland and that in England'. The other Law Lords expressed agreement with both Lord Hobhouse and Lord Millett. Further, s 6(1) the *Human Rights Act* provides: 'It is unlawful for a public authority to act in a way which is incompatible with a Convention right'. To that extent it corresponds to the substantive obligation in s 38(1) of the Charter. There is no equivalent to the procedural obligation in s 38(1). See Justice Emilios Kyrou, 'Obligations of Public Authorities Under Section 38 of the Victorian Charter of Human Rights and Responsibilities' (2014) 2 *Judicial College of Victoria On-Line Journal* 43, 77, 80. However, the UK Act does not contain an equivalent to general proportionality clause in s 7(2) of the Charter. Finally, the provisions for remedies differ. Section 8(1) of the *Human Rights Act* provides a statutory cause of action: 'In relation to any act (or proposed act) of a public authority which the court finds is (or would be) unlawful, it may grant such relief or remedy, or make such order, within its powers as it considers just and appropriate'. Section 39(1) of the Charter is very different. It provides that claims for Charter-unlawfulness can supplement other claims arising from unlawfulness.

598 (1998) 194 CLR 355.

> can be discerned a legislative purpose to invalidate any act that fails to comply with the condition.[599]

618 Second, just because a consideration is relevant to the exercise of some power does not mean that a failure to take it into account necessarily means that the exercise of the power is invalid. Such a failure will result in invalidity only where the lawful exercise of the power was conditional upon its being taken into account. Cases in which the High Court have held that a failure to take into account a relevant consideration has resulted in invalidity must be taken to be cases in which the valid exercise of the power was conditional upon taking that consideration into account. What was said in *Peko-Wallsend,*[600] *Craig*[601] and *Minister for Immigration and Multicultural Affairs v Yusuf*[602] about invalidity arising from a failure to take into account relevant considerations should be understood as applying to those cases in which the taking of that consideration into account was a condition of the lawful exercise of the relevant power.

619 Third, the role of s 38 of the Charter is to inform the exercise of every power and function by every public authority, powers and functions that are created or delegated by *other* legislation. There is now an explicit obligation attached to the exercise of every power and function to give proper consideration to 'a relevant human right'. Holding that a failure to give such consideration results in the invalid exercise of that power or function means, in effect, that Parliament has introduced a condition upon which the valid exercise of every power conferred upon a public authority is based. It would have been a consequence that could readily have been provided for by express provision. There is no such provision. Nor is there anything in the extrinsic materials that suggests that consequence was intended.

620 Fourth, the requirements of s 38(1) are imprecise. In assessing whether acts done in breach of s 160 of the *Broadcasting Services Act 1992* (Cth) were invalid, in *Project Blue Sky,*[603] McHugh, Gummow, Kirby and Hayne JJ said: 'Not every obligation imposed by the section has a rule-like quality which can be easily identified and applied.'[604] That observation is relevant here in that, in determining whether particular conduct is compatible with a human

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599 Ibid 388–9 [91]. The intention of Parliament is also the criterion for determining whether, when it exercises a statutory power, a delegate becomes *functus officio* or is able to reconsider the exercise of power. In *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597, Gleeson CJ said (603–4 [8]):

> The question is whether the statute pursuant to which the decision-maker was acting manifests an intention to permit or prohibit reconsideration in the circumstances that have arisen. That requires examination of two questions. Has the tribunal discharged the functions committed to it by statute? What does the statute provide, expressly or by implication, as to whether, and in what circumstances, a failure to discharge its functions means that the tribunal may revisit the exercise of its powers … ?

600 (1986) 162 CLR 24, 39–40.

601 (1995) 184 CLR 163, 179.

602 (2001) 206 CLR 323, 351 [82].

603 (1998) 194 CLR 355.

604 Ibid 391 [95].

right, consideration must be given to s 7(2), which mandates a broad ranging inquiry. SANTAMARIA JA

621 Fifth, div 4 of pt 3 of the Charter comprises only ss 38 and 39. Each section uses the term 'unlawful'. It may be presumed that Parliament has used the term in the same way throughout the Division. In s 39(1), the term is used to include errors of law that do *not* result in invalidity. Australian public law distinguishes errors that result in invalidity (jurisdictional error) and those that do not (non-jurisdictional error). Error of law on the face of the record is a clear example of the latter type of error.[605] Section 39(1) speaks of a person seeking 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'. Such grounds include non-jurisdictional errors such as error of law on the face of the record. If the term 'unlawful' in s 39(1) includes errors that are non-jurisdictional, there is no basis for presuming that the same term, when used in s 38(1), relates solely to errors that are jurisdictional.[606]

622 In *Project Blue Sky,*[607] the Court was considering whether a failure to take into account a statutory provision meant that the relevant act or decision was invalid. In doing so, the Court described the distinction between provisions that were 'mandatory' and those that were 'directory' as 'elusive' and as having outlived its usefulness.[608] The majority said:

> A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid ... In determining the question of purpose, regard must be had to 'the language of the relevant provision and the scope and object of the whole statute.'[609]

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605 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 566–8 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), 585 (Heydon J).

606 In *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 480, 492 [26] the Court said:

> Jurisdictional error constitutes one basis on which the Supreme Court can make an order in the nature of certiorari to remove the purported legal consequences of a purported exercise of power under a state statute. That basis for the Supreme Court making an order in the nature of certiorari is entrenched by the Commonwealth Constitution. Error of law on the face of the record constitutes a separate and distinct basis on which the Supreme Court can make an order in the nature of certiorari to remove the legal consequences or purported legal consequences of an exercise or purported exercise of power under a state statute. That basis for the Supreme Court making an order in the nature of certiorari is not entrenched by the Commonwealth Constitution; its application can be excluded by statute. Where it is not excluded, however, it applies independently of jurisdictional error. That is to say, where error of law on the face of the record is not excluded by statute as a basis for making an order in the nature of certiorari, and where an error of law on the face of the record is found, an order in the nature of certiorari can be made so as to remove the legal consequences or purported legal consequences of an exercise or purported exercise of power irrespective of whether the error of law also constitutes a breach of a condition of the valid exercise of that power (citations omitted).

607 (1998) 194 CLR 355.

608 Ibid 390 [93].

609 Ibid 390–1 [93] (McHugh, Gummow, Kirby and Hayne JJ) (citation omitted). In *Burwood Council v Ralan Burwood Pty Ltd (No 3)* (2014) 206 LGERA 40, Sackville AJA (with whom McColl and Barrett JJA agreed) said (at [156]): 'In *Smith v Wyong Shire Council* Spigelman CJ pointed out that *Project Blue Sky* expressly approved a line of authority in New South Wales on which McHugh JA relied in *Woods v Bate*. In the latter case, McHugh JA said that:

Similarly, the fact that a statute requires that consideration be given to certain matters does not, by itself, close the question whether the taking of those considerations into account is a condition of validity. A requirement to consider matters may, in one statute, be a condition of validity; not so in others.[610]

623 In *Project Blue Sky*, McHugh, Gummow, Kirby and Hayne JJ addressed the distinction between unlawfulness and invalidity. They said:

> In a case like the present, however, the difference between holding an act done in breach of s 160 is invalid and holding it is valid is likely to be of significance only in respect of actions already carried out by, or done in reliance on the conduct of, the ABA. Although an act done in contravention of s 160 is not invalid, it is a breach of the Act and therefore unlawful. Failure to comply with a directory provision 'may in particular cases be punishable'. That being so, a person with sufficient interest is entitled to sue for a declaration that the ABA has acted in breach of the Act and, in an appropriate case, obtain an injunction restraining that body from taking any further action based on its unlawful action.[611]

The Commission contended that the majority was drawing a distinction between decisions that are 'invalid' and liable to be quashed and those that were not. It said that the present case provided an example: unless a decision had been made under s 40(4) to investigate the complaint, s 40(2) required that the complaint be referred to the Commissioner for investigation. A declaration of unlawfulness would be of no assistance unless the decision itself was 'invalid' and could be quashed.

624 The Commission's contention that s 38(1), one of the principal operative provisions of the Charter, would be deprived of 'any practical utility' unless invalidity is the consequence of its breach may go too far. A decision made in breach of s 38(1) is unlawful, regardless of whether it is invalid. It could be quashed, if it appears on the record, in the same way as every other error of law.[612] Further, if a decision is unlawful, the remedies of declaration and injunction are also available to a the plaintiff who has standing.

625 A further matter needs to be considered when determining the consequences of a contravention of s 38(1). The Charter itself has made provision

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> In recent times the courts have shown great reluctance to invalidate an act done pursuant to a statutory provision because of the failure to comply with an antecedent condition. Speaking generally, I think that, at the present time, the proper approach is to regard a statutory requirement, expressed in positive language, as directory unless the purpose of the provision can only be achieved by invalidating the result of any departure from it, irrespective of the circumstances or resulting injustice.' (Citations omitted.)

See also *R v Soneji* [2006] 1 AC 340, 352–3 (Lord Steyn).

610 See also *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 294, 319–20 [73] (McHugh J), 345–6 [173] (Kirby J), 353–4 [205] (Hayne J); *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212, 225 [44] (Gleeson CJ, Gummow and Heydon JJ): 'the answer depends upon the construction of the Act to determine whether it was a purpose of the Act that an act done or not done, in breach of the provision, should be invalid'.

611 (1998) 194 CLR 355, 393 [100] (citations omitted).

612 It is to be recalled that, in Victoria, there is an extended view of the 'record'. See [563] above.

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for the consequences of a breach of s 38. In fact, it has limited the remedies that are available for Charter-unlawfulness. Section 39(1) distinguishes 'grounds' from 'any relief or remedy'. It then provides that if, apart from the Charter, a person has 'grounds' for any relief or remedy, those grounds may be supplemented by 'a ground of unlawfulness arising because of this Charter'. Given that that 'Charter unlawfulness' performs a supplementary function, there is a basis for considering that it was not a purpose of Parliament that 'Charter unlawfulness' itself be a ground of invalidity. There is nothing in the extrinsic materials that suggests that Parliament was seeking to restrict access to the courts and to curtail remedies in circumstances where a public authority was acting wholly outside the law. Further, the restriction that s 39(1) places upon the availability of relief for a contravention of s 38(1) also suggests that Parliament did not intend s 38(1) to have the 'rule-like quality which can be easily identified and applied' and which was spoken of in *Project Blue Sky* as a characteristic of provisions that must be complied with as a condition of validity.

626 Finally, the contention that, absent a rule that a contravention of s 38(1) results in invalidity, the Charter will be stripped of its normative force should be rejected. As Emerton J said in *Castles*:[613]

> The requirement in s 38(1) to give proper consideration to human rights must be read in the context of the Charter as a whole, and its purposes. The Charter is intended to apply to the plethora of decisions made by public authorities of all kinds. The consideration of human rights is intended to become part of decision-making processes at all levels of government. It is therefore intended to become a 'common or garden' activity for persons working in the public sector, both senior and junior. In these circumstances, proper consideration of human rights should not be a sophisticated legal exercise.[614]

In *Castles*, the judge was not considering whether the failure to give proper consideration to a relevant human right resulted in invalidity.[615] However, her observations about the intended reach of the Charter tells, in my opinion, against a contravention of s 38(1) necessarily resulting in invalidity.

Is there an implied procedural right under s 10(b) of the Charter to an 'effective' investigation of a claim of a breach of human rights stated in that section?

627 Bare said that the trial judge had erred in holding that the human right recognised in s 10(b) of the Charter, read in the light of the Charter as a whole, does not give a right to an effective investigation of a credible claim of cruel, inhuman and degrading treatment. He said that an 'effective investigation' of such a credible claim against members of the Victorian Police relevantly requires an investigation by an organisation that does not have a hierarchical or institutional connection to the Victorian Police and that has

613 (2010) 28 VR 141.

614 Ibid 184 [185].

615 Rather, the question was: what must be done to satisfy the requirement found in the procedural limb of s 38(1)?

'practical independence' from Victoria Police.[616]

628 The contention was based on the manner in which international tribunals have interpreted the provisions upon which s 10(b) of the Charter was based, in particular art 7 of the ICCPR[617] and art 3 of the European Convention.[618]

629 Bare and the Commission argued that, as each of art 7 of the ICCPR and art 3 of the European Convention had been interpreted as giving rise to an implied right to an investigation of a complaint as ancillary to the rights expressly recognised in those articles, s 10(b) should be similarly interpreted. In doing so, they relied upon s 32(2) of the Charter which provides:

> 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.

630 IBAC and the Attorney-General said that no such implication should be drawn. They said that, when it drew that implication, the ECtHR had relied upon provisions in the European Convention other than art 3 and that, when it had drawn, or had accepted, the implication, the House of Lords had relied upon principles which had no application in Victoria.

631 For the reasons given below, in my opinion, s 10(b) of the Charter does not contain an implied procedural right to an investigation of a complaint. International law and the judgments of domestic, foreign and international courts and tribunals may be considered in the interpretation of s 10(b). But, when it comes to the interpretation of the rights recognised in the Charter, care needs to be taken with the use of authorities in other jurisdictions, notwithstanding that the relevant rights are expressed in identical terms and are drawn from a common source.[619] A human right recognised in another jurisdiction may take its place in a legislative and juristic matrix that is quite different from that in which the rights recognised in the Charter are located. As it turns out, the procedural right recognised in other jurisdictions arises from the existence and operation of provisions that are not contained in the Charter. Further, those provisions are designed, in large part, to ensure that there will be effective remedies for contraventions of those rights. The Charter contains its own remedial provisions.

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616 Ground 5 of the amended notice of appeal.

617 Opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976). See [472] above.

618 Opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), as amended by *Protocol No 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 13 May 2004, CETS No 194 (entered into force 1 June 2010). See [471] above.

619 *Momcilovic v The Queen* (2011) 245 CLR 1, 37–8 [19] (French CJ), 88–90 [151]–[159] (Gummow J) (Hayne J agreeing 123 [280]); see also 211 [546], 217 [565] (Crennan and Kiefel JJ).

International provisions SANTAMARIA JA

632 The materials to which the parties refer, in relation to the content of the rights under s 10(b) of the Charter, should be considered with reference to these relevant provisions of the ICCPR and the European Convention:

ICCPR

Article 2

1. Each State Party to the present Covenant undertakes to respect and ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, religion, political or other opinion, national or social origin, property, birth or other status.
2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other means as may be necessary to give effect to the rights recognised in the present Covenant.
3. Each State Party to the present Covenant undertakes:
   (a) to ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
   (b) to ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State and to develop the possibilities of judicial remedy;
   (c) to ensure that the competent authority shall enforce such remedies when granted.

Article 7

No-one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no-one shall be subjected without his free consent to medical or scientific experimentation.

European Convention

Article 1

Obligation to respect human rights

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention.

Article 3

Prohibition of Torture

No-one shall be subjected to torture or to inhuman or degrading treatment or punishment.

Article 13

Right to an Effective Remedy

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

Reasons of the trial judge

633 The trial judge said that it was 'common ground' that the human rights recognised in the Charter 'should be construed in the broadest possible way' and that it 'should not be assumed that the Charter has narrowed traditional common law rights'.[620] While s 10(b) had effectively adopted the words of art 7 of the ICCPR and she was entitled to consider international law and the judgments of domestic, foreign and international courts and tribunals relevant in construing it, the trial judge held that s 10(b) did not contain the asserted procedural right. First, it contained nothing express to that effect. Second, s 10(b) of the Charter was distinguishable from art 7 of the ICCPR and art 3 of the European Convention as, unlike those instruments, the Charter did not contain provisions such as art 2(3) of the ICCPR and art 13 of the European Convention which imposed on the contracting States to those conventions an obligation to confer on their citizens a right to an effective remedy where their human rights had been violated. Third, she observed that 'the Charter not only states exhaustively how such rights are to be protected, but also makes a number of procedural requirements relating to the protection of a number of other rights'.[621] Fourth, the trial judge said that, even if the implication was confined to s 10(b), given that s 38(1) imposed duties on all public authorities, it would 'be impracticable to require many such bodies to bring about an independent investigation of a complaint of their own alleged breach of s 38(1)'.[622] Finally, while the provision was to be construed conformably with Australia's international obligations, the 'State's established criminal and civil justice systems would appear to supply the means for compliance with any investigative obligations the State might have in relation to a complaint of abuse of the right under s 10(b)'.[623]

Contentions of Bare and of the Commission

634 On the hearing of the appeal, Bare adopted the submissions of the Commission.

635 The Commission said General Comments of the UN Human Rights Committee provide guidance as to the proper interpretation and application of the ICCPR.[624] In General Comment 20, the Human Rights Committee said that art 7 of the ICCPR implicitly requires that '[c]omplaints must be investigated promptly and impartially by competent authorities so as to make the remedy effective'.[625] The Committee does not consider the right to an effective investigation of a credible allegation of breach of art 7 to

620 *Re Application under the Major Crime (Investigative Powers) Act 2004* (2009) 24 VR 415, 434 [80] (Warren CJ).

621 Reasons [160]. She gave as examples s 21 (right to liberty and security of person), s 22 (right to humane treatment when deprived of liberty) and s 24 (right to a fair hearing).

622 Reasons [161].

623 Reasons [162].

624 See *PJB v Melbourne Health* (2011) 39 VR 373, 390 [66] (Bell J).

625 Human Rights Committee, *General Comment No 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment)*, 44th sess (10 March 1992) [14], [21].

depend on the separate obligation to provide effective remedies.[626] Given Australia's international obligation to conduct an effective investigation in such circumstances, it should be assumed that, when it enacted s 10(b) of the Charter and based it on art 7 of the ICCPR, Parliament intended it to be interpreted in the same way. SANTAMARIA JA

636 The extensive jurisprudence on art 3 of the European Convention supports the proposition that s 10(b) of the Charter includes a procedural right to an effective investigation of credible allegations of cruel, inhuman and degrading treatment. Whatever may have been the case in the past, 'the mainstream jurisprudence of the European Court in relation to the legal foundation for the obligation to conduct an effective investigation of credible allegations of cruel, inhuman and degrading treatment' did not now depend upon the obligation of States Parties to provide an 'effective remedy'[627] for breach of rights. The ECtHR relied on art 13 in only one of the 30 cases ('so far decided in 2013') that considered the procedural limb of art 3. In cases where it is not possible to determine whether a person suffered cruel, inhuman or degrading treatment (perhaps because no effective investigation has occurred), art 13 cannot provide the source of the right to an effective investigation, because it is not known whether any breach of rights occurred that requires an 'effective remedy'. In such cases, the ECtHR ordinarily holds that the failure to undertake an effective investigation is itself a contravention of the procedural limb of art 3.

637 Next, although art 1 of the European Convention states that the parties 'shall secure to everyone within their jurisdiction' the rights and freedoms in the European Convention, that article had *not* been incorporated into the UK HRA. Despite that, English courts had held that art 3 of the European Convention contains a right to an effective investigation of credible allegations of breach. In *R (L (A patient)) v Secretary of State for Justice*,[628] Lord Phillips of Worth Matravers said that the right to such an investigation was 'not so much a secondary procedural obligation but rather part of the positive obligation'.[629] In *Morrison v Independent Police Complaints Commission*,[630] in a case where the issue was whether a complaint against the police was required to be investigated by the Independent Police Complaints Commission itself or could instead be referred to the police to investigate, the High Court accepted that the ECtHR had implied a duty to investigate arguable breaches of art 3. The Commission also referred to *R (L (A patient)) v Secretary of State for Justice*;[631] *R (Mousa) v Secretary of State for Defence*;[632] *Allen v*

626 Ibid [10]. The Commission referred to *María Cruz Achabal Puertas v Spain,* Human Rights Committee*, Views: Communication No 1945/2010*, 107th sess, UN Doc CCPR/C/107/D/1945/2010 (27 March 2013) [8.6].

627 Article 13 of the European Convention and art 2 of the ICCPR.

628 [2009] 1 AC 588.

629 Ibid 610 [26].

630 [2009] EWHC 2589 (Nicol J).

631 [2009] 1 AC 588.

632 [2011] EWCA Civ 1334.

Chief Constable of Hampshire;[633] *DSD & NBV v Commissioner of Police for the Metropolis*.[634]

638 Finally, the Commission contended that, if the procedural limb of s 10(b) did rely upon something akin to the obligation contained in art 1 of the European Convention, the combination of s 6(1) and s 38 of the Charter supplied the necessary obligation.[635]

Contentions of IBAC

639 For its part, IBAC said that the appellant and the Commission had misconceived the relevant Strasbourg jurisprudence and the English authorities. True, European cases have 'repeatedly recognised that the procedural right arises by way of implication *inter alia* from obligations assumed by international law States that are not imposed on public authorities by the Charter. The implication is thus limited to the context of applying instruments that include such obligations and does not arise here'. The leading cases in Europe rely on the *Assenov* principle in which the procedural right was held to depend upon an implication '*inter alia* from art 1 of the ECHR by which the parties to the Convention assumed obligations to "secure to everyone within their jurisdiction the rights and freedoms defined in ... [the] Convention" '. IBAC said that that provision had no analogue in the Charter. It said that the real issue 'is whether in enacting s 10(b) Parliament intended to recognise the implied procedural right even though it cannot be implied without resort of other elements of the ICCPR which have no analogue in the Charter context'. While the rights in the Charter were modelled on those in the ICCPR and s 32 of the Charter permitted reference to international materials, it did not require rights to be given the same meaning as any cognate right in international law. Caution had to be exercised in assuming that the matrix in which other countries had located their recognition of human rights was relevantly identical to that in Victoria. IBAC said that, in affirming the existence of the implied procedural right referred to in its General Comments 20 and 31, the Human Rights Committee referred to the general obligation imposed on State Parties to the Convention in art 2 of the ICCPR. The fact that recent Strasbourg jurisprudence did not refer to the obligation in art 13 of the European Convention to provide effective remedies did not mean 'that the role this obligation played in the development of the jurisprudence on the procedural limb is to be ignored'. Further, the trial judge had distinguished the Charter from international instruments in so far as the former, unlike the latter, lacked any obligation to secure the enjoyment of a right or to remedy its breach. European cases still rely on the *Assenov* principle which rests on art 1 of the European Convention. The trial judge had been correct to observe that the implication in art 3 of the European Convention of a procedural right to an effective independent investigation relies, either

633 [2013] EWCA Civ 967 [42]–[44].
634 [2015] 2 All ER 272 (***DSD & NBV***).
635 Section 6(1) provides inter alia: 'All persons have the human rights set out in pt 2'.

directly or indirectly upon art 1 (effective remedies) of the Convention. In relation to the UK decisions, the fact that the UK HRA does not reproduce art 1 of the European Convention is immaterial 'because the rights that are scheduled to the HRA are the clauses of the ECHR itself and the HRA is the principal means by which the UK implements the ECHR in fulfilment of art 1'. Further, by s 2(1) of the English Act, courts and tribunals are required to take into account Strasbourg jurisprudence. IBAC rejected the submission that s 6 and s 8 were analogous to art 1 of the European Convention: 'The Charter advances and promotes the rights and freedoms relevantly here in the particular ways prescribed in s 38(1) and not otherwise: by requiring public authorities to act in a manner that is compatible with, and in making decisions to give proper consideration to, relevant human rights'. There was no analogy to be drawn between the obligation of States to secure rights with the obligations on Victorian public authorities to act compatibly with human rights and to give them proper consideration in decision making. SANTAMARIA JA

Does the European Court of Human Rights consider the right to an independent investigation relies solely on Article 7 of the ICCPR?

640 In *Vitkovskiy v Ukraine*,[636] the applicant had lodged with the ECtHR an application under art 34 of the European Convention in which he alleged, in particular, that he had been ill-treated by the police and that there had been no adequate domestic investigation of the matter. The applicant was questioned by police at Novomoskovsk Police Station in connexion with a suspected attempted theft. The officers allegedly subjected him to ill-treatment to induce him to confess. Specifically, according to the applicant, they punched and kicked him, strangled him with a towel, put a gas mask on his face and made it difficult for him to breathe, as well as giving him electric shocks to his fingers and testicles. The applicant also allegedly had an injury to his chin, which caused extensive bleeding. He complained that he had been ill-treated by the police and that there had been no effective domestic investigation of the matter. He relied on art 3 of the European Convention. In its judgment upholding his application, the Fifth Section of the ECtHR said:

> The Court emphasises that where an individual raises an arguable claim that he or she has been seriously ill-treated by police in breach of Article 3, that provision requires by implication that there should be an effective official investigation capable of leading to the identification and punishment of those responsible. Otherwise, the general legal prohibition of torture and inhuman and degrading treatment and punishment would, despite its fundamental importance, be ineffective in practice, and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity (see *Assenov and Others v Bulgaria* and *Labita v Italy*).[637]

641 As is evident, the Fifth Section based its decision on *Assenov v Bulgaria*.[638]

636 European Court of Human Rights, Fifth Section, Application No 24938/06, 26 September 2013.
637 Ibid [96] (citations omitted).
638 (1998) 28 EHRR 652 (***Assenov***) (the report of the Court commences at 696).

In that case, the applicants were a family of Bulgarian nationals, of Roma origin, who lived in Shoumen, Bulgaria. Assenov was born in 1978. On 19 September 1992, while gambling in the market square in Shoumen, he was arrested by an off-duty policeman and taken to the nearby bus station, where the officer called for back-up. Subsequently his parents, who were both working at the bus station, came and asked for their son's release. His father, as a way of showing that he would administer any necessary punishment, took a strip of plywood and hit his son. At some point, two other policemen arrived. The applicants alleged that these officers hit the boy with truncheons. A dispute ensued between the boy's parents and the police, although it appears that Assenov himself was unaggressive and compliant. He and his father were handcuffed and forced into a police car. They were taken to the police station, where they were detained for approximately two hours before being released without charge. Assenov alleged that he was beaten with a toy pistol and with truncheons and pummelled in the stomach by officers at the police station. Assenov alleged that the events of 19 September 1992 had given rise to violations of art 3 of the Convention. He claimed that his complaints had not been taken seriously by the authorities in Bulgaria and that there was a lack of effective domestic remedies. The ECtHR said:

> The Court considers that, in these circumstances, where an individual raises an arguable claim that he has been seriously ill-treated by the police or other such agents of the State unlawfully and in breach of Article 3, that provision, read in conjunction with the State's general duty under Article 1 of the Convention to 'secure to everyone within their jurisdiction the rights and freedoms defined in ... [the] Convention', requires by implication that there should be an effective official investigation. This obligation, as with that under Article 2, should be capable of leading to the identification and punishment of those responsible. If this were not the case, the general legal prohibition of torture and inhuman and degrading treatment and punishment, despite its fundamental importance, would be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity.[639]

The Commission had found that Assenov had an arguable claim that he had been mistreated by the police, and that the official investigation had not been sufficiently thorough and independent to satisfy art 13 of the European Convention. The Court continued:

> The Court recalls that Article 13 guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of this Article is thus to require the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their obligations under this provision.
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> The scope of the obligation under Article 13 varies depending on the nature of the applicant's complaint under the Convention. Where an individual has an

639 Ibid 701 [102] (**the *Assenov* principle**) (citations omitted).

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> arguable claim that he has been ill-treated in breach of Article 3, the notion of an effective remedy entails, in addition to a thorough and effective investigation of the kind also required by Article 3, effective access for the complainant to the investigatory process and the payment of compensation where appropriate.[640]

642 There has been a long line of cases that have adopted the *Assenov* principle.[641] For example, in *MC v Bulgaria*,[642] a young girl said that her complaint that she had been raped by two men had not been adequately investigated by the authorities because she had not resisted the assault upon her. Relying upon several articles of the European Convention (including art 3), she said that Bulgarian law did not provide effective protection against sexual abuse in so far as prosecutions were only brought where the victim had actively resisted. She also alleged that the State had failed properly to investigate the offences. In the event, the Court identified two matters: whether the law of Bulgaria was so flawed as to amount to a breach of the State's positive obligations under arts 3 and 8 and whether the shortcomings in the investigation were so flawed as to amount to a breach of the same articles. In referring to the obligation upon the State to conduct an investigation, the ECtHR said: 'In a number of cases, art 3 of the Convention gives rise to a positive obligation to conduct an official investigation (see *Assenov v Bulgaria*). Such a positive obligation cannot be considered in principle to be limited solely to cases of ill-treatment by State agents (see, mutatis mutandis, *Calvelli and Ciglio v Italy*).[643]

643 However, the Commission said that: 'There have been at least 14 separate cases in 2013 alone regarding allegations of torture or ill-treatment by police where the European Court has found a breach of the implied procedural element of art 3 because of lack of an effective investigation without linking that finding to any other article in the ECHR'.[644] It referred, inter alia, to *Davitidze v Russia*.[645] In that case, the Court summarized its general princi-

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640 Ibid 704 [117] (citation omitted). Thus, art 1 (of the European Convention) requires the availability of a thorough and effective investigation and art 13 (of the ICCPR) requires effective access for the complainant to the investigatory procedure and the payment of compensation where appropriate.

641 In *Labita v Italy* (2000) 46 EHRR 1228, GC, the ECtHR effectively restated the *Assenov* principle.

642 (2005) 40 EHRR 20.

643 Ibid [151]. It was on this basis that the Court continued (at [153]):

> On that basis, the Court considers that States have a positive obligation inherent in Articles 3 and 8 of the Convention to enact criminal-law provisions effectively punishing rape and to apply them in practice through effective investigation and prosecution.

644 It referred, by way of example, to *Davitidze v Russia* (European Court of Human Rights, First Section, Application No 8810/05, 30 May 2013); *Popa v Moldova* (European Court of Human Rights, Third Section, Application No 17008/07, 12 February 2013, FINAL 12 May 2013); *Grimailovs v Latvia* (European Court of Human Rights, Fourth Section, Application No 6087/03, 25 June 2013); *Holodenko v Latvia* (European Court of Human Rights, Fourth Section, Application No 17215/07, 2 July 2013); *Karabet And Others v Ukraine* (European Court of Human Rights, Fifth Section, Applications No 38906/07 and 52025/07, 17 January 2013, FINAL 17 April 2013); *Kummer v Czech Republic* (European Court of Human Rights, Fifth Section, Application No 32133/11, 25 July 2013); *Sorokins and Sorokina v Latvia* (European Court of Human Rights, Fourth Section, Application No 45476/04, 28 May 2013).

645 European Court of Human Rights, First Section, Application No 8810/05, 30 May 2013.

ples governing an allegation of a lack of an effective investigation in respect of 'beatings'. It said:

> The Court reiterates that where an individual raises an arguable claim that he has been seriously ill-treated by agents of the State in breach of art 3 there should be a thorough and effective investigation (see, among others, *Assenov v Bulgaria* and *Gäfgen v Germany*).[646]

644 In *Milanovic v Serbia*,[647] the applicant was a member of the Hare Krishna religious community in Serbia. He was subject to repeated personal assaults. Despite his constant complaints to the police, they failed to find relevant inculpatory evidence. He complained that his Convention rights had been violated in so far as the State had failed to prevent repeated attacks upon him and was unwilling to conduct a proper investigation of his complaints. The Court referred to art 3 of the European Convention and described the obligations it imposed upon the State to conduct an effective official investigation leading to the identification and punishment of those responsible. It described the relevant principles as including the following:

> The Court further recalls that where an individual raises an arguable claim that he has been seriously ill-treated in breach of art 3, that provision, read in conjunction with art 1 of the Convention, requires by implication that there should also be an effective official investigation capable of leading to the identification and punishment of those responsible (see *Assenov and Others v Bulgaria*). A positive obligation of this sort cannot, in principle, be considered to be limited solely to cases of ill-treatment by State agents (see *MC v Bulgaria*; *Šeèiæ v Croatia*).[648]

645 The continued reference to the *Assenov* principle makes it clear that the implication of a procedural right arises from the existence of art 1 of the ICCPR and art 13 of the European Convention, neither of which has any equivalent in the Charter.[649]

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646 Ibid [98] (citations omitted). In *Gäfgen v Germany* (European Court of Human Rights, Grand Chamber, Application No 22978/05, 1 June 2010), the Court said (at [117]):

> As regards the requirement of a thorough and effective investigation, the Court reiterates that where an individual raises an arguable claim that he has been seriously ill-treated by the police or other such agents of the State unlawfully and in breach of art 3, that provision, read in conjunction with the State's general duty under art 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in … [the] Convention", requires by implication that there should be an effective official investigation. Such an investigation, as with one under art 2, should be capable of leading to the identification and punishment of those responsible

and traced the jurisprudence back to *Assenov*.

647 [2010] ECHR 2029.

648 Ibid [85] (citations omitted).

649 The references to *MC v Bulgaria* (2005) 40 EHRR 20 and *Milanovic v Serbia* (2014) 58 EHRR 33 are of particular significance when *DSD & NBV v Commissioner of Police for the Metropolis* [2014] EWHC 436 (QB); [2015] 2 All ER 272 (Green J) is discussed below.

Does the United Nations Human Rights Committee consider the right to an independent investigation relies solely of art 3 of the ICCPR? SANTAMARIA JA

646 As indicated above, the Commission also relied upon General Comment 20 the United Nations Human Rights Committee and said the Committee did not consider the right to an effective investigation of a credible allegation of breach of art 7 of the ICCPR to depend on the separate obligation to provide effective remedies.[650] In support of its contention, the Commission referred to *Maria Cruz Achabal Puertas v Spain*.[651] The Commission referred to [8.6] of the communication of the Committee of the views adopted at its 107th session.[652] Paragraph [8.6] is as follows:

> The Committee recalls its general comments No 20 (1992), and No 31 (2004) as well as its settled jurisprudence, according to which complaints alleging a violation of article 7 must be investigated promptly, thoroughly and impartially by the competent authorities and appropriate action must be taken against those found guilty … In those circumstances, the Committee considers that the investigation conducted by the domestic courts was not sufficient to guarantee the author her right to an effective remedy and that the facts before it constitute a violation of article 7, read independently and in conjunction with article 2, paragraph 3, of the Covenant.[653]

647 As is plainly expressed, the Committee has based its proposition that 'complaints alleging a violation of article 7 must be investigated promptly, thoroughly and impartially by the competent authorities' on General Comments 20[654] and 31[655] and its 'settled jurisprudence'.[656] General Comment 20 is entitled '*Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment)'.* Paragraph 14 is as follows:

> Article 7 should be read in conjunction with article 2, paragraph 3, of the Covenant. In their reports, States parties should indicate how their legal system effectively guarantees the immediate termination of all the acts prohibited by article 7 as well as appropriate redress. The right to lodge complaints against maltreatment prohibited by article 7 must be recognized in the domestic law. Complaints must be investigated promptly and impartially by competent authorities so as to make the remedy effective. The reports of States parties should provide specific information on the remedies available to victims of maltreatment and the procedure that complainants must follow, and statistics on the number of complaints and how they have been dealt with.[657]

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650 Articles 2(1) and (2) of the ICCPR.

651 Human Rights Committee, *Views: Communication No 1945/2010* 107th sess, UN Doc CCPR/C/107/D/1945/2010 (27 March 2013).

652 11–28 March 2013.

653 Human Rights Committee, *Views: Communication No 1945/2010* 107th sess, UN Doc CCPR/C/107/D/1945/2010 (27 March 2013) 13–14 [8.6].

654 General comment No 20 (1992); the Committee referred to [14].

655 General comment No 31 (2004); the Committee referred to [14].

656 By way of example, *Benitez Gamarra v Paraguay* (Human Rights Committee, Communication No 1829/2008, 22 March 2012) [7.5].

657 Human Rights Committee, *General Comment No 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment)*, 44th sess (10 March 1992).

General Comment 31 is entitled '*The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*'. Paragraph 15 is as follows:

> Article 2, paragraph 3, requires that in addition to effective protection of Covenant rights States Parties must ensure that individuals also have accessible and effective remedies to vindicate those rights. Such remedies should be appropriately adapted so as to take account of the special vulnerability of certain categories of person, including in particular children. The Committee attaches importance to States Parties' establishing appropriate judicial and administrative mechanisms for addressing claims of rights violations under domestic law. The Committee notes that the enjoyment of the rights recognized under the Covenant can be effectively assured by the judiciary in many different ways, including direct applicability of the Covenant, application of comparable constitutional or other provisions of law, or the interpretive effect of the Covenant in the application of national law. Administrative mechanisms are particularly required to give effect to the general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies. National human rights institutions, endowed with appropriate powers, can contribute to this end. A failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant. Cessation of an ongoing violation is an essential element of the right to an effective remedy.[658]

In *Benitez Gamarra v Paraguay*,[659] the Committee referred to its 'settled jurisprudence' (that 'complaints alleging a violation of art 7 must be investigated promptly, thoroughly and impartially by the competent authorities') and traced it back to General Comments 20 and 31.[660]

648 In light of the foregoing, the Commission's contention that the Human Rights Committee does not consider that the right to an independent investigation of torture or degrading treatment does not depend upon art 2 of the ICCPR cannot be sustained.

The UK Human Rights Act 1998

649 The Commission said that the most relevant authorities were the English cases construing the UK HRA. Those authorities were said to be relevant as they accepted that there was a right to an effective investigation of a credible claim of a breach of art 3 of the European Convention (the section corresponding to s 10(b) of the Charter), notwithstanding that that Act did not have any equivalent to art 1 of the European Convention or art 13 of the ICCPR. The Commission said that those cases were 'the best guide' for evaluating the case put against Bare by IBAC and the Attorney-General.[661]

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658 Human Rights Committee, *General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant,* 80th sess (29 March 2004).

659 Human Rights Committee, Communication No 1829/2008, 22 March 2012.

660 Ibid [7.5].

661 Counsel for the Commission referred, in particular, to *R (L (A patient)) v Secretary of State for Justice* [2009] 1 AC 588, 610 [26] and *R (Gentle) v Prime Minister* [2008] 1 AC 1356. In the latter case, Lord Bingham of Cornhill said (at 1366 [5]): 'This procedural duty does not derive from the express terms of article 2, but was no doubt implied in order to make sure that the substantive right was effective in practice'. Article 2 of the Convention provides: 'Everyone's right to life

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The Commission said that underlying these cases 'is the familiar legal idea that a grant of a right or conferral of a power carries with it all that is necessary in order to make it effective'. It said they employed the kind of reasoning: 'there is no point telling people that they have a right not to be tortured or subjected to treatment in a cruel, inhuman or degrading way if there is no way in practical terms that effect can be given to that right'. By way of example, the Commission referred to *DSD & NBV*.[662]

Analysis of English authorities

650 In several cases under the UK HRA, courts have held that there is an implied obligation to conduct an independent and effective investigation into credible complaints of a breach of art 3 of the European Convention notwithstanding that art 1 of the European Convention (upon which cases such as *Assenov* are based) does not form part of that Act.

651 In *R (Mousa) v Secretary of State for Defence*,[663] the claimant represented a large number of Iraqis who complained that they had been subjected to ill treatment, in breach of art 3 of the European Convention, at the hands of British forces in Iraq. Inquiries had been established; the proceeding concerned their adequacy rather than any obligation to conduct them. It was common ground that there had to be an investigation that was independent effective and reasonably prompt. The Court referred to *Jordan v United Kingdom*[664] in which it was decided that the right to an investigation in an art 2 case (right to life) also existed in an art 3 case. In *Jordan*, the ECtHR had said:

> The obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to 'secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention', also requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force.[665]

652 In *Jordan*, the ECtHR also referred to art 13 of the European Convention and said:

> The Court's case-law indicates that Article 13 of the Convention guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. The effect of Article 13 is thus to require the provision of a domestic remedy to deal with the substance of an 'arguable complaint' under the Convention and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their Convention obligations under this provision.[666]

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shall be protected by law'.

662 [2015] 1 WLR 1833; [2015] 2 All ER 272.

663 [2011] EWCA Civ 1334.

664 (2003) 37 EHRR 2 (***Jordan***).

665 Ibid [105].

666 Ibid [159].

653 In *Morrison v Independent Police Complaints Commission*,[667] the claimant had been stopped by police, subjected to a taser, arrested on suspicion of possession of a firearm and an offensive weapon, taken to Brixton Police Station and, eventually, to hospital where he was treated for cuts to his face which, he said, were caused by his having been 'tasered'. He was released without charge. He sought an investigation of the treatment to which he had been subjected. The issue before the court was not dissimilar to the issue before this Court: when an arguable complaint is made that the police have used ill-treatment, contrary to art 3 of the European Convention, against a person whom they have arrested, must the Independent Police Complaints Commission investigate the matter itself, or can the Commission direct the same police force to investigate the matter? In answering that question, Nicol J distinguished the substantive obligation in art 3 from the 'procedural' obligation. About the latter, he said:

> The European Court of Human Rights has implied a duty to investigate arguable breaches of Article 3. It has done so following a similar process of interpretation of the right in Article 2 which says 'Everyone's right to life shall be protected.' In both cases the Court has relied on the general duty under Article 1 of the Convention on Contracting States to 'secure to everyone within their jurisdiction the rights and freedoms defined in the Convention.' Although Article 1 is not one of the specified rights in Schedule 1 of the Human Rights Act 1998, a like investigative obligation is incorporated as part of domestic law though the 1998 Act.[668]

The Commission relied upon the holding that, under the UK HRA a procedural right was held to exist notwithstanding the absence of art 1 of the European Convention.

654 However, Nicol J also said:

> It is important to remember from the outset that the investigative obligation under Article 3 is cast on the UK as a Contracting State to the ECHR. It will only be in breach of the obligation if none of the suggested alternatives, singly or together, are sufficient. In these proceedings the Defendant is not (and cannot be) the UK government. The IPCC is, of course, a public authority for the purposes of the Human Rights Act 1998. As such, it owes a duty to the Claimant not to act incompatibly with Convention rights - see s 6 of the 1998 Act. In the present context, however, that means that the Commission will only be in breach of its duty under s 6 if this will inevitably involve a breach of the UK's obligation to carry out an effective investigation. Sometimes a Claimant can show that that is the case — as *Amin* illustrates — but I agree that this reasoning requires me to examine whether the alternatives put forward by the IPCC (and the Home Secretary) might be other ways in which the investigative obligation could be discharged.[669]

As the Attorney-General submitted, the High Court warned in *Momcilovic*[670] against the too ready reliance on United Kingdom jurisprudence.

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667 [2009] EWHC 2589 [33]–[35], [63]–[64].
668 Ibid [31].
669 Ibid [37].
670 (2011) 245 CLR 1.

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In that respect, it is important to remember that the investigative obligation under art 3 is cast from the United Kingdom as a Contracting State to the European Convention. The process of investigative obligation is quite different under the Charter from that which applies under international law. The latter is influenced to a very considerable degree in the international jurisprudence by the presence of specific obligations on the international entities, internationally, legally obliged entities which are parties to the international instruments. The provisions of art 1 and art 13 of the European Convention and art 2(2) and (3) of the ICCPR embrace the submissions as to effective remedy in that context. As is made clear in *Morrison*, the international obligation is placed on the State itself.

655 Further, characteristic of English decisions has been the determination of the English judges to align their human rights jurisprudence with 'Strasbourg jurisprudence'. In *R (Ullah) v Special Adjudicator*,[671] Lord Bingham said that a national court 'should not without strong reason dilute or weaken the effect of the Strasbourg case law'.[672] In *R (Al-Skeini) v Secretary of State for Defence*,[673] Lord Rodger said:

> Under section 2(1)(a) of the 1998 Act, when determining any question in connexion with a 'Convention right', a court in this country must take into account any judgment or decision of the European court. While article 1 is not itself included in the Schedule, it affects the scope of article 2 in the Schedule, and that article embodies a 'Convention right' as defined in section 1(1). It follows that, when interpreting that article 2 right, courts must take account of any relevant judgment or decision of the European Court on article 1.[674]

In the same case, Baroness Hale said that it was the task of the English courts to keep in step with Strasbourg jurisprudence, 'neither lagging behind nor leaping ahead'.[675]

656 In *Attorney-General's Reference (No 2 of 2001)*,[676] Lord Hope said:

> If questions arise about the content of these rights the answer which is given must take into account the jurisprudence of the European Court of Human Rights and the Commission: section 2(1). The decisions of those institutions are not binding on the domestic courts, but it is obviously desirable that close attention be paid to the Strasbourg jurisprudence ... The government's purpose was to see 'rights brought home'. That purpose would not be achieved if the domestic courts were to depart in material respects from current thinking about the content of the

671 [2004] 2 AC 323.
672 Ibid 350 [20].
673 [2008] 1 AC 153.
674 Ibid 198 [66].
675 Ibid 204 [90]. See also Lord Brown 207–9 [105]–[110], especially his endorsement of Lord Bingham in *R (Ullah) v Special Adjudicator* [2004] 2 AC 323, 350 [20]. For a discussion of the reasons leading English courts to align with Strasbourg jurisprudence together with a comment on the present stage of interaction between the UK Courts and that jurisprudence, see Rt Hon Lord David Neuberger of Abbotsbury, 'The Role of Judges in Human Rights Jurisprudence: A Comparison of the Australian and UK Experience' (2014) 2 *Judicial College of Victoria On-Line Journal* 43, 30, 40–1.
676 [2004] 2 AC 72.

Convention rights in Strasbourg.[677]

As the Attorney-General pointed out, the imperative of bringing 'rights back home' so that rights enforceable as part of international law become enforceable as part of domestic law (such that a right of investigation recognised as a part of international law becomes a right under domestic law) does not apply with the same force to public authorities in Victoria.

657 The Commission referred to *Allen v Chief Constable of the Hampshire Constabulary*[678] as supporting the proposition that art 3 alone (and not by reference to art 1) carried the implied procedural obligation. In that case, the appellant had commenced proceedings in which she claimed under s 6 of the UK HRA[679] that the respondent had failed to comply with his investigative and protective obligations in respect of her rights to freedom from inhuman and degrading treatment. It appears that the appellant had been married to a police officer and, she said, had been harassed by another police officer who had been in a relationship with her husband. The appellant also contended that the respondent was vicariously liable for the conduct of that police officer. The appellant's claim against the respondent had been struck out. For present purposes, we are concerned only with the discussion of the origin of the implied procedural obligation. Gross LJ (with whom Dyson MR and Ryder LJ agreed) said:

> Turning to matters of substance, the 'few words' of Art 3 give rise to a number of duties on the part of the State, designed to render its general legal prohibitions (of fundamental importance) effective in practice: see, the observations of Lord Dyson JSC (as he then was) in the context of Art 2, in *Rabone v Pennine Care NHS Trust*. At least for present purposes, these duties may be summarised as follows:
>
> i) A general obligation to provide systems of law enforcement and for the punishment of criminal liability.
>
> ii) An implied positive obligation to conduct an effective investigation into allegations that treatment amounts to, or arguably amounts to, a violation of a person's art 3 rights; such an investigation should be capable of identifying and punishing those responsible: *Assenov v Bulgaria*. Necessarily, this is an obligation of 'means' not 'results': *Vasilyev v Russia*.[680]

658 The Commission finally referred to *DSD & NBV*,[681] which, it said, was its 'best case'. In that case, the claimants brought proceedings under ss 7 and 8 of the UK HRA in which they said that their rights under art 3 of the

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677 Ibid 97 [52] (citation omitted).

678 [2013] EWCA Civ 967.

679 In so far as is material, s 6 provides: '(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right'. Section 7 of the Act empowered the victims of violations of rights to bring proceedings before the courts and s 8 conferred upon courts the power to grant appropriate relief, including damages.

680 [2013] EWCA Civ 967 [42] (citations omitted).

681 [2014] EWHC 436 (QB) (Green J). In this case, the Court decided that the defendant was liable to the claimants for breach of the UK HR). In a later judgment, the Court determined the claim for damages; see *D v Commissioner of Police of the Metropolis* [2015] 1 WLR 1833; [2015] 2 All ER 272.

European Convention had been violated. They had been victims of a rapist who had been convicted of having committed well in excess of 100 rapes and sexual assaults over a six year period of women whom he was carrying in his cab. At common law, the police do not owe a duty of care in negligence in relation to the investigation of crime. The question in this case was whether the UK HRA did impose such a duty and, if so, whether it had been breached. The defendant contended that the Act did not provide a remedy to victims of crime committed by private parties 'where the core of the allegation is that the police failed properly to investigate'.[682] SANTAMARIA JA

659 Before this Court, the Commission said that the case 'confronts an argument that is nearly identical to the argument' that this Court faces. In *DSD & NBV*, counsel (for the defendant) advanced an argument that all of the ECtHR decisions about an implied right to investigation should be ignored as (a) they depended upon art 1 and (b) the UK HRA does not incorporate that Article. The Commission said that that argument had been rejected. It placed emphasis on the following remarks of Green J:

> [I] can see no reason why Article 1 can be said to create a pro-active duty whereas the same would not be said of Article 3 standing in complete isolation (including from Article 1). Article 3 is a clear and unequivocal prohibition which has been repeatedly described by the Strasbourg Court as 'fundamental'. In *MC v Bulgaria* the Court stated that there was a 'positive obligation inherent' in Article 3 to apply law prohibiting rape through 'effective investigation' and punishment. [S]ee also *Milanovic*. The Article prohibits without caveat or qualification torture and inhuman or degrading treatment. That prohibition exists quite regardless of Article 1; the message in Article 3 is that the State must preserve its citizens from such severe treatment. Section 6 HRA makes it 'unlawful' for a public authority to act in a way that is incompatible with, *inter alia*, Article 3. And sections 7 and 8 make such an unlawful failure justiciable. There is no point in having a prohibition if it is not accompanied by the commensurate obligation on the State to enforce the prohibition. That applies to the conduct of the State and its agents and actors but extends also to the preservation of citizens from severe violence perpetrated by private parties. Article 3 does not require turbo-charging from Article 1 to arrive at this conclusion and in any event sections 6–8 HRA plug any gap that might otherwise exist.[683]

660 Green J surveyed the 'Strasbourg case law' and concluded:

> Article 3 of the Convention imposes a duty upon the police to investigate which covers the entire span of a case from investigation to trial. The purpose behind this duty is to secure confidence in the rule of law in a democratic society, to demonstrate that the State is not colluding with or consenting to criminality, and, to provide learning to the police with a view to increasing future detection levels and preventing future crime … The investigation must be independent, impartial and subject to independent scrutiny.[684]

661 Notwithstanding the way Green J expressed himself at the end of the para-

682 [2014] EWHC 436 (QB) [5].
683 Ibid [233].
684 Ibid [212].

graph extracted above, it is to be observed that he relied upon *MC v Bulgaria*[685] and *Milanovic v Serbia*.[686] As is plain from the discussion of them above, in holding that art 3 contained an implied procedural duty to investigate, each of those authorities relied explicitly upon the *Assenov* principle.[687] Finally, he said:

> Pulling together and summarising the various strands of argument I interpret the HRA as imposing a duty on the police in circumstances such as the present for the following reasons: (i) *Strasbourg case law which I must take account of is consistent settled and mature*; (ii) it articulates a test which does not open the Pandora's Box of liability for the police and when applied rigorously by the domestic courts should not be such as to create a disproportionate burden on the police; (iii) the duty which is acknowledged by Strasbourg case law (to investigate efficiently) is not one which jars with common law traditions but, on the contrary, is consistent with domestic law; (iv) the conclusion is one which the domestic courts have not (in their admittedly brief encounters with the principle) objected to. In all these circumstances I conclude that the duty contended for by the Claimants exists.[688]

662 In *Commissioner of Police of the Metropolis v DSD & NBV*,[689] the Court of Appeal (UK) dismissed an appeal from the judgment of Green J in *DSD & NBV*.[690] The appellant contended that art 3 of the European Convention did not impose any obligation to investigate and, to the extent that there was a positive obligation to investigate, it had been drawn from art 1 which formed no part of domestic law in so far as that article was not a Convention right within the meaning of the UK HRA. In his reasons, Laws LJ (with whom Dyson MR and Kitchin LJ agreed) pointed to the reasons underpinning the policy of the UK courts ensuring consistency between domestic law and Strasbourg jurisprudence. He said:

> Secondly, on [the appellant's] argument there is a substantial mismatch between the scope of Article 3 guaranteed by the Convention and the scope of Article 3 enforceable, by means of the HRA, in the UK courts. The first includes an investigative duty but the second does not. In the course of argument [counsel for the appellant] accepted that the HRA gives effect 'lock, stock and barrel' to the substantive rights guaranteed by the ECHR, and that is surely right: in *Quark Fishing Ltd* (cited by Lord Rodger in *Al-Skeini*) Lord Nicholls stated that '[t]he [HRA] was intended to provide a domestic remedy where a remedy would have been available in Strasbourg'. This contradicts the mismatch which Mr Johnson's argument implies. The effect of such a mismatch would anyway be bizarre. It would mean that a complaint of violation of Article 3 in the UK constituted by actual ill-treatment could be litigated here; but a complaint that the self-same Article was violated by an investigative failure would have to go to Strasbourg.[691]

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685 (2005) 40 EHRR 20.

686 (2014) 58 EHRR 33.

687 Green J also referred to those parts of the speeches in *R (Ullah) v Special Adjudicator* [2004] 2 AC 323 and *R (Al-Skeini) v Secretary of State for Defence* [2008] 1 AC 153 that have been extracted above.

688 [2014] EWHC 436 (QB) [241] (emphasis added).

689 [2015] 3 WLR 966 (30 June 2015).

690 [2014] EWHC 436 (QB).

691 [2015] 3 WLR 966, 977 [16] (citations omitted).

663 It is true that, in his judgment, Laws LJ seems to reject the proposition that the duty to investigate a breach of art 3 of the Convention is based solely upon art 1 and art 13.[692] However, he then described the manner in which the European Convention had been made part of UK domestic law. In the UK HRA, there are (at least) two sorts of provisions which implement in UK domestic law the rights recognised in the European Convention. Some of those provisions are 'ancillary provisions concerning proceedings and remedies'; other provisions state '*substantive* rights [that] are named as the Convention rights'. The former are the means whereby the UK has complied with art 1 of the European Convention (the obligation on the High Contracting Parties to secure to everyone the rights and freedoms defined in the Convention) and art 13 (the right to an effective remedy). Those articles are not themselves expressed in the UK HRA. On the contrary, the Act itself is the means whereby they are satisfied. SANTAMARIA JA

664 As has been indicated above, the Charter contains its own provisions for securing substantive rights, including express obligations placed upon public authorities and its own remedial provisions. As a consequence, the legal matrix in which rights are secured under the Charter is different from that in which rights have been secured under the UK legislation. For the reasons already given, the circumstances which have made Strasbourg jurisprudence part of UK domestic law are absent here.

Conclusion

665 In the circumstances, the European and the English cases provide little assistance on the question whether s 10(b) of the Charter contains an implied duty to investigate a complaint of a breach of that provision. In formulating its jurisprudence, the ECtHR has relied upon the obligation upon the parties to the European Convention to provide effective remedies. In construing the UK HRA, the English courts are specifically enjoined to take into account 'Strasbourg jurisprudence'[693] and they strive to keep in step with that jurisprudence. As the Attorney-General submitted: 'the concept of keeping in step with Strasbourg is alien to our Charter'. The Charter contains its own remedial provisions, and it does not need to resort to implications to achieve them.

666 In the circumstances, it is unnecessary to address the submissions of the parties on what might have been the content of any such procedural right in the present circumstances.

692 Ibid [17].
693 UK HRA s 2(1)(a).

Does the text of s 10(b) of the Charter itself give the right to an independent and effective investigation?

667 The terms of s 10(b) of the Charter make no reference to there being a right to an independent investigation of credible claims of a contravention of it. Should words be read into it to effect its purpose? In *Director of Public Prosecutions (Vic) v Leys*,[694] this Court dealt with the circumstances in which words could be read into legislation.[695] It referred to *Kingston v Keprose Pty Ltd (No 3)*,[696] in which McHugh JA, following what Lord Diplock had said in *Jones v Wrotham Park Settled Estates*,[697] said:

> First, the court must know the mischief with which the Act was dealing. Secondly, the court must be satisfied that by inadvertence Parliament has overlooked an eventuality which must be dealt with if the purpose of the Act is to be achieved. Thirdly, the court must be able to state with certainty what words Parliament would have used to overcome the omission if its attention had been drawn to the defect.[698]

668 In the case of s 10(b), these criteria cannot be met to support the existence of the procedural right. With respect to the conduct of public authorities, the Charter itself regulates the manner in which the rights it recognises are to be protected, the manner in which they are to be taken into account, the fact that conduct incompatible with them is to be unlawful and the way in which unlawful conduct may be remedied.[699]

Conclusion

669 For the reasons given above, in my opinion the appeal should be allowed. The delegate failed to give proper consideration to the appellant's right recognised in s 10(b) of the Charter and s 109 of the PI Act did not exclude the jurisdiction of the Court to give him the relief that he sought.

Appeal allowed.

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Solicitor for the second respondent:
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694 (2012) 296 ALR 96.
695 Ibid 111 [54] (Redlich and Tate JJA and T Forrest AJA).
696 (1987) 11 NSWLR 404.
697 [1980] AC 74, 105.
698 (1987) 11 NSWLR 404, 423.
699 See s 38 and s 39.