

34/12; [2012] VSC 407

SUPREME COURT OF VICTORIA

MAGEE v DELANEY

Kyrou J

23 August, 11 September 2012

CRIMINAL LAW – CRIMINAL DAMAGE TO PROPERTY – POSSESSING MATERIALS FOR THE PURPOSE OF DAMAGING PROPERTY – ‘LAWFUL EXCUSE’: *CRIMES ACT* 1958, ss196, 197, 199, 199(a)(i), 201.

HUMAN RIGHTS – RIGHT TO FREEDOM OF EXPRESSION – WHAT CONSTITUTES THE IMPARTING OF INFORMATION AND IDEAS – WHETHER PUBLIC POLICY CONSIDERATIONS LIMIT THE RIGHT TO FREEDOM OF EXPRESSION – WHETHER DAMAGE TO THE PROPERTY OF OTHERS IS A PROTECTED FORM OF EXPRESSION – EFFECT ON ‘RIGHTS ... OF OTHER PERSONS’ – PROTECTION OF ‘PUBLIC ORDER’ – WHETHER DAMAGE TO PROPERTY AS A MEANS OF EXERCISING THE RIGHT TO FREEDOM OF EXPRESSION CONSTITUTES A ‘LAWFUL EXCUSE’ FOR THE PURPOSES OF ss197(1) AND 199(a)(i) OF THE *CRIMES ACT* 1958; *CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES ACT* 2006, PREAMBLE AND ss1(2), 3(1), 5, 6(1), 15, 20.

STATUTORY INTERPRETATION – EFFECT OF ss7(2) AND 32 OF THE CHARTER.

M. went to a bus shelter in Melbourne with a bucket containing white water-based paint and a paintbrush. He painted over an advertising poster encased in glass inside the bus shelter and affixed a 'wet paint' sign to it. M. was intercepted and taken into police custody. M. said that his actions were part of his personal protest against the global advertising. M. was charged with damaging property and the offence of possessing materials for the purpose of damaging property. M. sought to escape criminal liability by contending that his acts engaged the right to freedom of expression and that the exercise of that right in furtherance of his philosophical opposition to advertising constituted a 'lawful excuse'. The sole issue for the Magistrate was to determine whether M's actions were performed without lawful excuse. The Magistrate found the charges proved, imposed an aggregate fine of \$500 and made compensation and forfeiture orders. Upon appeal—

HELD: Appeal dismissed.

1. The natural meaning of 'lawful' depends on the context in which the word is used. In the context of ss197, 199 and 201 of the *Crimes Act*, 'lawful excuse' may be interpreted as being used in the sense of an excuse 'supported by law', that is, an excuse that the law recognises as a valid excuse.

2. 'Lawful excuse' is an expression of wider import than 'lawful authority'. The defence of 'lawful excuse' can be sufficiently proved even though no 'lawful authority' exists for the conduct the subject of the charges. In proving a 'lawful excuse', it is the excuse or exculpatory reason put forward by the accused, rather than the conduct the subject of the charges, that must be shown to be lawful.

3. The right conferred by s15(2) of the *Charter of Human Rights and Responsibilities Act* 2006 ('Victorian Charter') is the right to 'freedom of expression'. The section does not provide an exhaustive definition of the contents of that right or the form in which it may be exercised. Rather, it sets out very broadly-worded examples of both. In particular, the reference to 'by way of art' in para (d) makes it clear that the 'impart[ing] [of] information and ideas' for the purposes of s15(2) is not confined to forms that convey fixed, objective meanings but also includes forms that may involve subjective interpretation.

4. Any act which is capable of conveying some kind of meaning falls within the words 'impart information and ideas of all kinds' in s15(2) of the Victorian Charter, without the need to prove that it actually conveyed a particular meaning to a specific person.

5. In the present case, whether an act was capable of imparting information or ideas was to be judged by its impact on reasonable members of the public who were exposed to it, without the benefit of any extraneous information about the purposes of the person who committed the act. If some reasonable members of the public perceived that the act sought to convey one or more messages, then the act was capable of imparting information or ideas, even if they did not know, or were uncertain about, the precise message or messages sought to be conveyed.

6. As the Victorian Charter was enacted to underpin and support our free and democratic society and the rule of law, rather than to undermine or fracture them, s15(2) of the Victorian Charter does

not protect all forms of expressive conduct. It certainly does not protect expression in the form of damage to a third party's property or a threat of such damage.

7. Accordingly, M's act of painting over the advertisement did not fall within the right to freedom of expression in s15(2) of the Victorian Charter.

8. The focus of the inquiry is upon the nature and scope of the lawful restriction, rather than upon its impact on the conduct of the person challenging the restriction. That is, the question to be asked under s15(3) of the Victorian Charter is not whether the manner in which the lawful restriction affects the conduct of the person impugning the restriction is reasonably necessary for the two identified purposes. The ultimate question is whether, having regard to its nature and scope, the lawful restriction is reasonably necessary for the two identified purposes. The answer to that question does not vary depending on the facts of a particular case.

9. The reference to 'the rights and reputation of other persons' in s15(3)(a) is not confined to the rights of human beings conferred by the Victorian Charter. Rather, it is a generic reference to rights enjoyed by natural persons as well as legal persons, irrespective of whether those rights are incorporated in the Victorian Charter.

10. Section 15(3)(a) of the Victorian Charter is not confined to lawful restrictions reasonably necessary to respect the human rights conferred by the Victorian Charter. It follows that the magistrate erred in so concluding.

11. Sections 197(1) and 199(a)(i) of the *Crimes Act* impose lawful restrictions reasonably necessary to respect property rights within the meaning of s15(3)(a) of the Victorian Charter. Accordingly, insofar as M's conduct may have otherwise engaged the freedom of expression in s15(2), that engagement was negated by ss197(1) and 199(a)(i) of the *Crimes Act* operating under s15(3)(a) of the Victorian Charter.

12. The expression 'protection of ... public order' means, in broad terms, giving effect to rights or obligations that facilitate the proper functioning of the rule of law. This is a wide and flexible concept and includes measures for peace and good order, public safety and prevention of disorder and crime. Without limiting the lawful restrictions that may be reasonably necessary for the protection of public order, they obviously include laws that enable citizens to engage in their personal and business affairs free from unlawful physical interference to their person or property.

13. The magistrate concluded that 'public order' involved regulating the actions of individuals and groups so as to ensure that they do not impact inappropriately on other members of the community. The magistrate's interpretation of 'public order' was too wide and uncertain and should not be accepted. The magistrate also erred by considering the application of s15(3)(b) of the Victorian Charter by reference to the peculiar facts relating to M., including his prior convictions. The issue was not whether M.'s conduct had undermined public order, but whether the statutory provisions under which he was charged were reasonably necessary for the protection of public order. However, the Magistrate was correct in his overall conclusion that ss197(1) and 199(a)(i) of the *Crimes Act* imposed lawful restrictions on M's right to freedom of expression for the protection of public order.

14. Having regard to public policy considerations that inform the scope of the protected forms of expressive conduct, the reasonableness of the restrictions in ss197(1) and 199(a)(i) of the *Crimes Act* for the purpose of protecting the property rights of third parties, the reasonableness of the restrictions in ss197(1) and 199(a)(i) of the *Crimes Act* for the protection of public order, the compatibility of the restrictions in ss197(1) and 199(a)(i) of the *Crimes Act* with s15(2) of the Victorian Charter and the factors set out in s7(2) of the Victorian Charter, the conclusion is irresistible that the restrictions in ss197(1) and 199(a)(i) of the *Crimes Act* constitute reasonable limits which are demonstrably justified in a free and democratic society based on human dignity, equality and freedom, within the meaning of s7(2) of the Victorian Charter.

KYROU J:

Introduction and summary

1. Kyle Magee was charged with the offence of damaging property under s197(1) of the *Crimes Act* 1958 and the offence of possessing materials for the purpose of damaging property under s199(a)(i) of that Act. He did not dispute that he intentionally committed the physical elements of those offences by painting over an advertisement in a bus shelter with white paint and by possessing a bucket of paint and a paintbrush for the purpose of painting over more advertisements. However, Mr Magee sought to escape criminal liability by contending that his acts engaged the right to freedom of expression in s15(2) of the *Charter of Human Rights and Responsibilities Act* 2006 ('Victorian Charter'), and that the exercise of that right in furtherance of his philosophical

opposition to advertising constituted a 'lawful excuse' for the purposes of ss197(1) and 199(a)(i) of the *Crimes Act*.

2. The magistrate who heard the two charges rejected Mr Magee's 'defence'^[1] based on s15(2) of the Victorian Charter. His Honour convicted Mr Magee on both charges, imposed an aggregate fine of \$500 and made ancillary compensation and forfeiture orders.^[2] Mr Magee has appealed against the magistrate's decision under s272(1) of the *Criminal Procedure Act* 2009. Following the giving of notices under s35 of the Victorian Charter, the Attorney-General of Victoria intervened in the appeal pursuant to s34.

3. The main issues in the appeal and my conclusions in relation to them, for the reasons that are set out below, are as follows:

(a) Was the painting over of the advertisement capable of imparting information or ideas for the purposes of s15(2) of the Victorian Charter? Yes.

(b) Does the imparting of information or ideas by means of damage to a third party's property engage the right to freedom of expression conferred by s15(2) of the Victorian Charter? No.

(c) For the purposes of s15(3)(a) of the Victorian Charter, is the right to freedom of expression subject to lawful restrictions reasonably necessary to respect the property rights of other persons, irrespective of whether those persons are human beings, companies, government bodies or other types of legal entities? Yes.

(d) For the purposes of s15(3)(b) of the Victorian Charter, does the expression 'lawful restrictions reasonably necessary ... for the protection of ... public order' include laws that enable citizens to engage in their personal and business affairs free from unlawful physical interference to their person or property? Yes.

(e) Are the restrictions in ss197(1) and 199(a)(i) of the *Crimes Act* reasonably necessary to respect the property rights of other persons and for the protection of public order? Yes.

(f) Are the conclusions in (a), (b), (c), (d) and (e) above affected by ss7(2) or 32 of the Victorian Charter? No.

4. The above conclusions mean that Mr Magee acted without any lawful excuse and that he was correctly convicted. Accordingly, the appeal will be dismissed.

Facts

5. The factual background is not in dispute.^[3] On 2 February 2010, Mr Magee attended at a bus shelter on the corner of William and Lonsdale Streets, Melbourne (outside the County Court) with a bucket containing white water-based paint and a paintbrush. He painted over an advertising poster encased in glass inside the bus shelter and affixed a 'wet paint' sign to it. As intended by Mr Magee, County Court Protective Services Officers observed his actions and arrested him. He was then taken into police custody.

6. The bus shelter was owned by the City of Melbourne and the advertisement was owned by a company called Adshel. The damage was rectified by washing away the paint at a cost of \$40.17.

7. Mr Magee made full admissions in his police interview. He said that he had bought the paint and the other items, and had attended at the bus shelter, for the purpose of painting over the advertising posters at that bus shelter. Mr Magee said that his actions were part of his personal protest against the global advertising industry.

8. In the course of his evidence at the Magistrates' Court hearing, Mr Magee adopted a statement he had prepared in which he stated that advertising was a perversion of art and an abuse of psychology and that it should be abolished by government. He gave evidence that he 'just sort of scribbled all over [the advertisement in the bus shelter], tak[ing] away all messages and images'.^[4] Mr Magee characterised his actions as 'political expression' and 'a simple non-violent protest against the practice of advertising', and said that he wanted to trigger a 'serious public debate about advertising'.^[5]

9. Mr Magee conceded that he had damaged property of another without consent.^[6]
10. Mr Magee has numerous prior findings of guilt or convictions for offences involving damage to property constituted by painting over advertisements. He had targeted the same bus shelter previously.

Relevant provisions of the *Crimes Act*

11. As stated at [1] above, Mr Magee was charged with offences under ss197(1) and 199(a)(i) of the *Crimes Act*. Section 197(1) provides:

Destroying or damaging property

(1) A person who intentionally and without lawful excuse destroys or damages any property belonging to another or to himself and another shall be guilty of an indictable offence and liable to level 5 imprisonment (10 years maximum).

12. Section 199(a)(i) of the *Crimes Act* relevantly provides:

199 Possessing anything with intent to destroy or damage property

A person who has anything in his custody or under his control—

(a) with the purpose of using it, or causing or permitting another to use it, without lawful excuse—

(i) to destroy or damage any property belonging to some other person or to himself, the user or both of them and some other person;

shall be guilty of an indictable offence and liable to level 6 imprisonment (5 years maximum).

13. Section 201 of the *Crimes Act* sets out, non-exhaustively, circumstances that constitute a 'lawful excuse' for the purposes of ss197(1) and 199(a)(i). It provides:

201 Lawful excuse

(1) This section applies to any offence under section 197(1) ... or 199(a)(i).

(2) A person charged with an offence to which this section applies shall, whether or not he would be treated for the purposes of this subdivision as having a lawful excuse apart from this subsection, be treated for those purposes as having a lawful excuse—

(a) if at the time of the conduct alleged to constitute the offence he believed—

(i) that the property in question belonged solely to himself;

(ii) that he held a right or interest in the property in question which authorized him to engage in the conduct; or

(iii) that the person or persons whom he believed to be entitled to consent to the destruction or damage in question had so consented or would have so consented if he or they had known the circumstances of the destruction or damage; or

(b) if he engaged in the conduct alleged to constitute the offence in order to protect property belonging to himself or another or a right or interest in property which was or which he believed to be vested in himself or another, and at the time of such conduct he believed—

(i) that the property, right or interest which he sought to protect was in immediate need of protection; and

(ii) that the means of protection adopted or proposed to be adopted were or would be reasonable having regard to all the circumstances.

(3) For the purposes of this section it is immaterial whether a belief is justified or not if it is honestly held.

(4) For the purposes of subsection (2) a right or interest in property includes any right or privilege in or over land, whether created by grant, licence or otherwise.

(5) This section shall not be construed as taking away or otherwise affecting any other defence recognized by law as a defence to criminal charges.

14. Section 196(1) of the *Crimes Act* defines 'property' to mean 'property of a tangible nature, whether real or personal'. Section 196(2) sets out circumstances in which property is to be treated as belonging to a person, including where a person has custody or control of the property or a proprietary right or interest in it.

Relevant provisions of the Victorian Charter

15. The preamble to the Victorian Charter relevantly provides:

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

This Charter is founded on the following principles—

human rights are essential in a democratic and inclusive society that respects the rule of law, human dignity, equality and freedom;

human rights belong to all people without discrimination, and the diversity of the people of Victoria enhances our community;

human rights come with responsibilities and must be exercised in a way that respects the human rights of others;...

16. Section 1(2) of the Victorian Charter sets out its main purpose. It relevantly provides:

(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; ...

17. Section 3(1) of the Victorian Charter defines ‘human rights’ to mean ‘the civil and political rights set out in Part 2’.

18. Section 6(1) of the Victorian Charter provides that ‘[o]nly persons have human rights’.^[7] Section 3(1) defines ‘person’ to mean ‘a human being’.

19. Part 2 of the Victorian Charter (ss7 to 27) sets out a number of human rights that Parliament ‘specifically seeks to protect and promote’ (s7(1)). Section 7(2) provides as follows:

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

...

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

(a) the nature of the right; and

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

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

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

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

20. The right to freedom of expression is one of the rights set out in pt 2 of the Victorian Charter. It is contained in s15, which provides:

15 Freedom of expression

(1) Every person has the right to hold an opinion without interference.

(2) Every person has the right to freedom of expression which includes the freedom to seek, receive and impart information and ideas of all kinds, whether within or outside Victoria and whether—

(a) orally; or

(b) in writing; or

(c) in print; or

(d) by way of art; or

(e) in another medium chosen by him or her.

(3) Special duties and responsibilities are attached to the right of freedom of expression and the right may be subject to lawful restrictions reasonably necessary—

(a) to respect the rights and reputation of other persons; or

(b) for the protection of national security, public order, public health or public morality.

21. Another right that is set out in pt 2 of the Victorian Charter relates to property. Section 20 provides that '[a] person must not be deprived of his or her property other than in accordance with law'.

22. Section 32 of the Victorian Charter deals with the interpretation of statutory provisions relevantly as follows:

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.

23. Section 5 of the Victorian Charter makes it clear that the Charter is not an exclusive code on human rights. It provides:

Human rights in this Charter in addition to other rights and freedoms

A right or freedom not included in this Charter that arises or is recognised under any other law (including international law, the common law, the Constitution of the Commonwealth and a law of the Commonwealth) must not be taken to be abrogated or limited only because the right or freedom is not included in this Charter or is only partly included.

Magistrate's decision

24. In the light of Mr Magee's concessions at the hearing before the magistrate, the sole issue for his Honour was whether Mr Magee's actions were performed without lawful excuse.

25. His Honour stated that Mr Magee's actions did not constitute the imparting of information or ideas by way of art. However, on the basis of Mr Magee's evidence, his Honour found that his actions were capable of being characterised as an act of protest 'in another medium chosen by him', thus falling within s15(2)(e) of the Victorian Charter.^[8]

26. The magistrate said that, to interpret the term 'lawful excuse' in ss197(1) and 199(a)(i) of the *Crimes Act* as extending to any act in the exercise of the freedom of expression as identified in s15(2) of the Victorian Charter, would 'seriously erode' the protection of property afforded by the *Crimes Act*.^[9] His Honour held that the restrictions in ss197(1) and 199(a)(i) of the *Crimes Act* did not attract s15(3)(a) of the Victorian Charter in the circumstances of the present case, because the owners of the bus shelter and the advertisement whose rights were affected were not human beings and therefore were not 'persons'. However, those restrictions attracted the 'public order' provisions of s15(3)(b) in relation to Mr Magee's acts.^[10]

27. The magistrate held that the notion of 'public order' encompassed more than issues of violence within the community; it involved regulating the actions of individuals and groups so as to ensure that they do not impact inappropriately on other members of the community.^[11] His Honour found that, while Mr Magee's undermining of public order by one isolated act 'may seem relatively trivial', it is not to be so considered when viewed in the context of his prior convictions for similar behaviour.^[12]

28. The magistrate then considered s7(2) of the Victorian Charter. In relation to s7(2)(a), which deals with the nature of the right, his Honour observed that the right to freedom of expression is a basic right in a free and democratic society that may be exercised in a number of ways.^[13] In relation to s7(2)(b), which deals with the importance of the purpose of the limitation, his Honour said that, insofar as ss197(1) and 199(a)(i) of the *Crimes Act* provide a limitation on the right to freedom of expression, their purpose is the protection of property, which is important in a civilised society.^[14]

29. In relation to s7(2)(c) of the Victorian Charter, which deals with the nature and extent of the limitation, his Honour said that ss197(1) and 199(a)(i) of the *Crimes Act* did not completely deny Mr Magee his freedom of expression. Rather, they limited the means of expression insofar as it is manifested in damage to property.^[15]

30. In relation to s7(2)(d) of the Victorian Charter, which deals with the relationship between the limitation and its purpose, his Honour said that the limitation impacts on the right to freedom of expression only if the exercise of that right involves damage to property. His Honour then considered s7(2)(e), which deals with the reasonable availability of less restrictive means of achieving the purpose that the limitation seeks to achieve. He said that any lesser restriction than that provided in ss197(1) and 199(a)(i) of the *Crimes Act* 'would be a licence to cause damage to property, perhaps up to a particular value, or for a particular purpose'.^[16]

31. The magistrate concluded that the restriction of the right to freedom of expression imposed by ss197(1) and 199(a)(i) of the *Crimes Act* was not significant and that it was within reasonable limits and justified.^[17]

Grounds of appeal

32. Mr Magee originally appealed on three grounds. At the commencement of the hearing of the appeal, however, he abandoned the third ground of appeal. The extant grounds of appeal are as follows:

(a) The magistrate erred in law in finding that an act of expression protected by s15 of the Victorian Charter is not capable of amounting to a 'lawful excuse' for the purposes of ss197 and 199 of the *Crimes Act*; and

(b) The magistrate erred in his construction of the phrase 'public order' in s15(3)(b) of the Victorian Charter. On the correct construction of that phrase, it was not open to the magistrate to find that Mr Magee's act was contrary to 'public order' and therefore not protected by s15 of the Victorian Charter. Alternatively, if Mr Magee's act was capable of being contrary to 'public order', it was not open to the magistrate to find that the extent of the impact of Mr Magee's act on 'public order' was sufficient to deny him the protection afforded by s15.

Crimes Act ss197, 199 and 201: Lawful excuse

33. As Mr Magee has been charged with offences under ss197(1) and 199(a)(i) of the *Crimes Act* and seeks to be excused from criminal liability under those sections on the basis of a 'lawful excuse' defence, the logical starting point for determining whether the circumstances upon which he relies constitute a 'lawful excuse' are the terms of those sections as supplemented by s201.

34. Sections 197(1) and 199(a)(i) of the *Crimes Act* do not define 'lawful excuse' or indicate the circumstances that may constitute a 'lawful excuse'. Section 201 sets out circumstances constituting a 'lawful excuse', which broadly deal with legal entitlement, consent and necessity. Section 201(5) and the opening words of s201(2) make it clear that s201 does not affect any other defences recognised by law as a defence to criminal charges.

35. It was common ground that the circumstances upon which Mr Magee relies do not fall within s201 of the *Crimes Act*. Mr Peter Kidd SC, who appeared with Ms Elizabeth McKinnon for the Director of Public Prosecutions ('DPP'), submitted that the expression 'any other defence recognised by law as a defence to criminal charges' in s201(5) is confined to defences such as consent, self-defence and defence of another person. Mr Magee has not relied upon those defences.

36. In response to a question from the bench, Mr Kidd properly conceded that another statute may expressly or by necessary intendment establish a lawful excuse for the purposes of ss197(1) and 199(a)(i) of the *Crimes Act*. As s15 of the Victorian Charter is the only statutory provision upon which Mr Magee has relied to defend the charges against him, the question that I need to determine is whether that section expressly or by necessary intendment provides a defence to those charges. The answer to that question depends on the scope and effect of s15, considered in the context of the Victorian Charter as a whole. Before turning to s15, I will briefly consider what is generally encompassed by the expression 'lawful excuse'.

37. It is neither possible nor desirable to define the expression 'lawful excuse'. It is an expression of broad ambit and each case must be examined on its individual facts.^[18]

38. The natural meaning of 'lawful' depends on the context in which the word is used.^[19] In the context of ss197, 199 and 201 of the *Crimes Act*, 'lawful excuse' may be interpreted as being used in the sense of an excuse 'supported by law', that is, an excuse that the law recognises as a valid excuse.^[20]

39. 'Lawful excuse' is an expression of wider import than 'lawful authority'. The defence of 'lawful excuse' can be sufficiently proved even though no 'lawful authority' exists for the conduct the subject of the charges. In proving a 'lawful excuse', it is the excuse or exculpatory reason put forward by the accused, rather than the conduct the subject of the charges, that must be shown to be lawful.^[21]

40. I now turn to s15 of the Victorian Charter.

Victorian Charter s15(2): Engagement of the right to freedom of expression

41. Mr Saul Holt, who appeared with Mr James Anderson for Mr Magee, submitted that Mr Magee's act of painting over the advertisement was an exercise of the right to freedom of expression because it imparted information and ideas, and that that exercise came within s15(2) of the Victorian Charter, notwithstanding that it involved damage to a third party's property.

42. Mr Holt contended that the ways in which a person can impart information or ideas under s15(2) of the Victorian Charter is expressed very broadly. Section 15(2), so it was said, was not confined to obvious expression requiring no or minimum forethought to interpret. Mr Holt submitted that where artistic expression is difficult to interpret or is open to competing interpretations, this does not mean that the expressive act through art does not convey meaning; rather, it means that there is a sophistication required to understand that meaning. According to Mr Holt, Mr Magee's act of painting over the advertisement was an expressive act and a form of art. He submitted that a passerby with no knowledge of Mr Magee's background who observed the relatively haphazard painting over of the advertisement would interpret it as a sign of disapproval of the advertisement.

43. Mr Holt submitted that, where an act imparts information or ideas, it falls within the right to freedom of expression in s15(2) of the Victorian Charter, unless it is subject to any lawful restrictions by virtue of s15(3). He contended that s15(2) itself does not impose any limitations on the right in addition to the restrictions in s15(3).

44. Mr Kidd SC submitted two bases upon which Mr Magee's act of painting over the advertisement did not engage the right to freedom of expression in s15(2) of the Victorian Charter.

45. The first basis was that the act was incapable of imparting information or ideas for the purposes of s15(2). Mr Kidd SC submitted that the question of whether a person's act was capable of imparting information or ideas was to be determined by the impressions of a member of the public who was exposed to it, without any extraneous knowledge of the person's purpose. In the present case, so it was contended, a member of the public would view the defaced advertisement as an act of vandalism and would not discern any message from that act; Mr Magee's conduct was purely physical and conveyed no message or communication. Mr Kidd SC submitted that this case was distinguishable from other acts which contained an inherent protest message, even if the nature of the protest was not apparent without further enquiries. He gave as an example the erection of tents outside Parliament House, where only the tents, and no banners, are visible.

46. The second basis upon which Mr Kidd SC submitted that Mr Magee's act of painting over the advertisement did not engage s15(2) of the Victorian Charter was that, even if the act was capable of imparting information or ideas, as a matter of public policy, the right to freedom of expression did not extend to acts involving violence against persons or damage to a third party's property contrary to the criminal law.

47. Mr Paul Holdenson QC, who appeared with Ms Joanna Davidson for the Attorney-General, agreed with the submissions of Mr Kidd SC that Mr Magee's conduct did not fall within the scope of the right to freedom of expression in s15(2) of the Victorian Charter.

48. The specific and general issues of construction raised by the submissions of the parties and the Attorney-General are discussed below.

Was Mr Magee's conduct capable of imparting information or ideas?

49. In the present case, a threshold question about the scope of s15(2) of the Victorian Charter is whether Mr Magee's act of painting over the advertisement was capable of imparting information or ideas. A negative answer to that question would require the dismissal of Mr Magee's appeal. On

the other hand, a positive answer would not necessarily mean that Mr Magee's act is protected by s15(2). Whether it is so protected would depend upon the answers to the following further questions:

(a) Is there any justification, either on public policy grounds or in the wording of s15(2) of the Victorian Charter, for excluding a medium of expression constituted by damage to a third party's property or a threat of such damage from the protection afforded by that section?

(b) Even if damage to a third party's property or a threat of such damage as a medium of expression is capable of falling within s15(2), is that medium subject to any of the restrictions in s15(3)(a) or (b)?

50. I will first discuss the threshold question.

51. In support of his submission that expressive conduct should be given a broad interpretation, Mr Holt relied upon the Canadian decisions of *R v Keegstra*^[22] and *Weisfeld v Canada (Minister of Public Works)*,^[23] and the English decision of *City of London Corporation v Samede*.^[24]

52. *Keegstra* concerned whether s319(2) of the *Canadian Criminal Code* ('Canadian Code') infringed the guarantee of freedom of expression in s2(b) of the *Canadian Charter of Rights and Freedoms* ('Canadian Charter'). Section 2(b) provides that '[e]veryone has the following fundamental freedoms ... (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication ...'. The issue arose in the context of the conviction of a high school teacher for wilfully promoting hatred against an identifiable group by communicating anti-Semitic statements to his students.

53. The Supreme Court of Canada unanimously held that s319(2) of the Canadian Code infringed s2(b) of the Canadian Charter. The majority (Dickson CJ and Wilson, L'Heureux-Dube and Gonthier JJ) held that, pursuant to s1 of the Canadian Charter, s319(2) was not unconstitutional because it represented a reasonable limit on the guarantee of freedom of expression. The minority (La Forest, Sopinka and McLachlin JJ) held that s319(2) was not a reasonable limit and was therefore unconstitutional.

54. Both the majority and the minority in *Keegstra* agreed that the term 'expression' in s2(b) of the Canadian Charter has a wide scope; that if an activity conveys or attempts to convey meaning, it has expressive content and *prima facie* falls within the scope of the guarantee in s2(b); and that the term 'expression' embraces all content of expression irrespective of the particular meaning or message sought to be conveyed.^[25]

55. *Weisfeld*^[26] involved the dismantling of a 'peace camp', consisting of tents, a literature table and a banner, that the appellant and others had erected on Parliament Hill to protest against cruise missile testing in Canada. The appellant claimed that he was expressing a political message; that the establishment of the peace camp was essential to the communication of that message; and that the respondent's dismantling of the peace camp and preventing its re-establishment violated his freedom of expression as guaranteed by s2(b) of the Canadian Charter.^[27]

56. An issue in *Weisfeld* was whether the appellant's actions in erecting the peace camp amounted to 'expression' protected under s2(b) of the Canadian Charter. The Federal Court of Appeal followed the decision of the Supreme Court of Canada in *Attorney-General for Quebec v Irwin Toy Ltd*^[28] and stated that 'expression' must be defined broadly to include 'any activity that conveys or attempts to convey meaning'.^[29] The Court continued:

Expression is not restricted to words, oral or written, but encompasses myriad forms of communication, including music, art, dance, poster, physical movements, marching with banners, etc., as long as the activity conveys or attempts to convey a meaning.^[30]

57. The Court disagreed with the trial judge's conclusion that the act of establishing the peace camp did not convey a message and thus did not amount to 'expression' within the meaning of s2(b) of the Canadian Charter. The following observations of the Court are apposite to the present case:

It may be that a person walking by the peace camp would not immediately have realised that the appellant's specific message was 'we don't want the Canadian government to accede to US requests

to test cruise missiles in northern Alberta'. This does not mean, however, that the placing of the structure on Parliament Hill did not convey or attempt to convey a message. The act of private citizens building a very visible structure on the grounds of Parliament Hill, as well as maintaining a vigil there for more than two years, certainly conveys some kind of meaning. ...

[E]xpression goes beyond words. People may choose to amplify or dramatise their messages in many ways: a sandwich board, a soapbox, a megaphone, a flag, a banner, a placard, a picture, a petition, all can be used to convey a message or to assist one in conveying a message more effectively.

Furthermore, ... the claimant need not establish that his or her message was received and subjectively understood or appreciated by others. It is the conveying or the attempted conveying of the meaning, not its receipt, that triggers the guarantee under s2(b). ...

[I]n this case, ... [i]t is enough that the appellant's conduct attempted to convey some meaning, which it clearly did.^[31]

58. *Samede*^[32] involved the occupation of highway land vested in the City of London Corporation and open land owned by St Paul's Cathedral by the defendants as a protest camp. The City of London Corporation, which sought possession of the highway land, conceded that the defendants' rights under arts 10 and 11 of the *European Convention on Human Rights* ('ECHR') were engaged. However, it contended that the removal of the tents from the camp would amount to a justified interference with those rights.^[33] Article 10 of the ECHR protects the right to freedom of expression^[34] and art 11 provides for the right to freedom of assembly and association.

59. Lindblom J in *Samede* observed that the rights protected under art 10 of the ECHR 'extend to the nature, form and manner of protest',^[35] and quoted from the judgment of Laws LJ in *Tabernacle v The Secretary of State for Defence*^[36] that:

[This] 'manner and form' may constitute the actual nature and quality of the protest; it may have acquired a symbolic force inseparable from the protestors' message; it may be the very witness of their beliefs...^[37]

60. In accordance with s32(2) of the Victorian Charter, judicial decisions in other jurisdictions relevant to a human right may be considered in interpreting a statutory provision. Therefore, the judgments in *Irwin Toy*, *Keegstra*, *Weisfeld* and *Samede* are of assistance in interpreting s15(2) of the Victorian Charter.

61. The right conferred by s15(2) of the Victorian Charter is the right to 'freedom of expression'. The section does not provide an exhaustive definition of the contents of that right or the form in which it may be exercised. Rather, it sets out very broadly-worded examples of both. In particular, the reference to 'by way of art' in para (d) makes it clear that the 'impart[ing] [of] information and ideas' for the purposes of s15(2) is not confined to forms that convey fixed, objective meanings but also includes forms that may involve subjective interpretation.

62. In my opinion, any act which is capable of conveying some kind of meaning falls within the words 'impart information and ideas of all kinds' in s15(2) of the Victorian Charter,^[38] without the need to prove that it actually conveyed a particular meaning to a specific person.

63. In a case such as the present, whether an act is capable of imparting information or ideas is to be judged by its impact on reasonable members of the public who are exposed to it, without the benefit of any extraneous information about the purposes of the person who committed the act. If some reasonable members of the public would perceive that the act seeks to convey one or more messages, then the act is capable of imparting information or ideas, even if they do not know, or are uncertain about, the precise message or messages sought to be conveyed. Accordingly, a protest sign in a foreign language that is carried during a demonstration would satisfy this test even if English-speaking members of the public may not understand the contents of the sign.

64. I acknowledge that the threshold for establishing whether an act falls within the words 'impart information and ideas' in s15(2) of the Victorian Charter is very low. That is precisely what the section intends.

65. In the present case, some reasonable members of the public who were exposed to Mr Magee's

act of painting over the advertisement, and who were not aware of Mr Magee's role and purpose in relation to that act, would have perceived a number of possible messages. Those messages include that the person who performed the act: was protesting about something; was protesting about advertisements in bus shelters; objected to the contents of the particular advertisement; and did not want the public to see the advertisement.

66. It is true that some reasonable members of the public may have formed the view that the person who painted over the advertisement was an anti-social individual who had engaged in an act of vandalism. This possibility, however, does not detract from the fact that some reasonable members of the public would have reacted in the manner set out at [65] above. That possibility is sufficient for Mr Magee's act to be capable of imparting information or ideas.

67. On the other hand, Mr Magee's conduct which resulted in a conviction under s199(a)(i) of the *Crimes Act* – namely, his possession of a bucket of paint, a paint brush and other items – was not capable of imparting information or ideas. Although possession of these items was preparatory to conduct that was capable of imparting information or ideas, Mr Magee was arrested before he could give effect to his purpose of painting over more advertisements. This conclusion is sufficient to dispose of Mr Magee's appeal against conviction under s199(a)(i) of the *Crimes Act*. For this reason, the ensuing discussion will focus mainly on the conviction for property damage under s197(1).

68. It will be recalled that the magistrate found that Mr Magee's act of painting over the advertisement did not impart information or ideas by way of art but did so in another medium chosen by Mr Magee. It is not necessary for me to decide whether Mr Magee's act constituted art. The phrase 'another medium chosen by him or her' is discussed further below. The magistrate was wrong to rely on Mr Magee's evidence in deciding whether Mr Magee's act constituted the imparting of information or ideas. His Honour should have determined this question according to the nature of that act, unaided by anything that did not form part of the act.

Public policy limits to protected forms of expression

69. My conclusion at [65] and [66] above that Mr Magee's act of painting over the advertisement was capable of imparting information or ideas does not necessarily mean that the act came within the right to freedom of expression conferred by s15(2) of the Victorian Charter. That is a separate issue which depends on the provisions of s15(2) as a whole, read in the context of the other provisions of the Victorian Charter, the preamble and purpose of the Victorian Charter and the underlying parliamentary intention.

70. Mr Kidd SC relied upon a number of decisions from overseas jurisdictions that have held that equivalents to the right to freedom of expression in s15(2) of the Victorian Charter do not cover acts of property damage. Those cases are discussed below.

71. Mr Holt accepted the possibility that some forms of property damage could be excluded from s15(2) of the Victorian Charter as a matter of public policy. However, he contended that the fact that property damage can be in various forms and in different degrees of severity^[39] negates the proposition that any kind of property damage that constitutes a crime can never amount to expressive conduct. Such a proposition, so it was said, would limit the scope of the right to freedom of expression in s15(2) of the Victorian Charter to such an extent that the right would be essentially unrecognisable.

72. In *Retail, Wholesale and Department Store Union v Dolphin Delivery Ltd*,^[40] an issue for the Supreme Court of Canada was whether secondary picketing by members of a trade union in a labour dispute was protected as an exercise of the right to freedom of expression under s2(b) of the Canadian Charter. Delivering the majority judgment, McIntyre J held that all forms of picketing involve at least some element of expression and enjoy protection under s2(b) of the Canadian Charter, unless some action on the part of the picketers alters the nature of the picketing and removes it from Charter protection for freedom of expression.^[41] His Honour continued:

That freedom ... would not extend to protect threats of violence or acts of violence. It would not protect the destruction of property, or assaults, or other clearly unlawful conduct.^[42]

73. Wilson and Beetz JJ in *Dolphin* dissented. However, on the issues that are presently

relevant, Wilson J agreed with McIntyre J.^[43] Beetz J held that the picketing would not have been a form of expression that fell within s2(b) of the Canadian Charter.^[44]

74. In *Keegstra*, the majority referred to previous decisions of the Supreme Court of Canada, including *Dolphin*, which have recognised an exclusion in s2(b) of the Canadian Charter where the expressive conduct is in the form of violence or threats of violence.^[45] Dickson CJ, who delivered the majority judgment, cited with approval the following statement in *Irwin Toy*:^[46]

While the guarantee of free expression protects all content of expression, certainly violence as a form of expression receives no such protection. It is not necessary here to delineate precisely when and on what basis a form of expression chosen to convey a meaning falls outside the sphere of the guarantee. But it is clear, for example, that a murderer or rapist cannot invoke freedom of expression in justification of the form of expression he has chosen.^[47]

75. The majority held that the exclusion applied only to acts of violence and did not extend to threats of violence. They concluded that hate propaganda did not fall within the exclusion for violence because it was not analogous to violence.^[48]

76. The minority in *Keegstra* held that, on the basis of *Dolphin*, both violence and threats of violence are forms of expression that are excluded from the guarantee of freedom of expression in s2(b) of the Canadian Charter.^[49] They said that, in this context, ‘violence’ means the exercise of physical force so as to inflict injury on or damage to persons or property.^[50] They also stated that violence connotes actual or threatened physical interference with the activities of others, and that exclusion of violence and threats of violence from the ambit of s2(b) was a ‘social or logical necessity’ for the following reasons:

The justification for excluding violence as a protected form of expression is not just that violence is harmful to the victim, it is rather that violence is inimical to the rule of law on which all rights and freedoms depend. Threats of violence are similarly inimical. They are coercive, taking away free choice and undermining freedom of action. ... Being antithetical to the values underlying the guarantee of free expression, it is logical and appropriate that violence and threats of violence be excluded from its scope.^[51]

77. The minority concluded that hate propaganda did not constitute, and was not akin to, either violence or threats of violence.^[52]

78. *R v Behrens*^[53] involved trespass charges against five members of a social action group for non-violent entry onto the grounds of a legislative building, contrary to a prohibition imposed by the Speaker of the Legislative Assembly of Ontario following an incident of vandalism in which they defaced the legislative building with theatrical blood. Quon JP of the Ontario Court of Justice stated that the activists’ conduct in vandalising the legislative building was not a form of expression protected by s2(b) of the Canadian Charter, for the following reasons:

In my opinion, vandalism is a form of violence to property ...

...

Vandalism, wilful destruction, defacement and destruction of property may be forms of expression but are not the type of expression that is protected under s2(b). I find that any such activity of defacement or destruction of public property is a form of violent expression or proscribed form of expression that is not to be protected under s2(b).

...

Pouring blood onto a public building, although a form of expression, is an act of vandalism. Vandalism is a form of violent expression. Section 2(b) does not protect expressive activity that is violent in nature or causes damage or destruction of public property. Vandalism does not traditionally further the values underlying the freedom of expression on public property nor is it compatible with the function of the building.^[54]

79. In *SG v France*,^[55] a public servant who was convicted of defacing several road signs – which he claimed was part of a campaign for the posting of bilingual road signs in the Bretagne region – alleged a violation of his right to freedom of expression protected under art 19(2) of the *International Covenant on Civil and Political Rights* (‘ICCPR’).^[56] The Human Rights Committee held that the defacing of road signs did not raise issues under art 19 of the ICCPR.^[57]

80. In *N v Switzerland*,^[58] the applicant was convicted and sentenced to nine months' imprisonment for damaging property by painting various figures on a number of buildings in Zurich with black aerosol spray. Before the European Commission of Human Rights, the applicant claimed that he did not commit any offence, as the buildings sustained no damage and the artistic value of the figures he painted actually enhanced the buildings. The Commission examined the complaint in connection with the right to freedom of expression under art 10 of the ECHR^[59] and concluded that that right could not be invoked to justify the property damage that the applicant had caused:

The Commission considers that in the present case the question as to whether artistic expression enjoys more extensive protection, under Article 10, than any other form of expression can remain open. The exercise of this freedom in the case in point was restricted by the second paragraph of Article 10, because the conviction and sentence about which the applicant complains, and which is prescribed by law, was a measure necessary in a domestic society for the protection of the rights and freedoms of others and for the prevention of disorder. In dealing with a conflict between the applicant's freedom of expression and respect for the property of others, the Zurich courts did not take a measure that was disproportionate ... in the present case.^[60]

81. According to Mr Holt, the majority decision in *Keegstra* does not extend the notion of violence to the very broad proposition that any kind of property damage will not constitute expressive conduct under s2(b) of the Canadian Charter. He submitted that the reasoning in *Behrens* should not be followed, as it is inconsistent with the reasoning in *Keegstra*, which imposed a narrow limitation upon the right to freedom of expression.

82. Mr Kidd SC submitted that, while *Keegstra* involved hate speech rather than criminal damage to property, the opinion of the minority that violence encompasses interference with the property of another, should be adopted. He contended that, while *Behrens* was dealing with public property, the same principle must apply with respect to private property.

83. Mr Kidd SC submitted that, properly construed, the term 'expression' in s15(2) of the Victorian Charter does not encompass conduct involving violence or damage to property, and that it is highly improbable that Parliament would have intended as such in enacting that section. He further submitted that, just as 'expression' directed towards physical harm of persons cannot be protected by the right to freedom of expression, neither can 'expression' directed towards the infliction of physical harm to the property of others.

84. Mr Holdenson QC agreed with the submissions of Mr Kidd SC that, properly interpreted, 'expression' in s15(2) of the Victorian Charter does not include conduct in the form of property damage.

85. The judgments in *Dolphin*, *Keegstra*, *Behrens*, *SG*, *GB* and *N* provide valuable assistance in interpreting the scope of the right to freedom of expression conferred by s15(2) of the Victorian Charter.

86. The very width of the expressive conduct that is potentially capable of falling within s15(2) of the Victorian Charter suggests that what constitutes a protected form of exercise of the right to freedom of expression must be informed by public policy considerations inherent in the nature of a free and democratic society.

87. Even persons who commit the most heinous crimes may claim to be exercising their right to freedom of expression in performing the acts that constitute those crimes. A mass murderer may claim to be conveying a political message about immigration policies by killing innocent people and a rapist may claim to be conveying a message about the role of women by sexually assaulting them. It is inconceivable that the Victorian Parliament intended to protect all forms of expressive conduct, no matter how egregious and inimical to the welfare of society, subject only to the specific restrictions recognised by s15(3) of the Victorian Charter.

88. The public policy considerations that are relevant to acts of violence against members of the community apply equally to acts that constitute criminal damage to property. A terrorist may claim to be conveying a religious message about the heresies of another religion by blowing up its places of worship. Likewise, to take a less extreme example, a person who had a philosophical

objection to physical barriers in neighbourhoods could claim to be conveying a message by tearing down residential fences and setting fire to hedges.

89. In my opinion, public policy considerations are inherent in s15(2) of the Victorian Charter and limit its application to some forms of expressive conduct, independently of s15(3). If this were not the case, there would be endless debates about whether acts which are unquestionably antithetical to freedom, democracy and the rule of law that sustain our society fall within the specific terms of s15(3).

90. Section 15(3) of the Victorian Charter sets out obvious instances of restrictions that apply to the right to freedom of expression, but it does not define the boundaries of permissible forms of expressive conduct. That section is not expressed to be an exhaustive statement of the restrictions to which the right to freedom of expression may be subject. Unlike s7(2), which uses the phrase 'subject ... only to', s15(3) uses the phrase 'subject to'. There is no indication in the language of s15(3) that it is an exclusive code of the limits to the forms of expressive conduct that are protected by s15(2). Indeed, such an interpretation would undermine the democratic foundations upon which the Victorian Charter is built. It must follow that s15(3) does not prevent public policy considerations from informing the scope of the protection conferred by s15(2) on forms of expressive conduct.

91. My opinion is consistent with *Dolphin*, *Behrens*, *SG* and *GB*. My opinion is also consistent with *Keegstra*. In that case, the majority and the minority agreed that acts of violence as a form of expression are excluded from s2(b) of the Canadian Charter as a matter of public policy. The only overt substantive difference between the majority and the minority, for present purposes, related to whether threats of violence were also excluded. On this issue, the reasoning of the minority is more compelling and in line with previous Canadian authorities.^[61]

92. The majority in *Keegstra* did not comment on the minority's opinion that property damage is a form of violence. Accordingly, it cannot be said that the majority disagreed with this proposition. Furthermore, the majority did not comment adversely on the opinion expressed in *Dolphin* that s2(b) of the Canadian Charter does not protect destruction of property.

93. Insofar as *N* implies that criminal damage to property is a form of expression that is included in the right to freedom of expression, subject only to the application of any specific statutory restrictions (such as the restriction for the protection of public order), I would not follow it.

94. Mr Holt submitted that, as a matter of public policy, graffiti should not be excluded as a form of expression protected by s15(2) of the Victorian Charter. He relied upon the following remarks in the statement of compatibility with human rights for the *Graffiti Prevention Bill* 2007: Clause 5 of the *Graffiti Prevention Bill* interferes with a person's right to freedom of expression by making it an offence for a person to mark publicly visible graffiti on property without the consent of the owner of that property. However, the clause protects the property rights of the owner by requiring the property owner's express consent to the marking of the graffiti on their property. The clause is therefore a lawful restriction reasonably necessary to respect the rights and reputation of other persons, pursuant to s15(3) of the Charter.^[62]

95. Mr Holt contended that the compatibility statement constitutes a recognition by Parliament that some forms of property damage, such as graffiti, fall within s15(2) of the Victorian Charter and are protected subject to any restrictions that might apply by virtue of s15(3).

96. I have not been assisted by the views of the minister in the compatibility statement for the *Graffiti Prevention Bill* 2007 on the question of whether conduct involving property damage may fall within the right to freedom of expression conferred by s15(2) of the Victorian Charter. While the explanatory memorandum and the second reading speech on the Victorian Charter may be of assistance in interpreting it in accordance with s35(b) of the Interpretation of *Legislation Act* 1984, subsequent views expressed by ministers or other members of Parliament – whether in or outside the Parliament – on the meaning of provisions of the Charter have no particular status.

^[63]

97. For the purposes of the present case, it is not necessary for me to decide whether, as a

matter of public policy, the forms of exercise of the right to freedom of expression that are protected by s15(2) of the Victorian Charter exclude any expressive act which constitutes a criminal offence. It is sufficient for me to state my conclusion that the exercise of the right in the form of damage to a third party's property or a threat of such damage, is not protected by s15(2).

98. If I am wrong in my view that the scope of the protected forms of exercise of the right to freedom of expression is informed by public policy considerations, there is an alternative analysis that supports the conclusion set out at [97] above. That analysis turns on the meaning of the words 'another medium chosen by him or her' in s15(2) of the Victorian Charter. In my opinion, based on the context in which those words are used and the preamble and purposes of the Victorian Charter, Parliament did not intend that every person be free to choose the form in which to express himself or herself, irrespective of the destructive impact upon society's most cherished democratic values.

99. As the Victorian Charter was enacted to underpin and support our free and democratic society and the rule of law, rather than to undermine or fracture them, the considerations set out at [86] to [97] above lead inevitably to the conclusion that s15(2) does not protect all forms of expressive conduct. It certainly does not protect expression in the form of damage to a third party's property or a threat of such damage.

Conclusion on whether s15(2) is engaged

100. For the above reasons, Mr Magee's act of painting over the advertisement did not fall within the right to freedom of expression in s15(2) of the Victorian Charter.

101. If my conclusion at [67] above in relation to Mr Magee's conduct which resulted in his conviction under s199(a)(i) of the *Crimes Act* is incorrect, then that conduct fell outside s15(2) of the Victorian Charter because it was akin to a threat of damage to a third party's property.

Victorian Charter s15(3): General observations

102. In the light of my conclusions at [100] and [101] above that Mr Magee's conduct did not engage the right to freedom of expression in s15(2) of the Victorian Charter, it is not strictly necessary for me to consider whether ss197(1) and 199(a)(i) of the *Crimes Act* constitute lawful restrictions on that right. However, in case my conclusions are wrong, I will discuss this issue.

103. Irrespective of the width of s15(2) of the Victorian Charter and whether it is subject to public policy limitations, s15(3) makes it clear that the right to freedom of expression is not absolute, but is conditional and qualified.

104. Section 15(3) of the Victorian Charter states that special duties and responsibilities are attached to the right to freedom of expression. It also states that the right may be subject to lawful restrictions necessary for two identified purposes, namely, to respect the rights and reputation of other persons and for the protection of national security, public order, public health or public morality. It is not clear whether the reference to 'special duties and responsibilities' is intended to refer to the two identified purposes or to other matters. If the latter is intended, the section does not identify the other matters or state how those matters can be used to restrict the right. It is not necessary to resolve these issues in the present case.

105. The words 'the right may be subject to lawful restrictions reasonably necessary' for the two identified purposes place the focus on the lawful restrictions. The question is whether the law imposing a restriction on the right to freedom of expression is reasonably necessary for one or both of the two identified purposes.

106. The breadth of the factual circumstances that may fall within the restriction, including the conduct of the person impugning the restriction, may inform the question of whether the restriction is reasonably necessary. If the wording of the restriction is so broad that it captures conduct which has long been considered a basic feature of a free and democratic society, then it may well be held not to be reasonably necessary for the two identified purposes.

107. However, the focus of the inquiry is upon the nature and scope of the lawful restriction, rather than upon its impact on the conduct of the person challenging the restriction. That is, the

question to be asked under s15(3) of the Victorian Charter is not whether the manner in which the lawful restriction affects the conduct of the person impugning the restriction is reasonably necessary for the two identified purposes. The ultimate question is whether, having regard to its nature and scope, the lawful restriction is reasonably necessary for the two identified purposes. The answer to that question does not vary depending on the facts of a particular case.

108. The above approach is consistent with the judgment of Nettle JA in *Noone v Operation Smile (Australia) Inc*^[64] which I will discuss shortly.

Victorian Charter s15(3)(a): ‘The rights of other persons’

Is s15(3)(a) confined to the rights of human beings in the Victorian Charter?

109. According to Mr Holt, the term ‘persons’ in the phrase ‘the rights ... of other persons’ in s15(3)(a) of the Victorian Charter is limited to the rights of human beings because s3(1) defines ‘person’ to mean ‘a human being’. As the victims of Mr Magee’s property damage were not human beings, so it was said, s15(3)(a) had no application.

110. By contrast, Mr Kidd SC submitted that the phrase ‘the rights ... of other persons’ in s15(3)(a) of the Victorian Charter is not so limited. On his submission, as ss197(1) and 199(a)(i) of the *Crimes Act* do not discriminate between property owned by natural persons and property owned by corporations and government, the application of the ‘lawful excuse’ defence does not depend upon the category of the property owner. Mr Kidd SC contended that criminal offences and defences are created for the protection of the community as a whole.

111. According to Mr Kidd SC, the effects of ss5 and 20 of the Victorian Charter demonstrate that the Charter does not seek to limit property rights enjoyed by either natural persons (human beings) or legal persons (such as corporations). Sections 5 and 20 are set out at [23] and [21] above, respectively.

112. Mr Kidd SC relied upon the judgment of Nettle JA in *Noone* in support of his contention that the phrase ‘the rights ... of other persons’ in s15(3)(a) of the Victorian Charter must be interpreted broadly to include the right not to have one’s property damaged, which includes property owned by corporations. Mr Kidd SC further contended, adopting the approach of Nettle JA in *Noone*, that ss197(1) and 199(a)(i) of the *Crimes Act* were always a legitimate restriction on the right to freedom of expression, and there can be no reason to suppose that Parliament’s intention in enacting s15(2) of the Victorian Charter was to confer a right to freedom of expression that included a right to damage the property of another.

113. Mr Holdenson QC adopted Mr Kidd SC’s submissions.

114. *Noone* involved allegations of misleading or deceptive conduct under s9(1) of the *Fair Trading Act* 1999 (‘FTA’) against the respondents, who had made statements on a website regarding the efficacy of their cancer treatments. The respondents invoked the right to freedom of expression conferred by s15(2) of the Victorian Charter and contended that to construe s9(1) of the FTA as prohibiting publication of the impugned statements would be a contravention of that right.

115. Nettle JA held that s9(1) of the FTA was compatible with the right to freedom of expression because it was reasonably necessary to protect ‘the rights ... of other persons’ under s15(3)(a) of the Victorian Charter.^[65] While Warren CJ and Cavanough AJA held that they did not need to determine this issue, their Honours saw ‘great force’ in Nettle JA’s reasoning.^[66]

116. Nettle JA observed that, apart from s15 of the Victorian Charter, s9(1) of the FTA was a legitimate restriction on freedom of speech.^[67] His Honour continued:

Nor is there any reason to suppose that parliament’s purpose in enacting s15 of the Charter was to confer a right of free speech which included the right to engage in misleading and deceptive conduct in trading and commerce ... [T]here is every reason to conclude that Parliament did not envisage the right of freedom of expression conferred by s15 of the Charter as including a right to engage in misleading and deceptive conduct in trade and commerce. The logical implication of s15 is that it was intended to incorporate rather than add to common law rights and freedoms of free speech in trade and commerce.

If there were any doubt about that, s15(3) in terms makes clear that the freedom of expression conferred by the section is subject to reasonably necessary restrictions to respect the rights and reputation of other persons and, in my view there can be no doubt that the proscription of misleading and deceptive conduct in trade and commerce is reasonably necessary to respect the rights of other persons.

...

In the sense that each member of society has a right not to be subjected to offensive material, he or she also has a right not to be misled or deceived in trade or commerce ... Admittedly, it would not qualify as a right *stricto sensu* ... But it would amount to a mesonomic right or privilege in the nature of a de facto interest or claim which is indirectly capable of protection by law ... Article 10(2) of the [ECHR] is not restricted to rights strictly so called. It extends, at least, to the kind of mesonomic rights which in European parlance are conceived of as an indisputable imperative. The 'rights' referred to in s15(3) of the Charter should be viewed in a similar fashion. Section 5 of the Charter lends support to that conclusion.

Approaching s15(3) in accordance with the canons of statutory construction dictated by *Project Blue Sky* thus implies that 'rights' includes the *de facto* interest or claim of a member of society not to be misled or deceived in trade or commerce.^[68]

117. In my opinion, the reference to 'the rights and reputation of other persons' in s15(3)(a) is not confined to the rights of human beings conferred by the Victorian Charter. Rather, it is a generic reference to rights enjoyed by natural persons as well as legal persons, irrespective of whether those rights are incorporated in the Victorian Charter.

118. My conclusion at [117] above is supported by the language of s15(3) of the Victorian Charter. If that provision were intended to be confined to the rights of human beings conferred by the Victorian Charter, as Mr Holt contended, it would be expected to have used the expression 'human rights', which is defined in s3(1) to mean 'the civil and political rights set out in Part 2'. The fact that that expression was not used and the general expression 'rights and reputation' was used strongly suggests that s15(3) is not confined to the rights conferred by the Victorian Charter on human beings.

119. The reference to 'reputation' in s15(3)(a) of the Victorian Charter also negates the hypothesis that s15(3)(a) is confined to the human rights conferred by the Victorian Charter. Section 13 confers rights in respect of reputation and privacy. That section is one of 20 sections in pt 2 of the Victorian Charter which confer one or more human rights. If s15(3)(a) were intended to be confined to the human rights set out in the Victorian Charter, it would have referred to 'rights' generally, in order to capture all the rights set out in pt 2 without identifying any specific right.

120. There is no logical reason why reputation is singled out for specific mention in s15(3)(a) of the Victorian Charter. It is true that the exercise of the right to freedom of expression under s15(2) may collide with the right conferred by s13(b) in relation to reputation. However, the same could be said about the right in relation to privacy in s13(a), the right to freedom of religion in s14 and the cultural rights in s19. Moreover, the Victorian Charter does not confer a right to reputation as such, but a right not to have a person's reputation unlawfully attacked.

121. Another powerful reason for not construing s15(3)(a) of the Victorian Charter as being confined to the rights of human beings conferred by the Charter is that such a construction would lead to absurd results and undermine the purposes of the Victorian Charter. This is particularly so if s15(2) is interpreted as not being subject to public policy limitations, as contended by Mr Holt.

122. The rule of law provides the foundation for every civilised society. The rule of law is founded on the existence of laws that impose rights and obligations on natural and legal persons and on fair and effective mechanisms for the enforcement of those laws. Our society is regulated by a multitude of laws, both civil and criminal and both statutory and common law. Those laws impose countless rights and obligations, of which the rights conferred by the Victorian Charter are but a miniscule subset. To confine the lawful restrictions on the right to freedom of expression in s15(2) of the Victorian Charter to the human rights conferred by the Charter and to those reasonably necessary for the protection of national security, public order, public health and public morality, would potentially undermine the rule of law and the very fabric of society.

123. The facts of this case bear out the above concerns. On Mr Holt's preferred construction of s15 of the Victorian Charter: Mr Magee's damage to the bus shelter falls within s15(2); that section is not subject to public policy limitations; the damage to property is not affected by the restrictions in s15(3)(b) (such as the protection of public order); and s15(3)(a) does not apply because the City of Melbourne and Adshel are not human beings. It is not readily apparent why property belonging to a human being should be protected from damage under s15(3)(a) and property belonging to a company, a government or some other legal entity should not be so protected. Many of the buildings in Victoria that are important from a historical, cultural, political, economic or public safety perspective are not owned by human beings.

124. The facts of this case illustrate a further problem with confining s15(3)(a) of the Victorian Charter to the rights of human beings conferred by the Charter. Section 20, which states that '[a] person must not be deprived of his or her property other than in accordance with law', is the only human right in relation to property that is conferred by the Victorian Charter. There is a real issue of whether the term 'deprived' is wide enough to include repairable damage to property. If such damage is not included, then s15(3)(a) will protect the rights of human beings in relation to their property only in very limited circumstances. Once again, it is not readily apparent why that should be so.

125. To construe the expression 'rights ... of other persons' in s15(3)(a) of the Victorian Charter as being confined to the human rights conferred by the Charter would be inconsistent with the analysis of Nettle JA in *Noone*. As is apparent from [115] and [116] above, his Honour did not adopt such a construction. The Victorian Charter does not confer a right not to be misled or deceived, which his Honour held was reasonably necessary under s15(3)(a). Further, his Honour held that the concept of 'rights' in s15(3)(a) is not confined to legally enforceable rights such as statutory rights and common law rights. Nettle JA's reasoning is consistent with the proposition that s15(3)(a) refers to the collective rights of the community rather than the statutory rights conferred on a particular human being under the Victorian Charter.

126. In my opinion, the matters to which I have referred at [117] to [125] above lead inescapably to the conclusion that s15(3)(a) of the Victorian Charter is not confined to lawful restrictions reasonably necessary to respect the human rights conferred by the Victorian Charter. It follows that the magistrate erred in so concluding.

127. I note, in passing, that Mr Magee's act of painting over the advertisement affected the human right to freedom of expression of members of the public, in the sense that the act prevented them from receiving the information in the advertisement.^[69] However, as the parties did not address this issue in any detail, I will not discuss it further in the context of s15(3)(a) of the Victorian Charter.^[70]

Does s15(3)(a) cover the restrictions in ss197(1) and 199(a)(i) of the *Crimes Act*?

128. Sections 197(1) and 199(a)(i) of the *Crimes Act* restrict the right of a person to damage another's property by rendering that conduct a criminal offence and exposing any person who commits it to a maximum penalty of 10 years' and 5 years' imprisonment, respectively. Those provisions reflect one of the fundamental tenets of any free and democratic society, namely, the right to own and enjoy one's property free from unlawful interference.

129. It follows that an absolute prohibition on intentional damage to the property of another without lawful excuse – such as that contained in s197(1) of the *Crimes Act* – is a restriction that is reasonably necessary to respect the rights of property owners. The same applies for an absolute prohibition on being armed with materials for the purpose of damaging property without lawful excuse, such as that contained in s199(a)(i) of the *Crimes Act*.

130. Anything short of an absolute prohibition, subject to lawful excuse, would be uncertain and unworkable and would seriously undermine the purpose of protecting property that underpins ss197(1) and 199(a)(i) of the *Crimes Act*. It is impracticable to effectively further that purpose by a variable restriction whose application depends on the type of property, the type of damage, the nature and utility of any message conveyed by the damage, the impact on the public or on criteria that are peculiar to the person who is charged with an offence under s197(1) or s199(a)(i). These matters are more suitable for consideration at the sentencing stage of the criminal trial process.

In my opinion, any weakening of the offences in ss197(1) and 199(a)(i) is likely to undermine their protective and deterrent effects.

131. It follows that ss197(1) and 199(a)(i) of the *Crimes Act* impose lawful restrictions reasonably necessary to respect property rights within the meaning of s15(3)(a) of the Victorian Charter. Accordingly, insofar as Mr Magee's conduct may have otherwise engaged the freedom of expression in s15(2), that engagement was negated by ss197(1) and 199(a)(i) of the *Crimes Act* operating under s15(3)(a) of the Victorian Charter.

Victorian Charter s15(3)(b): Protection of 'public order'

132. My conclusion at [131] above is sufficient to dispose of the appeal. However, given the extensive submissions by the parties and the Attorney-General on whether s15(3)(b) of the Victorian Charter applied to the facts of this case, I will now consider that issue.

133. The parties and the Attorney-General agreed that the protection of 'public order' is the only protection referred to in s15(3)(b) of the Victorian Charter that is potentially applicable to the present case. However, there was no consensus on the meaning of 'public order'.

134. Mr Holt submitted that the term 'public order' in s15(3)(b) of the Victorian Charter relates to the orderly nature of public spaces, and that it should be considered in terms of the impact of the act in question in the particular case upon the actual function in the public space in which it occurred. He contended that s15(3) of the Victorian Charter must be applied on a case-by-case, act by act basis to assess whether limitations on the right to freedom of expression conferred by s15 are reasonably necessary.

135. According to Mr Holt, Mr Magee's conduct did not impact on public order. The property damage involved painting over an advertisement for a short period of time with water soluble paint, and the erection of a 'wet paint' sign to ensure that no one was inconvenienced. However, if Mr Magee's conduct did impact upon public order, Mr Holt submitted that the impact was so minimal that the limitation imposed on his right to freedom of expression, in the form of a conviction for an offence under s197(1) of the *Crimes Act*, was not a proportionate response.

136. In support of these submissions, Mr Holt relied upon the New Zealand, United Kingdom and Australian authorities discussed below.

137. In *Brooker v Police*^[71] and *Morse v Police*,^[72] the Supreme Court of New Zealand considered the meaning of 'disorderly' and 'offensive' behaviour in s4(1)(a) of the *Summary Offences Act* 1981 (NZ) in the context of the right to freedom of expression conferred by s14 of the *Bill of Rights Act* 1990 (NZ) ('NZ Bill of Rights').^[73] In *Brooker*, a majority of the Supreme Court of New Zealand held that, for behaviour to be 'disorderly', it had to be disruptive of public order in the particular circumstances of time and place. Causing annoyance, even serious annoyance, would be insufficient to amount to 'disorderly' behaviour if public order was not affected.^[74] In *Morse*, the Court held that, to constitute 'offensive' behaviour, the behaviour did not need to be indecent, obscene or violent, but it had to be productive of disorder. This included behaviour that inhibited the use or enjoyment of a public space to such an extent that it was beyond what could be expected to be tolerated by other reasonable people in a democratic society.^[75]

138. *Hammond v Department of Public Prosecutions*^[76] involved an appeal against a conviction under s5 of the *Public Order Act* 1986 (UK), which relevantly provided that a person is guilty of an offence if he or she 'displays any ... sign ... which is insulting ... within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby ...'. May LJ held that there may be a variety of answers to the question of whether a sign was insulting, depending on the individual circumstances of the case. May LJ also held that, in determining whether a particular sign was insulting, the Court must bear in mind the right to freedom of expression in art 10 of the ECHR.^[77]

139. In *Coleman v Power*,^[78] the appellant was convicted of using insulting words to a person in a public place contrary to s7(1)(d) of the *Vagrants, Gaming and Other Offences Act* 1931 (Qld) ('Qld Vagrants Act'). He had been in a mall distributing pamphlets containing charges of police corruption. When approached by a police officer, the appellant said loudly, 'This is Constable [BP], a corrupt police officer'. A majority of the High Court (McHugh, Gummow, Kirby and Hayne

JJ, Gleeson CJ, Callinan and Heydon JJ dissenting) held that the conviction should be set aside. However, there was no clear majority in relation to the test to be applied in determining when conduct infringed s7(1)(d) of the Qld *Vagrants Act*.

140. The Court also considered the relationship between s7(1)(d) of the Qld *Vagrants Act* and the constitutionally protected right to freedom of communication about government or political matters. All the judges, other than McHugh J, held that the provision did not infringe that right and was therefore valid.

141. Gleeson CJ, in dissent, made the following observations:

Concepts of what is disorderly, or indecent, or offensive, vary with time and place, and may be affected by the circumstances in which the relevant conduct occurs. The same is true of insulting behaviour or speech. In the context of legislation imposing criminal sanctions for breaches of public order, which potentially impairs freedom of speech and expression, it would be wrong to attribute to Parliament an intention that any words or conduct that could wound a person's feelings should involve a criminal offence...

...

It is impossible to state comprehensively and precisely the circumstances in which the use of defamatory language in a public place will involve such a disturbance of public order, or such an affront to contemporary standards of behaviour, as to constitute the offence of using insulting words to a person. An intention, or likelihood, of provoking violence may be one such circumstance. The deliberate inflicting of serious and public offence or humiliation may be another. Intimidation and bullying may constitute forms of disorder just as serious as the provocation of physical violence. But where there is no threat to the peace, and no victimisation, then the use of personally offensive language in the course of a public statement of opinions on political and governmental issues would not of itself contravene the statute. However, the degree of personal affront involved in the language, and the circumstances, may be significant.^[79]

142. *Ferguson v Walkley*^[80] involved two appeals against conviction on charges of using insulting words in a public place and of behaving in an insulting manner in a public place contrary to s17(1) (c) and (d) respectively of the *Summary Offences Act* 1966 (Vic). Harper J discussed *Coleman* in detail and adopted a contextual approach to interpreting the term 'insulting' as used in that Act. His Honour said:

The authorities on this area of the law must be read with caution. The result of any litigation will depend upon the particular legislation under which the charge or charges in question is or are laid, and upon the individual circumstances of the case. ... [O]ne must be conscious of the fact that the language of the judgments may reflect those circumstances to the point where, however apt that language may be when read in the light of the particular facts then before the court, it may be quite inapt in its application to different circumstances.

...

The difficulty is compounded by the fact that insulting behaviour occurs in circumstances that are significantly variable. The context is therefore important, perhaps crucial. So, for example, freedom of communication may be an issue. It was not in the case of [the appellant]; it was in *Coleman*'s case.

...

The test, as I understand the judgment of the Chief Justice [in *Coleman*], is whether the impugned behaviour is so deeply or seriously insulting, and therefore so far contrary to contemporary standards of public good order, as to warrant the interference of the criminal law.^[81]

143. Mr Kidd SC submitted that the expression 'public order' in s15(3)(b) of the Victorian Charter includes the regulation of criminal wrongdoing and that a criminal offence which prohibits members of society from intentionally damaging or destroying the property of another goes to the very heart of the protection of public order. Therefore, so it was said, the magistrate was correct in finding that Mr Magee's act of painting over the advertisement, if it fell within the protection afforded by s15(2), must be subject to the lawful restriction contained in s15(3)(b), because it posed a threat to public order.

144. Mr Holdenson QC submitted that the term 'public order' in art 19(3) of the ICCPR, upon which s15(3) of the Victorian Charter is based, is broader than the term 'prevention of disorder and crime' in the ECHR. According to Mr Holdenson QC, cases such as *Coleman* upon which Mr Holt relied in contending for a narrower interpretation of the term 'public order' in s15(3)(b), are

of little assistance in determining the scope of that term. That is because, so it was said, those cases turned upon the particular construction of the offences in question and did not involve the interpretation of the expression 'public order' in a human rights instrument. According to Mr Holdenson QC, those cases dealt with offences that criminalised behaviour that did not involve physical harm to persons or property; therefore, they did not consider whether property damage falls within restrictions necessary to protect public order.

145. Mr Kidd SC agreed with Mr Holdenson QC's submissions.

146. I agree with the submissions of Mr Kidd SC and Mr Holdenson QC that *Brooker*, *Morse*, *Hammond*, *Coleman* and *Ferguson* are of little or no assistance in construing the meaning of the expression 'protection of ... public order' in s15(3)(b) of the Victorian Charter. This is because those cases deal with broadly-worded offences rather than the interpretation of a human rights instrument.

147. The offences that were considered in the above cases rely on concepts such as 'disorderly', 'offensive' and 'insulting'. Self evidently, whether an act falls within any of these descriptions will depend upon the time, place and context of the conduct. In some cases, the conduct may be antithetical to public order and its restriction may be said to be necessary 'for the protection ... of public order'. There is no fixed relationship, however, between these types of offences and the protection of public order which enables them to provide useful guidance on the meaning of the expression 'for the protection of ... public order' in s15(3)(b) of the Victorian Charter.

148. The actual outcomes of the above cases provide an even less reliable guide to the meaning and scope of the expression 'for the protection of ... public order' in s15(3)(b) of the Victorian Charter. That is because those outcomes depended on not only the meanings ascribed by the courts to the applicable statutory language in each case, but also on the facts of each case. Criminal law principles, including the presumption of innocence and the onus and standard of proof, as well as the law of evidence, also influenced the outcomes.

149. Mr Kidd SC referred to the observation in the compatibility statement for the *Graffiti Prevention Bill 2007* that '[p]ublic order may be defined as the sum of rules which ensure the peaceful and effective functioning of society'.^[82] He contended that a criminal offence that prohibits a member of society from intentionally damaging or destroying the property of another – such as ss197(1) or 199(a)(i) of the *Crimes Act* – goes to the very heart of that definition. For the reasons set out at [96] above, the views expressed by the minister in the compatibility statement are of little, if any, assistance to the Court in deciding the meaning of the term 'public order' in s15(3)(b) of the Victorian Charter.

150. The best guide to the meaning of the expression 'protection of ... public order' in s15(3)(b) is the Victorian Charter itself. The expression is used in conjunction with 'national security', 'public health' and 'public morality', which focus on the collective welfare of society rather than the rights of individuals. Section 15(3)(b) contemplates that individual rights may need to be subordinated to the needs of society for the greater public good. This theme is consistent with the preamble, which refers to 'a democratic and inclusive society that respects the rule of law' and states that 'human rights come with responsibilities and must be exercised in a way that respects the human rights of others'.

151. In the light of the matters to which I have referred, the expression 'protection of ... public order' means, in broad terms, giving effect to rights or obligations that facilitate the proper functioning of the rule of law. This is a wide and flexible concept and includes measures for peace and good order, public safety and prevention of disorder and crime.^[83] Without limiting the lawful restrictions that may be reasonably necessary for the protection of public order, they obviously include laws that enable citizens to engage in their personal and business affairs free from unlawful physical interference to their person or property.

152. For the reasons set out at [105] to [108] above, I agree with Mr Holdenson QC's submission that, whether a restriction in a law is 'reasonably necessary ... for the protection of ... public order' depends on the terms of that law rather than on its application to the facts of a particular case. I accept that the reasonableness of the restriction may be informed by the factual scenarios to

which it may be capable of applying. However, the answer to the question of whether the restriction is ‘reasonably necessary ... for the protection of ... public order’ lends itself to a single answer based on its nature and scope, rather than to a variable answer that depends on the facts and circumstances of each case.

153. I now turn to consider whether the prohibitions in ss197(1) and 199(a)(i) of the *Crimes Act* are ‘lawful restrictions reasonably necessary ... for the protection of ... public order’. Those sections punish intentional damage to the property of a third party and conduct preparatory to such damage, respectively. They seek to protect property rights in a punitive manner as well as by way of deterrence. As protection against unlawful physical interference with the enjoyment of property rights is a vital component of the rule of law, the restrictions in ss197(1) and 199(a)(i) are quintessentially for the protection of public order and are reasonably necessary to achieve it.^[84]

154. The magistrate concluded that ‘public order’ involved regulating the actions of individuals and groups so as to ensure that they do not impact inappropriately on other members of the community. It follows from [151] above that the magistrate’s interpretation of ‘public order’ is too wide and uncertain and should not be accepted. The magistrate also erred by considering the application of s15(3)(b) of the Victorian Charter by reference to the peculiar facts relating to Mr Magee, including his prior convictions, rather than following the approach set out at [151] and [152] above. The issue was not whether Mr Magee’s conduct had undermined public order, but whether the statutory provisions under which he was charged were reasonably necessary for the protection of public order. However, his Honour was correct in his overall conclusion that ss197(1) and 199(a)(i) of the *Crimes Act* imposed lawful restrictions on Mr Magee’s right to freedom of expression for the protection of public order.

Roles and interrelationship of ss7(2) and 32(1) of the Victorian Charter

155. Sections 7(2) and 32(1) of the Victorian Charter are set out at [19] and [22] above. Section 7(2) provides that a human right may be subject only to such reasonable limits as can be demonstrably justified in a free and democratic society. Section 32(1) provides that, 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.

156. In the present case, I have already held that Mr Magee’s conduct in painting over the advertisement and in being armed with materials for the purpose of painting over more advertisements, did not engage the right to freedom of expression in s15(2) of the Victorian Charter for the following reasons:

(a) As a matter of public policy, s15(2) does not apply where expression is in the form of damage to a third party’s property or a threat of such damage;^[85]

(b) Even if s15(2) applied to Mr Magee’s conduct, the right to freedom of expression was restricted by the prohibitions on damage to property in ss197(1) and 199(a)(i) of the *Crimes Act*, because those prohibitions were lawful restrictions reasonably necessary:

- (i) to respect the property rights of the City of Melbourne and Adshel;^[86] and
- (ii) for the protection of public order.^[87]

157. My conclusion that the restrictions in ss197(1) and 199(a)(i) of the *Crimes Act* are lawful restrictions reasonably necessary to respect the rights of other persons and for the protection of public order within the meaning of s15(3) of the Victorian Charter means that there is no room for s7(2) of the Charter to apply. That is because, having decided that the wording of the section that confers the human right itself excludes the application of that right, there is no right to which any ‘reasonable limits as can be demonstrably justified’ can apply.

158. Similarly, as s15 of the Victorian Charter contains its own competing considerations that need to be balanced before arriving at a decision on whether the right conferred by that section applies, it is difficult to see what additional role the interpretational provisions of s32(1) can play.

159. Nevertheless, as the parties and the Attorney-General made extensive submissions on ss7(2) and 32(1) of the Victorian Charter, I will discuss them.

160. The interrelationship of these provisions was considered by the Victorian Court of Appeal in *R v Momcilovic*^[88] and on further appeal, by the High Court in *Momcilovic v The Queen*.^[89] As there was no binding majority opinion in the High Court, there is some uncertainty about the law in this area.

161. This issue was recently considered by the Victorian Court of Appeal in *Noone*.^[90] Nettle JA sought to clarify the position as follows:

The effect of ss32(1) and s7(2) of the Charter was considered by the High Court in *Momcilovic v The Queen*. French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ concluded that s32(1) does not alter the duty of a court as defined in *Project Blue Sky Inc v Australian Broadcasting Authority*, ‘to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have’. It simply expands the range of background considerations against which the effect of a provision falls to be assessed. ...

Their Honours reached different views as to whether s7(2) of the Charter informs the interpretive process under s32(1). French CJ, Crennan and Kiefel JJ concluded that ‘the logical structure of s7(2)’ is such that ‘it cannot be incorporated into the content of the rights and freedoms set out in the Charter’ and, therefore, ‘cannot inform the interpretive process which s32(1) mandates’. ...

In contrast, Gummow, Hayne and Bell JJ held that the relationship between s32(1) and s7(2) is similar to the relationship between s5 and s6 of [the] *New Zealand Bill of Rights Act 1990* and so, as McGrath J of the New Zealand Supreme Court concluded in *Hansen*:

As between ss5 [s7(2)] and 6 [s32(1)] it will usually be appropriate for a Court first to consider whether under s5 [s7(2)] there is scope for a justified limitation of the right in issue. The stage is then set for ascertaining if there is scope to read the right, as modified by a justifiable limitation, as consistent with the other enactment.

According to Gummow, Hayne and Bell JJ, it follows that s32(1) is directed to the interpretation of statutory provisions ‘in a way which is compatible with the human right in question, as identified and described in Pt 2, including, where it has been engaged, s7(2)’. Heydon J concluded that ss32(1) and s7(2) of the Charter were invalid.

There being no majority view as to the operation of s7(2), one must deal with the point in the way that one thinks to be correct. This Court held in *Momcilovic* that s7(2) is to be considered only after the statutory provision in question has been interpreted in accordance with s32(1). In my view it is appropriate to adhere to that approach until and unless the High Court determines that it is incorrect.^[91]

162. Warren CJ and Cavanough AJA left the issue open.^[92]

163. For the purposes of the present appeal, I am content to adopt the approach of Nettle JA in *Noone*. Accordingly, I will consider s7(2) of the Victorian Charter only after ss197(1) and 199(a)(i) of the *Crimes Act* have been interpreted in accordance with s32(1) of the Victorian Charter. Ultimately, the position would not have been any different if I had considered s7(2) as part of the interpretation task under s32(1).

Victorian Charter s32: ‘Interpreted in a way that is compatible with human rights’

164. In the circumstances of the present case, s32(1) requires this Court to interpret ss197(1) and 199(a)(i) of the *Crimes Act*, so far as it is possible to do so consistently with their purpose, in a way that is compatible with the right to freedom of expression.

165. Mr Holt submitted that the protection of an act as ‘expression’ under s15(2) of the Victorian Charter amounts to a ‘lawful excuse’ for the purposes of ss197(1) and 199(a)(i) of the *Crimes Act*, and that this construction is supported by applying the interpretive obligation in s32(1) of the Victorian Charter. According to Mr Holt, an interpretation of ‘lawful excuse’ that does not allow for conduct protected by s15(2) of the Victorian Charter, derogates from the right to freedom of expression because it criminalises acts that may otherwise be a legitimate exercise of that freedom.

166. Mr Kidd SC contended that, pursuant to s32(1) of the Victorian Charter, the limitations imposed by s15(3) upon the right to freedom of expression provided by that section must be taken into account in interpreting ‘lawful excuse’ in ss197(1) and 199(a)(i) of the *Crimes Act* compatibly with that right. The interpretation of ‘lawful excuse’ contended for by Mr Magee, so it

was said, would broaden the concept beyond the limited exceptions recognised thus far. Mr Kidd SC submitted that it would require the Court to radically depart from the ordinary meaning of 'lawful excuse' in ss197, 199 and 201 of the *Crimes Act* and from the intention of Parliament in enacting those provisions.

167. Mr Holdenson QC adopted the submissions of Mr Kidd SC on this issue. He added that, consistently with the approach of Nettle JA in *Noone*,^[93] by reason of s32(1) of the Victorian Charter, the scope of the right to freedom of expression in s15 is a question of interpretation, which is referable to the language of the statute, rather than to Mr Magee's conduct in painting over the advertisement.

168. In *Slaveski v Smith*,^[94] the Victorian Court of Appeal summarised the principles to be drawn from the High Court's decision in *Momcilovic v The Queen*^[95] in relation to the operation and application of s32 of the Victorian Charter as follows:

French CJ, Crennan and Kiefel JJ and Gummow J, Hayne J and Bell J each held in separate judgments that s32(1) 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*.

...

[I]t ... emerges from *Momcilovic* that the effect of s32(1) is limited. It requires: statutes to be construed against the background of human rights and freedoms set out in the Charter in the same way as the principle of legality requires the same statutes to be construed against the background of common law rights and freedoms. The human rights and freedoms set out in the Charter in significant measure incorporate or enhance rights and freedoms at common law. Section 32(1) applies to the interpretation of statutes in the same way as the principle of legality but with a wider field of application ...

Consequently, if the words of a statute are clear, the court must give them that meaning. If the words of a statute are capable of more than one meaning, the court should give them whichever of those meanings best accords with the human right in question. Exceptionally, a court may depart from grammatical rules to give an unusual or strained meaning to a provision if the grammatical construction would contradict the apparent purpose of the enactment. Even if, however, it is not otherwise possible to ensure that the enjoyment of the human right in question is not defeated or diminished, it is impermissible for a court to attribute a meaning to a provision which is inconsistent with both the grammatical meaning and apparent purpose of the enactment.^[96]

169. The Court in *Slaveski*,^[97] and more recently, Nettle JA in *Noone*,^[98] adopted the High Court's approach to s32 of the Victorian Charter in the interpretation of the statutory provisions under consideration in those cases.

170. Applying that approach in the present case, I find that ss197(1) and 199(a)(i) of the *Crimes Act*, interpreted according to the natural meaning of their terms, are compatible with s15 of the Victorian Charter. This is because the parameters within which the right to freedom of expression is conferred by s15 recognise that the right is not absolute; it must yield to the collective interests of the community whose protection is vital to the very efficacy of the right.

171. The purpose underlying ss197(1) and 199(a)(i) of the *Crimes Act* is the protection of property rights. Respect for the property rights of others is a basic civic duty in our society and can aptly be described as a 'special duty and responsibility' for the purposes of s15(3) of the Victorian Charter. For the reasons discussed at [86] to [101] and [128] to [131] above, such respect is reasonably necessary in a free and democratic society founded on the rule of law.

172. The provisions of ss197(1) and 199(a)(i) of the *Crimes Act* are not draconian. They require the Crown to prove beyond reasonable doubt not only that the conduct of an accused was intentional, but also that it was committed without any lawful excuse. Accordingly, the provisions strike a fair balance between the rights of the community and the rights of an accused.

173. As ss197(1) and 199(a)(i) of the *Crimes Act* give effect to the collective rights and interests of the community, which s15(3) of the Victorian Charter itself recognises prevail over the right

to freedom of expression in s15(2), an interpretation of ss197(1) and 199(a)(i) which gives them effect according to their terms is compatible with s15.

Victorian Charter s7(2): ‘Subject ... only to such reasonable limits’

174. The discussion that follows is predicated on the conclusions set out at [156] being incorrect.

175. The question that arises under s7(2) of the Victorian Charter is whether the limits on the right to freedom of expression in ss197(1) and 199(a)(i) of the *Crimes Act* ‘can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom’. In deciding that question, the Court is required to take into account ‘all relevant factors’ including:

- (a) the nature of the right to freedom of expression in s15(2) of the Victorian Charter;
- (b) the importance of the purpose of the limitation in ss197(1) and 199(a)(i) of the *Crimes Act*;
- (c) the nature and extent of the limitation in ss197(1) and 199(a)(i) of the *Crimes Act*;
- (d) the relationship between the limitation in ss197(1) and 199(a)(i) of the *Crimes Act* and its purpose; and
- (e) any less restrictive means reasonably available to achieve the purpose that the limitation in ss197(1) and 199(a)(i) of the *Crimes Act* seeks to achieve.

Section 7(2): General observations

176. There is some overlap between the matters set out in s7(2) of the Victorian Charter and those set out in s15(3) which I have already discussed. Accordingly, I can deal with s7(2) relatively briefly.

177. The prohibitions on intentional damage to another person’s property and being armed with materials for the purpose of causing such damage that are embodied in ss197(1) and 199(a)(i) of the *Crimes Act* are among the defining features of a free and democratic society and are patently justified. In the absence of such prohibitions on the right to freedom of expression, an individual would be able to destroy other people’s property ostensibly in the exercise of that right. The right to quiet enjoyment of property which the law has jealously guarded over many centuries would be undermined, as would the rule of law. I need not repeat the discussion at [128] to [131] above.

178. The observations set out at [177] above become no less compelling when one moves away from general principles and takes into account specific relevant factors, including those set out in s7(2) of the Victorian Charter.

Section 7(2)(a): Nature of the right

179. Mr Holt emphasised that the right to freedom of expression is a basic right in a free and democratic society. He submitted that Mr Magee’s expression was political in nature, which is often deemed to attract a ‘higher level of protection’ than other expression.^[99] He contended that Mr Magee’s views were accepted by the magistrate as honestly held, and that Mr Magee chose to express those views in as non-invasive and reversible a way as possible while maintaining the integrity of the mode of communication that he chose. Mr Magee’s act in painting over the advertisement, so it was said, has more in common with expression in the form of posters adhered to public spaces than with property damage.

180. Mr Holdenson QC submitted that, while the right to freedom of expression is undoubtedly an important one, it can nevertheless be limited, as is apparent from s15(3) of the Victorian Charter. He contended that the exercise of the right carries responsibilities and imposes obligations upon those who engage in the act of expression.

181. The right to freedom of expression, by its nature, is one of the essential pillars of a democratic system of government, because it enables citizens to freely and effectively participate in the political, social, economic and other affairs of their community. The importance of that right cannot be underestimated. However, the right has never been treated as unconditional or unqualified. To treat it as such would undermine the rule of law and threaten the very foundations of democracy that the right seeks to support. Of particular relevance to the present case, the right

to freedom of expression has never been treated as a licence to ignore the criminal law, including laws designed to protect property rights.

182. Even if all the matters to which Mr Holt referred about Mr Magee's exercise of the right to freedom of expression are accepted, as the magistrate pointed out, there were many alternative forms available to Mr Magee to exercise that right, which would not have interfered with third party property rights. The fact that Mr Magee could have chosen other means to communicate his message which respected the property rights of others is a relevant consideration. So is the fact that Mr Magee's conduct interfered with the ability of the public to receive information in the advertisement, because s15(2) of the Victorian Charter includes 'the right to ... receive ... information and ideas of all kinds'.

Section 7(2)(b): Importance of the purpose of the limitation

183. Mr Holt conceded that the purpose of the limitations in ss197(1) and 199(a)(i) of the *Crimes Act* was protection of property rights and that this was an important purpose. However, he submitted that this was a less significant concern in the present case, because the property damaged was a bus shelter in a public place, the advertisement that Mr Magee painted over was contained in a glass wall, Mr Magee used water-based paint and the cost of repair was minimal.

184. Mr Holdenson QC submitted that the importance of the limitation – being to protect the property rights of others – is apparent from the fact that property rights are expressly recognised under s20 of the Victorian Charter and are well-established at common law.

185. The protective purpose of ss197(1) and 199(a)(i) of the *Crimes Act* has both a punitive element and a deterrent element.^[100] For the reasons that I have already discussed,^[101] the limitation against intentional damage to the property of other persons in s197(1) of the *Crimes Act* and the limitation against being armed with materials for the purpose of causing such damage in s199(a)(i), are of utmost importance in maintaining the rule of law. The matters to which Mr Holt referred do not detract from the importance of the punitive and deterrent elements of the purpose underlying ss197(1) and 199(a)(i) of the *Crimes Act*.

186. The purpose of ss197(1) and 199(a)(i) of the *Crimes Act* is not to restrict the right to freedom of expression. Although those provisions may have the effect of limiting one means by which the right could be exercised, their overall impact on the right is merely incidental.

Section 7(2)(c): Nature and extent of the limitation

187. According to Mr Holt, the limitations imposed by ss197(1) and 199(a)(i) of the *Crimes Act* are in the nature of broad and blunt indictable offences carrying a maximum penalty of 10 and 5 years' imprisonment, respectively. He referred to the comments of Murphy J in *R v Halden*^[102] that the offence of intentional property damage in s197(1):

... is a crime which may be committed in a very wide range of circumstances. The property damaged may vary from a book to a mansion, and no doubt the penalty to be imposed will be tempered according to the nature of the property and the damage done.

The penalty may also vary according to the circumstances in which the crime is committed, and the fact that it was here committed with gunshots at night would clearly be material.^[103]

188. Mr Holt sought to draw an analogy between Mr Magee's conduct in painting over the advertisement and the act of 'posting', that is, the adhesion of posters or leaflets on public property to communicate information or ideas. He referred to *Peterborough (City) v Ramsden*,^[104] where the Supreme Court of Canada held that a municipal by-law prohibiting the placing of posters on public property within the city of Peterborough was an unjustifiable restriction on the right to freedom of expression under s2(b) of the Canadian Charter, as it was overly broad and its impact on that right was disproportionate to its objectives.^[105] Delivering the judgment of the Court, Iacobucci J stated:

Posting has historically been an effective and relatively inexpensive means of communication. Posters have communicated political, cultural and social information for centuries ...

...

Posting on public property including utility poles increases the availability of these messages, and thereby fosters social and political decision-making.^[106]

189. Mr Holt submitted that unless 'lawful excuse' incorporates protected expression under s15 of the Victorian Charter, within the limitations imposed by ss197(1) and 199(a)(i) of the *Crimes Act*, there is no ability to take into account the intrusion upon the right to freedom of expression. He contended that those limitations apply without discernment to any property damage, irrespective of the expressive content of that damage. Mr Holt contrasted this position with s6 of the *Graffiti Prevention Act 2007*, which includes a defence of 'reasonable political comment' to the offence of marking offensive graffiti. In this way, so it was said, Parliament has sought to recognise the right to freedom of expression within an offence provision. By contrast, the prohibition on property damage in ss197(1) and 199(a)(i) is a blanket prohibition bearing potentially serious criminal consequences.

190. According to Mr Holdenson QC, the limitation imposed by ss197(1) and 199(a)(i) of the *Crimes Act* is only a limitation with respect to conduct in the nature of expression that causes property damage. Mr Magee or any person in his position, so it was submitted, would be free to express himself or herself in ways other than such as to cause damage to property.

191. The nature and extent of the limitations in ss197(1) and 199(a)(i) of the *Crimes Act* are that, subject to any lawful excuse, the intentional damage to another person's property and being armed with materials for the purpose of such damage are serious criminal offences carrying a maximum penalty of 10 years' and 5 years' imprisonment, respectively. The absolute nature of the limitations and the severe penalties that attach to their breach are clear indications of the importance of the limitations.

192. I accept Mr Holt's submission that the consequences of a conviction for an offence under s197(1) or s199(a)(i) of the *Crimes Act* are very serious. However, as Mr Holdenson QC pointed out, those consequences would arise through a deliberate decision by Mr Magee to express his message in a manner that damaged the property of others and flouted the criminal law, rather than through other means which did not have those effects on others or those consequences for him. The mode of expression selected by Mr Magee did not only affect the property rights of the City of Melbourne and Adshel, it also prevented other persons from exercising the right conferred by s15(2) of the Victorian Charter to 'receive [the] information and ideas' in the defaced advertisement.

193. I note that the offence in the *Graffiti Prevention Act 2007* which attracts the 'reasonable political comment' defence (s6) can be committed even where the graffiti is marked on the accused's own property or with the consent of the property owner. Moreover, as pointed out by Mr Holdenson QC, graffiti in the form of reasonable political comment is an offence under s5 of the *Graffiti Prevention Act 2007* if the property owner has not consented. The offences in ss5 and 6 of that Act are simply not comparable to the offence in s197(1) of the *Crimes Act*.

Section 7(2)(d): Relationship between the limitation and its purpose

194. Mr Holt accepted that there is a clear relationship between the criminal offence of damage to property and the purpose of protecting property. However, he submitted that the problem lies in the blunt means by which the sanctions for contravention of ss197(1) and 199(a)(i) of the *Crimes Act* apply if 'lawful excuse' does not extend to protected expression under s15 of the Victorian Charter.

195. Mr Holdenson QC submitted that there is clearly a direct relationship between the prohibition of property damage and the purpose for which property rights are protected, and it must be established that the property itself is damaged.

196. The relationship between the limitations in ss197(1) and 199(a)(i) of the *Crimes Act* and their purpose of protecting property rights involves both the punishment of those who contravene the limitations and the deterrence of those persons and others from committing such contraventions. In other words, the limitations utilise the traditional tools of the criminal law to maintain the rule of law and to promote peaceful coexistence based on respect for the property rights of others. Without the limitations, that purpose would be ineffectual.

Section 7(2)(e): Availability of less restrictive means

197. The last factor that is referred to in s7(2) of the Victorian Charter is whether any less restrictive means are reasonably available to achieve the purpose that the limitations in ss197(1) and 199(a)(i) of the *Crimes Act* seek to achieve.

198. Mr Holt submitted that it was not necessary for the police to charge Mr Magee under ss197(1) and 199(a)(i) of the *Crimes Act* so as to expose him to a maximum penalty of 10 years' imprisonment in circumstances where he could have been charged with offences carrying lower maximum penalties. He contended that there are less onerous means of achieving the purpose of protecting property rights.

199. In this regard, Mr Holt referred to the offence of wilful damage of property in s9 of the *Summary Offences Act* 1966, which carries a maximum penalty of 25 penalty units or six months' imprisonment; the offence of posting bills and defacing property in s10 of the *Summary Offences Act*, which carries a maximum penalty of 15 penalty units or three months' imprisonment, and the offences of marking graffiti and marking offensive graffiti in ss5 and 6 respectively, of the *Graffiti Prevention Act* 2007, which each carry a maximum penalty of two years' imprisonment.

200. Mr Holt submitted that a recognition that protected expression under s15 of the Victorian Charter can amount to a 'lawful excuse' to the offences in ss197(1) and 199(a)(i) of the *Crimes Act* would enhance this statutory scheme of property offences by ensuring proportionality between the charges and the gravity of the offending conduct.

201. Mr Holt also relied on the fact that civil remedies were available to the City of Melbourne and Adshel.

202. Mr Holdenson QC submitted that property owners should not be required to tolerate damage to their property, regardless of the extent and cost of repair of the damage. He contended that the existence of alternative criminal offences with lesser prescribed maximum penalties is irrelevant in this context. This is because, so it was said, the extent of the restriction on the right to freedom of expression under s15(2) of the Victorian Charter imposed by ss197(1) and 199(a)(i) of the *Crimes Act* is the same as the extent of the restriction of that right imposed by the offences with lesser penalties. Mr Holdenson QC submitted that the magnitude of the prescribed maximum penalty does not bear upon the extent of the restriction of the right.

203. Mr Kidd SC made five points in relation to Mr Holt's submission that ss197(1) and 199(a)(i) of the *Crimes Act* are a disproportionate response to property damage at the minor end of the scale. First, he submitted that a penalty for a criminal offence has never informed the elements of the criminal offence. Secondly, referring to *Maxwell v The Queen*,^[107] he submitted that decisions involved in the prosecution process, including as to whether or not charges should be laid, and if so, the choice of charges, are insusceptible of judicial review. Thirdly, Mr Kidd SC contended that there has never been a significant threshold in terms of the level of damage that needs to be proved to make out the offences under ss197(1) and 199(a)(i) of the *Crimes Act*.

204. Mr Kidd SC's fourth argument was that the sentence to be imposed for a conviction under s197(1) of the *Crimes Act* is ultimately a matter for the sentencing judge, and that the gravity of the offence is an important factor to be taken into account in the sentencing process. Mr Kidd SC referred to the decision of the Victorian Court of Appeal in *Pantazis v The Queen*^[108] in support of the proposition that any unfairness to an accused resulting from the laying of a more serious charge in preference to an equally or more appropriate less serious charge can be remedied at the sentencing stage. In that case, the Victorian Court of Appeal said:

[F]or the purpose of determining whether a less punitive regime was more appropriate it is necessary to consider whether such a lesser offence more specifically addresses the gravamen of the offending conduct and whether, having regard to the extent and character of the offender's criminal conduct, the maximum penalty will enable that conduct to be adequately punished. The same principle is at play when a higher court considers the fact that an offence could have been dealt with summarily and less punitively under other provisions than those charged though these factors will not always call for a reduction of sentence.

Where a sentencing judge concludes that the charge laid has exposed the prisoner to a more punitive regime of sentencing than that to which he ought reasonably have been exposed, the judge may take into account the less punitive regime of an offence which the judge considers more appropriate to the crime alleged. In determining whether the less punitive regime is more appropriate, the judge should have regard to the character and extent of the criminal conduct, whether the less punitive offence more specifically deals with that conduct and whether the maximum penalty prescribed by the lesser offence would be adequate to do justice to that conduct.^[109]

205. The fifth point raised by Mr Kidd SC was that the concept of 'lawful excuse' is not elastic, and that its case-by-case application contended for by Mr Magee would introduce an unacceptable degree of uncertainty into ss197(1) and 199(a)(i) of the *Crimes Act*.

206. In my opinion, Mr Holt's submissions are misconceived. As pointed out by Mr Kidd SC, the penalty that may be imposed upon conviction for an offence does not form part of the elements of that offence and therefore, it has no bearing on the circumstances in which a person may be found guilty of that offence. Each of the 'lesser offences' rendered Mr Magee's act of painting over the advertisement a criminal offence and, in that sense, prohibited it. The fact that an offence carries a lower penalty does not alter the nature of the prohibition. The penalty is relevant to the court's task of sentencing a person who has been found guilty of the offence. The nature and gravity of the offending conduct, the offender's culpability and the impact of the conduct on victims are considerations that must be taken into account under s5(2) of the *Sentencing Act* 1991. Again, as pointed out by Mr Kidd SC, in certain circumstances, the fact that another offence exists which more specifically addresses the offending conduct and which carries a lesser maximum penalty, can also be taken into account as a sentencing consideration.^[110]

207. Where a person's conduct falls within alternative offences, each carrying different penalties, it is a matter for the prosecuting authorities to decide the offence with which the person is charged. Whether the exercise of this prosecutorial discretion is subject to judicial review and whether s38(1) of the Victorian Charter^[111] applies are not issues for determination in the present appeal. I note that Mr Magee's notice of appeal originally included a third ground seeking to impugn the exercise of the prosecutorial discretion to charge him under ss179(1) and 199(a)(i) of the *Crimes Act*, but that this ground was abandoned at the commencement of the hearing of the appeal. Some of Mr Holt's submissions appear to be more relevant to this abandoned ground than to s7(2)(e) of the Victorian Charter.

208. Mr Holt's suggestion that a civil action for damages for minor damage to property is a viable alternative to the offence in s197(1) of the *Crimes Act* fails to take into account the additional unrecoverable cost that such an action would involve. In any event, the punitive and deterrent purposes of criminal offences would be absent from a civil action.

Section 7(2): Conclusion

209. If, contrary to my findings, Mr Magee's conduct engaged the right to freedom of expression in s15(2) of the Victorian Charter, then, having regard to:

- (a) the discussion at [86] to [101] above in relation to public policy considerations that inform the scope of the protected forms of expressive conduct;
- (b) the discussion at [128] to [131] above in relation to the reasonableness of the restrictions in ss197(1) and 199(a)(i) of the *Crimes Act* for the purpose of protecting the property rights of third parties;
- (c) the discussion at [150] to [153] above in relation to the reasonableness of the restrictions in ss197(1) and 199(a)(i) of the *Crimes Act* for the protection of public order;
- (d) the discussion at [170] to [173] above in relation to the compatibility of the restrictions in ss197(1) and 199(a)(i) of the *Crimes Act* with s15(2) of the Victorian Charter; and
- (e) the discussion at [177] to [208] above in relation to the factors set out in s7(2) of the Victorian Charter,

the conclusion is irresistible that the restrictions in ss197(1) and 199(a)(i) of the *Crimes Act* constitute reasonable limits which are demonstrably justified in a free and democratic society based on human dignity, equality and freedom, within the meaning of s7(2) of the Victorian Charter.

Proposed order

210. For the above reasons, Mr Magee acted without a lawful excuse and he was correctly convicted. Accordingly, the appeal will be dismissed. I will hear from the parties on the precise form of the orders to be made by the Court and on the question of costs.

^[1] As the absence of a lawful excuse is an element of the offences under ss197(1) and 199(a)(i) of the *Crimes Act*, the onus was on the Crown to prove that the matters upon which Mr Magee relied did not constitute a lawful excuse. For convenience, I will refer to lawful excuse as a defence.

^[2] *Delaney v Magee* (Unreported, Magistrates' Court of Victoria, Magistrate Mealy, 14 February 2011)

(‘Reasons’).

^[3] The parties prepared a statement of agreed facts for the purpose of the Magistrates’ Court hearing.

^[4] Transcript, *Magee v Delaney* (Unreported, Magistrates’ Court of Victoria, Magistrate Mealy, (29 September 2010) 20.

^[5] Transcript, *Magee v Delaney* (Unreported, Magistrates’ Court of Victoria, Magistrate Mealy, (29 September 2010) 21-2.

^[6] Transcript, *Magee v Delaney* (Unreported, Magistrates’ Court of Victoria, Magistrate Mealy, (29 October 2010) 1-2.

^[7] The note to s6(1) states that corporations do not have human rights.

^[8] Reasons, 7.

^[9] Reasons, 7.

^[10] Reasons, 7-8.

^[11] Reasons, 8.

^[12] Reasons, 8.

^[13] Reasons, 9.

^[14] Reasons, 9.

^[15] Reasons, 9.

^[16] Reasons, 10.

^[17] Reasons, 10.

^[18] *Wong Pooh Yin v Public Prosecutor* [1955] AC 93, 100-1 (‘Wong’); *R v Roach* [1988] VicRp 66; [1988] VR 665, 670; (1987) 31 A Crim R 302.

^[19] *Signorotto v Nicholson* [1982] VicRp 40; [1982] VR 413, 416; (1981) 46 LGRA 141 (‘Signorotto’).

^[20] *Signorotto* [1982] VicRp 40; [1982] VR 413, 416-17; (1981) 46 LGRA 141.

^[21] *Wong* [1955] AC 93, 101.

^[22] [1990] INSC 224; [1990] 3 SCR 697; 1990 4 SCC 314; 1990 2 SCALE 175; 1990 3 JT 403; AIR 1990 SC 1923; [1990] SCC (L & S) 696 (‘Keegstra’).

^[23] (1994) 116 DLR (4th) 232 (‘Weisfeld’).

^[24] [2012] EWHC 34 (QB) (18 January 2012) (‘Samede’).

^[25] *Keegstra* [1990] INSC 224; [1990] 3 SCR 697, 729 (majority), 826-7, 834, 842 (minority).

^[26] (1994) 116 DLR (4th) 232.

^[27] *Weisfeld* (1994) 116 DLR (4th) 232, 235.

^[28] [1989] 1 SCR 927; (1989) 39 CRR 193; 25 CPR (3d) 417; 35 CPR 93; (1989) 58 DLR (4th) 577; 94 NR 167; 24 QAC 2 (‘Irwin Toy’).

^[29] *Weisfeld* (1994) 116 DLR (4th) 232, 242.

^[30] *Weisfeld* (1994) 116 DLR (4th) 232, 242.

^[31] *Weisfeld* (1994) 116 DLR (4th) 232, 243-4.

^[32] [2012] EWHC 34 (QB) (18 January 2012).

^[33] *Samede* [2012] EWHC 34 (QB) (18 January 2012) [14].

^[34] Article 10 of the ECHR provides:

(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

^[35] *Samede* [2012] EWHC 34 (QB) (18 January 2012) [100].

^[36] [2009] EWCA Civ 23 [37].

^[37] *Samede* [2012] EWHC 34 (QB) (18 January 2012) [100].

^[38] This view is consistent with the statement of Brennan CJ in *Levy v Victoria* [1997] HCA 31; (1997) 189 CLR 579, 595; (1997) 146 ALR 248; (1997) 71 ALJR 837; (1997) 12 Leg Rep 14, that ‘non-verbal conduct which is capable of communicating an idea about the government or politics of the Commonwealth and which is intended to do so may be immune from legislative or executive restriction so far as that immunity is needed to preserve the system of representative and responsible government that the Commonwealth Constitution prescribes’. See also Kirby J at 637-8.

^[39] See *Samuels v Stubbs* [1972] 4 SASR 200; *R v Previsic* [2008] VSCA 112 (16 June 2008) [9]-[12].

^[40] [1986] 2 RCS 573 (‘Dolphin’).

^[41] *Dolphin* [1986] 2 RCS 573, 586, 588.

^[42] *Dolphin* [1986] 2 RCS 573, 588.

^[43] *Dolphin* [1986] 2 RCS 573, 604.

^[44] *Dolphin* [1986] 2 RCS 573, 604.

^[45] *Keegstra* [1990] INSC 224; [1990] 3 SCR 697, 730, 732.

^[46] [1989] 1 SCR 927, 970.

^[47] *Keegstra* [1990] INSC 224; [1990] 3 SCR 697, 732 (emphasis in original).

- [48] *Keegstra* [1990] INSC 224; [1990] 3 SCR 697, 732-3.
- [49] *Keegstra* [1990] INSC 224; [1990] 3 SCR 697, 827, 829.
- [50] *Keegstra* [1990] INSC 224; [1990] 3 SCR 697, 830.
- [51] *Keegstra* [1990] INSC 224; [1990] 3 SCR 697, 830-1.
- [52] *Keegstra* [1990] INSC 224; [1990] 3 SCR 697, 830, 832.
- [53] [2001] OJ No 245 (30 January 2001) (*'Behrens'*).
- [54] *Behrens* [2001] OJ No 245 (30 January 2001) [61], [64], [97].
- [55] Human Rights Committee, *Decisions: Communication No 347/1988*, 43rd sess, UN Doc CCPR/C/43/D/347/1988 (15 November 1991) (*'SG'*).
- [56] Article 19(2) of the ICCPR provides: 'Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice'.
- [57] SG, Human Rights Committee, *Decisions: Communication No 347/1988*, 43rd sess, UN Doc CCPR/C/43/D/347/1988 (15 November 1991) [5.2]. The Human Rights Committee made the same findings in *GB v France*, another case involving the defacing of road signs in protest: see Human Rights Committee, *Decisions: Communication No 348/1989*, 43rd sess, UN Doc CCPR/C/43/348/1989 (15 November 1991) [5.2] (*'GB'*).
- [58] Application No 9870/82 (13 October 1983) (*'N'*).
- [59] Article 10 is set out at n 34 above.
- [60] *N*, Application No 9870/82 (13 October 1983) 211-12 [2].
- [61] The question of whether s2(b) of the Canadian Charter extends to threats of violence was left open by the Supreme Court of Canada in *Suresh v Minister of Citizenship and Immigration* [2002] SCC 1; [2002] 1 SCR 3; (2002) 208 DLR (4th) 1, 48 [107]; 90 CRR (2d) 1.
- [62] Victoria, *Parliamentary Debates*, Legislative Assembly, 20 September 2007, 3210 (Bob Cameron).
- [63] *Priest v West* [2011] VSCA 186 (23 June 2011) [40]-[42].
- [64] [2012] VSCA 91 (11 May 2012) (*'Noone'*).
- [65] *Noone* [2012] VSCA 91 (11 May 2012) [143]-[166].
- [66] *Noone* [2012] VSCA 91 (11 May 2012) [22].
- [67] *Noone* [2012] VSCA 91 (11 May 2012) [144].
- [68] *Noone* [2012] VSCA 91 (11 May 2012) [147]-[148], [154]-[155] (citations omitted).
- [69] The right to freedom of expression in s15(2) of the Victorian Charter includes the right to 'receive ... information and ideas'.
- [70] See further below at [182] and [192].
- [71] [2007] NZSC 30; [2007] 3 NZLR 91; (2007) 23 CRNZ 346 (*'Brooker'*).
- [72] [2012] 2 NZLR 1 (*'Morse'*).
- [73] Section 14 of the NZ Bill of Rights provides that '[e]veryone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form'.
- [74] *Brooker* [2007] NZSC 30; [2007] 3 NZLR 91, 105 [24], 106 [31], 110 [41]-[42], 111 [45], 112 [47], 114 [56]-[57], 116 [63], 123 [90], 130 [120]-[121]; (2007) 23 CRNZ 346.
- [75] *Morse* [2012] 2 NZLR 1, 8-9 [2], 10 [7], 16 [25], 18-19 [33]-[36], 26 [62], 27 [67], 28 [70]-[72], 34-5 [102]-[103], 37 [117], 39-40 [124], [127]-[128].
- [76] [2004] EWHC 69 (Admin) (*'Hammond'*).
- [77] *Hammond* [2004] EWHC 69 (Admin) [21]. Article 10 of the ECHR is set out above, n 34. Unlike s15(3) of the Victorian Charter, art 10 does not restrict the right to freedom of expression by reference to 'public order'. Rather, it provides for 'formalities, conditions, restrictions or penalties as are prescribed by law and are necessary ... for the prevention of disorder or crime ...'.
- [78] [2004] HCA 39; (2004) 220 CLR 1; (2004) 209 ALR 182; (2004) 78 ALJR 1166 (*'Coleman'*).
- [79] *Coleman* [2004] HCA 39; (2004) 220 CLR 1, 25 [12], [15]; (2004) 209 ALR 182; (2004) 78 ALJR 1166.
- [80] [2008] VSC 7; (2008) 17 VR 647; (2008) 180 A Crim R 294 (*'Ferguson'*).
- [81] *Ferguson* [2008] VSC 7; (2008) 17 VR 647, 652 [19], 653 [27], 657 [42]; (2008) 180 A Crim R 294.
- [82] Victoria, *Parliamentary Debates*, Legislative Assembly, 20 September 2007, 3210 (Bob Cameron).
- [83] *Coleman* [2004] HCA 39; (2004) 220 CLR 1, 92-3 [242]; (2004) 209 ALR 182; (2004) 78 ALJR 1166.
- [84] See *N*, Application No. 9870/82 (13 October 1983) 211-12 [2], discussed above at [80].
- [85] See above at [86] to [101].
- [86] See above at [128] to [131].
- [87] See above at [151] to [154].
- [88] [2010] VSCA 50; (2010) 25 VR 436; (2010) 265 ALR 751.
- [89] [2011] HCA 34; (2011) 280 ALR 221; (2011) 85 ALJR 957.
- [90] [2012] VSCA 91 (11 May 2012).
- [91] *Noone* [2012] VSCA 91 (11 May 2012) [139]-[142] (citations omitted).
- [92] *Noone* [2012] VSCA 91 (11 May 2012) [24]-[31]. See also *Slaveski v Smith* [2012] VSCA 25 (29 February 2012) [20]-[24] (*'Slaveski'*).
- [93] [2012] VSCA 91 (11 May 2012).
- [94] [2012] VSCA 25 (29 February 2012).
- [95] [2011] HCA 34; (2011) 280 ALR 221; (2011) 85 ALJR 957.
- [96] *Slaveski* [2012] VSCA 25 (29 February 2012) [20], [23]-[24] (citations omitted).
- [97] [2012] VSCA 25 (29 February 2012) [25].
- [98] [2012] VSCA 91 (11 May 2012) [139], [142].

[99] *Sanders v Kingson* [2005] EWHC 1154 (Admin) [84].

[100] See above at [153] and below at [196].

[101] See above at [86] to [101], [128] to [131] and [150] to [153].

[102] (1983) 9 A Crim R 30 (*'Halden'*).

[103] *Halden* (1983) 9 A Crim R 30, 38-9.

[104] [1993] 2 SCR 1084 (*'Ramsden'*).

[105] *Ramsden* [1993] 2 SCR 1084, 1108.

[106] *Ramsden* [1993] 2 SCR 1084, 1096, 1101.

[107] [1996] HCA 46; (1996) 184 CLR 501, 513-14, 534; (1996) 135 ALR 1; [1997] 4 Leg Rep C1; (1996) 70 ALJR 324; (1996) 87 A Crim R 180.

[108] [2012] VSCA 160 (30 July 2012) [42]-[43] (*'Pantazis'*).

[109] *Pantazis* [2012] VSCA 160 (30 July 2012) [42]-[43] (citation omitted).

[110] *Pantazis* [2012] VSCA 160 (30 July 2012) [42]-[43].

[111] Section 38(1) of the Victorian Charter provides:

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.

APPEARANCES: For the appellant Magee: Mr S Holt with Mr JA Anderson, counsel. Victoria Legal Aid. For the respondent Delaney: Mr P Kidd SC with Ms E McKinnon, counsel. Office of Public Prosecutions. For the Attorney-General (Intervener): Mr OP Holdenson QC with Ms J Davidson, counsel. Victorian Government Solicitor.
