IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY
On appeal from the Supreme Court of Victoria – Court of Appeal

No M134 of 2010

BETWEEN:

VERA MOMCILOVIC
Appellant

THE QUEEN
First Respondent

ATTORNEY GENERAL FOR THE STATE OF VICTORIA
Second Respondent

VICTORIAN EQUAL OPPORTUNITY AND HUMAN RIGHTS COMMISSION
Third Respondent

ATTORNEY-GENERAL FOR THE AUSTRALIAN CAPITAL TERRITORY
Intervener

WRITTEN SUBMISSIONS OF THE ATTORNEY-GENERAL FOR THE AUSTRALIAN CAPITAL TERRITORY

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TABLE OF CONTENTS

PART I: CERTIFICATION

1. These submissions are in a form suitable for publication on the Internet.

PART II: BASIS OF INTERVENTION

2. The Attorney-General for the Australian Capital Territory (**the ACT**) intervenes under s 78A of the *Judiciary Act 1903* (Cth). The ACT intervenes in support of all parties as to the validity of provisions of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**the Charter**). It also intervenes in support of the appellant's construction of s 32(1) of the Charter[1] and the submissions of the Attorney-General for Victoria (**Victoria**) and the other parties to the extent that they adopt the same approach to the construction of s 32(1).

3. Specifically, for the reasons developed below, the Territory submits on the issues identified by the parties that:

   3.1. The application of s 32(1) of the Charter is conditional upon a finding that the provision in question, if construed apart from s 32, would be incompatible with the human rights set out in Part 2 of the Charter.

   3.2. Where the interpretative obligation in s 32(1) of the Charter is engaged, it requires that a law be construed having regard both to Parliament's intention in enacting the law in question and in enacting s 32(1). Section 32(1), as the primary remedial provision in the Charter, may require a reinterpretation of a provision, notwithstanding a lack of ambiguity about its meaning, but only insofar as the construction is not inconsistent with Parliament's purpose in enacting the law and does not take the court beyond the task of interpretation.

   3.3. So construed, s 32(1) of the Charter is not beyond the legislative power of the Victorian Parliament by reason of the principle first articulated in *Kable v DPP (NSW)* (1996) 189 CLR 51 (**the *Kable* principle**).

   3.4. Nor do ss 36(2) & (5) of the Charter, by which the Court may make a declaration of inconsistent interpretation, infringe the *Kable* principle.

   3.5. The High Court has power, in the exercise of the jurisdiction conferred upon it by s 73 of the Constitution, to set aside the declaration of inconsistent interpretation made by the Court of Appeal in the present case.

4. In addition, the ACT supports, but does not seek to supplement, Victoria's submissions that ss 5 and/or 71AC of the *Drugs, Poisons and Controlled Substances Act 1981 (Vic)* are not invalid by reason of any inconsistency with ss 13.1, 13.2 and 302.4 of the *Criminal Code (Cth)*.

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[1] See in particular appellant's submissions dated 17 January 2011 (**appellant's submissions**) at [54]-[56]. This is subject to the proviso that the ACT does not agree that, even if the legislation cannot be construed so as to be compatible with the human rights recognised in the Charter, s 32 requires the court to strive to construe the legislation in a way that is "*less incompatible*": cf appellant's submissions dated 17 January 2011 (**appellant's submissions**) at [56](d).

5. Finally, the Territory makes no submissions specifically on the question of the correct construction of ss 5 and/or 71AC of the *Drugs, Poisons and Controlled Substances Act 1981 (Vic)* in light of s 32(1) of the Charter.

PART III: LEAVE TO INTERVENE

6. The Attorney-General for the ACT intervenes as of right pursuant to s 78A of the *Judiciary Act 1903* (Cth).

PART IV: APPLICABLE CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

7. The directly applicable provisions are set out in annexure A to the appellant's submissions.

PART V: BRIEF STATEMENT OF THE INTERVENER'S SUBMISSIONS

(1) The Victorian Charter: Contextual considerations

8. In line with established principles, the question of construction should be considered before constitutional validity is assessed.[2] In turn, the construction of the relevant provisions of the Charter must be considered in context, including a consideration of the structure and purpose of the Charter as a whole.[3]

9. The Victorian Charter and the *Human Rights Act 2004* (ACT) (**HRA (ACT)**) as amended in 2007[4] are intended to create a comprehensive (but not exhaustive[5]) framework within their respective jurisdictions to protect and promote those human rights expressly included within their ambit. The importance attributed by the Parliament of Victoria to the observance of these rights is expressed in the first principle upon which the Charter is based that "*human rights are essential in a democratic and inclusive society that respects the rule of law, human dignity, equality and freedom...*".[6] It is also highlighted by s 31(4) of the Charter which states Parliament's intention that new laws overriding human rights "*will only be made in exceptional circumstances*"[7] and even then, for a maximum of five years without a further expression of Parliamentary intent.[8] As, therefore, highly significant laws enacted to protect basic human rights for the benefit of the individual and society, a broad approach to construction is

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[2] *K-Generation Pty Limited v Liquor Licensing Court* (2009) 237 CLR 501 at [46]; *Gypsy Jokers Motorcycle Club Incorporated v Commissioner of Police* (2008) 234 CLR 532 at [11].

[3] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 and 384 McHugh, Gummow, Kirby and Hayne JJ.

[4] The HRA (ACT) was amended by the *Human Rights Amendment Act 2007* (ACT) to provide *inter alia* guidance on the range of factors to be considered in assessing whether a limitation on a human right is justified under s 28, to replace the interpretative rule in s 30 consistently with s 32 of the Charter, and to impose enforceable obligations upon public authorities.

[5] Charter, s 5; HRA (ACT), s 7.

[6] Preamble to the Charter. See also e.g. *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 at 605 [132] Baroness Hale of Richmond.

[7] The Explanatory Memorandum to the Charter of Rights and Responsibilities Bill explained at p. 21 in relation to then clause 31 that "*[e]xamples of exceptional circumstances would be threats to national security or a state or emergency which threatens the safety, security and welfare of the people of Victoria.*"

[8] Charter, s 31(7).

warranted, in line with the approach adopted in other jurisdictions which have enacted similar laws.[9] These are not laws of narrow intent and ought not to be so construed.

10. The human rights protected and promoted by both Acts are essentially the same and are based on fundamental human rights protected in international human rights law.[10] Both the HRA (ACT) and the Charter draw primarily upon the expression of those rights in the *International Covenant on Civil and Political Rights 1966* (**ICPPR**)[11] which came into force, including for Australia, in 1976. Furthermore, Australians have been entitled to make complaints to the UN Human Rights Committee since Australia's accession to the Optional Protocol to the ICCPR in December 1991.[12] Australia's compliance with its human rights obligations under the ICCPR and other international treaties such as the International Convention on the Elimination of All Forms of Racial Discrimination, is also subject to regular monitoring by relevant international bodies.[13]

11. Importantly, the human rights recognised in these international instruments are not, in general, absolute but are subject to limitations which require a balancing of individual human rights against each other[14] and against competing interests.[15] Manifestly, there is no infringement of a human right if those limitations are not transgressed. Section 7 of the Charter and s 28 of the HRA (ACT) are intended to reflect those limitations, albeit that Victoria and the ACT each chose to enact a general limitation provision modelled, in particular, on s 36 of the Bill of Rights contained in the *Constitution of the Republic of South Africa 1996*, rather than imposing limitations only on a clause-by-clause basis.[16]

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[9] See e.g. *Minister of Home Affairs v Fisher* [1980] AC 319 at 328-329; *R v Grayson* [1997] 1 NZLR 399. A similar approach has been taken in Canada which has a constitutionally entrenched Charter of Rights and Freedoms: see e.g. *R v Big M Drug Mart Ltd* [1985] 1 SCR 295 at 344; *Re BC Motor Vehicle Act* [1985] 2 SCR 486.

[10] See in particular Schedule 1, HRA (ACT) which identifies the ICCPR source of the human rights protected by the Act. The list of human rights contained in the Charter is essentially the same as that contained in the HRA (ACT). See also s 32(2) of the Charter and s 13(1)of the HRA (ACT) which provide for international law to be considered in the interpretation process.

[11] Explanatory Memorandum to the Charter of Rights and Responsibilities Bill at p. 8 in relation to Part 2; Explanatory memorandum to the Human Rights Bill 2003 (ACT)

[12] International Covenant on Civil and Political Rights ("ICCPR") done at New York on 16 December 1966, ATS 1980, No 23; Optional Protocol to the ICCPR done at New York on 19 December 1966, ATS 1991, No 39. Australia signed the ICCPR on 18 December 1972 which came into force generally and for Australia on 23 March 1976, and became a party to the Optional Protocol with effect on 25 December 1991.

[13] In particular, Australia has reporting obligations under the Convention against Torture, the United Nations Convention on the Elimination of All Forms of Discrimination Against Women, the Convention on the Rights of the Child, the International Covenant on Economic, Social and Political Rights, and the ICCPR. In addition, Australia's human rights record is subject to the Universal Periodic Review every four years by the Human Rights Council established by UNGA Res 60/251 on 15 March 2006.

[14] The Explanatory Memorandum to the Charter of Rights and Responsibilities Bill at p. 9 in relation to clause 7 gave the example that "*...it is not Parliament's intention that the right to freedom of expression should be used to destroy the right to privacy.*"

[15] See e.g. articles 5(1) and 18(3), ICCPR. See also, e.g., articles 9 and 10, European Convention on Human Rights.

[16] Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill at pp. 8-9. Explanatory Statement, Human Rights Amendment Bill 2007 (ACT) in relation to clause 4.

12. Leaving aside a number of provisions unique to the circumstances of the United Kingdom, Victoria and the ACT adopted the HRA 1998 (UK) as the model by which they also sought to implement Australia's international obligations within their respective jurisdictions by the enactment of the Charter and HRA (ACT). As, for example, the Attorney-General for Victoria explained in the Second Reading Speech in the House of Assembly of the Charter of Rights and Responsibilities Bill, *"[t]his bill is based on human rights laws that now operate successfully in the Australian Capital Territory, the United Kingdom and New Zealand."* Similarly, in the Second Reading Speech for the Human Rights Amendment Bill 2007 (ACT), the Attorney-General explained that *[t]he passage of this legislation will bring the ACT into line with the United Kingdom, New Zealand and, most recently, Victoria...".*[17]

13. In particular, in common with the HRA (UK), the Charter and HRA (ACT) create a comprehensive framework for the protection and promotion of human rights by all three arms of the government by:—

13.1. applying the interpretative obligation, which requires that legislation, irrespective of when it was enacted, be construed, so far as possible, compatibly with the Convention rights, but not entitling courts to determine the validity of legislation;[18]

13.2. imposing an enforceable obligation upon public authorities[19] to act compatibly with human rights;[20]

13.3. requiring that the legislature follow a process designed to ensure that it considers the compatibility of proposed laws in an open and structured way[21] and, in the case of Victoria, expressly to ensure that human rights are not overridden save *"in exceptional circumstances"*;[22] and

13.4. where a statutory provision cannot be interpreted consistently with a human right, conferring power on the courts to make a declaration to that effect as a part of its final orders triggering a separate process for reconsideration of the provision by the legislature.[23]

14. When viewed in this statutory context, it is evident that the interpretative obligation is a pivotal provision in each Act with application to all who may have to interpret and give effect to legislation. Its significance is emphasised by the fact that it may be displaced only in the exceptional circumstances where an override declaration is made by the Parliament under s 31 of the Charter.[24] Moreover, as Lord Steyn in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557

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[17] Legislative Assembly, Human Rights Amendment Bill 2007,Second Reading Speech, *Hansard,* 6 December 2007 at p. 4027.

[18] Section 32, Charter; s 30 of the HRA (ACT). See also s 3(1), HRA (UK).

[19] *"[P]ublic authority"* is defined in s 4 of the Charter and s 40, HRA (ACT).

[20] Charter, ss 38-39; HRA (ACT), ss 40B-40C. See also s 6-8, HRA (UK).

[21] Sections 1 and 28-31, Charter; s 37-38. See also s 19, HRA (UK).

[22] Charter, s 31(4). See also the Explanatory Memorandum to the Charter of Rights and Responsibilities Bill at pp. 21-22 in relation to clause 31.

[23] Charter, s 36; HRA (ACT), s 32. See also s 4, HRA (UK).

[24] Charter, s 31(6). See also the Explanatory Memorandum to the Charter of Rights and Responsibilities Bill explained at p. 22 in relation to clause 31.

(Ghaidan) explained, the interpretative obligation (in s 3(1) of the HRA (UK)) was "*critical*"[25] to the achievement of the object of the HRA (UK) '..."*to bring rights home" from the European Court of Human Rights to be determined in the courts of the United Kingdom.*"[26] Central, in other words, to the object of the HRA (UK) is a reading of s 3(1) or the "*interpretative obligation*" as the "*prime remedial measure*", while s 4, which provides for the making of declarations of incompatibility by the Courts, is "*a measure of last resort*".[27]

15. Whilst it is true that neither Victoria nor the ACT have or could assume international obligations equivalent to those binding the UK under the European Convention on Human Rights, the purpose of both Acts is to create a commitment to abide by Australia's international human rights obligations utilising such means as are available to these polities constitutionally and, as a part of that, to enable domestic courts to adjudicate upon compliance by those polities and their laws with those standards. It is therefore not surprising that in the Second Reading Speech for the Human Rights Amendment Bill 2007, the Attorney-General for the ACT should have described the ACT as "*...pioneers in the quest to bring rights home in Australia.*"[28]

16. The central and remedial role played by the interpretative obligation underpins its construction by the House of Lords as requiring a broader approach to statutory interpretation than that adopted before its enactment.[29] What this entails is explained later in these submissions. However, the House of Lords has emphasised that in applying that obligation, the courts nonetheless remain engaged in the process of statutory interpretation.[30] That this is where the line must be drawn is also implicit in the declaration of incompatibility as the means by which the courts alert the legislature (and the people) to the existence of an incompatibility that the courts cannot resolve through interpretation, thereby creating what is loosely described as a "dialogue", rather than the "full stop" of invalidity under a constitutionally entrenched bill of rights.[31]

(2) Issue (i):— Does s 32(1) require a prior finding of incompatibility having regard to justification under s 7(2)?

17. The construction of the interpretive obligation in s 32(1) falls to be determined against this context. Specifically, s 32(1) provides that "*[s]o far as it is possible to do so consistently with*

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[25] [2004] 2 AC 557 at 574 [42]
[26] [2004] 2 AC 557 at 574 [42].
[27] [2004] 2 AC 557 at 575 [46]. See also e.g. id at 570 [26] Lord Nicholls of Birkenhead ("*[s]ection 3 is a key section in the Human Rights Act 1998. It is one of the primary means by which Convention rights are brought into the law of this country.*"), and 594 [106] Lord Rodger of Earlsferry.
[28] Legislative Assembly, Human Rights Amendment Bill 2007, Second Reading Speech by the Attorney-General, *Hansard*, 6 December 2007 at p. 4031.
[29] *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 at 577 [49 Lord Steyn
[30] *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 at 572 [33] Lord Nicholls of Birkenhead, 577 [49] Lord Steyn, 600 [119]-[122] Lord Rodger of Earlsferry.
[31] *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 at 600 [120] Lord Rodger of Earlsferry. See also [13] above regarding aspects of the human rights framework created by the Charter and HRA (ACT).

their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights."

18. Properly construed, the ACT submits that s 32(1) requires, as a precondition to its application, that an incompatibility with a human right protected under the Charter is identifed, including having regard to the question of justification under s 7(2).[32] The question of compatibility requires consideration of three steps:

    18.1. whether or not a human right protected under Part 2 of the Charter is engaged;

    18.2. if so, whether or not that human right has been limited; and

    18.3. if so, whether or not that limitation has been demonstrably justified having regard to all relevant factors, including those set out in s 7(2).

19. This approach to s 32(1) is consistent with that adopted with respect to equivalent legislation by the Court of Appeal of the Supreme Court of the ACT,[33] in New Zealand,[34] in Hong Kong[35] and in the United Kingdom.[36] The legitimacy of having regard to the construction adopted in those jurisdictions not only stems from Parliament's intention to follow the UK model. It also stems from the fact that s 32(2) specifically envisages that regard may be had to the judgments of domestic, foreign and international court and tribunals in the construction of statutory provisions relevant to a human right, as well as to international law.

20. By contrast, the Court of Appeal:

    20.1. held that the question of whether a limitation of a human right[37] is "*demonstrably justified*" under s 7(2)[38] of the Charter becomes relevant only ***after*** the meaning of the

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[32] By way of contrast with s 32(1) with its reference to compatibility, s 6 of the New Zealand *Bill of Rights Act 1990* provides that "*Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning*".

[33] *R v Fearnside* (2009) 223 FLR 77 at 97-8; cf the more recent decision of the Supreme Court of the ACT in a bail application in *In the matter of an application for Bail by Isa Islam* [2010] ACTSC 147 (19 November 2010) in which Penfold J adopted a different approach at [236].

[34] As set out by the majority of the court in *Hansen v The Queen* [2007] NZSC 7 at [57] *per* Blanchard J, [88] *per* Tipping J, [192] *per* McGrath J, cf Elias CJ at [8] who found that the interpretative obligation in s 6 of the NZ Bill of Rights Act 1990 required comparison simply against the content of the rights protected rather than against the narrower question of whether a limitation upon the right had been demonstrably justified. The approach of the majority in *Hansen* has been applied in subsequent New Zealand cases, eg *AMM, re HC Wellington CIV 2010-485-328* [2010] NZHC 977 at [13].

[35] *HKSAR v Lam Kwong Mai and Anor* (2006) 9 HKCFAR 574 at [29] *per* Sir Anthony Mason with whom Li CJ and Bokhary, Chan and Ribeiro PJJ agreed.

[36] See, for example, *R v A* [2002] 1 AC 45 at 66-67 [39-43] *per* Lord Steyn, 72 [58] & 86 [106] *per* Lord Hope, 97 [136] *per* Lord Clyde, and 106 [161-2] *per* Lord Hutton; R *v Lambert* [2002] 2 AC 545 at [87] where Lord Hope identified that "*the first question is whether, leaving aside section 3(1), there would be a breach of the Convention*", and *Ghaidan v Ghodin Mendoza* [2004] 2 AC 557 at 570, 583 & 594 where the first step in the argument, considered before any consideration of s 3 of the Human Rights Act 1998 (UK) was compatibility (at [25] *per* Lord Nicholls, at [60] *per* Lord Millett, at [106] *per* Lord Rodger).

[37] Human rights are defined in s 3(1) of the Charter as "*the civil and political rights set out in Part 2 [of the Charter*]". In the *Human Rights Act 2004 (ACT)*, human rights are defined in s 5 as "*the civil and political rights in part 3*". See also s 7(1) which provides that Part 2 "*sets out the human rights that Parliament specifically seeks to protect and promote.*"

challenged provision has been established, including having regard to s 32(1) (*R v Momcilovic* (2010) 265 ALR 751 at 780 [105]); and

20.2. rejected the "*possibility that parliament is to be taken to have intended that s 32(1) was only to operate where necessary to avoid what would otherwise be an unjustified infringement of a right.*" (ibid at 780 [107]).

21. The Court of Appeal would not, therefore, determine the third of the steps outlined above before determining whether s 32(2) applied.

22. With respect, this construction of the Charter would prevent the court from performing a function that the legislature intended that it undertake and should be rejected.

23. ***Limitations are compatible with the protection afforded by the Charter:—*** First, it is clear from s 7(3) of the Charter that limitations may be imposed upon human rights compatibly with the protection of human rights afforded by the Charter. Thus s 7(3) of the Charter provides that *"Nothing in this Charter gives a person, entity or public authority a right to limit (to a greater extent than is provided for in this Charter) or destroy the human rights of any person"* (emphasis added). This is also the premise of clause 6 of the preamble to the HRA (ACT) which acknowledges that *"[f]ew rights are absolute. Human rights may be subject only to the reasonable limits in law that can be demonstrably justified in a free and democratic society. ..."* Consistently with this, the Explanatory Memorandum to the Charter of Human Rights and Responsibilities Bill explained that cl 7(2) embodies *"Parliament's intention that human rights are, in general, not absolute rights, but must be balanced against each other and against competing public interests. The operation of this clause envisages a balancing exercise between Parliament's desire to protect and promote human rights and the need to limit human rights in some circumstances*". This "*need*" would be ignored if the Court of Appeal were correct in its approach.

24. ***S32(1) ensures only compatibility:—*** Secondly, the direction from Parliament in s 32(1) goes so far only as to ensure compatibility with the human rights protected by the Charter.[39] The concept of compatibility or consistency with a human right under the Charter (and the HRA (ACT) and (UK)) is effectively a translation to a domestic context of the concept of infringement or breach of a human right in an international forum. In each context, the underlying question is the same: has the human right in question been transgressed and, as that question cannot be answered at the international level without regard to limitations that may properly be imposed on the right, equally it cannot be answered by legislation intended to implement those obligations domestically without regard to the same question.[40]

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[38] Section 7(2) of Part 2 provides that those rights "*...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...*".

[39] As held by Lord Millett with respect to s 3 of the HRA (UK): *"the obligation arises (or at least has significance) only where the legislation in its natural and ordinary meaning, that is to say as construed in accordance with normal principles, is incompatible with the Convention": Ghaidan v Godin-Mendoza* [2004] 2 AC 557 at 584 [60].

[40] See also para 11 above.

25. ***The ACT's construction promotes purpose:***— Thirdly and related to the last point, the construction for which the ACT contends would promote the purpose of the Charter to give effect to Australia's international human rights obligations. By contrast, if the Court of Appeal's approach were adopted, the question would become whether an interpretation of the relevant provision could be adopted that would promote an ***absolute*** human right which may well not be recognised or consistent with the international instruments on which the Charter is based. Not only, therefore, would it involve a departure from the approach adopted in other jurisdictions that have enacted like Acts.[41] It would be inconsistent with the ICCPR and other international human rights instruments on which the human rights in Part 2 of the Charter (and in Part 3 of the HRA (ACT)) are based.[42]

26. More specifically, this is because, the ICCPR, like the European Convention on Human Rights upon which the HRA (UK) is based, does not separate out the questions of limitation (or interference with a right) and justification. Rather, the rights themselves incorporate limitations premised upon the question of justification, either expressly, as in the case of Article 12 (freedom of movement), Article 17 (privacy), Article 18 (freedom of thought), Article 22 (freedom of association) or implicitly, as in the case of Article 9 (right to liberty and security of the person) and Article 26 (non-discrimination).[43] Consistently with the ICCPR, the question of limitation or interference with human rights protected in Part 2 of the Charter, cannot properly be analysed without reference to questions of justification. The artificiality of any attempt to consider the question of limitation in isolation is highlighted when applied to rights generally accepted as containing positive, as well as negative, obligations, such as the right to life,[44] given that questions as to the existence or breach of a positive obligation are inextricably linked with questions of demonstrable justification (or, in other jurisdictions, proportionality).

27. In effect, therefore, s 7 of the Charter and s 28 of the HRA (ACT) provide an express statement of established principles as to the extent to which limitations may properly be imposed upon human rights which has developed in international jurisprudence in the context of human rights recognised in instruments such as the ICCPR and the European Convention. The intention that ss 7 and 28 interact with the human rights protected by the Charter and HRA (ACT) respectively in line with that jurisprudence is confirmed by the location of those provisions in those parts of the Charter and HRA that identify and define the rights.

28. ***Compatibility must be a consistent meaning:***— In the fourth place, adopting the approach for which the ACT contends means that the concept of compatibility with a human right will

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[41] See paragraph 19 above.

[42] The Explanatory Memorandum to the Charter sets out in its second paragraph that *"The human rights protected by the Charter are civil and political rights. They primarily derive from the International Covenant on Civil and Political Rights 1966 ...".* It states further, as regards clause 7, that Parliament considered a general limitation to be preferable to limitations that operate on a clause-by-clause basis.

[43] In General Comment 18 the United Nations Human Rights Committee recognises at [13] that a distinction will not constitute discrimination if it is based on reasonable and objective criteria and its aim is to achieve a purpose which is legitimate under the Convention.

[44] General Comment No. 06 of the Office of the High Commissioner of Human Rights: The right to life (art. 6): 04/30/1982.

bear a consistent meaning in the legislation.[45] Compatibility is central to the structure and operation of the Charter as is evident, for example, from s 28 (statements of compatibility), s 30 (Scrutiny of Acts and Regulations Committee), 31 (override by Parliament), s 32(3) (validity of incompatible legislation or subordinate instruments), 36(2) (declaration of inconsistent interpretation), and s 38 (conduct of public authorities). It would be surprising and unlikely that Parliament, for example, intended the expression compatible with a human right to bear different meanings in s 32(1), on the one hand, and s 38, on the other hand, which renders it unlawful for a public authority to act in a way that is incompatible with a human right. Indeed, it is not easy to see how, from a practical perspective, the difficulties of reconciling that construction with provisions such as s 38 might be resolved. Rather compatibility should be construed consistently throughout the Charter as importing a judgment as to demonstrable justification under s 7(2). As explained by Besanko J in *R v Fearnside* (2009) 3 ACTLR 25 at 44 [79] (referring to the analogous provision to s 7(2) in the HRA (ACT)), a law which sets a reasonable limit on a human right is not incompatible with the human right; it simply sets a permissible limit or boundary to the human right.

29. ***The construction below would render declarations of incompatibility remote from the controversy:—*** Finally, to hold that an assessment of whether the limitation upon the human right is justified is not relevant to the question of interpretation but only to the question of whether a declaration of incompatibility ought to issue, fundamentally changes the Court's function from the issue of an order consequential upon the resolution of the controversy between the parties, as is the case in the United Kingdom, to the making of an order that is remote from the controversy. In other words, on the approach below, there is no need for the Court to consider the question of justification save in the context of determining whether a declaration of incompatibility ought to be made. With respect, however, there is nothing in the extrinsic material that suggests any intention to depart in so fundamental a respect from the model adopted in other jurisdictions or to require the court to embark upon a function that would depart so markedly from the ordinary judicial function when otherwise adjudicating upon a case. Nor is there any apparent reason for the Victorian Parliament to have intended to do so.

30. ***No risk of different interpretations of the same provision in different contexts:—*** Against this, the Court of Appeal at para [106] was concerned that the approach for which the ACT contends would give rise to the possibility of different interpretations of s 5 of the DPCS Act in its application to different offences. However, with respect, s 32(1) in no way overrides the injunction in *Project Blue Sky* to construe the relevant provision so that it is consistent with the language and purpose of all of the provisions in the statute.[46] Thus, if a legislative provision can have the effect of requiring an unjustified limitation upon a human right protected under the Charter then it will be incompatible with that right, albeit that in other cases (and even if the case before the court is one of those other cases) it could be administered or applied without incompatibility. Parliament's intention that the court focus upon the whole of the applicable

[45] E.g. *Wilson v Commissioner of Stamp Duties* (1986) 6 NSWLR 410 at 418-19.
[46] *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 at 381 [69].

legislation is clear beyond doubt from the language of s 28 of the HRA (ACT) which requires that "*a Territory law*" be interpreted compatibly with human rights where "*a Territory law*" is defined, in the Dictionary, as "*an Act or statutory instrument*".[47]

(3) Issue (ii):— The nature and scope of the interpretive obligation in s 32(1) of the Charter

(a) Errors in the approach adopted below

31. The Court below held that s 32(1) was not intended to be a "*special*" rule of interpretation (at [69], reasons below) in the sense that it "*authorised (and hence required) the court, where necessary, to depart from the meaning which would be arrived at by application of "ordinary" principles of interpretation*" (at [33], reasons below). The first and second respondents support this construction.

32. In this regard, the Court of Appeal expressed "*tentative*" views as to how s 32(1) of the Charter was intended to operate at [101]-[104] of its reasons, suggesting that:

32.1. the provision has the same status as s 35(a) of the *Interpretation of Legislation Act 1984* (Vic)[48] in forming part of the body of rules governing the interpretative task;

32.2. compliance with the s 32(1) obligation requires that the court explore all possible interpretations of the relevant provision and adopt that which least infringes Charter rights; and

32.3. the presumption of legality, as explained by Gleeson CJ in *Plaintiff S157/2002 v Commonwealth,*[49] is given legislative expression in s 32(1) of the Charter and now extends its ambit to the human rights in Part 2 of the Charter.[50]

33. In so doing, the Court inverted the model taken from HRA (UK), making the declaration of incompatibility the primary remedial measure, rather than the measure of last resort.

34. With respect, however, there are a number of difficulties with this construction.

35. First, it runs counter to Parliament's apparent intention of following the UK model as is evident from the text and structure of the Charter and from the extrinsic materials.[51]

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[47] Section 32(1) of the Charter states "*all statutory provisions must be interpreted ...*". Section 3 of the Human Rights Act 1998 (UK) states "*primary legislation and subordinate legislation must be read and given effect ...*".

[48] Section 35(a) of the *Interpretation of Legislation Act 1984* (Vic) provides that "*[i]n the interpretation of a provision of an Act or subordinate instrument—(a) a construction that would promote the purpose or object underlying the Act or subordinate instrument (whether or not that purpose or object is expressly stated in the Act or subordinate instrument) shall be preferred to a construction that would not promote that purpose or object;...*".

[49] (2003) 211 CLR 476 at 492 [30].

[50] The principle of legality has also been explained by Gleeson CJ in *Electrolux Home Products Pty Ltd v The Australian Workers' Union and Ors* (2004) 221 CLR 309 at 329 [21] as more than "*...a common sense guide to what a Parliament in a liberal democracy is likely to have intended; it is a working hypothesis, the existence of which is known both to Parliament and the courts, upon which statutory language will be interpreted. The hypothesis is an aspect of the rule of law*". More recently the principle of legality was described by French CJ as "*the conservative principle that, absent clear words, Parliament does not intend to encroach upon fundamental common law principles ...*". *International Finance Trust v New South Wales Crime Commission* (2009) 204 CLR 319 at 349 [41].

36. Secondly, the Court of Appeal's construction does not sit comfortably with s 1(2) of the Charter which provides that the main purpose of the Charter is to protect and promote human rights including by (b) "***ensuring*** *that all statutory provisions, whenever enacted, are interpreted so far as possible in a way that is compatible with human rights*" (emphasis added).[52]

37. Thirdly, s 36(2) of the Charter frames the trigger for a declaration of inconsistent interpretation as a finding by the Court that a statutory provision "*cannot be interpreted consistently with a human right*". This language reinforces the view that Parliament intended to equip the courts with an effective remedial tool of interpretation in enacting s 32(1) and that a declaration of inconsistent interpretation was a last resort.

38. Consistently with this, the Explanatory Memorandum to the Charter Bill explained with respect to then clause 32(1) that:

> *"The object of this sub-clause is to ensure that courts and tribunals interpret legislation to give effect to human rights. The reference to statutory purpose is to ensure that in [interpreting legislation compatibly with human rights] courts do not strain the interpretation of legislation so as to displace Parliament's intended purpose or interpret legislation in a manner which avoids achieving the object of the legislation."*

39. This passage is taken directly from that of the Report of the Human Rights Consultation Committee published by the Department of Justice, Victoria, in November 2005,[53] which recommended the form of words in fact adopted in the Charter.[54] Significantly, in making that recommendation, the committee explained that *"[t]his is consistent with some of the more recent cases in the United Kingdom, where a more purposive approach to interpretation was favoured*", and referred to the speeches of Lords Nicholls and Lord Rodger in *Ghaidan v Ghodin-Mendoza* [2004] 2 AC 557.[55]

40. Finally, as explained earlier, the fact that the Victorian (and Territory) legislatures were not legislating to "'*bring rights home' from the European Court of Human Rights*" does not mean that their purpose is fundamentally different: cf reasons below at 776 [91]. The real mischief addressed by the HRA (UK) was "*...the fact that Convention rights as set out in the ECHR, which Britain ratified in 1951, could not be vindicated in [the UK] courts.*" Similarly, by the Charter and the HRA (ACT), the legislatures of Victoria and the ACT enacted a commitment to act conformably with human rights contained in international instruments to which Australia is a party and created a system for adjudicating upon compliance within their respective jurisdictions. In those circumstances, it is submitted that the case for reading the interpretative obligation in the Charter (and the HRA (ACT)) as the primary remedial provision is compelling.

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[51] See paras 12 to 13 above.

[52] Similarly, the Explanatory Memorandum to the Charter of Rights and Responsibilities Bill stated that "*[t]he object of this sub-clause [7] is to* ***ensure*** *that courts and tribunals interpret legislation to give effect to human rights.*" (emphasis added).

[53] *Rights, Responsibilities and Respect, The Report of the Human Rights Consultation Committee*, ISBN 1921028181, Melbourne, November 205, Department of Justice, at pp 82-3.

[54] At p 82.

[55] At p 83.

(b) Section 32(1) changes the way that provisions may be interpreted but the process remains one of interpretation:—

41. The Court of Appeal's concern stemmed largely from the view that to afford s 32(1) a remedial function comparative to that afforded to the equivalent provision in the UK would risk requiring the court to embark on a process of legislative amendment rather than interpretation: see e.g. reasons below at 761 [37]. With respect, however, reading s 32(1) of the Charter consistently with s 3(1) of the HRA (UK) does not entail this risk.

42. This is not to deny that that the enactment of s 32(1) of the Charter requires, if necessary to ensure compatibility, that a legislative provision be interpreted in a way that may not have been available before its enactment.[56] Absent that operation and effect, s32(1) and the equivalent provisions in the UK and ACT would be otiose. The decision in *Ghaidan* itself, decided before the enactment of the Charter and the amendments in 2007 to s 30 of the HRA (ACT), is an example of the interpretative obligation being applied with precisely that effect (as is explained further below).

43. However, that does not change the task from one of interpretation. Rather, whilst recognising that there are legitimate boundaries to what can be done by way of interpretation (the "*rubicon which courts may not cross*" in the words of Lord Steyn[57]), it is the location of Parliament's intention in ***both*** the legislative provision in issue ***and*** in s 32(1) of the Charter that guides the court in its interpretative function. As such, s 32(1) involves an application of established principle pursuant to which the language of a law must necessarily give way to a subsequent enactment disclosing a contrary (or different) legislative intent since the subsequent enactment represents in effect an amendment of the earlier provision.[58]

44. The end result, as Lord Hoffman in *R (Wilkinson) v HM Commissioner of Inland Revenue* [2005] 1 WLR 1718 at 1724 [18] stated with respect to s 3(1) of the HRA (UK), is that the intention of Parliament must now be ascertained by identifying:

> *"the interpretation which the reasonable reader would give to the statute read against its background, including, now, an assumption that it was not intended to be incompatible with Convention rights".* [59]

(c) The boundaries of what is "possible" under s 32(1):-

45. Nor when one looks at the construction of what is "possible" in applying the interpretative obligation in s 32(1), is the rubicon crossed if the approach in the United Kingdom is followed.

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[56] Indeed, that would be possible even on the approach adopted by the Court of Appeal pursuant to which in essence, s 32 would supplement and update the principle of legality.

[57] *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 at 577 [49].

[58] *Bropho v Western Australia*, (1990) 171 CLR 1 at 22. Similarly, Lord Woolf MR in *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48 at 72 [75] stated that "*[i]t is as though legislation which predates the Human Rights Act 1998 and conflicts with the Convention has to be treated as being subsequently amended to incorporate the language of section 3".*

[59] See also *R (Wilkinson) v HM Commissioner of Inland Revenue* [2005] 1 WLR 1718 at 1723 [17] Lord Hoffman.

46. Section 32(1) requires the court, if incompatibility is found, to determine whether it is possible to construe the relevant legislative provision consistently with its purpose in a manner which is not incompatible with the relevant human right.

47. Clearly "purpose" cannot be construed so narrowly as to mean the intention to enact a provision as construed prior to the enactment of the Charter. That construction would leave s 32(1) with no effective work to do.

48. Rather, contrary to the court below, in adopting the "*purpose*" of the provision being construed as the touchstone for what is "*possible*", it is submitted that the Victorian Parliament intended to follow the approach adopted by the House of Lords in *Ghaidan* which read the same limitation into s 3(1) of the HRA (UK). In the case of the HRA (ACT), the fact that this was a deliberate choice is evident from the Explanatory Statement that accompanied the Human Rights Amendment Bill 2007 which explained that the new cl 5 "*draws on jurisprudence from the United Kingdom such as the case of Ghaidan...*". Equally, as explained earlier, the extrinsic materials suggest that the same choice was intentionally made by the Victorian Parliament.[60]

49. It is true that *Ghaidan* held that s 3 of the HRA (ACT) may require legislation to bear a meaning that departs from the unambiguous meaning that the language would otherwise bear, and even that words may be read into the provision that the original draftsman did not include so as to make the legislation Convention compliant.[61] However, as Lord Rodger of Earlsferry, for example, explained in *Ghaidan* (in a passage recently cited with approval by the United Kingdom Supreme Court in *Principal Reporter v K and others* [2010] UKSC 56 (15 December 2010) at [61][62]):

> *"When the court spells out the words that are to be implied, it may look as it if is 'amending' the legislation, but that is not the case. If the court implies words that are consistent with the scheme of the legislation but necessary to make it compatible with Convention rights, it is simply performing the duty which Parliament has imposed on it and on others. It is reading the legislation in a way that draws out the full implications of its terms and of the Convention rights. And, by its very nature, an implication will go with the grain of the legislation."*[63]

50. As his Lordship went on to explain, "*...the key to what it is possible for the courts to imply into legislation without crossing the border from interpretation to amendment ... lies in a careful consideration of the essential principles and scope of the legislation being interpreted.*"[64]

51. It follows that it is not possible to define in the abstract precisely where the boundaries of what is "possible" for present purposes may lie. That is a matter that must be worked out in the particular case. However, the manner in which s 3(1) of the HRA (UK) operates so as to create an additional tool of interpretation where all other tools have failed to achieve a rights

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[60] See paragraphs 38 and 39 above.

[61] *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 at 571-572 [32]-[33]. See also ibid at 573 [41] Lord Steyn

[62] The approach in *Ghaidan* had previously been affirmed by the United Kingdom Supreme Court in *Ahmed v HM Treasury (Justice intervening); sub nom A and others v HM Treasury* [2010] UKSC 2 at [115].

[63] *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 at 601 [121].

[64] *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 at 601 [122].

compliant construction can usefully be illustrated by example by reference to *Ghaidan* and to the issue in this case.[65]

51.1. *Ghaidan* concerned the question of whether s 22 of the *Rent Act 1977* (UK) providing that, upon the death of a tenant, a person who was living with the original tenant "*as his or her wife or husband*" became a statutory tenant by succession, included persons in a same-sex relationship. The House of Lords had earlier held that it did not.[66] However, the majority in *Ghaidan* held that that construction did not survive the enactment of the HRA (UK) applying the interpretative obligation in s 3(1). As Lord Nicholls of Birkenhead explained, the policy objective of the provision was to protect the security of tenure of the survivor in light of the widespread contemporary trend for men and women to cohabit outside marriage. That policy objective was equally applicable to the survivor of homosexual couples living together in a close and stable relationship. Accordingly, to hold that s 3(1) of the HRA (UK) requiring that a convention compatible construction be adopted if possible, had by implication extended that protection to the survivor of a homosexual couple was perfectly compatible with the underlying thrust of the original Act. The fact that the particular form of words of the provision adopted by the parliamentary draftsman did not expressly provide for that result did not preclude the implication from being drawn when the *Rent* Act was revisited in the context of s 3(1) of the HRA (UK).[67] This was not a case where the construction would do such violence to the words of s 22 of the *Rent Act* that no such implication could be drawn, as Baroness Hale of Richmond's description of the kind of relationship that meets the statutory test of living together "*as husband and wife*" as "*marriage like*" illustrates.[68]

51.2. Turning then to s 5 of the *Drugs, Poisons and Controlled Substances Act 1981* (Vic), it may be open to construe such a provision as imposing an evidential burden only through the application of the principle of legality, as the appellant contends. However, if previous authority is correct and that construction cannot be achieved by applying ordinary principles of interpretation, then the question arises as to whether that provision has effectively been amended by implication by the enactment of s 32(1) of the Charter so as to impose the lesser onus consistently with the presumption of innocence protected by the Charter. Arguably that construction is consistent with the purpose of the provision, namely, to facilitate proof of the elements of the offence and open on the language which falls short of expressly requiring proof on the balance of probabilities.

52. The continuing significance of the approach in *Ghaidan v Godin-Mendoza* is apparent from both its recent application (in *Principal Reporter v K*, as set out above, and in *Ahmed v HM*

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[65] Note, however, that the ACT does not make any submission as to the correct construction of s 5 of the *Drugs, Poisons and Controlled Substances Act 1981* (Vic), but is merely illustrating the point here made by reference to arguments put by the parties.

[66] *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27.

[67] *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 at 570-572 Lord Nicholls of Birkenhead (with whose reasons Lord Steyn and Lord Rodger of Earlsferry agreed).

[68] *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 at 608 [144].

Treasury[69]), and by its continuing application since *R(Wilkinson) v Inland Revenue Commissioners* [2005] 1 WLR 1718.[70] Contrary to the view expressed by the Court of Appeal at paras 56-57 of its reasons, the speech of Lord Hoffman in *Wilkinson* has not been regarded in the United Kingdom as advocating a different approach from that adopted in *Ghaidan*; nor indeed did Lord Hoffman in *Wilkinson* at para 18 regard it as advocating a different approach.

53. The approach adopted in *Ghaidan* also accords with that taken in other jurisdictions. For example, in Hong Kong Sir Anthony Mason NPJ (with whom there was unanimous agreement) held that the power to make a remedial interpretation of a statutory provision of the kind applied in *Ghaidan, Lambert and Sheldrake* could be implied.[71] Similarly, in New Zealand, Elias CJ held having regard to the terms of s 6 of the New Zealand Bill of Rights Act 1990, which adopts the threshold of *"where an enactment can be given a meaning that is consistent ..."*, that s 6 may entail an interpretation which linguistically may appear strained.[72]

54. Moreover, a process of interpretation by reference to criteria from which Parliament's intention can be inferred so as to lead to a conclusion seemingly inconsistent with the language used is not of itself one with which Australian courts are unfamiliar. As recognised, for example, by Spigelman CJ in *R v Young* (1999) 46 NSWLR 681 at 686-8, a court may construe the words in a statute to apply to a particular situation or to operate in a particular way even if the words used would not, on a literal construction, so apply or operate provided that the words used in the statute are reasonably open to such a construction. Similarly, this court construed legislation so as to avoid an incongruous result of the literal meaning of the words used in, for example, *Cooper v Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297. Nor is the process of determining the scope of legislation in light of changing values or new technology by reference to its purpose alien to the function of statutory construction as, for example, consideration of the question of whether computer source programmes were literary works for the purposes of the *Copyright Act 1968* (Cth) illustrates.[73]

55. Finally, as the position in these other jurisdictions suggests, the adoption of a dialogue model of human rights legislation does not, with respect, indicate that the Parliament intended that the interpretative obligation in s 32(1) of the Charter be narrowly construed[74] (cf *R v Momcilovic* (2010) 265 ALR 751 at 777 [94]). To the contrary, the Second Reading Speech for the Charter in the Legislative Assembly explained that the Charter was based upon *"human rights laws that now operate successfully in the Australian Capital Territory, the United*

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[69] *Ahmed v HM Treasury (Justice intervening); sub nom A and others v HM Treasury* [2010] UKSC 2 at [115].
[70] See eg *Secretary of State for Work and Pensions v M* [2006] 2 FLR 56 at 93 *per* Lady Hale, *R9 Hurst) v London Northern District Coroner* [2007] AC 189 at 216 *per* Lord Brown.
[71] *HKSAR v Lam Kwong Mai and Anor* (2006) 9 HKCFAR 574 at [71-79] *per* Sir Anthony Mason with whom Li CJ and Bokhary, Chan and Ribeiro PJJ agreed.
[72] *Hansen v The Queen* [2007] NZSC 7 at [13].
[73] *Computer Edge Proprietary Limited v Apple Computer Inc* (1986) 161 CLR 171.
[74] This is also clear from the Second Reading Speech in the Legislative Assembly for the Human Rights Bill 2003, 18 November 2003, p 4424 -4250 in which it is stated that *"the facility for a declaration of incompatibility is a vital component of the dialogue model this bill seeks to establish"*.

Kingdom and New Zealand".[75] The relevant distinction drawn in the Second Reading Speech in the passages to which the Court of Appeal referred is between a model, as in the United States, where courts have power to hold legislation as invalid if incompatible with a bill of rights, on the one hand, and the dialogue model whereby Parliament has the final say, on the other hand.

(d) Section 32(1) differs from the principle of legality

56. It follows on the construction of s 32(1) for which the ACT contends that s 32(1) of the Charter differs significantly from the common law principle of legality in three respects.[76]

56.1. Once an incompatibility has been identified, it requires consideration of the legislative intention of Parliament in enacting s 32(1) to which all legislation shall be subject. Thus it is no longer merely Parliament's intention in enacting the legislative provision that is relevant on the question of construction.

56.2. Section 32(1) is cast in mandatory terms. Once an incompatibility has been identified, a construction must be adopted that avoids the incompatibility unless that is not possible consistently with the purpose of the relevant provision.

56.3. It is subject to specified and precise limitations. The threshold is one of possibility, having regard to the need to construe legislation consistently with Parliament's purpose. This threshold differs from those conventionally adopted in respect of the presumption of legality which is framed in different terms.

(4) Issue (iii) Is s 32(1) of the Charter beyond the legislative power of the Victorian Parliament?

57. For the reasons given above, s 32(1) of the Charter requires that the court interpret the relevant legislative provision consistently with the intention of Parliament ascertained by reference both to the legislative provision in question and s 32(1) of the Charter in circumstances where a legislative provision would otherwise be incompatible with a human right protected under Part 2 of the Charter.

58. So construed, s 32(1) does not compromise the independence or impartiality of the court so as to impair the institutional integrity of the Victorian Supreme Court. It is entirely consistent with the judicial character of the court. There is thus no invalidity under the principle set out in

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[75] Victorian Parliamentary Hansard, 4 May 2006, p 1289.

[76] Prior to the coming into effect of the Human Rights Act 1998 (UK) Lord Hoffman, in *Secretary of State for the Home Department v Simms* [2000] 2 AC 115 at 132, described section 3 as expressly enacting the principle of legality as a rule of construction. This was cited with apparent approval by Lord Rodger in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 at 593. Lord Rodger nonetheless premised his analysis upon s 3 of the Human Rights Act 1998 (UK) requiring a court to adopt a construction which could not be reached on a conventional interpretation (as at 594 [106]). More recently Lord Phillips (P) has, having referred to the statement of Lord Hoffman in *Simms*, that "I believe that the House of Lords has extended the reach of s 3 of the HRA beyond the principle of legality.": *Ahmed and others v HM Treasury (Justice intervening); sub nom A and others v HM Treasury* [2010] UKHL 2 at [112] (the case was determined under domestic law and not the Human Rights Act 1998 (UK).

Kable v Director of Public Prosecutions (NSW) (1996) 189 CLR 51 ***(Kable)***.[77] The role of the court remains that of construing legislation by the ascertaining of the legislative intention having regard to the provision in question and s 32(1) of the Charter.

(5) Issue (iv):— Are ss 36(2) & (5) of the Charter beyond the legislative power of the Victorian Parliament by reason of the Kable principle?

59. Section 36 permits, but does not require, the Supreme Court[78] to make a declaration of inconsistent interpretation if certain pre-conditions are satisfied:

(i) there are extant proceedings before the Supreme Court, or in which a question has been referred to the Supreme Court under s 33 of the Charter;[79]

(ii) an issue has arisen in those proceedings that relates to the application of the Charter or its effect on interpretation of legislation;[80]

(iii) there is no relevant override declaration;

(iv) notice in the prescribed form has been given to the Attorney-General and the Victorian Equal Opportunity and Human Rights Commission;[81] and

(v) the court is of the opinion that a statutory provision cannot be interpreted consistently with a human right.[82]

60. With respect to the last of these requirements, on a sensible construction, the term "opinion" would seem to have been used to cover those cases where the finding of incompatibility may not comprise part of the ratio of the decision.

61. The circumstances in which a declaration of incompatibility may be made under s 32(1) of the HRA (ACT) are similar but not identical. First, the HRA (ACT) has no equivalent to (iii) above. Secondly, with respect to (ii) above, a declaration may be made under the HRA (ACT) only if a proceeding is being heard by the Supreme Court and a question arises in the proceedings about whether a Territory law (defined in the Dictionary as an Act or statutory instrument) is consistent with a human right. This potentially ties the power to make a declaration even more closely to the resolution of the controversy.

62. There being no doctrine of separation of powers applicable to the States,[83] the only question is whether or not the existence of the power is incompatible with the institutional integrity of the Supreme Court by reference to the *Kable* principle.

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[77] As explained in *Forge v ASIC* (2006) 228 CLR 45 at 76 [63] *per* Gummow, Hayne and Crennan JJ and recently applied in *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 and *International Finance Trust v NSW Crime Commission* (2009) 240 CLR 319.

[78] Similarly, the power to make a declaration of incompatibility is conferred only on the Supreme Court of the ACT: s 32(1)(a) of the Human Rights Act 2004 (ACT).

[79] Section 36(1) of the Charter.

[80] Section 36(1) of the Charter.

[81] The equivalent provision in the *Human Rights Act 2004 (ACT)* is s 34 which requires notice to the Attorney-General and the human rights commission.

[82] Section 36(2) of the Charter. Section 32(2) of the *Human Rights Act 2004 (ACT)* uses slightly different language: *If the Supreme Court is satisfied that the Territory law is not consistent with the human right, the court may declare that the law is not consistent with the human right.*

63. Neither cumulatively nor individually do any of the features of the power to make a declaration of inconsistent interpretation in ss 36(2) & (5) of the Charter suggest any such incompatibility.

64. First, on the construction advocated by the ACT, the Court would determine the question of incompatibility, including whether the limitation on human rights is justified, in the context of determining whether a human rights compliant construction in the matter before it was possible using s 32(1) of the Charter. No separate inquiry divorced from the controversy between the parties would be required before the Court determined whether a relevant incompatibility existed and the power to make the declaration of inconsistency was triggered.[84] As such, the power is one that arises out, and is inextricably connected to, the proceedings. Furthermore, the Court's power to make a declaration is discretionary. It follows that the decision-making process which leads to the declaration is characteristically judicial, arising in the context of a determination of rights and involving itself an exercise of discretion capable of being exercised on appropriately judicial criteria.

65. Secondly, the declaration will have a direct impact upon the administration of the legislation in question by public authorities which are otherwise enjoined from acting in a way that is incompatible with a human right or making a decision that fails to give proper consideration to a relevant human right under s 38(1).

66. Thirdly, while a declaration of inconsistent interpretation does not affect the validity, operation or enforcement of legislation or create any legal right or civil cause of action,[85] the fact that the remedy is declaratory only is perfectly consistent with judicial power.[86]

67. Fourthly, procedural fairness is required and the Attorney-General and the Human Rights and Equal Opportunity Commission, together with all other parties to the proceedings,[87] have a right to be heard on the issue of the making of a declaration of inconsistent interpretation

68. Finally, upon the making of a declaration of incompatibility, the only obligation imposed upon the Supreme Court is to cause a copy of the declaration to be given to the Attorney-General under s 36(6). While the receipt of a declaration of inconsistent interpretation by the Attorney-General triggers the requirements under s 37 of the Charter for the relevant Minister to prepare a response to the declaration to be laid before the Houses of Parliament and

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[83] E.g. *John Fairfax Publications Pty Ltd v Attorney-General (NSW)* (2000) 158 FLR 81 at [41] Spigelman CJ.

[84] Under the Charter, it is theoretically possible, but practically unlikely that a declaration of inconsistent interpretation could be made in a case in which no question as to statutory interpretation had arisen. That question is not one which arises in this case. No such possibility, however, could arise under the HRA (ACT) where the trigger in s 32 requires that an issue arise in the proceeding about whether a Territory law, defined in the Dictionary as an Act or statutory instrument, is consistent with a human right.

[85] Section 36(5) of the Charter. The equivalent provision in the Human Rights Act 2004 (ACT) is s 32(3) which provides that *"The declaration of incompatibility does not affect – (a) the validity, operation or enforcement of the law; or (b) the rights or obligations of anyone."*

[86] See, eg *Mellifont v Attorney-General (Qld)* (1991) 173 CLR 289.

[87] The Attorney-General may intervene or be joined as a party under s 34(1) of the Charter, as may the Victorian Equal Opportunity and Human Rights Commission under s 40(1). In each case, the Attorney-General and Commission may be taken to be a party to the proceeding for the purposes of an appeal, if they should decide to intervene: s 34(2) and 40(2), Charter respectively.

published in the Gazette,[88] the Supreme Court has no involvement in those political processes. Given these matters and the independent discretion vested in the Court to make the declaration, it follows that the separateness and independence of the Supreme Court is not impinged upon in any degree by the vesting of the power in the Court to make a declaration of incompatibility.

(6) Issue (v):— Does this court have power in the exercise of the jurisdiction conferred on it by s 73 of the Constitution to set aside a declaration of inconsistent interpretation

69. It is submitted that a declaration is a judgment or order for the purposes of s 73 of the Constitution as a consequence of which, this Court has power to entertain an appeal against a declaration of inconsistent interpretation.

70. In *Mellifont v Attorney-General (Qld)* (1991) 173 CLR 289, Mason CJ, Deane, Dawson, Gaudron and McHugh JJ held that answers to questions referred to a full court for consideration in the course of proceedings fall within the description "*judgments, decrees, orders*" in s 73 of the Constitution whether or not those answers determine the rights of the parties, as did a determination of the Court of Criminal Appeal on a point of law arising only after the accused had been acquitted of the charge in the indictment or a *nolle prosequi* entered. This was because the reference and the decision on the reference arose out of the proceedings on the indictment and were a statutory extension of those proceedings.[89] Nor did their Honours consider that the fact that the purpose of seeking a review of the trial judge's ruling was to secure a correct statement of the law for application in future cases rendered the process academic or hypothetical so as to take it outside judicial power.[90]

71. An analogy may be drawn with the power to make a declaration of inconsistent interpretation. The power to grant such a declaration arises by reason of a detailed legislative scheme for the protection of human rights through a combination of remedies including relief (excluding damages) relying upon the unlawfulness of an act or decision of a public authority,[91] and construction of legislation compatibly with human rights under s 32(1), the end result of which in a particular case may be a finding that a human rights compatible construction of the legislative provision in question cannot be achieved. The power in those circumstances to issue a declaration of inconsistent interpretation under s 36(2) arises out of those proceedings and is a statutory extension of the powers otherwise available to dispose of the matter. There

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[88] The equivalent provision in the Human Rights Act 2004 (ACT) is s 33 which requires the Attorney General to present a copy of the declaration of incompatibility to the Legislative Assembly within 6 sitting days after the Attorney-General receives the copy and to prepare a written response to the declaration of incompatibility and present this to the Legislative Assembly not later than 6 months after the day the copy of the declaration is presented to the Legislative Assembly.

[89] At 304.

[90] At 305.

[91] Section 39(1) of the Charter. The analogous provision in the HRA (ACT) is s 40C which enables a person to start a proceeding in the Supreme Court against a public authority or rely on the person's rights under the Act in other legal proceedings if a person claims that a public authority has acted in contravention of s 40B (unlawfulness of acting incompatibly with human rights or failing to give proper consideration to a relevant human right) and alleges that the person is or would be a victim of the contravention.

is no persuasive reason in law or policy why the appellate powers of this Court should be limited to two of those three interconnecting and related forms of relief. Indeed, it would seem absurd if this court could allow an appeal against a decision as to interpretation, but could not set aside the declaration of inconsistent interpretation which was made consequent upon that interpretation.

Dated the 31st day of January 2010

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