IN THE HIGH COURT OF AUSTRALIA
MELBOURNE OFFICE OF THE REGISTRY

No. M134 of 2010

B E T W E E N:

10 **VERA MOMCILOVIC** Appellant

AND

THE QUEEN First Respondent

AND

THE ATTORNEY-GENERAL FOR THE STATE OF VICTORIA Second Respondent

20

AND

THE VICTORIAN EQUAL OPPORTUNITY AND HUMAN RIGHTS COMMISSION Third Respondent

30

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Part I: Certification

1. This submission is in a form suitable for publication on the internet.

Part II: Basis of intervention

2. The Attorney General for Western Australia intervenes in these proceedings pursuant to section 78A of the *Judiciary Act* 1903 (Cth) in support of the First Respondent.

Part III: Why leave to intervene should be granted

3. Not applicable.

Part IV: Applicable constitutional provisions, statutes and regulations

4. See Annexure 1. The statutory provisions set out in Annexure 1 are still in force, in that form, at the date of making this submission.

Part V: Submissions

Contentions of the Attorney General for Western Australia

5. The Attorney General for Western Australia contends that:

(a) Section 32(1) of the *Charter of Human Rights and Responsibilities Act* 2006 (Vic) ("the Charter"), as construed by the Court of Appeal or in accordance with the submissions of the First and Second Respondents, is within the legislative power of the Victorian Parliament.[1]

(b) However, s. 32(1) of the Charter would be beyond the legislative power of the Victorian Parliament if it were construed so as to require courts to interpret legislation in a manner that departs from the objectively determined intention of that Parliament.[2]

(c) The function of making declarations of inconsistent interpretation could not be validly conferred on a court exercising federal jurisdiction. To any extent that the Court of Appeal was exercising federal jurisdiction in the present case, s. 36 of the Charter would not be applicable in the proceedings;[3] and

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1 Paragraphs 6 - 39 below.
2 Paragraphs 6 - 27 and 40 - 45 below.
3 Paragraphs 46 - 72 below.

(d) A State Parliament may confer on a State court exercising non-federal jurisdiction the function of making declarations of inconsistent interpretation. However, such a declaration is not a "judgment, decree, order or sentence" in respect of which an appeal lies to this Court under s. 73 of the Constitution.[4]

(e) Sections 5 and 71AC of the *Drugs, Poisons and Controlled Substances Act* 1981 (Vic) ("the DPCS Act") are not inconsistent with ss. 13.1, 13.2 and 302.4 of the *Criminal Code* (Cth).[5]

Interpretation Provisions and the Constitution

6. The process of construing a statutory provision is commonly described as a search for legislative intention. As this Court noted in *Zheng v Cai*:[6]

> "It has been said that to attribute an intention to the legislature is to apply something of a fiction.[7] However, what is involved here is not the attribution of a collective mental state to legislators. That would be a misleading use of metaphor.[8] Rather, judicial findings as to legislative intention are an expression of the constitutional relationship between the arms of government with respect to the making, interpretation and application of laws. As explained in *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs*,[9] the preferred construction by the court of the statute in question is reached by the application of rules of interpretation accepted by all arms of government in the system of representative democracy."

This passage was recently re-affirmed by this Court in *Dickson v The Queen*,[10] and was applied by the Court of Appeal in the present case.[11]

7. The constitutional relationship referred to in *Zheng* operates both in relation to:

(a) the common law and equitable principles developed by the courts; and

(b) statutory additions to, or modifications of, those common law and equitable principles.

8. In a democratic society, changes in the law that cannot logically or analogically be related to existing common law rules and principles are the province of the legislature.[12]

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4 Paragraphs 73 - 75 below.
5 Paragraphs 76 - 77 below.
6 (2009) 239 CLR 446 at 455 [28].
7 *Mills v Meeking* (1990) 169 CLR 214 at 234; *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319 at 339-340.
8 *Singh v The Commonwealth* (2004) 222 CLR 322 at 385 [159].
9 (2002) 123 FCR 298 at 410-412.
10 (2010) 84 ALJR 635 at 642; [2010] HCA 30 at [32].
11 *R v Momcilovic* (2010) 265 ALR 751 at 778-9; [2010] VSCA 50 at [99].

9. In relation to statute law, the Constitution provides for the making of laws by a Commonwealth Parliament "directly chosen by the people"[13], and contemplates the continuation of the legislative power of representative State Parliaments established under State constitutions.[14] In Victoria entrenched[15] provision is made for a representative legislature with power to make laws for Victoria by ss. 16, 26 and 34 of the *Constitution Act 1975* (Vic). The authority to make laws, other than by the orderly development of common law and equitable principles, resides with Parliaments and not the courts. The role for Australian courts contemplated by this Constitutional structure concerns determining the validity of laws which Parliaments have purported to enact and the application of laws which Parliaments have validly enacted.

10. In applying, and determining the validity of, laws enacted by a Parliament the courts will ascertain what the legislature has done by a process of determining the objective intention of the legislature. In doing so the courts will have regard not only to the language used by Parliament but to the purpose of the law, the context in which it was enacted and a range of assumptions or presumptions. The "rules which the courts themselves have prescribed for the communication of the legislature's intention"[16] and statutory rules of interpretation provide part of the context in which the law was enacted. As French J noted in the passage of *NAVV* cited with approval in *Zheng*, the meaning which is the product of interpretation:[17]

> "is legitimate if and only if the interpretation process invokes criteria which, whether developed by courts or decreed by statute, or both, are broadly understood by the Legislature, the Executive and the judiciary."

11. The fundamental responsibility of a court when it interprets a statute is to give effect to the legislative intention as it is expressed in the statute.[18]

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12 *Breen v Williams* (1996) 186 CLR 71 at 115 per Gaudron and McHugh JJ; see also to similar effect at 99 per Dawson and Toohey J and *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 29-30 per Brennan . In England see *In Re Spectrum Plus Ltd (in liquidation)* [2005] 2 AC 680 at 697-8 [33] per Lord Nicholls of Birkenhead.

13 Sections 7 and 24, read with ss. 51 and 52, of the Constitution.

14 Sections 106-108 of the Constitution.

15 Section 18 of the *Constitution Act 1975* (Vic) read with s. 6 of the *Australia Act 1986* (Cth).

16 *Corporate Affairs Commission of NSW v. Yuill* (1991) 100 ALR 609 at 610 per Brennan J.

17 *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 123 FCR 298 at 412 [432].

18 *Babaniaris v. Lutony Fashions Pty Ltd* (1987) 163 CLR 1 at 13 per Mason J.

12. In *Marshall v. Watson*[19] Stephen J said:

> "...it is no [part][20] of the judicial function to fill gaps disclosed in legislation; as Lord Simonds said in *Magor and St Mellons RDC v. Newport Corp*oration,[21] 'If a gap is disclosed, the remedy lies in an amending Act' and not in a 'usurpation of the legislative function under the thin disguise of interpretation'."

Later decisions of the Federal Court have recognised a qualification to this principle enabling a court to "fill in a gap" in order to arrive at, and give effect to, the legislative intention, recognising the extreme caution necessary arising from the danger that the court may be seen to be engaging in judicial legislation. [22]

10 13. In *Babaniaris v Lutony Fashions*[23] all members of the Court recognised that the doctrine of *stare decisis* must give way to the unambiguous meaning of a statute.

14. The common law, independently of statute, permits a court construing legislation to consider, in the first instance and not merely at some later stage when ambiguity might be thought to arise, the context in which the law was enacted in order to ascertain the mischief which the statute was intended to cure.[24] That context is used for the purposes of ascertaining, rather than supplanting, the intention of the enacting legislature. The court may prefer to the literal meaning an alternative construction which is reasonably open and "more closely conforms to the legislative intent".[25]

15. A similar approach is adopted when applying a statutory provision, such as s. 15AA of
20 the *Acts Interpretation Act* 1901 (Cth) and its State equivalents, which require the court to prefer a construction that would promote the purpose or object of the legislation. In *Newcastle City Council v GIO General Ltd*[26] McHugh J said:

> "...as I pointed out in *Kingston* v *Keprose Pty Ltd,*[27] in applying a purposive construction, 'the function of the court remains one of construction and not legislation'. When the express words of a legislative provision are reasonably capable of only one construction and neither the purpose of the provision nor any other provision in the legislation throws doubt on that construction, a court cannot

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19 (1972) 124 CLR 640 at 649; see also Barwick CJ at 644.

20 The word "power" appears to have been erroneously used in the judgment instead of the word "part".

21 [1952] AC 189 at 191.

22 *Handa v Minister for Immigration* (2000) 106 FCR 95 at 100-101 [15]-[17] per Finkelstein J, cited in *Parks Holdings Pty Ltd v Chief Executive Officer of Customs* (2004) 56 ATR 210 at 230; [2004] FCA 820 at [86] per Goldberg J.

23 (1987) 163 CLR 1 at 13-14 per Mason J; at 23-24 per Wilson and Dawson JJ; at 30 per Brennan and Deane JJ.

24 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 per Brennan, Dawson, Toohey and Gummow JJ, Gaudron J concurring; *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85 at 112-113 per McHugh J.

25 *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 per Brennan, Dawson, Toohey and Gummow JJ (Gaudron J concurring).

26 (1997) 191 CLR 85 at 109.

27 (1987) 11 NSWLR 404 at 423.

> ignore it and substitute a different construction because it furthers the objects of the legislation.

16. The approach to interpretive provisions such as s. 15A of the *Acts Interpretation Act* 1901, which provides for Acts to be read subject to the Constitution, reflects a constitutional requirement. In *Re Dingjan; ex parte Wagner*[28] the Court adopted what was said by Latham CJ in *Pidoto v Victoria*.[29] Latham CJ had rejected an argument that s. 46(b) of the *Acts Interpretation Act* (the predecessor to s. 15A) was directed, not to the construction of laws for the purpose of determining their meaning, but to the operation of all laws and applies only when the law, construed according to its terms, is beyond power[30]. Latham CJ characterised such an application of s. 46(b) as requiring "the court to perform a feat which is in essence 'legislative and not judicial'." Latham CJ concluded that s. 46(b) did not authorise a court to adopt such a method of "promulgating a law under the guise of ascertaining it".[31]

17. In the *Bank Nationalisation Case* Latham CJ, dealing with a similar provision in s. 6 of the *Banking Act 1947* (Cth), said that the "Court cannot re-write a statute and so assume the functions of the legislature".[32] Rich and Williams JJ adopted what Latham CJ had said in *Pidoto* noting that "the Court cannot legislate; that is a function of Parliament".[33] Dixon J likewise construed the provision as not attempting "an inadmissible delegation to the Court of the legislative task of making a new law from the constitutionally unobjectionable parts of the old".[34]

18. As the Full Federal Court put the position in *Sportodds Systems Pty Ltd v NSW*:[35]

> "Put simply the Court cannot `construe' the relevant provision, whether by reading down or by expunging invalid provisions, where the effect of doing so is to create a provision which the Parliament did not intend. For this purpose various *indicia* are referred to such as the extent of the proposed change; the *indicia* within the statute itself; the legislative purpose and so on. But the essential issue remains - is the Court carrying out the permissible function of the interpretation of the statute (read in the context of the relevant *Acts Interpretation Act* provision), or is the Court itself making legislation?"

19. This limitation also applies to the common law principle that legislation should be construed in a manner which, so far as its language permits, would avoid, rather than

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28 (1995) 183 CLR 323 at 339 per Brennan J; at 348 per Dawson J; at 355 per Toohey J; at 366 per Gaudron J and at 372 per McHugh J

29 (1943) 68 CLR 87 at 109.

30 The argument is set out at (1943) 68 CLR 87 at 108-9.

31 (1943) 68 CLR 87 at 110.

32 *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 164.

33 *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 252.

34 *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 372.

35 (2003) 133 FCR 63 at 73 [19].

result in, a conclusion that the section is invalid.[36] That principle is based upon a "fundamental rule of construction that legislatures of the federation intend to enact legislation that is valid and not legislation that is invalid".[37] The principle operates by reference to, and not in abrogation of, the objective legislative intention of Parliament.

20. The formulation of the content of the law which is to be applied to the determination of a justiciable controversy is a function which is essentially legislative in character, except where what is involved is the orderly development of the common law and equity. In *Plaintiff S157/2002 v The Commonwealth*[38] the plurality identified the "hallmark of the exercise of legislative power" as being the "determination of 'the content of a law as a rule of conduct or a declaration as to power, right or duty'". In the same passage the plurality recognised that a "rewriting of the statute" was "a function of the Parliament, not a Chapter III court."

21. *Plaintiff S157/2002* was cited by Gummow and Crennan JJ, with whom Callinan and Heydon JJ concurred, in *Thomas v Mowbray*[39] where the critical question was identified as being whether the impugned provision failed to adequately define what is the jurisdiction of the relevant courts:

> "because it is an attempt to delegate to the issuing courts the essentially legislative task of determining 'the content of a law as a rule of conduct or a declaration as to power, right or duty'."

22. Similarly, in the *Native Title Act Case*[40] the Court recognised that:

> "Under the Constitution, the Parliament cannot delegate to the Courts the power to make law involving, as that power does, a discretion or, at least, a choice as to what that law should be".

The Court found s. 12 of the *Native Title Act* 1993 (Cth), which purported to give the "common law of Australia in respect of native title" the force of a law of the Commonwealth, to be invalid. One of the grounds of invalidity was that the provision involved an attempt to confer legislative power on the judicial arm of government.

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36 *New South Wales v The Commonwealth (The Work Choices Case)* (2006) 229 CLR 1 at 161 [355] per Gleeson CJ, Gummow, Hayne, Crennan and Heydon JJ; see also *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at 349 [41] –[42] per French CJ and cases there cited.

37 *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629 at 644 [28] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.

38 (2003) 211 CLR 476 at 513 [102] per Gaudron, McHugh, Gummow, Kirby and Hayne JJ, quoting from Latham CJ in *Commonwealth v Grunseit* (1943) 67 CLR 58 at 82.

39 (2007) 233 CLR 307 at 345 [71] per Gummow and Crennan JJ, Callinan J concurring at 509 [600], Heydon J concurring at 526 [651].

40 *Western Australia v The Commonwealth (The Native Title Act Case)* (1995) 183 CLR 373 at 486 per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ, Dawson J concurring.

23. That judicial power does not extend to the creation of rules which alter existing rights or obligations was also a basis of this Court's holding that it had no power to overrule cases prospectively. In *Ha v NSW*[41] the majority said:

> "A hallmark of the judicial process has long been the making of binding declarations of rights and obligations arising from the operation of the law upon past events or conduct[42]. The adjudication of existing rights and obligations as distinct from the creation of rights and obligations distinguishes the judicial power from non-judicial power[43]. Prospective overruling is thus inconsistent with judicial power on the simple ground that the new regime that would be ushered in when the overruling took effect would alter existing rights and obligations."

24. Rules of statutory construction are to be used to ascertain rather than to displace the objective legislative intention of the enacting Parliament. A provision which purports to authorise a court to depart from the objectively determined intention of the enacting legislature is inconsistent with the Constitution in at least three respects.

25. First, such a departure from the objectively determined legislative intention is inconsistent with the relationship between the arms of government with respect to the making, interpretation and application of laws contemplated by the Constitution.

26. Secondly, for a court to formulate the legal rules which will govern its determination of a dispute before it, other than by way of the development of common law and equitable principles subject to the constraints identified above, is repugnant to the judicial process, as understood and conducted in Australia, in a fundamental degree. Such a function cannot be validly conferred on an Australian court.[44]

27. Thirdly, such a provision would involve courts in the performance of a legislative function in conjunction with the exercise of judicial power. In the case of a Commonwealth statute, such a provision would involve the conferral of a non-judicial power on a court exercising the judicial power of the Commonwealth. In the case of a State statute, such a provision would require a court exercising federal jurisdiction to perform a non-judicial function where State law affects the determination of the relevant matter. Such a State provision would also require this Court to perform a non-judicial function in the exercise of its appellate jurisdiction under s. 73 of the Constitution. In both cases there would be an abrogation of the separation of the judicial power of the Commonwealth, which comprises both the appellate jurisdiction conferred on the High Court by s. 73 of the Constitution and the original jurisdiction

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41 (1997) 189 CLR 465 at 503 per Brennan CJ, McHugh, Gummow and Kirby JJ.

42 *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 188.

43 *Rola Co (Australia) Pty Ltd v The Commonwealth* (1944) 69 CLR 185 at 203.

44 *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at 363 [87] per Gummow and Bell JJ; at 368 [103] and 378 [136] per Hayne, Crennan and Kiefel JJ; and at 379 [140] per Heydon J.

conferred in relation to "matters" specified in ss. 75 and 76 of the Constitution,[45] from other governmental functions required by the Constitution.[46]

Validity of s. 32 of the Charter as construed by the Court of Appeal and the First and Second Respondents

28. Section 32(1) of the Charter 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."

The "human rights" referred to are those set out in Part 2 of the Charter.[47]

29. Section 32(2) of the Charter provides that international law and judgments relevant to a human right may be considered in interpreting a statutory provision. Section 32(3) provides that the section does not affect the validity of legislation.

30. In the present case the Court of Appeal rejected the argument that s. 32(1) was intended to create a "special" rule of statutory interpretation.[48] Rather, s. 32 was part of the body of rules governing the interpretative task.[49] The Court said:[50]

> "Compliance with the s 32(1) obligation means exploring all 'possible' interpretations of the provision(s) in question, and adopting that interpretation which least infringes Charter rights. What is 'possible' is determined by the existing framework of interpretive rules, including of course the presumption against interference with rights."

31. The Court of Appeal regarded the purpose of s. 5 of the DPSC Act as "unambiguously clear from the statutory language",[51] so that "it is not possible to interpret s. 5 of the DPCS Act other than as imposing a legal onus of proof".[52]

32. So construed and applied, s. 32(1) of the Charter did not operate in a manner which was fundamentally different from common law and statutory presumptions which are commonly applied to the construction of legislation.

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45 The judicial power of the Commonwealth: *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 264-5 per Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ.

46 *R v Kirby; ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254; *Attorney General (Cth) v The Queen* (1957) 95 CLR 529; *Re Wakim; ex parte McNally* (1999) 198 CLR 511.

47 Section 3(1) of the Charter, definition of "human rights".

48 It explained what it meant by a "special" rule at *R v Momcilovic* (2010) 265 ALR 751 at 760-761; [2010] VSCA 50 at [33] and [37]-[39].

49 *R v Momcilovic* (2010) 265 ALR 751 at 779; [2010] VSCA 50 at [102].

50 *R v Momcilovic* (2010) 265 ALR 751 at 779; [2010] VSCA 50 at [103].

51 *R v Momcilovic* (2010) 265 ALR 751 at 782; [2010] VSCA 50 at [113]. This is consistent with the approach recently taken by the Supreme Court of the ACT in *Re Islam* [2010] ATCSC 147.

52 *R v Momcilovic* (2010) 265 ALR 751 at 784; [2010] VSCA 50 at [119].

33. The Court of Appeal referred to the common law presumption that courts do not impute to the legislature an intention to abrogate or curtail fundamental rights or freedoms unless such an intention is clearly manifested by unmistakeable and unambiguous language.[53]

34. Similarly, in *International Finance* French CJ referred to "the conservative principle that, absent clear words, Parliament does not intend to encroach upon fundamental common law principles, including the requirement that courts accord procedural fairness to those who are to be affected by their orders."[54] Where an Act confers power on public officials to adversely affect an individual's interests, the rules of procedural fairness will be excluded only by "plain words of necessary intendment".[55]

35. Other strong presumptions arise at common law. These include that a legislature conferring a function on a court takes the court as it finds it with all its incidents, "in the absence of express words to the contrary or of reasonably plain intendment".[56] A law of the Commonwealth is not to be interpreted as withdrawing or limiting a conferral of jurisdiction unless the implication appears "clearly and unmistakably".[57] Certain kinds of statutes are assessed by reference to a presumption against an intention to interfere with vested property rights "unless that intention is manifest".[58]

36. Existing presumptions may also relate to international law. Generally a statute is to be interpreted and applied as far as its language admits so as not to be inconsistent with the comity of nations or with the established rules of international law.[59] Further, where legislation has been enacted pursuant to, or in contemplation of, the assumption of international obligations under a treaty or international convention, in cases of ambiguity a court should favour a construction which accords with Australia's

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53 *R v Momcilovic* (2010) 265 ALR 751 at 779; [2010] VSCA 50 at [103], by reference to *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 492 [30] per Gleeson CJ.

54 *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at 349 [41]. This principle was stated in *Coco v The Queen* (1994) 179 CLR 427 at 436-7 per Mason, Brennan, Gaudron and McHugh JJ.

55 *Plaintiff M61/2010E v The Commonwealth* at (2010) 85 ALJR 133 at 147-8; [2010] HCA 41 at [74] citing *Annetts v McCann* (1990) 170 CLR 596 at 598 per Mason CJ, Deane and McHugh JJ.

56 *Mansfield v DPP (WA)* (2006) 226 CLR 486 at 491 [7], citing *Electric Light and Power Supply Corporation Ltd v Electricity Commission (NSW)* (1956) 94 CLR 554 at 560. See also *Gypsy Jokers v Commissioner of Police (WA)* (2008) 234 CLR 532 at 555 [19] per Gummow, Hayne, Heydon and Kiefel JJ.

57 *Shergold v Tanner* (2002) 209 CLR 126 at 136 [34].

58 *Clissold v Perry* (1904) 1 CLR 363 at 373 per Griffith CJ, Barton and O'Connor concurring; *Clissold* was cited with approval in *Mandurah Enterprises v WAPC* (2010) 240 CLR 409 at 421 [32] per French CJ, Gummow, Crennan and Bell JJ.

59 *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309 at 363 per O'Connor J; *Polites v The Commonwealth* (1945) 70 CLR 60 at 68-9 per Latham CJ; at 77 per Dixon J and 80-81 per Williams J; *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at 384 [97] per Gummow and Hayne JJ; *Behrooz v Secretary of the Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486 at 529-530 [126]-[127] per Kirby J.

obligations.[60] In an appropriate case that may include the *International Covenant on Civil and Political Rights* on which the Charter is based.[61]

37. Parliaments may restate, modify, remove or add to these common law presumptions. A State law might abrogate or extend the presumption that it will act in accordance with established rules of international law. To do so is merely to modify the context against which State laws are to be read, which is a matter taken into account in determining objective legislative intention. If such a presumption is "a working hypothesis, the existence of which is known both to Parliament and the courts, upon which statutory language will be interpreted"[62] then it must be open to Parliament to change the rules by which its intention is to be determined.

38. There is a qualification to this statement, where a presumption is erected as a statutory rule. If an interpretative provision were to require a court to put to one side the unambiguous language of the statute being construed it may go beyond the establishment of a mere presumption. A provision would infringe the limitations on legislative power identified above if it required even unambiguous statutory language to be read with what French CJ referred to in *International Finance*[63] as a "counter-intuitive judicial gloss". In substance such a provision might require a court to depart from any objectively determined legislative intention. As French CJ recognised in *Fazzolari Pty Ltd v Parramatta City Council*,[64] the terminology of "presumption" is linked to that of "legislative intention".

39. On the construction of s. 32(1) of the Charter adopted by the Court of Appeal, as well as that adopted by the First and Second Respondents, the presumption gives way to the unambiguous language of the statute. On such a construction, s. 32(1) does not infringe any relevant constitutional limitation on State legislative power.

Validity of s. 32 of the Charter as construed by the Appellant

40. Section 3(1) of the *Human Rights Act* 1998 (UK) provides that:

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60 *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 492 [29] per Gleeson CJ, citing *Minister for Immigration v Teoh* (1995) 183 CLR 273 at 287 per Mason CJ and Deane J; see also *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 384 [98] per Gummow and Hayne JJ and *Al-Kateb v Godwin* (2004) 219 CLR 562 at 589-91 [63]-[65] per McHugh J; and at 622 [167] per Kirby J.

61 See *Coleman v Power* (2004) 220 CLR 1 at [17]-[20] per Gleeson CJ; compare Kirby J at 91-6 [240]-[249]. While it is unnecessary to determine which view is correct in the present case, it is submitted that the views of Gleeson CJ are to be preferred.

62 *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 at 329 [21] per Gleeson CJ cited in *K-Generation v Liquor Licensing Court (SA)* (2009) 237 CLR 501 at [47] per French CJ.

63 *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319 at 349 [42].

64 (2009) 237 CLR 603 at 619 [42]-[43].

> "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."

41. That section has been interpreted to require the United Kingdom courts to "depart from the intention of the Parliament which enacted the legislation"[65] even where the meaning to be attributed to the legislation is unambiguous. The limitation on this power is that the court cannot adopt a meaning "inconsistent with a fundamental feature of legislation", which is not "compatible with the underlying thrust of the legislation" or which does not "go with the grain of the legislation".[66]

42. An interpretive provision which requires a court to depart from the objectively determined intention of the enacting Parliament is of quite a different character to an interpretive provision which either requires or prohibits a court from taking account of rights such as those contained in the Charter. Such a provision involves the court in the exercise of a legislative power in a manner that infringes the constitutional limitations noted at paragraphs 25 - 27 above.

43. The effect of a provision authorising a departure from the objective legislative intention cannot be confined to State courts or courts exercising non-federal jurisdiction. In the present case this Court, exercising appellate jurisdiction under s. 73 of the Constitution, is called on to construe the DPCS Act in light of the Charter, in the course of determining the Appellant's criminal liability in respect of an offence for which she was sentenced to imprisonment. If the approach adopted in *Ghaidan* were applied to the Charter, that exercise of the judicial power of the Commonwealth would co-mingle with the determination by the Court, rather than Parliament, of the applicable law which governs that liability. That co-mingling of the judicial power of the Commonwealth with a legislative function would extend to the proceedings in the Court of Appeal if those proceedings involved the exercise of federal jurisdiction. Although the defence based on s. 109 of the Constitution and the *Criminal Code* (Cth) was not raised before the Court of Appeal or at trial, had that defence been raised at that time there would have been no question that the Victorian courts were exercising federal jurisdiction in a matter arising under the Constitution.

44. In considering whether s. 32(1) of the Charter, construed as a special interpretive rule, would involve an impermissible delegation of the legislative task of determining the content of a law it is relevant to have regard to the broad terms in which the rights are set out in ss. 8-27 of the Charter. It is also relevant to have regard to the terms in

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65 *Ghaidan v. Godin-Mendoza* [2004] 2 AC 557 at 571 [30] per Lord Nicholls of Birkenhead, Lord Steyn, Lord Roger of Earlsferry and Baroness Hale of Richmond concurring.

66 *Ghaidan v. Godin-Mendoza* [2004] 2 AC 557 at 572 [33] per Lord Nicholls of Birkenhead; and at 601 [121] per Lord Rodger of Earlsferry.

which s. 7 of the Charter is cast, contemplating "reasonable limits" ascertained taking account of "all relevant factors", including those specified in a non-exhaustive list. The experience in the United Kingdom outlined in annexure 2 to these submissions and in recently reported decisions of the House of Lords and Supreme Court,[67] demonstrates the breadth of choice which the *Human Rights Act* leaves to the courts in determining the content of the law which they are to apply. The experience in that country also shows that the rights specified in the Charter may conflict with each other, so that the courts will have to make an assessment as to which right is to prevail. For example the right to privacy and reputation identified in s. 13 of the Charter may need to be balanced against the right to freedom of expression identified in s. 15 of the Charter.[68] The choices demanded by the Charter, if its provisions were to usurp legislative intention, are such as to involve an impermissible delegation of the exclusively legislative function of providing what the law should be.[69]

45. That is not to say that no legislative function can ever be given to a court. Judges have the power to make subsidiary legislation in the form of their own rules of Court.[70] However, that is a function historically invested in courts which does not empower the courts to formulate the substantive law to be applied in the proceedings.

Declarations of Inconsistent Interpretation in Federal Jurisdiction

46. The Court of Appeal made a declaration of inconsistent interpretation under s. 36 of the Charter. This part of Western Australia's submissions addresses the authority of the Court to do so on the assumption that the Court of Appeal was exercising federal jurisdiction in determining the appeal.

47. On that assumption, the Court of Appeal could not have made a declaration of inconsistent interpretation in the exercise of federal jurisdiction because:

(a) The making of such a declaration does not involve the exercise of judicial power;[71] and

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67 See *R (Nasseri) v Secretary of State for the Home Department* [2010] 1 AC 1; *In re BBC* [2010] AC 145; *R (Purdy) v Director of Public Prosecutions* [2010] 1 AC 345; *R (L) v Commissioner of Police* [2010] AC 410; *R (Walker) v Secretary of State for Justice* [2010] AC 553; *Ali v Birmingham City Council* [2010] 2 AC 39; *RB (Algeria) v Secretary of State for the Home Department* [2010] 2 AC 110; *Secretary of State for the Home Department v AF (No 3)* [2010] 2 AC 269; *R v Horncastle* [2010] 2 AC 373 and *Norris v United States* [2010] 2 AC 487.

68 See *In re BBC* [2010] 1 AC 145 and *Re Guardian News and Media Ltd* [2010] WLR (D) 13; [2010] UKSC 1.

69 See paragraphs 20 - 22 above.

70 See, for example, section 168 of the *Supreme Court Act 1935* (WA) and section 88 of the *District Court of Western Australia Act 1969* (WA).

71 Paragraphs 49 - 56 below.

(b) The making of such a declaration does not involve the establishment of any right, duty or liability in any matter which may be the subject of federal jurisdiction.[72]

48. As a consequence, it is submitted that s. 36 of the Charter is not picked up and applied to proceedings in federal jurisdiction by ss. 79 or 80 of the *Judiciary Act.*[73]

Judicial Power

49. As was pointed out in *Ainsworth v. Criminal Justice Commission*[74] the jurisdiction of a superior court to grant declaratory relief is confined by the considerations which mark out the boundaries of judicial power.

10 50. An Australian court would not contemplate making a declaration of inconsistent interpretation absent some statutory authority to do so. The question must be asked: "why not?". If the discretion to make declarations is confined only in the manner suggested in *Ainsworth*, the only reason why a court could not make such a declaration would be because doing so would be to step outside the boundaries of judicial power. If that is the reason for the limitation, then the absence of power in federal jurisdiction cannot be cured by the enactment of a statutory provision.

51. In *Ainsworth* there was a breach of a legal duty by the Commission to accord procedural fairness. The declaration made in that case was as to the rights and duties of the parties, and not as to the mere compatibility of those rights with a standard.
20 Such a judicial declaration must relate to the rights or obligations of the parties, rather than an assessment of the merits of the law.[75]

52. A declaration of inconsistent interpretation does not determine the justiciable controversy about whether the Appellant has committed an offence against the DPCS Act. The Appellant remains convicted and sentenced for the offence, notwithstanding that the law which sustained that conviction was inconsistent with the rights provided for in the Charter. Neither she nor the Crown has any immediate right, duty or liability established by the declaration. The declaration merely states that the law of Victoria does not meet a certain standard which does not go to the validity of the law.

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72 Paragraphs 57 - 70 below.

73 Paragraphs 71 - 72 below,

74 (1992) 175 CLR 564 at 581-582 per Mason CJ, Dawson, Toohey and Gaudron JJ. See also Brennan J at 596. As to the development of the law relating to declaratory relief see *Tonkin v Brand* [1962] WAR 2 at 15 per Wolff CJ (Jackson SPJ concurring) and 21 per Hale J.

75 See also *Gardner v Dairy Industry Authority of NSW* (1978) 52 ALJR 180 at 184 per Barwick CJ; at 188 per Mason J (Jacobs and Murphy JJ) concurring; and at 189 per Aickin J.

53. A consequence of the making of the declaration is that the Attorney General must give a copy of the declaration to the relevant Minister, who must publish a written response to the declaration.[76] However, those obligations arise from the Charter rather than the declaration. While it may be fairly described as a "dialogue" between the court and the executive government,[77] engaging in such a dialogue does not constitute the exercise of judicial power by the court declaring the rights, duties or liabilities of any party.

54. In the course of its reasons the Court of Appeal said:[78]

> "It follows that it is not possible to interpret s 5 of the DPCS Act other than as imposing a legal onus of proof. It is therefore necessary to consider in accordance with s 7(2) of the Charter whether that limitation on the presumption of innocence is 'demonstrably justified'."

55. Such a consideration was not necessary for the determination of whether or not the Appellant was properly convicted of the offence, or whether her sentence for that offence was properly imposed. The legal issue relevant to the criminal appeal had been resolved by the Court: s. 5 of the DPCS Act imposed a legal onus of proof on the Appellant so the challenged direction to the jury did not involve an error of law. Any further consideration could be relevant, and necessary, only for the purposes of the Court considering whether to make a declaration of inconsistent interpretation.

56. Such a declaration would not be a binding declaration of right in the sense that term is used in the context of the exercise of judicial power.[79]

Matter

57. Even if (contrary to the above submissions) the making of a declaration of inconsistent interpretation involved the exercise of judicial power,[80] it did not involve the determination of any "matter" in federal jurisdiction.

58. There can be no "matter" unless there is some immediate right, duty or liability to be established by the determination of the Court. A court exercising the judicial power

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76 Section 36(7) and 37 of the Charter.

77 See M McHugh *A Human Rights Act, the courts and the Constitution* paper delivered to the Australian Human Rights Commission on 5 March 2009 available at http://www.hreoc.gov.au/letstalkaboutrights/events/McHugh_2009.html

78 *R v Momcilovic* (2010) 265 ALR 751 at 784; [2010] VSCA 50 at [119].

79 *Precision Data Holdings Ltd v Wills* (1991) 173 CLR 167 at 188.

80 It is clear that the characterization of a function as judicial is a necessary, but not sufficient, condition for conferral of federal jurisdiction: *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 264 per Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ; *Re Wakim; ex parte McNally* (1999) 198 CLR 511 at 542 [10] per Gleeson CJ; at 557-60 [57]-[64] and 575 [111] per Gummow and Hayne JJ.

of the Commonwealth cannot be authorised to make a declaration divorced from any attempt to administer the law.[81]

59. The judicial power of the Commonwealth does not extend to making a declaration of inconsistent interpretation, which does not establish any immediate right, duty or liability. The making of such a declaration in those circumstances would be divorced from any attempt to administer the law, for the following reasons.

60. Firstly, it may not be necessary for the court to reach any conclusion as to the scope of human rights declared by the Charter and whether another law is consistent with those rights. For example, in the present case the Court concluded that the meaning of s. 5 of the DPCS Act was unambiguously clear. It did not need to decide whether that meaning was inconsistent with the Charter for the purposes of determining the Appellant's criminal appeal.

61. Secondly, if the Appellant's criminal appeal constituted a matter arising under the Constitution, the function of making a declaration of inconsistent interpretation was not performed in the determination of that matter. A declaration which has no consequence for the parties is necessarily "divorced from any attempt to administer the law" in the sense that phrase is used in this context. As Gaudron J stated in *Truth About Motorways Pty Ltd v Infrastructure Investment Management Ltd*:[82]

> "There may be cases where a bare declaration that some legal requirement has been contravened will serve to redress some or all of the harm brought about by that contravention. *Ainsworth v Criminal Justice Commission*[83] was such a case. But a declaration cannot be made if it 'will produce no foreseeable consequences for the parties'[84]. That is not simply a matter of discretion. Rather, a declaration that produces no foreseeable consequences is so divorced from the administration of the law as not to involve a matter for the purposes of Ch III of the Constitution. And as it is not a matter for those purposes, it cannot engage the judicial power of the Commonwealth.[85]"

62. It is not enough that there is some matter before the Court. Federal jurisdiction is an authority to determine a matter, and not to decide some other question which may be merely associated with that matter. So, for example, the power of the Federal Court to determine claims based on State law depends on the State based claim forming part

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81 *In re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265-6 per Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ.

82 (2000) 200 CLR 591 at [52].

83 (1992) 175 CLR 564.

84 *Gardner v Dairy Industry Authority (NSW)* (1977) 52 ALJR 180 at 188; 18 ALR 55 at 69, per Mason J (with whom Jacobs and Murphy JJ agreed). See also at 189; 71, per Aickin J. And see *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 582, per Mason CJ, Dawson, Toohey and Gaudron JJ; *Friends of the Earth Inc v Laidlaw Environmental Services (TOC) Inc* (2000) 68 USLW 4044.

85 See *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564 at 582, per Mason CJ, Dawson, Toohey and Gaudron JJ.

of the same controversy as the federal claim, so as to constitute part of the one matter in federal jurisdiction.[86] A mere association between the two claims is not sufficient.

63. A declaration of inconsistent interpretation does nothing towards the resolution or determination of the dispute between the parties to a justiciable controversy to be resolved by an application of the statute which is the subject of the declaration. The making of that order has no foreseeable consequences for the rights of the parties determined by other orders of the Court. Such a declaration does not facilitate the exercise of the Court's jurisdiction (in the manner of procedural and costs orders), so as to be ancillary or incidental to the exercise of the Court's federal jurisdiction.

10 64. Thirdly, it is necessary to give sufficient weight to the distinction between the orders which a court makes and the reasons it gives for those orders. The exercise of judicial power is ultimately constituted by the orders which the court makes, rather than the reasons for those orders. It is the orders of the court which go to the determination of the matter, while the reasons explain why the matter was determined in a particular manner. There is a significant difference in the making such a declaration and the making of an observation by the court as to consistency of a statutory provision with the Charter in the course of its reasons for decision.

65. This last point is illustrated by the decision of the Court in *Wong v The Queen.*[87] In that case the NSW Court of Criminal Appeal published a sentencing "guideline table" 20 for drug offences in the course of determining an appeal by the Commonwealth DPP in relation to a sentence imposed for federal drug offences. The jurisdiction exercised by the NSW Court in those circumstances was federal jurisdiction. Gaudron, Gummow and Hayne JJ held that the NSW Court had no jurisdiction or power to publish the guideline table. While articulation in the reasons of the court of a principle applied in the course of determining the matter was central to the exercise of the court's jurisdiction, the publication of the expected or intended results of other cases was not within the jurisdiction or powers of the Court. In their view:[88]

> "The publication of a table of future punishments was neither to vary the sentence that was passed nor to pass a new sentence. It is not within the jurisdiction or the 30 powers of the Court to publish such a table because, to adopt constitutional terms, that is not directed to the quelling of the only dispute which constitutes the matter before the Court."

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86 *Re Wakim; ex parte McNally* (1999) 198 CLR 511 at [73]-[75] per McHugh J; at [135]-[140] per Gummow and Hayne JJ (Gleeson CJ and Gaudron J concurring); and at [272] per Callinan J.

87 (2001) 207 CLR 584.

88 (2001) 207 CLR 584 at [84]; see also Kirby J at [145]-[147].

66. The above submissions are not inconsistent with the decision in *Mellifont v Attorney-General (Qld)*.[89] That case concerned a trial of Mellifont on indictment alleging an offence against the *Criminal Code* of Queensland. Following an adverse ruling by the trial judge the prosecutor filed a *nolle prosequi* and Mellifont was discharged. The Attorney General then referred questions of law to the Court of Appeal. The Court of Appeal answered the referred questions favourably to the Attorney General and Mellifont sought special leave to appeal against the Court of Appeal's decision.

67. The Queensland Court of Appeal was not exercising federal jurisdiction. At issue was the High Court's appellate jurisdiction which does not depend on the existence of a "matter". Rather, the question before the High Court was whether the Court of Appeal's answers to the referred questions amounted to a judgment, decree or order of the Supreme Court for the purposes of s. 73 of the Constitution. The majority of the Court found that it did.[90] *Mellifont* recognised that the answering of the referred questions arising out of a criminal trial amounted to the exercise of judicial power. That does not necessarily mean that there was a "matter". There was clearly no "matter" of a kind specified in ss. 75 and 76 of the Constitution

68. There is one point at which the decision in *Mellifont* provides support for the view that there was a matter in that case. The majority indicated in their joint reasons that:[91]

> "In this situation, the decision on the reference was made with respect to a 'matter' which was the subject-matter of the legal proceedings at first instance and was not divorced from the ordinary administration of the law. The decision is therefore to be distinguished from the abstract declaration sought by the Executive Government in *In re Judiciary and Navigation Acts*. That opinion was academic, in response to an abstract question, and hypothetical in the sense that it was unrelated to any actual controversy between parties."

69. That observation noted above should not be divorced from that part of the reasons in *Mellifont* which explained why the giving of answers to reserved questions involved an exercise of judicial power. The majority said:[92]

> "In *O'Toole*[93], it was explicitly recognized that answers given by the full court of a court to questions reserved for its consideration in the course of proceedings in a "matter" pending in that court do not constitute an advisory opinion or abstract declaration of the kind dealt with in *In re Judiciary and Navigation Acts* whether or not those answers, of themselves, determine the rights of the parties. Such answers are not given in circumstances divorced from an attempt to administer the law as stated by the answers; they are given as an integral part of the process of determining the rights and obligations of the parties which are at stake in the proceedings in which the questions are reserved. Once this is accepted, as indeed it

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89 (1991) 173 CLR 289.
90 At 305 per Mason CJ, Deane, Dawson, Gaudron and McHugh JJ.
91 At 305 per Mason CJ, Deane, Dawson, Gaudron and McHugh JJ.
92 At 303 per Mason CJ, Deane, Dawson, Gaudron and McHugh JJ.
93 (1990) 171 CLR 232 at 244-245, 258-259, 279-285, 300-302.

> must be, it follows inevitably that the giving of the answers is an exercise of judicial power because the seeking and the giving of the answers constitutes an important and influential, if not decisive, step in the judicial determination of the rights and liabilities in issue in the litigation."

70. Unlike the determination of the questions of the kind identified in the passage quoted above, a declaration of inconsistent interpretation is not made as an integral part of the process of determining the rights and obligations of the parties. Nor is the making of a declaration of inconsistent interpretation an important, influential or decisive step in the judicial determination of the rights and liabilities at issue in the litigation. Rather, the making of such a declaration has no impact on the rights of the parties as found by the Court. It does not involve the determination of any "matter".

Judiciary Act

71. If the appeal before the Court of Appeal in this case involved a matter in federal jurisdiction, s. 36 of the Charter would apply only if picked up and applied to the proceedings by ss. 79 and 80 of the *Judiciary Act*. State law cannot regulate the exercise of federal jurisdiction of its own force.[94] However, s. 79 of the *Judiciary Act* only picks up laws "except as otherwise provided by the Constitution". Section 80 only applies the common law as modified by statute law in force in a State "insofar as it is not inconsistent with the Constitution". The terms of these provisions deny ss. 79 or 80 any operation that would require or empower courts exercising federal jurisdiction to pass beyond the limits of Chapter III of the Constitution.[95]

72. Sections 79 or 80 of the *Judiciary Act* would not pick up and apply s. 36 of the Charter to proceedings in federal jurisdiction because the making of a declaration of inconsistent interpretation does not involve the exercise of judicial power or the determination of any matter in federal jurisdiction. The Court of Appeal could not validly make a declaration of inconsistent interpretation in the course of exercising federal jurisdiction.

Declarations of inconsistent interpretation in non-federal jurisdiction

73. If the Court of Appeal was not exercising federal jurisdiction in the present matter, then the conclusion that the making of a declaration of inconsistent interpretation is

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94 *John Robertson & Co Ltd v Ferguson Transformers Pty Ltd* (1973) 129 CLR 65 at 79, at 80 per Menzies J; at 84 per Walsh J; at 87 per Gibbs J; at 93 per Mason J; *Maguire v Simpson* (1977) 139 CLR 362 at 369 per Barwick CJ; at 376 per Gibbs J; *Re Wakim; ex parte McNally* (1999) 198 CLR 511 at 557 per McHugh J; *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629 at 641-642 [21] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.

95 *Solomons v District Court of NSW* (2002) 211 CLR 119 at 134-6 [23]-[28] per Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ; *British American Tobacco v Western Australia* (2003) 217 CLR 30 at 47-8 [22] per Gleeson CJ; at 59-60 [66]-[67] per McHugh, Gummow and Hayne JJ; and at 87 [157] per Kirby J.

not an exercise of judicial power in a "matter" does not preclude the exercise of that function by the Court. The repugnancy doctrine identified in *Kable v. Director of Public Prosecutions (NSW)*[96] does not imply into the Constitutions of the States the separation of judicial power to which the Commonwealth is subject.[97]

74. The making of a declaration that a particular statute cannot be interpreted consistently with a human right as set out in the Charter is not a function which is inconsistent with the defining characteristics of a court or a Supreme Court.[98] Nor is it a function which is repugnant to the judicial process so as to be incompatible with the exercise of federal jurisdiction by those State courts when exercising non-federal jurisdiction.[99]

10 75. A State may confer non-judicial power on a Supreme Court in a manner that does not affect the institutional integrity of that Court and, when it does so, the exercise of power by the Supreme Court will not be subject to an appeal to this Court. The product of the exercise of such non-judicial function will not be a "judgment, decree, order or sentence" against which an appeal to this Court will lie under s. 73 of the Constitution.[100] Section 73 of the Constitution operates as an exhaustive statement of the appellate power of this Court.[101] Accordingly, if the exercise of a validly conferred authority to make a declaration of inconsistent interpretation does not involve an exercise of judicial power then this Court has no jurisdiction to entertain an appeal against such a declaration made by the Supreme Court of Victoria in the
20 exercise of that Court's non-federal jurisdiction. It would be otherwise if (contrary to the above submissions) the making of a declaration of inconsistent interpretation did involve the exercise of judicial power.

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96 (1996) 189 CLR 51.

97 *Kable v. Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 66-67 per Brennan CJ; at 80-81, 84-85 per Dawson J; and at 109-110 per McHugh J.

98 *Forge v. ASIC* (2006) 228 CLR 45 at 76 [63] per Gummow, Hayne and Crennan JJ; to similar effect see Gleeson CJ at 67 [41] (Callinan J concurring at 136 [238]); *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at 544 [153] per Gummow, Hayne, Heydon, Crennan and Kiefel JJ (French CJ concurring at 532 [99]); *Kirk v Industrial Relations Court (NSW)* (2010) 239 CLR 531 at 580 [96] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

99 *International Finance Trust Co Ltd v. NSW Crime Commission* (2009) 240 CLR 319 at 367 [98] per Gummow and Bell JJ; at 378 [136] per Hayne, Crennan and Kiefel JJ; at 379 [140] per Heydon J (adopting the language of Gummow J in *Kable v. DPP* (1996) 189 CLR 51 at 32); to similar effect see French CJ at 354-355 [55]-[56].

100 *Mellifont v Attorney General (Qld)* (1991) 173 CLR 289 at 299 per Mason CJ, Deane, Dawson, Gaudron and McHugh JJ,

101 *Ruhani v. Director of Police* (2005) 222 CLR 489 at 497 [3] per Gleeson CJ; at 530 [119] per Gummow and Hayne JJ; at 574 [288] per Callinan and Heydon JJ; R *v. Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 270 per Dixon CJ, McTiernan, Fullagar and Kitto JJ. See also *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.

Section 109 of the Constitution

76. The Appellant's submission that ss. 5 and 71 AC of the DPCS Act are inconsistent with ss. 13.1, 13.2 and 302.4 of the *Criminal Code* (Cth) should not be accepted. In some circumstances a State law may be directly inconsistent with a Commonwealth law where the State law would alter, impair or detract from the operation of a Commonwealth law[102] by imposing an obligation greater than that for which Commonwealth law has provided.[103] However, this will not occur where the Commonwealth law operates within the setting of other laws so that it is supplementary to or cumulative upon the State law in question.[104]

10 77. Section 300.4 of the *Criminal Code* contains the plainest indication that Part 9 of the *Code* is supplementary to or cumulative upon State law.[105] Such a provision was absent in Chapter 2 of the *Criminal Code*, considered in *Dickson v The Queen*.[106] It is not the case that a person cannot comply with both State and Commonwealth law.[107] It follows that State laws proscribing the possession, with intent to sell, of controlled drugs continue to operate following the commencement of the provisions of Part 9 of the *Criminal Code* on 8 November 2005.

Dated the 28th day of January 2011.

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102 *Victoria v The Commonwealth* (1937) 58 CLR 618 at 630.

103 *Blackley v Devondale Cream (Vic) Pty Ltd* (1968) 117 CLR 253 at 258-9 (Barwick CJ); *Attorney General (Cth) v Telstra Corp Ltd* (1999) 197 CLR 61 at [27]; *Dickson v The Queen* (2010) 84 ALJR 635 at 640-1; [2010] HCA 30 at [22].

104 *Attorney General (Cth) v Telstra Corp Ltd* (1999) 197 CLR 61 at [28], cited in *Dickson v The Queen* (2010) 84 ALJR 635 at 639-40; [2010] HCA 30 at [15]; to similar effect see *Ex parte McLean* (1930) 43 CLR 472 at 483 per Dixon J; *R v Credit Tribunal; ex parte General Motors Acceptance Corporation* (1976) 137 CLR 545 at 565 per Mason J (Barwick CJ, Stephen, Jacobs and Aickin JJ concurring); *Commercial Radio Coffs Harbour v Fuller* (1986) 161 CLR 47 at 57-58 per Wilson, Deane and Dawson JJ (Gibbs ACJ and Brennan J concurring); *McWaters v Day* (1989) 168 CLR 289 at 296.

105 As to the operation of provisions of this kind see *New South Wales v The Commonwealth (The Work Choices Case)* (2006) 229 CLR 1 at 166-9 [370] – [373] per Gleeson CJ, Gummow, Hayne, Crennan and Heydon JJ; and *Western Australia v The Commonwealth (Native Title Act Case)* (1995) 183 CLR 373 at 465-8 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ.

106 (2010) 84 ALJR 635 at 643; [2010] HCA 30 at [36]-[37].

107 See *R v Credit Tribunal; Ex parte General Motors Acceptance Corporation, Australia* (1976-7) 137 CLR 545 at 563-4 per Mason J (Barwick CJ, Gibbs, Stephen and Jacobs JJ concurring); *Palmdale AGCI Limited v Workers' Compensation Commission of New South Wales* (1977) 140 CLR 236 at 243-244 per (Mason J (Barwick CJ, Stephen, Jacobs and Aickin JJ concurring).

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE OFFICE OF THE REGISTRY

No. M134 of 2010

BETWEEN:

10 **VERA MOMCILOVIC** Appellant

AND

THE QUEEN First Respondent

AND

THE ATTORNEY-GENERAL FOR THE STATE OF VICTORIA Second Respondent

20

AND

THE VICTORIAN EQUAL OPPORTUNITY AND HUMAN RIGHTS COMMISSION Third Respondent

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ANNEXURE 1: CONSTITUTIONAL AND STATUTORY PROVISIONS

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We adopt the Appellant's Annexure of Constitutional and Statutory Provisions in relation to section 109 of the Constitution and the relevant provisions of the *Charter of Human Rights and Responsibilities Act* 2006 (Vic), the *Drugs, Poisons and Controlled Substances Act* 1981 (Vic) and the *Criminal Code* (Cth).

Relevant provisions of the Constitution

10 ***Section 73***

The High Court shall have jurisdiction, with such exceptions and subject to such regulations as the Parliament prescribes, to hear and determine appeals from all judgments, decrees, orders, and sentences:

(i) of any Justice or Justices exercising the original jurisdiction of the High Court;

(ii) of any other federal court, or court exercising federal jurisdiction; or of the Supreme Court of any State, or of any other court of any State from which at the establishment of the Commonwealth an appeal lies to the Queen in Council;

20 (iii) of the Inter-State Commission, but as to questions of law only;

and the judgment of the High Court in all such cases shall be final and conclusive.

But no exception or regulation prescribed by the Parliament shall prevent the High Court from hearing and determining any appeal from the Supreme Court of a State in any matter in which at the establishment of the Commonwealth an appeal lies from such Supreme Court to the Queen in Council.

Until the Parliament otherwise provides, the conditions of and restrictions on appeals to the Queen in Council from the Supreme Courts of the several States
30 shall be applicable to appeals from them to the High Court.

Section 75

In all matters:

(i) arising under any treaty;

(ii) affecting consuls or other representatives of other countries;

(iii) in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party;

(iv) between States, or between residents of different States, or between a State and a resident of another State;

(v) in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth;

the High Court shall have original jurisdiction.

Section 76

The Parliament may make laws conferring original jurisdiction on the High Court in any matter:

(i) arising under this Constitution, or involving its interpretation;

(ii) arising under any laws made by the Parliament;

(iii) of Admiralty and maritime jurisdiction;

(iv) relating to the same subject-matter claimed under the laws of different States.

Relevant provisions of the *Judiciary Act 1903* (Cth)

Section 79

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

(2) A provision of this Act does not prevent a law of a State or Territory covered by subsection (3) from binding a court under this section in connection with a suit relating to the recovery of an amount paid in connection with a tax that a law of a State or Territory invalidly purported to impose.

(3) This subsection covers a law of a State or Territory that would be applicable to the suit if it did not involve federal jurisdiction, including, for example, a law doing any of the following:

(a) limiting the period for bringing the suit to recover the amount;

(b) requiring prior notice to be given to the person against whom the suit is brought;

(c) barring the suit on the grounds that the person bringing the suit has charged someone else for the amount.

(4) For the purposes of subsection (2), some examples of an amount paid in connection with a tax are as follows:

(a) an amount paid as the tax;

(b) an amount of penalty for failure to pay the tax on time;

(c) an amount of penalty for failure to pay enough of the tax;

(d) an amount that is paid to a taxpayer by a customer of the taxpayer and is directly referable to the taxpayer's liability to the tax in connection with the taxpayer's dealings with the customer.

Section 80

So far as the laws of the Commonwealth are not applicable or so far as their provisions are insufficient to carry them into effect, or to provide adequate remedies or punishment, the common law in Australia as modified by the Constitution and by the statute law in force in the State or Territory in which the Court in which the jurisdiction is exercised is held shall, so far as it is applicable and not inconsistent with the Constitution and the laws of the Commonwealth, govern all Courts exercising federal jurisdiction in the exercise of their jurisdiction in civil and criminal matters.

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE OFFICE OF THE REGISTRY

No. M134 of 2010

BETWEEN:

VERA MOMCILOVIC	Appellant
AND	
THE QUEEN	First Respondent
AND	
THE ATTORNEY-GENERAL FOR THE STATE OF VICTORIA	Second Respondent
AND	
THE VICTORIAN EQUAL OPPORTUNITY AND HUMAN RIGHTS COMMISSION	Third Respondent

ANNEXURE 2: UK CASES CONCERNING THE *HUMAN RIGHTS ACT* 1998 (UK)

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Cases in which the definition of a particular term has been extended to include something which was not hitherto included in the definition

1. In *Ghaidan v. Godin-Mendoza*[1] the House of Lords considered paragraph 2 of Schedule 1 to the *Rent Act* 1977 (UK) by which a "surviving spouse", including a person who was living with the original tenant "as his wife or husband", succeeded as statutory tenant when the protected tenant died. The defendant in that case had for many years lived in a homosexual relationship with the protected tenant of a flat. The claimant sought possession of the flat upon the death of the original tenant. The defendant sought to succeed to the tenancy of the flat as the surviving spouse of the original tenant. At first instance, the judge granted a declaration that the defendant did not succeed to the tenancy of the flat. The defendant appealed to the Court of Appeal[2] which held that, pursuant to section 3 of the *Human Rights Act* 1998 (UK) it was possible to give effect to paragraph 2(2) of the *Rent Act* in a way which was compatible with the Convention by reading that paragraph as extending to persons living with the original tenant as if they were his or her wife or husband, thus including same-sex partners. The House of Lords agreed[3] notwithstanding that in 2001 the House of Lords had held that the provision did not include persons in a same-sex relationship.[4]

2. In *R (Van Hoogstraten) v. Governor of Belmarsh Prison*[5] the claimant had been remanded in custody pending sentence for manslaughter. The claimant instructed an Italian avvocato, S, who was not a member of the English legal profession to represent him at the sentencing hearing. Rule 38(1) of the Prison Rules 1999 made provision for the "legal adviser" of a prisoner to visit the prisoner in prison. A "legal adviser" was defined to mean, in relation to a prisoner, "his counsel or solicitor, and includes a clerk acting on behalf of his solicitor". The Governor of Belmarsh Prison refused to allow S to visit the claimant in prison because S was not a "legal adviser" for the purposes of rule 2 of the Prison Rules 1999. The claimant sought judicial review of the Governor's decision on the ground that it contravened his rights

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1 [2004] 2 AC 557

2 *Godin-Mendoza* v. *Ghaidan* [2003] Ch 380.

3 At 572 [35] per Lord Nicholls of Birkenhead; at 577 [51] per Lord Steyn; at 604 [129] per Lord Roger of Earlsferry; at 608-609 [144] per Baroness Hale of Richmond. Lord Millett dissented.

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

5 [2003] 1 WLR 263.

under Article 6 of the Convention. Jackson J (Queen's Bench Division) held that the definition of "legal adviser", when construed in a manner which conformed with Article 6(3)(b) and (c) of the Convention, embraced any lawyer who was chosen by the prisoner and who was entitled to represent the prisoner in criminal proceedings to which the prisoner was a defendant.[6]

3. In *Principal Reporter v K,*[7] a "relevant person" within the meaning of section 93(2)(b)(c) of the *Children (Scotland) Act* 1995 could attend or participate in discussions at a children's hearing. K was an unmarried father who had an established family life with his child but did not fall within the definition of "relevant person" under section 93(2)(b)(c) and was not permitted to participate in his child's hearing. The father argued that section 93(2)(b)(c) of the *Children (Scotland) Act* was incompatible with his rights under Articles 6, 8 or 14 of the Convention. The Supreme Court held that section 93(2)(b)(c) of the *Children (Scotland) Act* should be read to include the words "or who appears to have established family life with the child with which the decision of a children's hearing may interfere".[8]

4. In *McGibbon v McAllister,*[9] a *de facto* stepfather sought compensation for the wrongful death of his *de facto* stepchild under the *Damages (Scotland) Act* 1976. However, in order to qualify for damages, the pursuer had to be part of the deceased's immediate family including a person "who was a parent of the deceased" within Schedule 1(1)(b) of the *Damages (Scotland) Act.* The pursuer argued that to hold he was not a parent of the deceased would be contrary to Articles 8 and 14 of the Convention. Lord Brodie extended the meaning of "parent" to include someone who, to a material extent, as a matter of fact fulfilled the roles usually associated with parenthood.[10]

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6 At 269 [39]-[40].
7 [2010] UKSC 56; 2010 WL 5059169.
8 At 17 [70] per Lord Hope and Lady Hale.
9 [2008] CSOH 4; 2008 WL 546401.
10 At [22].

Cases in which a particular term has been altered or broadened beyond its ordinary meaning

5. In *Cachia v. Faluyi,*[11] the plaintiff, the widower and executor of the deceased's estate, had in 1991 issued a writ claiming damages under the *Fatal Accidents Act* 1976 (UK) on behalf of himself and his 4 children. The writ lapsed because it was not served. In 1997 a second writ was issued and served on the defendant claiming the same relief on behalf the deceased's dependents. The claims of the plaintiff and his eldest child were by that time statute-barred. A question arose as to whether the action commenced by the unserved writ precluded the remaining children from bringing an action on the second writ. Section 2(3) of the *Fatal Accidents Act* provided that "not more than one action shall lie for and in respect of the same subject matter of complaint." The plaintiff sought a declaration that the children were entitled to pursue their dependency claims. At first instance, the judge held that section 2(3) provided that only one action could be brought, namely the action commenced by the first writ, and struck out the action. On appeal, the Court of Appeal held it was possible to interpret the word "action" in section 2(3) as meaning "served process" so as to give effect to the dependents' right of access to courts under the Convention.[12]

6. In *Goode v. Martin*[13] the claimant sustained severe head injuries whilst sailing with the defendant in August 1996. The claimant had no recollection of the incident. In October 1997 a writ and statement of claim were issued by the claimant against the defendant for negligence based on an account of the incident given to the claimant by another person on the yacht. In January 1998, a draft amended defence was received by the claimant which contained facts which differed from the claimant's statement of claim. In April 2000, after the expiry of the 3 year limitation period, the claimant sought permission to amend her statement of claim. At first instance the Master refused to allow the amendment on the basis that rule 17.4(2) of the *Civil*

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11 [2001] 1 WLR 1966.

12 At 1971-1972 [20] per Brooke LJ (Henry LJ and Lord Phillips of Worth Matravers MR agreeing)

13 [2002] 1 WLR 1828.

Procedure Rules did not allow an amendment out of time in reliance on facts raised by the defendant which had not been pleaded by the claimant. The judge upheld the Master's decision. The claimant appealed to the Court of Appeal that the refusal of leave to amend impaired her right of access to the court under Article 6 of the Convention. The Court of Appeal held that rule 17.4(2) should be interpreted as if it contained the additional words "are already in issue on"[14] so that it would read:

> "The Court may allow an amendment whose effect will be to add or substitute a new claim, but only if the new claim arises out of the same facts or substantially the same facts as *are already in issue on* a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings."

7. In *R (Middleton) v. West Somerset Coroner*[15] the coroner conducted an inquest into the death of a prisoner who hanged himself. The deceased's family alleged that the Prison Service knew he was a suicide risk and should have put him on a suicide watch. The coroner directed the jury, in accordance with section 11(5) of the *Coroners Act* 1988 (UK) and rule 26 of the *Coroners Rules 1984*, that their findings were confined to the identity of deceased and to how, when and where he came by his death and that they could not express an opinion on any other matter. The Coroner also directed the jury that they could not return a verdict of neglect since rule 42 of the *Coroners Rules* prohibited an inquest verdict from being framed so as to determine questions of criminal or civil liability. The jury found that the deceased had killed himself whilst the balance of his mind was disturbed. They also gave the coroner a note in which it was stated that the jury had concluded the Prison Service had failed in its duty of care to the deceased. The coroner refused the family's request to append the note to the inquisition. The claimant sought judicial review of the coroner's direction and his refusal to publish the note. At first instance the judge granted a declaration that by reason of the restrictions of the verdict the inquest was inadequate to comply with Article 2 of the Convention. On appeal to the Court of Appeal it was held that where a coroner was aware that an inquest was to be the means by

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14 At 1840-1841 [46]-[47] per Brooke LJ (Latham and Kay LLJ agreeing).

15 [2004] 2 AC 182.

which the State satisfied its procedural obligations under Article 2, the jury should be permitted to make a finding of systemic neglect. The House of Lords held that the word "how" in the phrase "how, when and where the deceased came by his death" in section 11(5)(b)(ii) and rule 36(1)(b) should be interpreted in a broad sense as meaning "by what means and in what circumstances" rather than being simply limited to "by what means".[16] However, the change of approach was only required in some cases.[17]

Cases in which a different test has been applied to that which is set out in the statutory provision

8. In *R v. Offen,*[18] the 5 defendants were each convicted of a second serious offence within section 2(5) or (6) of the *Crime (Sentences) Act* 1997 (UK). Section 2(2) of the *Crime (Sentences) Act* required a court to impose a life sentence where a person was convicted of a second serious offence unless the court was of the opinion that there were exceptional circumstances relating to either the offence or to the offender which justified its not doing so. Four of the five defendants were sentenced to life imprisonment. The fifth defendant was sentenced to 12 years' imprisonment. The defendants' appeals or applications for leave to appeal against sentence and the Attorney General's application for leave to appeal against sentence were heard by the Court of Appeal. The defendants' contended that section 2 of the *Crime (Sentences) Act* was incompatible with articles 3, 5, 7 and 8 of the Convention. The Court of Appeal held that section 2, when construed in accordance with section 3(1) of the *Human Rights Act*, should be applied so that it did not result in offenders being sentenced to life imprisonment when they did not constitute a significant risk to the public.[19]

9. In *R (Sim) v Parole Board*[20] the claimant was convicted of 3 sex offences and received an extended sentence, consisting of 30 months imprisonment and an extended licence period of 5 years. The claimant was released from prison on licence after serving half the custodial sentence. The licence was later

16 At 202 [35].
17 At 202 [36]-[37].
18 [2001] 1 WLR 253.
19 At 276-277 [97]-[98].
20 [2004] QB 1288.

revoked and the claimant was recalled to prison for breach of the conditions of his licence. The Parole Board declined to direct the claimant's release because his immediate release would present an unacceptable risk to the public of his re-offending and because the Board was not "satisfied that it is no longer necessary for the protection of the public that [the claimant] should be confined", within the meaning of section 44A(4) of the *Criminal Justice Act* 1991 (UK). The claimant sought judicial review of the Board's decision. The judge hearing the review declared, *inter alia*, that section 44A(4) was to be construed having regard to article 5 of the Convention so that the Parole Board was no longer required to detain the prisoner unless it was positively satisfied that the interests of the public required that he be so confined. The Secretary of State appealed. The Court of Appeal held that in order to be compatible with article 5 of the Convention, section 44A(4) should be read as requiring the Parole Board to direct a recalled prisoner's release unless positively satisfied that the interest of the public required that his confinement should continue.[21]

Cases in which a proviso or exception has been read into a statutory provision which did not have such a proviso or exception

10. In *R v. A (No.2)*[22] the defendant was charged with rape. The defendant's defence was that the complainant had consented. Section 41 of the *Youth Justice and Criminal Evidence Act* 1999 (UK) restricted the circumstances in which an alleged victim of a sexual offence could be cross-examined about their sexual history. The defendant sought leave under that section to adduce evidence and to ask questions in relation to an alleged consensual sexual relationship between himself and the complainant and to an alleged sexual relationship between the complainant and a friend of the defendant. At first instance, the judge ruled that the evidence as to any prior consensual relationship would be inadmissible notwithstanding that his ruling would result in a breach of Article 6 of the Convention. However, the judge ruled that the complainant could be cross-examined in relation to the incident with the defendant's friend. On appeal, the Court of Appeal reversed the judge's

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21 At [50]-[51] per Keene LJ (Munby J and Ward LJ agreeing).

22 [2002] 1 AC 45.

ruling in relation to the incident involving the defendant's friend and ruled that evidence and questioning as to the defendant's alleged previous sexual relationship with the complainant were relevant to his belief in her consent and might be admitted under section 41(3)(a) but that such material was inadmissible on the issue of consent. The matter was then appealed to the House of Lords which read the section as being subject to an implied provision that evidence or questioning which was required to ensure a fair trial under Article 6 of the Convention should not be treated as inadmissible.[23] The effect of the decision was described by Lord Steyn as follows:

> "under section 41(3)(c) of the 1999 Act, construed where necessary by applying the interpretative obligation under section 3 of the Human Rights Act 1998, and due regard always being paid to the importance of seeking to protect the complainant from indignity and from humiliating questions, the test of admissibility is whether the evidence (and questioning in relation to it) is nevertheless so relevant to the issue of consent that to exclude it would endanger the fairness of the trial under Article 6 of the Convention. If this test is satisfied the evidence should not be excluded."[24]

11. In *Secretary of State for the Home Department v. MB*[25] non-derogating control orders were made against MB and AF under the *Prevention of Terrorism Act* 2005 (UK). Paragraph 4 of the Schedule to the *Prevention of Terrorism Act* and rule 76 of the *Civil Procedure Rules* required the relevant court to give permission to the Secretary of State to withhold certain material from the person the subject of a control order where disclosure of the material would be contrary to the public interest. The House of Lords was required to determine whether or not the provisions contravened Article 6 of the Convention. The House of Lords held that the provisions in paragraph 4 of the Schedule and the *Civil Procedure Rules* should be read down under

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23 At 56 [15] per Lord Slynn of Hadley; at 69 [46] per Lord Steyn; at 88 [109] per Lord Hope of Craighead; at 98 [141] per Lord Clyde; at 106 [164] per Lord Hutton.

24 At 69 [46].

25 [2007] 3 WLR 68. See also *Secretary of State for the Home Department v. AF* (No.3) [2010] 2 AC 269.

section 3 of the *Human Rights Act* and given effect only where it was consistent with fairness for them to do so.[26]

12. In *R v Holding*[27] the defendant was charged with 3 counts of incurring unauthorised expenses with a view to promoting or procuring the election of a candidate contrary to section 75(1) and (5) of the *Representation of the People Act* 1983 (UK) as a result of trailing banners from an aeroplane and distributing leaflets. Two of the counts were in respect of the banners which were prohibited by section 75(1)(a) and the third count was in relation to the leaflets which were prohibited by section 75(1)(b). Section 75(1)(c) and (d) prohibited the incurring of two other categories of expenses. However, whilst the conduct prohibited in section 75(1)(a) and (b) was prohibited absolutely, the conduct prohibited by section 75(1)(c) and (d) did not apply to expenses which did not exceed a permitted sum. At a pre-trial hearing the defendant argued that section 75(1)(a) and (b) engaged his right to freedom of expression guaranteed by Article 10 of the Convention and that an absolute prohibition on incurring expenditure was incompatible with Article 10 and that section 75(1)(a) and (b) should be read down, pursuant to section 3 of the *Human Rights Act,* so as to allow the same level of expenditure as was permitted under section 75(1)(c) and (d). The trial judge ruled against the defendant. The defendant was convicted and appealed against his conviction. The Court of Appeal held that section 75(1) should be read down and given effect in a way which was compatible with the right to freedom of expression under Article 10 of the Convention by applying the permitted sum proviso to paragraphs (a) to (d) of section 75(1).[28]

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26 At 703-704 [44] per Lord Bingham of Cornhill; at 712 [72] per Baroness Hale or Richmond; at 716 [84] per Lord Carswell; at 718 [90] per Lord Brown or Eaton-Under-Heywood

27 [2006] 1 WLR 1040.

28 At 1051[48] per the Court.

Cases in which a legal burden has been reduced to an evidential burden

13. In *R v Lambert,*[29] the appellant was found in possession of a bag which contained a class A controlled drug. The *Misuse of Drugs Act* 1971 (UK) contained a presumption that an accused knew that a substance was a controlled drug if he was found to have controlled drugs in his custody or control. The appellant relied on a defence under section 28(3)(b)(i) of the *Misuse of Drugs Act* namely that he did not believe, suspect or have reason to suspect that the bag which he carried contained a controlled drug. Under section 28(3) of the *Misuse of Drugs Act,* the appellant had to prove his defence on the balance of probabilities. The appellant was convicted of possession of a class A controlled drug with intent to supply. The appellant's appeal to the Court of Appeal was dismissed. The appellant's appeal to the House of Lords was also dismissed because the *Human Rights Act* did not apply to matters occurring before it came into force. However, Lord Slynn of Hadley, Lord Steyn, Lord Hope of Craighead and Lord Clyde each concluded that section 28(2) and (3) of the *Misuse of Drugs Act* could be read compatibly with article 6(2) of the Convention if the provision were construed as imposing an evidential burden rather than a legal burden on the accused.[30]

14. In *R v. Carass*[31] the defendant was to stand trial on 2 indictments. The second indictment alleged that the defendant had on 4 occasions concealed the debts of a company in anticipation of its winding up contrary to section 206(1)(a) of the *Insolvency Act* 1986 (UK). Section 206(4) of the *Insolvency Act* provided that it was a defence to such a charge for the defendant to prove that he had no intent to defraud. On an interlocutory appeal the defendant sought a declaration that section 206(4) was incompatible with Article 6(2) of the Convention. The Court of Appeal held that, by applying section 3(1) of the *Human Rights Act*, section 206(4) of the Insolvency Act could be read compatibly with Article 6(2) of the Convention as imposing an evidential

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29 [2002] 2 AC 545.

30 At 563 [17] per Lord Slynn of Hadley; at 574 [41] per Lord Steyn; at 585 [80] per Lord Hope of Craighead; at 609-610 [157] per Lord Clyde.

31 [2002] 1 WLR 1714.

burden only on the defendant.[32] The Court of Appeal read the section as follows:

> "It is a defence for a person charged under paragraph (a).... of subsection (1) (under subsection (2) in respect of the things mentioned in either of those two paragraphs) to adduce evidence sufficient to raise an issue that he had no intent to defraud, unless, if he does so, the prosecution proves the contrary beyond reasonable doubt."[33]

15. In *Sheldrake v. Director of Public Prosecutions; Attorney General's Reference (No.4 of 2002),*[34] the defendant in the Attorney General's reference was charged with 2 counts of belonging to and professing to belong to a proscribed organisation contrary to section 11(1) of the *Terrorism Act* 2000 (UK). At his trial the defendant claimed a defence under section 11(2) of the *Terrorism Act* that the organisation had not been proscribed at the time when the defendant became a member or professed to be a member of it and that he had not taken part in the activities of the organisation at any time while it was proscribed. At the trial the Crown conceded that section 11(2) imposed only an evidential burden and not a legal burden on the defendant. The judge at first instance ruled that there was no case to answer. The Attorney General referred certain questions to the Court of Appeal. The Court of Appeal held that the defence in section 11(2) imposed a legal burden which was compatible with Articles 6(2) and 10 of the Convention. The Court of Appeal referred the matter to the House of Lords which held that section 11(2) should be read down so as to impose on the defendant an evidential burden only notwithstanding that Parliament had intended to impose a legal burden on the defendant.[35]

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32 At 12729-1730 [60]-[62].

33 At 1730 [62].

34 [2005] 1 AC 268.

35 At 314 [53] per Lord Bingham of Cornhill (Lord Steyn and Lord Phillips of Worth Matravers MR agreeing); Lord Rodger of Earlsferry and Lord Carswell in dissent.