IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M134 of 2010

BETWEEN:

VERA MOMCILOVIC

Appellant

and

THE QUEEN

First Respondent

ATTORNEY-GENERAL FOR THE STATE OF VICTORIA

Second Respondent

VICTORIAN EQUAL OPPORTUNITY AND HUMAN RIGHTS COMMISSION

Third Respondent

SECOND RESPONDENT'S WRITTEN SUBMISSIONS

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Filed on behalf of: The Second Respondent
Prepared by:
John Cain
Victorian Government Solicitor
Level 25, 121 Exhibition Street
Melbourne VIC 3000
Ref: 949446, Jessica Cleaver

DX 300077 Melbourne
T (03) 8684 0444
F (03) 8684 0449
(jessica.cleaver@vgso.vic.gov.au)

PART I: CERTIFICATION

1. The second respondent (**the Attorney-General**) certifies that these submissions are suitable for publication on the Internet.

PART II: CONCISE STATEMENT OF ISSUES

2. In so far as this appeal concerns the Attorney-General,[1] it gives rise to some or all of the following questions:

   (a) Are ss 5 and/or 71AC of the *Drugs, Poisons and Controlled Substances Act 1981* (Vic) (**the Drugs Act**) inconsistent with ss 13.1, 13.2 and 302.4 of the *Criminal Code* (Cth) (**the Criminal Code**), such that they are suspended, inoperative and ineffective by operation of s 109 of the Constitution?

   (b) Properly construed, what is the meaning to be ascribed to s 5 of the Drugs Act, having regard to, amongst other things, s 32 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**the Charter Act**)?

   (c) Is s 32(1) of the Charter Act beyond the legislative power of the Parliament of Victoria in that, by conferring a legislative power on the courts of Victoria, it interferes with, compromises or impairs the institutional integrity of those courts as repositories of federal judicial power contrary to Ch III of the Constitution?

   (d) Is the power of the Supreme Court of Victoria to make a declaration of inconsistent interpretation under s 36(2) of the Charter Act beyond the legislative power of the Parliament in that the conferral of that power interferes with, compromises or impairs the institutional integrity of the Supreme Court of Victoria as a repository of federal judicial power contrary to Ch III of the Constitution?

   (e) Can the High Court of Australia in exercise of the jurisdiction conferred on it by s 73 of the Constitution validly set aside a declaration of inconsistent interpretation made pursuant to s 36(2) of the Charter Act?

PART III: SECTION 78B NOTICES

3. The Attorney-General served a notice pursuant to s 78B of the *Judiciary Act 1903* (Cth) on the Commonwealth, State and Territory Attorneys-General on 21 September 2010.[2] The appellant served a further notice on those Attorneys-General on 29 November 2010. The Attorney-General does not consider that any further notice is required.

PART IV: STATEMENT OF MATERIAL FACTS

4. The Attorney-General accepts the appellant's narrative of the relevant facts.

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1 The Attorney-General makes no submission on the appellant's second ground of appeal, as it raises no issue under the *Charter of Human Rights and Responsibilities Act 2006* (Vic) or the Constitution.

2 AB 357-361.

PART V: APPLICABLE CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

5. The Attorney-General accepts the appellant's statement of applicable constitutional provisions, statutes and regulations.

PARTS VI & VII: ARGUMENT

6. The Attorney-General makes the following submissions:

   (a) There is no direct inconsistency, or "direct collision", between ss 5 and/or 71AC of the Drugs Act and ss 13.1, 13.2 and 302.4 of the Criminal Code; the relevant provisions of each Act are capable of operating concurrently.

   (b) Section 5 of the Drugs Act is to be construed as requiring an accused to discharge a legal burden on the balance of probabilities. Even applying s 32 of the Charter Act as part of the statutory interpretation process, the provision is not capable of bearing any other meaning. Application of s 32 is part of the normal statutory interpretation process, which includes other common law and statutory principles of interpretation. That process also includes, as an inseparable aspect of s 32, the application of s 7(2) of the Charter Act to determine whether a possible interpretation is "compatible with human rights".

   (c) On its proper construction, s 32 of the Charter Act is a direction about the traditional judicial task of statutory interpretation; it does not involve the impermissible conferral of a legislative power on the courts of Victoria. As such, s 32 does not interfere with, compromise or impair the institutional integrity of those courts as repositories of federal judicial power contrary to Ch III of the Constitution.

   (d) The making of a declaration of inconsistent interpretation involves the exercise of judicial power and, as such, there is no constitutional impediment to such a power being conferred on the Supreme Court of Victoria.

   (e) If the submissions as to the proper meaning of s 5 of the Drugs Act are accepted, the Attorney-General does not seek to have the declaration of inconsistent interpretation made by the Court of Appeal set aside by the High Court. If the Court accepts the appellant's construction of s 5, the High Court would be empowered by s 73 of the Constitution to set aside the declaration and ought to do so as the declaration would in that circumstance be inconsistent with the Court's ruling as to the meaning of s 5.

Issue 1 - Section 109 inconsistency

7. The appellant's contention that ss 5 and/or 71AC of the Drugs Act (collectively, **the Victorian provisions**) are inconsistent with ss 13.1, 13.2 and 302.4 of the Criminal Code (collectively, **the Commonwealth provisions**) should be rejected.

Appellant's allegation of "direct" inconsistency

8. In alleging inconsistency between the Victorian provisions and the Commonwealth provisions, the appellant relies solely on an asserted direct inconsistency, or "direct

collision",[3] between the relevant provisions.[4]

9. Such inconsistency was described in the following terms by Dixon J in *Victoria v Commonwealth*:[5]

> When a State law, if valid, would alter, impair or detract from the operation of a law of the Commonwealth Parliament, then to that extent it is invalid.

10. There are two different types of direct inconsistency:[6] first, where it is impossible to obey both the State and Commonwealth laws – one law commands what the other forbids or one law compels disobedience of the other;[7] and, secondly, where one law "takes away a right conferred by [the] other".[8] In both these cases, a State law is inconsistent (and thus suspended, inoperative and ineffective[9]) because that State law would, adopting the language of Dixon J, "alter, impair or detract" from the operation of a Commonwealth law.[10]

11. It is plainly not impossible to obey both s 71AC of the Drugs Act and s 302.4 of the Criminal Code. The appellant relies on the second kind of "direct" inconsistency described above.

12. As seen recently in *Dickson v The Queen* (***Dickson***),[11] instances of direct inconsistency may arise where a State Act "renders criminal conduct not caught by, and indeed deliberately excluded from, the conduct rendered criminal by"[12] the Commonwealth Act. Put another way, if a Commonwealth law confers a liberty on a person, that area of liberty should not be closed up by a State law.[13]

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3 *Blackley v Devondale Cream (Vic) Pty Ltd* (1968) 117 CLR 253 at 258 per Barwick CJ.

4 The appellant does not allege that there is an *indirect* inconsistency on the basis that the Commonwealth Parliament intended, by enactment of the relevant provisions of the Criminal Code, to "cover the field" of drug offences. Such an argument is precluded by s 300.4(1) of the Criminal Code: see paragraph 16 below.

5 (1937) 58 CLR 618 at 630. This passage was cited with approval by a unanimous High Court in *Telstra Corporation Ltd v Worthing* (1999) 197 CLR 61 at 76 [28]; *R v Dickson* (2010) 84 ALJR 635 at 639 [13]; 270 ALR 1 at 6. See also, *Australian Mutual Provident Society v Goulden* (1986) 160 CLR 330 at 339-340 per Gibbs CJ, Mason, Brennan, Deane and Dawson JJ.

6 See the identification of these two types of direct inconsistency in, for example, *University of Wollongong v Metwally* (1984) 158 CLR 447 at 455-456 per Gibbs CJ.

7 See, eg, *R v Licensing Court of Brisbane; Ex parte Daniell* (1920) 28 CLR 23.

8 *Clyde Engineering Company Limited v Cowburn* (1926) 37 CLR 466 at 478 per Knox CJ and Gavan Duffy J. See, for other examples, *Western Australia v Commonwealth* (1995) 183 CLR 373; *Mabo v Queensland (No 1)* (1988) 166 CLR 186.

9 *Western Australia v Commonwealth* (1995) 183 CLR 373 at 464-465 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ; *Butler v Attorney-General (Vic)* (1961) 106 CLR 268 at 286 per Windeyer J.

10 (1937) 58 CLR 618 at 630. See paragraph 9 above.

11 (2010) 84 ALJR 635; 270 ALR 1.

12 (2010) 84 ALJR 635 at 640-641 [22] per the Court; 270 ALR 1 at 8.

13 *Dickson* (2010) 84 ALJR 635 at 641 [25] per the Court; 270 ALR 1 at 9, citing *Wenn v Attorney-General (Vic)* (1948) 77 CLR 84 at 120 per Dixon J.

13. The gravamen of the appellant's contention is that an "area of liberty",[14] described as "the mere occupation of premises on which drugs are found",[15] is closed up by the operation of s 5 on a charge under s 71AC of the Drugs Act.

14. Direct inconsistency is said to arise by virtue of three matters:[16] first, the conferral of a liberty on a person by the Commonwealth provisions, "namely mere occupation of premises on which drugs are found", such liberty requiring the prosecution to prove beyond reasonable doubt[17] the elements of the offence of trafficking controlled drugs (including possession of the drugs in question), while the Victorian provisions permit proof of possession merely by virtue of the person being in occupation of the premises; secondly, there are different methods of trial in relation to the State offence and the Commonwealth offence, the latter requiring a unanimous verdict as a result of s 80 of the Constitution;[18] and, thirdly, the maximum penalty for the State offence is greater than the penalty imposed for the Commonwealth offence.

There is no direct inconsistency

15. It is well accepted that the mere fact that there is a difference between the rules of conduct prescribed by Commonwealth and State laws, or that different penalties are prescribed for substantially the same conduct, does not necessarily lead to inconsistency.[19] In the federation created by the Constitution, the broad powers of State Parliaments,[20] together with the non-exclusive powers of the Commonwealth Parliament,[21] make such differences part of the Australian constitutional landscape.

16. In asserting a direct inconsistency, the appellant seeks to minimize the importance of s 300.4 of the Criminal Code, which provides:

> (1) This Part is not intended to exclude or limit the concurrent operation of any law of a State or Territory.
>
> (2) Without limiting subsection (1), this Part is not intended to exclude or limit the concurrent operation of a law of a State or Territory that makes:
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> (a) an act or omission that is an offence against a provision of this Part; or
>
> (b) a similar act or omission;
>
> an offence against the law of the State or Territory.
>
> (3) Subsection (2) applies even if the law of the State or Territory does any one or more of the following:
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> (a) provides for a penalty for the offence that differs from the penalty provided for in this Part;

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14 Adopting the language of Dixon J in *Wenn v Attorney-General (Vic)* (1948) 77 CLR 84 at 120, which was cited with approval in *Dickson* (2010) 84 ALJR 635 at 641 [25] per the Court; 270 ALR 1 at 9.

15 Appellant's Submissions, paragraph 46(a).

16 Appellant's Submissions, paragraph 46.

17 See ss 13.1 and 13.2 of the Criminal Code.

18 See *Cheatle v The Queen* (1993) 177 CLR 541, which was cited in *Dickson* (2010) 84 ALJR 635 at 637 [2] per the Court; 270 ALR 1 at 3.

19 See, eg, *McWaters v Day* (1989) 168 CLR 289 at 296 per the Court.

20 See, eg, s 16 of the *Constitution Act 1975* (Vic).

21 See s 51 of the Constitution.

(b) provides for a fault element in relation to the offence that differs from the fault elements applicable to the offence under this Part;

(c) provides for a defence in relation to the offence that differs from the defences applicable to the offence under this Part.

17. The appellant relies on the observations of Mason J in *R v Credit Tribunal; Ex parte General Motors Acceptance Corporation*[22] to the effect that such a provision cannot displace the operation of s 109 in rendering a directly inconsistent State law inoperative. However, that is not to say that the provision must be ignored in construing the Commonwealth law for the purposes of determining whether there is a direct inconsistency in the first place.[23] As Dixon J explained in *Ex parte McLean*:[24]

> When the Parliament of the Commonwealth and the Parliament of a State each legislate upon the same subject and prescribe what the rule of conduct shall be, they make laws which are inconsistent, notwithstanding that the rule of conduct is identical which each prescribes, and sec. 109 applies. That this is so is settled, at least when the sanctions they impose are diverse (*Hume v Palmer* [(1926) 38 CLR 441]). *But the reason is that, by prescribing the rule to be observed, the Federal statute shows an intention to cover the subject matter and provide what the law upon it shall be.* If it appeared that the Federal law was intended to be supplementary to or cumulative upon State law, then no inconsistency would be exhibited in imposing the same duties or in inflicting different penalties. The inconsistency does not lie in the mere coexistence of two laws which are susceptible of simultaneous obedience. It depends upon the intention of the paramount Legislature to express by its enactment, completely, exhaustively, or exclusively, what shall be the law governing the particular conduct or matter to which its attention is directed.

18. This reasoning has been applied by this Court on numerous occasions, including in *McWaters v Day*.[25] Similarly, in *R v Loewenthal; Ex parte Blacklock*,[26] in a passage cited in *R v Credit Tribunal*, Mason J stated that a difference in penalties prescribed for the same conduct under State and Commonwealth law could give rise to inconsistency "at least when it appears that the Commonwealth statute by prescribing the rule to be observed evinces an intention to cover the subject matter to the exclusion of any other law".

19. The liberty asserted by the appellant in this case is akin to that which was identified and discounted in argument by the Attorney-General for New South Wales in *McWaters v*

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22 (1977) 137 CLR 545 at 563 (Barwick CJ, Gibbs, Stephens and Jacobs JJ agreeing). See also *John Holland Pty Ltd v Victorian WorkCover Authority* (2009) 239 CLR 518 at 527-528 [20]-[21] per the Court.

23 *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1980) 142 CLR 237 at 260 per Mason J, at 280 per Aickin J; *Dao v Australian Postal Commission* (1987) 162 CLR 317 at 335 per the Court; *Metal Trades Industry Association v Amalgamated Metal Workers' and Shipwrights' Union* (1983) 152 CLR 632 at 642 per Gibbs CJ, Wilson and Dawson JJ.

24 (1930) 43 CLR 472 at 483 (emphasis added); see also *Wenn v Attorney-General (Vic)* (1948) 77 CLR 84 at 120 per Dixon J.

25 (1989) 168 CLR 289 at 296 per the Court. See also, *Viskauskas v Niland* (1983) 153 CLR 280 at 291 per the Court; *Raptis & Son v South Australia* (1977) 138 CLR 346 at 357 per Gibbs J; *T A Robinson & Sons Pty Ltd v Haylor* (1957) 97 CLR 177 at 182-183 per the Court; *O'Sullivan v Noarlunga Meat Ltd* (1954) 92 CLR 565 at 585 per Webb J, at 592 per Fullagar J, citing *Ex parte McLean* (1930) 43 CLR 472 at 483 per Dixon J. For statements to similar effect, see *R v Winneke; Ex parte Gallagher* (1982) 152 CLR 211 at 218 per Gibbs CJ, at 224 per Mason J, at 233 per Wilson J; *University of Wollongong v Metwally* (1984) 158 CLR 447 at 456 per Gibbs CJ.

26 (1974) 131 CLR 338 at 346-347 per Mason J.

Day.[27] In *McWaters*, s 16(1)(a) of the *Traffic Act 1949* (Qld) made it an offence to drive a motor vehicle under the influence of liquor. Section 40(2) of the *Defence Force Discipline Act 1982* (Cth) made it an offence to drive a vehicle on service land while "under the influence of intoxicating liquor ... to such an extent as to be incapable of having proper control of the vehicle". The Attorney-General argued that it could not be asserted that s 40(2) conferred a liberty on a serviceman to drive a vehicle under the influence provided he was still capable of controlling that vehicle. Likewise, here, it cannot be asserted that the Criminal Code confers a liberty "merely" to occupy premises with drugs on them,[28] just as it could not be said that it confers a liberty to traffic in drugs other than those defined under the Criminal Code as "controlled drugs". As in *R v Winneke; Ex parte Gallagher*,[29] it is difficult to imagine that co-operation between the Commonwealth and State Parliaments in the administration of the criminal law was intended to be disrupted in the manner asserted by the appellant.

20. To the contrary, by the expression of statutory intent in s 300.4,[30] the Commonwealth has made clear its intention that State legislatures may make laws in relation to the same subject matter.[31] As such, the Criminal Code provisions for the prevention of drug trafficking are intended to be supplementary to, or cumulative upon, the criminal law of other jurisdictions.[32]

21. In light of the recognition of the permissible existence of different norms of conduct and different penalties in relation to the same conduct,[33] the fact that the methods of trial may be different for Commonwealth and State offences is not such as to lead to inconsistency. The appellant relies upon the existence of s 46 of the *Juries Act 2000* (Vic), which permits a majority verdict, as taking away the benefit enjoyed by an accused person which requires a unanimous verdict in relation to trials on indictment for Commonwealth offences.[34] No case has held that this distinction is determinative as to inconsistency;[35] at most, as in *Dickson*, it may be relevant when considered along with "more stringent criteria" sought to be attached by a State to the relevant Commonwealth offence.[36] If the appellant's contention as to the effect of the different jury provisions was correct, the concurrent regulation of the same or similar conduct by the Commonwealth and the States

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27 (1989) 168 CLR 289 at 292, commented upon by the High Court in *Dickson* (2010) 84 ALJR 635 at 641-642 [29] per the Court; 270 ALR 1 at 9.

28 Cf Appellant's Submissions, at paragraph 46(a).

29 (1982) 152 CLR 211 at 218 per Gibbs CJ.

30 See also ss 308.1, 308.2 and 313.1 of the Criminal Code, which demonstrate that the Commonwealth considered, in the enactment of the statutory scheme, the very issue the subject of this appeal.

31 *Ex parte McLean* (1930) 43 CLR 472 at 483 per Dixon J. The relevant Commonwealth intent found in s 300.4 of the Criminal Code was "to lay down ... a non-exhaustive statement of the law with respect to drug trafficking": *R v El Helou* (2010) 267 ALR 734 at 740 [31] per Allsop P.

32 The statutory regulation of the criminal law is ordinarily (although obviously not exclusively) the province of the States in the Australian constitutional system.

33 See paragraph 15 above.

34 A trial under s 302.4 of the Criminal Code would satisfy this requirement: *Crimes Act 1914* (Cth), s 4G.

35 Isaacs J identified the different method of trial as being relevant in *Hume v Palmer* (1926) 38 CLR 441 at 450-451. In that case, the State offence was triable summarily while the Commonwealth offence was to be tried on indictment, invoking the requirement of a trial by jury under s 80 of the Constitution.

36 *Dickson* (2010) 84 ALJR 635 at 640 [22] per the Court; 270 ALR 1 at 8.

would not be possible, as there would always (assuming the continued operation of s 46 of the *Juries Act 2000* (Vic) and other comparable provisions) be an inconsistency in the method of trial. Instead, the statutory provisions operate concurrently, providing in different terms for the trial of offences against Commonwealth and State law respectively but remaining silent on the method of trial of offences in each other's jurisdiction.

22. The difference between the penalties imposed in respect of the State offence (a maximum of 15 years imprisonment) and the Commonwealth offence (a maximum of 10 years imprisonment or 2,000 penalty units, or both) is insufficient to constitute inconsistency for the purposes of s 109 of the Constitution. In those cases where a difference in penalties has been held to give rise to constitutional inconsistency,[37] such inconsistency has arisen only by virtue of the fact that the relevant Commonwealth legislation has been held to cover the relevant field[38] – these are cases of indirect inconsistency.

23. *Dickson* can be distinguished. In *Dickson*, the Court considered the offence of conspiracy to steal property that belonged to the Commonwealth, for which the appellant had been charged, and convicted, under State law. The State Act was held to have rendered criminal conduct not caught by, and deliberately excluded from, the conduct rendered criminal by the Commonwealth provision.[39] There was no provision equivalent to s 300.4.[40] To the contrary, adapting the language of Mason J in *R v Loewenthal; Ex parte Blacklock*,[41] it was not to be supposed that the Commonwealth Parliament, when it formulated the relevant rule, considered that other and different rules might apply in relation to Commonwealth property.[42]

Issue 2 - Section 5 of the Drugs Act

24. Section 5 of the Drugs Act provides:

> Without restricting the meaning of the word ***possession***, any substance shall be deemed for the purposes of this Act to be in the possession of a person so long as it is upon any land or premises occupied by him or is used, enjoyed or controlled by him in any place whatsoever, unless the person satisfies the court to the contrary.

Role of s 32 and relationship with other principles of interpretation

25. In interpreting s 5, regard must be had to s 32 of the Charter Act.[43] Section 32 is an interpretive tool which sits alongside other common law and statutory principles to determine the meaning of any Victorian statutory provision. It provides:[44]

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37 *Hume v Palmer* (1926) 38 CLR 441; *R v Loewenthal; Ex parte Blacklock* (1974) 131 CLR 338.

38 See paragraph 18 above; see also *R v El Helou* (2010) 267 ALR 734.

39 *Dickson* (2010) 84 ALJR 635 at 640-641 [22] per the Court; 270 ALR 1 at 8.

40 *Dickson* (2010) 84 ALJR 635 at 643 [36]-[37] per the Court; 270 ALR 1 at 11.

41 *R v Loewenthal; Ex parte Blacklock* (1974) 131 CLR 338 at 347.

42 *R v Loewenthal; Ex parte Blacklock* (1974) 131 CLR 338 at 347: "It is not to be supposed that the Commonwealth law, when it formulated the relevant rule of conduct in relation to Commonwealth property and that of its public authorities, proceeded on the footing that other and different rules of conduct might be enacted in relation to such property or that the rule of conduct which it formulated might be subjected to a different penalty."

43 The interpretive obligation in s 32 applies to all provisions of Victorian Acts (including the Charter Act itself) and Victorian subordinate instruments, whether enacted before or after the Charter Act: see ss 1(2)(b), 3(1) and 49(1).

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

26. The Attorney-General submits that the Court of Appeal correctly construed s 5 as imposing a legal or persuasive burden, rather than an evidential burden, on an accused. However, the Attorney-General submits by way of notice of contention that the Court of Appeal erred in two respects in its analysis of the operation of s 32. First, the Court considered that the question as to whether a statutory provision is compatible with human rights is to be determined without regard to the question of justification under s 7(2) of any limitation to which human rights are subject by virtue of the provision. Secondly, the Court held that s 32 requires a court construing a statutory provision to adopt the interpretation of that provision which least infringes human rights.

27. Before addressing those contentions, some general submissions are made regarding the construction of s 32 itself.

28. As the Court of Appeal held, s 32 is part of the body of interpretive rules to be applied in determining the meaning of the provision in question.[45] Consistently with the Court of Appeal's reasoning,[46] the Attorney-General does not contend that s 32 is a "special" rule of interpretation to be applied only after so-called "ordinary" techniques of statutory interpretation; it is inextricably part of that very process.[47] The appellant's contention to the effect that the ordinary meaning of a statutory provision is ascertained first[48] misunderstands the role of s 32 within, *and not outside*, the statutory interpretation framework.

29. In ascertaining parliamentary intention, regard must be had to matters such as the purpose or object underlying the Act,[49] the context in which the statutory provision is found (including the existing state of the law) and the mischief which the law was designed to remedy[50] along with common law presumptions,[51] such as the principle of legality.[52] In

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44 Emphasis added.

45 *R v Momcilovic* (2010) 265 ALR 751 at 760 [35], 779 [102]: AB 282, 310.

46 *R v Momcilovic* (2010) 265 ALR 751 at 760 [35], 770-779 [69]-[100]: AB 282, 297-309.

47 This understanding of the role of s 32 in the statutory interpretation process is consistent with the constitutional relationship between the arms of government and notions of representative democracy, in that it is involves the application of rules of interpretation by the judicial arm of government which are accepted by all other arms of government: see *Zheng v Cai* (2009) 239 CLR 446 at 455-456 [28] per French CJ, Gummow, Crennan, Kiefel and Bell JJ, cited by the Court of Appeal in *R v Momcilovic* (2010) 265 ALR 751 at 778 [99]: AB 309. See also, *Wilson v Anderson* (2002) 213 CLR 401 at 418 per Gleeson CJ; *NAAV v Minister for Immigration* (2002) 123 FCR 298 at 410-411 [430] per French J. The constitutional context in New Zealand, which also reflects the principle that courts should not be empowered to modify legislation, has been held to be relevant to the proper construction of the interpretive obligation in the *New Zealand Bill of Rights Act 1990* (**NZBORA**): see *R v Hansen* [2007] 3 NZLR 1 at 79 [246] per McGrath J.

48 Appellant's Submissions, paragraph 56(a), 60-67.

49 *Interpretation of Legislation Act 1984* (Vic), s 35(a).

50 See, eg, *CIC Insurance Limited v Bankstown Football Club Limited* (1997) 187 CLR 384 at 408 per Brennan CJ, Dawson, Toohey and Gummow JJ.

51 These presumptions are imputed to a legislature by the court, irrespective of the actual intentions of legislators in respect of a particular provision. See further, A Kavanagh, "The Role of Parliamentary Intention in Adjudication under the Human Rights Act 1998" (2006) 26 *Oxford Journal of Legal Studies* 179, 185-187.

the context of s 3 of the United Kingdom's *Human Rights Act 1998* (**UKHRA**), Lord Hoffmann has said that "[j]ust as the 'principle of legality' meant that statutes were construed against the background of human rights subsisting at common law ..., so now, section 3 requires them to be construed against the background of Convention rights".[53] Similarly, in Victoria, s 32 forms an additional element in the "modern approach to statutory interpretation".[54]

30. Section 32 itself indicates that it has this operation. It specifically addresses the process of interpreting. Moreover, it acknowledges that it may not be possible to interpret a provision in a way that is compatible with human rights.[55] It requires such an interpretation to be adopted only where it is possible to do so consistently with the purpose of the provision in question. In relation to this proviso, the Explanatory Memorandum to the Charter of Human Rights and Responsibilities Bill 2006 (Vic) (**Explanatory Memorandum**) states:[56]

> The reference to the statutory purpose is to ensure that in [interpreting legislation] 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.

31. In this way, s 32 adds to, but does not displace, the primacy of s 35(a) of the *Interpretation of Legislation Act 1984* (Vic).[57] That provision reads:

> In the interpretation of a provision of an Act or subordinate instrument ... a construction that would promote the purpose or object underlying the Act or subordinate instrument ... shall be preferred to a construction that would not promote that purpose or object.

32. Accordingly, when interpreting legislation in accordance with s 32, courts are to seek a human rights-compatible interpretation that nevertheless achieves the underlying purpose of the legislation and is reasonably open on the language.[58]

33. In giving effect to all of the statutory interpretation principles, including s 32, it is not necessary or desirable to mandate any one approach or sequence of steps. However,

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52 See especially *Coco v The Queen* (1994) 179 CLR 427 at 437 per Mason CJ, Brennan, Gaudron and McHugh JJ. See also *R & R Fazzolari Pty Ltd v Parramatta City Council* (2009) 237 CLR 603 at 619 [43] per French CJ; *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 at 520 [47] per French CJ; *Electrolux Home Products v Australian Workers' Union* (2004) 221 CLR 309 at 329-330 [21]-[23] per Gleeson CJ; *Al-Kateb v Godwin* (2004) 219 CLR 562 at 577 [19] per Gleeson CJ (dissenting); *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at 581-582 [104]-[106] per Kirby J; *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476 at 492-493 [30]-[32] per Gleeson CJ.

53 *R (Wilkinson) v Inland Revenue Commissioners* [2005] 1 WLR 1718 at 1723 [17] per Lord Hoffmann.

54 See, eg, *CIC Insurance Limited v Bankstown Football Club Limited* (1997) 187 CLR 384 at 408 per Brennan CJ, Dawson, Toohey and Gummow JJ; *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 320-321 per Mason and Wilson JJ.

55 See also s 36 which provides for the making of a declaration of inconsistent interpretation.

56 Explanatory Memorandum, 23; see also Human Rights Consultation Committee, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee 2005* (**Consultation Committee Report**), 82-83.

57 In relation to s 35(a), see, eg, *Mills v Meeking* (1990) 169 CLR 214 at 235 per Dawson J.

58 To similar effect, see *R v Hansen* [2007] 3 NZLR 1 at 26-27 [57]-[61] per Blanchard J.

where the natural meaning of a legislative provision and the obvious parliamentary purpose coincide, or where there is a well-established pre-Charter Act meaning, that meaning should first be examined for compatibility with the rights in the Charter Act before casting about for other "possible" interpretations.

Differences between s 32 and other comparable provisions

34. In enacting the Charter Act, the Parliament rejected a constitutional bill of rights, instead preferring an interpretative provision similar to s 6 of the *New Zealand Bill of Rights Act 1990* (**NZBORA**) and s 3 of the UKHRA. However, while s 32 of the is largely modelled on s 3 of the UKHRA,[59] the Victorian Parliament departed from the United Kingdom model in two important respects.

35. First, in s 32 the Parliament did not use the expression "read and given effect" recommended by the Consultative Committee and appearing in s 3 of the UKHRA, using the term "interpreted" instead. This makes clear that the role of the courts is one of interpretation of the statutory text.[60] As McGrath J has said of s 6 of the NZBORA:[61]

> The section does not qualify the basic principle of interpretation that the text is the primary reference in ascertaining meaning and there is no authority to adopt meanings which go beyond those which the language being interpreted will bear.

36. In New Zealand, to qualify as "interpretation", a meaning must be "viable, in the sense of being a reasonably available meaning on [the] orthodox approach to interpretation".[62]

37. By requiring that legislation be "read and given effect" in a way which is compatible with rights under the Convention for the Protection of Human Rights and Fundamental Freedoms, the UKHRA goes further than the interpretive obligation in s 32 of the Charter Act. Section 3 of the UKHRA does not depend critically upon the particular form of words appearing in the statutory provision under consideration;[63] it does not require that the interpretation be reasonable[64] but instead permits "considerable violence to the statutory language".[65] While United Kingdom courts have often stated that what is done under s 3 must fall within the concept of "interpretation" and not amount to judicial legislation,[66] it has also been said that the power in s 3 is "quasi-legislative" because the

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59 Consultation Committee Report, 82-83.

60 See, in contrast, *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 (***Ghaidan***) at 595 [107] per Lord Rodger, noting that "the content of the section actually goes beyond interpretation to cover the way that legislation is given effect". For examples of such cases, see *R v A (No. 2)* [2002] 1 AC 45 and *R (on the application of Hammond) v Secretary of State for the Home Department* [2006] 1 AC 603.

61 *R v Hansen* [2007] 3 NZLR 1 at 77 [237].

62 *R v Hansen* [2007] 3 NZLR 1 at 80 [252] per McGrath J. See also the comments of Blanchard J at 27 [61] that a meaning must be "genuinely open in light of both its text and its purpose."

63 *Ghaidan* [2004] 2 AC 557 at 571 [31] per Lord Nicholls.

64 *Ghaidan* [2004] 2 AC 557 at 574 [44] per Lord Steyn, at 585-586 [67] per Lord Millett (dissenting).

65 *Ghaidan* [2004] 2 AC 557 at 585 [67] per Lord Millett.

66 See, eg, *R (Wilkinson) v Inland Revenue Commissioners* [2005] 1 WLR 1718 at 1723 [17] per Lord Hoffmann; *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48 at 72-73 [75] per Lord Wolff CJ. The Court of Appeal queried whether this case signified a repudiation of the *Ghaidan* approach (at 767 [57]: AB 292), but it is clear the approach

court is not constrained by the language of the statute in question[67] and can "read in words which change the meaning of the enacted legislation, so as to make it Convention-compliant".[68] Such an approach has no place in the context of s 32.[69]

38. Secondly, the Victorian Parliament included the important qualifying words "So far as it is possible to do so consistently with their purpose". This serves to emphasise that s 32 does not displace s 35(a) of the *Interpretation of Legislation Act 1984* (Vic).[70] Courts applying s 32 are not permitted to "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".[71] The reference to purpose in s 32 requires courts to give effect to the purpose of the particular provision(s)[72] in issue, and not only to identify a meaning that is consistent with a "fundamental feature",[73] the "underlying thrust",[74] the "very core and essence"[75] or "cardinal principal"[76] of the legislation.

39. Aside from the differences in the wording of s 32, regard must be had to the different constitutional context and legislative history of the UKHRA and the Charter Act. The UKHRA operates in a context where aggrieved litigants can seek redress and obtain remedies from the European Court of Human Rights. It was enacted to "bring rights home" and enable domestic courts to deal with those issues. Section 3 of the UKHRA was modelled on language used by the Court of Justice of the European Communities to describe the obligations of domestic courts under European Community directives, whereas in Victoria, as in New Zealand, there is no equivalent authority for courts to modify legislation.[77]

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of the House of Lords in *Ghaidan* remains the accepted construction of s 3 of the UKHRA: see, eg, *Ahmed v Her Majesty's Treasury* [2010] 2 AC 534 at 647 [115] per Lord Phillips.

67 *Ghaidan* [2004] 2 AC 557 at 585 [64] per Lord Millett (dissenting).

68 *Ghaidan* [2004] 2 AC 557 at 571-572 [32] per Lord Nicholls. See also at 602 [124] per Lord Rodger.

69 For a similar rejection of this approach in the context of s 30 of the *Human Rights Act 2004* (ACT), see *R v Fearnside* (2009) 165 ACTR 22 at 41 [87] per Besanko J.

70 In *R v Hansen* [2007] 3 NZLR 1 at 80 [252], McGrath J considered the relationship between s 6 of the New Zealand Bill of Rights Act and s 5 of the Interpretation Act and held that "Section 6 ... adds to, but does not displace, the primacy of s 5 of the Interpretation Act, which directs the Courts to ascertain meaning from the text of an enactment in light of the purpose, and it does not justify the Court taking up a meaning that is in conflict with s 5... . Rather s 6 makes New Zealand's commitment to human rights part of the concept of purposive interpretation."

71 Explanatory Memorandum, 23. See also S Evans & C Evans, "Legal Redress under the Victorian Charter of Human Rights and Responsibilities" (2006) 17 *Public Law Review* 264, 269.

72 "Statutory provision" is defined in s 3(1) as meaning an Act or a provision of an Act.

73 *Ghaidan* [2004] 2 AC 557 at 572 [33] per Lord Nicholls.

74 *Ghaidan* [2004] 2 AC 557 at 572 [33] per Lord Nicholls.

75 *Ghaidan* [2004] 2 AC 557 at 597 [111] per Lord Rodger.

76 *Ghaidan* [2004] 2 AC 557 at 598 [114], 598-599 [116] and 603-604 [128] per Lord Rodger, see also *In re S (Minors) (Care Order: Implementation of Care Plan)* [2002] 2 AC 291 at 309-310 [23], 310-311 [27]-[28] and 314 [42] per Lord Nicholls.

77 As to the relationship between s 3 of the UKHRA and the European Court of Justice's "*Marleasing* principle", see *R (Hurst) v Commissioner of Police of the Metropolis* [2007] 2 AC 189 at 216 [52] per Lord Phillips; *Dabas v High Court of Justice (Madrid)* [2007] 2 AC 31 at 60 [76] per Lord Brown; *Revenue and Customs Commissioners v IDT Card Services Ireland Ltd* [2006] EWCA Civ 29 at [85]. See, in the New Zealand context, *R v Hansen* [2007] 3 NZLR 1 at 78-79 [244] – [246] per McGrath J, at 56 [158] n 193 per Tipping J.

"Compatible with human rights" (Notice of Contention, Grounds 1 and 2)

40. Section 32 requires that statutory provisions be interpreted in a way that is "compatible with human rights". The concept of compatibility is central to the Charter Act's operation, most notably in relation to the obligation on public authorities to act compatibly with human rights, a breach of which renders conduct unlawful (s 38), the obligation regarding interpretation of legislation (s 32) and the obligations on members of Parliament to table statements of compatibility when introducing Bills (s 28).[78]

41. It is submitted that the question of compatibility is to be determined by reference to s 7(2) of the Charter Act. Accordingly, a statutory provision that imposes a reasonable limit upon rights by reference to s 7(2) will be "compatible with human rights" for the purposes of ss 28 and 32. Similarly, a public authority will not be acting incompatibly with human rights (and therefore unlawfully pursuant to s 38) if it imposes a limit on those rights that is reasonable by reference to s 7(2).

42. Section 7(2) is a "key provision" of the Charter Act[79] that gives effect to Parliament's intention that "human rights are, in general, not absolute rights but must be balanced against each other and against other competing public interests".[80] It reflects Parliament's decision to include a general limitations provision, rather than following the model of incorporating limits within the rights themselves.[81] It is clear from the extrinsic material that it was Parliament's intention that reasonable limits on rights were permitted, as s 7 makes plain.[82] Moreover, the Second Reading Speech expressly links s 7(2) with the concept of compatibility, stating that where a right is reasonable and demonstrably justified in a free and democratic society by reference to the factors in s 7(2), "then action taken in accordance with that limitation will not be prohibited under the Charter Act, and is not incompatible with the right".[83]

43. The Court of Appeal was therefore incorrect to hold that a provision is incompatible with a human right if it "breaches" or "infringes" that right, simply by imposing a limit upon it.[84] Instead, compatibility requires the court to consider whether the imposed limit is reasonable under s 7(2). The Court of Appeal's approach would mean that a human right

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78 See also ss 30 (the power conferred on the Scrutiny of Acts and Regulations Committee to report to Parliament as to whether a Bill is compatible with human rights) and 41 (the function of the Victorian Human Rights and Equal Opportunity Commission to review a public authority's programs and practices, when requested, to determine their compatibility with human rights); *Ombudsman Act 1973* (Vic), s 13(1A); *Subordinate Legislation Act 1994* (Vic), s 21(1)(ha).

79 Explanatory Memorandum, 7.

80 Explanatory Memorandum, 9; see also 7. To similar effect, see the Second Reading Speech, Charter of Human Rights and Responsibilities Bill 2006 (Vic), Victoria, *Parliamentary Debates,* Legislative Assembly, 4 May 2006 (Mr Hulls, Attorney-General) (**Second Reading Speech**), 1290.

81 Explanatory Memorandum, 8. The Explanatory Memorandum and Second Reading Speech also make clear that the general limitation provision is in addition to any limits incorporated within the terms of the individual rights: Explanatory Memorandum in respect of clause 7 at 7; Explanatory Memorandum in respect of clause 15 at 14; Second Reading Speech, 1291. See also the Consultation Committee Report, 46-48 [2.6].

82 See especially the Explanatory Memorandum, 12 in respect of the right to freedom of movement in clause 12.

83 Second Reading Speech, 1291.

84 *R v Momcilovic* (2010) 265 ALR 751 at 760 [35](2): AB 282.

would be "breached" or "infringed" even if the limit imposed was relatively minor and sought to protect important countervailing interests.

44. This approach to the role of s 7(2) is consistent with that in other jurisdictions[85] whether or not there is an express limitations clause such as s 7(2); the question of compatibility with human rights is always determined in light of other competing rights and interests.[86] In jurisdictions with general limitations provisions comparable to s 7(2), the question of compatibility or incompatibility, breach or infringement, is determined by reference to that provision.[87] A similar approach is also applied where the relevant right is required to be delineated without reference to an express provision such as s 7(2). As the Privy Council has explained, even where the right to be presumed innocent is articulated in an instrument without an express limitation clause, it is "considered to have an implicit degree of flexibility [that] ... allows a balance to be drawn between the interest of the person charged and the State."[88]

45. Even without the indications in the Charter Act and the extrinsic materials as to the meaning of "compatible", it is submitted that the reasons given by the Court of Appeal[89] for excluding s 7(2) are insufficient to justify excluding s 7(2) from the interpretative analysis required by s 32.

46. The Court of Appeal relied on the purpose of protecting and promoting human rights, articulated in s 1(2), as a "fundamental consideration" regarding the role of s 7(2).[90] But that argument is ultimately circular, as s 1(2)(b) specifies the means by which that purpose is to be achieved, including by "ensuring that all statutory provisions ... are interpreted so far as is possible in a way that is *compatible* with human rights" (emphasis added).

47. The Court of Appeal also considered that application of s 7(2) as part of the interpretative process may give rise to different interpretations of s 5 of the Drugs Act depending upon the offence charged. However, it is submitted that this concern is unfounded. Section 7(2) plays a role in determining whether a proposed interpretation is "compatible with human rights". Whether such an interpretation is "possible" is governed by additional

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85 Aside from Victoria and the ACT, the only jurisdiction to have taken the approach adopted by the Court of Appeal is New Zealand, in some of the earlier jurisprudence on the NZBORA, and even then with a lack of consistency: see especially the conflicting judgments in *Ministry of Transport v Noort; Police v Curran* [1992] 3 NZLR 260. However, it is now well settled in New Zealand that the question of (in)consistency with rights is assessed by reference to the general reasonable limits provision in s 5 of the NZBORA. The approaches set out in the judgments of the majority of the New Zealand Supreme Court in *R v Hansen* have been consistently followed, including by the Court of Appeal: see, eg, *R v Wenzel* [2009] 3 NZLR 47; *Television New Zealand Ltd v Solicitor-General of New Zealand* [2009] NZFLR 390.

86 In Hong Kong see, eg, *HKSAR v Lam Kwong Wai* (2006) 9 HKCFAR 574 at 595 [29]. In the United Kingdom and Europe see, eg, *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48 and Beatson et al, *Human Rights: Judicial Protection in the United Kingdom* (Sweet & Maxwell, 2008), 472-510 [5-30]-[5-127].

87 In New Zealand, with respect to s 5 of the NZBORA, see *R v Hansen* [2007] 3 NZLR 1 at 36-37 [88]-[92] per Tipping J, with whom Blanchard J at 27-28 [57]-[60], McGrath J at 66 [192] and Anderson J at 84 [269] agreed). In Canada, with respect to s 1 of the *Canadian Charter of Rights and Freedoms,* see, eg, *R v Oakes* [1986] 1 SCR 103. In South Africa, see *Moise v Greater Germiston Transitional Local Council* 2001 (4) SA 491 at 493 [7].

88 *Attorney-General of Hong Kong v Lee Kwong-kut* [1993] AC 951 at 969 per Lord Woolf.

89 *R v Momcilovic* (2010) 265 ALR 751 at 781 [106]-[110]: AB 311-313.

90 *R v Momcilovic* (2010) 265 ALR 751 at 781 [107]: AB 312.

factors, including the purpose of the provision in question and its statutory context. It is accepted that it is not "possible" under s 32 to give the words of s 5 of the Drugs Act different interpretations depending upon the offence charged. But this means no more than that s 7(2) must be applied in that context. It therefore cannot be used to achieve different meanings of s 5 in relation to the various different offences to which it applies.

48. The Attorney-General also submits that the Court of Appeal misunderstood the function of evidence in a proportionality analysis under s 7(2). The experience of the United Kingdom is that evidence of the kind referred to by the Court of Appeal will not ordinarily be required[91] and may well be inappropriate.[92] The Court's role under s 7(2) is one of review that respects the different roles of the courts and Parliament,[93] and gives appropriate weight or latitude to the decision of the democratic decision-maker.[94] In most cases, the purpose, effect and public interest served by the legislation will be self-evident. As Lord Nicholls has stated, "the will of Parliament is expressed in the language used by it in its enactments. The proportionality of legislation is to be judged on that basis".[95] In some cases legislative fact evidence will be required, including reference to Hansard, Law Reform Commission reports and the like.[96] However, in assessing whether a reverse onus is an unreasonable limit upon rights, the courts have rarely needed to have resort to evidence.[97] In Victoria, the need for evidence is further diminished by the requirement in s 28 that all Bills be accompanied by a reasoned Statement of Compatibility.

49. In contrast, in Canada extensive evidence (similar in nature to a Brandeis brief) is often called by the state to support an argument that a limit is reasonable and justified. This practice however, has been criticised by some Canadian judges as time-consuming, expensive and of questionable value to the court.[98] While the Supreme Court has said that evidence will generally be required to be put before it in order for the state to prove that a

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91 See *Wilson v First Country Trust Ltd (No 2)* [2004] 1 AC 816 at 842-843 [62]-[67] per Lord Nicholls, at 865-866 [142] per Lord Hobhouse.

92 See the discussions of the relevance and permissible use of such evidence in *Evans v Amicus Healthcare Ltd* [2004] 3 WLR 681 and *Lancashire CC v Taylor* [2005] 1 WLR 2668.

93 *Wilson v First Country Trust Ltd (No 2)* [2004] 1 AC 816 at 844 [70] per Lord Nicholls.

94 In New Zealand see, eg, the discussion by Tipping J in *R v Hansen* [2007] 3 NZLR 1 at 41-45 [105]-[119]. For a discussion of the United Kingdom jurisprudence, see Beatson et al, *Human Rights: Judicial Protection in the United Kingdom* (Sweet & Maxwell, 2008),267-300 [3-182]-[3-247]. See also A Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge University Press, 2009) at 165-268.

95 *Wilson v First Country Trust Ltd (No 2)* [2004] 1 AC 816 at 843 [67]. See also the comments of Lord Woolf CJ in *Lancashire CC v Taylor* [2005] 1 WLR 2668 at 2683 [58]: "The first question is whether the policy justification for the distinction which is in issue is apparent from the legislation, whether read by itself or with its antecedents and the cases decided on the provisions. Only if the policy is not apparent from these materials should it become necessary to look wider".

96 See, eg, *R(F) v Justice Secretary* [2010] 2 WLR 992 at 998 [18] per Lord Phillips. Resort to such materials is familiar in the Australian constitutional context: see, eg, *Rowe v Electoral Commissioner* [2010] HCA 46.

97 In *Attorney-General's Reference (No 1 of 2004)* [2004] 1 WLR 2111, it does not appear that evidence was required for the courts to properly consider whether various legal onuses were justified, or to address the principles set out by the Court of Appeal in *R v Momcilovic* (2010) 265 ALR 751 at 765 [52]: AB 289-290. For cases in which the House of Lords has found reverse onuses to be justified without resort to additional evidence, see, eg, *R v Johnstone* [2003] 1 WLR 1736 and *Sheldrake v Director of Public Prosecutions; Attorney General's Reference (No 4 of 2002)* [2005] 1 AC 264.

98 See *R v D (D)* [2000] 2 SCR 275 at 301 [56].

limitation on a right is reasonable,[99] it has also accepted that such arguments may be "supplemented by common sense and inferential reasoning".[100] The courts also subject legislative fact evidence to less stringent admissibility requirements.[101]

50. The United Kingdom approach should be preferred to that of Canada. It more closely reflects the existing practices of Australian courts in constitutional cases and better respects the different roles of the courts and the legislature.

"Least infringement" of human rights (Notice of Contention, Grounds 3 and 4)

51. It is submitted that the Court of Appeal erred in concluding that "[c]ompliance 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".[102] Rather, a court must adopt an interpretation which achieves the purpose of the legislation; this may involve opting for an interpretation which limits the right to a greater degree than would the least restrictive interpretation.

52. If, consistently with the purpose of the legislation, there is an interpretation available which is compatible with human rights, then s 32 directs that it must be adopted. If there is no such interpretation, then the provision cannot be interpreted compatibly with human rights and the Court may consider making a declaration to that effect under s 36.

53. But in cases where more than one interpretation is available, each of which is compatible with human rights in the sense explained above, s 32 is silent as to which interpretation is to be adopted. It does not mandate adoption of the interpretation which least infringes human rights (although other principles of interpretation may have that effect). Rather than enacting a rule to that effect, s 32 leaves the issue in such a case for resolution by application of other principles of interpretation, including s 35(a) of the *Interpretation of Legislation Act*, which in a given case may dictate a contrary result.

54. The terms of s 7(2) and the comparative jurisprudence also make clear that for a limit to be reasonable, Parliament is not necessarily required to adopt the means that least limits rights. Whether there are "any less restrictive means reasonably available" to achieve the purpose of the limitation (s 7(2)(e)) is only one factor to be taken into account in the s 7(2) assessment.[103] Section 7(2) does not require a decision maker to "choose the *least intrusive* means available".[104]

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99 *R v Oakes* [1986] 1 SCR 103 at 138 per Dickson CJ.

100 *R v Sharpe* [2001] 1 SCR 45 at 94 [78] per McLachlin CJ.

101 *Danson v Ontario (Attorney General)* [1990] 2 SCR 1086 at 1099 per Sopinka J.

102 *R v Momcilovic* (2010) 265 ALR 751 at 779 [103]: AB 310.

103 Section 7(2) is modelled on s 5 of the NZBORA and, more particularly, on s 36 of the Bill of Rights contained in the *Constitution of the Republic of South Africa 1996*: Explanatory Memorandum, 9. See *R v Hansen* [2007] 3 NZLR 1 at 45 [119] per Tipping J; *S v Manamela* 2000 (3) SA 1 (CC) at 40-41 [94]-[95] per O'Regan J and Cameron AJ, with whom Madala, Sachs and Yacoob JJ agreed at 20-21 [34].

104 *Sabet v Medical Practitioners Board of Victoria* (2008) 20 VR 414 at 442 [188] per Hollingworth J (emphasis in original), citing *RJR McDonald Inc v Attorney-General (Canada)* [1995] 3 SCR 199 at 342 [160] per McLachlin J.

Application of s 32 to the present case

55. Where, as in this case, there is a well-established pre-Charter Act meaning, the starting point is to examine that meaning for compatibility with human rights (including by reference to s 7(2)). The enactment of the Charter Act did not automatically displace existing interpretations of statutory provisions. It is only those meanings that unreasonably limit human rights (determined by reference to s 7(2)) which s 32 requires the court to discard, and then only if the statutory language and purpose permit.

56. Since the decision of the Full Court of the Supreme Court in *R v Clarke and Johnstone*,[105] it has been established that s 5 operates so that a person occupying land or premises upon which there are drugs is deemed to possess those drugs unless they satisfy the jury on the balance of probabilities that they were not in possession of them.[106] As the Court of Appeal held,[107] it is not open on the text of s 5 to interpret it otherwise.[108]

57. The submissions of the first respondent are otherwise adopted in relation to this issue.

Issues 3 and 4 - Constitutionality of ss 32 and 36 of the Charter Act

Section 32 – The interpretative obligation

58. The function conferred on Victorian courts by s 32 is one of statutory interpretation. For the reasons above, s 32 does not permit the court to stray into a legislative role. The interpretation of statutes is a central part of the traditional judicial process; it has never been seen to, nor does it, involve the inadmissible delegation to the court of a legislative power.

59. Even if this function were conferred by a Commonwealth law on a federal court, no breach of the strict separation of powers at Commonwealth level would arise. As such, it follows that jurisdiction of this nature can be conferred on a State court exercising State jurisdiction consistently with Ch III of the Constitution;[109] there is no need to consider the principle formulated in *Kable v Director of Public Prosecutions (NSW)*[110] and later cases.

60. There is nothing antithetical to the judicial process in a court considering the elements of proportionality inherent in s 7(2) of the Charter Act. The process of considering the legitimate ends sought to be achieved by a statutory provision and the means adopted by the provision to achieve those ends is consistent with that applied by courts in other areas. For example, it has been employed in the context of deciding whether a law infringes a

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105 [1986] VR 643 at 659.

106 See, eg, *R v Tragear* (2003) 9 VR 107 at 117 [43] per Batt JA; *R v Hiep Tan Tran* [2007] VSCA 19 at [24] per Redlich JA; *R v Georgiou* [2009] VSCA 57 at [30] per Robson AJA.

107 *R v Momcilovic* (2010) 265 ALR 751 at 792 [154]: AB 329.

108 In this regard, the analysis of the New Zealand Supreme Court in *R v Hansen* [2007] 3 NZLR 1 should be preferred to that of the House of Lords in *R v Lambert* [2002] 2 AC 545.

109 *HA Bacharach Pty Ltd v Queensland* (1998) 195 CLR 547 at 561-562 [14] per the Court; *Silbert v Director of Public Prosecutions (WA)* (2004) 217 CLR 181 at 186 [10]-[11] per Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ.

110 (1996) 189 CLR 51.

constitutional limitation on State or Commonwealth legislative power, such as the implied freedom of political communication[111] or s 92 of the Constitution.[112]

61. There is nothing in s 32 which requires Victorian courts to undertake an exercise which is repugnant to, or incompatible with, their institutional integrity such that they are no longer appropriate repositories of federal judicial power.[113]

Section 36 – Declarations of inconsistent interpretation

62. Section 36(2) of the Charter Act confers upon the Supreme Court of Victoria a power to make a declaration of inconsistent interpretation. Such a declaration may be made where "the Supreme Court is of the opinion that a statutory provision cannot be interpreted consistently with a human right". By reason of s 36(5) of the Charter Act, the making of a declaration of inconsistent interpretation will not affect the outcome of the proceeding in which it is made, nor the validity, operation or enforcement of the statutory provision in question.[114]

63. The conferral of such a power on the Supreme Court does not contravene Ch III of the Constitution. The power conferred on the Supreme Court is a judicial one or, at the least, incidental to the exercise of judicial power. Accordingly, for the reasons set out in paragraph 59 above, there is no need to consider the *Kable* principle.

64. Generally, the exercise of judicial power involves the making of a "decision settling for the future, as between defined persons ... , a question as to the existence of a right or obligation" so as to create a "new charter by reference to which that question is in future to be decided as between those persons or classes of persons".[115] That results in the "quelling" of a controversy between parties.[116] There must be a "matter" capable of being so resolved between the parties and this requires "some immediate right, duty or liability to be established by determination of the Court".[117]

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[111] See, eg, *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Coleman v Power* (2004) 220 CLR 1.

[112] See, eg, *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436.

[113] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 95-96 per Toohey J, at 103 per Gaudron J, at 116 per McHugh J, at 143 per Gummow J. See also *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 591 [15] per Gleeson CJ, at 598-599 [37] per McHugh J, at 608 [66] per Gummow J, at 648 [198] per Hayne J; *Baker v The Queen* (2004) 223 CLR 513 at 513 [5] per Gleeson CJ, at 526 [21] per McHugh, Gummow, Hayne and Heydon JJ, at 543 [82] per Kirby J (dissenting), at 573 [172] per Callinan J; *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 67-68 [40]-[41] per Gleeson CJ, at 76 [63]-[64] per Gummow, Hayne and Crennan JJ, at 138 [244] per Heydon J; *South Australia v Totani* (2010) 85 ALJR 19 at 42-43 [69] per French CJ; (2010) 271 ALR 662 at 687-688.

[114] If a declaration of inconsistent interpretation is made, s 36 provides only that the Supreme Court must cause a copy to be given to the Attorney-General (s 36(6)), who must in turn give a copy to the Minister administering the relevant statutory provision (s 36(7)). That Minister must then cause a written response to be laid before Parliament and published in the Government Gazette (s 37).

[115] *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 374 per Kitto J.

[116] *Fencott v Muller* (1983) 152 CLR 570 at 608 per Mason, Murphy, Brennan and Deane JJ.

[117] *In Re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265 per Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ.

65. Nevertheless, it has been accepted that the resolution of a question of law which does not affect the trial or acquittal of a person may also involve the exercise of judicial power. In *Mellifont v Attorney-General (Qld)*,[118] the High Court considered s 669A of the *Criminal Code* (Qld), which permitted the Attorney-General to refer to the Court of Criminal Appeal any point of law that arose at the trial of a person on indictment where the person had been acquitted or the Crown had entered a *nolle prosequi*. The contention that the decision of the Court of Criminal Appeal was not a decision made in the exercise of judicial power, and thus was not subject to appeal to the High Court, was rejected. Mason CJ, Deane, Dawson, Gaudron and McHugh JJ said:[119]

> Although the indictment itself cannot serve as a vehicle for the further determination of the charge in consequence of the statement by counsel for the Crown and the subsequent filing of the nolle prosequi, the reference and the decision on the reference *arise out of* the proceedings on the indictment and are a statutory extension of those proceedings. ... [T]he decision on the reference was made with respect to a "matter" which was not 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 and in response to an abstract question, and hypothetical in the sense that it was unrelated to any actual controversy between parties.

66. There are two circumstances in which a declaration under s 36 may be made, namely:

(a) upon a reference to the Supreme Court of a question of law relating to the application of the Charter Act or the interpretation of a statutory provision in accordance with the Charter Act, from another court or a tribunal in which the question arises in a proceeding;[120] and

(b) in a proceeding in the Supreme Court in which a question of law arises that relates to the application of the Charter Act or a question arises with respect to the interpretation of a statutory provision in accordance with the Charter Act.[121]

67. It follows that in all cases in which a declaration may be made, it will be made in the course of proceedings in which the rights and liabilities of the parties to the proceeding will be affected by the resolution of a dispute as to whether a statutory provision can or cannot be interpreted in accordance with s 32 in a way that is "compatible with human rights" in the sense set out earlier in these submissions. Accordingly, in a proceeding in which the interpretation of a statutory provision is relevant to the determination of the rights and liabilities of the parties to the proceedings, the making of a declaration under s 36 of the Charter Act can be said to "arise out of the proceedings" and to constitute "a statutory extension of those proceedings". Only after having applied statutory interpretation principles (including s 32) in the context of a dispute, and coming to the

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[118] (1991) 173 CLR 289.

[119] (1991) 173 CLR 289 at 304-305 (emphasis in original). See also in the context of referrals of questions of law, *O'Toole v Charles David Pty Ltd* (1990) 171 CLR 232 at 244-245 per Mason CJ, at 258-259 per Brennan J, at 279-285 per Deane, Gaudron and McHugh JJ, at 300-302 per Dawson J.

[120] Sections 33 and 36(1)(b) of the Charter Act. Such a question may also be referred by the Trial Division of the Supreme Court to the Court of Appeal.

[121] Section 36(1)(a). A declaration may also be made if such a question arises in a proceeding before the Court of Appeal: s 36(1)(c).

conclusion as to the incompatibility of the provision in question with human rights will the court then consider the making of a declaration. That is to say, a declaration can only be made in proceedings for some other relief in which the question of statutory interpretation arises.[122]

68. Although the declaration itself does not affect the rights of the parties, the making of the declaration cannot be said to be unrelated to an actual controversy between two parties. The power to make a declaration is a discretionary one and should generally only be exercised where the rights of a party are, in fact, breached.[123] To the extent that the Court's decision in *Mellifont* placed some reliance on the fact that it arose in the context of the criminal law, enabling the Crown to seek to correct an error of law without exposing the accused to double jeopardy and without infringing the common law rule against the Crown appealing a verdict of acquittal,[124] the same rationale applies in the context of declarations under s 36. The making of a declaration is designed to draw the attention of Parliament to the incompatibility of a statutory provision with a human right protected by the Charter Act in a way that avoids infringing the fundamental common law principle of parliamentary supremacy.

69. Alternatively, if it were held that such a power were non-judicial in nature, it is not such as to be repugnant to, or incompatible with, the institutional integrity of the Supreme Court such that it is no longer an appropriate repository of federal judicial power.[125] The conferral of a non-judicial power on a State court does not of itself infringe this principle because it is accepted that State courts can exercise non-judicial powers.[126] There is nothing to suggest that s 36 results in the Supreme Court acting as an instrument of the executive government.[127] Furthermore, the making of a declaration of inconsistent interpretation, which is designed to protect internationally accepted human rights (many of which have their origins in the common law administered by the Supreme Court), cannot be conceived as being repugnant or inconsistent with the judicial process.

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[122] In the United Kingdom, a declaration of incompatibility cannot be made in circumstances where the interpretive power does not apply to the relevant provision: see *Jain v Trent Strategic Health Authority* [2009] 1 AC 853; *Wilson v First County Trust (No 2)* [2004] 1 AC 816.

[123] See also *R (Rusbridger) v Attorney General* [2004] 1 AC 357; *R (Nasseri) v Home Secretary* [2010] 1 AC 23.

[124] (1991) 173 CLR 289 at 305.

[125] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 95-96 per Toohey J, at 103 per Gaudron J, at 116 per McHugh J, at 143 per Gummow J. See also, *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 591 [15] per Gleeson CJ, at 598-599 [37] per McHugh J, at 608 [66] per Gummow J, at 648 [198] per Hayne J; *Baker v The Queen* (2004) 223 CLR 513 at 519 [5] per Gleeson CJ, at 526 [21] per McHugh, Gummow, Hayne and Heydon JJ, at 543 [82] per Kirby J (dissenting), at 573 [172] per Callinan J; *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 67-68 [40]-[41] per Gleeson CJ, at 76 [63]-[64] per Gummow, Hayne and Crennan JJ, at 138 [244] per Heydon J. *South Australia v Totani* (2010) 85 ALJR 19 at 42-43 [69] per French CJ; (2010) 271 ALR 662 at 687-688.

[126] This is so, of course, because there is no constitutional separation of powers at State level. In the context of the Victorian Constitution, see *City of Collingwood v State of Victoria (No 2)* [1994] 1 VR 652. See generally, *Kable v Director of Public Prosecutions* (1996) 189 CLR 51; *Clyne v East* (1967) 68 SR (NSW) 385; *Building Construction Employees and Builders' Labourers' Federation of NSW* v *Minister for Industrial Relations* (1986) 7 NSWLR 372; *Gilbertson v South Australia* [1978] AC 772; *JD and WG Nicholas v Western Australia* [1972] WAR 168.

[127] To the contrary, s 36 invites the executive government to consider how to respond to an adverse assessment the Supreme Court has made of legislation passed by State Parliament.

Issue 5 - High Court's jurisdiction to set aside declaration of inconsistent interpretation

70. The Attorney-General does not seek to have the declaration of inconsistent interpretation made by the Court of Appeal set aside, if its construction of s 5 of the Drugs Act is upheld.[128]

71. If, contrary to the submissions above, the Court upholds the appellant's contentions as to the proper construction of s 5 of the Drugs Act, it would follow that the Court of Appeal erred in making a declaration under s 36. The imposition of an evidential burden would not limit the presumption of innocence under s 25(1) of the Charter Act. While it requires an accused to raise or point to evidence, once that is done the accused cannot be convicted if there is a reasonable doubt as to his guilt.[129] Even if it is a limit, it is a reasonable one. The Attorney-General seeks an order setting aside the declaration in such circumstances.

72. The Court would be empowered to make such an order. Section 73(ii) of the Constitution provides, relevantly, that the High Court shall have jurisdiction to hear and determine appeals "from all judgments, decrees, orders and sentences" of the Supreme Court of any State. To constitute a judgment, decree or order for the purposes of s 73, the decision must be one made in the exercise of judicial power.[130] For the reasons given above,[131] a declaration made by the Supreme Court under s 36 of the Charter Act is an exercise of judicial power. As such, it constitutes a judgment, decree or order from which an appeal lies to the High Court under s 73(ii) of the Constitution.

73. For the foregoing reasons, the Attorney-General otherwise seeks an order that the appeal be dismissed.

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STEPHEN McLEISH	JOANNA DAVIDSON	ALBERT DINELLI
T (03) 9225 6484	T (03) 8684 0899	T (03) 9225 6909
F (03) 9670 0273	F (03) 8684 0449	F (03) 9225 8395
mcleish@owendixon.com	joanna.davidson@vgso.vic.gov.au	albert.dinelli@vicbar.com.au

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[128] The appeal does not raise the question whether power could validly be conferred on the High Court to *make* a declaration of inconsistent interpretation.

[129] In *R v DPP; Ex parte Kebilene* [2000] 2 AC 326 at 378 Lord Hope noted in respect of common law evidential burdens that "the burden of proving his guilt beyond reasonable doubt remains with the prosecution throughout the trial. It has not been suggested in this case that these common law evidential presumptions are incompatible with the presumption of innocence". The Court of Final Appeal of Hong Kong has generally regarded an evidential burden as consistent with the presumption of innocence: *Tse Mui Chun v HKSAR* (2003) 6 HKCFAR 601 at 618J-619D per Bokhary PJ and Lord Scott of Foscote NPJ; *HKSAR v Lam Kwong Wai* [2006] HKCFA, 31 August 2006, per Sir Anthony Mason NPJ at [25]. The Supreme Court of Canada, however, has found that an evidential onus may amount to a limit on the right if the evidence upon which the presumption is based would not necessarily lead to that conclusion: *R v Downey* [1992] 2 SCR 10.

[130] See *Mellifont* (1991) 173 CLR 289 at 299 per Mason CJ, Deane, Dawson, Gaudron and McHugh JJ.

[131] See paragraphs 64-69 above.