
Who is sovereign now? The Momcilovic Court hands back power over human rights that Parliament intended it to have

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The decision of R v Momcilovic concerned the rights-compatibility of a reverse legal burden of proof under drug control legislation. The Victorian Court of Appeal held that the reverse onus provision was an unjustified limit on the right to the presumption of innocence under s 25(1) of the Charter of Human Rights and Responsibilities Act 2006 (Vic) (Charter) and issued a declaration of inconsistent interpretation under s 36(2) of the Charter. This test case sought to resolve many fundamental issues concerning the Charter mechanisms relating to the human rights-compatibility of legislation, including strength of the s 32(1) interpretation obligation, and the appropriate methodology for the statute-related mechanisms under the Charter. This article will critique the court's resolution of these broader issues, arguing that the court has sanctioned a rights-reductionist method to the statute-related Charter mechanisms, undermined the remedial reach of the s 32(1) interpretation obligation, and considerably muted the institutional dialogue. Most significantly, however, is the fact that this is all done despite clear parliamentary intention to the contrary.

INTRODUCTION

The decision of *R v Momcilovic* (*Momcilovic*)¹ concerned the rights-compatibility of a reverse legal burden of proof under drug control legislation. The Victorian Court of Appeal (*Momcilovic* Court) held that the reverse onus provision was an unjustified limit on the right to the presumption of innocence under s 25(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (Charter) and issued a declaration of inconsistent interpretation under s 36(2) of the Charter. The magnitude of this decision goes far beyond the outcome of this particular case. Being the first occasion that a majority of the Court of Appeal relied on the Charter,² this became a test case on, inter alia, the strength of the s 32(1) interpretation obligation, and the appropriate methodology for the statute-related mechanisms under the Charter. A critique of the *Momcilovic* Court's resolution of these issues is the focus of this article.³

First, the article will outline the legal and factual matrix of the case. It will also examine the choices presented to the *Momcilovic* Court in relation to the reach of s 32(1) and the appropriate methodology, and the choices made by it. Secondly, the article will critique the choices made by the *Momcilovic* Court, with analysis being structured by the judgment. In particular, it will examine the *Momcilovic* Court's choice to rely on the narrowest position in the British jurisprudence and

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¹ *R v Momcilovic* [2010] VSCA 50 (*Momcilovic*).

² It should be noted that a majority of the Victorian Court of Appeal (*Momcilovic* Court), consisting of Maxwell P and Weinberg JA, avoided the issue arising under the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (Charter) issue in *RJE v Department of Justice* (2008) 21 VR 526 (*RJE*). Only Nettle JA based his concurring decision on the Charter.

³ This article is limited to an analysis of the methodology adopted by the *Momcilovic* Court. Word constraints did not allow for a full deconstruction of the *Momcilovic* Court's application of its methodology to the provisions in issue.

thoroughly scrutinise the reasoning behind its opinion that s 32(1) of the Charter did not replicate the equivalent provision in the British human rights instrument. In relation to the latter, discussion will focus on the courts analysis of the language of s 32(1), its construction of the enacting Parliament's intention, and its tentative conclusions on what is "possible" under s 32(1).

The *Momcilovic* Court has sanctioned a rights-reductionist method to the statute-related Charter mechanisms, undermined the remedial reach of the s 32(1) interpretation obligation, sidelined the core issue of justification for limitations on rights, and considerably muted the institutional dialogue envisaged under the Charter. Most significantly, this article will demonstrate that this is all done despite clear parliamentary intent to the contrary.

The irony here should not be lost. In considering the scope of the judicial powers in relation to rights-compatibility of legislation under s 32(1) – an issue which goes to the essence of the sovereignty of Parliament – the *Momcilovic* Court has arguably usurped the sovereignty of Parliament by ignoring the Charter-enacting Parliament's intentions. Indeed, the tension surrounding the preservation of parliamentary sovereignty⁴ was *partially resolved* by the enacting Parliament's adoption of a statutory human rights instrument. In an act of sovereign democratic will, parliamentary sovereignty was preserved by the enacting Parliament with the enactment of an instrument based on institutional dialogue between the executive, legislature and judiciary under which the judiciary's power was limited to interpretation and non-enforceable declaration, rather than the enactment of a constitutional human rights instrument which arguably promotes judicial monologues because of the judicial power to invalidate legislation. To be sure, *full resolution* of the tension between parliamentary and judicial sovereignty under the Charter requires an articulation of the reach of the s 32(1) interpretation obligation – the greater the remedial reach of s 32(1), the greater the power conferred on the judiciary. The salient question is whether the enacting Parliament considered that the conferral of a strong remedial element under s 32(1) transferred too much power to the judiciary. Much in the legislative history indicates the enacting Parliament did not, but the *Momcilovic* Court held that it did – thereby arguably usurping the parliamentary sovereignty it sought to maintain.

R v MOMCILOVIC

The issue

Momcilovic concerned the rights-compatibility of s 5 of the *Drugs, Poisons and Controlled Substances Act 1981* (Vic) (Drugs Act). Section 5 is a classic reverse onus provision. Under s 5, a substance is deemed "to be in the possession of a person so long as it is upon any land or premises occupied by him ... *unless the person satisfies the court to the contrary*" (emphasis added). According to pre-Charter interpretation principles, s 5 was considered to impose on a person a legal burden of disproving possession on the balance of probabilities.⁵ A failure to discharge this reverse onus has very serious consequences.

First, a person may be exposed to a conviction for drug trafficking. Section 73(2) of the Drugs Act provides that where a person is in possession of a drug of dependence of a traffickable quantity, "the possession of that drug of dependence in that quantity is prima facie evidence of trafficking by that person in that drug of dependence". Section 71AC then criminalises drug trafficking, providing that a person who trafficks in a drug of dependence is guilty of an offence punishable by up to 15 years imprisonment. Under s 70, "traffick" includes to "have in possession for sale". Accordingly, if a person fails to satisfy a court that he or she was not in possession under s 5, there is prima facie

⁴ This article will not address the arguments surrounding the legitimacy or otherwise of formal human rights protection in Victoria per se. The enactment of the Charter indicates a temporary resolution of this debate within the Victorian polity, and this article will focus on how the Charter is operating in Victoria. "Political life proceeds through a series of conflicts which are never definitely resolved, and whose temporary resolution comes about through provisional agreements, truces, and those more durable peace treaties called constitutions": Bobbio N, *The Future of Democracy: A Defence of the Rules of the Game* (Polity Press, Cambridge, 1987) p 120. See further Debeljak J, "Rights and Democracy: A Reconciliation of the Institutional Debate" in Campbell T, Goldsworthy J and Stone A (eds), *Protecting Human Rights: Instruments and Institutions* (Oxford University Press, Oxford, 2003) pp 135, 142-143.

⁵ *Momcilovic* [2010] VSCA 50 at [16]-[22].

evidence of drug trafficking under s 73(2), for which the person will be guilty of a criminal offence under s 71AC. Secondly, a person may be exposed to a conviction of possession of a drug of dependence. Under s 73(1), a person who has “in his possession a drug of dependence is guilty of an indictable offence” which is punishable by up to five years imprisonment and a fine.

Drugs of dependence of a traffickable quantity were found in an apartment owned and occupied by Vera Momcilovic. Momcilovic shared this apartment with her partner, Velimir Markovski, who himself owned another apartment in the same building. Momcilovic claimed that she had no knowledge of the drugs in her apartment, and Markovski admitted that the drugs were in his possession for the purpose of drug trafficking. Nevertheless, Momcilovic was deemed to be in possession of the drugs under s 5 and charged under s 71AC. Although Momcilovic led some evidence to suggest that she was not in possession of the drugs in her apartment, the legal onus to disprove possession on the balance of probabilities was not discharged and Momcilovic was convicted with one count of trafficking in a drug of dependence.

The *Momcilovic* Court had to consider whether the reverse *legal* burden in s 5 imposed an unjustifiable limitation on Momcilovic’s right to the presumption of innocence under s 25(1) of the Charter. If it did, it then had to consider whether the rights-incompatibility could be remedied through interpretation under s 32(1), which provides that “[s]o 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”. It was argued by three of the four parties, and the amicus curiae,⁶ that s 5 should be interpreted under s 32(1) as imposing only an *evidentiary* onus on the accused to ensure rights-compatibility. An evidential burden of proof only requires a person to adduce evidence that the person was not in possession of the drug, at which point the onus shifts back to the prosecution to prove beyond reasonable doubt that the person was in possession of the drug.⁷ If such an interpretation was not “possible” and not “consistent[] with [statutory] purpose” under s 32(1), the *Momcilovic* Court had to consider whether to issue a declaration of inconsistent interpretation under s 36(2) of the Charter.

The choices

The strength of s 32(1)?

One issue to be clarified was the strength of the s 32(1) interpretation obligation. The text of s 32(1) was modelled on s 3(1) of the *Human Rights Act 1998* (UK) (UKHRA),⁸ leading to much speculation about whether the s 32(1) interpretation power was equally as “radical”⁹ as the s 3(1) power under the British jurisprudence. Section 3(1) provides that “[s]o 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”. The similarity between s 32(1) and s 3(1) is striking, with the only relevant difference being that s 32(1) adds the words “consistently with their purpose”. By way of contrast, s 6 of the *New Zealand Bill of Rights Act 1990* (NZ) (NZBORA)¹⁰ reads “[w]herever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that

⁶ The Victorian Equal Opportunity and Human Rights Commission and the Human Rights Law Resource Centre argued that the latter could be achieved by “reading in” the evidential burden, such that s 5 ought to read “unless the person satisfies the court that there is some evidence to the contrary”: *Momcilovic* [2010] VSCA 50 at [40]. The Attorney-General argued that the latter could be achieved by simply interpreting the phrase “satisfies the court to the contrary” as legally meaning that only an evidentiary burden was imposed. That is, the Attorney-General did not think the *Momcilovic* Court had to go as far as “reading in” to “save” the provision from being an unjustified limitation on rights (at [42]).

⁷ Momcilovic may have discharged an evidential burden of proof with the evidence that she led.

⁸ *Human Rights Act 1998* (UK) (UKHRA).

⁹ See generally Nicol D, “Are Convention Rights a No-Go Zone for Parliament?” [2002] *Public Law* 438; Starmer K, “Two Years of the Human Rights Act” [2003] *European Human Rights Law Review* 14; Lord Irvine, “The Impact of the Human Rights Act: Parliament, the Courts and the Executive” [2003] *Public Law* 308. For a not so radical take on the British jurisprudence, see Kavanagh A, “Unlocking the Human Rights Act: The ‘Radical’ Approach to Section 3(1) Revisited” (2005) 3 *European Human Rights Law Review* 259.

¹⁰ *New Zealand Bill of Rights Act 1990* (NZ) (NZBORA).

meaning shall be preferred to any other meaning". Whether or not s 6 and s 3(1) achieve the same outcome is highly contested;¹¹ regardless, s 32(1) is clearly modelled on s 3(1) by way of comparison to s 6. The parallels between the Charter and the UKHRA continue, with the entire structure of the mechanisms for enforcing rights, both in relation to legislation and the actions of public authorities, being similar.¹²

A thorough analysis of the British jurisprudence is beyond the scope of this article and has been considered elsewhere.¹³ For the purposes of discussion, the British jurisprudence is of three categories. The earlier case of *R v A*¹⁴ is considered the "high water mark"¹⁵ for s 3(1),¹⁶ when a non-discretionary general prohibition on the admission of prior sexual history evidence in a rape trial was reinterpreted under s 3(1) to allow discretionary exceptions.¹⁷ One commentator considered that Lord Steyn's judgment signalled "that the interpretative obligation is so powerful that [the judiciary] need scarcely ever resort to s 4 declarations" of incompatibility,¹⁸ suggesting that "interpretation is more in the nature of a 'delete-all-and-replace' amendment".¹⁹

¹¹ See Geiringer C, "The Principle of Legality and the Bill of Rights Act: A Critical Examination of *R v Hansen*" (2008) 6 *New Zealand Journal of Public and International Law* 59 at 66.

¹² The coupling of interpretation with non-enforceable declaration is the same in both instruments (cf Charter, ss 32 and 36 with UKHRA, ss 3 and 4); the obligations imposed on public authorities are similar under both instruments (cf Charter, s 38 and UKHRA, s 6).

¹³ Debeljak J, "Parliamentary Sovereignty and Dialogue under the Victorian Charter on Human Rights and Responsibilities: Drawing the Line Between Judicial Interpretation and Judicial Law-Making" (2007) 33 *Monash University Law Review* 9 at 40-49 ("Parliamentary Sovereignty and Dialogue"); Debeljak J, "The Human Rights Act 1998 (UK): The Preservation of Parliamentary Supremacy in the Context of Rights Protection" (2003) 9 *Australian Journal for Human Rights* 183 at 201-205.

¹⁴ *R v A (No 2)* [2002] 1 AC 45 (*R v A*).

¹⁵ Wadham J, "The Human Rights Act: One Year On" [2001] *European Human Rights Law Review* 620 at 638.

¹⁶ In *R v A* [2002] 1 AC 45, Lord Steyn established some general principles in relation to s 3(1) interpretation. His Lordship confirmed that s 3 required a "contextual and purposive interpretation" and that "it will be sometimes necessary to adopt an interpretation which linguistically may appear strained" (at [44]). His Lordship held that s 3 empowers judges to *read down* express legislative provisions or *read in* words so as to achieve compatibility, provided the essence of the legislative intention was still viable (at [44]). Judges could go so far as the "subordination of the niceties of the language of the section" (at [45]). His Lordship justified this interpretative approach by reference to the parliamentary intention in enacting the UKHRA: Parliament clearly intended that a declaration be "a measure of last resort", with "a clear limitation on Convention rights [to be] stated *in term*" (at [44]) (emphasis in original). Nevertheless, Lord Nicholls quelled any doubts about the breadth of Lord Steyn's comments in *Re S* when Lord Nicholls expressly stated that "Lord Steyn's observations in *R v A* ... are not to be read as meaning that a clear limitation on Convention rights in terms is the only circumstance in which an interpretation incompatible with Convention rights may arise": *Re S (Minors) (Care Order: Implementation of Care Plan)* [2002] 2 AC 291 at [40] (*Re S*).

¹⁷ This case addressed the admissibility of evidence in a rape trial. Section 41 of the *Youth Justice and Criminal Evidence Act 1999* (UK) prohibited the leading of prior sexual history evidence, without the leave of the court. Accordingly, there was a general prohibition with some narrowly defined exceptions, notably the court could grant leave to lead evidence where the sexual behaviour was contemporaneous to the alleged rape (s 41(3)(b)) or the sexual behaviour is similar to past sexual behaviour (s 41(3)(c)). The House of Lords held that the provision unjustifiably limited the defendant's right to a fair trial under Art 6 of the *European Convention on Human Rights* (ECHR) (the common name for the *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953)) – although the legislative objective was beyond reproach, the legislative means were excessive. The provision was saved through s 32 "possible" interpretation, with the House of Lords interpreting the provision as being "subject to the implied provision that evidence or questioning which is required to ensure a fair trial ... should not be treated as inadmissible" (at [45]). In particular, s 41(3)(b) was interpreted so as to admit evidence of contemporaneous sexual behaviour, only if it was truly contemporaneous to the alleged rape; and s 41(3)(c) was interpreted so as to admit evidence of similar past sexual behaviour, only if it was so relevant to the issue of consent, that to exclude it would endanger the fairness of the trial.

¹⁸ Section 4(2) of the UKHRA is the equivalent to s 36(2) of the Charter.

¹⁹ Nicol, n 9 at 442 and 443 respectively. Starmer describes Lord Steyn's decision in *R v A* as the "boldest exposition": Starmer, n 9 at 16. See also Lord Irvine, n 9 at 320. For a not so radical take on *R v A*, see Kavanagh, n 9.

The middle ground is represented by *Ghaidan*.²⁰ In *Ghaidan*, the heterosexual definition of “spouse” under the *Rent Act 1977* (UK)²¹ was found to violate the Art 8 right to home when read with the Art 14 right to non-discrimination.²² The House of Lords “saved” the rights-incompatible provision via s 3(1) by reinterpreting the words “living with the statutory tenant as his or her wife or husband” to mean “living with the statutory tenant as if they were his wife or husband”.²³ Although *Ghaidan*²⁴ is considered a retreat from *R v A*,²⁵ its approach to s 3(1) is still considered “radical” because of Lord Nicholls obiter comments about the rights-compatible purposes of s 3(1) potentially being capable of overriding rights-incompatible purposes of an impugned law:

[T]he interpretative obligation decreed by section 3 is of an unusual and far-reaching character. Section 3 may require a court to depart from the unambiguous meaning the legislation would otherwise bear ... Section 3 may require the court to depart from ... the intention of the Parliament which enacted the legislation. The question of difficulty is how far, and in what circumstances, section 3 requires the court to depart from the intention of the enacting Parliament. The answer ... depends upon the intention reasonably to be attributed to the Parliament in enacting section 3.²⁶

It is questionable whether the obiter comments are in truth that “radical”. Lord Nicholls is *not* saying that the will of Parliament as expressed in the UKHRA will *always prevail* over the will of Parliament as expressed in challenged legislation. Indeed, it is not at all clear that Lord Nicholls instructs courts to go against the will of Parliament, especially given that his Lordship proceeds to articulate a set of guidelines about what s 3 does and does not allow. Section 3 *does* enable “language to be interpreted restrictively or expansively”; is “apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it Convention-compliant”; can allow a court to “modify the meaning, and hence the effect, of ... legislation” to “an extent bounded by what is “possible””.²⁷ However, s 3 *does not* allow the courts to “adopt a meaning inconsistent with a fundamental feature of legislation”; any s 3 reinterpretation “must be compatible with the underlying thrust of the legislation being construed” and must “go with the grain of the legislation”.²⁸

Focusing on departures from parliamentary intention, *Ghaidan*, and for that matter *Sheldrake*,²⁹ do not state that judges *must* depart from the legislative intention of Parliament. These cases indicate that judges *may* depart from legislative intention, *but not* where to do so would undermine the fundamental features of legislation, would be incompatible with the underlying thrust of legislation, or would go against the grain of legislation. The judiciary gets close to the line of improper judicial

²⁰ *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 (*Ghaidan*).

²¹ *Rent Act 1977* (UK), Sch 1, para 2(2).

²² ECHR, Arts 8 and 14.

²³ *Ghaidan* [2004] 2 AC 557 at [35]-[36] (Lord Nicholls), [51] (Lord Steyn), [129] (Lord Rodger), [144], [145] (Baroness Hale). Lord Millett dissented. His Lordship agreed that there was a violation of the rights (at [55]), and agreed with the general approach to s 3(1) interpretation (at [69]), but did not agree that the particular s 3(1) interpretation that was necessary to save the provision was “possible” on the facts: see esp at [57], [78], [81], [82], [96], [99], [101].

²⁴ And the cases leading up to *Ghaidan*, eg *R v Lambert* [2002] 2 AC 545 (*Lambert*); *Re S* [2002] 2 AC 291; *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837 (*Anderson*); *Bellinger v Bellinger* [2003] 2 AC 467.

²⁵ Debeljak, “Parliamentary Sovereignty and Dialogue”, n 13 at 45-46.

²⁶ *Ghaidan* [2004] 2 AC 557 at [30] (Lord Nicholls). Prior to this statement, in contemplating the reach of s 3, Lord Nicholls admits that “section 3 itself is not free from ambiguity” (at [27]) because of the word “possible”. However, his Lordship noted that ss 3 and 4 read together make one matter clear: “Parliament expressly envisaged that not all legislation would be capable of being made Convention-compliant” (at [27]). Given the ambiguity in s 3 itself, Lord Nicholls pondered by what standard or criterion “possibility” is to be adjudged, concluding that “[a] comprehensive answer to this question is proving elusive” (at [27]).

²⁷ *Ghaidan* [2004] 2 AC 557 at [32].

²⁸ *Ghaidan* [2004] 2 AC 557 at [33]. Lord Rodger agreed with these propositions (at [121], [124]), as did Lord Millett (at [67]). Lord Nicholls concluded on the facts (at [35]): “In some cases difficult problems may arise. No difficulty arises in the present case.” There is no doubt that s 3 can be applied to Sch 1, para 2(2) of the *Rent Act* so it is read and given effect “to as though the survivor of such a homosexual couple were the surviving spouse of the original tenant.”

²⁹ *Sheldrake v Director of Public Prosecutions* [2005] 1 AC 264 at [28] (*Sheldrake*).

interpretation (read judicial legislation) only where a s 3(1) reinterpretation is compatible with the fundamental features, the underlying thrust and the grain, but is incompatible with the legislative intent. But it is difficult to conceive of a case where the fundamental features, the underlying thrust, and the grain of the legislation would clash with parliamentary intention; that is, it is difficult to conceive of a case where the fundamental features, the underlying thrust, and the grain of the legislation were *compatible* with an interpretation, but the interpretation was *incompatible* with the parliamentary intention.³⁰ In effect, these obiter comments place boundaries around the judicial interpretation power, and indicate that s 3(1) does not sanction the exercise of non-judicial power – being acts of judicial legislation – by the judiciary.³¹

Moreover, as numerous Law Lords have indicated,³² more instructive than the obiter comments of judges is analysis of the *ratio* of the cases. The *ratio* of *Ghaidan* was grounded in a s 3(1) reinterpretation that was expressly demonstrated to be consistent with the purposes of the statutory provision in question.³³ Further, it is questionable whether the reinterpretation of the legislation in *Ghaidan* was that “radical”. In the pre-UKHRA equivalent case of *Fitzpatrick*,³⁴ Ward LJ “was able to interpret the words ‘living together as his or her husband’ to include same-sex couples”.³⁵ As Kavanagh notes, this demonstrates that the *Ghaidan* reinterpretation “was possible using traditional methods of statutory interpretation even before the UKHRA came into force”.³⁶ Unfortunately, these points of moderation are rarely acknowledged in the debate.

The “narrowest”³⁷ interpretation of s 3(1) was proposed by Lord Hoffman in *Wilkinson*.³⁸ Lord Hoffman describes s 3(1) as “deem[ing] the Convention to form a significant part of the

³⁰ See further Kavanagh, n 9.

³¹ See further Debeljak J, *Submission to the National Consultation on Human Rights* (15 June 2009) pp 51-57.

³² Indeed, as Lord Bingham states in *Sheldrake* [2005] 1 AC 264 at [28], after giving a similar exposition on s 3 to that of Lord Nicholls: “All of these expressions, as I respectfully think, yield valuable insights, but none of them should be allowed to supplant the simple test enacted in the Act: ‘so far as it is possible to do so.’” Similar sentiment was earlier expressed by Woolf CJ in *Poplar Housing & Regeneration Community Association Ltd v Donoghue* [2002] QB 48 at [76] (*Donoghue*), when he acknowledged that “[t]he most difficult task which courts face is distinguishing between legislation and interpretation”, with the “practical experience of seeking to apply section 3 ... provid[ing] the best guide”. The lesson from these statements is not to angst too much in the abstract about the meaning of s 3(1) of the Charter, and to simply understand it through its applications in particular cases.

³³ See *Ghaidan* [2004] 2 AC 557 at [35], where Lord Nicholls explicitly bases his s 3(1) reinterpretation on the social policy underlying the impugned statutory provision:

[T]he social policy underlying the 1988 extension of security of tenure under paragraph 2 to the survivor of couples living together as husband and wife is equally applicable to the survivor of homosexual couples living together in a close and stable relationship. In this circumstance I see no reason to doubt that application of s 3(1) to paragraph 2 has the effect that paragraph 2 should be read and given effect to as though the survivor of such a homosexual couple were the surviving spouse of the original tenant. Reading paragraph 2 in this way would have the result that cohabiting heterosexual couples and cohabiting [homosexual] couples would be treated alike for the purposes of succession as a statutory tenant. This would eliminate the discriminatory effect of paragraph 2 and would do so consistently with the social policy underlying paragraph 2.

³⁴ *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27 (*Fitzpatrick*).

³⁵ Kavanagh A, “Choosing Between Sections 3 and 4 of the Human Rights Act 1998: Judicial Reasoning after *Ghaidan v Mendoza*” in Fenwick H, Phillipson G and Masterman R (eds), *Judicial Reasoning Under the UK Human Rights Act* (Cambridge University Press, Cambridge, 2007) pp 114, 142, fn 131.

³⁶ Kavanagh, n 35. See further Debeljak, n 31, pp 51-57.

³⁷ The “narrowness” of *R (Wilkinson) v Inland Revenue Commissioners* [2005] UKHL 30 (*Wilkinson*) is disputed by Aileen Kavanagh in *Constitutional Review Under the UK Human Rights Act* (Cambridge University Press, Cambridge, 2009) pp 94-95:

Lord Hoffman’s articulation of a narrower and more text-bound rationale for disposing of *Ghaidan* does not necessarily entail that he endorses “a rather less bold conception of the role of s 3(1))” as a general matter. The most important premise in *Ghaidan* which led the majority to the “inescapable” conclusion that the language of the statute was not, in itself, determinative of the interpretative obligation under s 3(1), was that it allowed the court to depart from unambiguous statutory meaning. This premise is shared by Lord Hoffman in *Wilkinson*. As Lord Nicholls pointed out in *Ghaidan*, once this foundational point is accepted, it follows that some departure from, and modification of, statutory terms must be possible under s 3(1). Moreover, Lord Hoffman acknowledged that a s 3(1)

background against which all statutes ... had to be interpreted”,³⁹ drawing an analogy with the principle of legality. His Lordship introduces an element of reasonableness, describing interpretation under s 3(1) as “the ascertainment of what, taking into account the presumption created by s 3, Parliament would *reasonably* be understood to have meant by using the actual language of the statute”.⁴⁰ Although the reasoning of Lord Hoffman was accepted by the other Law Lords in that case,⁴¹ *Wilkinson* has failed to materialise as the leading case on s 3(1); rather, *Ghaidan* remains the case relied upon.⁴²

The methodology

Another issue to be confirmed in the case was the appropriate methodology to be used in assessing whether a law unjustifiably limited a right and the Charter’s response to such violation. The word “confirm” is used because under the two most relevant comparative statutory rights instruments⁴³ – the UKHRA⁴⁴ and the NZBORA⁴⁵ – the methodology adopted is similar and, by and large, settled. This method gives the interpretation power a remedial reach and focuses on two classic “rights questions” and two “Charter questions”,⁴⁶ and can be summarised in Charter language as follows (Preferred Method):

The “Rights Questions”

First: Does the legislative provision limit/engage any of the protected rights in ss 8 to 27?

Second: If the provision does limit/engage a right, is the limitation justifiable under the s 7(2) general limits power or under a specific limit within a right?

The “Charter Questions”

Third: If the provision imposes an unjustified limit on rights, interpreters must consider whether the provision can be “saved” through a s 32(1) interpretation; accordingly, the judge must alter the meaning of the provision in order to achieve rights-compatibility.

Fourth: The judge must then decide whether the altered rights-compatible interpretation of the provision is “possible” and “consistent[] with [statutory] purpose”.

The Conclusion ...

Section 32(1): If the s 32(1) rights-compatible interpretation is “possible” and “consistent[] with [statutory] purpose”, this is a complete remedy to the human rights issue.

interpretation can legitimately depart from the legislative purpose behind the statutory provision under scrutiny ... So it is far from clear that *Wilkinson* adopts a weaker or narrower conception of s 3(1) as a general matter.

³⁸ *Wilkinson* [2005] UKHL 30.

³⁹ *Wilkinson* [2005] UKHL 30 at [17].

⁴⁰ *Wilkinson* [2005] UKHL 30 at [17] (emphasis added).

⁴¹ *Wilkinson* [2005] UKHL 30 at [1] (Lord Nicholls), [32] (Lord Hope), [34] (Lord Scott), [43] (Lord Brown).

⁴² See, eg Beatson J, Grosz S, Hickman T, Singh R and Palmer S, *Human Rights: Judicial Protection in the United Kingdom* (Sweet & Maxwell, London, 2008) at [5-64]-[5-127]; Kavanagh, n 37, p 28: “In what is now the leading case on s 3(1), *Ghaidan*.”

⁴³ This article critiques the *Momcilovic* decision as against British and New Zealand (NZ) authority. It has not been considered necessary to address any arguments based on the *Basic Law of Hong Kong* because under this instrument the alternative to a remedial reinterpretation is the invalidity of a rights-incompatible law. In the context of considering the legal methodology under a legislative instrument that contains a remedial reinterpretation provision, coupled with the power to issue declarations of inconsistent interpretation, and which establishes a dialogue about human rights, the *Basic Law of Hong Kong* is of limited assistance.

⁴⁴ The methodology under the UKHRA was first outlined in *Donoghue* [2002] QB 48 at [75], and has been approved and followed as the preferred method in later cases, such as *R v A* [2002] 1 AC 45 at [58]; *International Transport Roth GmbH v Secretary of State for the Home Department* [2003] QB 728 at [149] (*Roth*); *Ghaidan* [2004] 2 AC 557 at [24].

⁴⁵ The current methodology under the NZBORA was outlined by the majority of judges in *R v Hansen* [2007] 3 NZLR 1 (*Hansen*). This method is in contradistinction to an earlier method proposed in *Moonen v Film & Literature Board of Review* [2000] 2 NZLR 9.

⁴⁶ Debeljak, “Parliamentary Sovereignty and Dialogue”, n 13 at 28, 32.

Section 36(2): If the s 32(1) rights-compatible interpretation is not “possible” and not “consistent[] with [statutory] purpose”, the only option is a non-enforceable declaration of inconsistent interpretation under s 36(2).

The *Momcilovic* Court had to decide between accepting the weight of this earlier authority, or rejecting it and creating a unique method. The *Momcilovic* Court did the latter, as will be discussed below,⁴⁷ seeking some support for its decision on a sole dissenting opinion in respect of the NZBORA.⁴⁸ By rejecting the Preferred Method, the *Momcilovic* Court undermined the remedial reach of s 32(1).

The Momcilovic Court decision

The issues of whether s 32(1) of the Charter replicated s 3(1) of the UKHRA and the appropriate methodology had already been considered by three Supreme Court justices. In *RJE*, Nettle JA followed the Preferred Method⁴⁹ and used s 32(1) to achieve a rights-compatible interpretation of s 11 of the *Serious Sex Offenders Monitoring Act 2005* (Vic), but did not consider it necessary to determine whether s 32(1) replicated *Ghaidan* to dispose of the case.⁵⁰ Similarly, in *Das*, Warren CJ in essence followed the Preferred Method⁵¹ and used s 32(1) to achieve a rights-compatible interpretation of s 39 of the *Major Crime (Investigative Powers) Act 2004* (Vic), but did not need to determine the applicability of *Ghaidan* to dispose of the case.⁵² In *Kracke*, Bell J adopted the Preferred Method⁵³ and held that s 32(1) codified s 3(1) as interpreted in *Ghaidan*.⁵⁴

The *Momcilovic* Court eschewed this earlier Victorian authority, and the *R v A* and *Ghaidan* approaches, and chose to align its judgment most closely with the *Wilkinson* approach.⁵⁵ The *Momcilovic* Court unanimously held that s 32(1) “does not create a ‘special’ rule of interpretation [in the *Ghaidan* sense], but rather forms part of the body of interpretative rules to be applied at the outset, in ascertaining the meaning of the provision in question”.⁵⁶ It then outlined a three-step methodology for assessing whether a provision infringes a Charter right, as follows (*Momcilovic* Method):

Step 1: Ascertain the meaning of the relevant provision by applying s 32(1) of the Charter in conjunction with common law principles of statutory interpretation and the *Interpretation of Legislation Act 1984* (Vic).

Step 2: Consider whether, so interpreted, the relevant provision breaches a human right protected by the Charter.

Step 3: If so, apply s 7(2) of the Charter to determine whether the limit imposed on the right is justified.⁵⁷

⁴⁷ See n 57.

⁴⁸ See the judgment of Elias CJ in *Hansen* [2007] 3 NZLR 1.

⁴⁹ See Nettle JA in *RJE* (2008) 21 VR 526 at [114]-[116].

⁵⁰ *RJE* (2008) 21 VR 526 at [118]-[119].

⁵¹ *Re Application under the Major Crime (Investigative Powers) Act 2004* (2009) 24 VR 415 at [50]-[53] (*Das*). Warren CJ refers to Nettle JA’s endorsement of the approach of Mason NPJ in *HKSAR v Lam Kwong Wai* [2006] HKCFA 84 and applies it: see *Das* (2009) 24 VR 415 at [53]. Nettle JA indicates that the Hong Kong approach is the same as the UKHRA approach under *Donoghue*, and expressly follows the *Donoghue* approach: see *RJE* (2008) 21 VR 526 at [116]. This is why Warren CJ’s approach is described as essentially following the UKHRA approach.

⁵² *Das* (2009) 24 VR 415 at [172]-[175].

⁵³ *Kracke v Mental Health Review Board* (2009) 29 VAR 1 at [52]-[65] (*Kracke*).

⁵⁴ *Kracke* (2009) 29 VAR 1 at [65], [214].

⁵⁵ *Momcilovic* [2010] VSCA 50 at [56]. For a critique of the *Momcilovic* Court’s reliance on *Wilkinson*, see below.

⁵⁶ *Momcilovic* [2010] VSCA 50 at [35]. This is in contrast to Lord Walker’s opinion that “[t]he words ‘consistently with their purpose’ do not occur in s 3 of the HRA but they have been read in as a matter of interpretation”: Walker R, “A United Kingdom Perspective on Human Rights Judging” (Paper presented at “Courting Change: Our Evolving Court”, Supreme Court of Victoria 2007 Judges’ Conference, Melbourne, 9-10 August 2007) p 4.

⁵⁷ *Momcilovic* [2010] VSCA 50 at [35].

In applying this methodology,⁵⁸ the *Momcilovic* Court held that, first, the proper meaning of s 5 is the imposition of a reverse legal onus, and that it was not possible consistently with its purpose to construe s 5 as imposing an evidential onus.⁵⁹ Secondly, it held “that the combined effect of s 5 and s 71AC is to limit the presumption of innocence”.⁶⁰ Thirdly, it held that the limitation was not reasonable or demonstrably justified under s 7(2).⁶¹ Although a rights-compatible interpretation of s 5 was not available, s 5 remained valid and enforceable under s 32(3) of the Charter.⁶² The only remedy available under the *Momcilovic* Method was the making of a declaration under s 36(2), which the *Momcilovic* Court did issue.⁶³

In its effort to avoid the *assumed* “judicial activism” associated with s 32(1) replicating s 3(1) as interpreted by *Ghaidan*, the *Momcilovic* Court rejected a strong remedial methodology as well.⁶⁴ The

⁵⁸ It should be noted that the *Momcilovic* Court’s language changes between its statement of the general rule under step 2 (“breach”) and its application of the rule under step 2 (“limit”). The latter is the correct language, whereas the former demonstrates a fundamental misunderstanding about the operation of rights.

⁵⁹ *Momcilovic* [2010] VSCA 50 at [35]. The *Momcilovic* Court held that “the purpose of s 5 is unambiguously clear from the statutory language”, the purpose being the imposition of a reverse legal onus, and that “[s] 32(1) prohibits any interpretation of the provision which would be inconsistent with the purpose” (at [113]). “It follows that it is not possible to interpret s 5 of the DPCS Act [*Drugs, Poisons and Controlled Substances Act 1981* (Vic)] other than as imposing a legal onus of proof” (at [119]). This adherence to a traditional interpretation is hardly the renewal of the statute book envisaged under the Charter.

⁶⁰ *Momcilovic* [2010] VSCA 50 at [123]. The *Momcilovic* Court stated that the provisions are (at [135]):

a substantial infringement of the presumption of innocence, in our view. It means that – subject always to the reverse onus – proof merely of occupation of relevant premises operates (by means of s 5 and s 73(2)) to establish a prima facie case of trafficking against an accused ... [A] person in the position of the applicant comes before the jury not as a person presumed to be innocent but as a person presumed to have a case to answer.

⁶¹ The *Momcilovic* Court held that the arguments advanced to justify the reverse onus in connection to the trafficking offence did not “come close to justifying the infringement” and that the reverse onus in connection to the possession offence was “not so much an infringement of the presumption of innocence as a wholesale subversion of it”: *Momcilovic* [2010] VSCA 50 at [153] and [152] respectively. “In our view, there is no reasonable justification, let alone any ‘demonstrable’ justification, for reversing the onus of proof in connection with the possession offence” (at [152]).

⁶² *Momcilovic* [2010] VSCA 50 at [154].

⁶³ *Momcilovic* [2010] VSCA 50 at [155]-[157]. *Lambert* [2002] 2 AC 545 is the equivalent British case. The *Misuse of Drugs Act 1971* (UK) contained a reverse legal burden of proof. Under s 28, in order to establish a defence, the accused had “to prove” that he did not know of some fact – the fact here being that alleged by the prosecution and being a necessary element of the offence. The defence, in truth is an element of the offence, and the accused argued that the burden for elements of an offence should be on the Crown to prove it beyond reasonable doubt, rather than on the defendant to disprove it on the balance of probabilities as per s 28. A majority of the House of Lords held that the reverse legal burden of proof under s 28 violated the presumption of innocence under Art 6(2) of the ECHR. Although the reverse legal burden was objectively justified (that is, the alleviation of difficulties faced by police and prosecuting authorities in prosecuting drug smugglers, couriers and dealers), it was a disproportionate response: “A transfer of a legal burden amounts to a far more drastic interference with the presumption of innocence than the creation of an evidential burden on the accused”: at [37] (Lord Steyn); see also at [16]-[17] (Lord Slynn), [35]-[41] (Lord Steyn), [87]-[91] (Lord Hope), [148]-[156] (Lord Clyde). The majority was, however, able to “save” the provision through a s 3(1) “re-interpretation”. The majority retained the original words used by the legislator, but *altered the meaning* of the words: at [17] (Lord Slynn), [42] (Lord Steyn), [94] (Lord Hope), [157] (Lord Clyde) (Lord Hutton dissented at [198]). Rather than reading the legislative words as imposing a legal burden of proof on the defendant in violation of Art 6(2), the majority read the legislative words as imposing only an evidential burden of proof on the defendant which the prosecution had the legal burden of rebutting: at [17] (Lord Slynn), [42] (Lord Steyn), [84], [91], [93]-[94] (Lord Hope), [157] (Lord Clyde). Note that *Lambert* did not get the benefit of this interpretation, however, because the majority held that the relevant provisions of the UKHRA had not come into operation at the time of this trial: at [6]-[14] (Lord Slynn), [95]-[117] (Lord Hope), [135]-[148] (Lord Clyde), [176] (Lord Hutton). The solution in *Lambert* was first suggested, in obiter, in *R v Director of Public Prosecutions; Ex parte Kebilene* [2000] 2 AC 326 (*Kebilene*). *Lambert* has been followed in *R v Forsyth* [2001] EWCA Crim 2926 (*Forsyth*) and *R v Lang* [2002] EWCA Crim 298 (*Lang*). *Lambert* has been discussed and distinguished in obiter in *R v Daniel* [2002] EWCA Crim 959 at [23]-[26] (*Daniel*), to the effect that reverse legal burdens are not automatically incompatible; rather the imposition of a reverse legal burden must be justified and its imposition shown to be necessary.

⁶⁴ Although the issues of s 32(1)/s 3(1) replication and methodology are related, the methodology is not dictated by the strength of s 32(1). Indeed, throughout the British jurisprudence, and in the decisions of Warren CJ, Nettle J and Bell J, the methodology did not dictate the strength of the remedial force of ss 3(1) and 32(1) respectively.

result is a very narrow construction of s 32(1) and a rights-reductionist methodology⁶⁵ which, in turn, deliver a much weaker rights instrument than that intended by Parliament. This article will demonstrate that in avoiding *Ghaidan* and rejecting a strong remedial methodology, it is the *Momcilovic* Court that is arguably “judicially sovereign” in handing back power that Parliament intended it to have.

THE CRITIQUE: WAS S 32(1) INTENDED TO REPLICATE S 3(1) OF THE UKHRA?

Being a test case, the *Momcilovic* Court sought to establish a method for the statute-related Charter mechanisms.⁶⁶ As part of this, it had to consider whether s 32(1) established a “special”⁶⁷ rule of statutory interpretation similar to s 3(1) of the UKHRA. The *Momcilovic* Court held that “the Victorian Parliament did not intend s 32(1) to be a ‘special’ rule of interpretation in the *Ghaidan* sense”,⁶⁸ such that s 32(1) was not intended to replicate s 3(1). This section of the article will analyse the reasoning of the *Momcilovic* Court. Some preliminary remarks on the *Momcilovic* Court’s discussion of the British jurisprudence, particularly the *Wilkinson* case,⁶⁹ will be followed by a detailed critique of its reasoning on the s 32(1)/s 3(1) replication issue. The structure of this section follows the structure of the *Momcilovic* Court’s judgment.

Reliance on Wilkinson

The *Momcilovic* Court began its substantive analysis of the issues with a review of the comparative authority. In terms of the British jurisprudence, the *Momcilovic* Court chose to align itself most closely with the *Wilkinson* case.⁷⁰ In particular, it relies on the explicit parallel drawn between the principle of legality and s 3(1) in *Wilkinson* to support its conclusions about s 32(1).⁷¹

This reliance on *Wilkinson* must be examined. First, that *Wilkinson* narrows *Ghaidan* in terms of the judicial power to modify statutory terms and to depart from the purpose of a statutory provision is convincingly disputed by Kavanagh:

Lord Hoffman’s articulation of a narrower and more text-bound rationale for disposing of *Ghaidan* does not necessarily entail that he endorses “a rather less bold conception of the role of s 3(1)” as a general matter. The most important premise in *Ghaidan* which led the majority to the “inescapable” conclusion that the language of the statute was not, in itself, determinative of the interpretative obligation under s 3(1), was that it allowed the court to depart from unambiguous statutory meaning. This premise is shared by Lord Hoffman in *Wilkinson*. As Lord Nicholls pointed out in *Ghaidan*, once this foundational point is accepted, it follows that some departure from, and modification of, statutory terms must be possible under s 3(1). Moreover, Lord Hoffman acknowledged that a s 3(1) interpretation can legitimately depart from the legislative purpose behind the statutory provision under scrutiny ...

⁶⁵ The term “rights-reductionist” is used because the *Momcilovic* method decreases the remedial reach of the Charter, particularly the remedial reach of the judiciary. Reducing the remedies available to judges will reduce the protection of rights within Victoria because, by design, the judiciary is considered more likely to protect the rights of the vulnerable, the minority and the unpopular, than the democratically-motivated and majoritarian executive and Parliament. To illustrate the point, one need look no further than the *RJE* decision, which was rights-protective of serious sex offenders (*RJE* (2008) 21 VR 526), and Parliament’s swift response to it, which reinstated the rights-incompatible meaning of the legislative provision in issue (*Serious Sex Offenders Monitoring Amendment Act 2009* (Vic)).

⁶⁶ The Charter establishes two mechanisms of “enforcement”. The first is the statute related mechanisms under Div 3, Pt 3 of the Charter. The second is the obligations imposed on public authorities under Div 4, Pt 3 of the Charter.

⁶⁷ The *Momcilovic* Court referred to interpretation under s 3(1) of the UKHRA as “a ‘special’ or extraordinary rule of interpretation” (*Momcilovic* [2010] VSCA 50 at [37]), following the lead of Bell J in *Kracke* (2009) 29 VAR 1 at [215]. The British jurisprudence does not use this terminology in relation to s 3 of the UKHRA.

⁶⁸ *Momcilovic* [2010] VSCA 50 at [69].

⁶⁹ *Wilkinson* [2005] UKHL 30.

⁷⁰ *Wilkinson* [2005] UKHL 30 at [56]-[57].

⁷¹ *Wilkinson* [2005] UKHL 30 at [56].

So it is far from clear that *Wilkinson* adopts a weaker or narrower conception of s 3(1) as a general matter.⁷²

Secondly, the reasons the *Momcilovic* Court provides for preferring *Wilkinson* must be examined. The *Momcilovic* Court relies on two sources to bolster its assertion that *Wilkinson's* link to the principle of legality ought to be preferred to *Ghaidan* and *Sheldrake*. The first source is obiter comments of Tipping J in the New Zealand (NZ) case of *Hansen*.⁷³ The NZ judge's obiter is purely speculation about the state of British jurisprudence. More problematically, Tipping J's obiter comment focuses on where *Wilkinson* draws the line between permissible interpretation and impermissible legislation under s 3(1), not on whether *Wilkinson* sanctions a radical rethink of the legal method under s 3(1) – the latter being the purpose for which the *Momcilovic* Court seeks to rely on both *Wilkinson* and Tipping J.⁷⁴

The second source relied upon is academic commentary. The *Momcilovic* Court refers to a NZ commentator, Claudia Geiringer, who speculates that *Wilkinson* may reflect “an implicit repudiation” of *Ghaidan*.⁷⁵ The “implicit repudiation of the *Ghaidan* approach” is based on Lord Nicholls' concurrence with Lord Hoffman in *Wilkinson* which, added to Lord Steyn's retirement, leads Geiringer to suggest this “might well tempt one to conclude that the strong interpretative approach in *Ghaidan* has had its day. On the other hand, the intuition that s 3(1) is an obligation of unprecedented character and far-reaching implication does appear to be shared by a number of Law Lords.”⁷⁶ Geiringer herself professes that these are very tentative conclusions.

The *Momcilovic* Court's reliance on the conclusions of Geiringer, which were not raised in written or oral argument, is problematic. *Wilkinson* has *not* changed the British approach to s 3(1) or to the legal methodology associated with s 3(1) – indeed Geiringer acknowledges that the potency of s 3(1) interpretation propounded in *Ghaidan* continues post-*Ghaidan*.⁷⁷ Remarkably, the *Momcilovic* Court concludes that “[o]ur researches have revealed no subsequent consideration by the English courts of the apparent change of approach in *Wilkinson*”.⁷⁸ The logical conclusion to draw from this is that *Wilkinson* did *not* change the law in Britain.

The language of s 32(1)

Turning to the s 32(1)/s 3(1) replication issue, the *Momcilovic* Court began by reviewing *Kracke*.⁷⁹ In *Kracke*, Bell J held that s 32(1) and s 3(1) “express the same special interpretative obligation and are of equal force and effect”.⁸⁰ His Honour held that the additional phrase of “consistently with their purpose” contained in s 32(1) “was intended to put into s 32(1) the approach to s 3(1) adopted by the House of Lords in *Ghaidan v Godin-Mendoza* (which had been decided before the Charter was

⁷² Kavanagh, n 37, pp 94-95.

⁷³ *Hansen* [2007] 3 NZLR 1.

⁷⁴ *Momcilovic* [2010] VSCA 50 at [57].

⁷⁵ Geiringer, n 11 at 82, as cited in *Momcilovic* [2010] VSCA 50 at [57].

⁷⁶ Geiringer, n 11 at 82.

⁷⁷ Geiringer, n 11 at 80.

⁷⁸ *Momcilovic* [2010] VSCA 50 at [57].

⁷⁹ *Kracke* (2009) 29 VAR 1.

⁸⁰ *Kracke* (2009) 29 VAR 1 at [215].

enacted”).⁸¹ His Honour approved statements from *Ghaidan* and *Sheldrake*, suggesting that s 32(1) was a “very strong and far reaching” obligation and may even require “the court to depart from the legislative intention of Parliament”.⁸²

The *Momcilovic* Court also referred to the report of the Victorian Human Rights Consultation Committee (Victorian Committee).⁸³ The Victorian Committee recommended the insertion of “consistently with their purpose” to the s 3(1) formula,⁸⁴ explaining that the additional words would provide the courts:

with clear guidance to interpret legislation to give effect to a right so long as that interpretation is not so strained as to disturb the purpose of the legislation in question. This is consistent with some of the more recent cases in the United Kingdom, where a more purposive approach to interpretation was favoured. In the United Kingdom House of Lords decision in *Ghaidan v Godin-Mendoza*, Lord Nicholls of Birkenhead said: “the meaning imported by application of s 3 must be compatible with the underlying thrust of the legislation being construed. Words implied must ... ‘go with the grain of the legislation.’”

Or as Lord Rodger of Earlsferry stated: “It does not allow the Courts to change the substance of the provision completely, to change a provision from one where Parliament says that x is to happen into one saying that x is not to happen.”⁸⁵

The *Momcilovic* Court disagreed with Bell J’s conclusions. It was of the opinion that “consistently with their purpose” were “words of limitation” and:

stamped s 32(1) with quite a different character from that of s 3(1) of the UKHRA, which was said in *Ghaidan* to require the court where necessary to “depart from the intention of the Parliament which enacted the legislation.” In our opinion the inclusion of the purpose requirement made it unambiguously clear that nothing in s 32(1) justified, let alone required, an interpretation of a statutory provision which overrode the intention of the enacting Parliament.⁸⁶

One must query the *Momcilovic* Court’s understanding that *Ghaidan* “required” the court to depart from parliamentary intention. Lord Nicholls at most indicated that that s 3(1) “may require”⁸⁷ departure from parliamentary intent, and his Lordship’s comments must be understood in the broader context as discussed above. Unfortunately, the *Momcilovic* Court falls into the trap that Kavanagh warns against, and fails to appreciate the “centrality” of “express terms and legislative intent”⁸⁸ evident in *Ghaidan*, as follows:

Unfortunately, some of the dicta in *Ghaidan* have given credence to the view that *Ghaidan* presents a “dismissive view as to the centrality of the statutory test in evaluating whether a Convention-compatible interpretation is possible” and that their Lordships rejected “both a focus on text and a focus on [legislative] purpose” as possible constraints on the application of s 3(1). These natural misunderstandings are due to the unfortunately overstated judicial dicta in *Ghaidan*. The valid point which the Lordships sought to make in *Ghaidan* was that statutory language *alone* was not determinative or

⁸¹ *Kracke* (2009) 29 VAR 1 at [214] (citations omitted). Bell J opined that (at [216]):

[t]he boundaries identified in *Ghaidan v Godin-Mendoza*, on which the requirement [in s 32(1)] is based, provide an adequate balance between giving the special interpretative obligation full force and proper scope on the one hand and safeguarding against its impermissible use on the other. Adopting narrower boundaries would weaken the operation of s 32(1) in a way that was not intended.

⁸² *Kracke* (2009) 29 VAR 1 at [218].

⁸³ Human Rights Consultation Committee (Victorian Committee), *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005) (Victorian Report).

⁸⁴ Note, slightly different language is used to express this concept in the body of the report and the draft Charter attached to the report (Victorian Committee, n 83, p 82) and the Draft Charter of Human Rights and Responsibilities, s 32 (Victorian Committee, n 83, p 191). These differences in language are of no consequence to this analysis, being grammatical changes due to the way in which the applicable law was described; that is, the phrase “all statutory provisions” was ultimately enacted rather than the suggested “Victorian law”.

⁸⁵ Victorian Committee, n 83, pp 82-83.

⁸⁶ *Momcilovic* [2010] VSCA 50 at [74] (emphasis in original).

⁸⁷ *Ghaidan* [2004] 2 AC 557 at [30] (Lord Nicholls).

⁸⁸ Kavanagh, n 37, p 59.

conclusive on the question of whether they should adopt a s 3(1) interpretation, not that it was of no significance whatsoever. If anything, *Ghaidan* endorses the importance and centrality of going with the grain of the impugned statute, including its express terms and legislative intent.⁸⁹

In any event, in coming to its conclusion, the *Momcilovic* Court relied on a number of arguments, which require close critique. First, it focused on the distinction between the purpose of a particular statutory provision and the purpose of legislation as a whole, highlighting that s 32(1) embodied the former, while s 35 of the *Interpretation of Legislation Act 1984* (Vic) (ILA) embodied the latter. The *Momcilovic* Court held that “this must be taken to have been a deliberate choice of language”.⁹⁰ It is not clear how this “deliberate choice of language” allowed the *Momcilovic* Court to differentiate between s 32(1) and s 3(1). How does a difference between s 32(1) and the ILA influence a decision on whether s 32(1) differs from s 3(1)?⁹¹ Moreover, how can the purpose of a particular provision be determined without reference to the purpose of the statute as a whole?⁹² Traditional rules of statutory interpretation require provisions to be interpreted according to their terms *and* by reference to statutory purpose and context.⁹³ The *Momcilovic* Court’s focus on the purposes of the provision does not conform to this; indeed, a requirement to focus *only* on the purpose of the provision being interpreted itself departs from traditional interpretation.⁹⁴ Furthermore, “statutory provision” under the Charter means “an Act ... or a provision of an Act”.⁹⁵ It is not clear that the s 32(1) reference to “consistently with their purpose” is exclusively to the purpose of the very statutory provision being interpreted and not the Act as a whole. The Explanatory Memorandum refers both to the purpose of the statute and the purpose of the provision. Thus, both the text and the Explanatory Memorandum suggest that the *Momcilovic* Court’s singular focus on the purpose of the provision is not warranted.⁹⁶

⁸⁹ Kavanagh, n 37, p 59 (citations omitted) (emphasis in original).

⁹⁰ *Momcilovic* [2010] VSCA 50 at [76]. It must be noted that the *Momcilovic* Court went on to hold that this distinction had no bearing on the case at hand (at [76], [114]). Given that the *Interpretation of Legislation Act 1984* (Vic) (ILA) applies unless the contrary intention appears in the legislation being interpreted, the “deliberate choice of language” may have been Parliament’s attempt to manifest its intention to exclude the operation of the ILA: see Pearce DC and Geddes R, *Statutory Interpretation in Australia* (LexisNexis, Australia, 2006) at [6.1].

⁹¹ The fact that *Ghaidan* is referring to statutory purpose in its broad sense, and the *Momcilovic* Court considers s 32(1) to be referring to the statutory purpose of a particular provision, does not resolve the issue. For the sake of argument, assuming that the *Momcilovic* Court is correct, a reasonable argument is that s 32(1) was intended to embody the obiter notion in *Ghaidan* that the overall statutory purpose may be overridden in favour of the UKHRA purposes, but that the specific statutory purpose of the provision must be adhered to (that is, in the unusual situation where the statutory purpose of a particular provision would be interpreted to be in opposition to the broader statutory purposes, rather than tempered by the broader statutory purposes).

⁹² Pearce and Geddes, n 90 at [2.5], [4.2]. “When the purposive approach was applied, the purpose was usually deduced by looking at the statute as a whole” (at [2.5]). “[T]o read the section in isolation from the enactment which it forms a part is to offend against the cardinal rule of statutory interpretation that requires the words of a statute to be read in their context”: Mason J in *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 60 ALR 509 at 514, cited by Pearce and Geddes, at [4.2].

⁹³ Pearce and Geddes, n 90 at [2.3]-[2.5], [2.8]-[2.9]. In *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, McHugh, Gummow, Kirby and Hayne JJ describe the *common law rule* as follows: “The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning” (at 384). In *Mills v Meeking* (1990) 169 CLR 214 at 235, in the context of s 35(a) of the ILA, Dawson J describes the *statutory rule* of interpretation as follows:

The literal rule of construction, whatever the qualification with which it is expressed, must give way to a statutory injunction to prefer a construction which would promote the purpose of an Act to one which would not, especially where that purpose is set out in the Act ... The approach required by s 35 needs no ambiguity or inconsistency; it allows a court to consider the purposes of an Act in determining whether there is more than one possible construction. Reference to the purposes may reveal that the draftsman has inadvertently overlooked something which he would have dealt with had his attention been drawn to it and if it is possible to as a matter of construction to repair the defect, then this must be done.

⁹⁴ Pearce and Geddes, citing *Edwards v Attorney-General* (2004) 60 NSWLR 667, note that “[i]n the interpretation of an Act a balance sometimes has to be struck between the purposes that are general and those that are specific to particular provision”: see n 90 at [2.11].

⁹⁵ Charter, s 3.

⁹⁶ Explanatory Memorandum, *Charter of Human Rights and Responsibilities Bill 2006* (Vic), pp 1 and 20 respectively.

Further, a focus on the purposes of the particular statutory provision in question does not necessarily differentiate s 32(1) from s 3(1) as interpreted in *Ghaidan*. The House of Lords in *Ghaidan* explicitly considered whether its “reinterpretation” of the heterosexual definition of statutory tenant to include cohabiting homosexual couples in para 2 of Sch 1 was “consistent[] with the social policy underlying paragraph 2”.⁹⁷

Secondly, the *Momcilovic* Court’s conclusion can be tested by considering an alternative approach to identifying statutory purpose under s 32(1), such as that suggested by Evans and Evans.⁹⁸ Rather than identifying statutory purpose from the plain, natural and literal meaning of the legislation, Evans and Evans argue that the judiciary should look to the purpose, or the mischief, that the legislation sought to achieve when attributing statutory purpose.⁹⁹ This approach has much to commend it, not least because it embodies the non-controversial purposive approach to interpretation.¹⁰⁰ This approach is supported by *Ghaidan*¹⁰¹ which, in turn, was clearly before the Victorian Parliament when it enacted s 32(1).¹⁰² If one accepts that s 32(1) is intended to capture the ideas that flow from *Ghaidan*,¹⁰³ “purpose” is to be identified at a high level of generality, with the words “consistently with their purpose” directed to the “mischief” of the statutory provision and the statute as a whole.

Indeed, in testing its conclusions, the *Momcilovic* Court did consider whether its conclusions would be different if s 32(1) were accepted as a codification of *Ghaidan*. The *Momcilovic* Court admits that s 5 could be interpreted as imposing an evidential onus if the reference to purpose was identified at the “underlying purpose” level of abstraction. However, it holds that the “statutory language would preclude such an interpretation”¹⁰⁴ by reference to the ILA and the following passage of Dawson J in *Mills v Meeking*:

[I]f the literal meaning of a provision is to be modified by reference to the purposes of the Act, the modification must be precisely identifiable as that which is necessary to effectuate those purposes *and it must be consistent with the wording otherwise adopted by the draftsman*. Section 35 requires a court to construe an Act, not rewrite it, in the light of its purposes.¹⁰⁵

The ILA and *Mills v Meeking* may not be the appropriate guide to interpretation under the Charter. The Charter has changed the ground rules of statutory interpretation, so pre-Charter understandings of the ILA and the application of *Mills v Meeking* require reconsideration.

In any event, it is not clear why attaching a *legal* meaning to “the wording otherwise adopted by the draftsman”¹⁰⁶ (that is, an evidential onus meaning rather than a legal onus meaning) is considered judicial rewriting, rather than an act of construction. In the British jurisprudence, to attach a different

⁹⁷ *Ghaidan* [2004] 2 AC 557 at [35]. Lord Millett generally agreed with the majority of the court on the interpretation of s 3(1) but his Lordship dissented on its application to the impugned legislation. In doing so, his Lordship considered the object of the specific statutory provision (at [78]): “both the language of paragraph 2(2) and its legislative history show that the essential feature of the relationship which Parliament had in contemplation was an open relationship between persons of the opposite sex.”

⁹⁸ Evans C and Evans S, *Australian Bills of Rights: The Law of the Victorian Charter and the ACT Human Rights Act* (LexisNexis Butterworths, Australia, 2008).

⁹⁹ Evans and Evans, n 98 at [3.33].

¹⁰⁰ See n 93.

¹⁰¹ Lord Nicholls opines that too much emphasis has been placed on the “language of a statute, as distinct from the concept expressed in the language” under s 3 analysis: *Ghaidan* [2004] 2 AC 557 at [31]; see also at [41] and [49] (Lord Steyn). This obsession with the form of words chosen by a draftsman is nonsensical “once it is accepted that s 3 may require legislation to bear a meaning which departs from the unambiguous meaning the legislation would otherwise bear” (at [31]). Indeed, Lord Nicholls describes the natural outcome of a linguistic obsession as making “the application of s 3 something of a semantic lottery” (at [31]). Similarly, Lord Steyn laments the “excessive concentration on linguistic features” of legislation (at [41]).

¹⁰² Victorian Committee, n 83, pp 82-83; Explanatory Memorandum, n 96, p 23.

¹⁰³ For example, going with the grain, not undermining the fundamental features: see discussion above.

¹⁰⁴ *Momcilovic* [2010] VSCA 50 at [114].

¹⁰⁵ *Mills v Meeking* (1990) 169 CLR 214 at 235, as cited in *Momcilovic* [2010] VSCA 50 at [114] (emphasis added in *Momcilovic*).

¹⁰⁶ *Mills v Meeking* (1990) 169 CLR 214 at 235.

legal meaning to the words used by Parliament is considered interpretation under s 3(1). In *Lambert*, the equivalent reverse onus provision case, the majority of the House of Lords retained the original words used by the legislator, but *altered the meaning* of the words.¹⁰⁷ Rather than reading the legislative words “to prove” and “if he proves” as imposing a legal burden of proof on the defendant in violation of Art 6(2), the majority read the legislative words as imposing only an evidential burden of proof on the defendant which the prosecution had the legal burden of rebutting.¹⁰⁸ The solution in *Lambert* was first suggested in obiter in *Kebilene*,¹⁰⁹ and has been followed in *Forsyth* and in *Lang*.¹¹⁰ Another example of altering the legislative meaning of words is the case of *R v Offen*.¹¹¹ To rely on the ILA and to fail to address *Lambert*, which is the equivalent reverse onus case from Britain, weakens the *Momcilovic* Court’s reasoning.

Moreover, it is within the range of “possible” that the words “unless the person satisfies the court to the contrary” under s 5 mean the imposition of an evidential onus. The concept of “possibility” is *not* a rigorous standard, and is less rigorous than a “reasonableness” standard. The difference between “possibility” and “reasonableness” was discussed in the British Parliament during debate on the *Human Rights Bill*. A proposed amendment to adopt the NZ “reasonable” interpretation approach was rejected by the British Parliament, with the difference between “reasonable” interpretations and “possible” interpretations being fully recognised and the latter preferred.¹¹² This debate preceded the enactment of the Charter and the Victorian Parliament chose to model s 32(1) on s 3(1) of the UKHRA rather than s 6 of the NZBORA. Accordingly, the reasonableness of a s 32(1) interpretation has no place under the Charter, nor *Wilkinson* for that matter.

Thirdly, the *Momcilovic* Court focused on the concept of “interpretation” embodied in s 32(1) to distinguish it from s 3(1). It notes that interpretation is “what courts have traditionally done”, such that “[i]t seems improbable that Parliament would have used the word ‘interpret’ in s 32(1) if it had intended to require courts to do something quite different”.¹¹³ This does not withstand scrutiny. It is equally as “improbable” that Parliament would have chosen to so closely replicate s 3(1), including accepting the insertion of “consistently with their purpose” on the recommendation of the Victorian Committee that the phrase codified *Ghaidan*, if it had intended the courts to do something remarkably different.¹¹⁴ Had Parliament intended to enact a unique statutory rights instrument, surely parliamentary draftspeople and Parliament could have chosen language which clearly differentiated the Victorian obligation from the pre-existing British obligation and its jurisprudence. The lack of differentiation is strong evidence that Parliament intended to replicate s 3(1).

Moreover, the *Momcilovic* Court’s focus on “interpretation” per se is misleading. Section 32(1) establishes a task of interpretation, but this is no ordinary task of interpretation. Section 32(1) requires

¹⁰⁷ *Lambert* [2002] 2 AC 545 at [17] (Lord Slynn), [42] (Lord Steyn), [94] (Lord Hope), [157] (Lord Clyde). Lord Hutton dissented at [198].

¹⁰⁸ *Lambert* [2002] 2 AC 545 at [17] (Lord Slynn), [42] (Lord Steyn), [84], [91], [93]-[94] (Lord Hope), [157] (Lord Clyde).

¹⁰⁹ *Kebilene* [2000] 2 AC 326.

¹¹⁰ *Forsyth* [2001] EWCA Crim 2926; *Lang* [2002] EWCA Crim 298. For a discussion of other relevant cases, see Starmer, n 9 at 18.

¹¹¹ *R v Offen* [2001] 1 WLR 253 (*Offen*). The House of Lords refused leave to appeal: [2001] 1 WLR 514.

¹¹² See United Kingdom, House of Commons, *Parliamentary Debates* (3 June 1998) cols 421-423 (Mr Jack Straw). Mr Straw, the Home Secretary, stated “[i]f we used just the word ‘reasonable’, we would have created a subjective test. ‘Possible’ is different. It means, ‘What is the possible interpretation? Let us look at this set of words and the possible interpretations’” (cols 422-423). This was confirmed in *R v A* [2002] 1 AC 45 at [44] (Lord Steyn) and *Ghaidan* [2004] 2 AC 557 at [44] (Lord Steyn).

¹¹³ *Momcilovic* [2010] VSCA 50 at [77].

¹¹⁴ Section s 3(1) of the UKHRA uses the words “read and given effect to”, as did the Draft Charter of Human Rights and Responsibilities, s 32 in Victorian Committee, n 83, p 191. The NZBORA uses the phrase “given a meaning”. The Charter uses “interpreted”. Commentators have failed to attribute any significance to these differences in terminology: Hettiarachi P, “Some Things Borrowed, Some Things New: An Overview of Judicial Review of Legislation under the Charter of Human Rights and Responsibilities” (2007) 7 *Oxford University Commonwealth Law Journal* 61 at 83; Geiringer, n 11 at 66. For a discussion of the significance of these phrases, see *Ghaidan* [2004] 2 AC 557 at [107] (Lord Rodger).

interpreters of statutory provisions “to exercise effort *to ensure compliance with human rights so far as it is possible to do so*”.¹¹⁵ The Explanatory Memorandum states that the “object of [s 32(1)] is to ensure that courts and tribunals interpret legislation to *give effect* to human rights”.¹¹⁶ Traditional statutory and common law rules of interpretation do not impose such obligations. The fact that s 32(1) did *not* embody the traditional interpretative role under statutory and common law rules of interpretation,¹¹⁷ and hence required especial legislative fiat under the Charter to expand the interpretative role, further supports the conclusion that s 32(1) goes beyond the traditional interpretative role.

Fourthly, the *Momcilovic* Court fails to acknowledge the limitations on interpretation imposed by the concept of “possibility”. Indeed, it fails to give *any* meaning or effect to the concept of “possibility”, a failure which itself eschews the traditional interpretative obligation to give *all* words *some* meaning and effect.¹¹⁸ In terms of limiting potential, the British jurisprudence indicates that “possible” limits judicial power: what is “possible” is interpretation; what is not “possible” is legislation.¹¹⁹ The former includes interpreting legislative language “restrictively or expansively”, “read[ing] in words which change the meaning of the enacted legislation”, “modify[ing] the meaning, and hence the effect” of legislation, and implying words provided they “go with the grain of the legislation”.¹²⁰ The latter prevents courts “adopt[ing] a meaning inconsistent with a fundamental feature of legislation” or “the underlying thrust of the legislation being construed”, and “mak[ing] decisions for which they are not equipped”.¹²¹ The Charter adopts the composite limit of “possible” and “consistently with their purpose”. If one accepts that the phrase “consistently with their purpose” was intended to codify the British jurisprudence, this phrase encapsulates the notion that an interpretation that is *inconsistent* with statutory purpose (that is, the underlying thrust or a fundamental feature)¹²² is *not* a possible interpretation.¹²³

Even if one does not accept the codification of *Ghaidan* argument, the text of the Charter itself reinforces the co-equal nature of “possible” over “consistently with their purpose”, if not the superior status of the former over the latter. The co-equality, if not the superiority, is clear from a traditional

¹¹⁵ Evans and Evans, n 98 at [3.17] (emphasis added).

¹¹⁶ Explanatory Memorandum, n 96, p 23 (emphasis added).

¹¹⁷ If s 32 is simply codifying traditional statutory or common law interpretation, why would the Explanatory Memorandum state that “clause 32 provides for *certain* rules of statutory interpretation under the Charter”: Explanatory Memorandum, n 96, p 23 (emphasis added). According to the *Oxford Dictionary*, “certain” means “specific but not explicitly named or stated”: see http://www.oxforddictionaries.com/view/entry/m_en_gb0134520#m_en_gb0134520 viewed 6 October 2010. It would have been straightforward to explicitly state the traditional statutory and common law rules of interpretation in the Explanatory Memorandum, had that been the parliamentary intent. Instead, the more amorphous term of “certain” was chosen.

¹¹⁸ See Pearce and Geddes, n 90 at [2.22].

¹¹⁹ For example, Woolf CJ in *Donoghue* [2001] EWCA Civ 595 emphasised that when the court decides whether a reinterpretation of a legislative provision is “possible”, the courts “task is still one of interpretation” (at [75]). If the court must “radically alter the effect of the legislation” to secure compatibility, “this will be an indication that more than interpretation is involved” (at [76]). See also *Adan v Newham London Borough Council* [2001] EWCA Civ 1916 at [42]; *Roth* [2002] EWCA Civ 158 at [156].

¹²⁰ *Ghaidan* [2004] 2 AC 557 at [32]-[33] (Lord Nicholls). Lord Rodger agreed with these propositions (at [121], [124]), as did Lord Millett (at [67]).

¹²¹ *Ghaidan* [2004] 2 AC 557 at [33]. Lord Rodger agreed with these propositions (at [121]), as did Lord Millett (at [67]). This has been confirmed by Bell J in *Kracke* (2009) 29 VAR 1 at [218]:

Because the obligation is to make legislation conform to transcendent human rights principles wherever possible, the role of the courts is fundamentally different to their role under the standard principles of interpretation. However, that role is still interpretation, not amendment. In consequence, there is a “limit beyond which a [rights-compatible] interpretation is not possible”.

¹²² See n 166.

¹²³ For example, inconsistency with a fundamental feature of the legislation or the underlying thrust of the legislation being construed: see n 120. See further Debeljak, “Parliamentary Sovereignty and Dialogue”, n 13 at 40-56.

purposive interpretation of s 32(1).¹²⁴ The purposes of the Charter as stated in s 1(2)(b) refer to the obligation to interpret “so far as is possible in a way that is compatible with human rights” *without* any reference to “consistently with their purpose”. This suggests a predominant parliamentary interest in “possibility” as the limit on the judicial interpretation power under s 32(1) or, at the very least, that “possible” is of greater significance than consistency.¹²⁵ Accordingly, the *Momcilovic* Court ought to have given greater consideration to the limiting nature of “possibility”, rather than focusing predominantly (indeed, exclusively) on “consistently with their purpose”.¹²⁶ Moreover, Pearce and Geddes note that “where an interpretation has been adopted that does not fit readily with [an objects] clause, it has had to be explained”¹²⁷ – a task the *Momcilovic* Court fails to do.

Fifthly, the *Momcilovic* Court also supports its focus on interpretation by reference to Kentridge JA in the *Zuma* case: “If the language used by the lawgiver is ignored in favour of a general resort to ‘values’ the result is not interpretation, but divination.”¹²⁸ The comments miss the point. Neither s 32(1) nor s 3(1) requires the language of the statute to be ignored. The language of the statute plays a central role when considering the “rights questions”; it also plays a central role when considering a rights-compatible reinterpretation under s 32(1). Moreover, under s 32(1) and s 3(1) there is not a “general resort to ‘values’”; rather, there is resort to the democratically-sanctioned guaranteed rights, which have a high degree of specificity under international, regional and comparative jurisprudence and the common law.¹²⁹

Finally, the *Momcilovic* Court fails to address the Victorian Committee’s report (Victorian Report). The insertion of “consistently with their purpose” was suggested by the Victorian Committee and was explicitly linked to *Ghaidan*.¹³⁰ This very same wording was adopted by Parliament which had the Victorian Report before it. This legislative history was not adequately dismissed by the *Momcilovic* Court.

¹²⁴ Purposive interpretation is the traditional interpretation technique which is favoured by statutory and common law rules of interpretation: see, eg s 35(1) of the ILA.

¹²⁵ This is clear from a purposive interpretation of s 32(1), given that s 1(2)(b) refers to the obligation to interpret “so far as is possible in a way that is compatible with human rights” *without any reference to* “consistently with their purpose”. See further below.

¹²⁶ This point is reinforced by the comments of Dawson J with respect to s 35(a) of the ILA in *Mills and Meeking* (1990) 169 CLR 214 at 235 (emphasis added): “[T]he literal rule of construction, whatever the qualifications with which it is expressed, must give way to a statutory injunction to prefer a construction which would promote the purpose of an Act to one which would not, *especially where that purpose is set out in the Act*.” Pearce and Geddes, n 90 at [2.8]-[2.9], make similar observations in relation to s 15AA of the *Acts Interpretation Act 1901* (Cth), which is the equivalent of s 35(a) of the ILA:

Section 15AA, however, requires the purpose or object to be taken into account even if the meaning of the words, interpreted in the context of the rest of the Act, is clear. When the purpose or object is brought into account, an alternative interpretation of the words may become apparent. And if one interpretation does not promote the purpose or object of an Act and another interpretation does so, the latter interpretation must be adopted.

¹²⁷ Pearce and Geddes, n 90 at [4.42]. Pearce and Geddes go on to say “and that in itself seems a worthwhile exercise in directing consideration of the purpose of the legislation” (at [4.42]).

¹²⁸ *State v Zuma* 1995 (4) BCLR 401, as cited in *Momcilovic* [2010] VSCA 50 at [77].

¹²⁹ At this juncture, it is appropriate to observe that throughout the entire debate about the propriety of judges exercising a reinterpretation power democratically allocated to it by the Parliament, no commentator has dared to contrast the democratic pedigree of the s 32(1) creative task compared with the undemocratic pedigree of the creative task of judges discovering, extending and renewing the common law.

¹³⁰ Victorian Committee, n 83, pp 82-83.

What did Parliament intend?

Another basis relied upon by the *Momcilovic* Court to differentiate s 32(1) from s 3(1) was the intention of the Parliament in enacting s 32(1).¹³¹ The *Momcilovic* Court's discussion here fails to convince, particularly because of its selective nature, its tendency to misconstrue and misapply fundamental issues, and its failure to address the weight of extrinsic material opposing its view.

The Second Reading Speech

The *Momcilovic* Court quotes from the Second Reading Speech, as follows:

Clause 32 of the bill recognises the traditional role for the courts in interpreting legislation passed by Parliament.

While this bill will not allow courts to invalidate or strike down legislation, it does provide for courts to interpret statutory provisions in a way which is compatible with the human rights contained in the Charter, so far as it is possible to do so consistently with their purpose and meaning.¹³²

The *Momcilovic* Court then proffers numerous arguments based on this to differentiate s 32(1) from s 3(1), which are open to critique.

First, the *Momcilovic* Court relies on a "striking ... absence of any suggestion that s 32(1) would establish a new paradigm of interpretation" which required courts "to depart from the ordinary meaning of a statutory provision and hence from the intention of the Parliament which enacted that provision".¹³³ It insists that if a fundamental departure from traditional interpretation had been contemplated, the "Minister would have been obliged to say so", supported by specific comments "about the nature and extent of the departure, presumably by drawing on examples from the UK jurisprudence".¹³⁴

If one accepts this very stringent and prescriptive requirement, one can point to the text of s 32(1) in satisfaction of the requirement. The obligation to interpret laws compatibly with human rights "so far as is possible to do so consistently with their purpose" is *not* commanded by traditional interpretative rules. This choice of language, in and of itself, evinces the intention of Parliament to enact something other than what had gone before. In addition, the modelling of s 32(1) on s 3(1) evinces the requisite parliamentary intention. Moreover, the historical link to s 3(1) and the codification of *Ghaidan* are not absent. These are explicitly outlined in the Victorian Report,¹³⁵ and the Explanatory Memorandum acknowledges them through the use of the same concepts and phraseology adopted from the British jurisprudence.¹³⁶ Further, the British courts did not require such stringent evidence in relation to s 3(1). During debate on the *Human Rights Bill*, the Home Secretary stated that "it is not our intention that the courts, in applying [s 3], should contort the meaning of words to produce implausible or incredible meanings".¹³⁷ Rather, s 3(1) is supposed to enable "the courts to find an interpretation of legislation that is consistent with Convention rights, *so far as the*

¹³¹ The *Momcilovic* Court cites Dawson J in *Mills v Meeking* (1990) 169 CLR 214 at 234, who states that "[t]he collective will of the legislature must therefore be taken to have been expressed in the language of the enactment itself": see *Momcilovic* [2010] VSCA 50 at [79]. The *Momcilovic* Court acknowledges "that resort may be had to Parliamentary debates for such assistance as they may properly provide" (at [80]) (emphasis added).

¹³² Victoria, Legislative Assembly, *Parliamentary Debates* (4 May 2006) p 1,293 (Mr Hulls). It should be noted that the *Momcilovic* Court cites the quotation in a single paragraph, when it was in fact in two paragraphs as per this article: *Momcilovic* [2010] VSCA 50 at [81].

¹³³ *Momcilovic* [2010] VSCA 50 at [82].

¹³⁴ *Momcilovic* [2010] VSCA 50 at [82].

¹³⁵ Victorian Committee, n 83, pp 82-83.

¹³⁶ Explanatory Memorandum, n 96, p 23. See further below.

¹³⁷ United Kingdom, n 112, col 421 (Mr Jack Straw).

plain words of the legislation allow".¹³⁸ Neither of these statements explicitly suggests "a new paradigm of interpretation", yet this did not prevent the British courts recognising the true intent behind s 3(1).¹³⁹

Secondly, the *Momcilovic* Court relies on the Minister's reference to "purpose and *meaning*" in the Second Reading Speech.¹⁴⁰ The *Momcilovic* Court opines that the use of the word "meaning" "makes it even clearer that Parliament had no intention of authorising (or requiring) interpretations which would depart from the meaning of a provision arrived at by ordinary principles of interpretation",¹⁴¹ and states that s 32(1) was enacted by Parliament in the wake of this ministerial explanation that "courts would be constrained both by the *purpose* of the provision being interpreted and by the *meaning* of the words in the provision".¹⁴² If "meaning" was *so* crucial to differentiating s 32(1) from s 3(1), why was it not expressly included in the text of s 32(1), the s 1(2) purposes provision of the Charter, or the Explanatory Memorandum? Why would Parliament leave this fundamental issue to the Second Reading Speech? In addition, if "consistently with their purpose" was so crucial to differentiating s 32(1) from s 3(1), one might expect it to be explicit in the s 1(2) purposes provision; yet s 1(2)(b) omits this phrase, merely stating that rights are protected by "ensuring that all statutory provisions, whenever enacted, are interpreted so far as is possible in a way that is compatible with human rights".¹⁴³ Moreover, it is not apparent why the word "meaning" is limited to that which is derived from ordinary principles of interpretation, rather than the new parliamentary instruction to interpret laws compatibly with human rights "so far as is it possible to do so".

Further, it is unclear why the *Momcilovic* Court focused on the reference to "meaning" in the Second Reading Speech, yet failed to focus on the following reference in the Explanatory Memorandum: "The object of [s 32(1)] is to ensure that courts and tribunals interpret legislation to *give effect* to human rights."¹⁴⁴ It is more challenging for the *Momcilovic* Court to explain away the reference to "give effect". It is more difficult to argue that an obligation to "interpret legislation to *give effect* to human rights" demonstrated parliamentary intent to sanction ordinary principles of interpretation because there is *no* ordinary principle of interpretation that obliges courts to interpret statutes so as to "give effect" to human rights. The failure to acknowledge and explain away "give effect" in the Explanatory Memorandum, particularly in the context of reliance on "meaning" from the Second Reading speech, weakens the *Momcilovic* Court's analysis. It also bears mentioning that the words "give effect" are directly lifted from s 3(1) of the UKHRA, which states that "[s]o far as it is possible to do so", "legislation must be read and given effect in a way which is compatible with the Convention rights".¹⁴⁵ Again, this ought to have been recognised and addressed by the *Momcilovic* Court.

¹³⁸ United Kingdom, n 112, col 421 (Mr Jack Straw).

¹³⁹ Moreover, when it comes to other differences between the Charter and the UKHRA (such as courts not being public authorities, and the absence of an independent cause of action and free-standing right to damages), the Explanatory Memorandum does not contain the level of detail in differentiating the Victorian position from the British position that the *Momcilovic* Court is requiring for the s 32(1) versus s 3(1) distinction. Does this mean that litigators should start to argue in favour of courts as public authorities, an independent cause of action and a free-standing right to damages?

¹⁴⁰ *Victoria*, n 132, p 1,293 (Mr Hulls), as cited in *Momcilovic* [2010] VSCA 50 at [81].

¹⁴¹ *Momcilovic* [2010] VSCA 50 at [84].

¹⁴² *Momcilovic* [2010] VSCA 50 at [84] (emphasis in original).

¹⁴³ That is, there is not even a reference to "consistent with their purpose" in s 1(2)(b) of the Charter, let alone a reference to "consistent with their purpose and meaning".

¹⁴⁴ Explanatory Memorandum, n 96, p 23.

¹⁴⁵ Commentators have failed to attribute any significance to these differences in terminology: see n 114.

The Explanatory Memorandum

The Momcilovic Court's view

In terms of the Explanatory Memorandum, the *Momcilovic* Court refers only¹⁴⁶ to the paragraph directly considering s 32(1), which states:

The object of [s 32(1)] is to ensure that courts and tribunals interpret legislation to give effect to human rights. The reference to statutory purpose is to ensure that in doing so 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.¹⁴⁷

The *Momcilovic* Court contrasts this statement with the British position, stating that "not only does s 3(1) UKHRA permit a 'strained interpretation' [*R v A*] but it has been held to go much further, requiring the court where necessary to depart entirely from the plain meaning of the provision in question".¹⁴⁸

This is an unfortunate misconstruction of the parliamentary intent. Numerous commentators have highlighted the provenance of these statements in the Explanatory Memorandum.¹⁴⁹ The precise wording of s 32(1), the explicit references to *Ghaidan* in the Victorian Report, and the explicit reference to concepts that have been explored in the British jurisprudence (eg "not strained" and not avoiding "the object") in the Explanatory Memorandum, were all deliberate choices to ensure that s 32(1) contained the more "purposive" approach to interpretation from *Ghaidan* and to avoid the more "radical" earlier interpretations from *R v A*.¹⁵⁰ The *Momcilovic* Court ought not have used *R v A* as a contrast to the Explanatory Memorandum; in fact, the choice of the opposite wording to *R v A* in the Explanatory Memorandum was a very deliberate choice to contrast *R v A* and to sanction *Ghaidan*.¹⁵¹

Moreover, it is not clear how the *Momcilovic* Court's comment about departing "from the plain meaning of a provision" contrasts with the references in the Explanatory Memorandum to the displacement of Parliament's intended purpose or the avoidance of the achievement of the object of the legislation. Even under ordinary rules of statutory interpretation, a court is empowered to depart from the plain (ie literal) meaning of a provision where to do so promotes the purpose of the provision.¹⁵² To depart from the plain meaning is *not* necessarily coupled with the displacement of parliamentary intent or the avoidance of the achievement of the object of legislation; in fact, departure

¹⁴⁶ Regarding other relevant material from the Explanatory Memorandum, see discussions below linked to nn 153 and 154.

¹⁴⁷ Explanatory Memorandum, n 96, p 23, as cited in *Momcilovic* [2010] VSCA 50 at [85].

¹⁴⁸ *Momcilovic* [2010] VSCA 50 at [85], citing *R v A* [2002] 1 AC 45 at [44] (Lord Steyn).

¹⁴⁹ See, eg Tate P, "The Charter of Human Rights and Responsibilities" (Paper presented at the Australian Institute of Administrative Law (Victorian Chapter), Melbourne, 7 March 2007) pp 19-20 ("The Charter"); Tate P, "Some Reflections on Victoria's Charter of Human Rights and Responsibilities" (2007) 52 *Australian Institute of Administrative Law Forum* 18 at 28 ("Some Reflections"); Williams G, "The Victorian Charter of Human Rights and Responsibilities: Origins and Scope" (2007) 30 *Melbourne University Law Review* 880 at 902; Debeljak, "Parliamentary Sovereignty and Dialogue", n 13 at 51; n 251.

¹⁵⁰ Pamela Tate SC, the Solicitor-General, further explains that the focus on the *Ghaidan* decision and the more purposive approach to interpretation was to avoid judicial interpretations, such as *R v A* [2002] 1 AC 45: Tate, "The Charter", n 149, pp 19-20. See further Tate, "Some Reflections", n 149 at 28; Williams, n 149 at 902; Debeljak, "Parliamentary Sovereignty and Dialogue", n 13 at 51; n 251.

¹⁵¹ In any event, a "strained" interpretation of legislation is not a foreign concept to Australian courts. McHugh J noted in *Newcastle City Council v GIO General Ltd* (1997) 191 CLR 85 at 113, "when the purpose of a legislative provision is clear, a court may be justified in giving the provision 'a strained construction' to achieve that purpose provided that the construction is neither unreasonable nor unnatural". See generally Pearce and Geddes, n 90 at [2.12].

¹⁵² See nn 92 and 93. See generally Pearce and Geddes, n 90 at [2.3]-[2.5]. McHugh, Gummow, Kirby and Hayne JJ describe the rule as follows in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 384:

the duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning.

from plain meaning may be necessary to achieve intent or object. Further, the *Momcilovic* Court fails to acknowledge the opening sentence on s 32 in the Explanatory Memorandum, which states that “[c]lause 32 provides for *certain* rules of statutory interpretation under the Charter”.¹⁵³ Why use the non-definitive adjective “certain” if the reference to “rules” was intended to replicate the well-known traditional statutory and common law rules of interpretation?¹⁵⁴

The Explanatory Memorandum and the British jurisprudence

At this juncture, although it has been addressed elsewhere,¹⁵⁵ a review of the Explanatory Memorandum and its link to the British jurisprudence is salient. Recall that the Explanatory Memorandum is concerned about the displacement of parliamentary intention and avoidance of legislative objectives.¹⁵⁶ As was highlighted in the Victorian Report,¹⁵⁷ these concerns are drawn from the British jurisprudence, which acknowledges displacement of parliamentary intention and avoidance of legislative objectives as examples of interpretations that are *not* possible.

In relation to preserving parliamentary intention, British jurisprudence indicates that a displacement of parliamentary intention would *not* constitute a possible interpretation. Indeed, even in *R v A*, Lord Steyn recognised the need to ensure the viability of the essence of the legislative intention under s 3(1).¹⁵⁸ Lord Hope in *R v A* emphasised that a s 3(1) interpretation was not possible if it contradicted express or necessarily implicit provisions in the legislation because express language or necessary implications thereto are the “means of identifying the plain intention of Parliament”.¹⁵⁹ Lord Hope further highlighted in *Lambert* that interpretation involves giving “effect to the presumed intention”¹⁶⁰ of the enacting Parliament. Lord Nicholls in *Re S* identified a clear parliamentary intent to give the courts threshold jurisdiction over care orders with no continuing supervisory role, which the s 3(1) interpretation of the lower court improperly displaced.¹⁶¹ Even the *Ghaidan* decision was based on preserving parliamentary intention. Lord Nicholls explicitly referred to “the social policy underlying” the statutory provision in question (being the heterosexual definition of spouse)¹⁶² and noted that the social policy “is equally applicable” to the survivor of cohabiting homosexual couples as it is to cohabiting heterosexual couples.¹⁶³ His Lordship held that to eliminate the discrimination between cohabiting heterosexual and cohabiting homosexual couples, by reading and giving effect to para 2 to include cohabiting homosexual couples, “would eliminate the discriminatory effect of paragraph 2 and would do so consistently with the social policy underlying paragraph 2”.¹⁶⁴

In relation to preserving legislative objects, the British jurisprudence indicates that s 3(1) interpretation will not allow displacement of the fundamental features of legislation. This is clear in

¹⁵³ Explanatory Memorandum, n 96, p 23 (emphasis added).

¹⁵⁴ According to the *Oxford Dictionary*, “certain” means “specific but not explicitly named or stated”: see http://www.oxforddictionaries.com/view/entry/m_en_gb0134520#m_en_gb0134520 viewed 6 October 2010.

¹⁵⁵ Debeljak, “Parliamentary Sovereignty and Dialogue”, n 13 at 49-56.

¹⁵⁶ Explanatory Memorandum, n 96, p 23. The parliamentary debate was silent on the matter.

¹⁵⁷ Victorian Committee, n 83. See also Human Rights Law Resource Centre, “The Victorian Charter of Human Rights and Responsibilities”, *Human Rights Law Resource Manual* (2006) Ch 5, p 46.

¹⁵⁸ *R v A* [2002] 1 AC 45 at [44]-[45]. Having read an implied proviso into the rape shield provisions to ensure their rights-compatibility, Lord Steyn stated that “[i]f this approach is adopted, s 41 will have achieved a major part of its objective but its excessive reach will have been attenuated in accordance with the will of Parliament as reflected in s 3 of the 1998 Act” (at [45]).

¹⁵⁹ *R v A* [2002] 1 AC 45 at [108] (Lord Hope).

¹⁶⁰ *Lambert* [2002] 2 AC 545 at [81].

¹⁶¹ *Re S* [2002] 2 AC 291 at [25], [28].

¹⁶² The impugned provision was para 2(2) of Sch 1 of the *Rent Act 1977* (UK): “a person who was living with the statutory tenant as his or her wife or husband shall be treated as the spouse of the statutory tenant.”

¹⁶³ *Ghaidan* [2004] 2 AC 557 at [35].

¹⁶⁴ *Ghaidan* [2004] 2 AC 557. Accordingly, para 2(2) of Sch 1 of the *Rent Act 1977* (UK) was to be “reinterpreted” as follows: “a person who was living with the statutory tenant as if they were his or her wife or husband shall be treated as the spouse of the statutory tenant.”

Re S and in *R v Anderson*.¹⁶⁵ Indeed, in *Ghaidan*, Lord Nicholls' stated, inter alia, that s 3 interpretation "must be compatible with the underlying thrust of the legislation being construed"; Lord Millett required an interpretation to be "consistent with the fundamental features of the legislative scheme"; and Lord Rodger stated that s 3 "does not allow the courts to change the substance of a provision completely, to change a provision from one where Parliament says that x is to happen into one saying that x is not to happen".¹⁶⁶

In conclusion, the Victorian Report and Explanatory Memorandum clearly indicate that the insertion of "consistently with their purpose" was intended to codify the British jurisprudence, both by referring to that jurisprudence by name¹⁶⁷ and lifting concepts from that jurisprudence in explaining the effect of the inserted phrase.¹⁶⁸

The parliamentary debate

The *Momcilovic* Court also relied on the parliamentary debate. Parliamentary debates are notoriously difficult for use as a guide to parliamentary intention: how does one differentiate political posturing from intended legal meaning; how does one attribute a single identifiable intention from the disparate musings of individual representatives; how can a body that is not sentient form an intention?¹⁶⁹ Given the *Momcilovic* Court's significant reliance on the parliamentary debates and the difficulty of establishing parliamentary intent from them, this aspect of the decision is questionable. The *Momcilovic* Court's selective referencing, coupled with the misconstruction and misapplication of the references, further weaken its reasoning.

Unacceptable transfer of power: The ACT and Victorian reports

The *Momcilovic* Court states that the parliamentary debate demonstrates that the "Government was at pains to dispel any concerns that the enactment of the Charter would involve an unacceptable transfer of power to the judiciary".¹⁷⁰ Whether this is a fair summary of the debate will be addressed in turn. But first a major unarticulated assumption underlying this claim needs to be tested – that s 32(1) involves an unacceptable transfer of power to the judiciary. It can be said that much of the debate about rights instruments in Australia has centred on the transfer of power to the judiciary. This is usually driven by a fear of constitutional rights instruments that confer power on the judiciary to invalidate legislation, which arguably results in a judicial monologue about rights. Statutory rights instruments directly respond to this concern by limiting the power of judges to that of interpretation and non-enforceable declaration in preference to invalidation, and establishing a dialogue about rights between the executive, Parliament and the judiciary. To claim that statutory rights instruments involve an "unacceptable" transfer of power is highly contentious and this assumption must be approached with circumspection.

¹⁶⁵ *Re S* [2002] 2 AC 291 at [40]-[44]. In *Anderson* [2003] 1 AC 837, the imposition of a sentence, which includes the tariff period, was held to be part of the trial such that the involvement of the Home Secretary in tariff setting violated the convicted murderers' Art 6(1) right (at [20]-[29] (Lord Bingham), [49], [54]-[57] (Lord Steyn), [67], [78] (Lord Hutton)). The House of Lords then concluded that the legislative provision on tariff setting could not be interpreted compatibly with Convention rights under s 3 of the HRA. Under legislation "the decision on how long the convicted murderer should remain in prison for punitive purposes is [the Home Secretary's] alone" (at [30] (Lord Bingham), [80] (Lord Hutton)). To interpret the legislation "as precluding participation by the Home Secretary ... would not be judicial interpretation but judicial vandalism" (at [30] (Lord Bingham)), giving the provision a different effect from that intended by Parliament. See also at [59] (Lord Steyn), [81] (Lord Hutton). The House of Lords issued a declaration of incompatibility.

¹⁶⁶ *Ghaidan* [2004] 2 AC 557 at [33] (Lord Nicholls), [67] (Lord Millett), [100] (Lord Rodger). See further Tate, "The Charter", n 149, pp 19-20; Tate, "Some Reflections", n 149 at 28. See also Williams, n 149 at 902.

¹⁶⁷ Victorian Committee, n 83, pp 82-83.

¹⁶⁸ Victorian Committee, n 83, p 83; Explanatory Memorandum, n 96, p 23: "The reference to statutory purpose is to ensure that in doing so 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."

¹⁶⁹ Geiringer, n 11 at 71-72; Pearce and Geddes, n 90 at [1.3]. The stated intent of one individual does not reliably represent the intent of all participants in the law-making process. It is doubtful that one shared intention exists within a collective decision making body: see Beatty D, *Talking Heads and the Supremes: The Canadian Production of Constitutional Review* (Carswell, Toronto, 1990) pp 20-21.

¹⁷⁰ *Momcilovic* [2010] VSCA 50 at [86].

Moreover, the *Momcilovic* Court refers to the Australian Capital Territory (ACT) Bill of Rights Consultative Committee (ACT Committee) and the Victorian Committee to support its assertion about unacceptable transfers of power.¹⁷¹ Neither reference fairly supports the assertion. In claiming that concerns about unacceptable transfers of power have been “prominent in the public discourse”,¹⁷² the *Momcilovic* Court refers in a footnote to seven paragraphs out of a 12-paragraph section¹⁷³ in one Chapter of the ACT Bill of Rights Consultative Committee report (ACT Report).¹⁷⁴ Of those seven paragraphs referred to, only one paragraph actually addressed the issue of transferring power to the judiciary, while two other paragraphs suggested alternative rights models that side-stepped the judiciary. Of the five paragraphs from the same section *not* referred to by the *Momcilovic* Court, four paragraphs were in favour of a constitutional or statutory rights instrument with a role for the judiciary. In addition to such selective referencing, the *Momcilovic* Court fails to acknowledge that the recommendations from the ACT Committee were in favour of a statutory rights instrument largely modelled on the UKHRA.¹⁷⁵ The *Momcilovic* Court failed to acknowledge such statements in support of statutory rights instruments:

[T]he Consultative Committee considers that a model that preserves a balance between the legislature, the executive and the judiciary in relation to the protection of rights is preferable to one that defers almost completely to the legislature and the executive (as in the current Australian legal system) or one that allows the judiciary to effectively trump the legislature and to invalidate laws (as in the United States Bill of Rights).¹⁷⁶

Similar criticisms can be made about the use of the Victorian Report. The *Momcilovic* Court refers to “submissions received by the [Victorian] Committee argu[ing] that ‘enacting a Charter would take power away from the Parliament and give unelected judges too much power’”.¹⁷⁷ In the introductory chapter of the Victorian Report,¹⁷⁸ the Victorian Committee canvassed the arguments in favour of a charter across nine pages,¹⁷⁹ and against a charter across five pages.¹⁸⁰ Some submissions were concerned about the transfer of power to the judiciary, with the Victorian Committee directly citing two such submissions.¹⁸¹ However, the *Momcilovic* Court fails to note the Victorian Committee’s direct response to these submissions:

Rather than handing over power to judges, as does the United States Bill of Rights, modern human rights laws like that now operating in the United Kingdom do not give judges the power to strike down laws made by Parliament. Instead, the judges can be directed to open up debate about how law and policy is made, casting a powerful lens over the day-to-day work of Government. As we set out in later Chapters, the Committee is recommending a model that gives the final say to the Parliament and not the courts. This is very different to places like the United States.¹⁸²

¹⁷¹ *Momcilovic* [2010] VSCA 50 at [86], fns 143 and 144. It should be noted that the *Momcilovic* Court cites James Allan (see fn 143), a vigorous anti-bill of rights academic. Similarly to its approach to the Australian Capital Territory (ACT) Report (see n 174) and the Victorian Report (see n 83), the *Momcilovic* Court fails to acknowledge the weight of contrary academic opinion.

¹⁷² *Momcilovic* [2010] VSCA 50 at [86].

¹⁷³ *Momcilovic* [2010] VSCA 50 at fn 143.

¹⁷⁴ The Chapter is entitled “Is a Bill of Rights Appropriate and Desirable for the ACT?” and the section is entitled “Is a Bill of Rights Consistent with Democratic Governance in the ACT?” See ACT Bill of Rights Consultative Committee (ACT Committee), *Towards an ACT Human Rights Act* (2003) pp 17, 41-43 (ACT Report).

¹⁷⁵ ACT Committee, n 174, Recommendations 3 and 9, [3.48]-[3.55], Ch 4.

¹⁷⁶ ACT Committee, n 174 at [3.50].

¹⁷⁷ *Momcilovic* [2010] VSCA 50 at [86], citing Victorian Committee, n 83, p 15.

¹⁷⁸ The introductory Chapter addressed whether change is needed in Victoria to better protect human rights: Victorian Committee, n 83, Ch 1.

¹⁷⁹ Victorian Committee, n 83, pp 4-13.

¹⁸⁰ Victorian Committee, n 83, pp 13-18.

¹⁸¹ Victorian Committee, n 83, p 15.

¹⁸² Victorian Committee, n 83, p 15.

The Victorian Committee's conclusion should not come as a surprise to those familiar with the *Statement of Intent* issued by the Victorian Government at the beginning of the consultation process. The *Statement of Intent* clearly demonstrates that the "unacceptable transfer of power" debate centred on the adoption of the United States Constitution.¹⁸³ The issue was how other models avoid the unacceptable transfer of power considered to be inherent in the United States Constitution. The *Momcilovic* Court has incorrectly applied the debate *between* constitutional and statutory rights instruments, to help resolve the distinct issues of the correct method and the strength of s 32(1) *under* a statutory instrument. The latter issues are not well informed by the former debate.

Neither the ACT Report, nor the Victorian Report, provides support for the *Momcilovic* Court's claim that statutory rights instruments involve an unacceptable transfer of power to the judiciary. The *Momcilovic* Court has selectively and somewhat misleadingly quoted from these extrinsic aids to interpretation, in order to reverse-engineer an argument that is simply not there on the legislative history.

The Victorian Parliament debate

The *Momcilovic* Court seeks support for a number of propositions in the parliamentary debate: that the Charter would be an unacceptable transfer of power to the judiciary; that the traditional nature of interpretation was embodied in s 32(1); and that the judicial power to issue declarations under s 36(2) was *the* tool for dialogue under the Charter. These propositions cannot be sustained.

First, in terms of unacceptable transfers of power, the *Momcilovic* Court quotes from the Shadow Attorney-General, Mr McIntosh. The quotations are curious because Mr McIntosh clearly states that the proposed charter "*will* shift power to the judiciary ... to involve itself in all sorts of political issues" and that the Parliament "*will* be devolving those political questions to the judiciary".¹⁸⁴ The *Momcilovic* Court also relies on the interjections of the Shadow Treasurer, Mr Clark, who considers that the proposed charter would "*transfer* legislative power from the Parliament to the judiciary".¹⁸⁵ It is not clear how these statements support a parliamentary intention that the Charter *did not* create an "unacceptable" shift in power to the judiciary and that s 32(1) *did* embody a traditional judicial interpretative role.

Secondly, in terms of proving that s 32(1) was intended to codify traditional methods of judicial interpretation, the *Momcilovic* Court again relies on curious aspects of the debate. For example, Mr Clark's interjection pertains solely to the *changes* to judicial interpretation under the proposed charter and *reinforces* the importance of s 32(1) to the scheme of the proposed charter. Indeed, interpretation being "a new wildcard" is far from a codification of the traditional interpretative method; the "diminish[ment] of the system of our common law background" highlights that s 32(1) was *not* intended as a codification of the common law principle of legality; and the transfer of "de facto legislative power" with an "enormous scope for judicial discretion in interpretation" clearly indicates that the proposed charter was intended to transfer some¹⁸⁶ power to the judiciary.¹⁸⁷ If anything, Mr Clark's speech supports s 32(1) as a codification of s 3(1) as propounded in *Ghaidan*, and certainly does not suggest that s 36(2) was intended as *the* tool of institutional dialogue.

¹⁸³ Victorian Government, *Human Rights in Victoria: Statement of Intent* (May 2005) at [8]-[11].

¹⁸⁴ *Momcilovic* [2010] VSCA 50 at [87], citing Victoria, Legislative Assembly, *Parliamentary Debates* (13 June 2006) pp 1,978-1,980 (Mr McIntosh) (emphasis added).

¹⁸⁵ *Momcilovic* [2010] VSCA 50 at [90], citing Victoria, n 184, p 2,000 (Mr Clark) (emphasis added). It ought to be noted that neither Opposition member describe the shift in power as "unacceptable".

¹⁸⁶ Although some transfer of power was suggested, it was not necessarily unacceptable levels or types of power being transferred to the judiciary.

¹⁸⁷ *Momcilovic* [2010] VSCA 50 at [90], citing Victoria, n 184, p 2,000 (Mr Clark) that the proposed charter:

will throw a new wild card into the interpretation of every statute on our books. It will force legislation to be interpreted against this collection of untried and untested verbiage and therefore diminish the strength of our common law background ... It is also going to transfer de facto legislative power from the Parliament to the judiciary by granting an enormous scope for judicial discretion in interpretation.

Thirdly, primarily in terms of the alleged focus on s 36(2) declarations and secondarily the s 32(1) issue, the *Momcilovic* Court seems to misconstrue or acontextualise its various quotations. For example, the first quotation from Ms D'Ambrosio considers the issue of whether judges can invalidate laws – the answer being in the negative, with an emphasis on the judicial power of non-enforceable declaration.¹⁸⁸ This tells us very little about what the proposed charter *was* intended to create, and a great deal about what it *was not* intended to create – the issue being addressed by Ms D'Ambrosio was how the proposed charter differed from the United States Constitution, not whether judicial declarations are *the* tool of dialogue. Moreover, her interjection directly acknowledges that a judicial declaration is only available once the “Supreme Court ... finds that a statutory provision cannot be interpreted consistently with a human right”.¹⁸⁹ This indicates that judicial declarations work in tandem with the s 32(1) interpretative power, such that no *single* Charter mechanism, let alone s 36(2), can be considered *the* dialogue mechanism.¹⁹⁰

The second quote from Ms D'Ambrosio explicitly acknowledges that the proposed charter is “similar in operation to the NZBORA and the UKHRA in that the Courts ... cannot invalidate primary legislation”.¹⁹¹ This quote is directed at comparing statutory models that do not empower judges to invalidate legislation (the NZ and British models) with those models that do (the United States model), rather than the particular operation of a particular statutory model. It also directly acknowledges that the Charter is based on the NZ and British models rather than being a codification of the principle of legality.¹⁹²

The quotations from Mr Wynne fail to bolster the *Momcilovic* Court's argument. Mr Wynne suggests that the proposed charter “accords with a Parliamentary-based model of human rights protection” and that “[w]e understand that Parliament remains the final and sovereign institution”.¹⁹³ Both of these sentiments are aimed at differentiating the Victorian statutory model from the United States constitutional model.¹⁹⁴ The comments are not directed at the dialogue issue or s 32(1) issue. Another example of the same criticisms can be found in the *Momcilovic* Court's quotation from Mr Lupton.¹⁹⁵

The UK parliamentary debate

The *Momcilovic* Court then compares the Victorian parliamentary debate to that which preceded the UKHRA,¹⁹⁶ drawing numerous propositions from the comparison. First, it contrasted the British

¹⁸⁸ *Momcilovic* [2010] VSCA 50 at [88], citing *Victoria*, n 184, p 1,984 (Ms D'Ambrosio): “The Supreme Court will not be able to invalidate a Victorian law when a statutory provision is deemed by it to be inconsistent with the Charter, although the Supreme Court will be able to make a declaration of inconsistent interpretation if it finds that a statutory provision cannot be interpreted consistently with a human right.”

¹⁸⁹ *Victoria*, n 184, p 1,984 (Ms D'Ambrosio).

¹⁹⁰ This is contrary to what the *Momcilovic* Court later suggests. “[I]t is the making of a declaration of inconsistent interpretation which is seen as the defining feature of the so-called ‘dialogue model’”: *Momcilovic* [2010] VSCA 50 at [95].

¹⁹¹ *Victoria*, n 184, p 1,985 (Ms D'Ambrosio), cited by *Momcilovic* [2010] VSCA 50 at [88].

¹⁹² This is contrary to the *Momcilovic* Court's tentative views about what is “possible” under s 32(1), particularly in relation to the codification of the principle of legality: *Momcilovic* [2010] VSCA 50 at [102]-[104].

¹⁹³ *Momcilovic* [2010] VSCA 50 at [89], citing *Victoria*, n 184, p 1,993 (Mr Wynne).

¹⁹⁴ The United States Constitution is a judiciary-focused model under which the Parliament is no longer sovereign. This does not necessarily mean the judiciary is sovereign; rather, it is the Constitution itself, as interpreted by the judiciary, that is sovereign.

¹⁹⁵ *Momcilovic* [2010] VSCA 50 at [89], citing *Victoria*, n 184, pp 1,999-2,000 (Mr Lupton):

[The Charter] finds the right balance, because it sets out the rights and responsibilities of Victorians but sets them out in a way that maintains Parliamentary sovereignty and allows the Courts in appropriate circumstances to make declarations about whether legislation meets the standards of human rights but does not allow the Court to invalidate those laws.

¹⁹⁶ Rather than reviewing the record of the actual British debate, the *Momcilovic* Court relies on a summary of the debate from Lord Steyn's judgment in *Ghaidan* – a questionable choice in and of itself, given the seriousness of the issues at stake in *Momcilovic* and the *Momcilovic* Court's reliance on parliamentary intention to justify its conclusions: *Momcilovic* [2010] VSCA 50 at [91].

objective of “bringing rights home”, claiming that “the Victorian legislature was not impelled by the objective of ‘bringing home’ rights already enforceable under an international convention”.¹⁹⁷ An absence of a “bringing rights home” political slogan in Victoria is explicable by the fact that Victoria does not have international legal personality. If *Momcilovic* concerned a federal rights instrument, a judicial conclusion based on the lack of a government-stated intention to “bring rights home” to be decided within the domestic, rather than an international or regional, setting may¹⁹⁸ have some resonance. It does not in the context of a provincial jurisdiction within a federated state.

The more appropriate point of reference is the fact that the Victorian government and Parliament wanted to improve human rights performance and accountability within the domestic (albeit provincial) jurisdiction, as did the British. The *Statement of Intent* acknowledges the important role of the Victorian courts in “interpreting the law and enforcing rights”,¹⁹⁹ similarly to the British mantra of “bringing rights home”. The *Statement of Intent* also squarely places the debate in the context of “the basic rights found in the ICCPR [the *International Covenant on Civil and Political Rights*]”, noting that “[t]hese essential features of a democracy are often taken for granted but are *not clearly expressed or fully protected in our system of government*”.²⁰⁰ If reference back to political intent is necessary, these comments reflect the sentiment of “bringing rights home”. Moreover, the Victorian Committee preferred to embed the relevant international obligations within the Victorian jurisdiction rather than shape a “home grown” set of rights,²⁰¹ and the Explanatory Memorandum links each right guaranteed under the Charter back to its ICCPR equivalent.²⁰² Again, both of these facts reflect the desire to bring the international into the domestic.

Secondly, the *Momcilovic* Court referred to the Lord Chancellor’s statement that “in 99% of the cases that will arise, there will be no need for judicial declarations of incompatibility”,²⁰³ and the Home Secretary’s expectation “that, in almost all cases, the courts will be able to interpret legislation compatibly with the Convention” but that “we need to provide for the *rare* cases where that cannot be done”.²⁰⁴ From such statements, Lord Steyn (in his judicial capacity) surmised that “this is the remedial scheme which Parliament adopted”.²⁰⁵ In contrasting the Charter from the UKHRA, the *Momcilovic* Court began by noting that the Victorian Parliament never indicated that s 32(1) would be the prime remedial measure.²⁰⁶ Nothing should turn on this because technically nor did the British Parliament; rather, the “remedial” classification was Lord Steyn’s judicial conclusion drawn from the actual parliamentary debates. In any event, the Victorian Parliament adopted the interpretative and declaratory mechanisms from the UKHRA after Lord Steyn’s assessment of the interpretation provision as *the* remedial measure, a fact that the Victorian Parliament can be taken to have been

¹⁹⁷ *Momcilovic* [2010] VSCA 50 at [91].

¹⁹⁸ “May” is used because the persuasive weight of a politically-motivated slogan is not known.

¹⁹⁹ Victorian Government, n 183 at [12].

²⁰⁰ Victorian Government, n 183 at [16] (emphasis added). The “essential features” are the basic rights found in the *International Covenant on Civil and Political Rights* (ICCPR), opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), with the *Statement of Intent* explicitly referring to equality before the law, a fair trial, freedom of expression, and freedom of thought, conscience and religion as examples (at [16]).

²⁰¹ Victorian Committee, n 83, pp 31-33.

²⁰² Explanatory Memorandum, n 96, pp 8-19. The only right not linked back to the ICCPR is the right to property under s 20 (p 15). This is because the ICCPR does not protect property rights.

²⁰³ United Kingdom, House of Lords, *Parliamentary Debates* (5 February 1998) col 840 (Lord Irvine).

²⁰⁴ United Kingdom, House of Commons, *Parliamentary Debates* (16 February 1998) col 780 (Mr Jack Straw) (emphasis added).

²⁰⁵ *Ghaidan* [2004] 2 AC 557 at [46].

²⁰⁶ *Momcilovic* [2010] VSCA 50 at [92]. In contrast to the *Momcilovic* Court’s assumption about silence from the Victorian Parliament indicating a rejection of the British position, it is equally arguable that the Victorian Parliament was silent on this issue because it assumed that the wording in s 32(1) was to have the same effect as s 3(1). It is reasonable to assume that if the Victorian Parliament did not want to achieve the same effect as s 3(1), it should have chosen different language for s 32(1) or explicitly stated this in the Explanatory Memorandum or the Second Reading Speech.

aware of.²⁰⁷ Moreover, it is the structure of the UKHRA, as much as anything said in parliamentary debate, that supports a remedial characterisation of s 3(1), and the Charter mimics this structure. Further, the Explanatory Memorandum does state, in the context of declarations of inconsistent interpretation, that “[i]n *some* cases a statutory provision may not be able to be interpreted consistently with human rights”.²⁰⁸ Although “some” does not equate to terminology like “99%” or “rare”, it does indicate that s 32(1) was intended as a remedy – that is, that declarations were only intended to be needed “in some cases”, not in cases generally.

The *Momcilovic* Court then claims that the Victorian “debate focused almost exclusively on the function of the court in identifying legislative inconsistency with human rights and then making a declaration which – it was repeatedly emphasised – would not affect the validity of the legislation”, such that in comparison with Britain, declarations were not envisaged as a “last resort” but rather the “epitom[y] of the intended relationship between the courts and the legislature”.²⁰⁹ This must be challenged.

Part of “the function of the court in identifying legislative inconsistency” requires an application of s 32(1) – “legislative inconsistency” occurs once it is not “possible” “consistently with their purpose” to find a rights-compatible interpretation of a law that is otherwise an unjustified limitation on rights. In other words, the use of “legislative inconsistency” language in parliamentary debate does not demote s 32(1) and promote s 36(2). Moreover, the focus in the debate on “validity of legislation” is explicable as a contrast between statutory and constitutional rights instruments, rather than a contrast between different types of dialogue under statutory rights instruments or differences between s 32(1) and s 3(1). Further, one must query the *Momcilovic* Court’s reliance on Lord Steyn in this context. Lord Steyn was in fact using these aspects of the parliamentary debate to *bolster* the remedial strength of s 3(1),²¹⁰ yet the *Momcilovic* Court uses the very same passage to justify *undermining* the remedial strength of s 32(1).

In any event, one must query how much reliance can be placed on the British parliamentary debate as evidencing s 3(1) as a remedial measure. For example, Lord Steyn relied on the statements of the Lord Chancellor and Home Secretary to argue that the jurisprudential statistics indicated that the declaration power was being used more than the interpretation power,²¹¹ which thereby revealed “a question about the proper implementation”²¹² of the UKHRA, given that interpretation was supposed to be the primary remedial mechanism. Such use of the parliamentary debate is flawed. As Klug and Starmer highlight, the statements of the Lord Chancellor and the Home Secretary are not “statement[s] of law, nor ... actuarial prediction[s]”, but rather “political assertion[s]” that British law at the commencement of the UKHRA was generally rights-compatible, and that neither interpretation nor declaration would be needed often.²¹³ In terms of drawing conclusions for the Charter, British parliamentary comments about the rights-compatibility of its statute book at a single point in time cannot be morphed into evidence of Victorian parliamentary intent *not* to give s 32(1) full remedial force.

²⁰⁷ Section 32 itself indicates the strength of the “obligation” of interpretation. The obligation is to interpret “so far as it is possible to do so”. The fact that it was captured as “99%” of the cases in the British debate but not in the Victorian debate does not water down the strength of the obligation under s 32(1) – the words “so far as it is possible to do so” are capable of supplying the 99%.

²⁰⁸ Explanatory Memorandum, n 96, p 20 (emphasis added).

²⁰⁹ *Momcilovic* [2010] VSCA 50 at [92].

²¹⁰ *Ghaidan* [2004] 2 AC 557 at esp [46], [49], [50].

²¹¹ In the first couple of years, the British judiciary focused more heavily on interpretations than declarations. In contrast, statistics from across the first four years highlighted that the interpretative power was used in 10 cases, and the declaration power was used in 15 cases, of which five were reversed on appeal: *Ghaidan* [2004] 2 AC 557 at [39] and Appendix (Lord Steyn). By 2005, 17 declarations of incompatibility had been issued, with seven being reversed on appeal: Klug F and Starmer K, “Standing Back From the Human Rights Act: How Effective Is It Five Years On” [2005] *Public Law* 716 at 721.

²¹² *Ghaidan* [2004] 2 AC 557 at [39].

²¹³ Klug and Starmer, n 211 at 722.

The dialogue

The *Momcilovic* Court turns to the concept of dialogue, stating that Parliament's focus on judicial declaration at the expense of judicial interpretation "is not surprising ... given that the Charter is said to exemplify the 'dialogue model' of human rights legislation".²¹⁴ Not only is the *Momcilovic* Court's reliance on the extrinsic aids to interpretation to establish a narrow concept of dialogue open to critique, but its discussion of dialogue fails to comprehend the interconnectedness of the declaration power and many other dialogic mechanisms under the Charter (especially s 7 and 32(1)).

In relation to the extrinsic aids criticism, the *Momcilovic* Court refers to the Second Reading Speech which states that the proposed charter was based:

on human rights laws that now operate successfully in the Australian Capital Territory, the United Kingdom and New Zealand. Importantly, it is nothing like the United States Bill of Rights. This Bill promotes a dialogue between the three arms of the government – the Parliament, the executive and the courts – while giving Parliament the final say. Unlike the United States, courts will not have the power to strike down legislation.²¹⁵

It then notes that the Victorian Committee drew the same distinction between the "United States Bill of Rights" and "modern human rights law like that now operating in the United Kingdom".²¹⁶ It then quotes a passage from the ACT Report highlighting that the "the legislature is assigned the 'last say'" and that under the dialogue the "judiciary should not be able to invalidate legislation".²¹⁷

At the risk of labouring a point, these aspects of the Second Reading Speech, the Victorian Report and the ACT Report are aimed at different matters to that which the *Momcilovic* Court lays claim. The speech and the reports are primarily aimed at highlighting the *similarities* between the Victorian, British and NZ statutory rights instruments; and differentiating those instruments from the United States constitutional rights instrument – that is, differentiating models based on an institutional dialogue, from those based on a judicial monologue. The speech and reports do *not* differentiate the dialogue established under the Charter statutory model from the dialogue established under the UKHRA and NZBORA statutory models; *nor* do they suggest that the judicial declaration power is *the* crux of the dialogue.

The *Momcilovic* Court concludes the discussion of the extrinsic aids by claiming that the Victorian Committee "evidently concurred" that the judicial declaration power was *the* defining feature, having described such declarations as "a channel through which the dialogue between the courts and the parliament takes place ... [T]hey are significant both as a trigger for Parliamentary

²¹⁴ *Momcilovic* [2010] VSCA 50 at [93].

²¹⁵ *Momcilovic* [2010] VSCA 50 at [93], citing Victoria, Legislative Assembly, *Parliamentary Debates* (4 May 2006) p 1,290 (Mr Hulls).

²¹⁶ *Momcilovic* [2010] VSCA 50 at [93], citing Victorian Committee, n 83, p 15:

Rather than handing over power to judges, as does the United States Bill of Rights, modern human rights laws like that now operating in the United Kingdom do not give judges the power to strike down laws made by Parliament. Instead, judges can be directed to open up debate about how law and policy is made, casting a powerful lens over the day-to-day work of Government. As we set out in later Chapters, the Committee is recommending a model that gives the final say to Parliament and not the courts. This is very different to places like the United States.

²¹⁷ *Momcilovic* [2010] VSCA 50 at [95], citing the ACT Committee, n 174 at [4.5]:

The Consultative Committee was impressed by the concept of creating a dialogue ... on human rights issues between the three arms of government and the community. However, the dialogue proposed is not an open-ended one and, after debate, the legislature is assigned the "last say" in relation to human rights issues. To create a dialogue, the judiciary should not be able to invalidate legislation but rather be able to give its opinion that a law is incompatible with the *Human Rights Act*. It should then be a matter for the legislature to determine whether or not to amend the legislation so that it conforms to the *Human Rights Act*.

The *Momcilovic* Court ought to have acknowledged that the ACT Report summarised the nine main features of dialogue, which included pre-enactment scrutiny, the judicial interpretation power and the judicial declaration power (at [4.8]). The ACT Committee concluded that "these features *will combine* to produce an appropriate balance between the legislature, the executive and the judiciary in relation to human rights issues" (at [4.9]) (emphasis added). None of this suggests that judicial declarations were intended to be *the* tool for dialogue.

reconsideration and as a means of holding the executive to account”.²¹⁸ This does not withstand scrutiny. A reference to judicial declarations as “a” channel for dialogue does not support a claim that judicial declarations are “the” channel for dialogue. In addition, the words omitted from this quote by the *Momcilovic* Court are significant: “a channel through which the dialogue between the courts and the parliament takes place. *While declarations of incompatibility have been used infrequently in the United Kingdom, they are significant both as a trigger for Parliamentary reconsideration and as a means of holding the executive to account.*”²¹⁹ The omitted reference to the *infrequency* of the declarations does not support the *Momcilovic* Court’s conclusion that judicial declarations are the dialogic tool. This deliberate omission helped to reverse-engineer an argument that is not supported by the legislative history

Moreover, this quotation forms part of the Victorian Report’s Chapter on the “Institutions of government”,²²⁰ and more specifically on “What should be the role of the courts?”²²⁰ This 10-page part of the Victorian Report canvasses judicial interpretation powers, judicial invalidation powers, and judicial declaration powers. The 10 pages also include Recommendation 17 that “[a]ll Victorian Courts and tribunals should be required to interpret legislation in a way that is compatible with the Charter ... tak[ing] into account of the purpose of the legislation”, and Recommendation 19 that “[i]f the Victorian Supreme Court is satisfied that an Act ... cannot be interpreted in a way that is consistent with the human rights listed in the Charter, it may make a Declaration of Incompatibility”.²²² Nowhere across the 10 pages is there any explicit suggestion that declarations are more important than interpretations per se or in establishing a dialogue. Indeed, the opposite is true. Read as a whole, the 10 pages outline an integrated range of obligations and powers given to the judiciary, starting with an obligation of interpretation and ending with a power of declaration, with both interpretation and declaration being essential. If anything, the interpretation power could be viewed as predominant given that a declaration is only available once a rights-compatible interpretation is shown not to be possible – a fact that was acknowledged on numerous occasions in the Victorian Report.²²³ Finally, the Explanatory Memorandum fails to support the *Momcilovic* Court’s conclusions as well.²²⁴

In relation to the failure to comprehend the interconnectedness between judicial declarations and the other dialogic mechanisms, the *Momcilovic* Court’s focus on judicial declarations at the expense of ss 7(2) and 32(1) must be critically examined. It held that:

the making of a declaration of inconsistent interpretation accords more closely with *this conception of dialogue*, and in particular with the avowed purpose of “*giving Parliament the final say*”, than would an

²¹⁸ *Momcilovic* [2010] VSCA 50 at [96], citing Victorian Committee, n 83, p 86 (emphasis added).

²¹⁹ Victorian Committee, n 83, p 86 (emphasis added).

²²⁰ Victorian Committee, n 83, p 66-90.

²²⁰ Victorian Committee, n 83, p 81-90.

²²² Victorian Committee, n 83, Recommendations 17 and 19 (pp 83 and 88 respectively).

²²³ See Recommendation 19 and the introductory paragraph to section 4.5.3 on declarations of incompatibility in the Victorian Report (Victorian Committee, n 83, pp 85-86), as opposed to the concluding paragraph of the same section which the *Momcilovic* Court selectively quotes. The introductory paragraph states (at 85) (emphasis added):

Many submissions expressed support for the courts having the power to make a Declaration of Incompatibility *where the court is unable to interpret legislation in a way that is consistent with the Charter*. It was pointed out that this is a good compromise between the power of declaring legislation invalid and allowing government institutions to simply ignore the Charter. It preserves the sovereignty of Parliament, yet still encourages dialogue between the courts, Parliament and the executive.

This quotation again highlights the preoccupation with parliamentary monologues about/monopolies over rights on the one hand (as was the status quo in Victoria), and judicial monologues about/monopolies over rights on the other (as illustrated by the United States Constitution).

²²⁴ See the anodyne discussion of cl 36(2): Explanatory Memorandum, n 96, p 26. Nothing in this discussion suggests that s 36(2) is of greater importance than, or should be used more frequently than, s 32(1).

expanded view of “interpretation” which allowed courts to depart from the plain meaning of a statutory provision and *the intent of Parliament* thereby conveyed.²²⁵

First, it is not clear what the *Momcilovic* Court means by “this conception of dialogue”. It may have been referring to the dialogue established under the ACT, British or NZ models, given the reference to these models in the preceding paragraph of the judgment.²²⁶ This answer is unsatisfactory because, at the very least, the British model adopts “an expanded view of ‘interpretation’”²²⁷ which the *Momcilovic* Court’s conception of dialogue rejects. Moreover, the NZ model essentially adopts the Preferred Method and, given the *Momcilovic* Court’s close link between the *Momcilovic* Method and s 32(1), it is unlikely to be referring to the NZ model.

Alternatively, the *Momcilovic* Court cites academic commentary of this author to “exemplify the ‘dialogue model’ of human rights”.²²⁸ The concept of dialogue explored in that commentary does *not* favour the *Momcilovic* Method or place judicial declarations at the centre of the dialogue.²²⁹ As outlined above,²³⁰ the concept of dialogue is based on the Preferred Method to statutory interpretation, which was later adopted by Nettle J in *RJE*,²³¹ in *Kracke*²³² and in *Das*.²³³ This Preferred Method favours a central position for s 7(2) proportionality analysis and a remedial use for s 32(1).²³⁴ Moreover, the dialogue clearly relies on the contributions and responses of each arm of government: the contributions of the executive to the “rights questions”, via the s 28 statements of (in)compatibility;²³⁵ the contributions of the Parliament to the “rights questions” via the reports of the Scrutiny of Acts and Regulations Committee under s 30 and the broader parliamentary debate;²³⁶ the contributions of the judiciary to the “rights questions” through its assessment of the justifiability of any limits on rights,²³⁷ and its contribution to the “Charter questions” through rights-compatible interpretations under s 32(1) and, if needed, any declarations under s 36(2);²³⁸ and the representative response mechanisms to judicial contributions under *both* s 32(1) and s 36(2),²³⁹ being the option to “do nothing”, the option to respond through the enactment of ordinary legislation, or the option of using the override provision under s 31.²⁴⁰ This conception of dialogue relies on many more mechanisms than just judicial declarations under s 36(2), with each mechanism being interconnected and of equal importance.

²²⁵ *Momcilovic* [2010] VSCA 50 at [94] (emphasis added). The *Momcilovic* Court also suggests that the “final say” is embodied in the obligation for a relevant minister to provide a formal response to a declaration under s 37.

²²⁶ The preceding paragraph of the judgment sees the *Momcilovic* Court quoting from the Second Reading Speech: *Momcilovic* [2010] VSCA 50 at [93].

²²⁷ *Momcilovic* [2010] VSCA 50 at [94].

²²⁸ *Momcilovic* [2010] VSCA 50 at [93], fn 155, citing Debeljak, “Parliamentary Sovereignty and Dialogue”, n 13.

²²⁹ Debeljak, “Parliamentary Sovereignty and Dialogue”, n 13, esp at 25-35.

²³⁰ See n 46.

²³¹ *RJE* (2008) 21 VR 526 at [114]-[119].

²³² *Kracke* (2009) 29 VAR 1 at [65], [67]-[235].

²³³ *Das* (2009) 24 VR 415 [50]-[53].

²³⁴ Debeljak, “Parliamentary Sovereignty and Dialogue”, n 13 at 28, 32.

²³⁵ Debeljak, “Parliamentary Sovereignty and Dialogue”, n 13 at 28-29.

²³⁶ Debeljak, “Parliamentary Sovereignty and Dialogue”, n 13 at 29.

²³⁷ Debeljak, “Parliamentary Sovereignty and Dialogue”, n 13 at 30-31.

²³⁸ Debeljak, “Parliamentary Sovereignty and Dialogue”, n 13 at 31-33.

²³⁹ It should be noted that the executive and legislature *may* decide to respond to a s 32(1) judicial interpretation, but *must* respond to a s 36(2) judicial declaration: Charter, s 37.

²⁴⁰ Debeljak, “Parliamentary Sovereignty and Dialogue”, n 13 at 33-35. The “do nothing” option entails leaving the s 32(1) rights-compatible interpretation in place, or the s 36(2) rights-incompatible law in operation. The “legislate” option in relation to s 32(1) rights-compatible interpretations may entail the Parliament re-enacting more expressly its rights-incompatible law or retaining but refining the rights-compatible interpretation given by the judiciary. The “legislate” option in relation to a s 36(2)

Secondly, the *Momcilovic* Court's focus on "giving Parliament the final say"²⁴¹ does not justify its conception of dialogue. To acknowledge that Parliament was intended to have the "final say" over rights does *not* dictate that the judicial declaration power is *the* tool of institutional dialogue; and it is *not* inconsistent to recognise that Parliament was intended to have the "final say" over rights and to simultaneously vest s 32(1) with remedial reach. In relation to both points, neither s 32(1) nor s 36(2) undermine Parliament having the "final say" under the Charter because representative response mechanisms exist in relation to both.²⁴² Further, "final say" language is utilised to distinguish statutory rights instruments where the judiciary *does not* get the "final say" from constitutional rights instruments under which the judiciary *arguably does* get the "final say" when it invalidates legislation. How this distinct debate about the *competing* statutory and constitutional models justifies an elevation of judicial declarations and an undermining of the remedial power of judicial interpretations under *one* of the competing models evades reasoning.²⁴³

Thirdly, the *Momcilovic* Court's preoccupation with the impact of the "intent of Parliament"²⁴⁴ has led it to throw out the baby with the bath water. In deciding the import of the words "consistently with their purpose", the *Momcilovic* Court could simply have adopted the British or NZ methodology, and separately decided whether s 32(1) resembled the "high water mark"²⁴⁵ of s 3(1) interpretation under *R v A*, the middle ground as represented by *Ghaidan* and explicitly referred to in the legislative history of the Charter, the more minimalist decision of *Wilkinson* decided after the Charter came into force, or indeed something else.²⁴⁶ This would have retained the intended remedial features of s 32(1), but drawn a clear line between what s 32(1) regards as possible/legitimate judicial interpretation and impossible/illegitimate judicial legislation. Whether the line was to be drawn at *Wilkinson*, *Ghaidan*, *R v A*, or elsewhere did *not* dictate a rejection of the accepted methodology – the Preferred Method.²⁴⁷

Instead, the *Momcilovic* Court has relied on the debate between constitutional and statutory rights models in order to improperly elevate the role of judicial declarations under one statutory rights model. In the paragraph preceding the "conception of dialogue" and "final say" discussion, the *Momcilovic* Court relies on a quotation from the Second Reading Speech which distinguishes the ACT, British and NZ models, from the United States model.²⁴⁸ If the question before the *Momcilovic* Court concerned whether judges had the power of invalidation or merely declaration, every argument constructed and all extrinsic aids employed would be of relevance and persuasive. If the question before the *Momcilovic* Court concerned whether the Charter adopted a judicial monologue/monopoly model rather than an institutional dialogue model, again the arguments and aids would be salient. However, these questions had already been answered by the sovereign Parliament with the enactment

declaration may entail the legislature redrafting the law to account for the rights deficiency identified by the judiciary. The override option may be in response to either a s 32(1) rights-compatible interpretation or s 36(2) declaration, thereby allowing the legislature to suspend both powers for five years.

²⁴¹ *Momcilovic* [2010] VSCA 50 at [94].

²⁴² See n 240.

²⁴³ Furthermore, the use of the so-called "final say" argument throughout the parliamentary debate, and the court's reliance on this in its reasoning, is bound to mislead. The notion that "Parliament gets the final say" is not true; it is really political-speak for saying the "judiciary does not get the final say". Under institutional dialogue models, interactions between the arms of government are ongoing. To be sure, the judiciary does not have the final say; but nor does the Parliament or the executive, because any representative responses to the judicial contribution to the dialogue are themselves subject to the dialogue mechanisms under the Charter, as outlined in the preferred UKHRA-based methodology discussed above: see Debeljak, "Parliamentary Sovereignty and Dialogue", n 13 at 35. Hogg and Bushell refer to the representative responses as "legislative sequels", terminology which helps to illustrate this point: Hogg PW and Bushell AA, "The Charter Dialogue Between Courts and Legislatures (or Perhaps the Charter of Rights Isn't Such a Bad Thing after All)" (1997) 35 *Osgoode Hall Law Journal* 75.

²⁴⁴ *Momcilovic* [2010] VSCA 50 at [94].

²⁴⁵ Wadham, n 15 at 638.

²⁴⁶ As per Nettle JA in *RJE* (2008) 21 VR 526 at [118]-[119]; Bell J in *Kracke* (2009) 29 VAR 1 at [214]-[216]; Warren CJ in *Das* (2009) 24 VR 415 [175].

²⁴⁷ See n 64.

²⁴⁸ *Momcilovic* [2010] VSCA 50 at [93], citing *Victoria*, n 215, p 1,290 (Mr Hulls).

of the Charter – the Charter is a statutory model establishing an institutional *dialogue*. The question before the *Momcilovic* Court concerned the proper construction of s 32(1) *given* the adoption of a *statutory* model establishing an institutional *dialogue*, which has nothing to do with the judicial power of invalidation under the United States Constitution and its consequential judicial monologue. Again, the *Momcilovic* Court focuses on the wrong debate, which leads it to adopt an unduly restrictive “conception of dialogue”, which in turn justifies the elevation of judicial declarations and the undermining of the remedial strength of the interpretation power.

The *Momcilovic* Court does recognise Parliament’s capacity to reverse judicial interpretations that the representative arms disagree with, but refuses to acknowledge that this is an aspect of dialogue.²⁴⁹ This refusal is so, even though examples of dialogue driven from s 32(1) interpretations have occurred in Victoria under the Charter.²⁵⁰ The *Momcilovic* Court does not explain *why* such interactions between judges and Parliament do not represent dialogue; nor does it explain *why* such interactions are any less of a “distinguishing feature” than judicial declarations. There is certainly nothing in the *Momcilovic* Court’s analysis that dictates this result. It seems that it can only reach this conclusion because of its misapplication of the “models” debate when deciding the meaning of s 32(1), which in turn led it to misidentify the conception of dialogue and its distinguishing features.²⁵¹

In conclusion, it is appropriate to note that the *Momcilovic* Court’s misapplication of arguments from constitutional models was not confined to its discussion of the s 32(1)/s 3(1) replication issue.²⁵²

²⁴⁹ “But this is not what is meant when the concept of a ‘dialogue’ between courts and Parliament is described as the distinguishing feature of this legislative model of human rights protection”: *Momcilovic* [2010] VSCA 50 at [94].

²⁵⁰ The prime example is *RJE* (2008) 21 VR 526 (Nettle JA particularly) and Parliament’s response to it (*Serious Sex Offenders Monitoring Amendment Act 2009* (Vic)): see further n 65.

²⁵¹ The *Momcilovic* Court also uses certainty of interpretation and representative democracy to support its narrow reading of s 32(1). Word restrictions do not allow a full consideration of this discussion, but the following points are salient. The Charter is a major change to our representative democracy and was years in the making. The government initiated the process by issuing a *Justice Statement* (n 266), followed by an exhaustive community consultation driven by a governmental *Statement of Intent* (n 183), followed by extensive parliamentary debate on the proposed charter, followed by a long and staggered transitional period allowing all arms of government to prepare for this fundamental shift in governance (see s 2 of the Charter). Moreover, this “significant change” in the interpretation rules was “signalled in the clearest of terms” by Parliament: *Momcilovic* [2010] VSCA 50 at [99]. Parliament had before it the *Statement of Intent*, the Victorian Report, the proposed Charter, the Explanatory Memorandum and the Second Reading Speech. These documents clearly outlined the choice between a constitutional and a statutory model of rights protection. Having preferred the statutory model, these documents canvassed the judicial role under the statutory models from NZ, Britain and the ACT. The proposed charter was clearly modelled on the UKHRA, not the NZ or ACT models. Further, it is curious that the *Momcilovic* Court refers to Lord Millett in *Ghaidan* in order to bolster this argument about “significant change”. Lord Millett did not dissent in respect of the broad scope given to s 3(1) of the UKHRA, but rather dissented only on the *application* of s 3(1) to the particular fact situation (*Ghaidan* [2004] 2 AC 557 at [69], [70]). Arguably, Lord Millett’s obiter regarding the scope of s 3(1) is the most “radical” interpretation of s 3(1) in the judgment (see esp at [59], [60], [67]). If the *Momcilovic* Court’s reasoning is applied to Lord Millett’s judgment, it might be found that Lord Millett accepts that s 3(1) is a “departure of the *Ghaidan* kind from the ‘ordinary’ rules of interpretation”; that this is a major change to representative democracy; and that such a change was deliberately brought about by the British Parliament.

²⁵² Having rejected the methodology in Britain and NZ (the Preferred Method), the *Momcilovic* Court offered additional justifications for the *Momcilovic* Method (*Momcilovic* [2010] VSCA 50 at [105]-[110]). Focusing on its discussion based on the dissenting opinion of Elias CJ in *Hansen* [2007] 3 NZLR 1, the *Momcilovic* Court bolsters its position by, inter alia, referring to Elias CJ’s reliance on the Canadian Charter in order to highlight that the limitations question is a “distinct and later enquiry” (at [109]). Referring to the Canadian Charter, Elias CJ states in *Hansen* (at [22], as cited in *Momcilovic* at [109] (emphasis added)):

[t]he first question is the interpretation of a right. *In ascertaining the meaning of a right, the criteria for justification are not relevant.* The meaning of the right is ascertained from the “cardinal values” it embodies. Collapsing the interpretation of the right and s 1 justification is insufficiently protective of the right ... This reasoning is in my view equally compelling in the context of s 5 of the NZBORA. Straining to graft s 5 into the interpretative direction under s 6 is not necessary to give it work to do in the NZBORA containing s 4.

It is not clear why the *Momcilovic* Court relies on this statement; indeed, such reliance indicates a misunderstanding of what is being discussed by Elias CJ. Elias CJ is discussing the “meaning of the *right*” in this passage, not the meaning of the *statutory provision* in question. A discussion about the meaning of a right and its interaction with a limitations provision has been confused with a discussion about the meaning of s 32(1) and its interaction with a limitations provision. The Canadian discussion about issues concerning the “rights questions” *only* cannot be morphed by the *Momcilovic* Court into a discussion about the interaction between the “rights questions” (ie s 7(2) limitation) and the “Charter questions” (ie s 32(1) interpretation).

What is possible under s 32(1)?

Tentatively,²⁵³ the *Momcilovic* Court held that s 32(1) “is a statutory directive, obliging courts ... to carry out their task of statutory interpretation in a particular way”.²⁵⁴ Section 32(1) is part of the “framework of interpretive rules”,²⁵⁵ which includes s 35(a) of the ILA and the common law rules of statutory interpretation, particularly the presumption against interference with rights (or, the principle of legality).²⁵⁶ To meet the s 32(1) obligation, a court must explore “all ‘possible’ interpretations of the provision(s) in question, and adopt[] that interpretation which least infringes Charter rights”,²⁵⁷ with the concept of “possible” being bounded by the “framework of interpretative rules”. For the *Momcilovic* Court, the significance of s 32(1) “is that Parliament has embraced and affirmed [the presumption against interference with rights] in emphatic terms”, codifying it such that the presumption “is no longer merely a creature of the common law but is now an expression of the ‘collective will’ of the legislature”.²⁵⁸ The guaranteed rights are also codified in the Charter.²⁵⁹

This conclusion is most unsatisfactory, given the choices before Parliament, the extensive legislative history to the Charter, and the broader context within which this conclusion sits.²⁶⁰

The framework of interpretative rules

If s 32(1) was intended to be part of a “framework of interpretative rules”, it is unclear why the Parliament chose to adopt language similar to s 3(1) rather than s 30 of the *Human Rights Act 2004* (ACT) (ACTHRA).²⁶¹ At the time the Charter was enacted, s 30(1) of the ACTHRA stated that “[i]n

Moreover, there are insurmountable difficulties with using the Canadian Charter to support this aspect of the *Momcilovic* Court’s reasoning. The Canadian Charter and the Victorian Charter do share the same “rights questions”; however, the Canadian Charter mechanisms differ from the Victorian Charter mechanisms. The Victorian Charter is a statutory instrument employing remedial mechanisms of judicial interpretation and judicial declaration. In contrast, the Canadian Charter is a constitutional rights instrument, employing the remedial mechanism of judicial invalidation. It is not clear how the *Momcilovic* Court can legitimately use the approach to the “rights questions” under the Canadian Charter, to bolster an approach to the “Charter questions” under the Victorian Charter, when the Canadian Charter and the Victorian Charter employ different Charter mechanisms. Indeed, Warren CJ has confirmed that “the jurisprudence from these [constitutional] jurisdictions may be of assistance in determining *comparable principle*” (*Das* (2009) 24 VR 415 at [97]). As Warren CJ suggests, “the only difference of importance between [constitutional] instruments and the Victorian Charter is in the remedial powers of the courts under such instruments” (*Das* (2009) 24 VR 415 at [97]). In the Chief Justice’s words, the *Momcilovic* Court is not using Canadian Charter jurisprudence to “assist[] in determining comparative principle”.

²⁵³ The *Momcilovic* Court only provided its “tentative views” because “[n]o argument was addressed to the Court on this question”: *Momcilovic* [2010] VSCA 50 at [101]. Indeed, three of the four parties sought the adoption of the preferred UKHRA-based methodology as propounded by Bell J in *Kracke* (2009) 29 VAR 1 at [65], [67]-[235].

²⁵⁴ *Momcilovic* [2010] VSCA 50 at [102].

²⁵⁵ *Momcilovic* [2010] VSCA 50 at [103]. It is merely “part of the body of rules governing the interpretative task” (at [102]).

²⁵⁶ For sound and persuasive arguments about why s 32(1) creates a stronger obligation than the common law presumptions, being arguments that are contrary to this conclusion of the *Momcilovic* Court, see Evans and Evans, n 98 at [3.11]-[3.17].

²⁵⁷ *Momcilovic* [2010] VSCA 50 at [103].

²⁵⁸ *Momcilovic* [2010] VSCA 50 at [104].

²⁵⁹ *Momcilovic* [2010] VSCA 50.

²⁶⁰ It is also unsatisfactory when the nature of the common law principles is considered. The common law principles are no more than assumptions which give way to contrary parliamentary intention, whether that intention is express or necessarily implied. To classify s 32(1) as a codification of the principle of legality demotes it from a strong and far reaching rule of interpretation, to an assumption that is readily displaced by contrary parliamentary intent. See generally Pearce and Geddes, n 90 at [5.2]-[5.3].

²⁶¹ Section 30 of the *Human Rights Act 2004* (ACT) (ACTHRA), at the time the Charter was adopted, read:

- (1) In working out the meaning of a Territory law, an interpretation that is consistent with human rights is as far as possible to be preferred.
- (2) Subsection (1) is subject to the *Legislation Act*, section 139.
- (3) In this section:
working out the meaning of a Territory law means –
 - (a) resolving an ambiguous or obscure provision of the law; or
 - (b) confirming or displacing the apparent meaning of the law; or
 - (c) finding the meaning of the law when its apparent meaning leads to a result that is manifestly absurd or is unreasonable; or

working out the meaning of Territory law, an interpretation that is consistent with human rights is as far as possible to be preferred".²⁶² Section 30(2) then stated that "subsection 1 is subject to the *Legislation Act*, section 139", with the statutory note indicating that "s 139 requires the interpretation that would best achieve the purpose of a law to be preferred to any other interpretation (the purposive test)".²⁶³ Section 30 of the ACTHRA could be characterised as establishing a "framework of interpretative rules", yet s 3(1) of the UKHRA could not. The Parliament had both provisions to choose from and it chose to model s 32(1) on s 3(1). This clear choice undermines the *Momcilovic* Court's conclusion.

Codifying the principle of legality?

Moreover, if s 32(1) was intended to codify the principle of legality, Parliament could have achieved this in much more simple language and in much less complicated legislation. For example, Parliament could have easily taken the language from *Plaintiff S157*,²⁶⁴ which predated the Charter, and simply amended the ILA by inserting a provision stating "that the legislature is not intended to abrogate or curtail fundamental rights or freedoms unless such an intention is clearly manifested by unmistakable and unambiguous language or necessary implication".²⁶⁵ The same wording could have been adopted in s 32(1) of the Charter. Moreover, the intention to codify the principle of legality would have been a simple message to convey in the *Justice Statement*,²⁶⁶ the *Statement of Intent* that launched the Community Consultation,²⁶⁷ the Victorian Report, and the ensuing Charter, Explanatory Memorandum and Second Reading Speech. The truth is that such a message is *not* conveyed; rather, all of these sources preceded on the basis that the Charter was adopting a statutory rights instrument, modelled the most closely on the UKHRA.

In coming to its conclusions on s 32(1), the *Momcilovic* Court relies significantly on Geiringer's analysis of the 2007 NZ decision of *Hansen*,²⁶⁸ in which she suggests that the s 6 mandated interpretive obligation under the NZBORA is a codification of the principle of legality.²⁶⁹ The *Momcilovic* Court states that her comments "can be applied equally to s 32(1)".²⁷⁰ Both its claim of applicability and its reliance on Geiringer require examination. First, the *Momcilovic* Court does not explain why Geiringer's theory is equally applicable to s 32(1). No question would arise if s 32(1) had adopted the text of s 6;²⁷¹ nor would a question arise if *Hansen* was decided before the Charter was enacted. But neither is true. Given this, the *Momcilovic* Court ought to explain *how* a theory about s 6 relates to the textually distinct s 32(1), and how *Hansen* which post-dates the Charter, and any theories

(d) finding the meaning of the law in any other case.

²⁶² This is a combination of both s 3(1) the UKHRA ("as far as possible") and s 6 of the NZBORA ("to be preferred").

²⁶³ Section 30 of the ACTHRA was amended as a consequence of its mandated review process, and the new s 30 is closely modelled on the Charter. If the ACT parliamentary intention was to secure a "framework of interpretative rules", this amendment is taking it further away from that intention than its original incarnation of s 30. The amended s 30 states: "So far as it is possible to do so consistently with its purpose, a Territory law must be interpreted in a way that is compatible with human rights."

²⁶⁴ *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 (*Plaintiff S157*).

²⁶⁵ *Plaintiff S157* (2003) 211 CLR 476 at [30].

²⁶⁶ Attorney-General, *Justice Statement* (May 2004). The *Justice Statement* prioritised the need to recognise and protect human rights in Victoria, and committed the government to a community consultation on how best to protect and promote human rights in Victoria.

²⁶⁷ Victorian Government, n 183.

²⁶⁸ *Hansen* [2007] 3 NZLR 1.

²⁶⁹ Geiringer, n 11 at 73, 75, 77. In particular, Geiringer suggests "that the New Zealand case law ... envisages the Bill of Rights Act as a legislative manifestation of (as opposed to departure from) common law approaches to value-oriented interpretation" (at 73).

²⁷⁰ *Momcilovic* [2010] VSCA 50 at [104].

²⁷¹ The language of s 32(1) is borrowed from the text of s 3(1), not s 6: see above. Indeed Geiringer herself refers to Lord Cooke's remarks that s 3(1) "read as a whole conveyed 'a rather more powerful message' than its New Zealand counterpart": n 11 at 66.

flowing from *Hansen*, are of assistance in identifying Parliament's intention in enacting s 32(1) in 2006. Rather than relying on the British jurisprudence explicitly referred to by name and concept in the extrinsic aids to the Charter,²⁷² the *Momcilovic* Court discovers²⁷³ Parliament's intention in 2006 from a NZ case decided in 2007 and academic commentary written in 2008.

Secondly, of greater concern is the selective and acontextual reliance on the passage quoted by the *Momcilovic* Court. Beyond the *Momcilovic* Court's focus, Geiringer draws some well-considered conclusions about methodology. She acknowledges that *Hansen* establishes a two-phase approach to interpretation, which is similar to the "rights questions" and "Charter questions" under the Preferred Method.²⁷⁴ Geiringer then concludes that a two-phase approach is appropriate if the interpretation obligation is distinct from ordinary interpretation at common law, such that it is "not surprising that the House of Lords has adopted a similar methodology under s 3(1) of the UKHRA".²⁷⁵ However, if the interpretation obligation codifies the common law principle of legality, Geiringer concludes that the phase-two inquiry is redundant. This conclusion does not progress the *Momcilovic* Court's argument because it relies on an assumption, and it is *that assumption* which is at the heart of the case – the assumption being that s 32(1) merely codifies the common law, and is to be considered the same as (rather than distinct from) ordinary interpretation under the common law. Surely this assumption cannot be made by the *Momcilovic* Court without justification.²⁷⁶

More importantly, the *Momcilovic* Court fails to acknowledge the conclusions Geiringer draws from conceptualising s 6 as a codification of the principle of legality. *Immediately after* the passage quoted by the *Momcilovic* Court,²⁷⁷ Geiringer states:

there is surely a respectable argument to be made that s 6 of the NZBORA may on occasion entitle the courts to adopt constructions that are *at odds with statutory purpose*. As Lord Steyn put it in *Ghaidan* with reference to the UKHRA, the question of whether the adoption of a s 6-mandated meaning would "flout the will of Parliament as expressed in the statute under examination ... cannot sensibly be considered without giving full weight to the countervailing will of Parliament as expressed in the [NZBORA]".²⁷⁸

Indeed, Geiringer's central thesis – "that s 6 may on occasion entitle the courts to adopt constructions that are *at odds* with statutory purpose"²⁷⁹ – and her conclusion "that in an appropriate case, even quite strong legislative indications of 'purpose' *must yield* to the statutorily mandated

²⁷² The Victorian Report refers to the British jurisprudence by name and the Victorian Report and the Explanatory Memorandum lift concepts from that jurisprudence in explaining the effect of the inserted phrase: see Victorian Committee, n 83, pp 82-83; Explanatory Memorandum, n 96, p 23. For example, the Explanatory Memorandum states that "[t]he reference to statutory purpose is to ensure that in doing so 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" (p 23).

²⁷³ "In view of our conclusion that s 32(1) was not intended to create a 'special' rule of statutory interpretation, we should state briefly *how we consider the provision was intended to operate*": *Momcilovic* [2010] VSCA 50 at [101] (emphasis added).

²⁷⁴ See n 46. Geiringer notes that phase one requires a provision to be given its ordinary meaning, and then assessed against protected rights and justifiable limitations; if a provision violates a protected right in an unjustifiable manner, phase two requires consideration of whether a provision can be given a meaning that is more consistent with the right: n 11 at 83.

²⁷⁵ Geiringer, n 11 at 83-84.

²⁷⁶ Indeed, Geiringer builds her thesis "both by reference to the New Zealand case law and, as a point of contrast, by reference to the position in the United Kingdom under the UKHRA" (n 11 at 73). The conclusions that flow from such a contrast are interesting, but give little insight into what Parliament intended under s 32(1) of the Charter, particularly if one is of the very reasonable opinion that s 32(1) was modelled on s 3(1) of the UKHRA and codified *Ghaidan*.

²⁷⁷ *Momcilovic* [2010] VSCA 50 at [104], citing Geiringer, n 11 at 89.

²⁷⁸ Geiringer, n 11 at 89 (emphasis added). Geiringer points out that the intention behind the NZBORA will *not* prevail every time there is a clash of statutory intentions. She outlines a range of factors that will be balanced in each case of conflict, including the right in issue, the legislation in question, the nature of the breach, the force with which the countervailing purpose is expressed, and the legislative history (at 89-90). Geiringer also notes that any "democratic objection[s]" to such interpretative techniques are "significantly ameliorated by the codification of a bill of rights" (at 63).

²⁷⁹ Geiringer, n 11 at 63.

imperatives set out in the NZBORA”²⁸⁰ – are based on the common law: “[w]here fundamental values are perceived to be threatened, there is a long history of common law courts utilising presumptions of interpretation to promote literal or even *strained* meanings in disregard of statutory purpose.”²⁸¹

This broader and central analysis of Geiringer’s does not sit comfortably with the *Momcilovic* Court’s reasoning. The specific question being answered in this part of its judgment is whether s 32(1) replicates s 3(1). Quite correctly, considerable significance is attached to the additional words “consistently with their purpose”. The *Momcilovic* Court is at pains to create a picture of s 32(1) in contradistinction to s 3(1) and particularly to *Ghaidan*, and to identify a conceptual analysis of s 32(1) that places the statutory purpose of the legislation being interpreted *under* the Charter above the statutory purposes contained *within* the Charter. The answer to both conundrums presented itself to the *Momcilovic* Court in conceptualising s 32(1) as a codification of the principle of legality, relying heavily on Geiringer’s musings for the NZBORA. Unfortunately, Geiringer’s principle of legality does not support fundamental elements underpinning the *Momcilovic* Court’s conclusion²⁸² – to envisage s 32(1) as a codification of the common law does *not* avoid *Ghaidan*-type interpretative analysis, and does *not* put to rest the tension between competing parliamentary intentions (indeed, it does not automatically elevate the statutory purpose of the impugned provision over the statutory purpose of the rights instrument).

CONCLUSION

This article has critiqued the choices made by the *Momcilovic* Court in relation to the reach of s 32(1) and the appropriate methodology for s 32(1) analysis. It questioned the *Momcilovic* Court’s reliance on *Wilkinson*, and scrutinised its decision to reject s 32(1) as a replication of s 3(1). In relation to the latter, the article criticised the *Momcilovic* Court’s understanding of *Ghaidan*, and the reasoning behind its decision that the language of s 32(1) was of a different character to s 3(1). It also criticised the *Momcilovic* Court’s discussion of parliamentary intent because of its selective nature, its tendency to misconstrue and misapply fundamental issues, and its failure to address the weight of extrinsic material opposing its view. Finally, the characterisation of s 32(1) as being part of a framework of interpretative rules and codifying the common law principle of legality was criticised against the choices available to Parliament, the legislative history of the Charter, and the broader context within which the *Momcilovic* Court’s conclusion sits.

Some general conclusion can be drawn from the specific analysis. The *Momcilovic* Court chose to reject and hand back powers that Parliament clearly intended it to have. The *Momcilovic* Court appears to subvert, if not usurp, the sovereignty of Parliament by refusing to acknowledge and accept the intended remedial reach of s 32(1). Instead, the *Momcilovic* Court interpreted s 32(1) to embody a mere codification of what the judiciary had already decided it had power to do under the common law – that is, to abide by the principle of legality. At best, this amounts to the *Momcilovic* Court reneging on a fundamental aspect of our constitutional settlement – that being, the supremacy of Parliament. At worst, some may argue that this is an act of judicial supremacy, with the judiciary considering itself free to decide whether or not it wishes to accept a power that Parliament clearly intended it to have.

It is rather ironic that, by adopting a statutory rights instrument in order to avoid the allegations of judicial supremacy levelled under constitutional rights instruments, one is now querying whether the judiciary has become supreme. As argued elsewhere,²⁸³ perhaps the least problematic rights instrument is a constitutional instrument where judges are empowered to invalidate laws. Under a constitutional instrument, the judicial task is to decide whether a law unjustifiably limits rights, with

²⁸⁰ Geiringer, n 11 at 91.

²⁸¹ Geiringer, n 11 at 63.

²⁸² That is, even if the highly contestable claim that s 6 analysis that post-dates the adoption of s 32(1) was accepted as applicable.

²⁸³ Debeljak J, “Mission Impossible: ‘Possible’ Interpretations under the Victorian Charter and Their Impact on Parliamentary Sovereignty and Dialogue” in Smith M (ed), *Human Rights 2006: The Year in Review* (Castan Centre for Human Rights Law, Melbourne, 2007) pp 169, 188-189.

invalidation flowing from this. The “creative” decision about whether or not to re-enact the invalidated rights-*incompatible* law subject to an override provision, or to amend the rights-*incompatible* law to achieve a valid legislative objective in a less rights-restrictive manner, or to let the rights-*incompatible* law go by allowing the invalidation to stand, is the choice of the representative arms of government. These roles of the judiciary and legislature reflect traditional understandings of judicial and legislative power. In contrast, statutory rights instruments ask of judges an unenviable task – that being, to “fix” rights-*incompatibility* where possible, but to not act as judicial legislators.²⁸⁴ This formula exposes judges to allegations of judicial activism and judicial supremacy, whether well-founded or not. The *Momcilovic* Court, having undermined the reach of s 32(1) and adopted a rights-reductionist methodology, may (or may not) have avoided the prospect of such allegations arising in future judgments under s 32(1), but the very decision *itself* raises questions about judicial usurpation of parliamentary intent.

The solution? In order to secure its intention, Parliament should delete the words “consistently with their purpose” from s 32(1) at the four-year mandated review of the Charter,²⁸⁵ thereby removing any doubt that s 32(1) replicates s 3(1) as propounded in *Ghaidan* which, in turn, will trigger a revision of the appropriate methodology. Alternatively, if the Charter experiment to date has exposed an unacceptable risk in relation to judicial acts of legislation, Parliament must give judges the power to invalidate rights-*incompatible* laws, coupled with an override provision based on the ICCPR.²⁸⁶

²⁸⁴ The following statement from Lamer J of the Canadian Supreme Court in *Slaight Communications v Davidson* [1989] 1 SCR 1038 at 1078 (emphasis added), highlights that constitutional rights instruments do not place judges in an unenviable position of being asked to “reinterpret” laws without becoming law makers:

Although *this Court must not add anything to legislation or delete anything from it in order to make it consistent with the Charter*, there is no doubt in my mind that it should also not interpret legislation that is open to more than one interpretation so as to make it inconsistent with the Charter and hence of no force or effect. Legislation conferring an imprecise discretion must therefore be interpreted as not allowing the Charter rights to be infringed.

²⁸⁵ Charter, s 44.

²⁸⁶ See generally Debeljak J, “Balancing Rights in a Democracy: The Problems with Limitations and Overrides of Rights under the Victorian Charter of Human Rights and Responsibilities Act 2006” (2008) 32 *Melbourne University Law Review* 422.