



Statutory interpretive techniques under the *Charter*

Three stages of the *Charter of Human Rights and Responsibilities 2006* — has the original conception and early technique survived the twists of the High Court's reasoning in *Momcilovic*?¹

Pamela Tate²

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Introduction

The most significant *Charter*³ mechanism to be tested in the courts has been the interpretive obligation under s 32(1); that is, the obligation to interpret legislation compatibly with human rights. More exactly, it is the obligation to interpret all statutory provisions in a way that is compatible with human rights, so far as it is possible to do so consistently with their purpose.⁴

To explore the interpretive techniques that have been adopted under s 32(1), I will trace three stages of the *Charter*. The first is the pre-enactment stage. During this stage, as Solicitor-General for Victoria, I was appointed in April 2005 as Special Counsel to the Human Rights Consultation Committee that recommended the enactment of the *Charter*. The

¹ *Momcilovic v The Queen* (2011) 245 CLR 1 ('*Momcilovic*').

² A judge of the Court of Appeal, Supreme Court of Victoria. I gratefully acknowledge the assistance of two researchers of the Court of Appeal, Claire Leyden-Duval and Kiri McEwan, in the preparation of this paper.

³ Section 1(1) of the *Charter of Human Rights and Responsibilities* provides: 'This Act may be referred to as the Charter of Human Rights and Responsibilities and is so referred to in this Act'. The convention is to refer to an Act by its short title (as expressed in the *Charter* by s 1(1)) and there is thus no need to refer to the *Charter* as the '*Charter of Human Rights and Responsibilities Act*': see *Interpretation of Legislation Act 1984*, s 10(1)(e); *Deming No 456 Pty Ltd v Brisbane Unit Development Corporation Pty Ltd* (1983) 155 CLR 129, 162 (Wilson J). It may be cited as the *Charter of Human Rights and Responsibilities*. In this paper I will simply refer to it as 'the *Charter*'.

⁴ Section 32(1) reads: 'So far as it is possible to do so consistently with their purpose, all statutory



second stage is the early years of the *Charter*,⁵ after s 32(1) had come into force in 2008.⁶

This was when *RJE v Secretary to the Department of Justice*⁷ was being heard by the Court of Appeal, and *Hogan v Hinch*⁸ by the High Court. The third stage covers *Momcilovic* and the implications that flow from the High Court's reasoning.

In the course of discussing these historical stages I will say something about the principle of legality and why, in my view, the interpretive obligation under the *Charter* is not a statutory expression of that principle. The principle of legality is a common law doctrine that provides that Parliament is not to be taken to have intended to interfere with fundamental rights recognised by the common law in the absence of 'a clear expression of an unmistakable and unambiguous intention'.⁹ The focus is upon discerning an unequivocal intention to interfere with a right and not upon assessing the rationality of the degree of interference consistent with the statutory objective.

My overall aim is to examine how much of the early judicial work, particularly on the relationship between s 32(1) and s 7(2), has survived the High Court's pronouncements in *Momcilovic*. To my mind there is much force in the proposition that a great deal of that early analytical work on interpretive technique has survived and warrants revisiting. In saying that,

provisions must be interpreted in a way that is compatible with human rights'.

⁵ The Bill passed the Legislative Assembly on 15 June 2006 and the Legislative Council on 20 July 2006. It was given royal assent on 25 July 2006.

⁶ The *Charter's* commencement was staggered and divs 3 and 4 of pt 3 came into operation on 1 January 2008: s 2(2). Section 32(1) is in div 3 of pt 3.

⁷ (2008) 21 VR 526 ('*RJE*').

⁸ (2011) 243 CLR 506.

⁹ *Coco v The Queen* (1994) 179 CLR 427, 437. See *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 259 [15], 271 [58] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ); *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309, 329 [21] (Gleeson CJ). See Murray Gleeson, 'The meaning of legislation: context, purpose and respect for fundamental rights' (speech delivered at the Victoria Law Foundation Oration, Melbourne, 31 July 2008); Stephen Gageler, 'Common Law Statutes and Judicial Legislation: Statutory Interpretation as a Common Law Process' (2011) 37 *Monash University Law Review* 1, 12-3.



I distinguish between interpretive technique, on the one hand, and, on the other hand, the scope of permissible interpretations that can be arrived at in reliance on s 32(1), the *Ghaidan*¹⁰ question. Some of the post-*Momcilovic* decisions exhibit a sense, perhaps justifiably, that the jurisprudence on the interpretive obligation has reached an impasse. I would like to separate some of the threads of that jurisprudence to identify a way through that impasse; to assist with what Chief Justice Elias has described as ‘the responsibility to engage with human rights’.¹¹

The first stage — the pre-enactment stage

During the pre-enactment stage, I became aware that it was taking New Zealand a long time to resolve the question of the appropriate interpretive technique under the *New Zealand Bill of Rights Act 1990* (N.Z.) (‘BORA’). Ultimately, it was resolved 17 years after BORA’s enactment, in *Hansen*¹² in 2007. I assumed, with all the enthusiasm of a former-New Zealander who delighted in the sophistication of the Australian legal system, that Victoria, and Australia, would do much better than that. It was my belief that all it would take to obtain some proper law on the subject would be to find a good case on the merits and make sure it headed to the High Court as quickly as possible. Then we could await a beautifully reasoned majority judgment that was straightforward to apply. The High Court had proven in *Cole v Whitfield*¹³ that it could provide lucid reasoning even on an issue as complex as the guarantee under s 92 of the Constitution that trade, commerce and intercourse among the States shall be absolutely free. Surely s 32(1) of the *Charter* would prove no greater

¹⁰ *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 (‘*Ghaidan*’).

¹¹ The Rt. Hon. Chief Justice Dame Sian Elias GNZM, Chief Justice of New Zealand, ‘Launching address: The international experience in human rights law’, *Human Rights Under the Charter: The Development of Human Rights Law in Victoria* conference, 7 August 2014.

¹² *R v Hansen* (2007) 3 NZLR 1 (‘*Hansen*’).

¹³ (1988) 165 CLR 360.



obstacle. It was not to be.

In May 2005¹⁴ the Attorney-General released the Victorian Government's *Statement of*

*Intent*¹⁵ to guide the Committee.¹⁶ With respect to the role of the courts, the *Statement of*

Intent made these observations. The government did not wish to create new individual

causes of action based on human rights breaches.¹⁷ It said, however, that the courts are to

'have an important role to play in interpreting the law and enforcing rights and obligations'.¹⁸

¹⁴ The *Charter* grew out of the *Attorney-General's Justice Statement* of May 2004 (Department of Justice, *New Directions for the Victorian Justice System 2004-2014: Attorney-General's Justice Statement* (May 2004)), ('*Justice Statement*'). One of the key initiatives of the *Justice Statement* was to establish a process of discussion and consultation within the Victorian community on how human rights and obligations could best be promoted in Victoria. The *Justice Statement* recognised that alternative models for human rights protection existed in different jurisdictions, including, on the one hand, constitutionally entrenched 'Bills of Rights' and, on the other hand, ordinary Acts of Parliament, albeit Acts with implications for other statutes. Those alternative models included a constitutionally entrenched charter, or 'Bill of Rights' as exists in the United States, where legislation or executive action that infringes rights can be declared invalid by the courts. Chapter 2 of South Africa's Constitution, being a Bill of Rights, reflects a similar constitutionally entrenched model. The rigidity of such a model was noted in the *Justice Statement* as was the criticism that it allowed judges to render laws passed by the Parliament inoperative and ineffective: see *Justice Statement*, 54. While it is a familiar feature of Australian constitutional life that the High Court has the power to declare laws invalid (for example, *Williams v Commonwealth* (2014) 88 ALJR 701), the criticism remained that the United States and South African models were inappropriate to Victoria where it was unlikely that there would be community support for the entrenching of human rights within Victoria's *Constitution Act 1975* (Vic): see *Justice Statement*, 56. The principal alternative model was that of a statutory charter of rights. As the *Justice Statement* described it, a statutory charter: 'is an ordinary piece of legislation of the Parliament. It is enacted in a manner that makes it no more difficult to change than other Acts of Parliament. It is subject to amendment or repeal in the same manner as all other legislation. A statutory Charter creates a presumption that other legislation must be interpreted to give effect to the rights listed in that Charter. The model does not invalidate any provision or allow a court to refuse to apply another Act's provisions because of inconsistency with one of the rights listed in the Charter of Rights instrument. This is the model of the *Human Rights Act 1998* (UK) and the *New Zealand Bill of Rights Act 1990*': see *Justice Statement*, 54. This was also the model adopted by the Australian Capital Territory ('the ACT') in enacting its *Human Rights Act 2004* (ACT) to which Victoria had regard.

¹⁵ Human Rights Consultation Committee, *Rights, Responsibilities and Respect — The Report of the Human Rights Consultation Committee* (November 2005), Appendix B, 161 ('*Statement of Intent*'). The *Statement of Intent* indicated that the Victorian Government was interested in a model that was similar to the United Kingdom, New Zealand, and the ACT in which rights were contained in an Act of Parliament that could be amended if Parliament saw fit. It expressly disavowed the United States model.

¹⁶ On 18 April 2005 the Attorney-General announced the establishment of the Human Rights Consultation Committee ('the Committee') to report back by 30 November 2005. The Committee was chaired by Professor George Williams and its other members were Professor Haddon Storey QC, Ms Rhonda Galbally and Mr Andrew Gaze.

¹⁷ This stands in contrast to the specific cause of action under s 7(1)(a) of the *Human Rights Act 1998* (UK) ('UKHRA').

¹⁸ See *Rights, Responsibilities and Respect — The Report of the Human Rights Consultation Committee* (November 2005), Appendix B, 162 (*Statement of Intent*).



Given that enforcement was not to proceed by way of specific or sui generis causes of action, this left interpretation as arguably the primary role to be undertaken by the courts.¹⁹

After engaging in extensive consultation,²⁰ the Committee delivered its report²¹ recommending that the *Charter* impose three principal obligations. The first was the obligation on members of Parliament to prepare statements of compatibility in respect of each Bill introduced into a House of Parliament. This became s 28.²² The same notion of compatibility was relied upon to describe the obligation on public authorities not to act in ways that are incompatible with human rights. This became s 38 which, while it does not use the language of compatibility, but rather its opposite, incompatibility, draws on the same cognate concept. The third principal obligation was that of interpreting legislation compatibly

¹⁹ The *Statement of Intent* (at 163) also identified the liberal democratic rights under the *International Covenant on Civil and Political Rights* (opened for signature 16 December 1966, 999 UNTS 171 (entered into force 1976)) as those to provide a starting point for the Committee's deliberations, particularly the right to equality before the law, the right to a fair trial, freedom of expression and freedom of thought, conscience, and religion. This was signed by Australia in 1972 and ratified by Australia in 1980. However, international covenants are not binding in Australia unless they have been specifically incorporated into Australia law by legislation. There has also been a limited common law presumption that, at least in the event of ambiguity, statutes are to be interpreted so as not to be inconsistent with established rules of international law: see *Coleman v Power* (2004) 220 CLR 1, 27-8 [17]–[19] (Gleeson CJ). See The Hon Justice Spigelman, 'Blackstone, Burke, Bentham and the Human Rights Act 2004' (2005) 26 *Australian Bar Review* 1, 7.

²⁰ The Committee released a discussion paper '*Have your say about human rights in Victoria*', *Human rights consultation community discussion paper* (Consultation paper, Human Rights Consultation Committee, 1 June 2005) ('consultation paper'). This was released on 1 June 2005. The Committee actively engaged in community consultation particularly by reference to a set of open-ended questions about whether there was a need further to protect human rights in Victoria, the form that any protection should take, and the range of rights to be protected. It carefully described the key features of the alternative models and, on the role to be performed by institutions, identified that in the ACT, New Zealand, and the United Kingdom 'courts have the task of interpreting legislation to be consistent with human rights' noting that 'the exact wording of this power differs in each case and can be very important in setting out how far courts can go in this process': see consultation paper, 41.

²¹ *Rights, Responsibilities and Respect — The Report of the Human Rights Consultation Committee* (November 2005) ('the report').

²² Section 28 of the Charter imposes on the Member of Parliament who introduces a Bill into a House of Parliament to prepare a compatibility statement in respect of that Bill and to have that statement laid before the House of Parliament into which the Bill is introduced before giving his or her second reading speech on the Bill.



with human rights, s 32(1).²³ These three principal obligations provide the framework of the *Charter*. The same notion of compatibility with human rights also occurs in ss 30 and 41 of the *Charter*, and in s 13 of the *Ombudsman Act 1973* (Vic) and s 21 of the *Subordinate Legislation Act 1994* (Vic) which were amended by the *Charter*.²⁴ The unifying core concept of the Charter is of *compatibility* with human rights.

This has two implications for interpretive technique.

The first is that appreciating how s 32(1) was intended to operate depends on an understanding of how the interpretive obligation interacts with other parts of the *Charter*. Section 32(1) cannot be considered in isolation from the rest of the *Charter*.²⁵

The second raises the question: what does 'compatibility with human rights' mean?

Answering that question turns on how rights were to be treated under the *Charter*.

Critically, it was acknowledged that the human rights protected under the *Charter* should not

²³ In this way it was intended that the *Charter* would bind all three arms of government, the Legislature, the Executive and the Judiciary, in different ways.

²⁴ Section 30 of the *Charter* confers a power on the Scrutiny of Acts and Regulations Committee ('SARC') to report to Parliament as to whether a Bill is incompatible with human rights and s 41 provides that a function of the Victorian Human Rights and Equal Opportunity Commission is to review a public authority's programs and practices, when requested, to determine their compatibility with human rights. Section 13(1)-(2) of the *Ombudsman Act 1973* includes the power to enquire into and investigate whether any administrative action is compatible with human rights: see *Charter*, sch, item 2. Section 21(1)(ha) of the *Subordinate Legislation Act 1994* (Vic) confers a power on SARC to report to Parliament that any statutory rule laid before Parliament is incompatible with the human rights set out in the *Charter*: see *Charter*, sch item 7.4.

²⁵ The brevity of the Charter, if not its charm, depends upon there being a strong inter-relationship between its component parts. This unusual brevity is reflected in other human rights laws such as BORA, the UKHRA, and the *Canada Act 1982* (UK), c 11, sch B pt 1 ('*Canadian Charter of Rights and Freedoms*.') An approach to s 32(1) that recognises its place in the context of the *Charter* as whole reflects that reaffirmed in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381 [69] (McHugh, Gummow, Kirby and Hayne JJ): 'The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined "by reference to the language of the instrument viewed as a whole".' (citations omitted).



be seen as absolute; the report recognised that ‘rights need to be balanced against each other and other competing public interests’.²⁶ The *Charter* needed a mechanism to facilitate the balancing of rights against the public policy objectives of legislation and against each other.²⁷ In its report, the Committee sought to explain the mechanism that the *Charter* was to employ to facilitate the balancing process.

In foreshadowing what became s 7(2) of the *Charter*, the report said this:

The balancing of rights can happen through an express limitation on a clause-by-clause basis (as in the [*International Covenant on Civil and Political Rights* (the ICCPR’)]) or through a general limitation clause (as is the case in the ACT, Canada, New Zealand and South Africa).

The ICCPR contains express limitation clauses. For example, the right to freedom of expression ... is subject to restrictions such as defamation laws.²⁸ While this approach can provide more certainty for the listed exceptions, it does not capture the broader balancing process.²⁹

The report went on to recommend the right to freedom of expression under the *Charter* should contain an express internal limitations clause, namely that the right is subject to

²⁶ The report, 46.

²⁷ For example, the right to freedom of expression and the right to a fair trial. In *General Television Corporation Pty Ltd v Director of Public Prosecutions* (2008) 19 VR 68 a judge of the Trial Division of the Supreme Court ordered an injunction against a commercial broadcasting station not to transmit or publish its television drama about a series of underworld ‘gangland’ killings. The *Charter* issues were ultimately withdrawn but the Court said (at 90 [38]) that had it been necessary to consider them, they would adopt the view of Richardson J in *Gisborne Herald Co Ltd v Solicitor-General* [1995] 3 NZLR 563, 575: ‘The present rule is that, where on the conventional analysis freedom of expression and fair trial rights cannot be fully assured, it is appropriate in our free and democratic society to temporarily curtail freedom of media expression so as to guarantee a fair trial’.

²⁸ So too, although the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953 (‘European Convention’)), does not contain a general limitation clause, assessments of proportionality are made by reference to express internal limitations in the rights or implied internal limitations, for example, in Art 6(2), namely ‘Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law’: *A-G (Hong Kong) v Lee Kwong-Kut* [1993] AC 951, 969. For an application of the proportionality test in respect of the presumption of innocence see *Sheldrake v DPP* [2005] 1 AC 264. Some rights under the European Convention are absolute. The UKHRA protects a number of ‘Convention rights’ drawn from the *European Convention*.

²⁹ The report, 46.



restrictions reasonably necessary to, for example, respect the rights and reputations of others, or protect public order. This right was applied by the High Court under the *Charter* in *Hogan v Hinch*.³⁰ What the report was advertent to, however, was the existence of a choice between the approach of tailoring an express internal limitations clause for each right, identifying what are the recognised objectives of limiting that specific right, and what type of limits might thereby be considered ‘reasonable’, as with the right to freedom of expression, or including a general limitation clause to govern the assessment of permissible restrictions on any right. Faced with the choice between specifying a set of rights, all with internal limitations, or including a general limitation clause to govern all the rights, the Committee recommended the latter. That was accepted.

The report said, referring to *Oakes*:³¹

Section 28 of the ACT Human Rights Act 2004 provides one form of limitation clause:

Human rights may be subject only to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society.

This is consistent with provisions in the human rights instruments in New Zealand (where it resides in s 5) and Canada. The provision embodies what is known as the ‘proportionality test’.³² The Canadian Supreme Court [in *Oakes*] has stated that in order for a limitation on a right to be reasonable and demonstrably justified, two key conditions must be met:

- The objective that the rights-limiting law is trying to fulfil ‘must be of sufficient

³⁰ (2011) 243 CLR 506, 550-1.

³¹ *R v Oakes* [1986] 1 SCR 103, 138-9 (Dickson CJ).

³² See the discussion of proportionality in *Momcilovic* (2011) 245 CLR 1, 214 [556]-[557] (Crennan and Keifel JJ), where, in particular, s 7(2)(e) is taken to reflect the test of ‘reasonable necessity’. See also *Christian Youth Camps Ltd v Cobaw Community Health Services Ltd* (2014) 308 ALR 615 where Redlich JA (dissenting in the result) said (at 740 [550]) : ‘The concept of proportionality — the identification and weighting of the conflicting interests and the evaluation of the extent to which the conflict may be minimised by careful choice of means — finds its form in part in s 7(2) of the Charter, which states that rights are subject “to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”.’



importance to warrant overriding a ... protected right or freedom'. The objective must 'relate to concerns which are pressing and substantial'.

- The means chosen to achieve the objective must be reasonable and demonstrably justified. This involves considering whether the means adopted are 'designed to achieve the objective in question', whether they impair rights and freedoms as little as possible and whether there is proportionality between the effects of the measures and the objectives which the rights-limiting law is seeking to achieve.³³

This statement in the report was the genesis of what we now know as the five factors in s 7(2)³⁴ which invite a consideration of the nature of the right at stake; the importance and purpose of the limitation imposed by the law or by the conduct of a public official; the nature and extent of the limitation; the relationship between the limitation and its purpose; and whether there are any less restrictive means reasonably available to achieve the purpose.³⁵

³³ The report, 47. In *Hansen* [2007] NZLR 1, Tipping J (41 [104]) summarised the *Oakes* test in this way: '(a) does the limiting measure serve a purpose sufficiently important to justify curtailment of the right or freedom? (b) (i) is the limiting measure rationally connected with its purpose? (ii) does the limiting measure impair the right or freedom no more than is reasonably necessary for sufficient achievement of its purpose? (iii) is the limit in due proportion to the importance of the objective?'. See also *Commerce Commission v Air New Zealand Ltd* [2011] NZLR 194, 210 [66].

³⁴ The Committee acknowledged in the report that an unstructured provision such as that then used by the ACT could be difficult to apply on a day-by-day basis and sought to provide a more certain form of guidance for the balancing process by identifying what matters needed to be taken into account to determine if a limitation, or a restriction, or interference with a right was reasonable and justifiable. The need for specific factors to be identified was raised during the course of the academic roundtable conducted as part of the consultation process by the Committee. In particular, a member of the academic roundtable Andrew Butler, the co-author of Andrew Butler and Petra Butler, *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis, 2005) explained the utility of specific factors being identified under a general limitation clause.

³⁵ Section 7(2) provides: 'A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including — (a) the nature of the right; and (b) the importance of the purpose of the limitation; and (c) the nature and extent of the limitation; and (d) the relationship between the limitation and its purpose; and (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve'. The five factors (a)–(e) were modelled on s 36 of the *Constitution of the Republic of South Africa 1996* (South Africa) ch 2 (Bill of Rights). See the report, 47-8. The last factor, s 7(2)(e) has been interpreted to mean any less restrictive means within a range of reasonable alternatives: see *Sabet v Medical Practitioners Board of Victoria* (2008) 20 VR 414, 442; *RJR McDonald Inc v A-G (Canada)* [1995] 3 SCR 199, [160]. For an application of these factors, see *Lifestyles Communities Ltd (No 3)* [2009] VCAT 1869, [316]-[418], especially [387]-[418] and *PJB v Melbourne Health (Patrick's Case)* [2011] VSC 327, [304]-[360], especially [335]-[357]. The ACT later amended its *Human Rights Act* to include the very same factors as appear in s 7(2) of the *Charter*. See *Human Rights Act 2004* (ACT) s 28(2)(a)-(e). The ACT also amended its interpretive obligation (s 30) to reflect the terms of s 32(1) of the *Charter*. Section 30 now reads: 'So far as it is possible to do so consistently with its purpose, a Territory law must be interpreted



The report went on to draw a connection between the concept of compatibility and the factors in s 7(2).

For example, the report recommended that a Human Rights Impact Statement be included in Cabinet Submissions.³⁶ The Impact Statement was to include:

- a statement of the purpose of the Bill, regulation, policy or proposal;
- a statement of its effect upon any of the human rights in the *Charter*; and
- a statement of any limitation placed upon any human right in the *Charter* by the Bill, policy or proposal, the importance and purpose of this limitation, the nature and extent of the limitation, the relation between the limitation and its purpose and whether there is any less restrictive means to achieve the purpose.³⁷

The report also recommended that, as mentioned, a statement of compatibility be presented to Parliament on every Bill. It said that ‘the Statement should address the same matters as would be required in respect of a Human Rights Impact Statement’,³⁸ that is, all the five factors in s 7(2). The report further recommended that for ‘each regulation tabled in

in a way that is compatible with human rights’. It had previously been cast as follows: ‘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’: *Human Rights Act* (ACT), as amended by the *Human Rights Amendment Act 2008* (ACT).

³⁶ The report, vii-viii (Recommendation 13), 70-1.

³⁷ Ibid.

³⁸ The report, viii (Recommendation 14). See also 73. This was no surprise given that the ACT was producing Statements of Compatibility that did address the issue of the justification of limitations upon rights, pursuant to s 28 of the ACT *Human Rights Act*. For example, in the ACT, the Attorney-General, when introducing legislation for the involuntary administration of electro-convulsive therapy, expressed the opinion that the Bill was compatible with human rights because under the relevant legislation it could only occur in an emergency situation where it was necessary to save a person’s life. Although the Bill limited a person’s right not to be subjected to medical treatment without his or her free consent, the degree of interference was considered to be reasonable and proportionate given the importance and significance of the objective to be achieved. See Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 26 August 2005, 3302 (Attorney-General).



Parliament, information should similarly be provided ... regarding the *compatibility* of the regulation with the *Charter*'.³⁹ This was given effect to in the *Charter* by requiring that a 'human rights certificate' be prepared for proposed statutory rules. The *Charter* provides⁴⁰ that a human rights certificate must set out the nature of any human right limited by the rule, the importance and purpose of the limitation, the nature and extent of the limitations, the relationship between the limitation and its purpose and any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.⁴¹ In other words, an assessment of the compatibility of a statutory rule expressly calls for an assessment of the same five factors identified in s 7(2). To determine if a regulation is compatible with *Charter* rights, a balancing exercise has to be undertaken.

It is a short step to conclude that 'compatibility' with human rights, wherever it occurs under the *Charter*, was intended to mean that any limit placed on human rights was reasonable and justified.⁴² In particular, an interpretation of a statutory provision that imposes a *justified* limit on a right is a human rights-compatible interpretation.⁴³

That meaning informs the three principal obligations that make up the framework of the *Charter*.

At the parliamentary level, the hundreds of Statements of Compatibility made in Victoria

³⁹ The report, viii (emphasis added). See also 73.

⁴⁰ By inserting s 12A into the *Subordinate Legislation Act*: see *Charter* sch 1 item 7.

⁴¹ *Subordinate Legislation Act*, s 12A.

⁴² In accordance with the maxim that, where possible, a word is to be given a constant or uniform meaning throughout a statute, *Craig Williamson Pty Ltd v Barrowcliff* [1915] VLR 450, 452; *Registrar of Titles (WA) v Franzon* (1975) 132 CLR 611, 618.

⁴³ See Evans and Evans, in describing the approach adopted by Blanchard J in *Hansen* (2007) 3 NZLR 1: 'This approach assumes that a provision that imposes a *justified* limit on human rights is consistent with human rights': Carolyn Evans and Simon Evans, *Australian Bills of Rights: The Law of the Victorian*



since the *Charter* was enacted almost invariably seek to address the s 7(2) factors to demonstrate that the legislative objective is pressing and substantial, that any limit on rights is proportional to the objectives of the legislation, and that the limits extend no more than is reasonably necessary to achieve those objectives.⁴⁴

So too, with respect to the obligation on public authorities, the report made it clear that in recommending that all public authorities should be required to comply with the *Charter* this involved giving effect to human rights standards.⁴⁵ Under s 38, the effect of acting incompatibly with human rights is unlawfulness. It is unlikely that a consequence as serious as unlawfulness, in any form, could have been intended to flow from actions of public authorities that were reasonable and justified interferences with human rights.⁴⁶ This recognises that the conduct of a public authority in limiting or interfering with a human right may nevertheless be 'compatible' with that human right if the limit or interference is imposed under law, is reasonable and is justified.

The link between the notion of compatibility under the *Charter* and the balancing exercise in s 7(2) was also expressed by the Attorney-General in introducing the *Charter* in Parliament when he said that 'where a right is ...limited [in a reasonable and demonstrably justified way]

Charter and the ACT Human Rights Act (LexisNexis Butterworths, Australia, 2008) 100 [3.43]. BORA uses the notion of consistency rather than compatibility.

⁴⁴ See Victoria, *Parliamentary Debates*, Legislative Assembly (Hansard), 4 May 2006, pp. 1290-1 (Attorney-General). For example, the compatibility statement tabled for the *Traditional Owner Settlement Bill 2010* (Vic), which sought to facilitate 'a framework for agreement making between the state and a given traditional owner group entity for an area of Crown land' acknowledged that it limited, inter alia, the right to freedom of movement in s 12 of the *Charter* but concluded that it was 'compatible with the human rights protected by the charter' as the limitation was reasonable and demonstrably justified in a free and democratic society. It undertook an analysis of each of the five factors listed in s 7(2) of the *Charter*; the nature of the right being limited, the importance of the purpose of the limitation, the nature and extent of the limitation, the relationship between the limitation and its purpose and any less restrictive means reasonably available to achieve its purpose: see Victoria, *Parliamentary Debates*, Legislative Assembly, 28 July 2010, 2746-9 (John Brumby, Premier).

⁴⁵ The report, 63.

⁴⁶ See *Momcilovic* (2011) 245 CLR 1, 249 [681] (Bell J).



... action taken in accordance with that limitation ... is not incompatible with the right'.⁴⁷

On the interpretive obligation, the report suggested that a court would ask questions which invoked the s 7(2) factors as part of the process of interpretation,⁴⁸ namely:

- Does the legislation restrict the right?
- Is the restriction reasonable or justifiable?
- Can that statute be interpreted in a way that would be consistent with the right in a way that does not disturb the main purpose of the law?⁴⁹

This approach, of connecting compatibility with s 7(2), places human rights law within the continuum of measures aimed at ensuring that public power is exercised in a principled manner and without abuse.⁵⁰ The *Charter* was intended to encourage a culture that valued rigour and rationality so as to contribute to the making of reasoned and proportionate decisions by both the Legislature and the Executive.⁵¹ Section 7(2) was intended to be the

⁴⁷ See Victoria, *Parliamentary Debates*, Legislative Assembly, (Hansard), 4 May 2006, 1291 where the Attorney-General said: 'Clause 7 is a general limitations clause that lists the factors that need to be taken into account in the balancing process. It will assist courts and government in deciding when a limitation arising under the law is reasonable and demonstrably justified in a free and democratic society. Where a right is so limited, then action taken in accordance with that limitation will not be prohibited under the charter, and is not incompatible with the right'.

⁴⁸ The report took the example of interpreting legislation that conferred powers on public authorities.

⁴⁹ The report, 118.

⁵⁰ See De Smith, Woolf and Jowell, *Judicial Review of Administrative Action* (Sweet & Maxwell, 5th ed) (1995) 3: 'In all developed legal systems there has been recognition of a fundamental requirement for principles to govern the exercise by public [officials] of their powers. These principles provide a basic protection for individuals and prevent those exercising public functions from abusing their powers to the disadvantage of the public'. There is a link to measures such as the statutory obligation on public officials to give reasons; see for example, the *Administrative Law Act 1978*, s 8(1) and *Administrative Decisions (Judicial Review) Act 1977* (Cth), s 13.

⁵¹ This is consistent with the statement made by Murray Hunt, when legal adviser to the UK Joint Committee on Human Rights that scrutinises legislation enacted by the British Parliament for compatibility with human rights, to the effect that the intended impact of the UK *Human Rights Act* was to create 'a culture of justification', that is, a society in which any interference with human rights by the Legislature or the Executive must be rationally and publicly justified: see Murray Hunt, 'The UK Human



statutory vehicle to achieve that accountability.

Thus, in my view, during the pre-enactment stage, and at the time of the *Charter's* enactment, the meaning of the concept of *compatibility with human rights* under the *Charter* was intrinsically linked to the balancing exercise in s 7(2).⁵² It followed that the obligation to interpret legislation 'in a way that is compatible with human rights' requires that the balancing exercise under s 7(2) be undertaken as part of the exercise of interpretation.

Furthermore, during the pre-enactment stage there was no mention of the principle of legality as an expression of what s 32(1) sought to achieve.

The second stage — the early years of the *Charter*

In the second stage of the *Charter*, its early years of operation, the question of what

Rights Act: Key Lessons for Australia' (Paper presented at the Protecting Human Rights Conference, Melbourne, 25 September 2007). Section 19(1)(a) of the UKHRA obliges a Minister of the Crown in charge of a Bill in either House of Parliament to: (a) make a statement to the effect that in his view the provisions of the Bill are compatible with the Convention Rights ('a statement of compatibility') or (b) make a statement to the effect that although he is unable to make a statement of compatibility the government nevertheless wishes the House to proceed with the Bill. In the UK if a Minister takes the view that a Bill is compatible with the rights protected under the UKHRA, all he or she need do is express that by way of a single statement, pursuant to s 19(1)(a). Thus, for example, before the second reading of the UK *Borders Bill*, designed to provide for the detention of individuals who have arrived unlawfully in the UK, the Secretary of State, John Reid, stated only that he was of the view that the provisions of the UK *Borders Bill* 2006-2007, Bill 53 06-07, were compatible with the European Convention rights protected under the UKHRA. Those provisions included the registration and use of biometric information about a person. However, the Explanatory Notes to the Bill went somewhat further and set out reasons for supporting the Secretary of State's opinion. In particular the Explanatory Notes stated (at [133]): 'The department recognises that taking biometric or other information from a person, storing that information (on existing IND biometric databases) and requiring the biometric immigration document to be used for specific immigration purposes, is likely to be an interference in the right to respect for private life. However, the department believes the interference is justified and proportionate.'

⁵² Textual and structural support for that link is also to be found in the inclusion of s 7(2) within pt 2 of the *Charter*, immediately before the rights to be protected are enumerated. As noted above, Evans and Evans refer to the approach adopted by Blanchard J in *Hansen* (2007) 3 NZLR 1 and say that it 'assumes that a provision that imposes a *justified* limit on human rights is consistent with human rights.' They go on to say: 'In both Victoria and the Australian Capital Territory, the limitation provision is in Pt 2 (Charters 7, ACT HRA s 28) and forms part of the specification of the human rights that are protected by Pt 2. The assumption is therefore justified under the Australian human rights Acts': Carolyn Evans and Simon Evans, *Australian Bills of Rights: The Law of the Victorian Charter and the ACT Human Rights Act* (LexisNexis Butterworths, Australia, 2008) 100 [3.43].



interpretive technique the Victorian courts should adopt was first explored in any depth in *RJE*.⁵³ The contest was over the interpretation of the word 'likely'. The word was used within the *Serious Sex Offenders Monitoring Act 2005* (Vic) in s 11 which empowered a court to make an Extended Supervision Order ('ESO') in respect of an offender who was serving a sentence of imprisonment if it was satisfied, to a high degree of probability, that the offender was 'likely' to commit a relevant offence if released into the community on completion of the sentence.⁵⁴

As Solicitor-General I argued for a technique which had significant support in the United Kingdom,⁵⁵ New Zealand,⁵⁶ Hong Kong⁵⁷ and the ACT⁵⁸. While sometimes expressed as a series of steps, the technique amounts to the asking of a single question:

On the ordinary principles of statutory interpretation, does the statutory provision limit any *Charter* right in a manner that is unjustifiable?

As Tipping J said in *Hansen*, it is only if the answer is 'Yes' that the court must then 'examine the words in question again ... to see if it is ... reasonably possible for a meaning consistent

⁵³ (2008) 21 VR 526.

⁵⁴ 'Relevant offences' at that time was confined to sexual offences against children.

⁵⁵ *Poplar Housing & Regeneration Community Association Ltd v Donoghue* (2002) QB 48. For a discussion of the general adoption of the technique in the United Kingdom see Jack Beatson et al, *Human Rights: Judicial Protection in the United Kingdom* (Sweet & Maxwell, 2008) 472-510 [5-30]-[5-127].

⁵⁶ *R v Hansen* [2007] 3 NZLR 1,36-7 [88]-[92] (Tipping J), Blanchard J (27-8 [57]-[60]), McGrath J (66 [192]) and Anderson J (83 [266]). Only Elias CJ adopted a methodology at odds with the other members of the Court (9[6]). While the *Hansen* approach is the prevailing approach, there is an acceptance in New Zealand that different contexts may require the adoption of an alternative approach (see *Moonen v Film and Literature Board of Review (No 2)* [2002] 2 NZLR 754, 760 [15]).

⁵⁷ *HKSAR v Lam Kwong Wai* (2006) 9 HKCFAR 574, 595 [29] (Mason NPJ). The four other judges agreed with Mason NPJ. See 588 [1] (Li CJ), 588 [2] (Bokhary PJ), 588 [3] (Chan PJ), 588 [4] (Ribeiro PJ).

⁵⁸ *R v Fearnside* (2009) 165 ACTR 22, 43 [97]-[98]. However, Besanko J states that although '[i]t seems to me that the general approach taken by the majority in *Hansen* is the correct one ... whether that will be so in every case is best left for a case in which the issue is decisive and is the subject of detailed



... with the relevant right or freedom to be found in them. If so, that meaning must be adopted'.⁵⁹

This technique was adopted in a clear and straightforward way by Nettle JA in *RJE*⁶⁰ so that compliance with s 32(1) required that 'likely' meant 'more probable than not'. The background against which this interpretation was adopted was one in which the Victorian Court of Appeal had held in an earlier case, *TSL v Secretary to the Department of Justice*,⁶¹ that there was no reason to consider that 'likely' meant more than 50 per cent.⁶² *TSL* had been applied by the New South Wales Court of Appeal, in two previous decisions *Tillman v Attorney-General (NSW)*⁶³ and *Cornwall v Attorney-General (NSW)*,⁶⁴ because they felt compelled to apply the decision of another intermediate appellate court in the light of *Farah Constructions Pty Limited v Say-Dee Pty Ltd*.⁶⁵ Nettle JA considered himself bound to apply the *Tillman* meaning, as having in effect fixed the meaning of 'likely' in this context if recourse was had only to the ordinary principles of statutory interpretation, unless there was a compelling reason to depart from it.⁶⁶ The obligation imposed by the *Charter* to interpret legislation compatibly with human rights, where possible to do so, and consistently with its purpose, provided that compelling reason.

Against that background, he considered whether the power to order an ESO under s 11,

submissions from both sides' (49 [98]).

⁵⁹ *Hansen* [2007]3 NZLR 1, 37 [92] (Tipping J). See Jack Beatson et al, *Human Rights: Judicial Protection in the United Kingdom* (Sweet & Maxwell, 2008) 474-9 [5-36]-[5-44], 490-1 [5-77].

⁶⁰ (2008) 21 VR 526.

⁶¹ (2006) 14 VR 109 ('*TSL*').

⁶² *Ibid* 113 [11], Callaway AP, Buchanan JA and Coldrey AJA agreeing.

⁶³ (2007) 70 NSWLR 448 ('*Tillman*').

⁶⁴ [2007] NSWCA 374.

⁶⁵ (2007) 230 CLR 89, 151 [135].

⁶⁶ *RJE* (2008) 21 VR 526, 553-4 [104].



under the pre-existing *TSL* interpretation, limited any *Charter* rights.⁶⁷ He held that s 32(1) obliged him to construe s 11 as subjecting the appellant's rights to freedom of movement, privacy, and liberty, only to such reasonable limits as could be demonstrably justified in a free and democratic society, so far as it was possible to do so consistently with the purpose of the section.⁶⁸ He then engaged in the balancing exercise required by s 7(2) by identifying the purpose of s 11 as intended to guard against the dire consequences of the commission of a relevant offence which in some circumstances could justify encroaching upon an offender's rights of freedom of movement of privacy and even the right to liberty.⁶⁹ Against that was the consideration that an interpretation of 'likely' as less than 50 per cent could 'mean that a relatively low risk of re-offending could provide a sufficient basis for making an order'.⁷⁰ He concluded that:

Even giving full weight to the purpose of s 11, I cannot conceive of the potentially far reaching restrictions on rights provided for in the [*Serious Sex Offenders Monitoring*] Act as being capable of demonstrable justification in the relevant sense unless the risk of an offender committing a relevant offence is at least more than even.⁷¹

The other two members of the bench, Maxwell P and Weinberg JA, did not view themselves as otherwise bound to apply *TSL* and adopted the same meaning of 'likely', as 'more

⁶⁷ He identified the relevant rights as the right to freedom of movement (*Charter*, s 12); the right to privacy (s 13); and the right to liberty (s 21). Sometimes this step is expressed as asking whether the statutory provision, on its ordinary interpretation, 'engages' with a right: See *Kracke v Mental Health Review Board* [2009] VCAT 646, [67]-[68] (Bell J). More generally Bell J conducts an extensive survey of the methodology associated with various interpretive obligations, formulated in different ways in different human rights laws.

⁶⁸ *RJE* (2008) 21 VR 526, 554 [106]. See also *Re Application Under the Major Crime (Investigative Powers) Act 2004* (2009) 24 VR 415, 421 [20]-[22], 428 [53] (Warren CJ).

⁶⁹ For an analysis of the s 7(2) exercise in the context not of s 32(1) but of s 38, see *Sabet v Medical Practitioners Board of Victoria* (2008) 20 VR 414; *Lifestyles Communities Ltd (No 3)* [2009] VCAT 1869, [316]-[418], especially [387]-[418]; and *PJB v Melbourne Health (Patrick's Case)* [2011] VSC 327, [304]-[360], especially [335]-[357].

⁷⁰ In particular, if a court was satisfied to a 'high degree of probability', as s 11 required, say, 80 per cent, that there was a 45 per cent chance of the commission of a relevant offence, this would mean that the risk of the commission of the offence would be only 36 per cent. See *RJE* (2008) 21 VR 526, 554 [107] (Nettle JA).



probable than not' on ordinary principles of statutory construction without it being necessary to consider the *Charter*.⁷² What is plain is that the interpretation of 'likely' applied by Nettle JA was open on the language and consistent with the purpose of s 11.⁷³ On that basis, and as I will discuss in the third stage, I consider that this interpretive technique, including the deployment of s 7(2), remains open and is consistent with the High Court's reasoning in *Momcilovic*.

In *Hansen*, the New Zealand Supreme Court, and most particularly Tipping J, but also Blanchard and McGrath JJ, analysed this technique as made up of a number of steps. Some of these steps are inter-related. They can be adapted to the *Charter* as follows:

- Step 1. Ascertain the meaning of the legislative provision in accordance with the ordinary rules of statutory interpretation. This includes, of course, the principle of legality.⁷⁴
- Step 2. Ascertain whether the meaning arrived at by the ordinary principles of statutory interpretation limits or restricts a relevant right or freedom. Importantly, this

⁷¹ *RJE* (2008) 21 VR 526, 554 [107].

⁷² *Ibid* 542 [54] (Maxwell P and Weinberg JA). Their Honours adopted the interpretation which produced the least infringement of common law rights, citing *Balog and Stait v Independent Commission Against Corruption* (1990) 169 CLR 625, 635–6; *Coco v The Queen* (1994) 179 CLR 427, 437; *CTM v R* (2008) 236 CLR 440, 456 [35]. There were a number of other *Charter* issues argued in *RJE*, including the interpretation of s 6(2)(b), but the Court did not consider it necessary to resolve them.

⁷³ Shortly after the delivery of judgment in *RJE* (2008) 21 VR 526, the Parliament of Victoria passed an Act, the *Serious Sex Offenders Monitoring Amendment Act 2009* ('the Amending Act'), which sought to ensure that an ESO could be granted, and a determination under s 11(1) made, even where it was not more likely than not that the offender would commit a relevant offence. The Amending Act inserted sub-s (2A) and (2B) into s 11 which provided: '(2A) For the purposes of sub-section (1), an offender is likely to commit a relevant offence if there is a risk of the offender committing a relevant offence and that risk is both real and ongoing and cannot sensibly be ignored having regard to the nature and gravity of the possible offending. (2B) For the avoidance of doubt, subsection (1) permits a determination that an offender is likely to commit a relevant offence on the basis of a lower threshold than a threshold of more likely than not.' The *Serious Sex Offenders Monitoring Act* has since been repealed and replaced by the *Serious Sex Offenders (Detention and Supervision Act) 2009* (Vic) which utilises a somewhat similar test: see *Nigro v Secretary to the Department of Justice* (2013) 304 ALR 535.

⁷⁴ *Hansen* [2007] 3 NZLR 1, 36 [89].



involves identifying the relevant rights and determining their scope.⁷⁵ If a statutory provision construed in accordance with the ordinary rules does not limit any relevant human right, that meaning can be adopted without further analysis. The meaning arrived at by the ordinary principles of statutory interpretation is *compatible* with human rights and there is no need for any further task of interpretation.⁷⁶

Step 3. If step 2 reveals that the legislation restricts or limits a relevant right, ascertain whether the limitation is nevertheless justified by reference to s 7(2), just as *Nettle JA* did.⁷⁷

Step 4. If the limit is justified, there is no incompatibility with a *Charter* right and the meaning ascertained by ordinary principles prevails.

Step 5. If the limit is not justified, once the balancing exercise under s 7(2) has been undertaken, the Court should examine the words in question again, to see if it is possible for a meaning compatible with the relevant right or freedom, consistent

⁷⁵ See *Kracke v Mental Health Review Board* [2009] VCAT 646 [70], [78].

⁷⁶ For example, the House of Lords resolved the meaning of the legislation in *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 (*'Daly'*) primarily on the basis of the principle of legality by holding that the statutory provision at issue, under which the prison had developed a policy of conducting searches in cells, failed to state with the necessary unequivocal clarity that it extended to compulsory inspection of legally privileged communications: *Daly* [2001] 2 AC 532, [30]-[31] (Cooke LJ), [21] (Bingham LJ). The reliance on common law principles alone may also be partly explained because the facts of *Daly* arose before the main provisions of the UKHRA came into force on October 2, 2000: Jack Beatson et al, *Human Rights: Judicial Protection in the United Kingdom* (2008) 1-20, n 56.

⁷⁷ The equivalent provision to s 7(2) of the *Charter* in BORA is s 5 which provides: 'Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'. Section 4 of BORA provides: 'No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights), (a) hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or (b) decline to apply any provision of the enactment by reason only that the provision is inconsistent with any provision of this Bill of Rights'. Section 6 is cast in terms of consistency with rights and provides: 'Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.' The relationship between ss 4, 5 and 6 of BORA has been the subject of much judicial discourse and academic commentary.



with statutory purpose, to be found in them. If so, that meaning must be adopted.

Again, this is precisely what Nettle JA did.

Thus, importantly, an adverse result on the s 7(2) exercise triggers the obligation to re-examine the statutory words to find a human-rights compatible meaning.

Step 6. If it is not possible to find a compatible meaning, or that meaning is not consistent with statutory purpose, the meaning ascertained by the ordinary principles of statutory construction prevails.⁷⁸

An example of the use of this technique is *Hansen* itself. There, the New Zealand *Misuse of Drugs Act 1975* (NZ) imposed a reverse onus provision on persons found in possession of more than a certain quantity of various drugs so that they were deemed to be in possession for purposes of supply or sale 'until the contrary is proved'. Hansen was found in possession of more than 28 grams of cannabis and charged with possession with intent to supply. Hansen argued that the interpretive obligation under BORA⁷⁹ required that the expression 'until the contrary is proved' be construed as imposing only an evidentiary burden upon him that he could discharge by evidence that would raise a reasonable doubt as to the purposes of his possession; he argued that 'proved' was to be read as 'tested'.

On the ordinary principles of interpretation the obligation to prove the contrary had been

⁷⁸ *Hansen* [2007] 3 NZLR 1, 37 [92]. Tipping J summarized his approach as involving six separate steps: 'Step 1. Ascertain Parliament's intended meaning. Step 2. Ascertain whether that meaning is apparently inconsistent with a relevant right or freedom. Step 3. If apparent inconsistency is found at step 2, ascertain whether that inconsistency is nevertheless a justified limit in terms of s 5. Step 4. If the inconsistency is a justified limit, the apparent inconsistency at step 2 is legitimised and Parliament's intended meaning prevails. Step 5. If Parliament's intended meaning represents an unjustified limit under s 5, the Court must examine the words in question again under s 6, to see if it is reasonably possible for a meaning consistent or less inconsistent with the relevant right or freedom to be found in them. If so, that meaning must be adopted. Step 6. If it is not reasonably possible to find a consistent or less inconsistent meaning, s 4 mandates that Parliament's intended meaning be adopted'.

⁷⁹ Section 6.



understood as casting a legal or persuasive onus on an accused to satisfy the jury that, on the balance of probabilities, possession was not for the presumed purpose. Under that interpretation it limited the right to the presumption of innocence. The next step was to ask: was that limitation justified given the public interest associated with facilitating the conviction of those who deal in drugs and cause immeasurable harm to society?⁸⁰

A majority of the Court⁸¹ held that the reverse onus, traditionally understood, was not a justified limit on the right. They conducted a balancing exercise and concluded that although there was a rational connection between the objective of the legislation and the interference with the presumption of innocence, the limitation was greater than reasonably necessary and not proportionate to its objective. This prompted the question: Was another meaning ‘reasonably possible’⁸² that was consistent with the right to the presumption of innocence? Ultimately, the Court held that the statutory language, ‘until the contrary is proved’ could not bear the rights-consistent meaning for which Hansen contended — in effect ‘proved’ was too stubborn a word and its ordinary meaning too well accepted.⁸³

The majority of the Court was in no doubt about the appropriate interpretive technique generally to be applied.⁸⁴ All four members of the majority⁸⁵ accepted that the justification

⁸⁰ See *Hansen* [2007] 3 NZLR 1, 46 [125] (Tipping J).

⁸¹ Tipping, McGrath and Anderson JJ. Blanchard J dissented (at 34-5 [83]) on this issue.

⁸² *Hansen* [2007] 3 NZLR 1, 36-7 [90] (Tipping J).

⁸³ *Ibid* 38 [95] (Tipping J).

⁸⁴ In so doing, they distinguished the alternative interpretive technique that had been adopted, for example, in *Moonen v Film & Literature Board of Review* [2000] 2 NZLR 9 (*‘Moonen’*) which had involved, in circumstances where the relevant words were capable of more than one meaning, adopting the meaning which constituted the least possible limitation on the right or freedom in question and then inquiring as to the extent to which the adopted meaning limits the relevant right or freedom to determine consistency. This methodology had been the subject of criticism. Butler and Butler had argued that the determination of whether a legislative provision is consistent or inconsistent with a right or freedom (s 6) can only be made after consideration has been given to whether the limitation it imposes is justified (s 5): Andrew Butler and Petra Butler, *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis, 2005) 161 [7.5.4]. The *Moonen* methodology had also been criticised on the basis that s 6 only requires



step, our s 7(2), was included as part of the task of interpretation. In particular, Tipping J explained its significance as recognising that Parliament has ‘an ability to legislate in terms which constitute a justified limit without having its purpose frustrated’.⁸⁶ Importantly, all members of the majority also accepted⁸⁷ that where the legislation imposes an unjustified limit, the interpretive obligation mandates further consideration of the meaning of the provision to see if a human rights-consistent meaning is reasonably possible. It triggers the critical requirement to re-examine.

Three immediate observations can be made of the technique endorsed.

First, the judges do not attempt to assimilate the technique they apply to the principle of legality. All common law construction principles are to be captured within the first step in the methodology.⁸⁸

consistency, and does not create a judicial obligation, when faced with constructional choice, to select a meaning which is least restrictive of rights: Butler and Butler, 165 [7.8.4], see also Paul Rishworth ‘Human Rights’ [1999] NZLR 457, 469. There may be other considerations to be taken into account. The recognition that there may be several parameters to be satisfied also better reflects the complexity of statutory interpretation. In *Hansen* Tipping J noted (37-8) [93]-[94] that the *Moonen* approach was not intended to be mandatory. Blanchard J in *Hansen* (27 [61]) also noted that in *Moonen* it was recognised that other approaches would be open.

⁸⁵ *Hansen* [2007] 3 NZLR 1. See Blanchard J (27 [60]), Tipping J (37 [91]-[92]), Anderson J (83 [266]). In particular, McGrath J (at 66 [192]) said this: ‘An approach that ...fits the desirability of addressing s 5 [the equivalent of s 7(2)] before applying s 6 [the equivalent of s 32(1)] is first to consider whether the circumstances fall within the natural meaning of the statutory provision being applied, then second to ask whether on that meaning there appears to be an inconsistency with a protected right. If so, the third inquiry is whether the limit on the right is a justifiable one in terms of s 5. If the limit is justifiable there is no inconsistency with the Bill of Rights. If not, then fourthly consider whether there is another meaning available through which the statute can be read consistently with the right. If there is no such other meaning, finally, the stage is reached that the natural meaning must be applied as that is required by s 4 of the Bill of Rights. This approach will generally be the most appropriate way of applying the three provisions and is certainly the preferable approach in the present case. I should point out that the approach set out above is broadly consistent with that outlined by Tipping J in his reasons at para [92] above. It is also broadly similar to the test applied by Blanchard J at para [60] above.’ (emphasis added).

⁸⁶ Ibid 37 [91].

⁸⁷ Ibid 27 [60] (Blanchard J), 37 [91]-[92] (Tipping J), 66 [192] (McGrath J), Anderson J (83 [266]).

⁸⁸ Ibid 36 [89] where Tipping J said: ‘The initial interpretation exercise should proceed according to all relevant construction principles, including the proposition inherent in s 6 that a meaning inconsistent with rights and freedoms affirmed by the Bill of Rights should not be lightly attributed to Parliament’.



Second, the justification step taken by the judges in Step 3 is one for which there is no equivalent separately articulated step within the principle of legality. Historically at least, that principle has not been pronounced in a manner that assists in determining how to balance competing rights, nor assists in assessing whether the extent of interference with a right is justified.⁸⁹ By contrast, the justification step involves the identification of a rational connection between the limitation and the objective for which a statutory provision limits rights, and an assessment of whether the limitation is proportionate to that objective. In engaging in the balancing exercise in the way they did, their Honours in *Hansen* treated the interpretive obligation as going beyond the principle of legality.

I should say that while I consider that the origins and the orthodox formulation of the principle of legality do not suggest that it incorporates the articulated assessment of proportionality engaged in by the majority in *Hansen*, or to be found in s 7(2), this is not to deny that the principle is a dynamic doctrine of the common law.⁹⁰ The underlying width and potential development of the doctrine will unfold over time. It was not the purpose of s 32(1) to alter the common law or inhibit the development of its doctrines. It may be that, in applying the principle, there has sometimes been an implicit and unstated assessment of the reasonableness of the extent of interference with a right. The assessment may demand more rigour when it is patently clear that a statute authorises an interference with rights and the interpretive contest is focused upon the degree of interference authorised.⁹¹ These are

⁸⁹ *Coco v The Queen* (1993) 179 CLR 427, 436-7; *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309, 329 [21]; *K-Generation Pty Ltd v Liquor Licensing Court* (2008) 237 CLR 501, 520 [47].

⁹⁰ This is particularly so given the well-deserved degree of thoughtful academic and judicial attention the principle has attracted in recent years, including The Hon Chief Justice French, 'Protecting Human Rights Without a Bill of Rights' John Marshall Law School, Chicago, 26 January 2010; see also *Momcilovic*, (2011) 245 CLR 1, 46-7 [42]-[45] (French CJ).

⁹¹ See *PJB v Melbourne Health (Patrick's Case)* [2011] VSC 327, [243]-[271], and, in particular, the English cases cited, including *Marcel v Commissioner of Police* [1992] CH 225; *R v Secretary of State*



unresolved questions for another day.

The third observation is that the Court in *Hansen* was sensitive to the particular words chosen by the Parliament and the inelasticity of those expressions. It refused to endorse an interpretation that was not open on the language.

The methodology endorsed in *Hansen* remains the authoritative interpretive technique in New Zealand⁹² although other approaches are open. It is recognised that the *Hansen* approach will not necessarily be applied on every occasion.

Another early *Charter* case was *Hogan v Hinch*. The broadcaster, Derryn Hinch, was charged with contravening suppression orders protecting the identity of certain sex offenders on ESO's because he published the names of the offenders on his website and in comments he made at a public rally.⁹³

The Australian High Court endorsed the utility of a test based on proportionality within the context of the interpretive obligation under the *Charter*. This was, admittedly, not as part of a methodology incorporating the general limitation clause, s 7(2), but as a specific balancing exercise in the context of the express internal limitations clause in the right to freedom of expression, under s 15(3) of the *Charter*. But both forms of balancing exercise are of the same character.

for the Home Department; Ex parte Leech [1994] QB 198; and *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532.

⁹² It has been consistently applied since. See, for example, *R v Wenzel* [2009] 3 NZLR 47, 53 [31]-[36] (Robertson, O'Regan and Arnold JJ); *Commerce Commission v Air New Zealand Ltd* [2011] 2 NZLR 194, 2-9-12 [65]-[77] (Glazebrook, Arnold and Harrison JJ); *AMM HC v Auckland CIV* [2010] NZFLR 629. See also *Morse v Police* [2012] 2 NZLR 1, 35 [105].

⁹³ The criminal prosecution commenced in the Magistrates' Court of Victoria but was removed to the High Court, pursuant to s 40(1) of the *Judiciary Act 1903* (Cth).



The case concerned the power of the County and Supreme Courts to make suppression orders in respect of proceedings for ESO's under, again, the *Serious Sex Offenders Monitoring Act*. That Act conferred the power to make orders prohibiting the publication of any information that might enable an offender to be identified, or would identify another person who had appeared or given evidence in the proceeding. It was a precondition to the making of a suppression order that the court be 'satisfied that it was in the public interest to do so'. Section 42(3) made it an offence to contravene an order.

There were two *Charter* questions. The first concerned the scope of the expression 'the public interest'. In argument Gummow J made the point that, after the *Charter's* enactment, 'public interest' in Victoria must include pt 2 of the *Charter*.⁹⁴ This was ultimately reflected in the judgment of the plurality, Gummow, Hayne, Heydon, Crennan, Keifel and Bell JJ. They observed that the expression 'in the public interest' must, of course, be judged by reference to the subject, scope and purpose of the Act. The Act was directed at the enhancement of community protection by the supervision of offenders who have completed their custodial sentences through an intrusive monitoring regime requiring a fixed place of residence. However, their Honours acknowledged that 'public interest' must now also be judged by reference to the additional dimension of the requirement under s 32(1) to adopt an interpretation compatible with the civil and political rights in pt 2 of the *Charter*.⁹⁵ This underscored the importance of arriving at a human-rights compatible interpretation.

The second question concerned the interpretation of the word 'contravention'. Their

⁹⁴ *Hogan v Hinch* (2011) 243 CLR 506, 512.

⁹⁵ *Ibid* 548 [69]-[70].



Honours identified⁹⁶ as relevant the right of offenders not to have their privacy arbitrarily interfered with⁹⁷ as well as the right of the defendant, Hinch, to freedom of expression in any chosen medium.⁹⁸ They observed that the right to freedom of expression is subject to lawful restrictions ‘reasonably necessary’ to respect the rights and reputations of other persons, including offenders.⁹⁹ Significantly, they understood that this demanded a proportionality analysis. They said:

The phrase ‘reasonably necessary’, which is used in s 15 of the [*Charter*], supplies a criterion for judicial evaluation and decision-making in many fields. Examples from the common law, statute law and Australian constitutional law were collected and discussed by Gleeson CJ in *Thomas v Mowbray*. In an earlier decision, his Honour had pointed out that ‘necessary’ does not always mean ‘essential’ or ‘unavoidable’. He also observed that, particularly in the field of human rights legislation, the term ‘proportionality’ might be used to indicate what was involved in the judicial evaluation of competing interests which were rarely expressed in absolute terms.¹⁰⁰

Most importantly, they conceived of the proportionality analysis as part of the task of arriving at a human rights-compatible interpretation. They concluded that the phrase ‘publish or cause to be published ... in contravention of an order’ should be construed as containing a knowledge element; that is, as requiring knowledge of the order in contravention of which the publication is made. They held that ‘contravention’ was used ‘in the sense of disputation or denial rather than mere failure to comply with an unknown requirement’.¹⁰¹ As they put it, ‘[s]uch a construction ... better accommodates the provision in s 15(3) of the [*Charter*] respecting reasonably necessary restrictions upon the right to freedom of expression’.¹⁰²

⁹⁶ Ibid 548-9 [71].

⁹⁷ *Charter*, s 13(a).

⁹⁸ Ibid s 15(2).

⁹⁹ Ibid s 15(3).

¹⁰⁰ *Hogan v Hinch* (2011) 243 CLR 506, 549 [72] (footnotes and citation omitted).

¹⁰¹ Ibid 550 [78].

¹⁰² Ibid 550-1 [78].



While the reasoning was telescoped, in effect what the Court was doing was to reject the meaning of ‘contravention’ as a mere failure to comply with an unknown requirement on the basis that such an interpretation would unreasonably restrict the right to freedom of expression. In other words, the Court viewed that meaning as imposing an unjustified limit on the right. To arrive at an interpretation that was compatible with the right required the Court to examine the word ‘contravention’ again to see if it was possible for a meaning compatible with freedom of expression to be found. This it did by interpreting ‘contravention’ as disputation or denial, which entailed that the offender had knowledge of the order. This clearly reflects *RJE* and *Hansen* territory.

That the Court conducted a balancing exercise is demonstrated by the reason it proffered for the constructional choice it made, namely, that the offence of contravening a suppression order is a reasonably necessary restriction on the right to freedom of expression providing that an element of the offence is that the offender has knowledge of the order.

There was no mention of the principle of legality in the plurality’s reasoning. It was referred to by French CJ in a separate concurring judgment.¹⁰³

It was perhaps too much to hope for that the conceptual clarity, and depth of agreement, manifest in *Hogan v Hinch* would continue in the third stage of the *Charter*.

The third stage — *Momcilovic* and its implications

Relevantly, at the core of *Momcilovic* was the claim that s 5 of the *Drugs, Poisons and Controlled Substances Act 1981 (Vic)* (the ‘*Drugs Act*’), by which drugs found upon land or

¹⁰³ Ibid 526 [5], 535 [27], 536 [29], 538 [36].



premises occupied by a person were deemed to be in that person's possession, 'unless that person satisfies the court to the contrary', should be construed as imposing only an evidential onus. It was argued that this was required by operation of s 32(1) of the *Charter* to avoid what would otherwise be an unjustifiable limitation on the right to the presumption of innocence.¹⁰⁴ The High Court¹⁰⁵ held that this deeming provision ought not to have been relied upon at trial because the accused had not been charged with the offence of possession per se¹⁰⁶ but with the separate offence of trafficking. It held that s 5 did not apply to the offence of trafficking¹⁰⁷ where the offence was based upon conduct satisfying the compound expression 'possession for sale'.¹⁰⁸ Gummow J expressly supported the adoption of an interpretation of 'possession for sale' as a composite expression to which s 5 did not apply, on the basis of an application of s 32(1) of the *Charter*.¹⁰⁹ Given that s 5 was inapplicable, there was no displacement of the presumption of innocence.¹¹⁰ A majority of the Court also held that s 32(1) would not countenance an interpretation of s 5 that imposed

¹⁰⁴ The *Charter* argument was put in the alternative to the submission that the interpretation flowed on ordinary principles.

¹⁰⁵ The matter came up on appeal from the Victorian Court of Appeal, *R v Momcilovic* (2010) 25 VR 436. I appeared as Solicitor-General for the Attorney-General for Victoria (intervening). The approach adopted by the Court of Appeal is analysed by Associate-Professor Julie Debeljak, 'Who Is Sovereign Now? The *Momcilovic* Court Hands Back Power over Human Rights That Parliament Intended It To Have' (2011) 22(1) *Public Law Review* 15.

¹⁰⁶ *Drugs Act*, s 73(1).

¹⁰⁷ *Ibid* s 71AC.

¹⁰⁸ *Momcilovic* (2011) 245 CLR 1, 31 [5], 58 [72]-[73] (French CJ); 80 [133], 99 [198] (Gummow J); 123 [280] (Hayne J); and 221 [581], 229-30 [609]-[611] (Crennan and Keifel JJ). Thus, it was held that the trial had miscarried by reason of the misapplication of s 5 of the *Drugs Act* and the appeal was allowed. The appellant's conviction was quashed and the sentence set aside. Bell J held that s 5 was engaged in a prosecution for the offence of trafficking contrary to s 71AC and it was not possible, consistently with the purpose of s 5, to interpret s 5 otherwise (252 [692]). Her Honour held that the trial had nevertheless miscarried because the failure of the trial judge to direct the jury that the appellant could not be convicted of trafficking unless the prosecution proved her knowledge of its existence was productive of a substantial miscarriage of justice (254-5 [700]).

¹⁰⁹ *Ibid* 99 [199]. He saw s 32(1) as providing additional support for the construction that could otherwise be arrived at without s 32(1).

¹¹⁰ *Ibid* 99 [200].



only an evidential onus.¹¹¹

The significance of *Momcilovic* on the question of statutory techniques under the *Charter* can be divided into three central propositions, one for which the case stands as authority,¹¹² one for which it does not, and one which it leaves unresolved.

Possibly the clearest proposition for which *Momcilovic* stands as authority is that the scope of permissible interpretations under s 32(1) does not extend to those countenanced under the interpretive obligation of the UKHRA, s 3, and in particular does not extend to the type of ‘strong or remedial approach’¹¹³ to be found in *Ghaidan*.¹¹⁴ That proposition, supported by six of the seven judges,¹¹⁵ and the conception of the *Charter* it reflects, stands to be applied in future cases. Associate-Professor Julie Debeljak has argued forcefully that it is inconsistent with the *Charter*’s legislative history and intended operation.¹¹⁶ On this issue clearly reasonable minds can differ.

The terms in which s 32(1) was drafted include a restraint that is not reflected in the comparable provision in the United Kingdom, the restraint that any interpretation arrived at must be consistent with the purpose of the statutory provision being interpreted. The obligation is to arrive at a human rights compatible meaning so long as that meaning is also

¹¹¹ Ibid 31 [5] (French CJ); 208 [537] (Crennan and Keifel JJ); 240 [659], 242-3 [665]-[666] (Bell J).

¹¹² Some commentators have pointed out that, given the disposition of the appeal, most of the High Court’s reasoning was obiter. Nevertheless it constitutes seriously considered dicta and, on that basis, is binding; see *Farah Constructions Pty Limited v Say-Dee Pty Ltd* (2007) 230 CLR 89, 150-1 [134].

¹¹³ *Momcilovic v The Queen* (2011) 245 CLR 1, 38 [20], 48-9 [47] (French CJ).

¹¹⁴ *Ghaidan* [2004] 2 AC 557.

¹¹⁵ See *Momcilovic* (2011) 245 CLR 1, 38 [20], 54-5 [61]-[62] (French CJ); 87-90 [148]-[160] (Gummow J); 123 [280] (Hayne J); 211 [546], 219 [574] (Crennan and Keifel JJ); and 250 [684] (Bell J).

¹¹⁶ Associate-Professor Julie Debeljak, ‘Proportionality, Rights-Consistent Interpretation and Declarations under the Victorian *Charter of Human Rights and Responsibilities*: the *Momcilovic* litigation and beyond’ (2014) 40(2) *Monash University Law Review* (forthcoming).



consistent with legislative purpose. As the High Court has recently stated, this is seldom an all or nothing matter.¹¹⁷ There may be multiple statutory purposes and they may be competing.¹¹⁸ Under the *Charter*, there are two matters to keep in mind simultaneously in the task of interpretation, legislative purpose and human rights compatibility. They may not always both point in the same direction and there may be constructional choices to be made that satisfy one parameter more than the other, just as an interpretation may satisfy one purpose more than another. On one view, the express requirement of consistency with purpose in s 32(1) reflected no more than the observations in the House of Lords in *Ghaidan* that any interpretation must 'go with the grain of the legislation'.¹¹⁹ On another view, the requirement was much more stringent.

Quite apart from the High Court's reasoning in *Momcilovic*, I have observed over almost ten years a multitude of responses to the conclusion of the House of Lords in *Ghaidan*, that the term 'spouse' defined to include a person living with another 'as his or her wife or husband', and expressly as not confined to a person in a relationship of marriage, extended to a same sex partner. The response given has typically, although not universally, been informed by whether the speaker accepts that the relationship between a same-sex couple can have a husband-like and wife-like character to it and 'as' is read 'as if' they were in that relationship. If that is rejected, the conclusion is seen as inconsistent with the purpose of the legislation conferring the right to succeed to a statutory tenancy on the tenant's spouse. By contrast, if a same sex relationship is viewed as analogous to the relationship between a husband and

¹¹⁷ See *Carr v Western Australia* (2007) 232 CLR 138, 142-3 (Gleeson CJ); *Construction Forestry Mining & Energy Union v Marmocoet Australia Pty Ltd* (2013) 87 ALJR 1009, 1016 [40]-[41]; *Kline v Official Secretary to the Governor General* (2013) 249 CLR 645, 661 [37]; *MyEnvironment v VicForests* (2013) 306 ALR 624, 626-30 [5]-[14], 665-8 [148]-[155].

¹¹⁸ *MyEnvironment v VicForests* (2013) 306 ALR 624, 626-30 [5]-[14], 665-8 [148]-[155].

¹¹⁹ This was how the requirement for consistency with purpose was characterised in the report, 83.



wife, as a heterosexual de facto relationship is, the conclusion is seen as consistent with statutory purpose.

Those who reject the conclusion in *Ghaidan* make much of the intention of the enacting Parliament. This is despite the fact that the High Court has repeatedly and powerfully emphasised that legislative intention is not an expression of the collective subjective mental state of the legislators; rather, when a court states it has engaged in the ‘ascertainment of legislative intention’ this is ‘a statement of compliance with the rules of construction, common law and statutory’¹²⁰ and compatibility with human rights is now one of the rules of construction.

In my view, regrettably, the controversial subject-matter in *Ghaidan* impeded the likelihood of an acceptance that s 32(1) stood as equivalent to the United Kingdom’s interpretive obligation as applied in *Ghaidan*. *Momcilovic* has made it clear that analogies with BORA are likely to be more productive than reliance upon meanings adopted under s 3 of the UKHRA. This may be the beginning of an Australasian approach to human rights law.

Interpretations that are ‘possible’ under the *Charter* may involve departure from literal or grammatical meaning, just as was recognised in *Project Blue Sky Inc v Australian Broadcasting Authority*¹²¹ if that is necessary to comply with the statutory directive under s 32(1).¹²²

However, what is also suggested by the rejection of the United Kingdom’s approach and the establishment of an analogous technique to that adopted in New Zealand is that, in future

¹²⁰ *Lacey v A-G (Qld)* (2011) 242 CLR 573, 592 [43].

¹²¹ (1998) 194 CLR 355.



cases, much will depend on the elasticity of the statutory language in question. Open-ended expressions like 'public interest' lend themselves to dimensions of meaning that can accommodate human rights standards. The same is not true of comparatively inflexible words like 'proved'. Flexibility may be found, however, as it was in *Momcilovic*, in the interplay of definitions and offences, or in determining elements of offences as in *Hogan v Hinch*. What seems tolerably clear is that the Australian approach is not to be one of uncovering the underlying concept expressed by a word and adopting a human rights-compatible interpretation that remains faithful to the concept yet conveys a meaning that the particular statutory expression cannot bear. This may simply reflect the importance that the High Court has placed in recent years on fidelity to the statutory language.

The key proposition which *Momcilovic* left unresolved was the relationship between s 32(1) and s 7(2). Nevertheless four of the judges, Gummow, Hayne, Heydon and Bell JJ, accepted that the balancing exercise of s 7(2) was to be undertaken as part of the task of interpretation in the course of seeking to arrive at a human rights-compatible meaning. As Heydon J was in dissent, his analysis of the relevant relationship cannot be relied upon to establish a binding ratio on the point. But the reasoning of all four judges cannot be ignored.

Gummow J, with whom Hayne J relevantly agreed, drew a direct analogy between s 7(2) and the New Zealand general limitation clause, s 5.¹²³ He then cited *Hansen* and the methodology I described above, namely, that the general limitation clause is to be considered first before arriving at a conclusion on the meaning of the statutory provision in

¹²² See *Momcilovic* (2011) 245 CLR 1, 92 [170] (Gummow J).

¹²³ The difference in the disposition of the appeal which Hayne J would have ordered stemmed from his conclusion that s 71AC of the *Drugs, Poisons and Controlled Substances Act* was inconsistent with s 302.4 of the *Criminal Code* (Cth) and was thus invalidated by s 109 of the Constitution (see *Momcilovic* (2011) 245 CLR 1, 123 [80]). On this issue he disagreed with the other members of the Court. The



issue and its compatibility with human rights, under the interpretive obligation in s 6 of BORA. He cited the reasons of McGrath J while noting that Blanchard J and Tipping J spoke to similar effect.¹²⁴ He went on to say:

Section 32(1) is directed to the interpretation of statutory provisions in a way which is compatible with the human right in question, as identified and described in Pt 2, including, where it has been engaged, s 7(2). This relationship between ss 32(1) and 7(2) is thus similar to that between ss 5 and 6 of the NZ Act [the comparable provisions in BORA].

More generally he considered the reasoning of the majority in *Hansen* to be of utility.

This is not surprising given the ease with which the Court applied the specific proportionality analysis called for in *Hinch v Hogan*,¹²⁵ to which Gummow J referred in *Momcilovic*, an analysis that carried the support, notably, of Heydon, Crennan and Keifel JJ as well as Hayne and Bell JJ.

With great respect to their Honours, no explanation is given by Crennan and Keifel JJ in

disagreement did not stem from his approach to the *Charter*.

¹²⁴ *Momcilovic* (2011) 245 CLR 1, 91 [166] where Gummow J said: 'In *Hansen*, McGrath J said: "As between ss 5 [the limitations clause] and 6 [the interpretive obligation] it will usually be appropriate for a Court first to consider whether under s 5 there is scope for a justified limitation of the right in issue. The stage is then set for ascertaining if there is scope to read the right, as modified by a justifiable limitation, as consistent with the other enactment." Blanchard J and Tipping J spoke to similar effect'. (citations and footnotes omitted).

¹²⁵ A similar specific proportionality analysis was carried out, post-*Momcilovic*, by Nettle JA in *Noone, Director of Consumer Affairs Victoria v Operation Smile (Australia) Inc* [2012] VSCA 91, [143]-[164]. He held that the prohibition of misleading and deceptive conduct in trade or commerce under s 9 of the *Fair Trading Act 1999* (Vic) was compatible with the right to freedom of expression because it was reasonably necessary to respect the rights of other persons, relying on *Hogan v Hinch* ([148]). The context was one where statements had been made to the effect that certain alternative cancer treatments involving vitamin C can prolong and improve life. All members of the Court, Warren CJ, Nettle JA and Cavanough AJA, also held that the right to freedom of expression did not require that the prohibition be construed as requiring that the contravenor knew or was reckless as to whether the conduct was misleading or deceptive: at [12] (Warren CJ and Cavanough AJA), [165-6] (Nettle JA). For Warren CJ and Cavanough AJA this was because such a construction would defeat the purpose of the prohibition: [16]-[20]. Nettle JA agreed that such a construction would defeat the purpose and held, in any event, the absence of a mens rea requirement was not incompatible with the right to freedom of expression ([166]) relying, by analogy, on Canadian authority that the absence of a mens rea requirement for misleading and deceptive conduct in regulatory offences akin to s 9 of the *Fair Trading Act 1999* does not offend the *Canadian Charter of Rights and Freedoms*: *R v Wholesale Travel Group*



Momcilovic as to why they accepted the specific proportionality analysis in *Hogan v Hinch* as part of the task of interpretation and yet in *Momcilovic* they refused to accept that a more general proportionality analysis was incorporated within s 32(1).

When their Honours express the view that the justification exercise ‘cannot affect the interpretive process mandated under s 32(1)’¹²⁶ it is almost as though they had forgotten that the justification exercise in which they had engaged in *Hogan v Hinch* had directly informed the interpretive process called for there under s 32(1).

Bell J identified precisely this link when she said:

Consideration of whether a statutory provision is compatible with the right of freedom of expression must require determination of whether any apparent limitation is a reasonably necessary limitation within s 15(3) of the Charter. It is a task that may be thought to be of the same character as the determination of whether an apparent limitation on [for example] the right of peaceful assembly is demonstrably justified within s 7(2).¹²⁷

Her Honour implicitly recognised the choice the Committee had earlier faced between two types of balancing exercise, one involving internal limitations on each right, or the option of a general limitation clause, both exercises being of the same character.

She also recognised what ‘compatibility’ means. On the basis of the *Charter’s* legislative history, and the text and structure of the *Charter*, her Honour said, ‘[t]he Charter’s recognition that rights may be reasonably limited and that their exercise may require consideration of the rights of others informs the concept of compatibility with human

Inc (1992) 84 DLR (4th) 161; *R v 671135 Ontario Ltd* (Unreported, Ontario Supreme Court, Mackinnon J, 29 March 1994).

¹²⁶ *Momcilovic* (2011) 245 CLR 1, 219 [573] (Crennan and Keifel JJ).

¹²⁷ *Ibid* 249 [682] (Bell J).



rights'.¹²⁸ In rejecting the submission that compatibility was to be assessed before evaluating whether any limitation was justified, her Honour considered the obligation on Members of Parliament and stated crisply:

It is a questionable proposition that informed debate concerning the human rights implications of proposed legislation is advanced by a construction of the Charter that would require statements of incompatibility for every demonstrably justified limitation of a Charter right.¹²⁹

The same *reductio* reasoning was employed by Heydon J.¹³⁰

Importantly, Bell J expressly endorsed the *Hansen* interpretive technique, the same technique that had been used in the early years of the *Charter* in *RJE*. Her Honour concluded:

The Victorian Attorney-General's submission that the question of justification in s 7(2) is part of, and inseparable from, the process of determining whether a possible interpretation of a statutory provision is compatible with human rights should be accepted. It is a construction that recognises the central place of s 7 in the statutory scheme and requires the court to give effect to the Charter's recognition that rights are not absolute and may need to be balanced against one another.¹³¹

In my view her Honour's reasoning, and the reasoning of the other three judges on this

¹²⁸ Ibid 247-8 [678] (Bell J).

¹²⁹ Ibid 248 [679] (Bell J). By contrast with the compatibility statements required under the *Charter*, under s 7 of BORA the Attorney-General is only required to make a statement when, in his or her opinion, any provision in a Bill 'appears to be inconsistent with any of the rights of freedoms' in BORA. This appeared to play a part in the reasoning of the minority judgment of Elias CJ in *Hansen* (2007) 3 NZLR 1, 13 [16] that inconsistency should be assessed before any assessment is made of whether a limitation imposed on a right by statute is justified. Her Honour said: 'Interpreting s 6 to refer to the rights identified in Part 2 without qualification is also consistent with the obligation under s 7, which would otherwise require the Attorney-General to draw to the attention of the House only provisions which are inconsistent with the rights as reasonably limited'. Her Honour considered that this would unduly restrict the obligation on the Attorney-General; no such consequence would flow in relation to the *Charter* because the obligation to prepare and table compatibility statements applies to all Bills and not only those where there is an apparent incompatibility.

¹³⁰ *Momcilovic* (2011) 245 CLR 1, 165-6 [416].

¹³¹ Ibid 249-250 [683]. Her Honour referred to the judgment of Blanchard J in *Hansen*: 'It would surely be difficult to argue that many, if any, statutes can be read completely consistently with the full breadth of each and every right and freedom in the Bill of Rights. Accordingly, it is only those meanings that *unjustifiably* limit guaranteed rights or freedoms that s 6 requires the Court to discard, if the statutory



issue, is faithful to the origins and purpose of the *Charter*, and to the text and structure of the *Charter*, in that they accept that the notion of compatibility depends upon s 7(2), that s 7(2) is central to the *Charter*, and that it informs the interpretive task under s 32(1). I consider that the reasoning of the majority on this issue must be taken account of in any future *Charter* case invoking s 32(1), especially given that the context is one in which the High Court overturned the decision below. Moreover, while in *Momcilovic* three judges concluded that s 7(2) had no role to play in discharging the interpretive obligation, two of those three, Crennan and Keifel JJ, rejected the application of s 7(2) that had found favour below.¹³²

Momcilovic is also important for the proposition for which it does not stand as authority. It is the proposition that s 32(1) is a statutory codification of the principle of legality. I have already expressed the view that this proposition does not find support in the legislative history accepting, of course, that extrinsic materials are no substitute for statutory language. But, as I've said, nor does it find support in the reasoning in *Hansen* as approved by the High Court.

Nevertheless, there is a commonly expressed view that the High Court in *Momcilovic* concluded that s 32(1) was to be read as a statutory expression of the principle of legality, with a greater sphere of application due to the range of protected rights extending beyond those recognised at common law in such cases as *Potter v Minahan*¹³³ and *Coco*.¹³⁴ In my

language so permits'. (emphasis in original).

¹³² *Momcilovic* (2011) 245 CLR 1, 208-9 [539] and 220 [575], where their Honours say: 'It is not possible to read s 7(2) so that it operates with s 32(1) or s 36(2) ... it forms no part of the role of the courts in interpreting a statutory provision in connection with the Charter or the making of a declaration by the Supreme Court', and further (220 [576]): 'It follows that neither the appellant's methodology nor that of the Court of Appeal was correct in their application of s 7(2)'. See also French CJ (44[36]) that s 7(2) could play at most a part in the discretionary decision whether to make a declaration of inconsistent interpretation and not in determining whether a statutory provision cannot be interpreted consistently with a right.

¹³³ *Potter v Minahan* (1908) 7 CLR 277, 304 (O'Connor J).

¹³⁴ *Coco v The Queen* (1993) 179 CLR 427, 436-7; *Electrolux Home Products Pty Ltd v Australian Workers'*



view, a close reading of the judgments in *Momcilovic* indicates that only French CJ accepted this analysis.¹³⁵

There is no discussion about the relationship between s 32(1) and the principle of legality by Crennan and Keifel JJ. Their Honours mention the principle of legality¹³⁶ before they turn their attention to the *Charter*. They mention it again in their observation that many of the rights and freedoms protected under the *Charter* have for some time been recognised at common law.¹³⁷ Perhaps the closest their Honours come to endorsing the proposition is the statement that ‘the process referred to in s 32(1) is clearly one of interpretation in the ordinary way’¹³⁸ but this may only reflect that s 32(1) does not embrace a strong or remedial approach or, in their Honours’ view, is divorced from s 7(2). There is no identification of any of the ordinary rules of interpretation as carrying more weight than others in this context. In particular, there is no singling out of the principle of legality as linked to s 32(1) nor an attempt to assimilate s 32(1) to that principle.

Section 32(1) is not to be treated as a statutory codification of the principle of legality for the other four judges for whom the proportionality exercise under s 7(2) is a necessary part of the task of interpretation. To treat the High Court in *Momcilovic* as having endorsed the proposition that s 32(1) adds nothing to the common law principle of legality, other than an

Union (2004) 221 CLR 309, 329 [21]; *K-Generation Pty Ltd v Liquor Licensing Court* (2008) 237 CLR 501, 520 [47].

¹³⁵ See, for example, *Momcilovic* (2011) 245 CLR 1, 50 [51] (French CJ) relying (48-9 [47]) on Lord Hoffman’s remarks in *R v Secretary of State for the Home Department: Ex parte Simms* [2000] 2 AC 115,132 and in *R v Inland Revenue Commissioners; ex parte Wilkinson* [2006] 1 All ER 529, 535 and on Lord Rodger in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557. His Honour accepted that this differed from the approach of the majority in *Ghaidan* and that ‘[n]otwithstanding the difference in approach between *Ghaidan* and the later case of *Wilkinson*, it is *Ghaidan* which ... is routinely cited and applied and treated as authoritative in leading United Kingdom text books and journals’: (49 [48] footnotes and citations omitted).

¹³⁶ *Momcilovic* (2011) 245 CLR 1, 200 [512].

¹³⁷ *Ibid* 203 [522].

¹³⁸ *Ibid* 219 [574]. See also 210 [545]-[546].



enlarged sphere of application, is, in my view, not a true reflection of the complexity of reasoning exhibited in the judgments.

In summary, a way through the impasse I referred to at the outset can be encapsulated in the following five propositions:

- (1) The underlying unifying concept of the *Charter* is compatibility;
- (2) An assessment of compatibility, wherever it occurs under the *Charter*, requires an evaluation of whether any limit or interference with a right is unjustified; that is, whether any limitation is greater than reasonably necessary and not proportionate to its objective;
- (3) That assessment is to be conducted in accordance with the five factors under s 7(2); this exercise is of the same character as that undertaken more specifically with respect to the right to freedom of expression (under s 15(3));
- (4) The interpretive obligation under s 32(1) involves determining whether an interpretation on ordinary principles imposes a limit on a right that is unjustified; only where that is so, the Court must re-examine the statutory words to arrive at a human-rights compatible meaning. An adverse result on the s 7(2) exercise in this context triggers the obligation to re-examine the statutory language to find a human-rights compatible interpretation;
- (5) The human-rights compatible meaning should be adopted but only if that meaning is consistent with legislative purpose and otherwise 'possible', considering in particular the flexibility or otherwise of the statutory language.

A six-member plurality of the High Court applied this approach in *Hogan v Hinch* and a four-



member majority in *Momcilovic* understood that these principles form the logic of the interpretive obligation under the *Charter*.

It is apparent that the voyage undertaken by the *Charter* has been a choppy one. It has sought to cope as best it can and has demonstrated resilience.¹³⁹ We have good reason to be hopeful that it can function as a significant public law initiative.

¹³⁹ See, for example, *DPP v Piscopo* (2011) 33 VR 182; *PJB v Melbourne Health (Patrick's Case)* [2011] VSC 327; *Director of Housing v Sudi* (2011) 33 VR 559; *WK v The Queen* (2011) 33 VR 516; *Noone (Director of Consumer Affairs Victoria) v Operation Smile (Aust) Inc* [2012] VSCA 91; *W B M v Chief Commissioner of Police* [2012] VSCA 159; *Director of Public Prosecutions v Leys* (2012) 296 ALR 96; *Victorian Police Toll Enforcement v Taha* [2013] VSCA 37; *Nigro v Secretary, Department of Justice* (2013) 304 ALR 535.