THE EFFICACY OF THE HUMAN RIGHTS ACTS IN THE ACT AND VICTORIA

CHALLENGES AND LESSONS LEARNT

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Introduction

I hope that I will be forgiven for starting with a tale by a story-teller from ancient Greece which provides a metaphor, as I will explain, for the dilemma that confronted the High Court in Momcilovic.

“Once upon a time there was a hare who, boasting how he could run faster than anyone else, was forever teasing tortoise for its slowness. Then one day, the irate tortoise answered back: ‘Who do you think you are? There’s no denying you’re swift, but even you can be beaten!’ The hare squealed with laughter.

‘Beaten in a race? … Not you, surely! I bet there’s nobody in the world that can win against me… Now, why don’t you try?’

Annoyed by such bragging, the tortoise accepted the challenge.”

The next morning at dawn the race began. And seeing how painfully slow his rival was, the hare:

“… half asleep on his feet, [decided] to have a quick nap. ‘Take your time!’ he said. ‘I’ll have forty winks and catch up with you in a minute’….

[And so when] [t]he sun started to sink, below the horizon, and the tortoise, who had been plodding towards the winning post since morning, was scarcely a yard from the finish … the hare woke with a jolt. He could see the tortoise a speck in the distance and away he dashed. … But the hare’s last leap was just too late, for the tortoise had beaten him to the winning post. … he slumped down beside the tortoise who was silently smiling at him.

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'Slowly does it every time' he said."^2

I’ve drawn on Aesops’ fable about the hare and the tortoise to illustrate one of the main issues raised in the High Court’s recent decision in Momcilovic v The Queen:^3

- to what extent could the Charter of Human Rights and Responsibilities Act 2006 (Vic) (the Victorian Charter) by a new remedial rule affect the meaning of prior laws in a comprehensive and immediate way so as to render them compliant with human rights – the hare in our fable; or

- was it possible to achieve that remedial goal only by the Parliament undertaking an individual reconsideration of prior laws in the slow way that the tortoise was constrained to move carefully forward step-by-step?

Before addressing that question (and being mindful that my paper is intended to provide an overview of the position following the decision in Momcilovic from which the papers which follow will address more specific themes), I will start with a few words about the legal context against which the Human Rights Act 2004 (ACT) (HRA (ACT)) and subsequently the Victorian Charter were enacted. I will then draw out a number of salient aspects of the decision in Momcilovic, before returning to consider some of the consequences of the decision looking forward.

**Context against which the HRA and Charter were enacted**

It is important to emphasise that before the HRA (ACT) and the Victorian Charter were enacted, human rights were protected in a piecemeal fashion at the domestic level. These include:

- the principle of legality at common law that "absent clear words, Parliament does not intend to encroach upon fundamental common law principles ...".\(^4\)


^3 [2011] HCA 34. The author appeared in the appeal with Peter Garrisson, Chief Solicitor for the ACT, and Dr Kristina Stern on behalf of the Australian Capital Territory intervening.
• certain important but limited constitutional guarantees and immunities including the requirement in s 51(xxxi) of the Constitution that a Commonwealth law for the acquisition of property comply with the requirement of just terms and the implied freedom of political communication; and

• legislation such as Commonwealth and State anti-discrimination legislation, which is intended to implement Australia’s international obligations.\(^5\)

**Essential Elements of Human Rights Act (ACT) and the Human Rights Act**

The immediate difference that the HRA (ACT) and Victorian Charter effected was that they erected a comprehensive scheme to protect and promote human rights drawn largely from the International Covenant on Civil and Political Rights so as to impact on the functions carried out by all three institutions of government at Territory and State levels respectively.

There are four essential elements of the scheme established by the Charter (and the HRA (ACT) following its amendment in 2008).

• First, the Charter provides that “all statutory provisions” irrespective when they were enacted “must be interpreted in a way that is compatible with human rights” “[s]o far as it is possible to do so consistently with their purpose” (s 32(1), Victorian Charter).

• Secondly, the Charter imposes an enforceable obligation on public authorities to act compatibly with human rights.

• Thirdly, the Charter requires that the Parliament follow a process designed to ensure that it considers the compatibility of proposed laws in an open and transparent fashion.

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\(^5\) Decisions such as that in *Mabo v Queensland (No. 2)* (1992) 175 CLR 1 also demonstrate how the development of universal human rights at international law in turn can influence the development of the common law, in that case by the abandonment of the fiction that our indigenous peoples lacked rights in relation to land under their traditional laws and customs when Australia was settled.
• Finally, where a law cannot be so construed even with the assistance of s32, the Court has power to issue a declaration of inconsistent interpretation triggering a separate process for reconsideration of the provision by the Parliament but not having any other legal effect. In particular, incompatibility does not affect the validity of the law.

This model closely resembles that adopted by the United Kingdom in the Human Rights Act 1998 (UK) (HRA (UK)).

The interpretative obligation under the HRA (UK)

Section 3(1) of the HRA (UK) (which is equivalent to s 32 of the Victorian Charter) has a pivotal role. In particular, it can have a remedial operation when applied to pre-existing legislation which is attracted where the process of interpretation using all pre-existing principles of statutory interpretation, including the principle of legality, has failed to achieve a rights-compliant construction. The consequence of applying s 3(1) of the HRA (UK) is that words may be written in (or potentially written out) of a law. This can be illustrated by the controversial decision in Ghaidan v Ghodin-Mendoza [2004] 2 AC 557.6

Ghaidan concerned the question of whether s 22 of the Rent Act 1977 (UK) providing that, upon the death of a tenant, a person who was living with the original tenant “as his or her wife or husband” became a statutory tenant by succession, included persons in a same-sex relationship. The House of Lords had earlier held that it did not.7 However, the majority in Ghaidan held that that construction did not survive the enactment of the HRA (UK) applying the interpretative obligation in s 3(1). As Lord Nicholls of Birkenhead explained, the policy objective of the provision was to protect the security of tenure of the survivor in light of the widespread contemporary trend for men and women to cohabit outside marriage. That policy objective was equally applicable to the survivor of homosexual couples living together in a close and stable

6 Note that I have left aside for the moment the question as to whether later cases and, in particular R (Wilkinson) v HM Commissioner of Inland Revenue [2005] 1 WLR 1718, took a different approach from that adopted by the House of Lords in Ghaidan as the High Court considered in Momcilovic.

7 Fitzpatrick v Sterling Housing Association Ltd [2001] 1 AC 27.
relationship. Accordingly, to hold that s 3(1) of the HRA (UK) requiring that a
convention compatible construction be adopted if possible, had by implication
extended that protection to the survivor of a homosexual couple was perfectly
compatible with the underlying thrust of the original Act, notwithstanding that it
was not accommodated by the particular form of words used by the draftsman.
It was in effect an appeal to the purpose of the law at a higher level.

_The issue in Momcilovic_

The questions relevantly for the Court in _Momcilovic_ were whether the
principle contained in s 32 of the HRA (which was based on s 3(1) of the
HRA) required a court to engage in a similar process to that in _Ghaidan_ and, if
so, whether this process should be characterised as legislative or as judicial
interpretation in that the court was being required to construe the law having
regard not only to its purpose, but also to Parliament’s further intention as
expressed in the later law.

These questions, of course, have particular significance in the Australian
constitutional context where it was accepted by all parties that the Victorian
Parliament could not confer power upon the courts to amend legislation
conformably with the _Kable_ principle that protects the institutional integrity of
State courts.

The choice about how s 32 operated arose just as acutely in _Momcilovic_ as it
had in _Ghaidan_.

By way of background, s 5 of the _Drugs, Poisons and Controlled Substances
Act 1981 (Vic)_ (the _Victorian Drugs Act_) deemed any proscribed substance
to be in the possession of a person so long as it is on any land relevantly
occupied by him or her, “unless _the person satisfies the court to the contrary._”
The jury at the trial of Ms Momcilovic had been directed that, provided they
were satisfied beyond reasonable doubt that she occupied the apartment and
that methylamphetamine was present in the apartment, she would have been
in possession of it subject to proof by her on the balance of probabilities that
she was not. In other words, the assumption was that s 5 of the Act applied to
the offence of trafficking with which Ms Momcilovic had been charged and that,
in line with earlier authorities, the provision imposed a legal onus.
The appellant contended that the earlier authorities holding that s 5 imposed a legal burden were wrongly decided, and that it imposed an evidential onus of disproof only, that is, that it required only that there be sufficient evidence adduced by the accused to raise an issue as to the existence of the fact of possession.

However, in the event that submission was not accepted (and indeed it was not accepted by any member of the High Court), the question was then whether that interpretation had been affected by the enactment of s 32 of the Charter, given that the imposition of a legal burden of proof on an accused constituted a more serious derogation from the human right to the presumption of innocence recognised by the Charter than the imposition of an evidential burden. The Court of Appeal had held that s 32 effected no such change, as a result of which the Court made a declaration of inconsistent interpretation under s 36 of the Charter.

**What did the High Court decide?**

The High Court held that s 5 did not apply to the offence of trafficking of which the appellant had been convicted and as a result, her trial had miscarried (with the exception of Bell J who nonetheless found on other grounds that the jury had been misdirected). Furthermore, with the exception of Justice Heydon who held that the whole of the Charter was invalid, the remaining members of the Court considered that s 32(1) of the Charter created a valid rule of statutory construction. Finally, a majority of the Court found that the court’s power to make a declaration of inconsistent interpretation was valid (with Gummow, Hayne and Heydon JJ in dissent on this issue). However, French CJ and Bell J held that there could be no appeal against such a declaration to the High Court as it was not an order for the purposes of s 73 of the Constitution, while Crennan and Kiefel JJ held that the Court of Appeal ought not to have made the declaration in the exercise of its discretion, expressing particular concern as to the capacity of such a declaration in the context of criminal proceedings to undermine confidence in the verdict.8

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8 As their Honours explained in *Momcilovic* op cit at [602]: “There is little doubt that the Charter may serve to raise the expectations of an accused as to the recognition and
I don’t propose to say anything further about declarations of inconsistent interpretation (or incompatibility as they are called in the ACT HRA). Rather, my focus will be upon the manner in which s 32 of the Charter was interpreted. While it will be a slightly artificial distinction, I will not address on the interaction between that provision and s 7(2) of the Charter providing that human rights may be subject to reasonable limits, as that question will be covered by Dr Stern in her paper this afternoon.

The High Court appears to have been united in rejecting the approach adopted by the House of Lords in Ghaidan, with the exception of Heydon who considered the whole Charter to be invalid. Two themes may be discerned as underpinning the reasons of the majority in rejecting Ghaidan and upholding the validity of s 32(1).

First, the process of interpretation engaged in by Australian Courts is shaped and constrained by the constitutional relationship between the Courts and the Parliament. For example, French CJ explained (at [38]) that “The interpretation of a law of the State of Victoria by the Supreme Court of Victoria is ‘an expression of the constitutional relationship between the arms of government with respect to the making, interpretation and application of laws.’” Thus even in exceptional cases where a strained interpretation is adopted, his Honour held that it is adopted only where the ordinary meaning of the law would contradict the Parliament’s apparent purpose.

Secondly, s 32(1) accordingly to its terms required a court to engage in a process of construction which was consistent with that constitutional relationship, and did not purport to require the court to engage in the more adventurous rewriting of laws required by s 3(1) of the UK HRA reflecting in decisions such as Ghaidan. Particular weight was given in this regard to the use of the term “interpret” in s 32(1) of the Charter to describe the process in which the Court is to engage, rather than the phrase “read and given effect” in the UK Act. As Crennan and Kiefel JJ explained at [454], “The reference to enforcement of the rights to which it refers. The reality is otherwise. … The making of a declaration placed the Court of Appeal in a position where it acknowledged that the trial process conducted by the County Court involved a denial of the appellant’s Charter rights even though it upheld the validity of the convictions. In such a circumstance not only does a declaration served no useful purpose to the appellant, it is not appropriate that it be made.”
interpretation must be taken to be a reference to that process of construction is understood and ordinarily applied by courts, a process which is taken as accepted by the other arms of government in a system of representative democracy.”

Moreover, the statutory rule that laws be interpreted compatibly with human rights in s 32(1) was subject to the limitation “so far as it is possible consistently with their purpose”. As, for example, Gummow J said in this regard “…the reference to purpose in such a provision as s 32(1) is to the legislative ‘intention’ revealed by consideration of the subject and scope of the legislation in accordance with principles of statutory construction and interpretation. There fall within the constitutional limits of that curial process the activity which was identified in the joint reasons in Project Blue Sky.” (at [170]). The court’s duty, in other words, is to do no more and no less than to give the words the meaning that the legislature intended them to have.

Nonetheless, the end result, as Bell J expressly recognised at [684], is that:

“Provisions enacted before the Charter may yield different, human rights compatible, meanings in consequence of s 32(1). However, the scope for this to occur is confined by the requirement of consistency with purpose. That directs attention to the intention, objectively ascertained, of the enacting Parliament. The task imposed by s 32(1) is one of interpretation and not of legislation.”

Heydon J, on the other hand, who held that the Victorian Charter was wholly invalid, considered that properly construed, s 32(1) required the Court to read words into, and to change, the meaning of enacted legislation. As his Honour said (at [450]):

“In effect, s 32(1) permits the court to ‘disregard the express language of a statute when something not contained in the statute itself, called its ‘purpose’, can be employed to justify the result the court considers proper. The wider the gap, the more purpose is an empty vessel into which particular judges can unrestrainedly pour their own wishes. Judges, having found a mischief, or redefined it to suit their own perceptions, can decide that the words used by the legislature have not caused it to be remedied well, can formulate their own view of what a satisfactory remedy would be, and can decide that the statutory purpose is to supply that remedy.”
Where to now?

There was clearly a concern among the members of the High Court about the extent to which a broad construction of s 32 of the Charter would involve the Court in usurping the legislative role. To the extent that words might need to be read into or out of a law of the Parliament in order to achieve a human rights compatible construction, as the Court considered had occurred in Ghaidan, that was a legislative function and it could not be circumvented by a “fast-track” method such as s 32(1). The only manner in which such laws could be revised was by the Parliamentary amendment law by law. The hare (to return to my fable) was not going to win this race.

Nonetheless, it remains true to say that there is still scope for s 32(2) of the Victorian Charter and s 30 of the ACT HRA to have a remedial role with respect to pre-existing laws, notwithstanding that that role may be more limited than the equivalent provision in the UK Act. In this regard, the court has made it clear that any solution must be uniquely tailored to Australia’s constitutional circumstances.

Moreover, the decision in Momcilovic deals only with the manner in which s 32(1) of the Charter applies “looking backwards”, that is, how it applies to pre-existing laws. It may be that s 32(1) will be applied with more vigour in relation to laws enacted after the HRA or Charter came into force.9

Finally, it should be borne in mind that this was the High Court's first consideration of a comprehensive Human Rights Act. Such laws are novel in this jurisdiction. As such, it is not surprising that the High Court should adopt a more conservative approach to the construction of such laws than has been adopted elsewhere, and that it should endeavour to interpret them consistently with more familiar concepts such as the principle of legality. A similarly conservative approach was initially evident also in the United Kingdom. In this regard, Justice Heydon, in a passage that time may prove to be prophetic, observed that:

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9 See e.g. by analogy Bropho v Western Australia (1990) 171 CLR 1 at 22-23 regarding the manner in which a change in a common law presumption as to Parliamentary intent applied to the construction of legislation enacted before and after the decision.
“Judicial fires which have sunk low may burn more brightly in response to a call for adventure. Where judicial appetites have been jaded or lost, the call may stimulate and freshen them to grow with what they feed on. In future the decision that s 32(1) is valid will be remembered. Not so the narrow interpretation on which the conclusion of validity rests. In numerous minds forensics oblivion will be its portion. Most of those who will remember it will silently suppress it. Any protest about this will be silenced by reference to the blessing vagueness of the word purpose in s 32(1).”

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10 Momcilovic op cit at [453].