

**IN THE COUNTY COURT OF VICTORIA
AT MELBOURNE**

No: 0702684, 0702686 and 0702932

The Queen

– and –

Kylie Fenech, Robert Murone and Jessie Fenech

**SUBMISSIONS ON BEHALF OF THE VICTORIAN EQUAL OPPORTUNITY &
HUMAN RIGHTS COMMISSION, INTERVENING**

A. INTRODUCTION AND SUMMARY OF ARGUMENT

1. The Victorian Equal Opportunity & Human Rights Commission (the **Commission**) intervenes in these proceedings to make written submissions only in relation to two aspects of the application and operation of the *Charter of Human Rights and Responsibilities 2006* (the **Charter**) in relation to the *Drugs Poisons and Controlled Substances Act 1981* (the **Act**):
 - (1) the operation and effect of s 6(2)(b) of the Charter in these proceedings;
and
 - (2) the operation and effect of s 32 of the Charter in these proceedings.
2. The Commission was originally established under s 6 of the former *Equal Opportunity Act 1984* (Vic) and continues by virtue of s 160 of the current *Equal Opportunity Act 1995* (Vic). Under the Charter the Commission was given a range of new functions. Section 40 of the Charter provides the Commission with the right to intervene in legal proceedings initiated by other parties. It is pursuant to this provision that the Commission intervenes in this matter.
3. The Commission's intervention aims to advance the principles and objectives that underpin the enactment of the Charter, which are reflected in its preamble. In particular that:

- (1) human rights are essential in a democratic and inclusive society that respects the rule of law, human dignity, equality and freedom;
- (2) human rights belong to all people without discrimination, and the diversity of the people of Victoria enhances our community;
- (3) human rights come with responsibilities and must be exercised in a way that respects the human rights of others.

Summary of Argument

4. In relation to s 6(2)(b) of the Charter, the Commission contends as follows:
 - (1) The Court is acting in a “judicial capacity” when it hears a charge laid pursuant to section 5 of the Act. As such it is not a “public authority” within the meaning of the Charter and accordingly, section 38 of the Charter has no application.
 - (2) As the Court is acting in a judicial capacity in these proceedings, the effect of section 6(2)(b) is that the Charter applies to the proceedings to the extent that the Court exercises functions under Part 2 and Division 3 of Part 3.
 - (3) In this case, the Charter applies to the proceedings to the extent that the Court is required to consider and act compatibly with the right to the presumption of innocence (s 25(1)) and in the exercise of its functions under Division 3 of Part 3, including the interpretive obligation (s. 32) and the referral power (s.33).
5. In summary, in relation to s 32 of the Charter, the Commission contends as follows:
 - (1) Pursuant to the interpretive obligation in s 32 of the Charter, the Court is to adopt a construction of the Act that is, as far as possible, compatible with the rights protected by the Charter.
 - (2) In ascertaining whether the relevant rights are limited by the Act, the Court should adopt the broadest construction of the rights open to it.

- (3) In this case, the Act limits the rights protected by the Charter by imposing a reverse onus on an accused, thereby abrogating the right to be presumed innocent until proved guilty according to law.
- (4) The Court is then required to assess whether this limit on rights is compatible with the Charter by reference to s 7(2) of the Charter, which provides for such limits that are “demonstrably justified in a free and democratic society”.
- (5) If the Court concludes that the limits on rights are not justified, then it must either adopt an alternative interpretation of the Act or issue a declaration of inconsistency, pursuant to s 36 of the Charter.

B. RELEVANT LEGISLATIVE PROVISIONS

B1. *The Drugs, Poisons and Controlled Substances Act 1981*

- 6. The Act sets out a regime that inter alia provides for indictable offences involving the possession, use, sale and supply of drugs, poisons and controlled substances.
- 7. Relevantly, for the purposes of these proceedings, section 5 of the Act provides:

Without restricting the meaning of the word possession, any substance shall be deemed for the purposes of this Act to be in the possession of a person so long as it is upon any land or premises occupied by him or is used, enjoyed or controlled by him in any place whatsoever, unless the person satisfies the court to the contrary.
- 8. The Commission understands that the accused persons have each been charged with one count of possession of a drug of dependence in circumstances where a drug of dependence was found at the accused place of residence.
- 9. By operation of section 5 of the Act, the accused are ***deemed*** to be in possession of the drug in question because the drug was upon premises that were occupied by the accused, unless the accused satisfies the court to the contrary. The practical effect of section 5 of the Act is that the onus of proof is transferred to the accused, as opposed to being borne by the prosecution. Such a provision is commonly known as a “reverse onus provision”.

B2. The *Charter of Human Rights and Responsibilities*

10. The Charter makes provision for the protection of human rights in Victoria. It commenced on 1 January 2007, with the exception of Divisions 3 and 4 of Part 3, which commenced on 1 January 2008.
11. Part 2 of the Charter sets out the rights protected by the Charter. The right relevant to the current proceedings is as follows:
 - (1) Section 25(1): “a person charged with a criminal offence has the right to be presumed innocent until proved guilty according to law” (the **presumption of innocence right**).
12. Section 7 sets out the circumstances in which a right protected by the Charter may be limited, as follows:
 - (2) 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.
13. Section 6(2)(b) provides a definition of a public authority. It relevantly provides as follows:
 - (1) For the purposes of this Charter a public authority is—
 - ...
 - (b) an entity established by a statutory provision that has functions of a public nature; or
 - (c) an entity whose functions are or include functions of a public nature, when it is exercising those functions on behalf of the State or a public authority (whether under contract or otherwise);but does not include—
 - ...
 - (j) a court or tribunal except when it is acting in an administrative capacity;

Note

Committal proceedings and the issuing of warrants by a court or tribunal are examples of when a court or tribunal is acting in an administrative capacity. A court or tribunal also acts in an administrative capacity when, for example, listing cases or adopting practices and procedures.

14. Section 32(1) of the Charter provides that legislation is to be interpreted consistently with the Charter, as follows:

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

C. OPERATION OF SECTION 6(2)(b)

C1: Application of the Charter to the Court

15. The Commission contends that the obligation in s 38 of the Charter does not apply to the Court in these proceedings, because the Court is acting in a judicial capacity when it hears a charge that has been laid pursuant to s 5 of the Act, that is, it involves the application of the law to facts in order to determine the rights and duties of parties to a dispute (being a classic exercise of judicial power¹).
16. The Commission thus contends that the function of the Court in determining whether an accused is guilty or not of an offence pursuant to s 5 of the Act, is a judicial function, with the result that the Court is excluded from the definition of “public authority” by s 4(1)(j) of the Charter and the Court therefore is not bound by the obligations that apply to public authorities pursuant to the Charter — in particular, the obligation under s 38 to consider and act compatibly with the rights protected by the Charter.
17. However, the Commission contends that the Charter does apply to the Court in these proceedings, having regard to s 6(2)(b) of the Charter.
18. Section 6(2)(b) provides for the Charter to apply to courts and tribunals ‘to the extent that they have functions under Part 2 and Division 3 of Part 3’. This section applies as the sole source of Charter obligations when the County Court is acting in a judicial capacity.
19. Section 3(2)(a) of the Charter defines a ‘function’ as including powers, authorities and duties. Part 2 of the Charter sets out all the human rights that are protected by the Charter and Division 3 of Part 3 relates to the interpretation of laws (s. 32), the referral of questions of law to the Supreme Court of Victoria (s. 33) and the making of declarations of inconsistent interpretation (s. 36).

¹ See, eg, *Huddart Parker & Co v Moorehead* (1909) 8 CLR 330 at 357 (Griffith CJ).

20. Courts and tribunals may be given functions (that is – powers, authority or duties) under various sections in Part 2 and Division 3 of Part 3 in various circumstances. It is not possible or desirable to predetermine the circumstances in which courts and tribunals will have powers, authority or duties under the relevant parts and divisions of the Charter – each situation must be examined on its facts. However it is clear that some sections clearly give functions to courts and tribunals. These sections are:

- s. 21(5)(c): rights when arrested and detained on a criminal charge;
- s. 21(6)-(8): rights when awaiting trial;
- s. 23(2)-(3): rights of children in the criminal process;
- s. 24: right to a fair hearing;
- s. 25: rights in criminal proceedings;
- s. 26: right not to be tried or punished more than once;
- s. 27: prohibition on retrospective criminal laws;
- s. 32: interpretation;
- s. 33: referral to Supreme Court;
- s. 36: declaration of inconsistent interpretation by Supreme Court.

21. Section 6(2)(b) has been the subject of judicial consideration in a small number of cases. In *R v Williams* (2007) 16 VR 168, Justice King considered the Charter, although she held that the Charter did not apply to the case before her. King J commented that:

When a court is determining what would constitute a fair hearing in respect of a criminal trial it would be difficult to imagine that the rights referred to as minimum guarantees in criminal proceedings, would not form, in addition to any common law and other statutory requirements, the basis of what constitutes a fair hearing.²

22. This is the approach that has been taken in the Australian Capital Territory, where courts are similarly not public authorities. Although there is no specific application provision akin to s. 6 in the ACT, ACT courts have proceeded on the basis that they are required to apply and respect the right to a fair hearing. For example in *Commonwealth of Australia v Davis Samuel Pty Ltd (no 3)* [2008]

² *R v Williams* (2007) 16 VR 168 at [54]

ACTSC 76 (unreported) Justice Refshauge considered whether the right to a fair trial contained in the *Human Rights Act 2004* (ACT) required him to vacate a trial date as requested by the Applicants. His Honour noted that in deciding the application he ‘must have regard to the paramount duty to see that the Applicants are not denied a fair trial nor access to the court as protected by the *Human Rights Act 2004* (ACT)’.³ In *R v Griffin* [2007] ACTCA 6 (unreported) the Court of Appeal stated that:

It should be noted that s 21 *Human Rights Act 2004* (ACT) (*HR Act*) now is the source, under Territory law, of the right to a fair trial. The difference may be one of emphasis rather than of substance. It does, however, mean that there is now a positive right to a fair trial rather than the right not to be tried unfairly as the common law provides. It may be that would make a difference in some cases, though in this case it seems to us to lead to the same result.

There is a duty cast on the trial judge to relieve the unfairness referred to by Wilson J (*supra*).

That duty is reinforced by the provisions of the *HR Act* (for example, s 21).⁴

23. Accordingly, the Commission submits that to the extent that the County Court exercises its functions under sections 25, 32 and possibly 33 of the Charter, the Charter applies to these proceedings.

C2. Which rights are applicable?

24. Whenever a public authority is called upon to act compatibly with the Charter, it will be necessary to determine which, if any, of the rights are applicable to the particular circumstances with which the authority is faced (this is sometimes described as asking whether any rights are “engaged”).
25. The Commission contends that the right to the presumption of innocence is engaged in circumstances where a statutory provision, such as s 5 of the Act, imposes a reverse onus on a person that has been charged with a criminal offence (as is understood to be the case here⁵).
26. The question whether particular rights are engaged requires the Court to interpret the rights protected by the Charter to determine their scope. This involves an

³ *Commonwealth of Australia v Davis Samuel Pty Ltd* (no 3) [2008] ACTSC 76 (unreported) at [51]

⁴ *R v Griffin* [2007] ACTCA 6 (unreported) at [4] – [6]

⁵ The Commission notes that it has limited factual material in relation to the charges laid in this case.

interpretive exercise distinct from the interpretive exercise in relation to the Act, as it involves the interpretation of the terms of the Charter itself, rather than interpretation of other legislation.

27. The Commission contends that, in undertaking this interpretive task, the Court, guided by international law and jurisprudence,⁶ should adopt the broadest construction of the rights in question that is open to it. This approach to the construction of the Charter is consistent with its purpose, which is to protect and promote human rights. Rather than interpret the Charter rights narrowly, the Commission contends that concerns about balancing competing rights and interests are best dealt with by the express mechanism for limitations on rights to be imposed, pursuant to s 7(2) of the Charter.
28. The Commission contends that the imposition of the onus of proof on a person charged with a criminal offence is contrary to the right to the presumption of innocence such that, where that right is abrogated, the reversal of the onus of proof should be interpreted as imposing only an evidentiary burden of proof, as opposed to a legal burden of proof.
29. The Commission acknowledges that in two jurisdictions, namely South Africa and Hong Kong,
30. In relation to the European Convention on Human Rights (**ECHR**), the question of derivative use immunity has not been addressed; the European Court of Human Rights has only addressed the issue of direct use immunity.⁷ To the extent that the applicant's submissions imply that the ECHR does not require derivative use immunity,⁸ they are incorrect. This remains undecided.

⁶ See s 32(3) of the Charter, which applies to the interpretation of the Charter itself as well as to the interpretation of other legislation.

⁷ *Saunders v United Kingdom* (1997) 23 EHRR 313. In *Saunders* the Court commented that the right not to incriminate oneself did not extend to preclude obtaining compulsory evidence such as documents, breath samples, fingerprints, blood and urine samples and tissue samples. But it did not express any opinion on the issue of derivative use immunity in relation to compulsory questioning.

⁸ See applicant's submissions at [22]. The fact that the UK has three statutes that abrogate the privilege and do not provide derivative use immunity does not demonstrate that such legislation is consistent with the ECHR.

31. Further, the applicant’s submissions do not address the question of derivative use immunity in other jurisdictions that have bills of rights. In Canada and the United States (discussed in detail below) analogous rights have been held to require that, where the right not to incriminate oneself is abrogated, abrogation must be accompanied by both a direct use immunity and a derivative use immunity. Commentary in relation to the International Covenant on Civil and Political Rights (**ICCPR**) also suggests such an approach is applicable to article 14 of the ICCPR (also discussed below).
32. The Commission contends that this approach should be taken to the relevant rights as protected by the Charter. It is clear that, in light of the comparative jurisprudence, two constructions of these rights are open: one that requires derivative use immunity and one that does not. In such circumstances, the Court should prefer the broader approach in determining the scope of the rights, particularly where that approach finds support in jurisdictions with similar histories and legal systems to our own.

ACT jurisprudence

- 33.
- 34.

Canadian jurisprudence

35. The *Canadian Charter of Rights and Freedoms* (the **Canadian Charter**) contains three rights that relate to criminal process rights: ss 7, 11 and 13.
- (1) Section 7 provides that “everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice”, which has been held to include a right against self-incrimination.⁹
- (2) Section 11 provides that “Any person charged with an offence has the right ... (c) not to be compelled to be a witness in proceedings against that person in respect of the offence”.

⁹ See, eg, *R v Jarvis* [2002] 3 SCR 757 at [67].

- (3) Section 13 provides that “a witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate the witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence”.
36. The Canadian Charter has no right expressed in terms of a fair hearing right. However, contrary to the applicant’s submissions,¹⁰ the Commission contends that the right to fundamental justice in s 7 of the Charter is analogous to the right to a fair hearing so that the approach adopted by the Supreme Court of Canada to s 7 is of assistance in determining the scope and operation of the right to a fair hearing in s 24 of the Charter.
37. While s 13 has been held not require derivative use immunity, the Canadian Supreme Court has held that derivative use immunity is an aspect of the right to fundamental justice in s 7.
38. In *Re Application under s 83.28 of the Criminal Code*,¹¹ the Supreme Court considered the constitutional validity of s 83.28 of the Criminal Code, which provided for an order that a named person attend a judicial examination in relation to suspected terrorism offences. The Court explained the operation of s 83.28 as follows:¹²
- Section 83.28 provides for a two-stage process, whereby an order for the gathering of information from a named individual is first issued, and an examination of the individual so named is subsequently held. The provision provides a series of parameters which govern the judicial investigative hearing. At its core, s. 83.28 permits the investigation of terrorism offences, at both a pre- and post-charge stage through testimonial compulsion on the part of the named witness. Consequently, the purpose of the provision is to confer greater investigative powers upon the state in its investigation of terrorism offences
39. As is apparent, the regime in issue is similar to the CPO regime under the Act; however, s 83.28 provided for both direct use immunity and derivative use immunity in relation to compelled testimony.
40. The Supreme Court went on to consider whether the compulsory questioning of a named person violated s 7 of the Charter. It held that it did not, because the

¹⁰ At n 8 (page 5).

¹¹ [2004] SCC 42.

¹² Ibid at [41].

statute included both direct use *and* derivative use immunity, as required by the Canadian Charter.¹³

41. It is thus clear that, under the Canadian Charter, derivative use immunity is required when the right not to incriminate oneself is abrogated, even in the context of investigation of terrorism offences, and even where the more narrowly framed express self-incrimination right in s 11 has no application.

United States jurisprudence

42. Like Canada, the United States Constitution contains no right to a fair hearing in those precise terms; but the Fifth Amendment contains both the right against self-incrimination and the right to due process, the latter being analogous to the right to a fair hearing.
43. The Fifth Amendment to the United States Constitution relevantly provides as follows:

... nor shall [any person] be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; ...

44. The United States Supreme Court held in *Kastigar v United States*¹⁴ that legislation that compels testimony from an unwilling witness and abrogates the privilege against self-incrimination is constitutional so long as the abrogation of the privilege is accompanied by the provision of direct use immunity and derivative use immunity. The Court held that the Fifth Amendment, while it required both direct and derivative use immunity, did not require an absolute bar to prosecution for the offences to which the compelled testimony related. The Court concluded that so long as the statutory immunity “precludes the prosecutorial authorities from using the compelled testimony in any respect”, it satisfies the requirements of the Fifth Amendment.

¹³ Ibid at [70]-[73]. The Court also held that in order to comply with s 7 each of the use immunities must extend beyond criminal prosecutions and apply also in extradition and deportation proceedings: *ibid* at [79].

¹⁴ 406 US 441 (1972). See also *United States v Hubbell* 530 US 27 (2000) and *Counselman v Hitchcock* 142 US 547 (1892).

45. The Court expressly reiterated the position adopted in 1892 in *Counselman*:¹⁵ that a statute that did not:

prevent the use of [compelled] testimony to search out other testimony to be used in evidence against” the witness in criminal proceedings

or

prevent the obtaining and use of witnesses and evidence which should be attributable directly to the testimony [the witness] might give under compulsion, and on which he might be convicted, when otherwise, and if he had refused to answer, he could not possibly have been convicted

was inconsistent with the Fifth Amendment.

International Covenant on Civil and Political Rights

46. Article 14 of the ICCPR relevantly provides as follows:

(1) ... In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. ...

...

(3) In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality ... (g) Not to be compelled to testify against himself or to confess guilt.

47. The Human Rights Committee is yet to consider a communication involving derivative use of evidence obtained by compulsion. The jurisprudence of the Committee rather involves allegations of forced confessions, which more obviously violate article 14(3)(g). However, the Committee has also issued a General Comment relating to article 14, in which it was said:¹⁶

Subparagraph 3 (g) provides that the accused may not be compelled to testify against himself or to confess guilt. In considering this safeguard the provisions of article 7 and article 10, paragraph 1, should be borne in mind. In order to compel the accused to confess or to testify against himself, frequently methods which violate these provisions are used. *The law should require that evidence provided by means of such methods or any other form of compulsion is wholly unacceptable.*

¹⁵ *Kastigar*, 406 US 441 (1972) at 454 (references omitted).

¹⁶ UN Doc HRI/GEN/1/Rev1 (1994), at 14 (emphasis added).

48. The words ‘evidence provided by...any other form of compulsion’ in the General Comment appear to be sufficiently wide to apply to derivative use of material provided under through compulsory testimony such as that required by the Act.¹⁷
49. Some further insight into the scope of the article 14 rights may be gained from the 2006 report of the United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, *Australia: Study on Human Rights Compliance While Countering Terrorism*.¹⁸ The Special Rapporteur observed that, in the terrorism context, under the *Australian Security Intelligence Organisation Amendment (Terrorism) Act* a person may be compelled to provide information and answer questions and that the privilege against self-incrimination is abrogated and replaced only with a direct use immunity. The Special Rapporteur stated:¹⁹

The Special Rapporteur notes, however, that concerns have been raised about the potential “derivative use” of such information. That is, concern has been raised that information provided at an ASIO hearing may steer police officers who are present at the hearing towards a particular line of inquiry that would not otherwise have been pursued, and that evidence obtained through that line of inquiry might be used in criminal proceedings against the person giving the information. The Federal Court of Australia ruled, in *A. v. Boulton* (2004) 136 FCR 420, that there is no derivative use immunity in respect of compulsory hearings before the Australian Crime Commission and it therefore appears that members of the police present during ASIO hearings are in a position to use information provided during those hearings in order to further their own investigations. In the context of Australia’s common-law jurisdiction, the Special Rapporteur takes the view that police officers should not be present at ASIO hearings or, in the alternative, that derivative use immunity should be provided for within the ASIO Act.

Conclusion on scope of the rights

50. After consideration of the full picture provided by comparative jurisprudence, it is clear that the approach to the right to the presumption of innocence in other jurisdictions is not uniform. Some jurisdictions have held that a reverse onus provision imposes only an evidentiary burden of proof on an accused, (Canada

¹⁷ See Christopher Michaelsen, “International Human Rights on Trial – The United Kingdom’s and Australia’s Response to 9/11” (2003) 25 *Sydney Law Review* 285–286, discussing the abrogation of the privilege against self-incrimination by the *Australian Security and Intelligence Organisation Act 1979* (Cth) and the failure of that Act to provide derivative use immunity.

¹⁸ UN Doc A/HRC/4/26/Add.3

¹⁹ Ibid at [32].

and the United States); whereas others have held that a reverse onus of proof in some circumstances is completely incompatible with human rights (South Africa and Hong Kong). Still others have yet to adopt a clear position (ICCPR and Europe).

51. In those circumstances, as submitted above, the Court should prefer the broader approach to the rights in question. The Court should conclude that s 25(1) requires that, where a reverse onus provision is imposed upon a person accused with a criminal offence, such that the right to the presumption of innocence is abrogated, the provision should be read so as to impose only an evidential burden of proof on an accused person in order to be compatible with the Charter. Thus the relevant right is engaged in this proceeding.

D. OPERATION OF SECTION 32

D1: Approach to s 32

52. Section 32 requires the Court, as far as possible, to interpret legislation in a way that is compatible with human rights, consistently with the legislative purpose. This obligation applies regardless of whether the Court is a public authority within the meaning of the Charter.

Interaction between s 32 and s 7(2)

53. There is a question whether s 32 requires legislation to be interpreted in a way which is compatible with civil and political rights in their **primary form** if such an interpretation is tenable consistently with the purpose of the legislation, or whether it requires legislation to be interpreted in a way which is compatible with civil and political rights **as reasonably limited** after the application of s 7(2). There remain a variety of approaches in other jurisdictions to their respective human rights interpretation provisions. None of those comparative provisions are identical to s 32: there are some common features and some unique ones.
54. In the UK in *Ghaidan v Godin-Mendoza*²⁰ a majority of the House of Lords held that s 3(1) of the *Human Rights Act* was a remedial measure, with the

²⁰ [2004] 2 AC 557.

incompatibility declaration a “measure of last resort”,²¹ requiring a court (or other body²²) to concentrate on the substance of a provision,²³ and to imply words into a provision if need be,²⁴ but as not extending to “judicial vandalism” where an express power conferred by the Parliament was negated.²⁵

55. In Canada, a majority of the Supreme Court in *R v Oakes*²⁶ decided that the interpretative exercise (whether a statutory provision was consistent or inconsistent with a human right – in that case, a reverse onus provision and the presumption of innocence) must be kept “analytically distinct” from the reasonable limits justification under s 1 of the Canadian Charter.²⁷ Therefore, the majority first decided whether the provision imposing the reverse onus violated the right to be presumed innocent in s 11(d) of the Canadian *Charter of Rights and Freedoms* and, finding that it did, then went on to consider whether that provision was a reasonable limit demonstrably justified in a free and democratic society.
56. In New Zealand, the Supreme Court has divided on the correct approach to its interpretative provision. In *Hansen v R*,²⁸ a majority decided, albeit with some qualifications,²⁹ that the reasonableness of any limits on rights should be evaluated **before** the court considers whether a provision can be reinterpreted consistently or compatibly with relevant civil and political rights.
57. *Hansen*, like *Oakes* in Canada, was a case involving the imposition by statute of a reverse onus in a drug prosecution. Both clearly involved a construction issue

²¹ Ibis at [46].

²² The obligation extends to public authorities who must interpret the powers they are to exercise: *Ghaidan* at [106].

²³ *Ghaidan* at [123].

²⁴ *Ghaidan* at [122]-[123].

²⁵ *Ghaidan* at [111].

²⁶ *R v Oakes* [1986] 1 SCR 103 per Dickson CJ, Chouinard, Lamer, Wilson and Le Dain JJ.

²⁷ *R v Oakes* [1986] 1 SCR 103, [60].

²⁸ *Hansen v The Queen* [2007] 3 NZLR 1, [57]-[60], [92], [191]. Elias CJ dissented, noting at [21] that the approach she preferred had also been adopted in South Africa. See also *Brooker v Police* [2007] 3 NZLR 91; Evans and Evans, *Australian Bills of Rights* (2008) (Evans & Evans) 3.40–3.43.

²⁹ *Hansen v The Queen* [2007] 3 NZLR 1, [94].

first and foremost. New Zealand and Canada have thus taken different approaches. Similarly, *Ghaidan* also involved a clear construction issue on the terms of the statute itself. The approach in *Ghaidan* is different again, and perhaps closer to the familiar principles set out by the High Court from time to time; namely that rights, freedoms and immunities appropriately recognised as fundamental will not be taken to be abolished, suspended or adversely affected in the absence of “a clear expression of an unmistakable and unambiguous intention”;³⁰ that identification of what rights and interests are fundamental in the relevant sense should proceed from the Constitution, the common law and the exposition of principle contained in human rights treaties and Conventions to which Australia is a party;³¹ and that statutes are to be interpreted and applied, as far as their language permits, so as to be in conformity and not in conflict with established rules of international law.³² The Commission notes that the judgment in *Ghaidan* was expressly referred to by the Human Rights Consultation Committee in recommending enactment of an interpretive obligation.³³

58. The Commission contends that the phrase “in a way which is compatible” in s 32 does not necessarily mean “*identical with*” the rights identified in Part 2 in their pure or unlimited form. The Macquarie Dictionary defines the noun “compatible” as meaning “capable of orderly, efficient integration with other elements in a system”. The integration of rights into a statutory scheme may take account of limitations on those rights, and the purpose of those limitations. Thus the exercise required by s 7(2) of the Charter will be an integral step in the interpretive task required by s 32.

The steps required by s 32

59. The Commission contends, however, that there is no single way to approach the task required by s 32. The appropriate approach will depend upon the nature of

³⁰ *Coco v R* (1994) 179 CLR 427, 438.

³¹ *Swafield v R* (1998) 192 CLR 159, 213 per Kirby J.

³² *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 287 per Mason CJ and Deane J; *Kartinyeri v Commonwealth* (1998) 195 CLR 337, at [97] per Gummow and Hayne JJ. See also *Al Kateb v Godwin* (2004) 219 CLR 562, [19]-[20] per Gleeson CJ.

³³ *Rights, Responsibilities and Respect: Report of the Human Rights Consultative Committee* (2005) at 82-3.

the statutory provision in question and, in particular, whether it is a provision with a clear, unambiguous meaning or whether it is one in relation to which there is more than one possible meaning open.

60. The New Zealand Courts have acknowledged that different approaches may be appropriate in different statutory contexts. In *GA Moonen v Film and Literature Board of Review*, the New Zealand Supreme Court outlined the approach it considered appropriate to the interpretive exercise under the *New Zealand Bill of Rights Act*, as follows (emphases added):³⁴

After determining the scope of the relevant right or freedom, the **first step** is to identify the different interpretations of the words of the other Act which are properly open. If only one meaning is properly open that meaning must be adopted. If more than one meaning is available, the **second step** is to identify the meaning which constitutes the least possible limitation on the right or freedom in question. It is that meaning which s 6 of the Bill of Rights, aided by s 5, requires the Court to adopt. Having adopted the appropriate meaning, the **third step** is to identify the extent, if any, to which that meaning limits the relevant right or freedom.

[18] The **fourth step** is to consider whether the extent of any such limitation, as found, can be demonstrably justified in a free and democratic society in terms of s 5. If the limitation cannot be so justified, there is an inconsistency with the Bill of Rights; but, by dint of s 4, the inconsistent statutory provision nevertheless stands and must be given effect. ... Ultimately, whether the limitation in issue can or cannot be demonstrably justified in a free and democratic society is a matter of judgment which the Court is obliged to make on behalf of the society which it serves and after considering all the issues which may have a bearing on the individual case, whether they be social, legal, moral, economic, administrative, ethical or otherwise.

[19] The fifth and **final step** which arises after the Court has made the necessary determination under s 5, is for the Court to indicate whether the limitation is or is not justified. If justified, no inconsistency with s 5 arises, albeit there is, ex hypothesi, a limitation on the right or freedom concerned. If that limitation is not justified, there is an inconsistency with s 5 and the Court may declare this to be so, albeit bound to give effect to the limitation in terms of s 4.

61. In *Hansen*, the majority adopted a slightly different approach, which Tipping J summarized as follows (emphases added):

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.

³⁴ [1999] NZCA 329 at [17]-[19].

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.

62. The difference between the two approaches is that in step two of *Moonen*, the Court concludes that it is to adopt the interpretation **least restrictive** of rights; whereas this is not stated in *Hansen*. However, in so far as *Hansen* acknowledges the traditional presumptions applicable to statutory construction, "including the proposition ... that a meaning inconsistent with the rights and freedoms affirmed by the Bill of Rights should not lightly be attributed to Parliament",³⁵ the difference between the two may be more apparent than real.
63. In any event, Tipping J went on to acknowledge that he was not rejecting the *Moonen* approach:³⁶

[93] It is appropriate to say something about the way this approach fits with what was said by the Court of Appeal on this subject in *Moonen v Film and Literature Board of Review*. In that case a rather differently arranged and constructed sequence was suggested as being helpful, albeit the Court recognised that other approaches would probably lead to the same result. The *Moonen* approach was not intended to be mandatory. In any event that sequence was suggested in a case which involved words that were in themselves conceptually elastic and therefore intrinsically capable of having a meaning which impinged more or less on freedom of expression. It was not a case like the present in which the words "until the contrary is proved" are said to be capable of having two conceptually distinct meanings, one involving inconsistency with the presumption of innocence contained in s 25(c) of the Bill of Rights and the other involving no or at least less inconsistency. ...

[94] There is a difference between a case in which there are two conceptually distinct meanings and a case in which the issue concerns the point at which, on a possible continuum of meaning, the appropriate meaning should be found. In the continuum type of case, there may be good reason to adopt the approach set out in *Moonen*, if only because it will usually be difficult to determine where Parliament intended the meaning to fall on the continuum. The point at which a tenable meaning ceases to limit or least limits the right or freedom may well represent the appropriate point at which to fix the meaning. But in a case like the present, where the two potential meanings are conceptually quite different and distinct and, as I shall shortly indicate, there is only one candidate for Parliament's intended meaning, I consider that the approach earlier outlined is the one which will best serve the relationship between ss 4, 5 and 6 [of the BORA].

³⁵ *Hansen* at [89].

³⁶ *Hansen* at [93]-[94].

64. The Commission contends that there is no single, universal approach to the s 32 exercise. Rather, there are (at least) two distinct approaches to the practical application of s 32 and the correct approach will depend on how clear the legislative provision is. One approach should be used where the ordinary meaning of the provision is identified without any ambiguity; and a different approach should be used where there is a range of possible meanings available.
65. The common first step is thus to engage in the task of statutory interpretation, according to ordinary principles of the statutory construction (pursuant to both common law and the *Interpretation of Legislation Act 1984*). In particular, regard should be had to the following two common law presumptions:
- (1) courts should not impute to the legislature an intention to infringe upon a civil right unless the words of the legislature are expressed with irresistible clarity or necessary intendment;³⁷ and
 - (2) statutes should be interpreted and applied, so far as their language allows, in a manner which is consistent with international agreements or the established rules of international law.³⁸
66. This first step will reveal whether the provision in question is one with a single, unambiguous meaning, or whether it is a provision for which there is a range of meanings available.
67. Having ascertained the nature of the provision, the appropriate approach to the s 32 exercise can then be applied.
- (1) The approach that should be taken where there is a **single unambiguous meaning** is as follows (the **Hansen approach**):

Step 2: Does the single unambiguous meaning impact on any Charter rights? If no impact on Charter rights, adopt the unambiguous meaning.

Step 3: If the unambiguous meaning impacts on a Charter right(s), is the impact “demonstrably justifiable” under s. 7(2)? If the impact is “demonstrably justifiable”, adopt the single unambiguous meaning.

³⁷ *Coco v The Queen* (1993) 179 CLR 427 at 437.

³⁸ *Chu Cheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 38.

Step 4: If the impact is not “demonstrably justifiable”, consider if the section can be reinterpreted compatibly with the Charter (either with no limit or with a limit that is reasonable under s. 7(2)), in accordance with the statutory purpose, preferring the least possible limit on Charter rights. If reinterpretation is possible consistent with purpose, adopt reinterpreted meaning.

Step 5: If no reinterpretation is possible, consistently with the statutory purpose, adopt the unambiguous meaning (and, if in Supreme Court, consider whether to make a declaration of inconsistent interpretation).

- (2) The approach that should be adopted where there is **more than one possible meaning** is as follows:

Of the possible meanings ascertained, select the meaning that is most compatible with human rights, with the following preferences:

First preference should be for a meaning that does not limit rights; then for a meaning that limits rights in a way that is “demonstrably justifiable” (in accordance with s. 7(2)); and last preference should be for a meaning that limits rights unreasonably (in breach of s. 7(2)). Within each of those categories, preference should be for the meaning that least limits rights.

D2: Application of s 32 in this case

Step 1: Construction of the Act

68. In this case, then, the first step is to construe the relevant provisions of the Act.
69. It is quite clear that s 5 of the Act abrogates the common law right to the presumption of innocence until proven guilty. This is certainly sufficient to rebut the common law presumption that the Parliament does not intend to abrogate fundamental common law rights or rights recognised in international law.
70. The Act does not expressly state whether the reversal of onus from the State onto the accused imposes an evidentiary burden of proof, or a legal burden of proof – it is silent on this issue.

71. In the face of such silence, the Commission contends that s 5 of the Act is ambiguous. Accordingly, the correct approach to interpretation is thus the second approach outlined above at paragraph 67(2).

Step 2: which meaning is most compatible with human rights?

72. Of the possible meanings ascertained in respect of s 5 of the Act, the Court must select the meaning that is most compatible with human rights, with the following preferences:

- (1) a meaning that does not limit rights;
- (2) a meaning that limits rights in a way that is “demonstrably justifiable” (in accordance with s. 7(2)); and
- (3) a meaning that limits rights unreasonably (in breach of s. 7(2)).

Within each of these categories, preference should be for the meaning that least limits rights.

Preference 1: does the Act limit rights?

73. Preference 1 of Step 2 asks whether the s 5 of the Act is capable of being interpreted in a way that does not limit rights. In this case, the Commission submits that it is not possible to interpret s 5 in a way that does not limit the right to the presumption of innocence as it clearly imposes a reverse onus of proof.

Preference 2: does the Act limit rights in a way that is demonstrably justified?

74. Preference 2 of Step 2 turns attention to s 7(2) of the Charter, which makes express provision for rights to be limited in certain circumstances. Section 7(2) requires attention to the following matters:

- (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.

75. As the Canadian Supreme Court stated in considering the importance of effective responses to terrorism:³⁹

[T]he challenge for a democratic state's answer to terrorism calls for a balancing of what is required for an effective response to terrorism in a way that appropriately recognizes the fundamental values of the rule of law. In a democracy, not every response is available to meet the challenge of terrorism. At first blush, this may appear to be a disadvantage, but in reality, it is not. A response to terrorism within the rule of law preserves and enhances the cherished liberties that are essential to democracy.

76. Notably, in the Canadian context, the right against self-incrimination was preserved and extended, even in the context of investigation of terrorism offences.

77. **Nature of the right:** In this case, the relevant right (to the presumption of innocence) is fundamental to the criminal justice system. Its importance should not be underestimated. As Smith J stated in *C v Chief Commissioner of Police*:⁴⁰

The rights affected by these provisions are fundamental rights. As Kaye J said [in *CR v Attorney General of Victoria* [2007] VSC 263 at [51]]

“The provisions of the Act constitute a far reaching intrusion into and derogation of basic rights of members of the community. The powers provided by the Act affect the liberty of any person who is the subject of a witness summons. They also derogate from the right of a person summonsed before the Chief Examiner to exercise his or her right to silence, and expressly derogates from the right of a person not to incriminate himself or herself.”

The right to silence and the privilege against self-incrimination are rights which define the relationship between the individual and the State and protect people against aggressive behaviour of those in authority. They reflect the philosophy that the State must prove its case without recourse to the suspect.[11]

78. The United States Supreme Court has also commented on the importance of the right not to incriminate oneself, in the context of balancing the need of the state for testimony against the individual right:⁴¹

[T]he power to compel testimony is not absolute. There are a number of exemptions from the testimonial duty, the most important of which is the Fifth Amendment privilege against compulsory self-incrimination. The privilege reflects a complex of our fundamental values and aspirations, and marks an important advance in the development of our liberty. It can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory, and it protects against any

³⁹ Ibid at [7].

⁴⁰ [2008] VSC 51 at [9].

⁴¹ *Kastigar*, 406 US 441 (1972) at 444-447 (footnotes omitted).

disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used. This Court has been zealous to safeguard the values that underlie the privilege.

Immunity statutes, which have historical roots deep in Anglo-American jurisprudence, are not incompatible with these values. Rather, they seek a rational accommodation between the imperatives of the privilege and the legitimate demands of government to compel citizens to testify. The existence of these statutes reflects the importance of testimony and the fact that many offenses are of such a character that the only persons capable of giving useful testimony are those implicated in the crime.

79. Finally, the European Court of Human Rights commented on the importance of the right not to incriminate oneself in *Saunders v United Kingdom*:⁴²

[T]he right to silence and the right not to incriminate oneself are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6. Their rationale lies, inter alia, in the protection of the accused against improper compulsion by the authorities thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6 ... The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. In this sense the right is closely linked to the presumption of innocence contained in Article 6 para. 2 of the Convention.

80. **Purpose of the limitation:** The purpose of the Act is the prosecution and prevention of the kinds of offences within the scope of the Act, namely organised crime offences of a serious nature. The purpose of abrogating the privilege against self-incrimination and failing to provide a derivative use immunity is to better enable the investigation of such offences, which are regarded as significantly detrimental to society. The purpose is clearly important, although perhaps not as important as, for example, investigation of terrorism offences.
81. **Nature and extent of the limitation:** The extent of the limitation on rights affected by the Act is significant. While it is true that direct use immunity is preserved, it is at least arguable that no distinction can meaningfully be drawn between the harm that may flow from incriminating information provided directly and incriminating evidence derived from such information. From the witness's perspective, derivative information can present consequences as deleterious as the original, self-incriminating information. A direct use immunity thus provides insufficient protection to the provider of incriminating information

⁴² (1997) 23 EHRR 313 at [68].

because its operation allows the Chief Investigator to obtain the benefit of the original abrogation and to use it against the witness, while still complying with the requirements of the use immunity. Thus derivative use of the information has the same consequences for the witness as would use of the original information.

82. Further, the Act expressly permits the questioning of a person by the Chief Examiner where that person has been charged with an offence to which the questioning relates: s 29(2). It is not clear that the Act “does not permit questions designed to establish that an accused is guilty of the offence with which he is charged”, as the applicant’s contends;⁴³ the Act, after all, is designed to expand the state’s investigative powers. Section 29(3) requires the Chief Examiner to “take all reasonable steps to ensure that the conduct of the examination does not prejudice” the proceedings against the person; but it does not expressly go as far as the applicant contends, at least on its ordinary construction. Nor does it appear to preclude questioning designed to open up avenues of investigation against the person.⁴⁴
83. ***Relationship between the limitation and its purpose:*** The limitation on the right is clearly related to its purpose: it will make it easier for investigative authorities to pursue those involved in major crimes if it can compel such persons to answer questions and then use that information derivatively to prosecute a person for serious offences.
84. However, the failure to provide derivative use immunity arguably goes further than is required to achieve the purpose. In the context of major crime, which by definition involves more than one person, it is not in fact necessary to compel the persons who are intended to be charged to give evidence; it would be sufficient to compel persons who will ultimately not be charged to give evidence; or to

⁴³ Applicant’s submissions at [25].

⁴⁴ Cf applicant’s submissions at [26]. The applicant’s reference to *R v S(RJ)* [1995] 1 SCR 451 fails to take into account the particular context of that case, which involved a subpoena of a co-accused (who was to be tried separately) to give evidence at trial, where his evidence was subject to a direct use immunity and a derivative use immunity. The comments relied upon by the applicant do not necessarily apply in relation to an investigative proceeding of the kind in issue here, where the clear purpose of abrogating the privilege is to provide greater investigative powers to the state.

compel persons who will be charged based on evidence obtained independently from their own testimony.

85. ***Any less restrictive means reasonably available to achieve the purpose:*** The Commission contends that the purpose of the Act could have been achieved whilst at the same time retaining derivative use immunity. Given that in Canada, for example, it has been considered possible to investigate terrorism offences effectively whilst retaining derivative use immunity, there appears to be no strong reason why in Victoria investigators cannot investigate major crime whilst retaining such immunity.
86. ***Conclusion:*** After considering the various factors set out in s 7(2), in light of approaches in comparative jurisdictions, the Commission contends that the reversal of the onus of proof in circumstances where an accused person's liberty and movement may be restricted is not *demonstrably justified* in a free and democratic society, as required by s 7(2).

87.

Preference 3 of Step 2: Does the Act limit rights unreasonably?

Can the Act be interpreted so as to be compatible with human rights?

88. The Commission contends that the Act can be reinterpreted pursuant to s 32 so as to be compatible with the right to the presumption of innocence, bearing in mind that the reinterpretation permitted by s 32 is significant, so long as any reinterpretation remains consistent with the purpose of the Act.⁴⁵ This may include implying words into the Act, if necessary.
89. In this case, the Commission contends that it is possible to reinterpret the Act so as to render it consistent with the relevant right in the following way:
- (1) The words "unless the court is satisfied to the contrary" in s 5 of the Act are to be read down as imposing an evidentiary burden of proof on an accused person.

⁴⁵ See discussion in *Ghaidan* [2004] 2 AC 557 at 570-2, 577, 597, 601, 603.

90. The Commission contends that it is open to the Court consistently with the purpose of the legislation to read in words that would provide for the imposition of the reversal of onus in respect of an evidentiary burden of proof only.
91. The Commission contends that, while reinterpretation of the Act in the way suggested might be contrary to the intention of Parliament as expressed in the legislation, it is nonetheless consistent with the purpose of the Act, which is to enable prosecution of drug-related offences such as possession, use, sale and supply, whilst preserving the fundamental rights of the accused.
92. This degree of reinterpretation is permissible in light of *Ghaidan v Godin-Mendoza*,⁴⁶ which was expressly referred to by the Human Rights Consultative Committee in its paper recommending the enactment of the Charter and on which the Charter was based.⁴⁷ In *Ghaidan*, the House of Lords reversed a House of Lords decision from only three years earlier,⁴⁸ on the basis of the interpretive provision in the UK *Human Rights Act*. The majority held that the phrase “as his or her wife or husband” in a tenancy statute included same-sex couples, even though they concluded that this was not what Parliament intended when it enacted the legislation. It is thus clear that interpretive provisions such as s 32 allow the Court to do a great deal to ensure that legislation is interpreted consistently with human rights, subject only to constraints of purpose.

Step 5: if the Act cannot be reinterpreted, consider a declaration of inconsistency

93. If, contrary to the Commission’s primary submissions, the Court is of the view that it is not possible to reinterpret the Act so as to give proper protection to the relevant rights and thus render the Act compatible with those rights, then the Court must give meaning to the provision that is incompatible with human rights. The Commission notes that it is not possible for the County Court to make a declaration of inconsistency pursuant to s 36 of the Charter, as such power is reserved for the Supreme Court of Victoria.

⁴⁶ [2004] 2 AC 557 at 570-2, 577, 597, 601, 603.

⁴⁷ *Rights, Responsibilities and Respect: Report of the Human Rights Consultative Committee* (2005) at 82-3.

⁴⁸ *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27.

E. THE COURT OF APPEAL DECISION IN *RJE*

94. The Commission contends that our submissions above are supported by the recent Victorian Court of Appeal decision in *RJE v The Secretary to the Department of Justice*.⁴⁹
95. In light of the decision in *RJE*, the Commission contends as follows:
- (1) The Commission's submissions in respect of the operation and effect of s 32 of the Charter are in substance confirmed by the decision in *RJE*.
 - (2) The plurality in *RJE* was silent with respect to the methodology applicable to s 32 (apart from its implicit endorsement of ordinary statutory interpretation as a starting point for the interpretive task). Thus the Commission contends that this Court should follow the approach of Nettle JA in *RJE*, who did consider the operation and effect of s 32. Nettle JA's judgment is consistent with the approach to s 32 set out in the Commission's submissions above.
96. *RJE* concerned the meaning and effect of the *Serious Sex Offenders Monitoring Act 2005* (the **Monitoring Act**) and the effect of the Charter on the meaning and effect of that Act. Pursuant to s 11(1) of the Monitoring Act a judge of the Supreme Court or County Court may make an extended supervision order (**ESO**) in relation to a person who has been convicted of a "relevant offence" (the **offender**) (being a sexual offence against a child) if the Court is satisfied "to a high degree of probability" that the offender "is likely to commit a relevant offence if released into the community" at the end of his or her sentence. If an ESO is made, certain conditions are imposed on the offender that limit the offender's freedom of movement; the Court has no discretion as to the content of these conditions. In addition, the making of an ESO enlivens a power in the Adult Parole Board (the **Parole Board**) to impose additional conditions on the offender, including conditions that may impact severely on his or her liberty and freedom of movement.
97. In an earlier decision concerning s 11(1), *TSL v Secretary to the Department of Justice*,⁵⁰ the Court of Appeal had held that "likely to commit a relevant offence"

⁴⁹ [2008] VSCA 265.

could include circumstances where there was a less than 50% chance of the person reoffending. *TSL* had twice been followed by the New South Wales Court of Appeal.

98. An ESO had been made by the County Court in relation to *RJE* pursuant to s 11(1) as understood in light of *TSL*. He appealed against the making of the ESO. On 18 December 2008, the Court of Appeal allowed the appeal. All members of the Court decided the matter on the basis that the previous interpretation of the phrase “likely to commit a relevant offence” in *TSL* was incorrect; contrary to *TSL*, the phrase required that the offender be “more likely than not” to commit a further relevant offence upon release.⁵¹
99. Two members of the Court of Appeal (Maxwell P and Weinberg JA) overruled *TSL* on the basis of ordinary principles of statutory interpretation, without reference to the Charter. In contrast, Nettle JA, while agreeing with the plurality’s interpretation of “likely to commit a relevant offence”, considered it necessary to turn to s 32 of the Charter in order to depart from the settled meaning of s 11(1).

E1: Relevance of Maxwell P and Weinberg JA’s approach to these proceedings

100. In light of their conclusion in relation to the meaning of “likely to commit a relevant offence” in s 11(1) of the Monitoring Act, the plurality stated that it was therefore unnecessary for them to come to a conclusion on any issues said to arise in respect of the Charter.⁵²
101. The plurality decision confirms, by implication, that despite s 32 of the Charter having commenced operation, the first step in the interpretation of Victorian legislation is to ascertain the meaning of the relevant statutory provision in accordance with the ordinary principles of statutory interpretation and without regard to s 32.

⁵⁰ (2006) 14 VR 109.

⁵¹ *RJE* at [53] (Maxwell P and Weinberg JA), [97] (Nettle JA).

⁵² *RJE* at [55]-[56].

102. The Commission further contends that the plurality must have been of the view that the construction of s 11(1) that it adopted was compatible with the Charter — if it were not so, s 32 would have required that the Court go on to consider whether some alternative construction was open that was Charter-compatible. Although the plurality did not state this expressly, such a view should be imputed to them, particularly given their reliance on common law rights, including the right to liberty, in the application of the ordinary principles of statutory interpretation.⁵³
103. The plurality judgment in *RJE* does not preclude this Court from applying s 32 of the Charter in the interpretation of the relevant provisions of the Drugs, Poisons and Controlled Substances Act. The plurality approach is consistent with the approach to s 32 set out in the Commission's submissions above. However, it provides limited guidance in a case in which the ordinary principles of statutory construction do not result in a construction that is Charter-compatible. The Commission contends that the present case is of this character.

E2: Relevance of Nettle JA's approach to these proceedings

104. The Commission contends that the reasoning of Nettle JA is of greater assistance in this case because Nettle JA relied upon s 32 of the Charter as the only justification for the Court to depart from the line of authority regarding the meaning of s11(1) of the Monitoring Act.
105. In particular, Nettle JA's judgment supports two important aspects of the Commission's Submissions:
- (1) first, Nettle JA's judgment confirms the significant impact s 32 may have on the task of statutory interpretation; and
 - (2) second, Nettle JA's approach to s 32 is consistent with the approach adopted by the majority of the New Zealand Supreme Court in *R v Hansen*,⁵⁴ which the Commission contends should be adopted by this Court.

⁵³ *RJE* at [37].

⁵⁴ [2007] 3 NZLR 1.

106. Nettle JA held that s 32, read in light of s 7 of the Charter, requires that s 11(1) of the Monitoring Act be construed, “so far as it is possible to do so consistently with the purpose of the section, in a way that subjects the appellant’s rights to freedom of movement, privacy and liberty only to such reasonable limits as can demonstrably be justified in a free and democratic society”.⁵⁵
107. Nettle JA thus considered whether the “potentially far reaching restrictions on rights” provided for in the Monitoring Act were capable of demonstrable justification in accordance with s 7 of the Charter. He concluded that they were not if the level of risk of re-offending regarded as sufficient to enable an order to be made was set too low. Accordingly, he preferred an interpretation of “likely to commit a relevant offence” that, in accordance with s 32 of the Charter, was compatible with human rights — namely that the phrase required that commission of a relevant offence be “more likely than not”.

Far-reaching impact of s 32

108. Nettle JA quoted with approval the comment of the UK Court of Appeal in *Poplar Housing and Regeneration Community Association Ltd v Donoghue*⁵⁶ (**Poplar Housing**) to the effect that “it is difficult to overestimate the importance of section 3”, the interpretive provision of the *Human Rights Act 1998* (UK) (**HRA**) analogous to s 32 of the Charter, and stated that he saw “no reason to doubt that the same is true of s 32”.
109. His Honour accepted that the interpretation of s 11(1) he favoured was contrary to the intention of Parliament at the time the Act was passed. However, he took the view that the effect of s 32 of the Charter was to produce a change in parliamentary intention.⁵⁷ In this regard, Nettle JA relied upon *Poplar Housing*, where the Court of Appeal noted that the effect of s 3 of the HRA is to require the courts to adjust their traditional role in relation to interpretation so as to give effect to the mandatory obligations provided for in section 3 of the HRA.

⁵⁵ At paragraph [106] of *RJE*.

⁵⁶ [2001] 3 WLR 183.

⁵⁷ *RJE* at [114].

110. In particular, the Court of Appeal observed that:⁵⁸

It is as though legislation which predates the [HRA] and conflicts with the [European Convention on Human Rights] has to be treated as being subsequently amended to incorporate the language of section 3.

111. The Commission contends that Nettle JA’s view of the effect of s 32 accords with Parliament’s intention, expressed in s 32 of the Charter, to change the way in which Victorian courts must now interpret legislation.

112. Further, the Commission observes that Nettle JA quoted from the judgment of Lord Nicholls of Birkenhead in *Ghaidan v Godin-Mendoza*⁵⁹ in relation to the “far-reaching scope” of the interpretive obligation in s 3 of the HRA, including that it may “require legislation to bear a meaning which departs from the unambiguous meaning the legislation would otherwise bear”.⁶⁰ Although he did not find it necessary to determine whether the Charter “goes this far”,⁶¹ Nettle JA’s judgment is consistent with this approach to the interpretive provision and he clearly did not reject this approach.

Methodology for application of s 32

113. Against this backdrop regarding the character of the s 32 obligation to interpret legislation compatibly with human rights, Nettle JA adopted the following propositions from Lord Woolf CJ’s judgment in *Poplar Housing*:⁶²

- (a) Unless legislation would otherwise be in breach of the Convention section 3 can be ignored; (so courts should always first ascertain whether, absent section 3, there would be any breach of the convention),
- (b) If the court has to rely on section 3 it should limit the extent of the modified meaning to that which is necessary to achieve compatibility;
- (c) Section 3 does not entitle the court to *legislate*; (its task is still one of *interpretation*, but interpretation in accordance with the direction contained in section 3),
- (d) The views of the parties and of the Crown as to whether a “constructive” interpretation should be adopted cannot modify the task of the court; (if section 3 applies the court is required to adopt the section 3 approach to interpretation).

⁵⁸ [2001] 3 WLR 183 at 204 [75].

⁵⁹ [2004] 2 AC 557.

⁶⁰ Ibid at [[31].

⁶¹ *RJE* at [119].

⁶² *RJE* at [115].

114. Nettle JA noted that this approach had also been followed by Mason NPJ of the Hong Kong Final Court of Appeal in *HKSAR v Wai and Man*.⁶³
115. Nettle JA also declined to follow the dissenting approach of Elias CJ in *Hansen*.
116. The Commission contends that, notwithstanding Nettle JA's failure to refer directly to the majority judgments in *Hansen*, his approach is consistent with the majority approach in *Hansen*. The majority judgments in *Hansen* — in particular, that of Tipping J — articulate steps in the interpretive exercise that essentially elaborate upon the *Poplar Housing* approach, and accordingly, the Court in this case can apply *Hansen*, as contended for in the Commission's Submissions.

F. CONCLUSION

117. Having interpreted the Act in light of the injunction in s 32 to prefer a rights compatible meaning where possible.

Dated: 30 March 2009

MATTHEW CARROLL

TESSA VAN DUYN

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and Human Rights
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⁶³ Unreported, Final Court of Appeal of the Hong Kong Special Administrative Region, 31 August 2006, No 4 of 2005.