

Did *R v Momcilovic* kill the Victorian Charter's interpretation power?

Opinion, by Deputy Director, Dr Julie Debeljak

The Court of Appeal recently issued its first declaration of inconsistent interpretation under s 36 of the *Victorian Charter of Human Rights and Responsibilities* in *R v Momcilovic*. Although many will greet this as a human rights friendly decision by a court that is committed to the promotion of human rights, in truth the decision has undermined the role of the Charter in remedying human rights breaches and significantly impaired the Charter's framework for dialogue between the executive, parliament and the judiciary.

The court in *Momcilovic* considered whether s 5 of the *Drugs, Poisons and Controlled Substances Act 1981* is compatible with the right to the presumption of innocence contained in the Charter. Section 5 deems that a person is in possession of a drug found on their premises "unless the person satisfies the court to the contrary". Such a provision is traditionally considered to impose a legal onus on that person to prove that he or she was not in possession, on the balance of probabilities. If a person cannot disprove possession, serious consequences follow, including exposure to a conviction for drug trafficking, which is punishable by up to 15 years imprisonment. Indeed, Ms Momcilovic was convicted of trafficking.

The Court correctly held that s 5 was an unjustified limitation on the right to the presumption of innocence. The Court then had to consider whether to use s 32 of the Charter to reinterpret the rights-incompatible provision, or to use s 36 of the Charter declare it inconsistent with human rights.

Under s 32(1) of the Charter, "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." Three of the four parties to the case, and the amicus, argued that s 5 of the *Drugs Act* could be "re-interpreted" to reduce the burden on the accused from a legal onus to the less stringent evidential onus (such that an accused would only need to provide some evidence that she was not in possession, thereby shifting the onus to the prosecution to prove beyond reasonable doubt that the accused was in possession).

This argument was based on the approach adopted under similar laws, primarily the UK *Human Rights Act* and secondarily the New Zealand *Bill of Rights*. The UK and New Zealand approach, which has been endorsed by some Victorian judges (namely Chief Justice Warren, and Justices Nettle and Bell) and numerous commentators, gives s 32(1) a remedial focus as follows:

1. According to ordinary principles of interpretation, does a provision interfere with a Charter right?
2. If so, is that interference a justified limitation under s 7(2) of the Charter?
3. If not, the meaning of the provision must be altered in order to achieve a rights compatible interpretation under s 32(1).

4. Is the altered rights-compatible interpretation "possible" and "consistent with [statutory] purpose" under s 32(1)?
5. If not, the Court must apply the provision according to its ordinary meaning and consider whether to issue a declaration of inconsistent interpretation under s 36(2).

The Court rejected this legal approach, holding that s 32(1) was not intended to create a "special" rule of interpretation. Rather, the Court adopted a three-step approach as follows:

1. Ascertain the meaning of a provision by applying s 32(1) in conjunction with common law principles of statutory interpretation and the *Interpretation of Legislation Act 1984* (Vic);
2. Once the meaning is ascertained, establish whether the provision breaches a *Charter* right;
3. If a breach does occur, establish whether the breach is a justified limitation under s 7(2) of the *Charter*.

Using this methodology, the Court held that first, s 5 could only mean the imposition of a reverse legal onus; secondly, that such a reverse legal onus breached the right to the presumption of innocence under s 25(1); and thirdly, that the breach was not justified under s 7(2). The Court issued a declaration of inconsistent interpretation, such that the rights-incompatible s 5 remains valid and was applied against Ms Momcilovic, whose conviction stands. It is now up to Parliament to decide whether to make s 5 compatible with the presumption of innocence.

Although this decision is justified by the Court mainly by reference to the intention of Parliament in enacting the *Charter*, there is clear evidence in the legislative history to the *Charter* that s 32(1) was intended to be *the* remedial mechanism. This decision decimates the remedial aspects of s 32(1). Unfortunately, to an equivalent degree, it also undermines the obligations on public authorities to act and decide lawfully under s 38(1) because the application of s 32(1) to claims under s 38(2) that a public authority was merely giving effect to a rights-incompatible law is equally weakened. Moreover, the reliance on s 36 declarations as *the* judicial tool for institutional dialogue mutes the contribution of the judiciary. The dialogue envisaged under the *Charter* relies on a strong s 32(1) interpretation power to remedy breaches and the s 7(2) limitation power to increase transparency and accountability for justifiable limitations on rights. Under the Court's three step approach, justifying limitations on rights seems to be no longer necessary unless a Declaration of Incompatibility may be issued. Given that Declarations may not be issued by lower courts, such courts may not therefore need to apply s 7(2).

See further Julie Debeljak, "Parliamentary Sovereignty and Dialogue under the Victorian Charter on Human Rights and Responsibilities": (2007) 33 Monash University Law Review 9, especially 49-56, and a forthcoming article on the Momcilovic decision.