

A pyrrhic victory for individual human rights in Australia?

As judges grapple with the tension between interpreting legislation and legislating themselves, individuals lose out on their human rights

By Neda Monshat



Michael Croucher explores the outcome of the Momcilovic case.

The importance of the 2010 decision by the Victorian Court of Appeal in *R v Momcilovic* was highlighted by the full house of more than 200 people who turned out to hear Ms Momcilovic's barrister speak for the Castan Centre recently. Members of the legal profession were well-represented as Michael Croucher reviewed what he characterised as a disappointing decision in one of the most important cases so far on the *Victorian Charter of Human Rights and Responsibilities Act 2006* Charter.

The case turned on the large quantity of methyl amphetamine found in Ms. Momcilovic's house in 2006. Though there was no evidence connecting her to the drugs, the Crown relied on s 5 of the *Drugs, Poisons and Controlled Substances Act 1981* ('the Drugs Act') which deemed Ms Momcilovic to be in possession of the methyl amphetamine. During the trial, evidence was offered to explain that it was in fact Ms. Momcilovic's partner who owned and dealt with the drugs.

Section 5 contains what is known as a 'reverse onus' provision, where the defendant – rather than the prosecution – has to 'satisfy the court' that something is true, in this case that the drugs were not in Ms Momcilovic's possession. The Court of Appeal found that this provision infringed Ms Momcilovic's right to be presumed innocent. That was the easy part. The court then had to decide whether to 'interpret' s 5 of the Drugs Act (using the power given to it under s 32 of the Charter) to make it rights-compatible, or to 'declare' the section incompatible with human rights (using the power in s 36 of the Charter). The effect of the court's choice would be stark – a reinterpreted s 5 would allow the defendant's conviction

to be quashed, while a declaration under s 36 would have no legal effect on the case at hand – the parliament would be alerted to the inconsistency, but the section would remain valid law and the conviction would stand.

The Court chose to use s 36 and make Victoria's first ever declaration of inconsistent interpretation, meaning that Ms Momcilovic remains a convicted criminal despite the finding of the State's highest court that her right to be presumed innocent had been infringed.

In his speech, Mr Croucher explained that the Court of Appeal found that s 32 was not a new, 'special' rule of interpretation, but rather a restatement of existing common law principles. Because the Court found s 32 to be such a narrow power, it could not be used to reinterpret the offending provision because that would be tantamount to rewriting the legislation (Ms Momcilovic had requested the court to reinterpret s 5 so that she only had to point to some evidence to support her assertion, rather than proving it on the balance of probabilities). This approach would have placed Victoria in line with the UK where a similar situation arose in relation to the *Human Rights Act 1998* (UK) in *R v Lambert* [2001] UKHL 37. Ms Momcilovic's application was supported by the Attorney-General and the Victorian Equal Opportunity and Human Rights Commission, who intervened in the case, and the Human Rights Law Resource Centre, which presented an amicus curiae ('friend of the court') brief.

Because of the amount of drugs found in Ms Momcilovic's home, she was ultimately found guilty of the more serious charge of 'trafficking' due to another provision of the Drugs Act which deems a person in possession of a 'traffickable quantity' of drugs to be guilty of trafficking. As a result of the conviction, Ms. Momcilovic, who prior to the charges was practicing as a patent attorney, lost her practicing certificate and was given an 18 month suspended sentence, two months of which was served in custody prior to the appeal.

Mr Croucher stated that the case of Ms. Momcilovic has made it clear that the operation of s 32 of the Victorian Charter is now much narrower than many had thought. The s 36 declaration of inconsistent interpretation ultimately issued by the Court only requires the Minister to respond to the declaration within 6 months, and have the declaration with its response laid before each House of Parliament and published in the Government Gazette.

As Mr Croucher pointed out, the Victorian Court of Appeal, by not using s 32 of the Charter to reinterpret s 5 of the Drugs Act, has ensured the continuation of a situation where people will be charged with crimes on the basis of a provision which infringes human rights. While the Court has acknowledged that s 5 of the Drugs Act infringes the right to be presumed innocent, the detriment to Ms. Momcilovic has made it a costly victory indeed. The case has been appealed to the High Court and will be heard in 2011.