

ACT Human Rights Act – A Judicial Perspective
Conference on the Tenth Anniversary of ACT Human Rights Act
Chief Justice Helen Murrell – 1 July 2014

INTRODUCTION

I acknowledge the traditional owners. It is appropriate that the Preamble to the *Human Rights Act 2004* (ACT) (HRA) states:

Although human rights belong to all individuals, they have special significance for Indigenous people—the first owners of this land, members of its most enduring cultures, and individuals for whom the issue of rights protection has great and continuing importance.¹

In a speech to the Victorian judiciary in 2007 less than two months after the commencement of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (*Victorian Charter*), Chief Justice Marilyn Warren said:

We, as the judiciary of Victoria, have before us the opportunity... to develop the first Australian jurisprudence of human rights law.²

Her Honour was mistaken; we are celebrating the 10th Anniversary of our HRA and the associated jurisprudence well before the Victorians celebrate their first decade.

Today, I would like to reflect on some of the jurisprudence that has developed in the ACT. I do so as someone who comes from NSW, a jurisdiction with no HRA and with a sometimes questionable human rights record. To a large extent I come in ignorance to the world of human rights legislation, but I do have some decades of experience in the criminal law and a fresh mind.

I will discuss the following:

- The way in way the judiciary engages with rights on a day to day basis.
- The provisions of the HRA that are most relevant to our judiciary.
- Some of the key decisions in the ACT.
- Some of the implications of the High Court decision in *Momcilovic v The Queen*³ (*Momcilovic*).

I will do so with a view to considering where we are and where we are going from a judicial perspective.

Since my appointment as a Chief Justice of the Australian Capital Territory, I have considered the HRA on only a few occasions. It was briefly considered in *Eastman v Australian Capital Territory*.⁴ The plaintiff sought judicial review of the executive's decision to refuse him release on licence. One of the plaintiff's arguments was that

¹ *Human Rights Act 2004* (ACT) Preamble para 7.

² Chief Justice Marilyn Warren AC, Opening Remarks: Judicial College of Victoria: Introduction to Human Rights Seminar, 19 February 2007, p 4.

³ *Momcilovic v The Queen* (2011) 245 CLR 1.

⁴ [2014] ACTSC 105.

the manner in which the executive made their decision was contrary to his right to a fair and public hearing under s 21 of the HRA. It was not necessary to consider the HRA in any detail as I found that the executive's power to grant release on licence was an executive function, so the right in s 21 was not engaged.

HUMAN RIGHTS & THE JUDICIARY

a. The judiciary's engagement with human rights

It has often been observed that the judiciary engages with human rights on a daily basis.⁵

Rights that are codified in the HRA such as the right to a fair and public hearing of criminal charges (s 21 (1)), the right to equality before the law (s 8 (3)), the right to a presumption of innocence (s 22 (1)) and rights to procedural fairness (s 22 (2)) are the sorts of rights that are intimately familiar to Australian judges, regardless of whether they operate in a jurisdiction with a Human Rights Act.

In applications for judicial review, judges ensure compliance with procedural fairness by administrative decision makers.

We often weigh up competing rights, such as the public's right to have access to information, against an individual's right to privacy. Judges are asked to rule on applications for public interest immunity, where we have to balance the public interest in suppressing sensitive documents and the competing public interest that litigants may have in accessing those documents for the purpose of securing a fair trial. Similar considerations arise in the context of client legal privilege, the privilege attaching to professional confidential relationships, and the privilege attaching to religious confessions. For example, recent hearings of the Royal Commission into Child Sexual Abuse have raised the clash of the right of confidentiality and the public interest related to confessions made to priests. In response to the position in canon where someone confessed to a crime, Archbishop Phillip Wilson said that "we have to be able to maintain our commitment to confessional secrecy, but at the same time there must be some way these difficulties are dealt with".⁶

The fact that the courts recognise many rights apart from those enshrined in a HRA is not an argument against a HRA. On the contrary, in a climate where (at least in other jurisdictions) the legislature increasingly seeks to undermine the human rights that the courts seek to defend, the judiciary embraces the HRA because it requires the court to consider rights and may extend the rights that are fundamental to our justice system.

⁵ See, Chief Justice Marilyn Warren AC, 'Opening Remarks' (Speech delivered at the Judicial College of Victoria: Introduction to Human Rights Seminar, State Library Theatre, 19 February 2007); The Honourable Justice Chris Maxwell, 'Human Rights: A View From the Bench' (Speech delivered at the Annual General Meeting of the Administrative Law and Human Rights Section of the Law Institute of Victoria, 26 October 2005).

⁶ AAP, 'Archbishop: confession needs 'discussion'', *News.com* (online), 25 June 2014 <<http://news.ninemsn.com.au/national/2014/06/25/20/15/archbishop-confession-needs-discussion#5omK3BsRUJzhF5hH.99>>.

b. The Judiciary's role under the ACT Human Rights Act

The HRA impacts upon the three arms of government; compatibility must be considered in relation to a bill that is to be presented to the Legislative Assembly (pt 5), the executive and public authorities must act in a way that is compatible with human rights (pt 5A) and, in so far as it is possible to do so, the courts must interpret laws in a way that is compatible with human rights (s 30).

Compliance with these requirements by the other arms of government will reduce the judiciary's role by minimising judicial review proceedings and proceedings under pt 5A of the HRA (s 40C of the HRA enables proceedings to be brought against a public authority that has failed to give proper consideration to a human right or has acted in a manner that is incompatible with human right).⁷

The HRA sets up a "dialogue" between the legislature and the courts. Where it is not possible to interpret legislation in a manner that is consistent with human rights, the Court can issue a declaration of incompatibility, which must be presented to the Legislative Assembly (s 33). The legislature must then consider whether to displace the operation of the HRA.

In the "dialogue model" the Act itself is an ordinary piece of legislation, not a constitutional enactment. Courts cannot declare legislation to be invalid when it is incompatible with the HRA. The "dialogue model":

carefully specifies the role of the courts and tribunals so as to protect the legislative supremacy of the Parliament as the ultimate expression of the democratic will.⁸

Of course, any decision of a court may be considered by the executive (resulting in executive action) or by the legislature (resulting in legislative amendment) and in this way an informal "dialogue" occurs in the ordinary course.

In addition to creating a formal dialogue, under the HRA, the informal "dialogue" between the courts and the executive/legislature may be strengthened by the provisions of pt 5A. I have already seen an example of the strengthened informal dialogue in action. In the course of deciding the Eastman case to which I have already referred, my attention was drawn to an interesting passage in the earlier decision of *Eastman v Australian Capital Territory*,⁹ which concerned a previous application by Mr Eastman for release on licence. In that case, Rares J made the observation that:

There is in my view an issue as to whether the limitations on any rehabilitation programs available to Mr Eastman, by reason of his status as a prisoner with no determinate sentence or fixed parole date, conforms with the function under s 7(1)(d) of the *Crimes (Sentence Administration) Act*, namely the promotion of his rehabilitation and reintegration into society. Given the apparently significantly

⁷ See also ss 40B, 40C.

⁸ Justice Kevin Bell, "The significance of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) for reconciliation with the Aboriginal community and a federal charter of rights" (Speech delivered at the National Indigenous Legal Conference, Melbourne 12 September 2008).

⁹ (2013) 279 FLR 249.

improved behaviour of Mr Eastman in the past two years it seems to me that one question which may well be relevant for consideration by the Executive, under s 295(1)(b) having regard to its functions under the Act and its obligations under s 40B of the *Human Rights Act*, is the promotion of Mr Eastman's rehabilitation and reintegration into society and to ensure so far as practicable, in accordance with s 7(2)(a), that he is not subject to further punishment in addition to deprivation of liberty only because of the conditions of his detention.¹⁰

By the time that the circumstances surrounding consideration of the later application for release on licence came before me, the executive had directed that consideration be given to affording Mr Eastman access to appropriate rehabilitation programs.

KEY PROVISIONS FOR THE COURTS

a. The Act generally

Part 3 of the HRA which recognises a raft of human rights is derived from the International Covenant on Civil and Political Rights (ICCPR).¹¹

The HRA applies to Territory legislation but *not* to the common law.¹²

The Explanatory Statement to the bill suggests that:

This Bill does not expressly apply to the common law although it may influence the development of the common law.¹³

The means by which the HRA might influence the common law are unclear; perhaps this is just a motherhood statement.

The HRA does not limit or restrict other rights or freedoms that have their source apart from the Act,¹⁴ and these would include common law procedural rights that are recognised by the courts.

Section 28 of the HRA provides that human rights may be subject to "reasonable limits set by laws that can be demonstrably justified in a free and democratic society".

The key provisions that affect the courts are the interpretation provision, the declaration of compatibility and the new duties on public authorities.

c. Interpretation of legislation in a manner consistent with human rights

Section 30 of the HRA provides that:

So far as it is possible to do so consistently with its purpose, a Territory law must be interpreted in a way that is compatible with human rights.

¹⁰ *Eastman v Australian Capital Territory* (2013) 279 FLR 249 [20].

¹¹ Explanatory Statement, Human Rights Bill 2003 (ACT).

¹² *Human Rights Act 2004* (ACT) ss 3, 29.

¹³ Explanatory Statement, Human Rights Bill 2003 (ACT) 4-5.

¹⁴ *Human Rights Act 2004* (ACT) s 7.

But s 139 of the *Legislation Act 2001* (ACT) (*Legislation Act*) provides:

- (1) In working out the meaning of an Act, the interpretation that would best achieve the purpose of the Act is to be preferred to any other interpretation.
- (2) This section applies whether or not the Act's purpose is expressly stated in the Act.

Section 139 seems to conflict with s 30 of the HRA. The former s 30¹⁵ stated that interpretation was to be not only compatible with human rights but "subject to the *Legislation Act*, section 139". The authors of the *Report to the Department of Justice and Community Safety* on the first five years of the HRA (Five Year Report),¹⁶ considered that the amendment would ensure that a human rights consistent interpretation would prevail unless such an interpretation "would defeat the purpose of the legislation".

The relationship between s 30 of the HRA and s 139 of the *Legislation Act* is considered below.

Section 31 (1) of the HRA provides that:

International law, and the judgments of foreign and international courts and tribunals, relevant to a human right may be considered in interpreting the human right.

Section 141 of the *Legislation Act* also deals with the consideration of material that does not form part of an Act when interpreting that Act, and it is consistent with s 31 of the HRA and usual principles of interpretation.

d. Declaration of incompatibility

Section 32 of the HRA applies where the Supreme Court is considering whether a Territory law is consistent with a human right. It provides:

- (2) If the Supreme Court is satisfied that the Territory law is not consistent with the human right, the court may declare that the law is not consistent with the human right (the declaration of incompatibility).
- (3) The declaration of incompatibility does not affect—
 - (a) the validity, operation or enforcement of the law; or
 - (b) the rights or obligations of anyone.
- (4) The registrar of the Supreme Court must promptly give a copy of the declaration of incompatibility to the Attorney-General.

e. Public authority - cause of action.

The *Human Rights Amendment Bill 2007* (ACT) introduced pt 5A, which imposes a direct duty on public authorities (all public bodies except the legislature and the courts) to act in a way that is compatible with human rights and to consider human rights when making decisions, and creates a cause of action and an associated right to claim relief (but not damages) if a public authority fails to do so.

¹⁵ Amended by the *Human Rights Amendment Act 2008* (ACT).

¹⁶ The ACT Human Rights Act Research Project, *The Human Rights Act 2004 (ACT): The First Five Years of Operation A Report to the Department of Justice and Community Safety* (2009) 51.

These provisions came into force on 1 January 2009.

The Explanatory Statement does not provide guidance about possible remedies, but it does state that:

Sub-section 40C (4) provides that the Court may grant such relief it considers appropriate in relation to the unlawful act, except for damages. However, sub-section 40C (5) makes clear that if the same conduct is independently unlawful and compensable, this section does not take away that right to damages.¹⁷

The Twelve-month review into the HRA considered that these provisions would strengthen the human rights culture in the ACT, and would increase compliance with human rights by government officials.¹⁸

The provision in the *Victorian Charter* is slightly more complicated; a plaintiff must be able to show a cause of action on another ground before they can argue for a remedy for a failure of a public authority to consider human rights. Section 39 of the *Victorian Charter* provides:

39 Legal proceedings

(1) If, otherwise than because of this Charter, a person may seek any relief or remedy in respect of an act or decision of a public authority on the ground that the act or decision was unlawful, that person may seek that relief or remedy on a ground of unlawfulness arising because of this Charter.

...

(3) A person is not entitled to be awarded any damages because of a breach of this Charter.

To the extent that the ACT provision is a simplification of this provision it is to be welcomed.¹⁹

HUMAN RIGHTS ACT IN THE ACT SUPREME COURT

a. Statistics

Between 1 July 2004 (when the HRA came into force) and 30 May 2014 the ACT Supreme Court sitting at first instance, has published 149 decisions in which the HRA has been mentioned (9.1% of 1639 published decisions in this period).²⁰ In the same period, 26 Court of Appeal decisions have involved or mentioned the HRA (7.7% of 338 published decisions).²¹

b. Analysis of trends

¹⁷ Explanatory Statement, Human Rights Amendment Bill 2007 (ACT).

¹⁸ The ACT Human Rights Act Research Project, *The Human Rights Act 2004 (ACT): The First Five Years of Operation A Report to the Department of Justice and Community Safety* (2009) p 51.

¹⁹ *Ibid* p. 22.

²⁰ To the best knowledge of the ACT Supreme Court Russel Fox Library.

²¹ Year on year data is in Appendix 1.

As the graph below shows, there was a slow start in the first couple of years before a peak in 2009. At about that time, the HRA was raised unsuccessfully in a number of bail applications. Since that time, there has been a decline in the percentage of cases in which the *HRA* has been raised.

c. Interpretation provision in the Court

At the time that the HRA was introduced, one of the key concerns of bill of rights sceptics was that the interpretation provision would give too much power to judges to 're-write' legislation.

One of the most vocal critics of bills of rights in Australia, Professor Jim Allan, in typically colourful terms opined:

reading down provisions such as these throw open the possibility of 'Alice in Wonderland' judicial interpretations; they confer an 'interpretation on steroids' power on the unelected judges. So although there is no power to invalidate or strike down legislation, the judges can potentially accomplish just as much by rewriting it, by saying that seen through the prism (that is, their own prism) of human rights, 'near black' means 'near white' or 'interim order becomes a final order' means 'interim order does not become a final order'.²²

Ultimately, the kind of interpretations posited have not materialised.

In the UK, the House of Lords has held that, in the case of human rights legislation, the judicial interpretative power goes beyond the ordinary power. In *Ghaidan v Godin-Mendoza (Ghaidan)*²³ the House of Lords considered a similar provision concerning legislative interpretation in the UK bill of rights. Lord Nicholls, (with whom Lord Steyn, Lord Rodger and Baroness Hale agreed, Lord Millett dissenting) said:

It is now generally accepted that the application of s.3 [the reading down provision] does not depend upon the presence of ambiguity in the legislation being interpreted. Even if, construed according to the ordinary principles of interpretation, the meaning of the legislation admits of no doubt, s.3 may none the less require the legislation to be given a different meaning ... Section 3 may require the court to ... depart from the intention of the Parliament which enacted the legislation ... It is also apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it convention-compliant [meaning bill of rights compliant].²⁴

The facts in *Ghaidan* were that the defendant's long term homosexual partner had been the tenant of the premises. On the partner's death, the claimant lessor brought possession proceedings. The first instance judge found that the defendant's occupation was not protected because he was not a "spouse" of the original tenant; he was not living with the original tenant "as his or her wife or husband".

The House of Lords took a different view, and held that the extended definition of "spouse" treated survivors of homosexual partnerships less favourably than those of

²² James Allan, 'The Victorian *Charter of Human Rights and Responsibilities*: Exegesis and Criticism' (2006) 30 *Melbourne University Law Review* 906, 909-910.

²³ [2004] 2 AC 557.

²⁴ *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, 571-572.

heterosexual partnerships. Applying s 3 of the *Human Rights Act 1998* (UK), which provides that “so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with [rights under the *Convention for the Protection of Human Rights and Fundamental Freedoms*]”, the House of Lords found that, although the meaning of the section was unambiguous (and did not extend to homosexual relationships), the underlying social policy could extend to homosexual relationships, and reading the legislation as extending to homosexual relationships would eliminate the infringement of the defendant’s rights. Consequently, the House of Lords adopted the human rights compatible meaning.

In determining whether a human rights compatible interpretation was “possible”, the majority concluded that, for legislation to be given a rights compatible meaning, it was not a precondition that the legislation was ambiguous. However, Lord Nicholls did acknowledge that the courts were precluded from adopting a meaning “inconsistent with a fundamental feature of the legislation”.²⁵

Note that the ACT HRA differs from the UK Act in that, in the ACT, a rights compatible interpretation must not only be “possible” but it must also be “possible” to give that interpretation “consistently with [the purpose of the Act under consideration]”.²⁶ Does the requirement of consistency with “the purpose of the Act under consideration” differ from Lord Nicholls requirement that the human rights meaning be not “inconsistent with a fundamental feature of the legislation”?

The *Ghaidan* approach does give courts the power to adopt a meaning that differs from the meaning that is clearly intended by the legislature.

There has been some confusion about the effect of *Ghaidan* and whether that decision applies in the ACT.²⁷

It is unnecessary to consider whether the *Ghaidan* approach results in an undemocratic and illegitimate outcome (as Professor Allan has contended), because the ACT Supreme Court has rejected the *Ghaidan* approach and the High Court has implied that such an approach is unconstitutional.

Although in *Kingsley’s Chicken Pt Ltd v Queensland Investment Corporation*²⁸ the Court of Appeal gave passing approval to the *Ghaidan* approach, it has been rejected in three key ACT decisions. In *Casey v Alcock*²⁹ Besanko J decided that it should not be followed. His Honour restated the point in some detail in *R v Fearnside (Fearnside)*.³⁰

Fearnside was a case in which the ACT Director of Public Prosecutions had sought leave to appeal against a decision of Higgins CJ to vacate a trial date so that an

²⁵ *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, [33].

²⁶ *Human Rights Act 2004* (ACT) s 30.

²⁷ Luke Beck, *The interpretation provisions of statutory bills of rights: A little bit Humpty Dumpty?* (2011) 22 Public Law Review 97, 110.

²⁸ [2006] ACTCA 9.

²⁹ (2009) 3 ACTLR 1.

³⁰ (2009) 3 ACTLR 25.

accused could reactivate his entitlement to elect for trial by a judge alone under s 68B of the *Supreme Court Act* 1933. His Honour found that the right to a fair trial in s 21 HRA entailed more than the the common law right not to have an unfair trial, and that the s 21 right would be impinged if the accused was statute-barrred from making an election for trial by judge alone. The Court of Appeal disagreed. Besanko J (with whom Gray P and Penfold J concurred) held that reliance on the HRA failed at the “first stage” because s 21 of the HRA was not enlivened by s 68B; the right to elect for trial by judge alone was not part of the right to a fair trial in s 21 of the HRA.³¹

Besanko J made the following comments about s 30 of the HRA:

86. In the present case, it was suggested that the Court in *Kingsley’s Chicken* had sanctioned the adoption of the *Ghaidan* approach. I do not think that is the case. ...The Court was not suggesting that s 139(1) of the Legislation Act or s 30(1) of the HRA authorised and required a court to take the type of approach taken by the House of Lords in *Ghaidan*. If I am wrong, and the Court was suggesting that that approach could and should be taken, then I would respectfully decline to follow the Court’s observations, which were obiter.

...

89. In its [amended] form, s 30 appears to give the Court a broader power to adopt an interpretation of a Territory law which is consistent with a relevant human right. I am conscious of the fact that discussing the matter in the abstract is of limited assistance. Nevertheless, I think s 30 would enable a Court to adopt an interpretation of a legislative provision compatible with human rights which did not necessarily best achieve the purpose of that provision or promote that purpose, providing the interpretation was consistent with that purpose. ...under s 30 in the HRA the purpose or purposes of the legislative provision must be ascertained through well-established methods, and the interpretation adopted by the Court must be consistent with that purpose or those purposes.

...

97. The Supreme Court of New Zealand in *R v Hansen* [2007] 3 NZLR 1 (Hansen) was prepared to consider the proper approach and by a majority favoured an approach to the second and third stages broadly similar to that advanced by the Attorney-General in this case. Tipping J said (at [92]):

A summary may be helpful:

Step 1. Ascertain Parliament’s intended meaning.

Step 2. Ascertain whether that meaning is apparently inconsistent with a relevant right or freedom.

Step 3. If apparent inconsistency is found at step 2, ascertain whether that inconsistency is nevertheless a justified limit in terms of s 5.

Step 4. If the inconsistency is a justified limit, the apparent inconsistency at step 2 is legitimised and Parliament’s intended meaning prevails.

Step 5. If Parliament’s intended meaning represents an unjustified limit under s 5, the Court must examine the words in question again under s 6, to see if it is reasonably possible for a meaning consistent or less inconsistent with the relevant right or freedom to be found in them. If so, that meaning must be adopted.

Step 6. If it is not reasonably possible to find a consistent or less inconsistent meaning, s 4 mandates that Parliament’s intended meaning be adopted.

...

98. It seems to me that the general approach taken by the majority in *Hansen* is the correct one, although whether that will be so in every case is best left for a case in which the issue is decisive and is the subject of detailed submissions from both

³¹ *R v Fearnside* (2009) 3 ACTLR 25 [101].

sides: see Wilberg H, “The Bill of Rights and Other Enactments” [2007] NZLJ 112. In the present case any reliance on the HRA fails at the first stage.³²

*R v Hansen (Hansen)*³³ concerned a “deemed supply” drugs offence. The legislation provided that a person found in possession of drugs above a certain amount was deemed to possess them for the purposes of supply or sale “until the contrary is proved”. The appellant contended that the provision was inconsistent with the right to be presumed innocent until proven guilty enshrined in s 25(c) of the *Bill of Rights Act 1990* (NZ) (BORA). The Supreme Court considered whether the provision could be read consistently with BORA as merely imposing an evidentiary burden rather than a legal burden. The majority of the Court found that the relevant provision had a clear, natural and established meaning, and must be interpreted as applying a legal burden, and not merely an evidentiary burden. The Court found that the inconsistent interpretation must be applied because the meaning was clear, even though there was no justified limitation on the presumption of innocence.

It was in relation to a bail application that the ACT Supreme Court (Penfold J) made the first declaration of incompatibility in Australia in *Re Application for Bail by Isa Islam (Islam)*.³⁴ Section 9C of the *Bail Act 1992* (ACT) (*Bail Act*) requires those accused of certain offences to establish “exceptional circumstances” before they are able to obtain bail. Penfold J found that the provision was incompatible with s 18 of the HRA (an accused must not be detained in custody as a general rule).

The applicant sought to rely on *Ghaidan*, arguing that the Court could “read in” an interpretation to make a provision consistent with human rights.

Penfold J firmly rejected the *Ghaidan* approach, finding that there was no indication in the HRA of an intention that the courts should “re-write” legislation to make it human rights compatible. Rather, the HRA focussed on drawing matters to the attention of the legislature by making a declaration of incompatibility.³⁵ Her Honour agreed with the Victorian Court of Appeal in *R v Momcilovic*³⁶ (at the time that *Islam* was decided, the *Momcilovic* appeal had not yet been decided by the High Court), where the Court concluded that such human rights interpretation provisions were not “remedial”, did not create a “special rule of interpretation” of the kind identified in *Ghaidan*, and did not displace the “ordinary principles of interpretation”.³⁷

As to the proper process of interpretation, Penfold J observed in *Islam* that in *Fearnside* the Court’s conclusions as to the proper process of interpretation had been tentative and strictly obiter, since in *Fearnside* the Court concluded that the right to elect for trial by judge alone was not part of the right to a fair trial recognised by the HRA and the argument failed at the “first stage”.³⁸

³² *R v Fearnside* (2009) 3 ACTLR 25 [86]-[98].

³³ [2007] 3 NZLR 1.

³⁴ (2010) 4 ACTLR 235.

³⁵ *Re Application for Bail by Isa Islam* (2010) 4 ACTLR 235 [122].

³⁶ (2010) 25 VR 436.

³⁷ *Re Application for Bail by Isa Islam* (2010) 4 ACTLR 235 [124]-[126].

³⁸ *Re Application for Bail by Isa Islam* (2010) 4 ACTLR 235 [135].

In *Islam*, Penfold J rejected the approach to process that had been adopted in *Hansen* and approved (in obiter) in *Fearnside*. Her Honour took an approach to the process of interpretation that was similar to that taken by the Victorian Court of Appeal in *Momcilovic*:

Step 1: Identify all meanings of the provision that are available under ordinary principles of statutory interpretation *and* consistent with legislative purpose (the *available meanings*), including meanings generated by applying s 30 of the Human Rights Act but also meanings that would be available apart from s 30.

Step 2: Set aside for the time being any available meaning that is not human rights-compatible under s 30.

Step 3: Examine the remaining available meanings (that is, those that are human rights-compatible).

Step 3A: If there are one or more available meanings that are human rights-compatible, then that meaning, or the one of those meanings required by s 139 of the Legislation Act to be preferred, is adopted.

Step 3B: If there are no available meanings left (that is, there were no available meanings that were also human rights-compatible), re-instate the non-compatible available meanings set aside at Step 2.

Step 4: Undertake an inquiry under s 28 of the Human Rights Act into whether any of those re-instated available meanings can be justified.

Step 4A: If only one meaning can be justified, it is adopted.

Step 4B: If two or more available meanings can be justified, then a choice must be made between them; in the ACT that choice would seem to be directed by s 139 in favour of the available meaning that best achieves the legislative purpose. In the absence of such a provision the choice would be less constrained and might, for instance, include a consideration of which meaning had the least impact on relevant human rights.

Step 4C: If none of the available meanings can be justified, then the available meaning or one of the multiple available meanings (in the ACT chosen as required by s 139) is adopted, and a declaration of incompatibility may be considered.³⁹

Applying that test to s 9C of the *Bail Act*, her Honour found that the provision applied a general rule to implement a presumption against bail, and it was inconsistent with s 18 (5) of the HRA

Applying s 28 of the HRA, her Honour found that the limits of s 9C of the *Bail Act* were not proportional to the importance of its purpose.

d. Comparison of approaches in Fearnside and Islam

Two approaches have been discussed by the ACT courts; that in *Fearnside* and that in *Islam* (following, to a large extent, the reasoning of the Victorian Court of Appeal in *R v Momcilovic*⁴⁰). The crucial difference between the approaches is whether the court starts by identifying the “normal meaning” (as in *Fearnside* s 139 > s 28 > s 30), or starts by seeking a “human rights compatible meaning” (as in *Islam* s 30 > s 139 > s 28).

Do the *Fearnside* and the *Islam* approaches produce different outcomes?

³⁹ *Re Application for Bail by Isa Islam* (2010) 4 ACTLR 235 [236].

⁴⁰ (2010) 25 VR 436.

Are the approaches likely to result in different outcomes?

In *Islam* Penfold J considered that the *Islam* approach was more likely to achieve a human rights compatible outcome.⁴¹

Her Honour must be right. A *Momcilovic/Islam* approach seeks to find a human rights compatible interpretation, and favours it, whereas a *Fearnside* approach starts with an interpretation that may be human rights incompatible and asks whether it is justifiable. As her Honour said:

One of the effects of the *Momcilovic* approach is that a provision may be interpreted so as to make it human rights-compatible when in fact a non-compatible meaning for the provision could have been justified. This could be said to result in an inappropriate constraining of the legislature's power to legislate effectively for an objective that involves some incompatibility with a human right but is seen as socially desirable.⁴²

e. Other decisions

In the Supreme Court, the HRA tends to be raised in criminal cases rather than civil cases. This impression is consistent with observations in the Five Year Report:

Over 60 per cent of the HRA cases concern the criminal law, covering issues such as bail, search warrants, admissibility of evidence, treatment of persons in custody, the particular rights of children in the criminal process, the right to trial without undue delay, the right to a jury trial and sentencing issues, including circle sentencing, a community-based sentencing option for Indigenous offenders. This focus on criminal issues reflects the general trend of use of bills of rights in other jurisdictions.⁴³

However, the HRA has been considered in some civil cases, both in the Supreme Court and in other jurisdictions.

In *Allat & ACT Government Health Directorate (Administrative Review)*,⁴⁴ the ACT Administrative Appeals Tribunal (ACAT) reviewed a decision of an ACT Government Directorate that, in complying with a FOI request, it would not redact names of the members of the Directorate's Committees. The respondent accepted that ACAT is a public authority for the purposes of the HRA and must act in accordance with s 40B when making a decision.

ACAT considered "that the right to freedom of expression which includes a freedom to seek, receive and impart information in s 16(2) of the Human Rights Act is engaged by the issues in dispute".⁴⁵ ACAT followed the approach in *Islam* and found that it was possible to adopt a human rights-compatible meaning that complied with s 139 of the *Legislation Act*. ACAT found that the names of committee members were

⁴¹ *Re Application for Bail by Isa Islam* (2010) 4 ACTLR 235 [148].

⁴² *Re Application for Bail by Isa Islam* (2010) 4 ACTLR 235 [147].

⁴³ The ACT Human Rights Act Research Project, *The Human Rights Act 2004 (ACT): The First Five Years of Operation A Report to the Department of Justice and Community Safety* (2009) 47.

⁴⁴ [2012] ACAT 67.

⁴⁵ *Allat & ACT Government Health Directorate (Administrative Review)* [2012] ACAT 67 at [71].

not exempt from release. The public interest in transparency outweighed any potential for detriment. Claims for legal professional privilege were upheld.

In *Blundell v Sentence Administration Board*⁴⁶ Mr Blundell claimed that a decision of the Sentence Administration Board (SAB) cancelling his parole should be set aside. Section 150 of the *Crimes (Sentence Administration) Act 2005* (ACT) (the *Sentence Administration Act*) requires cancellation “if, while an offender’s parole order is in force, the board decides that the offender has been convicted or found guilty of” a non-ACT offence.

The key issue was whether the section extended to offences that had occurred prior to the commencement of the parole order. The plaintiff raised the human rights in ss 11, 13 and 18 of the HRA [family and children, freedom of movement, liberty and security of person].

Refshauge J accepted that two possible interpretations of the provision were available; that offences committed at any time permit cancellation, and that only offences committed during the parole period give rise to the power. His Honour held that the SAB could only cancel a parole order under s 150 if the parolee was convicted of an offence committed while the parole order was in force.⁴⁷ The case was decided on general interpretation principles, but his Honour was “comforted” in his conclusion by the provisions of the HRA.⁴⁸

In *Griggs v Sentence Administration Board of the ACT*,⁴⁹ Mr Griggs sought judicial review of a decision of the SAB cancelling a periodic detention order and requiring that he serve his sentence by way of full-time detention. Under s 70 of the *Sentence Administration Act*, the SAB was required to cancel a periodic detention order if it decided “that, since an offender was sentenced to serve periodic detention, the offender has been convicted or found guilty of” an offence.

Gray J held that the SAB was required to cancel periodic detention only where an offender was convicted or found guilty after the periodic detention order was imposed. His Honour mentioned the HRA and noted that his approach was consistent with that of Refshauge J in *Blundell*.

f. Legal Aid & Public Authorities

The first decision to consider the obligations imposed upon public authorities by pt 5A was that of Refshauge J in *Hakimi v Legal Aid Commission (ACT)*.⁵⁰ The accused had been charged with a serious offence and qualified for legal aid. He wished to instruct a particular private lawyer but the Legal Aid Commission refused to pay for a private solicitor, granting aid on the basis that the accused instructed a lawyer employed by the Commission.

⁴⁶ (2010) 245 FLR 424.

⁴⁷ *Blundell v Sentence Administration Board* (2010) 245 FLR 424 [184].

⁴⁸ *Blundell v Sentence Administration Board* (2010) 245 FLR 424 [159].

⁴⁹ (2010) 5 ACTLR 185.

⁵⁰ (2009) 227 FLR 462.

His Honour noted that under s 28 (2) of the HRA 22 (2) (d) of the HRA (the right of a person charged with a criminal offence to defend himself/herself personally or through legal assistance “chosen” by him or her) was not an absolute right and was limited by reasonable limits that can be demonstrably justified in a free and democratic society.⁵¹ However, his Honour did not need to decide the case on that basis as he found that an absolutist interpretation of the right in s 22 should be rejected.⁵²

In *R v GZ*⁵³ the accused had been charged with having sexual intercourse with a child in 2009. The matter came to trial in 2012, but the jury was unable to reach a verdict. If the accused did not accept a date in a month’s time, the Court could not re-list the matter until 2014. The accused resisted the early date because his counsel was unavailable, and argued that there was a clash of two rights under s 22 of the HRA: (c) the right to be tried without unreasonable delay, and (d) the right to be defended by legal assistance chosen by him.

Refshauge J adjourned the trial indicating that the accused might be forced on regardless of counsel’s convenience if new dates became available, but would not be forced to accept the date in a month’s time. His Honour made the following comments:

[17] In *R v Mills* (2011) 210 A Crim R 434; 252 FLR 295, Higgins CJ also noted that the failure to provide adequate resources such as enough judicial officers to conduct enough trials in a timely fashion is no answer to the claim of delay.

...

[22] It is clear that at common law an accused has no right to counsel, although an absence of representation may render a trial unfair or so require that it be stayed, as in *Dietrich v The Queen* (1992) 177 CLR 292. A fortiori, an accused has, at common law, no right to counsel of his or her choice. So much was stated by King J in *R v Williams* (2006) 16 VR 168 at [58].

[23] While, as King J said in *R v Williams* (2006) 16 VR 168 at [66], “[t]he court has always done what it could to attempt to accommodate counsel of choice”, that is not a primary consideration, and the convenience of counsel cannot determine when proceedings may be listed, even if that means different counsel needs to be briefed, including in serious matters such as faced the court in *R v Ngo* [2001] NSWSC 887.⁵⁴

g. Delays & inadequate resourcing of the Courts

Section 22(2)(c) of the HRA refers to the right of a person who has been charged with a criminal offence “to be tried without unreasonable delay”.

It has long been recognised that, at common law, courts may permanently stay criminal proceedings for abuse of process if any trial will necessarily be unfair to the accused: *Jago v District Court of NSW*.⁵⁵ This is because the courts have jurisdiction to ensure that their processes are not converted into instruments of injustice or

⁵¹ *Hakimi v Legal Aid Commission (ACT)* (2009) 227 FLR 462 [34].

⁵² *Hakimi v Legal Aid Commission (ACT)* (2009) 227 FLR 462 [90]-[91].

⁵³ (2012) 271 FLR 404.

⁵⁴ *R v G Z* (2012) 271 FLR 404 [17]-[23].

⁵⁵ (1989) 168 CLR 23

unfairness contrary to their intended purpose of administering justice with fairness and impartiality: *Calleja v The Queen*.⁵⁶

Delay is the most common basis for seeking a stay for abuse of process, but an abuse of process is not confined to situations where alleged injustice is related to delay, and the category of case in which a stay may be granted is not closed.⁵⁷ Recently, in *Lee v The Queen*,⁵⁸ the High Court quashed convictions and ordered a new trial in circumstances where an accused had been interrogated by the NSW Crime Commission and, contrary to law, the Commission had published transcripts of the accused's Commission evidence to the DPP so that the DPP could ascertain the accused's defence at the trial.

However, in the context that there is a legitimate public interest in the disposition of charges of serious offending, a stay will be granted only in extreme cases and it is notoriously difficult to convince a court that any trial will necessarily be unfair. In *Webb v R*,⁵⁹ the NSW Court of Criminal Appeal upheld a decision that it was not necessarily unfair to try an accused for offences that had allegedly occurred 20 years earlier, despite the fact that the accused would be unable to confront the complainant because the complainant was deceased.

A number of cases have considered whether the HRA expands the courts' common law power to ensure trials are fair, either directly through s 21 (the right to a fair trial), s 22 (2) (c) (the right to be tried without unreasonable delay) or other rights provisions of the HRA, or indirectly, through pt 5A. In relation to the matter of *Webb* referred to above, s 22 (2) (g) of the HRA refers to the right "to examine prosecution witnesses".

Section 40C in pt 5A enables the Supreme Court to grant relief where a public authority has contravened s 40B by acting in a way that is incompatible with the human right or making a decision without considering a relevant human right.

In *R v Upton*,⁶⁰ the accused had been charged with an offence committed in 2002 and the matter was tried in 2003, but the jury had to be discharged before a verdict was reached. The matter was relisted in 2005, but the prosecution sought to vacate the hearing date as a witness was unavailable.

Connolly J granted a stay, but permitted the prosecution to apply for a contrary order if it met the costs of the accused. His Honour acknowledged the common law power to stay proceedings, but his Honour seems to have considered that he was exercising a statutory discretion to grant a stay under s 20 of the *Supreme Court Act*. Consequently, he was obliged to refer to the HRA, including s 22 (2) (c) of the HRA. His Honour referred to *Attorney-Generals Reference (No 2)*⁶¹ (which established that the applicable human rights provisions may be breached by unreasonable delay

⁵⁶ [2012] NSWCCA 37 per Beazley JA (with whom Hulme and Garling JJ agreed) at [35], referring to *Walton v Gardiner* (1993) 177 CLR 378 at 392–393.

⁵⁷ *Walton v Gardiner* (1993) 177 CLR 378; *Dupas v The Queen* (2010) 241 CLR 237 at [35].

⁵⁸ [2014] HCA 20.

⁵⁹ [2012] NSWCCA 216.

⁶⁰ [2005] ACTSC 52.

⁶¹ [2004] 2 AC 72.

even in the absence of demonstrated prejudice), and to New Zealand case of *Martin v Tauranga District Court*⁶² (where Cooke P set out the factors to be considered under BORA when determining whether a delay was “unreasonable”).

In *R v Mills*,⁶³ the accused had been committed for trial in 2007. A 2008 trial was aborted and for various reasons the trial was delayed until March 2011. Higgins CJ granted a permanent stay of the proceedings on the basis of the right in s 22(1) (c). In doing so, his Honour made the following observations:

[21] I agree with [Connolly J in *Upton*] that the conferral of the right to trial without unreasonable delay “may confer a greater power on this Court than the common law position” (see [18]). I would go further, however. I consider it does so.

[22] In saying that, I also agree that a breach of this provision does not confer a right to a stay. As his Honour noted, the test is one of proportionality, referring to *Attorney-General’s Reference (No 2)* per Lord Hobhouse.

[23] The difference between the common law right and that conferred by the *Human Rights Act*, in my view, is illustrated by the case of *R v PJ* [2008] ACT SC 100... The difference was whether a breach of a right to a fair trial required a retrial even if the breach would not alter the outcome...

...

[44] A failure to provide adequate resources will, if unreasonable delay results, be a breach of the human rights entitlements of litigants, civil and criminal, for which the state is then liable (see particularly 4.6.50 at p 322 [of *Human Rights Law and Practice (Third Edition)*] (Lord Lester of Herne Hill QC, Lord Pannick QC and Javan Herbert]) The state cannot on the one hand, confer a right to trial without unreasonable delay and, on the other, provide insufficient resources for its exercise.

[46] ...even where state has taken steps to address institutional delays in its court system, it does not thereby diminish the entitlement of a particular litigant to trial within a reasonable time.⁶⁴

In *Nona v R*,⁶⁵ the accused had been charged with offences in 1995-1996. The Court of Appeal upheld a decision to refuse a stay of proceedings. As s 22(2) is concerned with “anyone charged with a criminal offence”, the question of delay turned on the date upon which the accused had been “charged”. The Court decided that, in the ACT, a person is “charged” at the earliest when he or she is arrested or served with a summons or court appearance notice.⁶⁶

What is of interest from a general human rights perspective is that, in the course of her reasons, Penfold J disagreed with one aspect of Dowsett J’s decision and commented on the approach taken in *Upton* and *Mills*. Her Honour stated:

[82] First, given the distinction drawn in the *Human Rights Act* between the right to a fair trial (s 21 (1)) and the right to a trial without unreasonable delay (s 22 (2) (c)), I do not agree that prejudice needs to be demonstrated before a finding of unreasonable delay may be made.

[93] Finally, I note that counsel who appeared for the appellant on the stay appeal made submissions ... that can be summarised as follows:

⁶² [1995] 2 NZLR 419.

⁶³ (2011) 252 FLR 295.

⁶⁴ *R v Mills* (2011) 252 FLR 295 [21]-[46].

⁶⁵ (2013) 8 ACTLR 168.

⁶⁶ *R v Mills* (2011) 252 FLR 295 [295] per Dowsett J, Higgins CJ and Penfold JJ agreeing.

(a) The *Human Rights Act* does not only provide a basis for statutory interpretation (under s 30 of that Act), and for remedies (under Part 5A of that Act) where public authorities disregard the rights explicitly provided for in the *Human Rights Act*, but also creates or recognises “free-standing” rights, which do not depend for their impact on the enforcement provisions of the *Human Rights Act*.

...

[94] ...I do not agree that the *Human Rights Act* requires or permits s 20 of the Supreme Court Act, to the extent that it confers jurisdiction on the Court, to be read as conferring powers on the Court, to provide remedies for breaches of “free-standing” human rights, to the extent that such remedies go beyond recognised common law remedies and the remedies provided for by the *Human Rights Act* itself, or by other specific legislation, properly interpreted by reference to the *Human Rights Act* .

[95] No authority was identified for the proposition that the *Human Rights Act* creates “free-standing rights” that, by reason of their specification in the *Human Rights Act*, may be protected by the *Supreme Court* in ways not provided for by either the common law or by the *Human Rights Act* itself....⁶⁷

In *R v Forsyth*,⁶⁸ Penfold J considered an application to permanently stay proceedings relating an incident in 2007. A summons had been issued in 2008 and the matter came to trial in 2012.

Her Honour noted that the right of a person who has been charged to be tried without unreasonable delay (s 22 (2) (c) HRA) is separate from the right of everyone to a fair trial (s 21 (1) HRA) and separate from the right of an arrestee/detainee to be tried within a reasonable time or released (s 18 (4) (b) HRA).⁶⁹ In the absence of full argument, her Honour accepted that unreasonable delay by a public authority such as the DPP could justify a remedy, including the remedy of a permanent stay.⁷⁰ However, her Honour refused the application on the basis that, although the delay was unreasonable (in the sense that it was unjustifiable), institutional delays and the conduct of the accused had contributed, and her Honour was not satisfied that the relevant public authority, the DPP, had acted unlawfully within s 40B of the HRA.⁷¹

Her Honour went on to comment that, if the accused had established unlawful conduct by the DPP, a stay would have been the appropriate remedy.⁷² In the absence of identifiable prejudice or potential unfairness to the accused, her Honour declined to exercise her common law power to grant a stay for abuse of process.⁷³

Of general interest is the following passage:

My preliminary view is that the DPP is a public authority, but that it should not be equated with the executive in the context of the *Human Rights Act*. Relevantly for this case, it is not a public authority responsible for ensuring that resources (except DPP resources) are available to enable trials to be held without unreasonable delay. A failure to provide a prosecutor to conduct a listed trial might show an unlawful disregard of an

⁶⁷ *R v Mills* (2011) 252 FLR 295 [82]-[95].

⁶⁸ (2013) 281 FLR 62.

⁶⁹ *R v Forsyth* (2013) 281 FLR 62 [26], [252].

⁷⁰ *R v Forsyth* (2013) 281 FLR 62 [78]-[79].

⁷¹ *R v Forsyth* (2013) 281 FLR 62 [165], [257].

⁷² *R v Forsyth* (2013) 281 FLR 62 [258].

⁷³ *R v Forsyth* (2013) 281 FLR 62 [262].

accused's human rights by the DPP, but the DPP cannot be held responsible, as such, for the Supreme Court's inability or failure to offer early trial dates. Nor in my view could the DPP be held responsible as, such, for decisions such as a decision by a person responsible for courts administration to redirect available funds away from trials and into more peripheral areas of the Court's activities. In such a case, however, the court's administrators might be part of a public authority that could itself be found to have disregarded a person's right to trial without unreasonable delay, which might in turn permit a remedy to be provided for the breach of that right (including, in an appropriate case, a stay).⁷⁴

If the approach of Penfold J is accepted, then the DPP can only be held responsible under the HRA for delays and other injustices resulting directly from its actions or lack of action; the DPP cannot be held responsible for institutional delays.

However, other government authorities may be accountable for such delays. Currently, and into 2015, the Court prioritises criminal matters. In relation to criminal matters, there are unlikely to be significant institutional delays within the Court system. However, as the Court is inadequately resourced, the prioritising of criminal matters may significantly impact upon delays experienced in civil matters. This may raise the questions: Can the s 21 right to a fair trial of "rights and obligations recognised by law" address extended delays associated with civil proceedings which result in prejudice, and what, if any, public authority may be held responsible under the HRA for delays in the hearing of civil matters that flow from inadequate resourcing?

Impact of the HRA on the DPP

One important way in which the HRA impacts upon the judiciary is via decisions that are taken by others in association with court proceedings. In relation to criminal proceedings, decisions by the DPP can vitally affect human rights.

The ACT DPP has advised the Court:

Prosecutors are perhaps the ultimate human rights lawyers. The DPP acts on behalf of the community. Every decision in the prosecution process must balance competing interests. All of those decisions are suffused with human rights considerations.

A notable feature of the *Human Rights Act* is that the right provided by section 21 to a fair trial is a right provided to "everyone" - in other words accused persons, victims, witnesses and indeed the entire community. Prosecutorial decisions typically involve balancing considerations and interests of all of those interested persons.

There are sometimes decisions required in proceedings which are ancillary to prosecutions which also involve human rights considerations. For example for proceedings under the *Confiscation of Criminal Assets Act*, internal DPP guidelines require possible hardship to third parties (for example the children of accused persons) to be taken into account in any decisions in relation to actions under the Act.

The section 11 protection of the family and children right is a particularly important one. An example of the way in which this right is vindicated is the way in which the

⁷⁴ *R v Forsyth* (2013) 281 FLR 62 [82].

DPP deals with child witnesses in sexual assault cases. Indeed this right has informed the Sexual Assault Reform Program generally. It has also informed the Family Violence Intervention Program for the prosecution of family violence offences, in which the DPP plays a pivotal role.

Human rights audits

Under s 41 of the HRA, to date, the Human Rights and Discrimination Commissioner has conducted three human rights audits under section 41 of the HRA. Audits of been undertaken of the former ACT youth detention centre, Quamby (in 2005), the ACT remand facilities (in 2007), and the Bimberi Youth Detention Centre (in 2011). This is another way in which those associated with the courts may be influenced to make their processes more consistent with human rights.

Areas where the HRA may have application

From the perspective of court proceedings, a number of cases have focused on procedural rights, particularly the right to a fair trial. But procedures are largely covered by the common law, which is unaffected by the HRA.

There has been relatively little exploration of the potential impact of s 30, the interpretation provision. That provision is likely to have most impact where legislation is broad-brush and arguably ambiguous. The ACT has chosen to legislate in relation to the judicial sentencing discretion, and this is an area where the interpretation provision may have a role to play.

Does the “dialogue” model achieve positive human rights outcomes?

In *Islam*, Penfold J issued the only declaration of intent compatibility that has been issued in the ACT. Having found that s 9C of the *Bail Act* could not be interpreted consistently with the HRA, her Honour issued a declaration of incompatibility under s 32 HRA.

What became of that declaration?

On 15 February 2011 the Attorney-General presented it to the Legislative Assembly, stating that the government “disagrees with the conclusion that her Honour reached about this particular law and the analysis that led Justice Penfold to that decision.”⁷⁵

The government filed an appeal. The appeal was adjourned while the ACT intervened in the High Court in the case of *Momcilovic v The Queen*⁷⁶ (*Momcilovic*) and then awaited the outcome of those proceedings.

Following the High Court decision in *Momcilovic* in September 2011, the Attorney-General withdrew the appeal in *Islam*.

⁷⁵ Attorney-General, Legislative Assembly of the Australian Capital Territory, *Presentation of Declaration of Incompatibility to Legislative Assembly* (2011) 2.

⁷⁶ *Momcilovic v The Queen* (2011) 245 CLR 1.

In May 2012, the Government provided a final response to the declaration.⁷⁷ It made “drafting suggestions” about narrowing the impact of section 9 C (1) so that it applied only to offences that carried a penalty of life imprisonment, and otherwise narrowing the provision in a way that would have benefited applicants for bail.

To date, s 9C of the *Bail Act* stands unamended.

Declarations of incompatibility have been described as “booby-prizes”. Parties can successfully argue human rights principles, but the law remain unchanged. In *Islam* and *Momcilovic* both individuals secured a declaration, but in neither case did the declaration have any practical effect on the outcome. Isa Islam has now gone to trial, was found guilty of intentionally inflicting grievous bodily harm,⁷⁸ was sentenced,⁷⁹ and an appeal against her conviction and sentence was dismissed by the Court of Appeal.⁸⁰

Professor Allan has criticised the “dialogue” model, predicting that the legislature would be inclined to do what judges said that it should do, and has advocated that:

If the *Victorian Charter of Rights* is really to result in a dialogue, a scenario in which the judges’ views do not routinely prevail, then it must be the case that sometimes — in fact — the elected legislators stand up to the unelected judges and say, in effect, ‘we’ve heard your view about how rights ought to play out and we’ve considered it but after more reflection we disagree’. If the judges always prevail, that in no way resembles a dialogue.⁸¹

So far, the fear that the legislature would behave in a cowardly fashion has not been borne out in the ACT.

The High Court decision in Momcilovic

In *Momcilovic* the High Court considered both the interpretation provision and the declaration provision of the *Victorian Charter*. I admit that I have not considered in detail the 275 pages that make up the six separate High Court judgments in that case. However, it seems that *Momcilovic* has significant implications for the ACT HRA.

Ms Momcilovic, a Queensland resident, had been convicted in Victoria of the offence of trafficking in methylamphetamine contrary to section 71 AC of the *Drugs, Poisons and Controlled Substances Act 1981* (Vic) (*Drugs Act*). The drug was found in her apartment, but she said that she didn’t know that it was there. In order to establish trafficking, the prosecution relied upon “deemed possession” of a trafficable quantity of the drugs. Section 5 of the *Drugs Act* provides that:

⁷⁷ Attorney-General, Legislative Assembly of the Australian Capital Territory, Declaration by the ACT Supreme Court that section 9C of the *Bail Act 1992* is not consistent with section 18(5) of the *Human Rights Act 2004* Final Government Response (2012).

⁷⁸ *R v Islam* [2011] ACTSC 32.

⁷⁹ *R v Islam* (Unreported, Supreme Court of the Australian Capital Territory, Mathews AJ, 25 May 2011).

⁸⁰ *Islam v R* [2013] ACTCA 10.

⁸¹ James Allan, ‘The *Victorian Charter of Human Rights and Responsibilities*: Exegesis and Criticism’ (2006) 30 *Melbourne University Law Review* 906, 913.

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.

The trial judge held that s 5 reversed the legal onus of proof; it required an accused to positively prove that he or she did not know that a drug was in her premises. Ms Momcilovic argued that this interpretation contravened her human right to a “presumption of innocence” under s 25 (1) of the Victorian Charter.

Momcilovic involved a state statute (the *Drugs Act*), but federal jurisdiction was being exercised under s 75(iv) of the Constitution, because the case was between a State and a resident of another State.

The Victorian Court of Appeal found that s 5 could not be interpreted in a human rights compatible way, and made a declaration of inconsistent interpretation (equivalent to a declaration of incompatibility in the ACT).

The first matter to note is that the High Court rejected the “remedial approach” in *Ghaidan*.⁸² Underlying the rejection by each of the judges is the implication that a remedial approach would be an unconstitutional exercise of legislative power by the judiciary.⁸³

In relation to declarations of inconsistent interpretation, five judges of the Court found that the making of a declaration was neither an exercise of judicial power nor incidental to the exercise of judicial power.⁸⁴ However, four judges concluded that the Victorian Court of Appeal could make declarations. Crennan and Kiefel JJ (who were in the minority) concluded that the declaration power was incidental to the judicial power. French CJ (with whom Bell J agreed in relation to the nature of the power being non-judicial but not unconstitutional)⁸⁵ concluded that a declaration of incompatibility could be made by the Supreme Court of Victoria once its federal jurisdiction functions had been “exhausted” and, in any event, the High Court had no jurisdiction to entertain an appeal against a decision that involved the exercise of a non-judicial power.⁸⁶

The consequences that are relevant for the ACT seem to be:

- At a State Supreme Court level, the declaration power is constitutional.
- When a State Supreme Court is exercising federal jurisdiction, it may also issue declarations, at least after the federal jurisdiction is “exhausted”.
- While exercising federal jurisdiction, a court cannot issue a declaration of incompatibility (because such an act does not involve exercising judicial

⁸² *Momcilovic v The Queen* (2011) 245 CLR 1 [46], [62] (French CJ), [146], [170]-[171] (Gummow J), [280] (Hayne J), [544]-[545] (Crennan and Kiefel JJ), [684] (Bell J).

⁸³ Heydon J in dissent at [454] found precisely this - having construed the provision to authorise remedial interpretations his Honour found the provision unconstitutional.

⁸⁴ *Momcilovic v The Queen* (2011) 245 CLR 1 [90]-[91] (French CJ), [187] (Gummow J), [280] (Hayne J), [457] Heydon J, [661] Bell J.

⁸⁵ *Momcilovic v The Queen* (2011) 245 CLR 1 [661] (Bell J).

⁸⁶ *Momcilovic v The Queen* (2011) 245 CLR 1 [101] French CJ.

power, is not incidental to the exercise of judicial power and is therefore unconstitutional).⁸⁷

In the ACT, there is a live issue about the nature of the ACT Supreme Court's jurisdiction; whether all territory jurisdiction is federal jurisdiction, or whether there is a separation between federal jurisdiction and Territory jurisdiction. This argument arises because territory courts have been established under the territories power in s 122 of the Constitution. If it is correct that all territory jurisdiction is federal jurisdiction, then it may be unconstitutional for the ACT Supreme Court to issue a declaration of incompatibility under the HRA.⁸⁸

Momcilovic appears to be to preclude a "dialogue" model of human rights that involves a federal court and to preclude a "dialogue" style federal bill of rights.⁸⁹ Helen Irving made the point that:

Overlooked by champions of the charter, Chief Justice French's conclusion was plain: section 36 could not apply in proceedings in the exercise of federal jurisdiction. Thus a majority of at least four justices found the declaration power to be unconstitutional for federal courts.

The High Court has effectively pronounced the death sentence on any future "dialogic" Human Rights act for Australia.⁹⁰

Conclusions

I would like to make a few concluding observations.

First, the view that a Human Rights Act is undemocratic and the predictions that it will result in judicial interpretation on steroids/Alice in Wonderland interpretations have proved to be unfounded. The "remedial" *Ghaidan* approach to interpretation has been rejected in the ACT and *Momcilovic* now says that it is unconstitutional.

Second, on the contrary, in the ACT the HRA has had little direct impact on the outcome of cases. The enactment of the HRA was a powerful symbolic statement, and it was predicted that the Supreme Court would play an important role in increasing human rights compliance in the ACT. But despite the significant number of cases in which the HRA has been mentioned, there are very few in which it has made a difference to the outcome. On the other hand, it is arguable that the HRA has had a distinctly positive but largely indirect effect, by increasing awareness of human rights among public servants, Ministers and the legislature. The 5 year review of the HRA concluded that:

⁸⁷ *Momcilovic v The Queen* (2011) 245 CLR 1 [90]-[91], [100] (French CJ), [146], [187] (Gummow J), [280], (Hayne J), [457] (Heydon J), [661] (Bell J).

⁸⁸ Will Bateman and James Stellios, 'Chapter III of the Constitution, Federal Jurisdiction and Dialogue Charters of Human Rights' (2012) 36 *Melbourne University Law Review* 1, 29.

⁸⁹ Will Bateman and James Stellios, 'Chapter III of the Constitution, Federal Jurisdiction and Dialogue Charters of Human Rights' (2012) 36 *Melbourne University Law Review* 1, 19; Helen Irving, 'The High Court of Australia kills the dialogue model of human rights', *The Australian* (Sydney), 16 September 2011.

⁹⁰ Helen Irving, 'The High Court of Australia kills the dialogue model of human rights', *The Australian* (Sydney), 16 September 2011.

one of the clearest effects of the HRA has been to improve the quality of law-making in the Territory, to ensure that human rights concerns are given due consideration in the framing of new legislation and policy.⁹¹

If the HRA has the effect that legislation is more consistent with human rights then that will only serve to reduce the role of the Courts.

Third, the amount of jurisprudence is partly dependent on the willingness of counsel to raise the HRA. Practitioners may need to understand the domestic and international jurisprudence so that they can, where appropriate, raise the HRA. The Five Year Review of the HRA noted that:

Until the courts fully grasp their part in the human rights conversation, there will remain some question as to the HRA's ability to generate dialogue between the courts and legislature, and to provide accountability for the government's implementation of human rights.⁹²

And recommended that:

... the judiciary should be provided with training that focuses on the methodology of applying amended s 30, the direct right of action provision, and sources of international human rights jurisprudence. Training programs need to be ongoing to keep up to date with current developments and include opportunities for regular refresher courses.⁹³

It is always helpful for judges to receive professional development in the areas of substantive law in which they practice, but the primary responsibility for educating judges lies with counsel. The nature of the adversarial system makes it inappropriate for judges to initiate arguments based on the HRA, and it is naive to think that judicial education in this area will necessarily result in more widespread application of the HRA by the Courts.

If counsel maintains a focus on the HRA, it may be that, in the next 10 years, we see more substantive outcomes.

Fourthly and finally, at a more general level procedural justice is a concept that is often associated with restorative justice. Like many human rights, it is concerned with procedure rather than outcome. It holds that litigants may be satisfied with any outcome as long as they feel that they had a voice, were listened to and were respected by a fair and neutral decision-maker who was concerned for their well-being.

⁹¹ The ACT Human Rights Act Research Project, *The Human Rights Act 2004 (ACT): The First Five Years of Operation A Report to the Department of Justice and Community Safety* (2009) 6.

⁹² The ACT Human Rights Act Research Project, *The Human Rights Act 2004 (ACT): The First Five Years of Operation A Report to the Department of Justice and Community Safety* (2009) 7.

⁹³ The ACT Human Rights Act Research Project, *The Human Rights Act 2004 (ACT): The First Five Years of Operation A Report to the Department of Justice and Community Safety* (2009) 49.

The essential elements of procedural justice⁹⁴ are voice (the opportunity to tell one's story to the decision maker, who listens carefully), neutrality (a trustworthy, benevolent decision maker who is impartial and sincere) and respect.

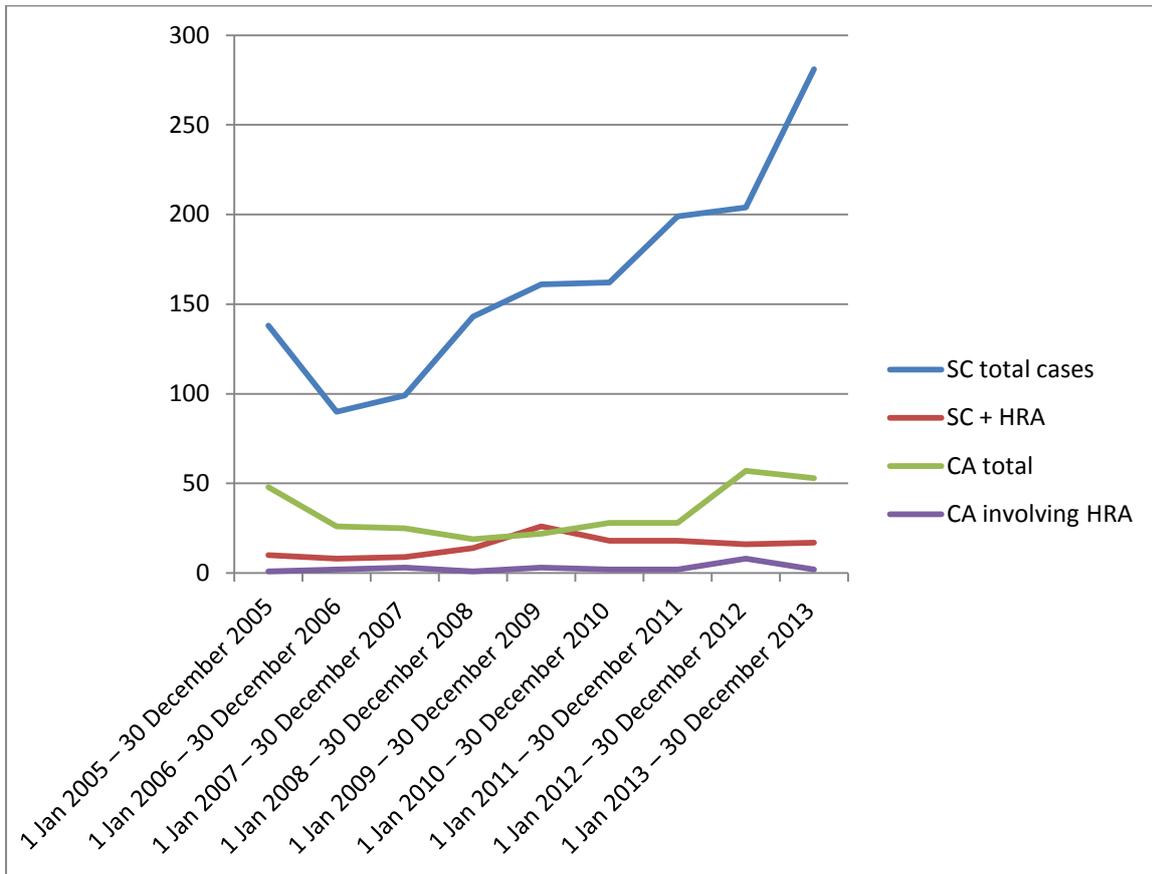
Alongside human rights, procedural justice is an approach that should be borne in mind by lawyers and judges, as it may contribute to the respect that litigants have for the judicial process and their faith that the system is a fair system, whatever the outcome of their case.

⁹⁴ Judge Kevin S. Burke 'Just What Made Drug Courts Successful?' (2010) 36 (1) *New England Journal on Criminal and Civil Confinement*, 53-54.

APPENDIX 1 – Number of Supreme Court decisions by year

DATE OF DECISION	SC total	SC + HRA	CA total	CA + HRA	%SC involving HRA	% of CA involving HRA
1 July 2004 – 30 December 2004	79	4	15	0	5.06%	0.00%
1 Jan 2005 – 30 December 2005	138	10	48	1	7.25%	2.08%
1 Jan 2006 – 30 December 2006	90	8	26	2	8.89%	7.69%
1 Jan 2007 – 30 December 2007	99	9	25	3	9.09%	12.00%
1 Jan 2008 – 30 December 2008	143	14	19	1	9.79%	5.26%
1 Jan 2009 – 30 December 2009	161	26	22	3	16.15%	13.64%
1 Jan 2010 – 30 December 2010	162	18	28	2	11.11%	7.14%
1 Jan 2011 – 30 December 2011	199	18	28	2	9.05%	7.14%
1 Jan 2012 – 30 December 2012	204	16	57	8	7.84%	14.04%
1 Jan 2013 – 30 December 2013	281	17	53	2	6.05%	3.77%
1 Jan 2014 – 30 May 2014	83	9	14	2	10.84%	14.29%
TOTAL 1 July 2004 - 30 May 2014	1639	149	335	26		

APPENDIX 2 - Graph of ACT Human Rights Act cases in Supreme Court & Court of Appeal



PERCENTAGE OF TOTAL CASES INVOLVING HRA

