

**The Victorian Charter of Rights and Responsibilities so far:
a lawyer's perspective**

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1. The impact of the Charter in the first 18 months of it being fully in force¹ has not been felt most prominently in the published decisions of the courts and tribunals of the State. In the broader scheme of things, with the National Human Rights Consultation looming, and now in full swing, this ought to have been a good thing. It would at least give the lie to the apocalyptic claims of those who oppose a national Charter that the inevitable result of such legislation would be the transfer of political power to “unelected judges” and the demise of Parliamentary sovereignty. But those claims are still being made.²

2. In fact, it has been suggested that one of the first indications of how a Charter will fatally undermine the sovereignty of the Parliament can be found in the judgment of Nettle JA in *RJE v Secretary to the Department of Justice*.³ The author of this particular article⁴ does not seem to have considered that his argument was somewhat undermined by the fact that Maxwell P and Weinberg JA reached the same conclusion as Nettle JA on ordinary principles of interpretation. Even more significantly, for those who claim that statutory bills of rights are in practice no different from constitutional bills, because Parliament will not be able to counteract the courts' interpretation of what

¹ Divisions 3 and 4 of Part 3 of the Charter came into operation on 1 January 2008. The remainder of the Charter had already come into operation one year earlier on 1 January 2007.

² As just one example, see The Hon K Handley AO QC, “Human Rights: The Question is – Who is the Master?” in J Leaser and R Haddrick (eds), *Don't Leave Us With the Bill* (2009, Menzies Research Centre), 111 at 115, who suggested that an apt title for a national Human Rights Act would be the *Parliament (Transfer of Powers to the Courts) and Lawyers (Augmentation of Incomes) Act*.

³ [2008] VSCA 265.

⁴ B Jellis, “Look But Don't Leap: Lessons from the Victorian Statutory Bill of Rights”, in Leaser and Haddrick, op cit n 2, 319 at 322-323.

human rights require, the Victorian Parliament promptly reversed the effect of the Court of Appeal's decision in *RJE*.⁵

3. This paper will consider some reasons why there has been such little consideration of the Charter by courts and tribunals so far and then analyse the ways in which what little case law there has been can be utilised by practitioners.
4. I should say at the outset that the "lawyer's perspective" that I am able to give is a fairly narrow one. As a barrister, I generally only become involved in any dispute, including now disputes raising human rights issues, when things have reached such a stage that the parties involved are contemplating commencing litigation or have already done so. No doubt the impact of the Charter goes much wider than that. I expect that lawyers working in and for government, and in the community sector, will have had occasion to consider and apply the Charter on a much more regular basis as part of the cultural and procedural change at the executive and parliamentary levels of government that the Charter was intended to achieve.⁶ Having acknowledged the limited base from which I can speak, I think it is also fair to say that practitioners in England 18 months after the *Human Rights Act 1998 (UK) (the UK HRA)* came into force would have seen a very different picture. Why has the Charter not yet taken hold in Victoria in quite the same way? I will suggest four factors that have occurred to me. No doubt there are others.
5. The first and most obvious reason is time: the provisions of the Charter that enable it to be raised in legal proceedings have been in force for only 18 months, since 1 January 2008. It takes time for appropriate cases to arise, for

⁵ *Serious Sex Offenders Monitoring Amendment Act 2009 (Vic)*. The Minister responsible for the Bill, the Hon Bob Cameron MLA, Minister for Corrections, made a statement of compatibility when the Bill was introduced into Parliament on 3 February 2009. The Bill was passed and received the Royal Assent within a week of its introduction, on 10 February 2009, before the Parliament's Scrutiny of Acts and Regulations Committee's report on the Bill was received.

⁶ See, for example, the Second Reading Speech for the Bill for the Victorian Charter, where the Attorney-General said that the Charter that it should promote the protection of human rights in Victoria as far as it was possible to do so by ensuring that "human rights are observed in administrative practice and the development of policy within the public sector without the need for recourse to the courts": Victoria, Legislative Assembly, *Debates* (4 May 2006), Vol 470, page 1293, Mr Hulls.

lawyers to take a Charter point as part of those cases, and for those cases to work their way through the system. There have also been a few cases in which attempts to raise the Charter have failed on the basis that the relevant events occurred before the Charter came into force and the Charter has not been applied retrospectively.⁷

6. A second obvious reason is that some cases in which Charter points have been raised will have been settled before hearing or judgment. The Charter can play a not insignificant role in helping parties to resolve a matter out of court.
7. Thirdly, certain provisions of the Charter, namely ss 35 and 39, can have an inhibiting effect on the Charter being raised in litigation.
8. In *R v Benbrika (No 2)*,⁸ Bongiorno J drew attention to the potential for delay created by the requirement in s 35 of the Charter to give notice where a question of law arises relating to the Charter. In that case, the accused persons had applied for a stay of the proceedings against them on the ground that the trial was unfair because of the conditions in which they were being held on remand and transported to and from the Court. They had sought to rely upon provisions of the Charter in support of that argument, but ultimately abandoned the Charter grounds. His Honour observed that “[t]he section needs to preserve a residual discretion in the judge to relieve a party from giving notice where to do so would unduly disrupt or delay a proceeding or for other good reason”.
9. In addition to the effects of any delay, the giving of notice can result in a relatively small dispute between two parties taking on much larger proportions. Not many clients, I suspect, would relish the prospect of their case becoming a Charter test case with a phalanx of lawyers lined up along the Bar table. That prospect, too, can have an inhibiting effect.

⁷ See, for example, *R v Williams* (2007) 16 VR 168; *Guneser v Magistrates' Court of Victoria* [2008] VSC 57; *State of Victoria v Turner* [2009] VSC 66; *Nolan v MBF Investments Pty Ltd* [2009] VSC 244. See also *Kracke v Mental Health Review Board* [2009] VCAT 646 at [334]-[357].

⁸ [2008] VSC 80 at [17]-[18].

10. Nevertheless, on the whole, s 35 is a useful provision. The Attorney-General should, at least in these early years of the Charter's operation, receive notice of Charter cases. The knowledge and resources that the Attorney (and other interveners or amici curiae, such as the Victorian Human Rights and Equal Opportunity Commission or the Human Rights Law Resource Centre) can bring to the proceedings can ensure that proper consideration is given to the application of the Charter in particular cases and in some cases alleviate the burden on the parties of doing so.
11. Then there is section 39. It has not yet received any detailed judicial consideration, but the intention behind it is clear enough – the Charter is not to give rise to any new or free-standing cause of action.⁹ There is at least one VCAT decision where the intent behind s 39 has been relied on, somewhat questionably in my opinion, to hold that the compliance by a public authority with its obligations under s 38 of the Charter were not reviewable by the Tribunal.¹⁰ Section 40C of the ACT *Human Rights Act 2004* (**the ACT HRA**), which provides for a free-standing right of action and makes clear, too, that the Charter can be relied upon in any legal proceedings, is to be preferred.
12. Fourthly, prior to the enactment of the UK HRA in 1998, the United Kingdom had for just over 30 years been subject to the right of individual petition to the European Court of Human Rights under the *European Convention for the Protection of Human Rights and Fundamental Freedoms*. That Court had, over the years, issued numerous adverse judgments in cases brought against the United Kingdom government, which provided some of the impetus for the enactment of the UK HRA and also helped to ensure that many practitioners and judges were very familiar with the European Convention and how it could be used to challenge domestic laws and practices. By contrast, it is fair to say that many Victorian practitioners are as yet unfamiliar with the Charter – what it does and how it operates and whether in fact it would make

⁹ See, eg, page 28 of the Explanatory Memorandum to the Charter; and *Sabet v Medical Practitioners Board of Victoria* [2008] VCA 346 at [104].

¹⁰ See *Director of Housing v IF (Residential Tenancies)* [2008] VCAT 2413 at [49]-[50]. But cf *Kracke v Mental Health Review Board* [2009] VCAT 646 at [856]-[857] and *Homeground Services v Mohamed (Residential Tenancies)* [2009] VCAT 1131. I am grateful to Maya Narayan of the Tenants Union of Victoria for bringing the *Homeground* case to my attention.

any practical difference in particular cases. That uncertainty can then be coupled with the daunting prospect of researching a Charter argument. There is a vast body of authority from several jurisdictions on the rights themselves and the overseas equivalents to the “mechanical” provisions of the Charter, such as the interpretative power and the obligations on “public authorities”. Trying to marshal all of the relevant authority in order to run a Charter argument can be a time-consuming and potentially costly exercise, and where the practical benefits of doing so are unclear or uncertain, some practitioners may, quite justifiably, choose not to go down that path.

13. It can be expected, however, that these difficulties will diminish with time as the body of domestic precedent grows. The overseas jurisprudence will remain relevant and that is undoubtedly a good thing. But it will become more intelligible; the leading cases more familiar. Victorian and ACT lawyers (and if a national charter is enacted, all Australian lawyers) will slowly bridge the gap that Spigelman CJ spoke of a few years ago between domestic jurisprudence and the developing human rights jurisprudence of other jurisdictions.¹¹ There are already signs of this occurring, for example in the areas of public housing, mental health and the criminal law.
14. But what is needed is some guidance about a clear and simple way to approach the application of the Charter to particular cases. So I would like to turn now to what can be gleaned in this respect from the cases decided to date. The leading case is *Kracke v Mental Health Review Board*,¹² but there are others worth close reading, including *Sabet v Medical Practitioners’ Board of Victoria*¹³ and *RJE*¹⁴ and some decisions from the ACT. This paper will not analyse the cases themselves, but will instead attempt to summarise what they suggest about how to approach a Charter argument.

¹¹ Hon JJ Spigelman AC, ‘Rule of Law – Human Rights Protection’ (1999) 18 *Australian Bar Review* 29 at 32-33; and ‘The truth can cost too much: the principle of a fair trial’ (2004) 78 ALJ 29 at 47; and Hon JJ Spigelman AC, ‘Principle of legality and the clear statement principle’ (2005) 79 ALJ 769 at 782.

¹² *Kracke v Mental Health Review Board* [2009] VCAT 646.

¹³ *Sabet v Medical Practitioners Board of Victoria* [2008] VCA 346.

¹⁴ *RJE v Secretary to the Department of Justice* [2008] VSCA 265.

How to approach a Charter argument

15. There are essentially two ways that a Charter argument can be raised in proceedings in a court or tribunal:
 - 15.1. one, by challenging the interpretation of a relevant statutory provision under s 32 of the Charter; and
 - 15.2. two, by challenging an act or decision of a public authority as incompatible with s 38 of the Charter.
16. In *Kracke*,¹⁵ Bell J identified a third way, based on s 6(2)(b) of the Charter, where courts and tribunals are directly bound (even when they are not acting “in an administrative capacity” for the purposes of s 4(1)(j)) to apply and enforce those human rights in Part 2 of the Charter that “relate to” court or tribunal proceedings, which his Honour identified as ss 10(b) (in its reference to punishment), 21(5)(c), 21(6), 21(7), 21(8), 23(2), 23(3), 24(1), 24(2), 24(3), 25, 26 and 27. Such cases will be relatively rare (at least where either s 32 or s 38 is not also engaged) and it is not necessary to go into them in this paper.
17. Several cases have suggested a step-by-step approach to the application of s 32 and s 38, or their equivalents in the ACT HRA, each of which seems to vary slightly from the others.
18. In *Sabet*,¹⁶ Hollingworth J accepted a three step approach suggested by the Solicitor-General for analyzing whether a public authority had complied with s 38 of the Charter. In *Hakimi v Legal Aid Commissioner*,¹⁷ Refshauge J in the ACT Supreme Court came up with no less than a seven step test.
19. In *Kracke*,¹⁸ Bell J proposed a four step approach to the application of ss 32 and 36 of the Charter. And in *R v Fearnside*,¹⁹ Besanko J applied the three-step test proposed by the ACT Attorney-General in that case.

¹⁵ [2009] VCAT 646 at [236]-[254].

¹⁶ [2008] VSC 346 at [108].

¹⁷ [2009] ACTSC 48 at [51]-[53].

¹⁸ See [2009] VCAT 646 at [65] for his Honour’s summary of the four steps.

20. There are of course some differences depending on whether one is seeking to challenge a statutory provision or an act or decision of a public authority, but it is possible to identify a common approach to the core issues that have to be addressed in either case. In my view, they are as follows:
- 20.1. step one, **define the issue**: what is the statutory provision or the act or decision of the public authority that is being challenged as incompatible with a human right?
- 20.2. step two, **define the right**: this step is what has been called the “engagement” question in the cases, but what it really involves, I think, is the identification of the scope and content of the right or rights in question;
- 20.3. step three, **limitation**, which essentially involves a comparison of the first two steps: does the statutory provision or the act or decision in question limit or restrict the exercise of a human right in any way? If it does not, that is the end of the matter. If it does, one proceeds to step four.
- 20.4. step four, **justification**: was any such limitation or restriction reasonable and justified within the circumstances set out in s 7(2)? Or as Refshauge J said in *Hakimi*, “[t]o put it another way, is the limitation proportionate?”²⁰
21. These four steps are the central issues in any case in which it is alleged that a person’s human rights have been interfered with.
22. In a public authority case, that will ordinarily be the end of the Charter analysis. The act or decision in question will either be compatible with relevant human rights or it will not and orders should follow accordingly. There will be cases where s 38(2) might be called in aid by a public authority which says that having regard to a statutory provision it could not reasonably have acted differently, but then the real issue in such cases might

¹⁹ [2009] ACTCA 3 at [93]-[104].

²⁰ [2009] ACTSC 48 at [51] point 3.

be whether the provision in question is incompatible with human rights and whether it can be re-interpreted under s 32.

23. In cases involving the interpretation of a statutory provision, there will be a further two steps, identified by Bell J in *Kracke* as follows:

23.1. step five, **re-interpretation**: if the limitation or restriction imposed by the provision cannot be justified under s 7(2), is it possible to interpret it compatibly with human rights by the application of s 32?²¹ and

23.2. step six, in the Supreme Court only, is the possibility of a **declaration of inconsistent interpretation**: if it is not possible to interpret the provision compatibly with human rights, should the Supreme Court exercise its power under s 36 to make a declaration of inconsistent interpretation?²²

24. The remainder of this paper will make a few brief comments about these steps.

Simplicity

25. The first is a point about the need for simplicity. There is obviously a risk that what was intended to provide an accessible means of approaching a Charter analysis can instead become formulaic and very complex. The approach that has been suggested is no more than a guide; it may not be suitable in all cases. In cases where some of the steps identified above are obvious or uncontroversial, the need for simplicity in the application of the Charter suggests that practitioners should go straight to the heart of the case, much in the way Nettle JA did in *RJE*, where his Honour took little more than a paragraph to conclude that the prevailing interpretation of the statutory provision in question in that case restricted an offender's freedom of

²¹ [2009] VCAT 646 at [65], [198]-[230].

²² [2009] VCAT 646 at [65], [232]-[235].

movement and right to privacy to an extent that was not capable of justification.²³

Step one: Defining the issue

26. As to the first step, defining the issue, both Nettle JA in *RJE*²⁴ and Bell J in *Kracke*²⁵ suggested that in a case where a statutory provision is being challenged, one should start with the interpretation of the relevant provision according to standard principles of interpretation.

Step two: Defining the right

27. The second step requires the identification of the scope and content of the relevant human right or rights. This might demonstrate that the provision, or the act or decision, in question does not fall within the scope of a right at all.
28. So, for example, in *Hakimi*, the applicant's case fell at this hurdle. Refshauge J decided that the right to legal assistance in s 22 of the ACT HRA did not confer a right for a legally aided person to choose their lawyer. His Honour therefore did not need to go on to consider whether the decision of the respondent Commission to appoint a Commission lawyer to represent Mr Hakimi in criminal proceedings, rather than a private lawyer of his choosing, constituted a reasonable limitation on any such right.²⁶

Step three: Limitation

29. It is important to identify the scope and content of the right or rights in issue at the outset, because once that is done, the next question – whether and how the relevant statutory provision or act or decision *limits* or *restricts* that right should be readily apparent. Indeed, in *Kracke*, Bell J treated these first two steps as part of the first stage in his four stage analysis.²⁷

²³ [2008] VSCA 265 at [113].

²⁴ [2008] VSCA 265 at [115]-[116].

²⁵ [2009] VCAT 646 at [68].

²⁶ See also *Sabet* [2008] VSC 346 at [128]-[129].

²⁷ [2009] VCAT 646 at [67]-[97].

Step four: Justifying the limitation

30. It may be expected that in most cases the issue of justification will form the crux of the case. Once a limitation on a right is established, the question of whether it is compatible or incompatible with the right depends upon the application of s 7(2) of the Charter – does the limitation in question constitute a reasonable limit such as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom and taking into all relevant factors, including those set out in paragraphs (a)-(e)?
31. In *Sabet*, Hollingworth J said that “the Charter requires a Victorian court to have regard to the specific factors mentioned in s 7(2)” and not to “general notions of proportionality”.²⁸ However, in *Kracke*, Bell J took a different view. His Honour said that s 7(2) “reflects the concept of proportionality as articulated in the international jurisprudence” and that the specified factors in s 7(2)(a)-(e) “fit into the general proportionality analysis”. Similarly, in *Hakimi*, Refshauge J accepted the submission of the ACT Attorney-General that the equivalent test in s 28 of the ACT HRA involved asking the simple question “is the limitation proportionate?”²⁹
32. It is submitted, with respect, that the approach taken in *Kracke* and *Hakimi* is to be preferred. It is supported by the extrinsic materials;³⁰ it recognizes that the factors in s 7(2)(a)-(e) are only factors relevant to the overall test; it makes sense of those factors; and it has the benefit of connecting the Victorian test, which is expressed in very similar terms to those in the Canadian, New Zealand and South African instruments, with the proportionality test that has been consistently applied in other jurisdictions. As Bell J said in *Kracke*, the proportionality test “is a foundational concept in the international human rights jurisprudence. It is applied universally across

²⁸ [2008] VSC 346 at [187].

²⁹ [2009] ACTSC 48 at [51] point 3.

³⁰ See, for example, the Second Reading Speech for the Charter Bill in which the Attorney-General said that “[t]he general limitations clause embodies what is known as the ‘proportionality test’”: Victoria, Legislative Assembly, *Debates* (4 May 2006), Vol 470, page 1291, Mr Hulls.

the various jurisdictions in determining whether limitations on human rights are justified.”³¹

Step five: interpretation under s 32

33. Finally, the cases decided to date have given some consideration to the extent of the interpretative power in s 32 of the Charter and its equivalent in s 30 of the ACT HRA. Just what is “possible” under s 32? The outer limits remain open to argument. But there are at least two areas where the application of s 32 of the Charter should be uncontroversial.

34. The first concerns statutory provisions conferring discretionary powers in general terms. The second concerns statutory provisions which use a word or phrase whose meaning might be described as “malleable” or “sensitive to context”.

General discretionary powers

35. In the first case, Bell J said that “provisions which confer open-ended discretions” *must*, if possible consistently with their purpose:

“be interpreted such that the discretion can only be exercised compatibly with human rights. Therefore, unless the very purpose of the provision is incompatible with human rights, which will surely be an exceptional case, the solution to legal problems concerning the exercise of an open-ended discretion will depend upon whether it has been exercised compatibly with human rights, not the interpretation of the provisions which, under s 32(1), is set.”³²

36. This seems to be no different from the common law principle that the courts will presume that the legislature did not intend to interfere with fundamental common law rights unless the intention to do so is clearly and unambiguously manifested either expressly or by necessary implication. As

³¹ [2009] VCAT 646 at [111]. The leading cases from other jurisdictions concerning the concept of proportionality set out in Bell J’s reasons in *Kracke* at [111]-[135].

³² [2009] VCAT 646 at [208], [210]-[211], citing *Slaight Communications Inc v Davidson* [1989] 1 SCR 1038 at 1078; and *Societe des Acadiens et Acadiennes du Nouveau-Brunswick Inc v Canada* [2008] SCC 15 at [20].

McHugh J said in *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission*:³³

“A power conferred in general terms, however, is unlikely to contain the necessary implication because ‘general words will almost always be able to be given some operation, even if that operation is limited in scope’³⁴.”

37. It may be, therefore, as Bell J recognized in *Kracke*,³⁵ that the application of this standard common law principle of interpretation will in some obviate the need for reliance on s 32 of the Charter. The usefulness of the Charter in such a case may be found in the facts that in some cases it expands upon the common law canon of fundamental rights which may be used to read down such general statutory powers, that those rights are made express, and that s 7(2) of the Charter provides a framework for assessing whether the general nature of the power is or is not compatible with human rights.

Words that are sensitive to context

38. In the second case, s 32 is capable of applying so as to enable statutory provisions of somewhat indeterminate meaning to be interpreted more broadly or more narrowly, as the case requires, in order to render them compatible with human rights. Again, this seems no different to standard principles of interpretation.
39. *RJE* is a good example. That case concerned section 11(1) of the *Serious Sex Offenders Monitoring Act 2005*, which enabled a court to make an extended supervision order (**ESO**) in relation to a convicted sex offender where it was satisfied, “to a high degree of probability, that the offender is likely to commit a relevant offence if released in the community” on completion of his or her sentence. An ESO could include a range of restrictions, including restrictions on an offender’s place of residence and freedom of movement and forms of monitoring.

³³ (2002) 213 CLR 543 at 563 [43]; see also at [32] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

³⁴ *Coco v The Queen* (1994) 179 CLR 427 at 438.

³⁵ [2009] VCAT 646 at [69].

40. A previous decision of the Court of Appeal, *TSL v Secretary to the Department of Justice*,³⁶ had interpreted the word “likely” to mean that a less than 50% chance might suffice. Maxwell P and Weinberg JA held that that decision should not be followed and that the word “likely” in s 11(1) should be interpreted to mean “more likely than not”.³⁷ Their Honours reached that conclusion on ordinary principles of construction: “likely” was a word whose meaning was sensitive to context and their Honours considered that they should favour the interpretation which produced the least infringement on the individual’s common law right “to be at liberty”.³⁸
41. Nettle JA reached the same conclusion by application of s 32 of the Charter. His Honour held that:
- “the making of an [ESO] of itself so restricts an offender’s right to move freely within Victoria and to enter and leave it (s 12), and his right to privacy (s 13), if not his right to liberty (s 21), that it is not capable of demonstrable justification in the relevant sense unless the risk of the offender committing a relevant offence is at least more likely than not.”³⁹
42. To depart from the *TSL* interpretation of “likely” and to construe it as meaning “at least more likely than not” was, said his Honour, “within the permissible ambit of *interpretation*, well short of the forbidden territory of *legislation*”.⁴⁰
43. One practical difference between the two approaches was that in order to depart from *TSL*, Maxwell P and Weinberg JA were compelled to say that that decision was wrong and was wrong when it had been decided. Nettle JA, on the other hand, needed only to say that, in light of s 32 of the Charter, the *TSL* interpretation could no longer stand. Nettle JA’s approach recognizes that s 32 can have the effect of changing the law. It can enable a single judge to depart from a previous interpretation of a statutory provision, prior to the introduction of the Charter, which would otherwise be binding.

³⁶ (2006) 14 VR 109.

³⁷ [2008] VSCA 265 at [21]ff.

³⁸ [2008] VSCA 265 at [27]-[37].

³⁹ [2008] VSCA 265 at [113] (footnote omitted).

⁴⁰ [2008] VSCA 265 at [117].

Departing from the unambiguous meaning of a statutory provision

44. What is still open to argument is whether s 32 goes any further than either of these situations, and in particular whether it goes as far as the House of Lords' interpretation of s 3 of the UK HRA in *Ghaidan v Godin-Mendoza*⁴¹ and requires a court to depart from the unambiguous meaning of a statutory provision, where possible to do so consistently with the purpose of the provision, in order to render it compatible with human rights.
45. Nettle JA expressly left that question open in *RJE*.⁴² Other judges have, however, offered their views, albeit only in obiter.
46. In *Kracke*, Bell J expressed the view that s 32 of the Charter was equally as powerful as s 3 of the UK HRA. His Honour considered that the two provisions "express the same special interpretative obligation and are of equal force and effect"⁴³ and that the "purpose" proviso in s 32 of the Charter did not distinguish it from s 3 of the UK HRA, but rather codified the boundaries of the latter provision that had been identified by the House of Lords in *Ghaidan*.⁴⁴
47. However, in two cases decided earlier this year in the ACT Court of Appeal, prior to *Kracke*, the Court expressed the contrary view in relation to s 30 of the ACT HRA, which is relevantly identical to s 32 of the Charter.
48. In *R v Fearnside*,⁴⁵ Besanko J, with whom Gray P⁴⁶ and Penfold J⁴⁷ agreed, said he did not think "s 30 authorises and requires the Court to take the type of approach taken by the House of Lords in *Ghaidan*." In coming to this view, his Honour noted that the "purpose" proviso in s 30 of the ACT HRA was absent from s 3 of the UK HRA.

⁴¹ [2004] 2 AC 557.

⁴² [2008] VSCA 265 at [118]-[119].

⁴³ [2009] VCAT 646 at [215].

⁴⁴ [2009] VCAT 646 at [214].

⁴⁵ [2009] ACTCA 3 at [85]-[90].

⁴⁶ [2009] ACTCA 3 at [1].

⁴⁷ [2009] ACTCA 3 at [20].

49. Besanko J made the same observations in *Casey v Alcock*,⁴⁸ on this occasion with the agreement of Refshauge J.⁴⁹
50. This conclusion is a little difficult to square with the Explanatory Memorandum for the Human Rights Amendment Bill 2007, which amended s 30, and which said that in its present form, the section “draws on jurisprudence from the United Kingdom such as the case of *Ghaidan v Godin-Mendoza*”.
51. It is submitted, with respect, that Bell J’s view is to be preferred. Again, it is consistent with the extrinsic materials⁵⁰ and, most importantly, it is consistent with the purpose behind interpretative provisions of this nature in a “dialogue model” of human rights legislation. They represent a compromise of sorts. Courts are not given the power to strike down Acts of Parliament, but in order to ensure an appropriate level of protection of human rights, they are given a powerful interpretative tool. To water down that power, so that in effect it is no stronger than the purposive rule or the common law rule of interpretation in favour of fundamental rights, risks blunting a significant and essential feature of these Acts. As Bell J said in *Kracke*:⁵¹

“The boundaries identified in *Ghaidan v Godin-Mendoza*, on which the purpose requirement is based, provide an adequate balance between giving the special interpretative obligation full force and proper scope on the one hand and safeguarding against its impermissible use on the other. Adopting narrower boundaries would weaken the operation of s 32(1) in a way that was not intended. Narrower boundaries would reduce the special interpretative obligation to a restatement of the standard principles of interpretation or the rules already expressed in s 35(a) of the *Interpretation of Legislation Act 1984*.”

⁴⁸ [2009] ACTCA 1 at [108].

⁴⁹ [2009] ACTCA 1 at [12]-[13]. In the course of these observations, their Honours expressed doubt that observations made by the Court of Appeal in *Kingsley’s Chicken Pty Ltd v Queensland Investment Corp* [2006] ACTCA 9 intended to equate s 30 of the ACT HRA (in its previous form) with s 3 of the UK HRA. Higgins CJ, who was a member of the Court in both *Kingsley’s Chicken* and *Casey v Alcock*, made no comment on the issue in the latter case.)=

⁵⁰ See Human Rights Consultation Committee, *Rights, Responsibilities and Respect* (Department of Justice, Victoria, 2005), at pp 82-83.

⁵¹ [2009] VCAT 646 at [216].

52. His Honour expressly disagreed with *Raytheon Australia Pty Ltd v ACT Human Rights Commission*,⁵² in which Peedom P in the ACT AAT had expressed a view similar to that subsequently expressed by Besanko J in the cases referred to above.
53. In any event, the issue may soon be the subject of consideration in the case of *Momcilovic v R*, to be heard by the Victorian Court of Appeal in late July 2009, concerning a reverse onus provision in drug possession offence. The Court will be asked to consider the application of s 32 of the Charter to the provision in question and may therefore address the difference of approach between the House of Lords in *R v Lambert* [2002] 2 AC 545 and the New Zealand Supreme Court in *R v Hansen* [2007] 3 NZLR 1 as to the strength of the s 32 equivalents in the human rights legislation in those countries.

⁵² [2008] ACT AAT 19 at [78].