
Medical law reporter

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A BAD TRIP FOR HEALTH-RELATED HUMAN RIGHTS: IMPLICATIONS OF MOMCILOVIC v THE QUEEN (2011) 85 ALJR 957

Momcilovic v The Queen (2011) 85 ALJR 957; [2011] HCA 34 arose from a prosecution for drug trafficking brought under the Drugs, Poisons and Controlled Substances Act 1981 (Vic). The Australian High Court held that the Charter of Human Rights and Responsibilities Act 2006 (Vic) (the Charter) validly conferred a power on the Victorian Supreme Court and Court of Appeal to interpret legislation in a manner consistent with a defined list of human rights. By a slim majority it also held that the Charter validly created a judicial power to “declare” a law inconsistent with one or more enumerated human rights. In reaching its decision, however, the majority supported a narrow interpretation likely to undermine the intended capacity of the Charter to act as a remedial mechanism to reform laws, regulations and administrative practices which infringe human rights and freedoms. Although Momcilovic involved interpretation of a specific State human rights law, the High Court judgments allude to significant problems should the Federal Government seek to introduce a similar charter-based human rights system. Momcilovic, therefore, represents a risk to future efforts to develop nationally consistent Australian human rights jurisprudence. This has particular relevance to health and medically related areas such as the freedom from torture and degrading and inhuman treatment and, in future, enforceable constitutional health-related human rights such as that to emergency health care.

INTRODUCTION

Australia remains the only Western liberal democracy without constitutional or statutory protection of human rights at a national level.¹ One of the chief purposes of constitutional human rights protections is to create a mechanism whereby citizens can protect themselves against their government. In recent times Australians have witnessed instances of governments ordering their military to torture and kill their own citizens in nations such as Egypt, Libya and Syria. They are also increasingly aware of the extent to which corporate interest groups are able to turn governments against the public interest by mechanisms such as trade agreements, lobbying and revolving-door appointments (whereby, eg, senior public servants driving privatisation policies through government are appointed from industry and return to it after the policy is implemented).

The Australian *Constitution* does contain some health-related human rights protections. Section 116, eg, arguably protects the mental health of Australian citizens in that it prohibits any federal government from passing legislation that would create a religion, impose a religious observance or interfere with the free practice of a religion (including, presumably the capacity to meditate or reach states of consciousness characterised by a universal idealism that de-prioritises the interests of the state). There are a few other constitutional provisions that could become major health-related human rights protections if the Justices of the Australian High Court interpret them to benefit their role in a free society. Examples might include the right to vote in s 41 if the judges thought more broadly about how that right, of necessity, also protects the essential preconditions of the right to

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¹ O’Neill N, Rice S and Douglas R, *Retreat from Injustice – Human Rights Law in Australia* (2nd ed, Federation Press, Sydney, 2004) p 27.

vote (for instance, adequate education in the democratic process and adequate health, as well as security from persecution or corruption of the ballot). Section 80 likewise should (but through narrow interpretation currently does not) accord a group of citizens indirect health benefits by guaranteeing trial by jury in any case where long-term imprisonment is a possibility.

Section 117 similarly could prohibit legislation that imposes a disability or discrimination on citizens because of their residence in one State or another. One case here relates to the under-representation of the Territories in the Senate, but a health-related aspect potentially concerns inequities in federal support for medical or dental services, in particular States rather than others. Section 92 likewise could be interpreted as prohibiting trade or commerce between States that interferes (eg through its scale or monopoly power) with the capacity of individual citizens to conduct their own trade or commerce. Such an interpretation would have obvious implications for the capacity of providers of medical or dental services to ply their trade free of managed care corporate control. An interpretation along these lines might coalesce with the prohibition (in s 51(xxiiiA)) on legislation facilitating conscription to private corporations for providers of medical or dental services.²

There have been attempts by a few High Court judges to imply protections for the citizen into the *Constitution*. Many of these have health-related implications. In 1975, eg, in *R v Director General of Social Welfare; Ex parte Henry (Vic)* (1975) 133 CLR 369 at 388, Murphy J found that the *Constitution* contained a prohibition on slavery:

It would not be constitutionally permissible for the Parliament of Australia or any of the States to create or authorize slavery or serfdom. The reason lies in the nature of our Constitution. It is a Constitution for a free society.

Justice Murphy also found that s 51(xxiiiA) supported a general implication of a free society which limits Parliament's authority to impose civil conscription: *General Practitioners Society v Commonwealth* (1980) 145 CLR 532 at 565.

In *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 the full High Court struck down an amendment to the *Broadcasting Act 1942* (Cth) limiting television and radio advertising by political parties during election periods, on the ground that the statute infringed an implied constitutional guarantee of freedom of communication on matters of Commonwealth public affairs and politics. Mason CJ held (at 140):

Freedom of communication in the sense just discussed is so indispensable to the efficacy of the system of representative government for which the Constitution makes provision that it is necessarily implied in the making of that provision.

Despite periodic policy commitments to introduce statutory protection for human rights³ and the overwhelming support of the Australian community,⁴ federal governments have failed to put the issue to a referendum.⁵ Proposals to insert by referendum a constitutional right to emergency health care

² Faunce TA, "Constitutional Limits on Federal Legislation Practically Compelling Medical Employment: *Wong v Commonwealth*; *Selim v Professional Services Review Committee*" (2009) 17 JLM 196.

³ Australian Labor Party, *National Constitution and Platform* (2007) pp 9, 207, available from Pandora, http://www.pandora.nla.gov.au/pan/22093/20071124-0102/www.alp.org.au/download/now/2007_national_platform.pdf viewed 13 February 2012; Parliament of Australia, *Bill of Rights* (Law Internet Resources), http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Browse_by_Topic/law/billofrights viewed 3 May 2012.

⁴ The Brennan Committee Inquiry into human rights protections in Australia received 35,014 written responses ("the largest number ever for a national consultation in Australia") and held 66 community roundtables in 52 locations with about 6,000 registered participants. Of the 32,091 submissions that discussed the option of a Charter of Rights or a Human Rights Act, 87% supported the passage of such a law: Commonwealth of Australia, *Report of the National Human Rights Consultation Committee* (2009) p xxiv.

⁵ In lieu of a Charter, the government has developed a *Human Rights Action Plan* which sets out some of the administrative responses the government will make. In 2011 the Federal Parliament also passed legislation creating a joint standing committee of Parliament to scrutinise all legislation for human rights violations. The legislation also requires a Minister or Private Member to table a statement of human rights compatibility when introducing legislation into either House: *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

(such as that in the Indian and South African Constitutions) largely have been ignored.⁶ In the absence of action at a federal level, charters of human rights were introduced first in the Australian Capital Territory and then Victoria.⁷ Both of these Acts follow the “dialogue” model of human rights protection and purport to respect the principle of “parliamentary sovereignty”.⁸ Problems with judicial implementation of that legislation, particularly in the medical and health-related context, have been raised previously in this journal.⁹

In *Momcilovic v The Queen* (2011) 85 ALJR 957; [2011] HCA 34 (*Momcilovic*), a Full Bench of the High Court had its first opportunity to consider the Victorian Charter (and, by analogy, the Australian Capital Territory equivalent) and to determine fundamental questions over how courts in those jurisdictions should determine the content and limitations of each enumerated human right, as well as any remedial approach open to the court when declaring inconsistency. A further question for the High Court was whether the whole Charter, including the power of the Supreme Court of Victoria to “make” a “declaration of inconsistent interpretation”, was constitutionally “repugnant”, and invalid.¹⁰ While *Momcilovic* arose from a prosecution for drug trafficking, brought under the *Drugs, Poisons and Controlled Substances Act 1981* (Vic) (the *Drugs Act*), the High Court’s reasoning would apply to the interpretation of all protections under the Victorian Charter.

This analysis explores whether the High Court’s decision in *Momcilovic* may have significant, detrimental repercussions for health-related human rights in Australia, including the capacity of patient advocates to challenge state and private actor conduct that amounts to “torture and cruel, inhuman or degrading treatment” or an infringement of civil liberties.

THE CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES ACT

Following extensive community consultations and parliamentary debate, Victoria enacted the *Charter of Human Rights and Responsibilities Act 2006* (Vic).¹¹ Although the Charter, in the main, came into force on 1 January 2007,¹² it applies to all Victorian legislation whenever passed.¹³ The specified purpose of the Charter includes:

- (a) setting out the human rights that Parliament specifically seeks to protect and promote; and
- (b) ensuring that all statutory provisions, whenever enacted, are interpreted so far as is possible in a way that is compatible with human rights; and
- (c) imposing an obligation on all public authorities to act in a way that is compatible with human rights; and

⁶ Faunce, n 2.

⁷ The *Human Rights Act 2004* (ACT) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Charter) respectively. This analysis refers to these Acts as “Charters” to distinguish them from constitutionally entrenched Bills of Rights.

⁸ The “dialogue model” of rights sets up the Courts, Executive and Parliament as equal parties for ensuring the law respects human rights, with the Court identifying infringing legislation, remedying that law where possible through interpretation or notifying the Executive that a particular law is inconsistent with a human right and requires amendment. This is to be contrasted with the “judicial monologue” promoted under a constitutionally entrenched Bill of Rights where the judiciary can invalidate incompatible legislation, thus having the first and last say in the matter: see generally, Debeljak J, “Who is Sovereign Now? The *Momcilovic* Court Hands Back Power Over Human Rights That Parliament Intended It to Have” (2011) 22 PLR 15.

⁹ Faunce TA, Shats K and Jefferys S, “Re Herrington: Aboriginality and the Quality of Human Rights Jurisprudence in End-of-life Decisions by the Australian Judiciary” (2007) 15 JLM 201.

¹⁰ A line of High Court precedent has held that the Federal Parliament or a Parliament of a State or Territory cannot confer a function on a judicial officer that is or would be repugnant to or incompatible with the institutional integrity of a repository of federal judicial power. See *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51; *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319; *South Australia v Totani* (2010) 242 CLR 1; *Wainohu v New South Wales* (2011) 243 CLR 181.

¹¹ For background on the Victorian Charter, see Williams G, “The Victorian Charter of Human Rights and Responsibilities: Origins and Scope” (2006) 30 MULR 880; Debeljak, n 8.

¹² *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 2.

¹³ *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 1(2)(b).

- (d) requiring statements of compatibility with human rights to be prepared in respect of all Bills introduced into Parliament and enabling the Scrutiny of Acts and Regulations Committee to report on such compatibility; and
- (e) conferring jurisdiction on the Supreme Court to declare that a statutory provision cannot be interpreted consistently with a human right and requiring the relevant Minister to respond to that declaration.

The human rights protected under ss 8-27 of the Charter largely mirror those included in the *International Covenant on Civil and Political Rights* (International Covenant) which Australia has ratified, but not yet incorporated into legislation.¹⁴ Under the Charter, only natural “persons”, not corporations, possess “human rights”.¹⁵ With the exception of some “cultural rights” (s 19), the Charter is silent on economic, cultural and social rights – these generally being considered more controversial by liberal democracies.¹⁶ For example, there is no reference to a right to adequate health care (or a clean environment) under the Charter, despite the importance of health to the enjoyment of many freedoms.¹⁷

Since the passage of the Charter, all new Victorian legislation must be accompanied by a “statement of [human rights] compatibility”,¹⁸ which provides an important opportunity for the government, or a private Member, to consider a Bill’s possible impact on rights before it is tabled in Parliament. Furthermore, s 38 of the Charter makes it “unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision, to fail to give proper consideration to a relevant human right” unless “as a result of a statutory provision or a provision made by or under an Act of the Commonwealth or otherwise under law, the public authority could not reasonably have acted differently or made a different decision”.¹⁹

Recognising that few rights are absolute, s 7(2) provides that a right may be subject to limits. However, such limits can only be those “as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom”.²⁰ In determining whether a limit is demonstrably justified, a court must have regard to the following matters (s 7(2)):

- (a) the nature of the right; and
- (b) the importance of the purpose of the limitation; and
- (c) the nature and extent of the limitation; and
- (d) the relationship between the limitation and its purpose; and
- (e) any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.²¹

This limiting provision applies to all rights under the Charter, including the “right to life”, the “protection from torture and cruel, inhuman or degrading treatment” and “freedom from forced work”, notwithstanding the absolute prohibition on any derogation from these rights under the International Covenant and in defiance of the status of these prohibitions as *jus cogens* in international law.²²

¹⁴ *International Covenant on Civil and Political Rights* opened for signature 16 December 1966, New York. Entered into force in Australia 13 November 1980 (except for Art 41), [1980] ATS 23. Rights protected include equality before the law (s 8); the right to life (s 9); protection from torture and cruel, inhuman or degrading treatment (s 10); freedom from slavery or forced work (s 11); freedom of movement (s 12), thought, conscience, religion and belief (s 14), expression (s 15), peaceful assembly and association (s 16); protection of privacy and reputation (s 13) and of family and children (s 17), among others.

¹⁵ *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 6(1).

¹⁶ O’Neill, Rice and Douglas, n 1, p 27.

¹⁷ Compare Art 9 and Art 12 in particular, *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1976, New York. Entered into force in Australia 10 March 1976, [1976] ATS 5.

¹⁸ *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 28. The Federal Government introduced a similar requirement with its *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

¹⁹ *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 38(1)-(2).

²⁰ *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 7(2).

²¹ *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 7(2).

²² Art 4(2), *International Covenant on Civil and Political Rights* opened for signature 16 December 1966, New York. Entered into force in Australia 13 November 1980 (except for Art 41), [1980] ATS 23. See also Art 3, *European Convention on Human*

Under s 32(1) of the Charter and “so far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights”.²³ To aid in interpretation, a court is explicitly permitted to refer to “international law and the judgments of domestic, foreign and international courts and tribunals relevant to a human right”.²⁴ Section 32(1) is modelled on similar provisions in other statutory human rights regimes: eg, s 30 of the *Human Rights Act 2004* (ACT), s 6 of the *New Zealand Bill of Rights Act 1990* (NZ), and s 3(1) of the *Human Rights Act 1998* (UK).²⁵

Unlike the Canadian *Charter of Human Rights*, Hong Kong’s *Basic Law* or the *Bill of Rights* to the *Constitution of the United States*, the Charter does not empower a court to invalidate a law or a provision that is inconsistent with the Charter-protected rights.²⁶ Instead, s 32(3) quite clearly provides for the supremacy of Parliament, stating:

- (3) This section does not affect the validity of –
- (a) an Act or provision of an Act that is incompatible with a human right; or
 - (b) a subordinate instrument or provision of a subordinate instrument that is incompatible with a human right and is empowered to be so by the Act under which it is made.

Cases determined under the *Human Rights Act 1998* (UK) have shown that, even without the power to strike down offending provisions, the interpretation power can allow a court to move from the grammatical and logical language of the text if doing so would give effect to a human right.²⁷ If applied in a similar fashion in Victoria (and, mutatis mutandis in the Australian Capital Territory) s 32(1) would provide a powerful remedial tool for a court to protect the rights of vulnerable members of the community, including young people, persons with a mental illness and those undergoing voluntary or involuntary treatment. There may, however, be cases where the language of the provision is such that it is not possible to apply it consistently with human rights.

According to the Charter, if the Victorian Supreme Court (or Court of Appeal) is unable to interpret a provision “consistently with a human right, the Court may make a declaration to that effect in accordance with this section”.²⁸ Before making a declaration, the court must be satisfied that the Victorian Attorney-General and the Human Rights and Equal Opportunity Commission (the Commission) have been notified and given “a reasonable opportunity ... to intervene in the proceeding or to make submissions in respect of the proposed declaration of inconsistent interpretation”.²⁹

Rights opened for signature 4 November 1950, CETS 5 (entered into force 3 August 1953). Cf Reidy A, *The Prohibition of Torture - A Guide to the Implementation of Article 3 of the European Convention on Human Rights* (Human Rights Handbooks, No 6, 2002).

²³ *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 32(1).

²⁴ *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 32(2). However, as the High Court held in *Momcilovic v The Queen* (2011) 85 ALJR 957, s 32(2) does not do anything “novel”: the courts could always refer to overseas judgments to aid in interpretation, provided it does so with care (at [18]-[19] (French CJ)). See also *Jumbunna Coal Mine NL v Victorian Coal Miners’ Association* (1908) 6 CLR 309 at 363 (O’Connor J); *Zachariassen v Commonwealth* (1917) 24 CLR 166 at 181 (Barton, Isaacs and Rich JJ); *Polites v Commonwealth* (1945) 70 CLR 60 at 68-69 (Latham CJ), at 77 (Dixon J), at 80-81 (Williams J); *Minister for Foreign Affairs and Trade v Magno* (1992) 37 FCR 298 at 304-305 (Gummow J). See also *Garland v British Rail Engineering Ltd* [1983] 2 AC 751 at 771; *R v Secretary of State for the Home Department; Ex parte Brind* [1991] 1 AC 696 at 747-748 (Lord Bridge).

²⁵ Relevantly, however, the United Kingdom provision 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 the Convention rights” (emphasis added).

²⁶ Indeed, Members of Parliament were keen to stress the differences between the Charter and the United States *Bill of Rights*: Victoria, Legislative Assembly, *Parliamentary Debates* (4 May 2006) p 1290 (Mr Hulls).

²⁷ Lord Steyn, in *R v A* [2002] 1 AC 45, discussed how a court should apply s 3(1) to United Kingdom legislation, stating that s 3 required a “contextual and purposive interpretation” and that “it will be sometimes necessary to adopt an interpretation which linguistically may appear strained” (at [44]). In *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 an arguably less radical position was taken by Lord Nicolls that s 3(1) does not allow the courts to “adopt a meaning inconsistent with a fundamental feature of legislation” (at [33]). See generally Debeljak, n 8 at 17-19.

²⁸ *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 36(2).

²⁹ *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 36(4).

Once again, however, the validity of the legislation is not called into question by the making of such a declaration:

- (5) A declaration of inconsistent interpretation does not –
 - (a) affect in any way the validity, operation or enforcement of the statutory provision in respect of which the declaration was made;
 - or
 - (b) create in any person any legal right or give rise to any civil cause of action.³⁰

A declaration must be “given to the Attorney-General” within seven days after any appeal is finalised,³¹ and provided by the Attorney-General to the Minister responsible for administering the inconsistent law.³² Within six months of the making of the declaration, the responsible Minister must table a written response in Parliament; however, there is no requirement for Parliament to amend or repeal the offending provision.³³

MOMCILOVIC AT TRIAL AND ON APPEAL TO THE VICTORIAN COURT OF APPEAL

On 14 January 2006, police found quantities of substances containing methylamphetamine at the apartment of Vera Momcilovic’s (the appellant). Scientific evidence linked the seized drugs to her partner; however, there was no scientific evidence linking any of the items to her.³⁴ Her partner pleaded guilty to the charges brought against him and admitted, at the appellant’s later trial, that the drugs were in his possession for sale and denied that his partner “had been aware of [the substances] or of his drug trafficking activities”.³⁵ Despite his testimony, Ms Momvilovic was convicted in the County Court of Victoria of the offence of trafficking in a drug of dependence, contrary to s 71AC of the *Drugs Act*.³⁶ She was sentenced to a term of imprisonment of 27 months with a non-parole period of 18 months.³⁷

Central to the prosecution’s case – and the ultimate outcome of the appellant’s appeal to the High Court – was the interaction between s 71AC and s 5 of *Drugs Act*. Section 71AC created the offence of trafficking:

A person who, without being authorized by or licensed under this Act or the regulations to do so, trafficks or attempts to traffick in a drug of dependence is guilty of an indictable offence and liable to level 4 imprisonment [15 years maximum].

Section 71AC was, according to the prosecution, modified by the application of s 5 of the *Drugs Act*:

Meaning of possession

Without restricting the meaning of the word *possession*, any substance shall be deemed for the purposes of this Act to be in the possession of a person so long as it is upon any land or premises occupied by him or is used, enjoyed or controlled by him in any place whatsoever, unless the person satisfies the court to the contrary.³⁸

³⁰ *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 36(5).

³¹ *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 36(6).

³² *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 36(7).

³³ *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 37.

³⁴ *Momcilovic v The Queen* (2011) 85 ALJR 957 at [8] (French CJ).

³⁵ *Momcilovic v The Queen* (2011) 85 ALJR 957 at [10] (French CJ).

³⁶ The trial was before a judge and jury. The judge’s directions to the jury in relation to the application of s 5 of the *Drugs Act* formed the basis for the appellant’s appeal to the Victorian Court of Appeal.

³⁷ In *R v Momcilovic* (2010) 25 VR 436 the Victorian Court of Appeal dismissed the appellant’s appeal against her conviction but upheld her appeal against her sentence, reducing it to a term of imprisonment of 18 months. The Court of Appeal directed that so much of her sentence as had not already been served be suspended for a period of 16 months.

³⁸ The court also considered the relationship between ss 70(1) and 73(2) of the *Drugs Act*. Those deliberations are outside the scope of this analysis.

The effect of s 5 is to reverse the onus of proof for the element of possession from the prosecution to the defendant.³⁹

On appeal to the Victorian Court of Appeal (Maxwell P, Ashley and Neave JJA), the appellant argued that, on ordinary principles of construction, s 5 should be construed as imposing only an evidentiary, rather than a legal, burden on the accused. Alternatively, it was submitted that s 32(1) of the Charter required or allowed the court to interpret s 5 as placing only an evidentiary burden on the accused.⁴⁰

The Court of Appeal rejected the appellant's arguments and dismissed her appeal.⁴¹ It found that s 5 of the *Drugs Act* infringed s 25(1) of the Charter.⁴² It also held that s 32(1) did not create a "special" rule allowing a "remedial" interpretation that would allow the court to interpret s 5 as imposing anything other than a legal burden of proof.⁴³ Consequently, the court upheld her conviction and issued a "declaration of inconsistent interpretation" under s 36(2) of the Charter.⁴⁴

The appellant appealed to the High Court. Special leave was granted to consider, among other issues, the relationship between s 5 and s 71AC of the *Drugs Act*; the approach taken by the Victorian Court of Appeal in interpreting s 32(1) of the Charter; and whether ss 32(1) and 36(2) were valid laws and amendable to the appellant jurisdiction of the High Court.⁴⁵

THE AUSTRALIAN HIGH COURT INTERPRETS A STATE HUMAN RIGHTS CHARTER

Momcilovic v The Queen (2011) 85 ALJR 957 provided the first opportunity for the Australian High Court to consider issues of keen interest to many members of the legal and wider community: namely, would it promote or retard the progression to incorporation of human rights jurisprudence in Australian law? Specific questions concerned how far should or can a court go to interpret a provision consistently with human rights under s 32(1) of the Charter, is the declaration-making power under s 36(2) constitutionally valid and, if it is, can a declaration be appealed to the High Court?

Ultimately, the High Court allowed Momcilovic's appeal, quashed her conviction and ordered a retrial.⁴⁶ French CJ, Gummow, Hayne, Crennan and Kiefel JJ held that s 5 of the *Drugs Act* did not apply to the offence of trafficking created by s 71AC and that, therefore, the jury had been misdirected.⁴⁷ This interpretation of the *Drugs Act* was sufficient to allow the appeal and disposed of the matter; however, the court still considered the remaining constitutional and Charter issues.⁴⁸

³⁹ Without s 5, it was argued, the prosecution would have to prove "beyond a reasonable doubt" that the defendant had possession of the substance being trafficked. Under a reversed onus of proof, a defendant bears a "legal onus", and must prove "on the balance of probabilities" that they did possess the substance (or know of the substances' presence).

⁴⁰ *R v Momcilovic* (2010) 25 VR 436.

⁴¹ *R v Momcilovic* (2010) 25 VR 436.

⁴² *R v Momcilovic* (2010) 25 VR 436 at [135]. Indeed, the court went further and rejected the notion that the infringement was justified under s 7 of the Charter, stating (at [152]): "in our view, there is no reasonable justification, let alone any 'demonstrable' justification, for reversing the onus of proof in connection with the possession offence."

⁴³ *Momcilovic v The Queen* (2011) 85 ALJR 957 at [46] (French CJ), at [677] (Bell J).

⁴⁴ However, as noted above, the Court of Appeal did uphold the appeal against sentence.

⁴⁵ Section 73 of the Australian *Constitution* provides that the High Court "shall have jurisdiction ... to hear and determine appeals from all judgments, decrees, orders, and sentences ... of any other federal court, or court exercising federal jurisdiction; or of the Supreme Court of any State" (emphasis added).

⁴⁶ *Momcilovic v The Queen* (2011) 85 ALJR 957 (French CJ, Gummow, Crennan, Keifel and Bell JJ). Hayne J also allowed the appeal but on different grounds (at [280]). Heydon J dissented and dismissed the appeal (at [371]).

⁴⁷ Per French CJ, Gummow, Hayne, Crennan, Keifel JJ. Bell J held that s 5 of the *Drugs Act* did apply to s 71AC but allowed the appeal on other grounds. Heydon J alone would have upheld on the basis that s 71AC was invalid under s 109 of the Australian *Constitution* as it was inconsistent with s 302.4 of the federal *Criminal Code 2002* (Cth): *Momcilovic v The Queen* (2011) 85 ALJR 957 at [280].

⁴⁸ This analysis does not explore the appellant's alternative constitutional ground of appeal, namely that s 71AC of the *Drugs Act* was invalid under s 109 of the *Constitution*. In any event, only Hayne J agreed with the appellant's submission on this point: *Momcilovic v The Queen* (2011) 85 ALJR 957 at [280].

On the Charter-related questions the court found itself divided. French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ held that s 32(1) of the Charter operated as a valid rule of interpretation.⁴⁹ There were, however, different opinions on how it should be applied, and what role s 7 of the Charter should play in the determination of whether a provision was inconsistent with human rights.⁵⁰

Disappointingly, the judges in the majority held that, despite the ambitions of the Charter, it does not introduce a “special rule” of interpretation and may simply represent the codification of the common law presumption of “legality” and the application of “the ordinary rules of construction” by a judge.⁵¹ As described by French CJ (at [44]), the principle of legality

has been applied on many occasions by this Court. It is expressed as a presumption that Parliament does not intend to interfere with common law rights and freedoms except by clear and unequivocal language for which Parliament may be accountable to the electorate. It requires that statutes be construed, where constructional choices are open, to avoid or minimise their encroachment upon rights and freedoms at common law.⁵²

Going further, French CJ stated (at [51]):

The [Court of Appeal] emphasised the importance of certainty in the interpretation of legislation pursuant to s 32(1). It observed, correctly in my respectful opinion, that if Parliament had intended to make a change in the rules of interpretation accepted by all areas of government in Victoria “its intention to do so would need to have been signalled in the clearest terms.”

The human rights and freedoms set out in the Charter in significant measure incorporate or enhance rights and freedoms at common law. Section 32(1) applies to the interpretation of statutes in the same way as the principle of legality but with a wider field of application. The Court of Appeal was essentially correct in its treatment of s 32(1).

This approach of ostensibly protecting fundamental rights and freedoms at common law sits ill with relatively recent High Court decisions that provide an “open door” or “green light” for legislatures to change or abolish those very rights and freedoms.

As was argued on another occasion in this column:

At what point will the High Court cease to acquiesce in the capacity of the legislature to alter the basic principles of the common law? This is a particularly important question given the widely publicised, pre-eminent role of the common law in protecting human rights in contemporary Australia. If a legislature decided to reverse the burden of proof in criminal cases to abolish habeas corpus, it is not clear from the majority judgments of the High Court in *Harriton* on what jurisprudential basis the High Court would recommend any “line” be drawn against statutory erosion of such basic common law principles and rights.⁵³

Further, on this limited view expressed by the Justices of the Australian High Court, it is unlikely that the Victorian Charter could give rise to the types of remedial interpretations seen in the United Kingdom, which have ensured that United Kingdom law complies, as far as possible, with the *European Convention on Human Rights*.⁵⁴ On this point, Gummow J (at [151]) distinguished the use of the phrase “read and given effect” in s 3(1) of the *Human Rights Act 1998* (UK) with s 32(1) of the Charter which simply requires that provisions be “interpreted”.

⁴⁹ Heydon J, dissenting, held that the whole Charter was invalid: *Momcilovic v The Queen* (2011) 85 ALJR 957 at [379].

⁵⁰ This discussion falls outside the scope of this analysis. However, for a review of the High Court’s lack of unity on this point see Rice S, “Staring Down the ITAR: Reconciling Discrimination Exemptions and Human Rights Law” (2011) 10(2) *Canberra Law Review* 97 at 102-103. For a discussion of the arguments over the “preferred model” and the “Momcilovic model” (written prior to the High Court’s decision) see Debeljak, n 8.

⁵¹ *Momcilovic v The Queen* (2011) 85 ALJR 957 at [44] (French CJ), at [684] (Bell J). See also Peace DC and Geddes RS, *Statutory Interpretation in Australia* (6th ed, LexisNexis Butterworths, Australia, 2006) at [5.16], [5.24] and [5.31].

⁵² See also *Momcilovic v The Queen* (2011) 85 ALJR 957 at [512] and [612] (Crennan and Kiefel JJ).

⁵³ Faunce TA and Jefferys S, “Abandoning the Common Law; Medical Negligence, Genetic Tests and Wrongful Life in the Australian High Court” (2007) 14 JLM 469 at 476.

⁵⁴ For example, under the *Rent Act 1977* (UK), while the survivor of a heterosexual couple may become a statutory tenant by succession, the survivor of a homosexual couple could not. However, in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, the House of Lords held that the relevant provisions of the Act should be read, in light of s 3(1) of the *Human Rights Act 1998* (UK), to confer the same rights on a homosexual couple living together as if they were husband and wife.

This narrow interpretation of the Charter deserves greater academic and public scrutiny.⁵⁵ One questions why the passage of the Charter itself, as well as the lengthy processes of community consultation leading to its passage, was not enough to signify “in the clearest terms” that the Charter was indeed intended to “make a change in the rules of interpretation by all areas of government in Victoria”. Why introduce s 32(1) in the context of the Charter when, if all that was intended was the codification of a common law presumption of legality, the Victorian Parliament could have simply amended the *Interpretation of Legislation Act 1984* (Vic)?⁵⁶ Moreover, the Charter makes it “unlawful” for a public authority to act or reach a decision in contravention of human rights, unless no other lawful option is open.⁵⁷ This is a strong indication that Parliament intended the Charter to change the principles of interpretation “accepted by all areas of government in Victoria”.⁵⁸

Ironically (and with no small hint of sarcasm), Heydon J in his dissent (at [384]) best expresses the contrary view to the narrow view adopted by the majority:

There are several reasons for not interpreting the Charter narrowly. First, if ever there were legislation which is on its face reforming and remedial in character, it is the Charter. Its very name is significant, with its echoes of *Magna Carta*, of the French Charter of 1814 and of the People’s Charter of 1838. Reforming and remedial legislation, particularly human rights legislation, is to be interpreted amply, not narrowly.⁵⁹

With reference to the Preamble to the Charter, he further added (at [389], emphasis in original):

The ... words are strong words. They send the message that Australia’s benighted isolation on a lonely island lost in the middle of a foggy sea must be terminated. And if the Charter is to be *comprehensive*, and is to *ensure* both *observance* and *recognition of fundamental human rights*, it must be interpreted with some amplitude.

And this, as his Honour’s discussion of ss 32(1) and 7(2) reveals, was the reason why he held the Charter invalid. Ascertaining the content of rights, determining whether any limits on them are “demonstrably justifiable” and then reinterpreting offending provisions where feasible “are not tasks for judges. They are tasks for a legislature.”⁶⁰ Concluding on this point, he stated (at [431]) that the Charter “contemplates the making of laws by the judiciary, not the legislature”.⁶¹

With respect, the notion expressed here by Heydon J that it is primarily for the legislature to provide protections for citizens against legislative incursions upon their rights and freedoms fundamentally misconstrues the purpose of human rights. Lest it be thought, however, that his Honour was on his own “lonely island”, comments by Crennan and Kiefel JJ (at [581]) suggest that moves to

⁵⁵ For some despairing reviews of the manner in which Australian courts and tribunals have interpreted the Charter and the *Human Rights Act 2004* (ACT) see Debeljak, n 8; and Rice, n 50.

⁵⁶ See, similarly, s 139 of the *Legislation Act 2001* (ACT) and the discussion in Debeljak, n 8 at 24.

⁵⁷ *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 38(1)-(2).

⁵⁸ *Momcilovic v The Queen* (2011) 85 ALJR 957 at [51] (French CJ).

⁵⁹ His Honour made reference to several leading cases where this principle was applied to human rights legislation: *R v Kearney; Ex parte Jurlama* (1984) 158 CLR 426 at 433; *Waters v Public Transport Corp* (1991) 173 CLR 349 at 372; *IW v City of Perth* (1997) 191 CLR 1 at 12. Cf *Momcilovic v The Queen* (2011) 85 ALJR 957 at [159] (Gummow J).

⁶⁰ *Momcilovic v The Queen* (2011) 85 ALJR 957 at [431] (Heydon J). Heydon J’s arguments, however, are unpersuasive. And, as Bell J held (at [684]), “these are criteria of a kind that are readily capable of judicial evaluation”. See also *Thomas v Mowbray* (2007) 233 CLR 307 at 331-334 (Gleeson CJ), at 344-348, 350-351 (Gummow and Crennan JJ), at 507 (Callinan J); *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542 at 553-554 (Gummow J), at 597 (Crennan and Kiefel JJ). In a different context, Hayne and Kiefel JJ also addressed the relevance of statutory tests of proportionality in *South Australia v Totani* (2010) 242 CLR 1; see Williams G and Lynch A, *The High Court on Constitutional Law: The 2010 Term*, p 12, <http://www.gtcentre.unsw.edu.au> viewed 12 February 2012.

⁶¹ Debeljak, n 8, correctly refutes this argument, pointing out that interpreting the “meaning” of statutory provisions is not the same as drafting those provisions and is a natural function of the judicial power.

create a “special rule” of interpretation, that would have allowed the Court of Appeal to reinterpret s 5 of the *Drugs Act* consistently with human rights, would “involve something approaching a legislative function”.⁶²

This leaves the Parliaments of the States and Territories with an impossible choice: strengthening the interpretative provisions of their Charters, so the courts can apply them in the manner it was arguably intended, risks conferring “a legislative function” on their judiciary. While this may be constitutionally tolerable at the State level,⁶³ any conferral of a non-judicial function on a judge exercising federal jurisdiction would be constitutionally impossible at the federal level.⁶⁴ Alternatively, Victoria could leave its Charter unamended, but its impact on remedying Victorian law and, less tangibly, its value as an inspirational document, will be greatly reduced.⁶⁵

One possible reform to the Charter could include aligning the language of s 32(1) with s 3(1) of the *Human Rights Act 1998* (UK) – in accordance with Gummow J’s observation in *Momcilovic* (at [151]). It is doubtful, however, whether the current Victorian Government would be amendable to such a proposal and it bears remembering that Gummow J also found the declaration-power invalid (at [151]).

On the power of the Victorian Supreme Court to make a declaration of inconsistency, the High Court was further split, with only French CJ, Crennan, Kiefel and Bell JJ upholding the provision as valid. To add further complexity, of these four justices, French CJ and Bell JJ (in separate judgements) held that the making of a declaration of incompatibility was a permissible, non-judicial function,⁶⁶ but did not fall within the appellate jurisdiction of the High Court under s 73 of the *Constitution*.⁶⁷ Conversely, Crennan and Kiefel JJ held that a declaration was incidental to the judicial power but that one should not have been made in this case.⁶⁸

However, the Chief Justice remarked (in obiter, at [92])) that it would be unlikely that the High Court would accept the conferral of such a power on a Ch III court.⁶⁹ This final view has serious consequences for proponents of a national Charter of Human Rights, as the declaration-making power is seen by some judges,⁷⁰ but not all commentators,⁷¹ as the central plank in the “dialogue model”. Certainly it has been seen as an effective means of initiating law reform in the United Kingdom.⁷² As established authority suggests there is “no constitutional provision under which the Parliament may

⁶² See also French CJ in *Momcilovic v The Queen* (2011) 85 ALJR 957 at [96], albeit that his comments were made in a different context.

⁶³ *Momcilovic v The Queen* (2011) 85 ALJR 957 at [92] (French CJ); *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 656 (Callinan and Heydon JJ); but cf *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 and recent cases such as *South Australia v Totani* (2010) 242 CLR 1.

⁶⁴ *R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254.

⁶⁵ A breach of the Charter by a public authority can be included as a ground for seeking, inter alia, an injunction (but not damages): s 39(1), (3). However, determining whether a breach has occurred will still involve the interpretive process so restricted by the High Court and Court of Appeal.

⁶⁶ *Momcilovic v The Queen* (2011) 85 ALJR 957 at [89]-[92] (French CJ), at [661] (Bell J).

⁶⁷ *Momcilovic v The Queen* (2011) 85 ALJR 957 at [100]-[101] (French CJ), at [661] (Bell J).

⁶⁸ *Momcilovic v The Queen* (2011) 85 ALJR 957 at [606] (Crennan and Kiefel JJ). Interestingly, the joint judgement of their Honours also expressed the view that “prudence dictates that a declaration” “will rarely be appropriate” (at [605]), reflecting the High Court’s historic reluctance to undermine the principle of finality: *D’Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at [34]-[36] (Gleeson CJ, Gummow, Hayne and Haydon JJ).

⁶⁹ See also *Mellifont v Attorney-General (Qld)* (1991) 173 CLR 289 at 300 (Mason CJ, Deane, Dawson, Gaudron and McHugh JJ).

⁷⁰ *Momcilovic v The Queen* (2011) 85 ALJR 957 at [95].

⁷¹ Debeljak, n 8 at 39.

⁷² Geiringer C, “On a Road to Nowhere: Implied Declarations of Inconsistency and the New Zealand Bill of Rights Act” (2009) 40 VUWLR 613 at 618, fn 20, but note the cautious treatment of the United Kingdom’s experience.

require State courts to exercise any form of non-judicial power”,⁷³ this would negate the possibility for a Federal Charter to confer the declaration power on a State Supreme Court judge and bypass the Ch III court. There are other, informal ways, however, for judges to express their view over the content and effect of legislation,⁷⁴ and even for these remarks to be given life beyond their maker’s knowing.⁷⁵

IMPLICATIONS FOR HEALTH CARE PATIENTS, MENTAL HEALTH AND ACCESS TO HEALTH CARE

Drawing some conclusions from *Momcilovic*, it appears:

- Charters of rights in Australia will be narrowly read;⁷⁶ and therefore
 - a Charter will not give rise to a special rule of interpretation unless a State or Territory Parliament uses the “clearest” of language;
 - however, such language may be seen by the High Court as an impermissible transfer of legislative power to the judiciary and invalidated or read-down.
- The risks of an interpretative rule being seen as an invalid conferral of legislative power on a judicial officer increase precipitously where the judicial officer is a member of a Ch III court.
- The power to issue a declaration of inconsistency is, for now, valid if exercised by a State judge but invalid if exercised by a federal judge.
- Whether a declaration of inconsistency can be appealed to a Ch III court remains unresolved, but it is more likely than not that it falls outside the jurisdiction of the High Court to hear appeals from “sentences, judgments, orders and decrees” of the Supreme Court of a State.

The minimalist approach adopted by the High Court and the Victorian Court of Appeal to the Charter does not bode well for efforts by advocates to challenge laws that, eg, provide for the involuntary confinement⁷⁷ and treatment of the mentally ill,⁷⁸ nor for challenging the determinations of guardianship boards over the management of property or personal matters.⁷⁹ The treatment of the mentally ill by law enforcement and corrective officers is also unlikely to benefit from the application of the Charter in the way envisaged by the proponents of human rights legislation.

As Williams has noted, the Charter since 2006 has

- prevented the eviction of a single mother and her children from public housing into homelessness;
- supported a 19-year-old woman with cerebral palsy to obtain support services and case management;
- improved funding and eligibility criteria for children with autism; and
- assisted an elderly woman with brain injury to access critical medical assistance.⁸⁰

Likewise, it has allegedly led the Victorian Department of Health to “revise the law and policies on involuntary detention for mental illness” and to “change disability housing from a directive model

⁷³ *Queen Victoria Memorial Hospital v Thornton* (1953) 87 CLR 144. See Zines L, *Federal Jurisdiction in Australia* (Federation Press, Sydney, 2002) pp 200-201 for expert commentary.

⁷⁴ *Momcilovic v The Queen* (2011) 85 ALJR 957 at [600] (Crennan and Keifel JJ). See *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 at 20, fn 53 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).

⁷⁵ *Baker v The Queen* (2004) 223 CLR 513.

⁷⁶ Unless one adopts the rather cynical opinion of Heydon J (at [455]) that “in future the decision that s 32(1) is valid will be remembered. Not so the narrow interpretation on which the conclusion of validity rests. In numerous minds forensic oblivion will be its portion. Most of those who will remember it will silently suppress it.”

⁷⁷ See eg s 10 of the *Mental Health Act 1986* (Vic), “Apprehension of mentally ill person in certain circumstance”.

⁷⁸ Section 12 of the *Mental Health Act 1986* (Vic), to be read with s 8 of the same.

⁷⁹ The Victorian Civil and Administrative Tribunal now has responsibilities for guardianship orders: *Guardianship and Administration Act 1986* (Vic), *Victorian Civil and Administrative Tribunal Act 1988* (Vic). While tribunals cannot issue declarations of incompatibility, they are able to refer questions on the application of the Charter to the Supreme Court: *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 33(1).

⁸⁰ Williams G, *The Future of the Australian Bill of Rights Debate* (University of NSW Law Research Series 39, 2010), <http://www.austlii.edu.au/au/journals/UNSWLRS/2010/39.html> viewed 26 February 2012.

to one based upon participation and personal decision making”.⁸¹ However, it is important to note that none of these matters were determined by a court and all could, in the language of civil liberties advocates, be called “easy cases” which attracted public, media and, subsequently, political sympathy.

The true test for the Charter will be when a less sympathetic – but still deserving – individual invokes it in court to challenge an administrative decision based on a Victorian law or regulation. Then it will be seen whether the remedial purpose and intention of the Charter has been neutered by the High Court’s decision in *Momcilovic*.

Nevertheless, the Charter still provides an opportunity for soft reform of Victorian legislation, through the application and consideration of foreign judgments by the Supreme Court and Court of Appeal on the question of whether conduct by medical practitioners, guardians, hospital administrators (whether private or public) or corrective officers amounts to “cruel, inhuman or degrading treatment”.⁸²

Section 32(2) of the Charter provides:

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

As s 10 of the Charter is identical in language to Art 3 of the *European Convention on Human Rights*, the jurisprudence of the European Court of Human Rights in Strasbourg might assist a court on the application of the Charter. For example, European cases determining whether a prisoner’s treatment amounted to “inhuman or degrading” treatment have found that the court should “take into consideration their vulnerability and their inability, in some cases, to complain coherently or at all about how they are being affected by any particular treatment”.⁸³ Translated into an Australian context, this judgment could have important implications for access to “official visitors”, ombudsmen or legal aid by individuals suffering mental illness, whether in prison, on remand or under an involuntary treatment order.

While accepting that consideration of foreign judgments was not a novel function for a court, French CJ nonetheless cautioned (at [19]):

[I]nternational and foreign domestic judgments should be consulted with discrimination and care. Such judgments are made in a variety of legal systems and constitutional settings which have to be taken into account when reading them.

Heydon J went further (at [453], footnotes omitted), questioning:

Should reference be made to “human rights” materials in foreign countries? There is little to be learned from African or Arab Charters, for example, for in 2006 Africa contained very few countries answering the description “liberal democracy”, and the Arab world contained none ... The effect [of s 32(2)] is, as it has been said, to “ratchet-up” s 32(1) by reference to the most extreme foreign decisions. The odour of human rights sanctity is sweet and addictive. It is a comforting drug stronger than poppy or mandragora or all the drowsy syrups of the world. But the effect can only be maintained over time by increasing the strength of the dose. In human rights circles there are no enemies on the left, so to speak. Because s 32(2) only permits consideration of foreign decisions, but does not compel it, the Victorian courts are empowered to consider those decisions they favour and decide not to consider those they dislike.

It was noted at the beginning of this analysis that the Charter is focused primarily on civil and political rights. Protection of economic, social and cultural rights, including a broad right to physical and mental health,⁸⁴ remains unpalatable for governments, possibly due to the closer relationship between these rights and policy. For example, the Australian Government could proudly point to

⁸¹ Williams, n 80.

⁸² *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 10. Other relevant provisions would include the right to privacy and reputation (s 13) and the protection of families and children (s 17).

⁸³ *Herczegfalvy v Austria* Series A No 244, § 82 (24 September 1992); *Aerts v Belgium* Reports 1998-V, p 1966, § 66 (30 July 1998). See generally, Reidy, n 22.

⁸⁴ Art 12, *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1976, New York. Entered into force in Australia 10 March 1976, [1976] ATS 5.

Medicare, the Pharmaceutical Benefits Scheme (PBS) and public hospitals as proof that it supported the rights of Australians to physical health. Indeed, a link to the *International Covenant on Economic, Social and Cultural Rights* could assist in rebuffing neoliberal policies and treaties which seek to undermine the effectiveness of the PBS. Yet Australian federal and State governments are under constant pressure from the lobbyists of supranational corporations to privatise the health care and energy sectors in Australia, as they have been in the past to privatise the banking, telecommunications and air transport sectors. No real guarantee exists that such services (often providing critical preconditions for health) will continue to operate in the national interest in the absence of constitutional human rights that can be used against legislatures that “lose their way”.

No Australian federal government is likely to introduce legislation into Parliament which could provide the courts with a power to reinterpret provisions of the *National Health Act 1953* (Cth) and *Health Insurance Act 1973* (Cth) that determine, eg, the eligibility of some individuals to a Medicare rebate,⁸⁵ or a concession card,⁸⁶ or to require the government to amend its scheme for the provision of aerial medical or dental services.⁸⁷ If it did, restrictions on these services could be challenged by, eg, asylum seekers, migrant workers on “457” work visas, non-Australian citizens or foreign students.

It is worth noting that, in many nations that have introduced human rights legislation, it has taken time for the judiciary to feel comfortable working and applying their provisions.⁸⁸ This appears to remain the case even for constitutionally entrenched Bills of Rights. For example, Zines, commenting on the Canadian experience, found:

It took ten years and a number of cases before the Supreme Court decided that the Bill of Rights was not a mere rule of construction ... The fact that the provisions [of the Charter] are part of the of the Constitution and difficult to amend seems to have made a great difference in judicial attitudes. It appears also that the manner of creating a Bill or Charter of Rights, contributes to judicial approaches to interpretation in this area.⁸⁹

CONCLUSION

While the Charter had achieved some success in Victoria prior to the *Momcilovic* decision, the High Court’s decision in this case may embolden public authorities in that jurisdiction to adopt a tougher approach when considering whether it should act consistently with the spirit of the Charter, knowing now that the High Court supports only a parsimonious reading.

Additionally, the decision may hinder future efforts by the Australian Parliament to legislate to protect human rights under a similar charter. Within the health space, this could prevent practitioners from challenging policies that undermine, or impose discriminatory burdens on, patient access to the “pillars” of Australia’s universal health care system – the Pharmaceutical Benefits Scheme, Medicare and public hospitals – or attempt to unwind this system in favour of neo-liberal “managed care” arrangements. The best chance for a constitutional health-related right to be included by referendum in the near future would be for a right to emergency hospital care. Almost all Australians would consider that any federal legislation that attempted to significantly reduce or eliminate such a human right should be declared contrary to our social contract – unconstitutional, in jurisprudential parlance.

Ultimately, the High Court’s decision in *Momcilovic* does little to satisfy those members of the community (best represented in the court by the Human Rights Resource Centre Ltd) who seek to implement statutory protection for human rights across Australia. Likewise, it does not assuage the concerns of those who – like Heydon J – are wary of any statute which might involve the judiciary in the quasi-policy function of determining the content and “demonstrably justified” limits of rights. For

⁸⁵ Section 10 of the *Health Insurance Act 1973* (Cth) sets out who has an entitlement to a Medicare benefit.

⁸⁶ Section 84G of the *National Health Act 1953* (Cth) sets out the persons covered by a concessional card.

⁸⁷ *National Health Act 1953* (Cth), s 9.

⁸⁸ For example, in the first couple of years, the British judiciary focused more heavily on interpretations than declarations under the *Human Rights Act 1998* (UK): Klug F and Starmer K, “Standing Back From the Human Rights Act: How Effective Is It Five Years On?” [2005] *Public Law* 716 at 721, quoted in Debeljak, n 8 at 41, fn 211.

⁸⁹ Zines L, *Constitutional Change in the Commonwealth* (Cambridge University Press, New York, 1988) pp 65-66.

proponents of a statutory Charter of rights at the federal level, the decision should cause a rethink on the best model for guaranteeing the rights of all Australians, while respecting the institutional integrity of Ch III courts.

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