In the Supreme Court of the Australian Capital Territory
[Criminal jurisdiction]

No SCC 58 of 2020

The Queen
Respondent

[redacted]
Applicant

ACT Human Rights Commissioner
Proposed intervener

OUTLINE OF SUBMISSIONS

1. On 27 November 2020 the Commissioner applied for leave to intervene under s 36 of the *Human Rights Act 2004* (ACT) (the **HRA**), with respect to an interlocutory application regarding the use of an intermediary in the proceedings. Leave was sought by the Commissioner to make submissions to address the key human rights issues with respect to the use of an intermediary in criminal proceedings and the appropriate construction of s 4AK of the *Evidence (Miscellaneous Provisions) Act 1991* (ACT) (the **EMPA**). If leave is granted, the Commissioner's intervention will address the matters set out below.

2. In addressing the key human rights issues with respect to the use of an intermediary in criminal proceedings the Commissioner will address the following issues (and come to the following conclusions):

   (a) What is the statutory role of an intermediary? Answer: To impartially assist with communicating with the relevant witness; to allow a witness to communicate their best evidence without being traumatised by the process of giving evidence.

   (b) Does the appointment of an intermediary affect the fairness of a trial, prevent a defendant from receiving a fair trial and/or ensure that particular types of witnesses

Filed for and on behalf of the ACT Human Rights Commissioner by:
Rosemary Budavari, ACT Human Rights Commission, Level 1, 5 Constitution Avenue, ACT, 2601, Ph: (02) 6205 2222
Email: [redacted]

are treated fairly? Answer: The appointment of an intermediary will not undermine the fairness of a trial where it occurs in accordance with the EMPA, and can ensure that vulnerable witnesses are treated fairly, and the Court is able to ensure both of these outcomes by putting in place rules for the involvement of the intermediary at the ground rules hearing.

(c) Does the appointment of an intermediary affect any other rights protected by the HRA? Answer: Yes, the appointment of an intermediary protects the best interests of the child, in cases involving a child witness, and the right to equality, in cases involving witnesses with disabilities.

(d) Is there a role for s 30 of the HRA in the interpretation of s 4AK? Answer: Section 30 of the HRA confirms the ordinary meaning of s 4AK, and does not require a strained meaning be adopted.

(e) What are "the interests of justice" for the purposes of s 4AK? Answer: "the interests of justice" incorporate the broad range of interests that the accused, prosecution, complainants, other witnesses and the rest of the community have in the proper functioning of the justice system. These interests include respect for the rights contained in the HRA that are affected by court proceedings, including those in ss 8, 21 and 22 of the HRA.

(f) What are "the interests of justice" for the purposes of s 4AF? Answer: The interests are the same as those relevant to the test in s 4AK although these two tests operate in very different ways.

(g) How should the phrase "communication difficulties" in s 4AJ be interpreted? Answer: given that the courts retain a discretion not to appoint an intermediary, for example where it would limit the right to a fair hearing, the "communication difficulty" precondition should be interpreted broadly so as to allow the court to appoint an intermediary as needed.

3. These submissions will address these questions in the course of addressing the following overarching matters:

(a) **firstly**, by considering the legislative scheme for intermediaries;

(b) **secondly**, by considering the relevant human rights and jurisprudence;

(c) **thirdly**, by considering how the Court should apply the interpretive obligation in s 30 of the HRA when interpreting the legislative scheme for intermediaries.

I. INTERMEDIARIES APPOINTED UNDER THE EMPA

4. The use of intermediaries for child complainants in sexual offence proceedings is provided for by ss 4AK of the EMPA. An ordinary interpretation of s 4AK(1) suggests that an intermediary is required to be appointed for prescribed witnesses, because the word "must" is usually treated as mandatory.[1] However under s 4AK(2) the court "need not appoint an intermediary" if one is not available or if "it is not in the interests of justice" to do so. Regulation 3B of the *Evidence (Miscellaneous Provisions) Regulation 2009* (ACT) prescribes certain types of witnesses for the purposes of s 4AK(1) of the EMPA, including "a child complainant in a sexual offence proceeding".

5. Alternatively, under s 4AJ of the EMPA it appears that a court has a discretion to appoint an intermediary in any criminal proceedings for any witness "with a communication difficulty" because the use of the word "may" is usually treated as discretionary.[2]

6. The functions performed by an intermediary are specified and strictly controlled by the legislation. The following features are relevant:

(a) the functions of an intermediary are prescribed by s 4AI(1) as being to:

i. prepare and provide reports about the witness's communication needs as required; and

ii. at a hearing—

1. communicate to the witness questions put to the witness, to the extent necessary for the witness to understand the questions; and
2. communicate to the person putting questions to the witness, the witness's answers to the questions, to the extent necessary for the person to understand the answers; and

[1] *Keller & Anor v Bayside City Council & Ors* [1996] 1 VR 356 at 382.
[2] *Ex Parte Gleeson* [1907] VLR 368 at 373.

3. otherwise assist the court, and any lawyer appearing in the proceeding, to communicate with the witness.

(b) an intermediary appointed for a witness is an officer of the court and must act impartially when assisting with communication with the witness (s 4AI(2));

(c) where an intermediary is appointed for a particular witness ground rules hearing must be held with respect to that witness (s 4AB(2));

(d) at a ground rules hearing the court may make any directions that it considers in the interests of justice (s 4AF(1));

(e) a defendant in a criminal proceeding who is a witness is also entitled to have in intermediary appointed (s 4AG(2)).

7. The role of intermediaries is carefully regulated in the ACT, as outlined in the *ACT Intermediary Program Procedural Guidance Manual* published by the ACT Human Rights Commission.[3] The use of intermediaries is said to allow a witness to communicate their best evidence:[4]

> The Intermediary Program's overarching objective is to provide skilled intermediaries to the criminal justice system so vulnerable witnesses (primarily children) **communicate their best evidence at police interview and trial**, thereby reducing vulnerable witnesses' trauma and assisting justice processes.

8. Under s 702(3) of the *Criminal Code 2002* an intermediary commits the offence of aggravated perjury if they make false or misleading statements or improperly assist a witness' communication. Intermediaries are also required to abide by the Code of Conduct set out in the *Guidance Manual*, which provides, amongst other things, that:[5]

(a) An intermediary has an overriding duty as an officer of the court, to assist impartially. An intermediary's paramount duty is to the court, and not to any other stakeholder engaged in the case or court proceeding.

(b) An intermediary is not to present themselves as an advocate, witness or expert witness.

(c) An intermediary must not discuss evidence with the witness or any other person. If a witness, or person associated with them, discloses evidence during a

[3] *ACT Intermediary Program Procedural Guidance Manual* (February 2020).
[4] *ACT Intermediary Program Procedural Guidance Manual* (February 2020) at 4 (emphasis added).
[5] *ACT Intermediary Program Procedural Guidance Manual* (February 2020) at 6.

communication assessment or otherwise, the intermediary must inform the police officer in charge of the case (or their delegate). Immediately after attempting to inform the police, the intermediary must inform the Intermediary Program Team of the incident.

(d) An intermediary must never be alone with a witness. If this occurs the intermediary must immediately inform the Intermediary Program Team.

9. The provisions of the EMPA and the Code of Conduct make it clear that the role of an intermediary is to **impartially** assist those involved in the court process to communicate with the relevant witness (with criminal offences for performing the role improperly). The *Guidance Manual* indicates that the goal of this impartial assistance is to allow a witness to communicate their best evidence without being traumatised by the process of giving evidence.[6]

II. RELEVANT HUMAN RIGHTS AND JURISPRUDENCE

10. The following human rights in the HRA are relevant to the use of intermediaries in criminal trials and to the interpretation of the relevant provisions of the EMPA:

(a) section 8 of the HRA provides for equality before the law, enjoyment of human rights without discrimination and the equal protection of the law from discrimination (the **equality right**);

(b) section 11(2) of the HRA provides that every child has the right to the protection needed by the child because of being a child (**rights of the child**);

(c) section 21(1) of the HRA provides the right to a fair trial (the **fair trial right**):

> Everyone has the right to have criminal charges, and rights and obligations recognised by law, decided by a competent, independent and impartial court or tribunal after a fair and public hearing.

[6] *ACT Intermediary Program Procedural Guidance Manual* (February 2020) at 4 (emphasis added).

(d) section 22(2)(g) of the HRA provides criminal defendants with the right to examine of witnesses on the same basis as the prosecution (the **equal right to examine witnesses**):

> Anyone charged with a criminal offence is entitled to the following minimum guarantees, equally with everyone else: …
>
> to examine prosecution witnesses, or have them examined, and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as prosecution witnesses;

11. Section 31(1) of the HRA provides that

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

12. In *Hakimi v Legal Aid Commission* this Court confirmed that when interpreting the rights in the HRA, international cases are relevant:[7]

> The process of the identification of the content of rights enshrined in the Human Rights Act is properly to be assisted by the jurisprudence of international courts and tribunals, which consider the same or relevantly similar rights expressed in instruments similar to the Human Rights Act.

13. In *Nona v R* the ACT Court of Appeal affirmed the relevance of international case law under s 31 of the HRA and noted that this case law was "highly persuasive".[8] In *Andrews v Thomson*, the Court of Appeal also considered that the HRA should be interpreted in the same way as relevantly similar provisions of the Victorian *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the **Charter**).[9] These submissions will rely on both international and Victorian case law, where the ACT courts have not previously considered an issue.

The right to equality

14. Section 8 of the HRA is worded similarly to s 8 of the Charter, although s 8 of the Charter includes a further subsection expressly dealing with positive discrimination.

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[7] *Hakimi v Legal Aid Commission* [2009] ACTSC 48, [71].
[8] *Nona v R* [2012] ACTCA 55, [36].
[9] *Andrews v Thomson* [2018] ACTCA 53, [45].

However some care must be taken when applying the Victorian case law on s 8 of the Charter because the word "discrimination" in that section is confined by the definition of "discrimination" in the *Equal Opportunity Act 2010* (Vic). That is not the case with the ACT provision. As a result, the ACT provision will sometimes provide broader protection as it is not confined by the technicalities of the equal opportunity jurisdiction.

15. The Victorian jurisprudence makes it clear that the principle of equality reflected in s 8 of the Charter is concerned with both formal and substantive equality and may require differential treatment of persons whose situations are relevantly different:[10]

> The second limb of s 8(3) protects substantive equality, one that accommodates difference. This is a principle of equality that recognises that uniformity of treatment between different persons may not be appropriate or adequate but that disadvantaged or vulnerable persons may need to be treated differently to ensure they are treated equally.

16. The right to equality may require the State to establish special mechanisms, by way of legislative schemes addressing the special needs of particular parts of the community. In *Cemino v Cannan* the Supreme Court of Victoria considered that Victoria's Koori Court was a measure to address discrimination and thereby promote the right in s 8(3):[11]

> The Koori Court was established for purposes that included addressing systemic disadvantage faced by Aboriginal people who have been over-represented in the criminal justice system, in imprisonment and in deaths in custody. The Koori Court seeks to reduce that systemic disadvantage by providing special measures and accommodations so that the procedure is less disadvantageous for Aboriginal offenders; it protects against indirect discrimination on the basis of race. It is a means through which systemic disadvantage in the justice system is mitigated in pursuance of the s 8(3) right.

17. The Victorian Supreme Court has also held that the equality right requires courts to make reasonable adjustments to its procedures to ensure that all parties are able to effectively participate in a hearing:[12]

> In its application in this context, the right to equal and effective protection against discrimination in s 8(3) has operation in respect of persons who, without that

[10] *Victoria Police Toll Enforcement v Taha* [2013] VSCA 37, [210] (Tate JA). See also *Matsoukatidou v Yarra Ranges Council* [2017] VSC 61, [61] and *Cemino v Cannan* [2018] VSC 535, [142].
[11] *Cemino v Cannan* [2018] VSC 535, [143].
[12] *Matsoukatidou v Yarra Ranges Council* [2017] VSC 61, [108] (emphasis added).

> protection, could not effectively participate in a court or tribunal proceeding (including in any hearing) by reason of age, race, disability or other protected attribute under the Equal Opportunity Act. **The ability of such a person effectively to participate in the proceeding might be due to a number of attribute-related physical, communicative or cognitive capability deficits.** Those experiencing the effect of discrimination on a number of intersecting grounds are likely to be in a position of aggravation in this regard. In order to ensure equal protection against such discrimination, **the court is required to make such adjustments and accommodations as may be reasonably necessary and available to ensure the effective participation of the individual despite their disability**, subject to the fundamental requirements of judicial independence, impartiality and fairness and respect for the human rights of other participants.

18. As will be discussed further with respect to the right in s 11(2) of the HRA, the Victorian Supreme Court has also held that when hearing criminal charges against children, the equality right (together with the right to a fair hearing and the principle of the best interests of the child) requires courts to take reasonable and necessary steps to ensure that the trial process does not expose the child defendant to intimidation, humiliation and distress and to assist them to effectively participate in the proceeding.[13]

19. The Commissioner submits that the appointment of an intermediary for children and people who have difficulty communicating in the criminal justice context protects and promotes the right to equality in s 8 of the HRA by making reasonable adjustments to the court processes to allow them to effectively communicate and participate in the proceedings on an equal basis with others who do not have that disability. Although the equal participation principles have traditionally been applied to the parties to a proceeding, the Commissioner submits that it is consistent with the recognition that non-parties also have a legitimate interest in the proper functioning of the justice system (discussed below) to also recognise that some non-parties may require assistance in their engagement with the justice system so as to participate equally, consistent with s 8 of the HRA.

The rights of children to protection

20. Australia is a signatory to the United Nations *Convention on the Rights of the Child* and Courts considering the contents of the rights of the child should be informed by that

[13] *DPP (Vic) v SL* [2016] VSC 714 at [12] referring to *SC v United Kingdom* (2005) 40 EHRR 10, *DPP (Vic) v SE* [2017] VSC 13 at [12], *Application for Bail by HL* [2016] VSC 750 at [71]-[72].

Convention.[14] Article 3 of the Convention requires that in all actions concerning children, the best interests of the child shall be the primary consideration. The Committee on the Rights of the Child has also observed:[15]

> A child cannot be heard effectively where the environment is intimidating, hostile, insensitive or inappropriate for her or his age. Proceedings must be both accessible and child-appropriate. Particular attention needs to be paid to the provision and delivery of child-friendly information, adequate support for self-advocacy, appropriately trained staff, design of court rooms, clothing of judges and lawyers, sight screens, and separate waiting rooms.

21. The right of children to such protection as is needed by reason of being a child in s 11(2) of the HRA requires special procedures to be adopted in court proceedings involving child witnesses. The special needs of child defendants have been given close consideration in the domestic jurisprudence, however the Commissioner submits that these considerations apply equally to other child witnesses, particularly where the child is a complainant. The rights of a child complainant to protection from intimidation by adults during the court process are the same as those of a child defendant, noting that both types of witness are likely to be key witnesses (and therefore the subject of significant unwanted attention) in any hearing.

22. In *R v YL* Crispin J declined to grant an order compelling a seven year old child complainant to attend for cross examination, because it would have limited the rights of that child under s 11(2) of the HRA:[16]

> …Whilst it will normally be appropriate for the Court to take such measures as may be necessary to ensure the attendance of compellable but reluctant witnesses, such remedies are discretionary and the Court may decline to do so when satisfied that the interests of justice require such a course.
>
> In my opinion any conceivable doubt that s 20 should be construed sufficiently widely to permit a judge to refuse to take coercive measures against a young child would now be effectively dispelled by s 11 of the *Human Rights Act 2004* (ACT) ("the Human Rights Act"), which provides, inter alia, that "Every child has the right to the protection needed by the child because of being a child, without distinction or discrimination of any kind". [Section 30 of the Human Rights Act] provides that "In working out the meaning of a Territory law, an interpretation that is consistent with

[14] *Certain Children v Minister for Families and Children* [2016] VSC 796 at [146].
[15] Committee on the Rights of the Child, *General Comment 12: The Right of the Child to be Heard*, 51st sess, UN Doc. CRC/C/GC/12 (20 July 2009) [34].
[16] *R v YL* [2004] ACTSC 115 at [30], [31], [33].

> human rights is as far as possible to be preferred"... I see no reason to doubt that the Court has power to refuse to take coercive measures against a child in order to protect him from the risk of psychological harm to which he is vulnerable by reason of his age and position as a child in a family.
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> …
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> Whilst I accepted that the child fell within the class of witnesses amenable to compulsion, it would, in my opinion, have been inappropriate to have applied any of these coercive measures to him. A seven year old boy could not be sensibly threatened with contempt proceedings and, save perhaps in the most compelling circumstances, such a child should clearly not be arrested, forced into court or intimidated in order to require him to give evidence when he might suffer significant psychological harm as a consequence of doing so. Children of that age should be protected by the law; not harmed by it.

23. [redacted] the legislature has recognised that until the age of 18 years, individuals have a right to special protection by reason of being a child.[17] Further, [redacted] the legislature has provided protection for adults [redacted] where they were a child at the time of the alleged offences.[18]

24. In *DPP v SL* the Victorian Supreme Court made the following relevant observations with respect to child defendants, which should also be applied to children who are witnesses in court proceedings:[19]

> Where courts normally accustomed to trying adults have not appropriately adapted their procedures when trying a child, it has been held that the human right of the child to a fair trial has been breached. The general principle that is applied is that courts should take reasonable and necessary steps to ensure that the trial process does not expose a child defendant to avoidable intimidation, humiliation and distress and to assist him or her effectively to participate in the proceeding.

25. The Commissioner submits that the appointment of an intermediary for children in the criminal justice context protects and promotes the bests interests of the child in s 11(2) of the HRA by making reasonable adjustments to the court processes to allow them to effectively participate without avoidable intimidation, humiliation and distress.

[17] Section 11(2), HRA and *Legislation Act 2001*, Dictionary.
[18] Regulation 3B, *Evidence (Miscellaneous Provisions) Regulations 2009*.
[19] *DPP v SL* [2016] VSC 714 at [12].

The right to a fair trial and to examine witnesses

26. The right to a fair hearing in s 21 of the HRA (and the more detailed criminal process rights in s 22 of the HRA) is closely related to the right to equality before the law in s 8 of the HRA.[20] In *Pham v Drakopoulos* the Victorian Court of Appeal observed that neither of these rights "focus on single issues, but rather consist of a complex set of rules and practices".[21] The rules and practices developed to ensure a fair hearing and equality before the law also support the proper administration of justice:[22]

> **The importance of these rights in the protection of human rights generally is underscored by the fact that the effective observance of all human rights ultimately depends upon the proper administration of justice**.
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> The rules which govern the administration of justice in Victoria are comprehensive. Examples are provided by the Rules, the Act and the vast body of case law developed over centuries to facilitate the orderly and fair disposition of court business.
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> The High Court in *Aon Risk Services Australia Ltd v Australian National University* also recognised the application of case management by courts needs to take into account the fact that "**the resolution of disputes serves the public as a whole, not merely the parties to the proceedings**".
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> **Together these rules provide a key element of human rights protection and serve as a procedural means to safeguard equality before the law and the right to a fair trial itself.** In order to work, it cannot be left to the dictates of a party to a legal proceeding to determine the content of these rights. To proceed otherwise would be to abrogate the rule of law.

27. It has been held that the right to a fair hearing is absolute, but that what constitutes a fair hearing in any particular case will depend on all the circumstances: "there is no single exhaustive set of aspects of a trial which will make it fair".[23] In *Condon v Pompano* Hayne, Crennan, Kiefel and Bell JJ observed that:[24]

> [T]he question is whether, taken as a whole, the court's procedures for resolving the dispute accord both parties procedural fairness and avoid "practical injustice".

[20] *Pham v Drakopoulos* [2013] VSCA 43 at [65] with respect to the equivalent rights in the Charter.
[21] *Pham v Drakopoulos* [2013] VSCA 43 at [65].
[22] *Pham v Drakopoulos* [2013] VSCA 43 at [66] – [69] (emphasis added).
[23] *Victoria Police Toll Enforcement v Taha* [2013] VSCA 37 at [205] (Tate JA).
[24] *Condon v Pompano* [2013] HCA 7, [156] – [157].

28. Although a court cannot conduct a trial that is unfair, the Victorian Court of Appeal has held that: "[a] trial does not need to be perfect to be fair".[25]

29. In *R v IB (No 3)* the Chief Justice recently applied the interpretive obligation in s 30 of the HRA, in a case where the "relevant" rights were those in ss 21 and 22 of the HRA.[26] Her Honour confirmed that s 21 of the HRA provides for an adversarial trial in which there is "equality of arms between the prosecution and defence".[27] The Chief Justice confirmed that this does not require a trial by jury for criminal matters.[28]

30. As suggested in *Pham v Drakopoulos*, the requirements of justice and of a fair hearing take into account a range of interests beyond those of the parties themselves. The jurisprudence of this Court supports this position. In *R v GZ* the Court held:[29]

> [T]he Court bears the responsibility of controlling proceedings and ensuring that fairness to all, the accused, the witnesses, **especially the complainant**, the Crown, other litigants **and the community** is ensured and to preserve the integrity of the trial process.

31. The views expressed in *R v GZ* about the range of interests that must be considered by the courts are consistent with the position adopted by the House of Lords that providing a fair trial involves a "triangulation of interests". Lord Steyn is credited with first framing the right to a fair trial in this manner in *Attorney General's Reference (No 3 of 1999)*:[30]

> The purpose of the criminal law is to permit everyone to go about their daily lives without fear of harm to person or property. And it is in the interests of everyone that serous crime should be effectively investigated and prosecuted. **There must be fairness to all sides. In a criminal case this requires the court to consider a triangulation of interests. It involves taking into account the position of the accused, the victim and his or her family, and the public.**

32. The above formulation was cited with approval by the Appellate Committee of the House of Lords (Lord Bingham of Cornhill, Lord Woolf, Lord Hope of Craighead, Lord Walker of Gestingthorpe and Lord Carswell) in *R v H*.[31] In that case the Lords made the

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[25] *Slaveski v Smith* [2012] VSCA 25 at [56].
[26] *R v IB (No 3)* [2020] ACTSC 103 at [45].
[27] *R v IB (No 3)* [2020] ACTSC 103 at [46].
[28] *R v IB (No 3)* [2020] ACTSC 103 at [47].
[29] *R v GZ* [2012] ACTSC 183 at [31] (emphasis added).
[30] *Attorney General's Reference (No 3 of 1999)* [2001] 2 AC 91 at 118 (emphasis added).
[31] *R v H* [2004] 2 AC 134 at [12].

following highly relevant observations about the evolving nature of what is considered a fair trial:[32]

> Fairness is a constantly evolving concept. Hawkins J (*Memoirs*, chapter IV) recalled a defendant convicted of theft at the Old Bailey in the 1840s after a trial which lasted 2 minutes 53 seconds, including a terse jury direction: "Gentlemen, I suppose you have no doubt? I have none". Until 1898 a defendant could not generally testify on his own behalf. Such practices could not bear scrutiny today. But it is important to recognise that standards and perceptions of fairness may change, not only from one century to another but also, sometimes, from one decade to another.
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> While the focus of article 6 of the Convention is on the right of a criminal defendant to a fair trial, it is a right to be exercised within the framework of the administration of the criminal law: as Lord Steyn pointed out in *Attorney-General's Reference (No 3 of 1999)* [2001] 2 AC 91, 118,
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> > "The purpose of the criminal law is to permit everyone to go about their daily lives without fear of harm to person or property. And it is in the interests of everyone that serious crime should be effectively investigated and prosecuted. There must be fairness to all sides. In a criminal case this requires the court to consider a triangulation of interests. It involves taking into account the position of the accused, the victim and his or her family, and the public".
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> The European Court has repeatedly recognised that individual rights should not be treated as if enjoyed in a vacuum: *Sporrong and Lönnroth v Sweden* (1982) 5 EHRR 35, 52, para 69; *Sheffield and Horsham v United Kingdom* (1998) 27 EHRR 163, 191, para 52. As Lord Hope of Craighead pointed out in *Montgomery v HM Advocate* [2003] 1 AC 641, 673:
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> > "the rule of law lies at the heart of the Convention. It is not the purpose of article 6 to make it impracticable to bring those who are accused of crime to justice. The approach which the Strasbourg court has taken to the question whether there are sufficient safeguards recognises this fact."

33. The extract from Lord Steyn's judgment with respect to the "triangulation of interests" involved in a fair trial has also been adopted by the Supreme Court of Victoria in *Ragg v Magistrates' Court of Victoria* when discussing the contents of the right to a fair trial under the Charter.[33] The Commissioner submits that the assessment of what is required for a fair hearing under s 21 of the HRA also involves a triangulation of interests, including those of the accused, the alleged victim, their family and the community.

[32] *R v H* [2004] 2 AC 134 at [12]-[13].
[33] *Ragg v Magistrates' Court of Victoria* [2008] VSC 1 at [77].

34. In *R v IB (No 3)* the Chief Justice observed that **justice** means "a fair trial according to law".[34] Her Honour also considered the meaning of the phrase "the interests of justice" and confirmed that:[35]

> The expression "the interests of justice" is broad and derives substance from the context in which it is used. Invariably, it involves matters other than the interests of the parties and includes larger questions of legal principle, public interest, and policy: *BHP Billiton Ltd v Shultz* [2004] HCA 61; 221 CLR 400 (*BHP Billiton*), *Landsman v R* [2014] NSWCCA 328; 88 NSWLR 534 at [69] per Beazley P, Hidden and Fullerton JJ agreeing.
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> Limited assistance can be gained from the way in which the expression has been construed in other cases, as each decision relates to a particular statutory context. However, the following cases provide some assistance.
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> In *BHP Billiton*, the Court considered cross-vesting legislation that was designed to ensure that cases were heard in the forum dictated by "the interests of justice". A plaintiff had made a claim in NSW and resisted an application that it be transferred. At [15], Gleeson CJ, McHugh and Heydon JJ pointed out that:
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> **The interests of justice are not the same as the interests of one party, and there may be interests wider than those of either party to be considered. Even so, the interests of the respective parties … will arise for consideration.** …
>
> Undoubtedly, in criminal contexts such as the present, the "interests of the accused" (as opposed to the preference of the accused) is an important aspect of the "interests of justice", but the expressions are far from coterminous: *TVM v Western Australia* [2007] WASC 299; 180 A Crim R 183 per McKechnie J at [31].

35. The Chief Justice had further occasion to apply the "interests of justice" test in relation to judge only criminal trials in *R v Vunilagi*.[36] In doing so her Honour took into account a great range of matters in addition to the rights of the accused.[37] Her Honour was concerned to ensure the focus on the core of the right to a fair hearing, not on the specific manner in which fairness had traditionally been secured (such as by way of a jury trial):[38]

> Although trial by jury is the desirable way of trying serious criminal matters it is unhelpful to employ emotive expressions such as "ancient right", which may derail focus from the critical right to a fair trial and the related human right to a timely trial.

[34] *R v IB (No 3)* [2020] ACTSC 103 at [48].
[35] *R v IB (No 3)* [2020] ACTSC 103, [94] – [96], [103] (emphasis added).
[36] *R v Vunilagi* [2020] ACTSC 225.
[37] *R v Vunilagi* [2020] ACTSC 225, [40].
[38] *R v Vunilagi* [2020] ACTSC 225, [40].

36. Like when providing a fair trial, when considering what is in the interests of justice the Court cannot focus solely on one party, or even on both parties, to the proceedings. At a general level the interests of justice include the interests of the community as a whole, and at the particular level it includes those of complainants and witnesses who have been affected by the relevant events and who will be affected by the manner in which the trial is conducted.

37. Whilst the use of intermediaries and the impact of their use on the fairness of a criminal trial has not been examined in the Territory, the Court has considered other aspects of the EMPA that protect vulnerable witnesses. For example, in *R v PT* the Court considered the provisions that allow the use of pre-recorded evidence. In its discussion the Court notes that these provisions were **intended to bring about a change to the substance of the evidence a witness is able to give**, and that concepts of fairness apply to both the interests of the accused and the interests of witnesses:[39]

> It is inherent in the scheme for the admission of recorded police interviews that such interviews will not always take the same course as would have been taken if the complainant's "evidence" was first given in court.
>
> One of the complexities of this matter is that there are two different kinds of unfairness that may arise in this situation [i.e. fairness to the witness and fairness to the accused].

38. The adoption of alternative procedures for vulnerable witnesses has been considered in a number of cases in the United Kingdom, considered below. These cases have considered the measures that a trial judge can legitimately take to protect a vulnerable witness, without impacting adversely on the right of an accused to a fair trial, which is protected in the United Kingdom under the *Human Rights Act 1998* (UK), which incorporates the rights from the *European Convention on Human Rights*.

39. In *R v Lubemba* the England and Wales Court of Appeal observed that it is now expected that "justice is to be done" not just to the accused but to witnesses, and that this will require practitioners to change how they cross-examine:[40]

[39] *R v PT* [2013] ACTSC 20 at [31] – [32].
[40] *R v Lubemba I[2014] EWCA Crim* 2064 at [45].

> It is now generally accepted that if justice is to be done to the vulnerable witness and also to the accused, a radical departure from the traditional style of advocacy will be necessary. Advocates must adapt to the witness, not the other way round. They cannot insist upon any supposed right "to put one's case" or previous inconsistent statements to a vulnerable witness. If there is a right to "put one's case" (about which we have our doubts) it must be modified for young or vulnerable witnesses. It is perfectly possible to ensure the jury are made aware of the defence case and of significant inconsistencies without intimidation or distressing a witness (see for example paragraph 3E.4 of the Criminal Practice Directions).

40. More recently the England and Wales Court of Appeal confirmed earlier findings that it is improper to imply to a jury that a defendant's defense has been "emasculated" by rules designed to protect vulnerable witnesses, and held that:[41]

> It is not appropriate to submit that the system is unfair because it does not permit a form of cross-examination which young and vulnerable may see as intimidating and confusing.

41. The use of intermediaries has been considered by the Courts in South Africa. In *DPP v Minister of Justice* the South African Constitutional Court has observed that the use of intermediaries in fact **ensures that the defendant receives a fair trial**:[42]

> As pointed out earlier, questioning a child requires a special skill. Not many judicial officers have this skill, although there are some who, over the years and because of their constant contact with child witnesses, have developed a particular skill in questioning children. This illustrates the importance of using intermediaries where young children are called upon to testify. They have particular skills in questioning and communicating with children. Counsel for the Centre for Child Law and Childline was quite correct when, in her reply, she submitted that everything seems to turn upon the need for intermediaries when young children testify in court. **Properly trained intermediaries are key to ensuring the fairness of the trial. Their integrity and skill will be vital in ensuring both that innocent people are not wrongly convicted and that guilty people are properly held to account.**

42. Although the use of intermediaries has not been considered by this Court, in *R v BNS* Refshauge J held that where the rules of court permit cross-examination of a witness by video link, this will not infringe the right in s 22(2)(g) of the HRA.[43] His Honour observed:[44]

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[41] *Le Brocq v The Liverpool Crown Court* [2019] EWCA Crim 1398 at [63].
[42] *DPP v Minister of Justice* [2009] ZACC 8 at [167].
[43] *R v BNS* [2016] ACTSC 51 at [15].
[44] *R v BNS* [2016] ACTSC 51 at [15].

> I note, too, that s 22 of the *Human Rights Act 2004* (ACT) does not, in terms, require that an accused have the right to confront his or her accuser but establishes the right to have prosecution witnesses examined.

43. Similarly, the right in s 22 of the HRA does not, in terms, require that an accused have the right to cross-examine without the presence of an intermediary. Section 22(2)(g) specifically requires that a defendant be able to "examine prosecution witnesses", and to call witnesses "under the same conditions as prosecution witnesses". The intermediary rules do not prevent a defendant from examining the relevant witness. Further, the same conditions apply to both prosecution and defence witnesses (including the defendant: s 4AG(2)) – these provisions apply to both where vulnerable witnesses are required to give evidence.

44. The European Court of Human Rights (**ECtHR**) has considered the equivalent right to s 22(2)(g) of the HRA as reflected in article 6 of the *European Convention on Human Rights* on a number of occasions. That court's treatment of the right, considered below, makes it clear that the right is concerned with the overall outcome (which may be attained in a number of ways depending on context), rather than with enforcing specific procedures inflexibly for their own sake. The ECtHR's primary concern under article 6 is to evaluate the overall fairness of criminal proceedings.[45] In doing so, that court looks at the proceedings "as a whole", including the way in which evidence has been obtained, "having regard to the rights of the defence but also to the interests of the public and the victims in seeing crime prosecuted".[46]

45. The starting point for the purposes of article 6 is that before an accused can be convicted, all evidence against them normally has to be produced in their presence at a public hearing with a view to adversarial argument.[47] Although that is normally the case, that court will in fact allow evidence to be used that has not been tested in cross examination at all where there are:[48]

[45] *Schatschaschwili v Germany* 9154/10 at [101].
[46] *Schatschaschwili v Germany* 9154/10 at [101].
[47] *Al-Khawaja and Tahery v the United Kingdom* (26766/05 and 22228/060 at [118].
[48] *Al-Khawaja and Tahery v the United Kingdom* (26766/05 and 22228/060 at [147].

> …sufficient counterbalancing factors, including strong procedural safeguards, to compensate for the handicaps caused to the defence as a result of the admission of the untested evidence and to ensure that the trial, judged as a whole, was fair.

46. In particular the ECtHR has accepted that it may be justifiable to admit the evidence of a complainant in sexual offence proceedings without cross examination, because of the need to take specific measures for the purpose of protecting the victim.[49] That Court has observed that:[50]

> Such proceedings are often conceived of as an ordeal by the victim, in particular when the latter is unwillingly confronted with the defendant. These features are even more prominent in a case involving a minor. … Therefore, the Court accepts that in criminal proceedings concerning sexual abuse certain measures may be taken for the purpose of protecting the victim, provided that such measures can be reconciled with an adequate and effective exercise of the rights of the defence.

47. Consistent with the approach of the ECtHR, the objective of the use of intermediaries appears to be to do justice to witnesses in a manner that does not appear to cause an injustice to defendants. The case law considered above indicates that the appointment of an intermediary will not affect the overall fairness of a trial given the safeguards that accompany their appointment, and that it can ensure that vulnerable witnesses are treated fairly. If there are particular features of the use of an intermediary that might result in unfairness to an accused in any particular case without other adjustments being made, the Court is able to ensure the trial is fair for all participants through the mechanism of the ground rules hearing, which was clearly provided for that reason.

III. INTERPRETATION USING SECTION 30 OF THE HRA

48. Section 30 of the HRA provides that:

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

49. Section 30 of the HRA was wholly replaced in 2008. The *Explanatory Statement* for the bill introducing that amendment states:[51]

[49] *Aigner v Austria* 28328/03 at [39].
[50] *Aigner v Austria* 28328/03 at [37].
[51] *Explanatory Statement, Human Rights Amendment Bill 2007*.

> Clause 5 replaces the existing interpretative provision in the *Human Rights Act 2004*. It clarifies the interaction between the interpretive rule and the purposive rule such that as far as it is possible a human rights consistent interpretation is to be taken to all provisions in Territory laws. This means that unless the law is intended to operate in a way that is inconsistent with the right in question, the interpretation that is most consistent with human rights must prevail. This is consistent with the Victorian approach contained in subsection 32(1) of the *Charter of Human Rights and Responsibilities Act 2006*.

50. The statement makes it clear that s 30, like s 32 of the Charter, is an interpretation provision. The statement also suggests that s 30 will result in varying levels of consistency with human rights depending on the purpose of the particular legislation, and on what interpretations are available in any particular case.[52]

51. In *Momcilovic*, six Justices of the High Court held that s 32 of the Charter is an ordinary rule of interpretation.[53] If the reasoning in that case also applies to s 30 of the HRA, s 30 should be applied as part of the ordinary interpretive process by:

    (a) considering interpretations available consistent with the ordinary principles of statutory construction; and
    (b) choosing the interpretation that is compatible, or "most consistent",[54] with human rights unless the Court concludes that the section was intended to operate in a way that is inconsistent with the rights in question.

52. The interpretive process required by s 32 of the Charter was considered by the Victorian Court of Appeal very recently in *Gebrehiwot v State of Victoria* – a case involving consideration whether the use of force by a police officer was an assault.[55] The Victorian Court of Appeal reiterated its previous comments that:[56]

> [W]here there is a constructional choice, the interpretive obligation under the Charter requires that the construction be adopted that renders the statutory

[52] Whether this means that s 28 of the *Human Rights Act* (the equivalent of s 7(2) of the *Charter*) is a part of the interpretive process (as is the case in Victoria) remains to be determined.
[53] *Momcilovic v The Queen* (2011) 245 CLR 1; [51] (French CJ); [146], [170] (Gummow J with Hayne J agreeing at [280]), [545] – [546], [565], [574] (Crennan and Kiefel JJ), [684] (Bell J).
[54] *Explanatory Statement, Human Rights Amendment Bill 2007*.
[55] *Gebrehiwot v State of Victoria* [2020] VSCA 315.
[56] *Gebrehiwot v State of Victoria* [2020] VSCA 315 at [135].

provision compatible with human rights, providing this is consistent with the purpose of the provision.

53. *Gebrehiwot* considered the Victorian Court of Appeal's earlier decision *Nguyen v Director of Public Prosecutions* in which the Court adopted a particular interpretation of a provision on the basis that it "better accommodates" the right in the Charter to a fair hearing.[57] In that case the court had said:[58]

> A right to a fair hearing quintessentially requires that both parties be heard. [This] interpretation … manifestly "better accommodates" the right to a fair hearing than an interpretation that impliedly excludes the court's power to entertain an application for a discharge of an *ex parte* order. This construction affords a meaning that respects the right to a fair hearing and is consistent with a plain reading of s 40W and reflective of common law principles of construction. It is an interpretation that does not strain the language used but, rather, as countenanced by this Court in *Treasurer (Vic) v Tabcorp Holdings Ltd*, is in accordance with the ordinary meaning of the words that Parliament has chosen.

54. The court in *Gebrehiwot* noted that the "better accommodates" test is derived from the High Court's decision in *Hogan v Hinch*. In that case Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ had said:[59]

> [T]he phrase in s 42(3) 'publish or cause to be published … in contravention of an order' indicates a requirement of knowledge of that order in contravention of which the publication is made. 'Contravention' is used in the sense of disputation or denial rather than mere failure to comply with an unknown requirement. Such a construction of s 42(3) also **better accommodates** the provision in s 15(3) of the [Charter] respecting reasonably necessary restrictions upon the right to freedom of expression.

55. Relying upon the High Court's application of the interpretive provision, the Victorian Court of Appeal applied s 32 of the Charter to the legislative provision governing the use of force by Senior Constable Miller against Mr Gebrehiwot:[60]

> It was conceded by the State that, for example, Gebrehiwot's 'dignity' right was engaged, or potentially engaged, by the actions of SC Miller in placing the plaintiff under arrest. The dignity right is the right when deprived of liberty, to humane treatment and to be treated with humanity and respect for the inherent dignity of the

[57] *Gebrehiwot v State of Victoria* [2020] VSCA 315 at [137].
[58] *Nguyen v Director of Public Prosecutions* [2019] VSCA 20, [104]-[105] (Tate JA, Maxwell P and Niall JA agreeing).
[59] *Hogan v Hinch* (2011) 243 CLR 506 at [78].
[60] *Gebrehiwot v State of Victoria* [2020] VSCA 315 at [140] (emphasis added).

human person. **A human-rights compatible interpretation of 'not disproportionate' in s 462A would place some emphasis on the question of whether SC Miller had reasonably available to him an alternative option to the takedown that would have better preserved Gebrehiwot's dignity right.** Such an interpretation 'better accommodates' the dignity right than an interpretation that takes no account of the human rights of a person subject to arrest; it discharges the obligation under s 32 of the Charter to adopt a human rights compatible interpretation of all statutory provisions. In answering the question of whether the takedown was not disproportionate, all of the factors identified in above would remain relevant but added to them would be a consideration of whether any of the alternative options that were available would have interfered less with Gebrehiwot's dignity right yet in the circumstances still enabled the arrest to be effected.

56. The Commissioner submits that this is the approach that should also be taken to the interpretation of the relevant provisions of the EMPA using s 30 of the HRA.

Interpretation of s 4AK of the EMPA

57. There are two aspects of s 4AK of the EMPA that require interpretation before applying that section in this case:

    (a) the word "must" in s 4AK(1);
    (b) the phrase "interests of justice" in s 4AK(2)(b).

58. With respect to the first interpretive question, there are two available interpretations of the word "must" – one in which that command does not leave any discretion (as a mandatory requirement) and the other which allows the decision maker a discretion (reading the word as "may"). The ordinary interpretation of the word "must" is that it imposes a mandatory requirement.[61] The Commissioner submits that the word "must" in s 4AK(1) should be interpreted in the ordinary way as a mandatory requirement because the appointment of an intermediary in all cases involving prescribed witnesses better accommodates all of the rights in ss 8, 11 and 21 of the HRA and does not limit the rights in s 22(2)(g).

[61] *Keller & Anor v Bayside City Council & Ors* [1996] 1 VR 356 at 382.

59. With respect to the second interpretive question, there are a variety of ways in which the interests of justice test in s 4AK(2)(b) can be interpreted, including the two ways proposed by the parties:

    (a) *The court need not appoint an intermediary for a prescribed witness if the witness does not have a (narrowly defined) communication difficulty.*

    This appears to be the interpretation proposed by the defence, which correlates the interests of justice with the witness' communication ability.

    (b) *The court must appoint an intermediary for a prescribed witness if the witness has a (broadly defined) communication difficulty or is otherwise vulnerable.*

    This appears to be the interpretation proposed by the prosecution, which appears to convert the interests of justice test from a negative to a positive assessment.

60. The effect of the interpretations preferred by the parties is to read the mandatory requirements of s 4AK to appoint an intermediary for a prescribed witness as being subject to an implied condition that the particular prescribed witness must have a communication difficulty in order to warrant the application of that section. These interpretations both read the concept of "communication difficulties" into s 4AK (from s 4AJ and the explanatory materials) despite the fact that the legislature has not chosen to utilise that concept to limit the scope of the section and the fact that the words used by the section are clear and do not result in absurd or inconvenient outcomes.

61. The task of statutory construction begins with the text itself,[62] however context remains important.[63] Context includes the general purpose and policy of a provision.[64] It also includes the legislative context, because the meaning of a provision must be determined by reference to the entire Act.[65] Accordingly, in determining the meaning that the

[62] *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at [47] (Hayne, Hayden, Crennan and Kiefel JJ).
[63] *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 92 ALJR 248, [34] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ); *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381 [69] (McHugh, Gummow, Kirby and Hayne JJ); *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378, 388-389 [23]-[24].
[64] *Alcan* (2009) 239 CLR 27, [47] (Hayne, Heydon, Crennan and Kiefel JJ).
[65] *Project Blue Sky* (1998) 194 CLR 355, [69] (McHugh, Gummow, Kirby and Hayne JJ).

legislature is "taken to have intended"[66] for a particular provision that provision should not be considered in isolation. A construction that would promote the purpose or object underlying the provision is to be preferred to one that would not, and consideration may be given to extrinsic materials, such as explanatory memoranda and parliamentary debates.[67] However, extrinsic materials cannot be relied on to displace the clear meaning of the text.[68]

62. The Commissioner submits that despite the focus in the explanatory materials on "communication difficulties" (which are expressly dealt with in s 4AJ of the EMPA) the legislature did not intend that only children who have communication difficulties should have the benefit of s 4AK, in the relevant types of proceedings. The section was intended to cover witnesses with a broader range of vulnerabilities than communication difficulties, which are sourced in the vulnerability of childhood (either as a current state or when the events occurred). This intention is put beyond doubt when one considers that the ordinary meaning of the word "child" is any individual who is under 18 years old;[69] and in the relevant part of the EMPA "child, in a proceeding", will include a witness **who is currently an adult but was a child**:[70]

    (a) at the time the proceeding started; or
    (b) if the witness gives evidence in an audiovisual recording —at the time the recording was made; or
    (c) **for a complainant in a sexual offence proceeding —at the time of the offence the subject of the proceeding**.

63. Given that many sexual offence proceedings are not heard until many years after the alleged offences occurred, Parliament clearly contemplated that witnesses who were well beyond 18 years of age would be provided with an intermediary under this provision. Witnesses in this category are not generally afflicted by a "communication difficulty" in the ordinary sense but rather have in common a childhood event that is likely to be highly traumatizing to recount. It is difficult to reconcile the prescription of this category

[66] *Project Blue Sky* (1998) 194 CLR 355, [78] (McHugh, Gummow, Kirby and Hayne JJ).
[67] *Interpretation of Legislation Act 1984* (Vic), s 35(a) and (b).
[68] *Alcan* (2009) 239 CLR 27, [47].
[69] *Legislation Act 2001*, Dictionary.
[70] EMPA, s 42, Dictionary.

of witness with the gloss that the parties would place upon s 4AK, by confining its intended use to those cases where the age of the relevant witness, or the trauma they have experienced, creates a communication difficulty.

64. Further, s 4AJ of the EMPA already provides the Court with a discretion to appoint an intermediary where a witness has a communication difficulty, and reading s 4AK down by reference to the existence of a communication difficulty would give it no work to do.

65. A third interpretation of the interests of justice test in s 4AK(2)(b) that does not read in the concept of "communication difficulty" is:

> *The court has a discretion not to appoint an intermediary for a prescribed witness if doing so would prevent the trial being fair or otherwise cause injustice, taking account of the interests of the parties, complainants and the community.*

66. The Commissioner submits that the above interpretation of s 4AK(2)(b) better accommodates all of the rights engaged by the appointment of intermediaries and is consistent with the purposes of s 4AK. It is also consistent with the role of paragraph (2)(b) as an exception to a mandatory rule, which indicates that a broad range of factors should be capable of influencing the exception. Section 30 of the HRA requires the Court to choose the interpretation that is compatible, or "most consistent",[71] with human rights unless the Court concludes that the section was intended to operate in a way that is inconsistent with the rights in question. The Commissioner considers that this third interpretation is the most consistent interpretation available, within the constraints of the ordinary interpretive process,[72] of which s 30 is a part.

67. The Commissioner further submits that the phrase "in the interests of justice" in s 4AK(2) should be interpreted in the manner suggested by the recent case law above as involving a consideration of all relevant interests including the rights in the HRA that are engaged (a "triangulation of interests") and not just the interests of the accused or the interests of the parties.

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[71] *Explanatory Statement, Human Rights Amendment Bill 2007*.
[72] *Momcilovic v The Queen* (2011) 245 CLR 1; [51] (French CJ); [146], [170] (Gummow J with Hayne J agreeing at [280]), [545] – [546], [565], [574] (Crennan and Kiefel JJ), [684] (Bell J).

68. Given that the "interests of justice" criterion in s 4AK(2)(b) operates as an exception to the presumption in favour of appointing an intermediary in s 4AK(1) (which is a beneficial provision) great care must be taken in interpreting this exception so as not to destroy the balance chosen by the legislature in bestowing this benefit and then providing an exception to when that benefit **must** be bestowed. It is accepted that exceptions provisions in beneficial legislation should not necessarily be given a liberal interpretation.[73]

69. The Supreme Court of Victoria has given consideration to the interpretive considerations that arise when dealing with legislation which has beneficial objects but which was also clearly intended to have some limiting effect on rights. In *PJB* Bell J observed:[74]

> …The problem of interpretation is to determine the scope of the permissible interference in this context.
>
> … It is hardly pertinent to say the legislation should be interpreted strictly when it unmistakably authorises some or even a substantial interference with rights. It is equally unhelpful to say the legislation contains provisions having that unmistakable effect when there is legitimate dispute about the scope of operation of those provisions, properly interpreted. It is necessary to engage more intensely and explicitly with the purposes of the legislation and its impact on individual rights and freedoms and then determine where, on a proper interpretation of the provisions, the legislative balance has been struck. …

70. The task for the Court in this case is to determine where, on a proper interpretation of the provisions, the legislature intended the balance to be struck, bearing in mind the command in s 30 of the HRA to prefer an interpretation that is "most consistent" with rights, where that is consistent with the legislative intention.

Interpretation of s 4AF of the EMPA

71. The phrase "in the interests of justice" is also used in s 4AF of the EMPA:

> At a ground rules hearing for a witness in a criminal proceeding, the court may make any direction the court considers is in the interests of justice…

[73] *Rose v Secretary, Department of Social Security* (1990) 21 FCR 241 at 244 (Full Federal Court).
[74] *PJB v Melbourne Health ('Patrick's Case')* (2011) 39 VR 373, [247], [248].

72. The Commissioner submits that the phrase "in the interests of justice" in s 4AF(1) should also be interpreted as involving a consideration of all relevant interests including the rights in the HRA that are engaged (a "triangulation of interests") and not just the interests of the accused or the interests of the parties. Having said that, in this section the phrase operates in very different way from its use in s 4AK(2).

73. Whereas the interests of justice test in s 4AK(2)(b) operates as a negative assessment (i.e. it must be established that appointing an intermediary is **not** in the interests of justice), the interests of justice test in s 4AF(1) allows the court to make any direction that it considers **is in** the interests of justice. Whilst the "interests of justice" criterion in s 4AK(2)(b) operates only as an exception to the presumption in favour of appointing an intermediary in s 4AK(1) (which is a beneficial act, exceptions to which ought be made sparingly) the "interests of justice" criterion is used to allow the courts to adjust their procedures to ensure that a trial is fair, and should therefore be applied generously.

Interpretation of s 4AJ of the EMPA

74. The Commissioner submits that the word "may" in s 4AJ of the EMPA should be interpreted as providing the Court with a discretion to appoint an intermediary where the relevant preconditions are met – in accordance with the ordinary meaning of that word.[75] That discretion has not been expressly fettered by the legislature, although its context suggests that it too should be exercised in the interests of justice.

75. The word "difficulties" in the phrase "communication difficulties" in s 4AJ of the EMPA should be interpreted by adopting the ordinary meaning of that word, so as to mean "a thing that is hard to accomplish, deal with or understand"[76] rather than requiring a medically diagnosed disability or impairment or a severe incapacity. Despite their use in anti-discrimination legislation, and their common usage, the legislature has not chosen to use the words "disability" or "impairment" in the relevant phrase, both of which connote a medical diagnosis and some severity.

[75] *Ex Parte Gleeson* [1907] VLR 368 at 373.
[76] *Oxford English Dictionary*.

76. The Commissioner submits that there is no need to read down the word "difficulty" as being only a medically diagnosed difficulty or only a difficulty of a particular severity in order to avoid any injustice that might arise from an expansive interpretation of the phrase "communication disability". Section 4AJ merely provides the court with a discretion to appoint an intermediary where the relevant preconditions are met (in its use of the word "may"). Although not expressly fettered, any court will be required to exercise that discretion judicially, in a manner that avoids injustice. It is through the flexible operation of this discretion that the courts can ensure that s 4AJ is only applied where the benefits of an intermediary outweighs any inconvenience or likely interference with the normal course of cross examination (for example).

77. This discretionary mechanism for limiting the operation of s 4AJ is preferable to the blunt instrument of reading down the statutory precondition to the operation of that discretion, as it allows a court to consider all of the circumstances of the case. It also better accommodates the right to equality in s 8 because it recognises the communication difficulties that certain people who do not have a diagnosed communication disability can have participating equally in the court process. Appointing an intermediary in these circumstances need not limit the defendant's fair hearing rights in ss 21 and 22, because the courts retain a discretion not to appoint an intermediary if that would be the result. Any court will be compelled to exercise its discretion to refuse to appoint an intermediary where to do so would result in an unfair trial for an accused. This is because a court cannot conduct a trial that is unfair.

Dated: 16 December 2020

SARALA M C FITZGERALD

Castan Chambers