Human Rights Under the Charter: The Development of Human Rights Law in Victoria
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Editorial

This edition of the Judicial College of Victoria Online Journal gathers together papers delivered at a conference held in Melbourne on 7-8 August 2014, ‘Human Rights Under the Charter: The Development of Human Rights Law in Victoria’. It provides an opportunity to share those papers with the wider legal community.

The conference itself was a historic occasion. The result of collaboration between the Supreme Court of Victoria, Monash University’s Faculty of Law, the Judicial College of Victoria, the Victoria Law Foundation, and the Human Rights Law Centre, the conference was an ideal opportunity to reflect on six and a half years of jurisprudence in Victoria arising from the Charter of Human Rights and Responsibilities Act 2006 (Vic) (‘the Charter’). Informed by local and international perspectives and including presentations from members of the judiciary, the academy, and the profession, the conference covered many key Charter topics affecting the courts including proportionality analysis, interpretative obligations, public authorities and the application of the Charter in legal practice.

In preparation for the commencement of the relevant parts of the Charter on 1 January 2008, the Judicial College of Victoria delivered training programs for judges, magistrates and VCAT members. In February 2007, Chief Justice Marilyn Warren opened the first of those programs, saying:

We, as the judiciary of Victoria, have before us the opportunity to take the common law, foreign jurisprudence and every ounce of our intellectual capacity to develop the first Australian jurisprudence of human rights law. It is a moment of excitement and exhilaration but also one of trepidation and reservation.¹

Since then, Victorian courts have considered the Charter in relation to matters such as post-sentence detention,² the best interests of the child principle,³ criminal law,⁴ actions by public authorities,⁵ legislation affecting the imprisonment of intellectually disabled people for failure to pay fines,⁶ bail and the treatment of prisoners.⁷

¹ Introduction to Human Rights, 19 February 2007, Introductory Remarks, program conducted by the Judicial College of Victoria.
² DPP v JPH (No 2) [2014] VSC 177 (16 April 2014); RJ v Department of Justice (2008) 21 VR 526; Nigro v Secretary to the Department of Justice (2013) 304 ALR 535.
⁷ Re Dickson [2008] VSC 516 (26 November 2008); Gray v DPP [2008] VSC 4 (16 January 2008); Castles v Secretary, Department of Justice (2010) 28 VR 14;
Common to almost all these cases are questions of statutory interpretation. This demonstrates (if there was any doubt) the growing reach of legislation and the importance of statutory interpretation in modern court proceedings. The effect of the Charter on statutory interpretation is integral to legal practice in Victoria.

As the papers in this journal show, areas of uncertainty remain in Victorian human rights law: What is the correct method for giving effect to the direction in s 32 that, so far as possible, legislation must be interpreted compatibly with human rights? How are the decisions of public authorities tested for compliance with the Charter? How is proportionality to be assessed? These questions will inevitably be resolved, when the appropriate cases come forward, using the traditional tools of adversarial litigation, statutory interpretation and judicial reasoning.

Despite the encouragement of courts, and the support of individual judges, we continue to see reluctance on the part of practitioners to raise arguments under the Charter. It is hoped that this collection of papers will assist practitioners to develop their skills and expertise in Charter jurisprudence. Not only will building their awareness of the Charter assist practitioners to identify relevant issues and to ask the right questions about a case, it will also assist them to come to court equipped with cogent submissions on the Charter’s operation and effect on statutory interpretation.

Through this process, we will resolve unanswered questions about the Charter, and further develop internationally recognised human rights jurisprudence in Victoria.

The Hon Chief Justice Marilyn Warren AC
Supreme Court of Victoria
Chair of the College

The Hon Justice Pamela Tate
Court of Appeal
Supreme Court of Victoria
A Voyage Around Statutory Protections of Human Rights*

The Rt Hon Chief Justice Dame Sian Elias GNZM †

In 2004, Lord Cooke, Baron of Thorndon, expressed confidence that the world was moving gradually to a single law of human rights.¹ He was writing against the background of the great success of human rights instruments following the Second World War. The Declaration of Human Rights was followed by the International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights and the adoption of statements of rights in the constitutions of the newly independent Commonwealth countries.

Even those countries which lacked constitutional statements of rights gradually became open to the scrutiny of international or supranational agencies. The United Kingdom became subject to the European Court of Human Rights. The accession by New Zealand and Australia to the First Optional Protocol to the International Covenant on Civil and Political Rights brought access to the United Nations Human Rights Committee for those who had exhausted their domestic remedies. The cold wind of measurement against international human rights standards took away some of the warm complacency with which we regarded common law protection.

Protection of human rights in domestic law was given impetus by the adoption in Canada of a Charter of Rights and Freedoms (‘the Canadian Charter’). The Canadian Charter overtook a rather feeble experiment with a statutory statement of rights adopted in 1960.² New Zealand and later the United Kingdom looked to the Canadian model to provide more systematic domestic measures of protection for human rights.

The solution we eventually adopted in New Zealand in 1990 was a parliamentary bill of rights, respectful of parliamentary sovereignty, instead of the constitutional measure that had first been proposed. The process of changing direction at a late stage has left some oddities in the expression of the Bill of Rights Act 1990 (NZ) (‘the New Zealand Act’ or ‘Bill of Rights Act’) to save incompatible legislation from invalidity. It was proposed at a time when the New Zealand Bill of Rights Bill provided that incompatible legislation was invalid. As French CJ noted in Momcilovic, the proportionality test it mandated had no part to play in the interpretation of

² Canadian Bill of Rights SC 1960 c 44.
legislation to conform with the rights protected. Nevertheless, after considerable hesitation, it is now established in New Zealand that the general provision balancing rights against the objectives of the legislation is key to the interpretation of legislation which impinges on rights.

Lord Cooke’s optimism about ultimate world-wide convergence was expressed with knowledge of the legislative enactment of statements of rights in New Zealand and in the United Kingdom. He would have regarded the adoption of similar legislative responses in the Australian Capital Territory (‘ACT’) and Victoria as further evidence of the trend to convergence.

Ten years later, I am not so sure about directions. It is true that the common derivation of the domestic statements of rights in the international covenants may be expected to promote common outcomes in the very long haul and the work of international agencies such as the United Nations Human Rights Committee is likely to provide encouragement towards commonality. So it would be rash to think that domestic legal regimes will not shift over time under such influences. But significant divergence in the methods of addressing human rights exists in all common law jurisdictions. In those circumstances, the expectation expressed in the interpretive provisions in the Victorian Charter of Human Rights and Responsibilities Act 2006 (Vic) (‘the Charter’) and the ACT statute about the use of comparative law may be dangerous if not accompanied by an understanding of the differences in approach in the different domestic human rights instruments and the different legal cultures in which apparently comparable provisions come to be applied.

The effort required in working with domestic expressions of human rights which draw on international instruments and their different application in comparable jurisdictions is not to be underestimated. So, far from sharing Dyson Heydon’s recent Law Quarterly Review opinion that judges are avid for such cases to relieve the tedium of more humdrum (and worthwhile) work, I am of the view that this work is hard. It calls for close attention both to judicial method and the exposition of fundamental values in the domestic legal order. *Pace* Dyson Heydon, ‘Gay Paree’ this is not.

**The Role of Courts in Human Rights**

In trying to fulfil my brief to bring an international perspective, it is therefore necessary to talk about difference as much as what we have in common. I want to start by saying something about the role of courts in human rights. Whether we operate under constitutional or statutory bills of rights, I think the importance of a statement of rights may not depend on the courts.

One of the aspirations of those who promoted the *Bill of Rights Act* was that it would become part of the political and social culture as well as a source of vindication through courts.

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3 *Momcilovic v The Queen* (2011) 245 CLR 1, 41–42 [26]–[29] (‘Momcilovic’).
4 *Hansen v The Queen* [2007] 3 NZLR 1 (‘Hansen’).
6 Ibid 403.
It was to be a ‘set of navigation lights’ for legislators and a standard by which executive power, particularly in the exercise of discretion, could be measured and, if necessary, checked. It was also to be an accessible statement of shared values which would raise public consciousness about constitutional fundamentals and the level of civil discourse about such values. Sir Geoffrey Palmer, the architect of the New Zealand legislation, in 2005 expressed the view that the Bill of Rights Act is a ‘Parliamentary bill of rights’ which relies principally upon the processes of government, rather than court decisions, to protect human rights. There is no doubt that, in New Zealand, the success of the Bill of Rights Act is not principally to be gauged from reading court decisions. It has permeated the processes of power, as appears from the Cabinet Manual down. There has been a revolution in what has been required of those exercising public power by way of reasons (prompted in part by other legislative measures concerning freedom of information and other checks, such as are provided by Ombudsmen). It would be cynical to doubt that the observance of human rights by public agencies has greatly improved as a result.

If anything, the political and social aspiration for rights is even more pronounced in the legislative statements of rights adopted in Victoria and the ACT. They are concerned to limit recourse to the courts for remedies. They emphasise the principal role of the courts is to interpret legislation to conform with the statements of rights wherever possible and, where not, to make declarations of inconsistency.

I do not want to make too much of the point that in gauging the success of parliamentary statements of rights it is a mistake to concentrate on the role of the courts. The role of courts is critical not only to the scheme of ensuring that legislation is construed in conformity with the Bill of Rights Act. It is also critical in ensuring the legality of executive action which affects rights. If the purpose of a parliamentary bill of rights is in part to raise understanding of and respect for rights, the explanations provided through the judgments of the courts in deliberative public processes are an essential bridge to understanding. What is most important in the judicial contribution to human rights may be the processes of engagement. In connection with this, I want to make some remarks about judicial methodology and touch on some of the challenges in each jurisdiction arising out of our own history, constitutional arrangements and traditions.

One more point should be made about the role of the courts. A parliamentary statement of rights may seem fragile protection at times and may leave judges feeling uncomfortably exposed. The ongoing legal and political debate in Victoria illustrates the anxieties. They include the proposals on review of the legislation to pare it back to a statement of principles for Parliament which cuts out the interpretive role for the courts and the anxiety evident in the Momcilovic decision to ensure that it does not disrupt the constitutional order. But such anxieties should not obscure the fact that statements of rights seem authentically appealing in our societies. 95 per cent of the

submissions received by the Scrutiny of Acts and Regulations Committee into the first four years of the operation of the Charter, tabled in September 2011, supported retention or strengthening of the legislation.

In any event, the obligation of the courts in our systems is to give effect to the legislation enacted by Parliament, in the spirit in which it is made. It should not be overlooked that a principal function of the courts is not only to check abuse of power but also to vindicate proper executive and legislative action, stilling controversy. Determinations by independent courts that legislation conforms with the standards Parliament has set itself in human rights or that executive action complies with the obligations on those exercising public functions to comply with human rights is important judicial work.

So how are we doing? I am not qualified to comment on the performance of the courts in Victoria so I make some brief comments only about the views that have been expressed about the New Zealand experience, in case they strike a chord or are cautionary.

The New Zealand Experience

The effect of the Bill of Rights Act has always been the subject of some controversy. Sir Robin Cooke said that the Act ‘does not merely repeat the old law’ and that it was intended to be woven into the fabric of the whole of New Zealand law. But the more generally held view was that the Act was intended to reflect existing law and to be ‘evolutionary’.

The concern to fit the new Act within the existing law may in part have been a strategic response to the political controversies which surrounded its adoption. Originally, the Bill of Rights, to give effect to New Zealand’s commitment under the International Covenant on Civil and Political Rights (‘the ICCPR’), had been put forward in a form binding on Parliament, in the manner of the Canadian Charter on which it was patterned. That proposal was rejected, in part because of fears of the transfer of power to the judiciary in a constitutional order which had previously lacked any such check.

At the time of its enactment, the Bill of Rights Act, as a statutory bill of rights, had no equivalent elsewhere. The similar non-entrenched statement of rights in Canada had earlier failed. With that example and with public suspicion of judicial aggrandisement, it is perhaps not surprising that the courts did not talk up the effect of rights and that the legal profession and the public should have been cautious in their invocation of it.

We are now plugged into an international community in which the New Zealand statutory bill of rights model is no longer unique. Some of the solutions we adopted when we thought we were unique are being rejected in other jurisdictions. Caution about recourse to the Bill of Rights Act is suggested by some to mean that our jurisprudence and our methodology are undeveloped. We

have been stretched by the developing case law in the United Kingdom. The early New Zealand diet of drunken drivers and petty criminals, in retrospect, may have made the courts a little casual at times. By contrast, the courts of the United Kingdom were pitch-forked into applying human rights in the most contentious cases of the day, those concerned with the threat of terrorism. Although in New Zealand human rights adjudication has not to date been conducted against such high public anxiety, it is evidently past time to get our thinking into order.

Many of the more difficult questions concerning the application and interpretation of the *Bill of Rights Act* are only just emerging, nearly 25 years after its enactment. Apart from the criminal bar, the profession has been slow to appreciate the potential of the Act. Although the form of our legislation does not prevent development of the common law in conformity with the rights and freedoms expressed in the Act, very few cases have used that methodology. Some commentators have questioned the extent to which administrative law has adjusted to take account of human rights values in the exercise of administrative discretion. I will touch on some of these matters when speaking of the comparative position. But for present purposes it is sufficient to say that the Act may not yet run throughout the whole fabric of New Zealand law, as was the expectation of some in its early years. It is a more long-term project than may have been appreciated at the outset.

Although there have been a number of statements in New Zealand cases that the *Bill of Rights Act*, though derived from the ICCPR, is a New Zealand statute and is to be interpreted in the light of New Zealand conditions, it is not easy to discern a conscious New Zealand jurisprudence. In carrying the project on, we will undoubtedly be influenced by the solutions adopted in other jurisdictions, particularly those with similar legislation. Again, however, I think it is necessary to be careful in analogies from comparative law to keep a sense of when different methods are appropriate to meet domestic conditions. It is therefore unfortunate that we have not yet got further down the track in developing the sense and reach of our own legislation and confidence in our own tradition.

It is thought by some commentators that it may be a disadvantage that the *New Zealand Act* was an early model. I am not so sure about that when I look at some of the newer models. Our legislation is however affected by its genesis in a model derived from the *Canadian Charter* which was originally intended to allow judicial review of legislation. An early view by a leading New Zealand academic commentator that our legislation sets up a statement of ‘reasonable rights’ because of what he considered to be the overarching effect of s 5 (the justifiable limits provision patterned

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on s 1 of the *Canadian Charter* and to be found in s 7(2) of the *Charter*) was not accepted in early *Bill of Rights Act* cases by Cooke J and most members of the Court of Appeal, but was supported by Richardson J, whose views on this have now prevailed in the majority judgment of the Supreme Court in *Hansen*. Its application to the central interpretative function of the courts under the *New Zealand Act* now puts us out of step with Canada and South Africa.

Some commentators have questioned whether the declaratory form of judicial review for human rights values introduced with the *New Zealand Act* (by which the courts under s 4 must apply legislation which is inconsistent with the Act) has left us with the worst of all worlds: a view that human rights are the responsibility of courts when the courts cannot insist on their observance. That is said to have led to two further consequences: erosion of the former conventions of parliamentary observance of human rights and perhaps respect for the decisions of the courts; and timidity on the part of the courts in protecting human rights.

Janet McLean has suggested that, whereas before the *Bill of Rights Act* ‘Parliament limited itself’, we are now in danger of adopting what she calls ‘a s 4 [Bill of Rights Act] anti-constitutionalism’ by which Parliament is liberated to do whatever it wants in relation to human rights. ‘That’, she says, ‘was never our constitutional tradition’. She substantiates her concerns by reference to the number of adverse Attorney-General certificates which did not affect enactment of the inconsistent legislation and which were largely unremarked on and not debated by Parliament. The position may be even more concerning since, following the decision of the Supreme Court in *Hansen* in 2007, Attorney-General reports are not required by legislative practice if a limitation on rights is considered by the government’s legal advisers to be one that is justified. Parliamentary assessment of that eminently political judgment under a parliamentary bill of rights may therefore be avoided. Perhaps in acknowledgement of this potential gap in Parliamentary oversight of rights, the present Attorney-General has indicated he is thinking about providing reports which are not non-compliance reports, where there is public disagreement about whether a proposed measure is justified. In the context of legislation which relies heavily on parliamentary check to protect rights, that suggestion seems to me to be one very much to be welcomed.

In respect of the performance of the courts, it is sobering that Sir Geoffrey Palmer, in a retrospective review of the first 21 years of the *Bill of Rights Act*, has said that the Supreme Court needs to ‘step up’ on the subject of human rights. He says that what he sees as the ‘tactical reticence’ of the courts to get into conflict with the political branches of government is destructive of human rights. It is difficult for someone deeply implicated to assess objectively whether these fears are

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14 *Hansen* [2007] 3 NZLR 1.
15 Professor Janet McLean, ‘Bills of Rights and Constitutional Conventions’ (Speech delivered at the New Zealand Centre for Public Law Public Lecture, Victoria University, Wellington, 30 August 2011).
well founded. But I think the criticism that we are avoiding responsibility is one that has to be taken very seriously indeed.

The Bill of Rights comes to be applied in New Zealand in the context of constitutional balances which are fragile. The institutional position of the courts is not constitutionally protected, as it is in Victoria under the *Kable* doctrine.\(^{18}\) There is no higher further authority to which appeal can be made, such as is currently available in the United Kingdom with recourse to the European Court of Human Rights. (The scrutiny of the United Nations Human Rights Committee is not comparable.) With that background, judicial method and reasoning are themselves critical in discharging the statutory responsibilities to protect human rights. Close attention to reasoning and method are critical. There may be force in some of the criticisms that this responsibility is not well fulfilled by underwritten or conclusory reasons. In particular, it may be queried whether the at-large and overall balancing we slip in to is sufficient methodology in the recognition and protection of rights. Judicial methodology is something I return to at the end of my remarks.

**Some Points of Comparison between the Victorian *Charter* and the New Zealand Act**

Statutory expressions of rights, like all statutes, repay reading in full — and should be re-read frequently. The *Charter* is well worth the read. It is a good precept for any advocate or judge looking to the comparative case law on this topic to look carefully at the legislation which is being applied.

The preamble to the *Charter*, for example, has no equivalent in the rather flatly expressed *New Zealand Act*. It may well be useful to the courts in developing Bill of Rights reasoning. It starts by recognising that all people are ‘born free and equal in dignity and rights’. Equality and dignity are therefore at the forefront. They are values all working with the legislation are required to keep in mind. They are values which draw on and refer to the history of ideas and philosophy.

Unlike in New Zealand, where discrimination is dealt with in a separate statute, the *Human Rights Act 1993* (NZ), in Victoria non-discrimination is identified as a principal purpose in the preamble and you have legislation integrated in a way that ours is not (and which may have led the courts to be less aware of equality issues). It is significant, too, that under the *Charter* preamble it is recognised as a responsibility that rights must be exercised ‘in a way that respects the human rights of others’. This responsibility balances rights but only with the rights of others. Similar balance is to be seen in the ACT legislation also. It is possible that this juxtaposition suggests that justified limits on rights are confined to those found in competing commensurate rights and interests.\(^{19}\) That is not how justification has been treated in New Zealand.

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18 *Kable v DPP (NSW)* (1996) 189 CLR 51 (*Kable*).
19 But see s 15(3) of the *Charter*, which provides that ‘special duties and responsibilities are attached to the right of freedom of expression’ and states that ‘the right may be subject to lawful restrictions’ which are ‘reasonably necessary … to respect the rights and reputation of other persons’ and ‘for the protection of national security, public order, public health or public morality’. 
As in New Zealand, it is an object of the Charter and the ACT legislation to ‘promote’ as well as protect human rights. The means of protection and promotion is however limited to the measures contained in s 1(2), whereas the purpose of promoting rights is not so confined in the New Zealand Act.

The Charter sets up three principal ways in which human rights are protected: by facilitating parliamentary scrutiny of new legislation for compliance (through the requirement of a statement of compatibility and report by the Scrutiny of Acts and Regulations Committee); by a requirement that legislation be interpreted to comply with human rights where possible and providing a power to declare incompatibility where such interpretation is not possible; and by requiring ‘public authorities’ to act compatibly with human rights and to take them into account in decision-making.

These same mechanisms to achieve compliance with rights are found in the New Zealand and the United Kingdom legislation, but with differences. The policy of limiting litigation, in particular by withholding a remedy in damages for Charter breaches and by circumscribing the application of the legislation to courts (a restriction that narrows the scope for development of the common law in conformity with rights) as well as the restriction of the application of the Charter to categories of public actors rather than more loosely to those exercising public functions, is a point of departure from the legislation in New Zealand and in the United Kingdom. The line-drawing certainly suggests that the Charter will be more technical in application.

The Charter does not contain a provision equivalent to those in Canada, the United Kingdom and the ACT legislation which permit courts to grant appropriate relief for breach of rights. In order to exclude the New Zealand implication of power to grant such relief (arising in large part from the obligations of the courts themselves to act in conformity with the Bill of Rights Act), the Charter seems to make existing legal remedies the sole means of redress although, in a clause which is of some difficulty, s 39(1) seems to permit the existing remedy to be based ‘on a ground of unlawfulness arising because of this Charter’.

I want to mention briefly later questions of remedy and in particular the development of existing tort law, which seems to be encouraged by this Charter. In New Zealand, we have tended to think of Bill of Rights remedies as distinct from other remedies available in law, and in particular have treated them as ‘top-up’ vindication where no other remedy is available.\textsuperscript{20} It may be, however, that using the statement of rights to galvanise the common law, in the manner in which the Great Charters in the past did so, may yet in some respects be a better route.

\textsuperscript{20} Taunoa [2008] 1 NZLR 429.
The *New Zealand Act*, unlike the *Charter*, protects legal persons as well as natural persons. But in a number of respects, such as the explicit recognition of privacy, the *Charter* goes further than the *New Zealand Act*, which emphasises the civil and political rights and rights of fair criminal procedure. In New Zealand, the *Bill of Rights Act* affirms rights treated as immanent in existing New Zealand law. We had no transitional provisions equivalent to s 49(2), which has caused much difficulty in Victoria in application. In New Zealand, exclusion of evidence is, however, available as a response to *Bill of Rights Act* breach, even if no other illegality exists. The requirement that the courts observe the *Bill of Rights Act* lends support to the view that they cannot be co-opted in *Bill of Rights* breaches and is more pointed than the general residual public policy discretion by which evidence may be excluded in Victoria.

As is the case with the *New Zealand Act*, the *Charter* rights are not exclusive but ‘in addition to other rights and freedoms’ recognised under any other law ‘including international law, the common law, the Constitution of the Commonwealth and a law of the Commonwealth’. While many of the features of the Victorian and New Zealand legislation are similar, we have no explicit remedy of declaration of inconsistency. The New Zealand courts have, however, indicated their preparedness to make such a declaration, and the New Zealand Parliament apparently approves,

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21 *Bill of Rights Act* s 29 provides that except where provisions of the Act otherwise provide, the provisions of the Act apply ‘so far as practicable’ to legal persons. Similarly, the South African *Bill of Rights* (Chapter 2 of the *Constitution of the Republic of South Africa 1996* (South Africa)) s 8(4) provides that ‘[a] juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person’. Human rights protection of legal persons is available under the *Canadian Charter* but a few rights belong exclusively to natural persons. The s 15 equality rights and the s 7 right to life, liberty and security of the person can only be exercised by natural persons; corporations may, however, invoke freedom of expression: *Irwin Toy v Quebec (A-G)* [1989] 1 SCR 927, 1001-1003. *Human Rights Act 1998* (UK) (‘the *UK Act*’) s 7(7) provides that ‘a person is a victim of an unlawful act only if he would be a victim for the purposes of Article 34 of the Convention if proceedings were brought in the European Court of Human Rights in respect of that act’. Under art 34, a ‘person’ can include a legal person. However, some *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) (‘the *European Convention*’) rights have been held to be unavailable to legal persons, such as the right to life, the right to education and the right to be free from inhuman treatment: *Clayton and Tomlinson, The Law of Human Rights* (Oxford University Press, 2009) [22.21]–[22.22].

22 However, in *Magee v Delaney* [2012] VSC 407 (13 September 2012), the Court concluded that the phrase ‘other persons’ in s 15(3) extends to the rights of non-natural persons, despite the *Charter* definition of ‘person’ which means a ‘human being’. Mr Magee had painted over an advertisement displayed in a bus shelter and affixed a ‘wet paint’ sign to it. He was charged with criminal offences relating to property damage. In the Supreme Court, he argued that his conduct engaged the right to freedom of expression under s 15 of the *Charter* and that the exercise of that right constituted a ‘lawful excuse’ in respect of the criminal charges. The Court held that the right to freedom of expression did not extend to acts involving violence or property damage, for reasons of public policy. However, the Court then considered whether, if the right to freedom of expression was in fact engaged, it was limited by s 15(3) of the *Charter*. The Court held that Mr Magee’s conduct impacted on the property rights of non-natural persons – the Council (which owned the bus shelter) and Adshell (the advertising company which displayed the advertising material) – so sub-s (3) would operate to limit Mr Magee’s right to expression.

23 *Charter* s 30.

24 *Evidence Act 2008* (Vic) s 138.

25 *Charter* s 5.

26 *Taylor v A-G* [2014] NZHC 1630, [82]. Taylor, a prisoner, sought a declaration that the *Electoral (Disqualification of Sentenced Prisoners) Amendment Act 2010* (NZ) was inconsistent with the right to vote under s 12(a) of the *Bill of Rights Act*. Brown J refused to strike out the claim on the basis that the Crown had not demonstrated that the Court did not have jurisdiction to issue such a declaration.
because such a power is directly conferred in the parallel human rights legislation.27

Unlike the New Zealand Act, which binds all those exercising public functions to observance of the Act, the Charter opts for an institutional approach which defines a public authority (to include, among other things, court staff) in s 4.28 It also extends the definition to parliamentary committees and courts and tribunals when they are acting in ‘an administrative capacity’. The illustration given — that committal proceedings and the issuing of warrants by a court or tribunal are examples of a court or tribunal acting in an administrative capacity — as well as actions taken in listing cases or adopting practices and procedures would seem to provide some scope for court responsibility where, for example, rights are infringed because of delays in hearing cases.

The Charter does not apply to courts and tribunals except ‘to the extent that they have functions under Part 2 and Division 3 of Part 3’.29 These strike me as provisions of some considerable difficulty in application. It seems under pt 2, which is the part dealing with the human rights recognised, that limits set by the common law and functions impinging on the rights recognised are subject to the Charter. On that basis, the development of the common law touching on human rights in claims against public authorities (but not in relation to private actors) would seem to be subject to the Charter. So too would the function of interpretation, which has, I think, the capacity to be transformative of law more generally than in direct human rights litigation because it may arise in litigation by entities which are not themselves subject to the Charter.

Section 38 of the Charter sets out what is implicit in the New Zealand Act, that it is unlawful for public authorities 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’. That obligation does not apply in circumstances set out in sub-s (2):

(2) Sub-section (1) does not apply if, 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.

This seems to affirm a reasonableness standard of review, although as I want to suggest, I do not think it precludes proportionality reasoning. Subsection (3) makes it clear that the section does not apply ‘to an act or decision of a private nature’.

27 Human Rights Act 1993 (NZ) s 92J.
28 It is notable that the Governor in Council may make regulations prescribing entities to be public authorities and not to be public authorities for the purposes of the Charter s 46(2).
29 Charter s 6(2)(b).
Section 39 seems to be a very difficult provision under the Charter. It permits relief on the ground of unlawfulness arising because of the Charter, but only in claims for relief or remedy against public authorities for acts or decisions which are unlawful ‘otherwise than because of this Charter’. This seems to permit piggy-back Charter claims but not standalone ones. But perhaps I misread the provision? Subsection (2) prevents damages because of a breach of the Charter, but does not affect any right to damages a person might have ‘apart from the operation of this section’.30

Section 32 may perhaps be a wider power to interpret for compatibility than s 6 of the New Zealand Act. Our s 6 requires the courts to give statutes and positive law the meaning which conforms to the rights contained in the New Zealand Act, wherever such a meaning ‘can’ be given.31 We have not used this provision as assertively as the House of Lords used its equivalent interpretive direction in Ghaidan v Godin-Mendoza.32 In Hansen, we took the view that it was not possible to interpret the reverse onus of proof as setting up an evidential onus only, a view taken of similar legislation by the Victorian Court of Appeal in Momcilovic.33 I have wondered however whether the wording of your interpretation provision permits slightly more departure from the text than we have felt ours to allow, since it is tied to the purpose of the provision, in what must have been a deliberate choice of language. Since purpose is usually derived from unmistakeable text, the difference in wording may not perhaps be significant in practice.

Since international law is available to assist in interpreting a statutory provision under s 32(2), the ICCPR and the commentary on it by the United Nations Human Rights Committee is imported. The same position is reached in New Zealand by the acknowledgement in the legislation that the Act affirms New Zealand’s commitment to the ICCPR.34

A further point of difference in interpretation is provided by s 32(3). Under the New Zealand legislation, no enactment may be held invalid or ineffective ‘by reason only’ that the provision is inconsistent with any provision of the Bill of Rights, nor may a court decline to apply it.35 ‘Enactment’ is not defined under the Bill of Rights Act, but under the Interpretation Act ‘enactment’

30 Charter s 39 states:

39 Legal proceedings

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

(b) This section does not affect any right that a person has, otherwise than because of this Charter, to seek any relief or remedy in respect of an act or decision of a public authority, including a right–

(1) To seek judicial review under the Administrative Law Act 1978 or under Order 56 of Chapter 1 of the Rules of the Supreme Court; and

(2) To seek a declaration of unlawfulness and associated relief including an injunction, a stay of proceedings or exclusion of evidence.

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

(d) Nothing in this section affects any right a person may have to damages apart from the operation of this section.

31 New Zealand Act s 6.

32 [2004] 2 AC 557 (‘Ghaidan’).


34 Bill of Rights Act Preamble.

35 Bill of Rights Act s 4.
includes subordinate legislation which is otherwise amenable to judicial review. The matter has not arisen for decision in New Zealand, but one interpretation is that a court could not invalidate subordinate legislation solely for incompatibility with the *Bill of Rights Act* (but might on other grounds of invalidity which might draw on the Bill of Rights). This may be contrasted with s 32 of the *Charter*, which appears to leave open the argument that a subordinate instrument is not valid unless it is specifically empowered to be incompatible by the Act under which it is made.

**Horizontal Effect**

Rights are limited in their reach by the identification in the *Bill of Rights Act* of those obliged to observe them. The New Zealand legislation, unlike the South African Constitution, does not explicitly bind those not exercising public functions. Nor does it explicitly require the judiciary to develop the common law to conform with the rights and freedoms in the Act, thus ensuring ‘horizontal’ application. But the *Bill of Rights Act* explicitly applies to the judicial branch of government. It also applies to acts done ‘by any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law’.

We have treated this as requiring the courts to observe human rights in exercising their functions. The stated rights may also be important as principles of interpretation or standards against which to measure reasonableness of behaviour or for a similar purpose in other areas of law. These are democratically conferred values declared to be fundamental; they are an obvious source to use when standards like reasonableness are invoked by the general law.

The question of horizontal effect has not been directly confronted by the appellate courts in New Zealand but they seem to have proceeded on the basis that the common law must reflect the values adopted by Parliament in the *Bill of Rights Act*. So, in *Hosking v Runting*, a majority in the Court of Appeal referred to such values in recognising a tort of invasion of privacy, which in the context of the case was held to outweigh freedom of information interests. The judges in the minority in *Hosking v Runting* took the view that the rights expressed as fundamental in the Act should not be balanced against a value (privacy) which had not been included. In *TVNZ v Rogers*, however, the judgments of the Supreme Court (admittedly in a case where a qualified right was in issue) proceed on the assumption that freedom of expression may justifiably be limited by the interest

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36 Interpretation Act 1999 (NZ) s 29.
37 In *Drew v A-G* [2002] 1 NZLR 58, the Court of Appeal construed the empowering provision consistently with the *Bill of Rights Act* in such a way that the impugned regulation was ultra vires the authorising enactment. Mr Drew was a prisoner who was penalised for a disciplinary offence under Prison Regulations. The prison regulations stated that he did not have a right to a lawyer in defending the charge. The Court held that the provision which conferred the power to make regulations was to be given a meaning consistent with the right to natural justice, protected by s 27 of the *Bill of Rights Act*, so that the regulation was ultra vires the empowering provision.
38 Constitution of the Republic of South Africa Act 1996 (South Africa) s 8(2).
39 *Bill of Rights Act* s 3.
40 *Hosking v Runting* [2005] 1 NZLR 1 (Gault, Blanchard and Tipping JJ).
41 Ibid 42–44 [178]–[184], 51–54 [208]–[222] (Keith J), 63 [265], 64 [267], 64 [269], 65 [271] (Anderson J).
in protection of privacy.\textsuperscript{42}

Similar horizontal effect has been accepted by the House of Lords in application of the UK Act. In \textit{Campbell v MGN} Lord Nicholls took the view that the privacy values recognised in the \textit{European Convention} ‘are as much applicable in disputes between individuals or between an individual and a non-government body such as a newspaper as they are in disputes between individuals and a public authority’.\textsuperscript{43} Lord Hoffmann thought there was ‘no logical ground for saying that a person should have less protection against a private individual than he would have had against the state for the publication of personal information for which there is no justification’.\textsuperscript{44}

There has been little exploration in the New Zealand case law to date of the extent to which s 3(b) limits the enjoyment of rights by exempting private actors. The High Court has emphasised that it is necessary to look to the substance of the matter in a ‘fact-dependent’ assessment of the nature of the power being exercised rather than the status of the person exercising it.\textsuperscript{45} This position is similar to that reached by the minority judges in the recent United Kingdom case of \textit{YL v Birmingham City Council},\textsuperscript{46} a case in which the House of Lords divided. This is a matter of some moment in jurisdictions where human rights reaches ‘public functions’, because of the increased outsourcing of functions previously thought to be public.

The right to the observance of the principles of natural justice conferred by the \textit{New Zealand Act} is expected of ‘any tribunal or other public authority which has the power to make a determination in respect of … rights, obligations, or interests protected or recognised by law’.\textsuperscript{47} To date, the New Zealand courts have interpreted this right narrowly, confining it to bodies with ‘adjudicative’ responsibilities.\textsuperscript{48} The case law is however slight on the topic to date and it may be that there is room for some movement in a case where the point directly arises.

\textbf{Constitutional and Legal Differences}

I have already adverted to differences in our constitutional arrangements. There are others which also shape different responses to the challenges thrown up by domestic human rights instruments. I want to enlarge on these differences a little. But I also want to deal with other differences both in our domestic human rights instruments themselves and in the legal cultures in which they are applied which make transposition difficult, despite the similarities in our common law heritage and the derivation of the human rights standards we observe.

\textsuperscript{42} \textit{TVNZ v Rogers} [2008] 2 NZLR 277.
\textsuperscript{43} \textit{Campbell v MGN} [2004] 2 AC 457, 465 [17].
\textsuperscript{44} Ibid 473 [50].
\textsuperscript{45} \textit{Ransfield v Radio Network Ltd} [2005] 1 NZLR 233, 248 [70] (Randerson J).
\textsuperscript{46} [2008] 1 AC 95 (Lords Scott, Mance and Neuberger in the majority and Lord Bingham and Baroness Hale in the minority).
\textsuperscript{47} \textit{Bill of Rights Act} s 27(1).
I start with some constitutional differences and differences in legal culture because they are in large measure responsible for the different choices made in the domestic statutes. I do not aim to be comprehensive, but just to illustrate the point I make about the need for care with comparative legal material (a concern expressed in *Momcilovic* by French CJ and Gummow J).49

I have already mentioned the absence in New Zealand of constitutional protections for the functions of the judiciary, which mean that courts are particularly exposed when required to enter into matters of political controversy, such as through assessing statutes for compliance with fundamental values. Other important points of difference arising out of the Australian constitution which have shaped responses on human rights protection here include the implications of federalism and the strict separation of powers.

Federalism and separation of powers concerns shaped the form of the legislation in Victoria and the ACT. Pamela Tate S.C., as Solicitor-General, explained the exclusion of courts in developing the common law as prompted by the federal constraints recognised by the High Court in respect of the common law of Australia.50 Although this reason was criticised as implicitly limiting the authority of state legislatures, and as ‘an esoteric bit of human rights theory gone awry’,51 it was an accurate prediction of some of the factors that exercised the High Court in the *Momcilovic* case.

While the need to ensure harmony with the common law of Australia presents challenges for the adoption of overarching fundamental values as in a charter of rights, it is difficult to see how line-drawing in respect of common law development can be maintained if the legislation is to be effective.

Strict separation of powers also gives rise to very difficult line-drawing according to whether courts and parliamentary bodies are acting ‘administratively’ rather than in their judicial or legislative capacities. Your system and those of other common law jurisdictions seem to diverge significantly on this point. It is not easy for outsiders to follow why it was possible to decide, as I think was decided in *Momcilovic*, that the power to interpret legislation is a judicial power but that the power to make a declaration of incompatibility is a non-judicial power.

Similar separation of powers concerns make advisory opinions by courts problematic in Australia – but not in Canada. In New Zealand we have an old and useful statutory jurisdiction to make declaratory judgments on the application of anyone affected as to the validity or construction of any statute, regulation, by-law, deed, will, document of title, agreement in writing, memorandum or articles of association or any instrument prescribing the powers of any company or body corporate.52 (In Australian law it seems this would be classified as a ‘non-judicial power’ on

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52 *Declaratory Judgments Act 1908* (NZ) s 3.
the approach taken to s 36 in *Momcilovic*). 53 I have not yet seen an application for a declaratory opinion about the interpretation of a statutory provision consistently with the rights and freedoms contained in the *New Zealand Act*, but one could perhaps turn up.

The separation of powers doctrine followed in Australia sets up a further point of distinction with Canada, where a form of the *Chevron* doctrine partly explains why the Supreme Court has been more relaxed about deference to primary decision-makers in their assessments of rights-compliant determinations than has been acceptable in Australia or New Zealand. 54 The United Kingdom position seems to remain unsettled on the application of proportionality analysis to administrative decision-making. I want to enlarge on that matter because I think it is an area of law in which we have not sufficiently integrated human rights doctrine and administrative law doctrine.

More generally, differences in our traditions of administrative law impact on the basis of review for human rights compliance of the discretionary powers conferred for public purposes. So, for example, Canadian preparedness to countenance primary agency choice is partly explained by the case law developed by the Supreme Court of Canada in *Baker*, requiring reasons to be given by administrative decision-makers (allowing better supervision for rationality). 55

In Canada, too, reasonableness is treated as a contextual standard (as it is increasingly recognised to be in New Zealand and the United Kingdom). Australian preference for a strict division between review and merits in administrative decision-making and insistence on jurisdictional error (admittedly understood in an increasingly broad sense) or *Wednesbury* unreasonableness may be explicable by reference to both constitutional doctrine and the Australian system of administrative appeals on the merits, but it necessarily results in divergence in addressing breaches of right by administrative decision-makers.

I do not intend to contend that any one system is to be preferred. They no doubt are each serviceable in their own domestic context and may well yield comparable outcomes for human rights overall. My point is that without insight into these differences, translation of approaches to human rights assessments from one jurisdiction to another is risky. I am not sure that we are good enough as comparative lawyers always to be sufficiently discerning in such matters.

53 *Momcilovic* (2011) 245 CLR 1, 70 [101] (French CJ), 97 [188] (Gummow J), 123 [280] (Hayne J), 185 [457] (Heydon J), and with the concurrence of Bell J, 241 [661].

54 Dunsmuir v New Brunswick [2008] 1 SCR 190 established that correctness and a single, context-specific reasonableness standard are the two standards applicable to review of administrative decisions. Formal distinctions between law, fact and discretion are mostly dispensed with. The deferential reasonableness standard will apply to almost all questions of fact and discretion and most questions of law.

55 *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817 (‘Baker’).
Human Rights and Supervision of Discretionary Decision-making

I raised the question whether we have sufficiently adapted administrative law principles to integrate human rights. Such integration is particularly pressing in cases where discretionary decision-making affects human rights.

In the United Kingdom, the Courts have acknowledged frankly that they are feeling their way. In R (ProLife Alliance) v British Broadcasting Corporation Lord Walker said that the whole area was one where domestic jurisprudence was still developing: ‘So the court’s task is, not to substitute its own view for that of the broadcasters, but to review their decision with an intensity appropriate to all the circumstances of the case’. In R (SB) v Governers of Denbigh High School, the House of Lords took the view that whether human rights have been infringed is always a matter for objective determination by the court. In Belfast City Council v Miss Behavin’, where the House of Lords backtracked in allowing choice to the primary decision-maker in controlling the location of sex shops, Lord Hoffmann criticised the administrative review approach as a ‘tick the box’ check for rationality in a process potentially destructive of human rights. He also thought it ‘quite impractical’:

What was the Council supposed to have said? “We have thought very seriously about your Convention rights but we think that the appropriate number of sex shops in the locality is nil”? Or: “Taking into account art 10 and art 1 of the First Protocol and doing the best we can, we think that the appropriate number is nil”? Would it have been sufficient to say that they had taken convention rights into account, or would they have had to specify the right ones? A construction of the 1998 Act which requires ordinary citizens in local government to produce such formulaic incantations would make it ridiculous. Either the refusal infringed the applicant’s convention rights or it did not. If it did, no display of human rights learning by the Belfast City Council would have made the decision lawful. If it did not, it would not matter if the councillors had never heard of art 10 or the First Protocol.

Where human rights are affected, it may not be adequate for a court to be satisfied the decision-maker took human rights into account and came to a decision which was rational. Where human rights are affected, it is necessary for the court to be concerned with the substantive question of compliance. Some sort of proportionality analysis seems inescapable. It is difficult to see that the Court can avoid considering whether the decision reached by the primary decision-maker that human rights were not breached is correct.

56 Ghaidan [2004] 2 AC 557, 570 [27] (Lord Nicholls).
57 R (ProLife Alliance) v British Broadcasting Corporation [2004] 1 AC 185, 257–258 [139].
58 [2007] 1 AC 100 (‘Denbigh High School’).
59 [2007] 3 All ER 1007, 1012–1013 [13].
60 Ibid.
The reasoned views of the primary rule-maker may be given weight in coming to that conclusion and some choice may remain if the assessment is one of judgment if the decision-maker has adequately justified the conclusion reached. The judgment of the primary decision-maker is ‘always relevant and may be decisive’.\(^{61}\)

On the approach taken by Lord Bingham in *Huang v Secretary of State for the Home Department*, close assessment by the courts will however be necessary if the decision-maker has not properly addressed the human rights dimension. The court does not undertake a ‘secondary, reviewing function’, but must itself be of the view that rights have not been infringed.\(^{62}\)

The topic of deference in human rights has unsurprisingly attracted a great deal of academic comment. Trevor Allan has argued that a doctrine of judicial deference is ‘either empty or pernicious’.\(^{63}\) If prompted by separation of powers concerns it is ‘empty’ because ‘that separation is independently secured by the proper application of legal principles defining the scope of individual rights or the limits of public powers’.\(^{64}\) A doctrine of deference is ‘pernicious’ if it:

> permits the abdication of judicial responsibility in favour of reliance on the good faith or good sense or special expertise of public officials, whose judgments about the implications of rights in specific cases may well be wrong. In its latter manifestation, judicial deference amounts to the abandonment of impartiality between citizen and state: in acceding to the supposedly superior wisdom of the public agency (or of Parliament), the court is co-opted into the executive (or the legislature), leaving the claimant without any independent means of redress for an arguable violation of rights.\(^{65}\)

Allan’s conclusion is that deference talk short-circuits proper analysis and that its suggestion of a ‘direct linkage between deep-level constitutional theory and the resolution of particular rights-claims’ generates ‘only confusion and misunderstanding’.\(^{66}\)

In New Zealand, we have fluctuated in our approach. Claudia Geiringer, a close observer, takes the view that, contrary to the weight of academic authority, New Zealand case law does not support a conclusion that the *Bill of Rights Act* mandates proportionality review of administrative action,\(^{67}\) although she thinks that s 5 (the New Zealand equivalent of s 7(2) of the *Charter*) ought to apply, as she thinks s 5 should apply to the question of interpretation (points on which I have considerable doubt).

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61  *Huang v Secretary of State for the Home Department* [2007] 2 AC 167, 183–184 [12].
64  Ibid.
65  Ibid 675–676.
66  Ibid 676.
67  Geiringer, above n 11.
In the *Moonen* litigation, the Court of Appeal focussed on the process followed by the Film and Literature Board of Review in making its classification that a publication was ‘objectionable’. \(^{68}\) In the first case, the Court held that the Board had failed to weigh the right to freedom of expression in its determination. It remitted the classification for further consideration but indicated a proportionality approach should be applied. In the second case, after the Board's reconsideration found the material was objectionable, the Court refused to supervise more closely than to consider whether there was evidence before the Board upon which it could have come to its conclusion and whether the determination was reasonably open to it. This approach is similar to that taken in the English Court of Appeal in *Denbigh High School* (and repudiated by the House of Lords) and is similar to the approach taken by the minority in the Canadian Supreme Court in *Multani v Commission Scolaire Marguerite-Bourgeoys*.*^{69}\)

Geiringer takes the view that the New Zealand courts have not settled whether their approach to review of administrative action for rights compliance is the *R v Oakes*\(^{70}\) approach taken to proportionality review in Canada or the sort of overall weighing favoured in the early case of *Noort* by Richardson J and, she suggests, now mandated by s 7(2) of the *Charter*.

Section 7(2) requires a proportionality assessment, although the formal steps do not follow the sequencing in *Oakes* in which each step must be fulfilled. It permits overall assessment, although failure to meet the conditions identified surely makes it difficult to show compliance with human rights.

In New Zealand cases where a judgment as to compliance with rights turns on mixed questions of interpretation and fact (the assessment of behaviour as disorderly or offensive for example)\(^{71}\) the courts have supervised powers closely, not deferring to the arresting constable’s assessment. In the case of reasoned decisions taken under statutory authority, however, the standard of supervision may be less straitened. That approach would seem now to be accepted in Canada,\(^{72}\) in reversion to the view taken by the minority in *Multani*. It arises however against the background already referred to of a degree of comfort with agency interpretation of their legislation, not a tradition with which we in Australia and New Zealand are particularly comfortable. So, in *Commerce Commission v Air New Zealand*, the Court of Appeal applied proportionality reasoning in interpretation but, having found the power to be available, retreated into standard judicial review.\(^{73}\)

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68 Moonen v Film and Literature Board of Review [2000] 2 NZLR 9, Moonen v Film and Literature Board of Review (No 2) [2002] 2 NZLR 754.

69 [2006] 1 SCR 256 (Deschamps, Abella and Le Bel JJ) (‘Multani’).

70 [1986] 1 SCR 103 (‘Oakes’).

71 Brooker v Police [2007] 3 NZLR 91 (‘Brooker’) (‘disorderly behaviour’); Morse v Police [2012] 2 NZLR 1 (‘offensive behaviour’).

72 Doré v Barreau du Québec [2012] 1 SCR 395 (‘Doré’).

I am not convinced that the methodology of administrative law and review for rights-compliance should diverge. But that is on the basis of the variable standard of reasonableness which takes its colour from the context that rights are affected. In effect, that may well require application of proportionality analysis to ensure that rights are not unnecessarily eroded. Proportionality is part of what reasonableness requires in that context.

As indicated, I consider there is room to place weight on the reasons given by a primary decision-maker, especially where the decision is a matter of expert judgment. It is also possible that in a particular case there are different outcomes that are rights-compliant in which the views of the primary decision-maker may be accepted without the need for the Court to undertake its own assessment of correctness. It is however one thing for the courts to find the reasoning of the primary decision-maker convincing, and it is quite another thing to defer to that agency in matters of rights unless its conclusion is irrational. In matters of very great moment affecting rights, even a supervisory jurisdiction may require a standard of correctness, as the Canadian Supreme Court recognised in *Dunsmuir v New Brunswick*.

In *Doré*, Abella J for the Supreme Court drew a distinction between cases where the Court was assessing rights-compliance of binding rules of general application, and those where discretionary decision-making was being assessed for compliance with rights. In the first a standard of correctness was appropriate. In the second the standard was reasonableness, assessed ‘in the context of the particular type of decisionmaking involved and all relevant factors’. The analysis was said by Abella J in *Doré* to require ‘both decisionmakers and reviewing courts ... [to] remain conscious of the fundamental importance of [Canadian] Charter values in the analysis’. That the assessment is still one of proportionality was made clear by Abella J. The decision-maker must ask how the *Canadian Charter* values in issue are best protected in view of the statutory objectives:

This is at the core of the proportionality exercise, and requires the decisionmaker to balance the severity of the interference of the *Canadian Charter* protection with the statutory objectives. This is where the role of judicial review for reasonableness aligns with the one applied in the *Oakes* context.

The ‘proportionality test’ is satisfied if the measure ‘falls within a range of possible, acceptable outcomes’.

If the right in issue is internally qualified (as in the ‘disproportionately severe treatment’ in issue in the prisoner rights case in New Zealand of *Taunoa*), then there is no further room for proportionality analysis and further balancing.

What is more controversial is the question of whether human rights can be limited to protect

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74 [2008] 1 SCR 190.
76 *Doré* [2012] 1 SCR 395.
77 Ibid 426 [56].
values or principles which advance social or government policy but which cannot be ranked as fundamental or as human rights in themselves. In a number of New Zealand cases justifiable limits have been assumed to arise from interests not equivalent to human rights or fundamental constitutional principles. Some greater focus may be necessary. In the United Kingdom, Professor Ashworth has criticised decisions that seem to favour ‘broad balancing’ of rights against other less fundamental public interests.78 Jeremy Waldron, however, accepts that many conflicts between rights and utility as well as between rights are best addressed by balancing – although he stresses the need for care, context and relativity in time and place.79 Some academic commentators assume that the values advanced in limitation of rights must be of the same rank, thus setting up ‘intra-constitutional conflict’.80 But this does not seem to be the prevailing view in the courts, although it perhaps gets some support from the wording of s 7 of the Charter.

Remedies

In both Canada and the United Kingdom, the Court is empowered to grant such remedy as is ‘appropriate and just’.81 Although the New Zealand Act is silent on the question of remedies, the courts have drawn on the obligations in the ICCPR to provide ‘effective remedy’ to develop a range of responses, including a remedy of damages.82 They have also indicated a willingness to make declarations of incompatibility in appropriate cases, despite the s 4 requirement that the courts must give effect to incompatible legislation. What is required for vindication is contextual. In some cases, exclusion of evidence may be sufficient redress. In others, it may not be available or may provide incomplete response to the breach of rights.84

81 Canadian Charter s 24(1); UK Act s 8(0).
83 This is perhaps because discretionary powers to admit evidence notwithstanding illegality are used. In New Zealand, the Evidence Act enacted in 2006, following a reversal by the Court of Appeal of its previous policy of prima facie exclusion of evidence obtained in breach of the Bill of Rights Act, now adopts the balancing proposed by the Court of Appeal. The exclusion of evidence under s 30 must be ‘proportionate’, balancing ‘the impropriety’ and taking ‘proper account of the need for an effective and credible system of justice’. The factors identified by the legislation as bearing on this calculus include ‘the importance of any right breached by the impropriety and the seriousness of the intrusion on it’, ‘the nature and quality of the improperly obtained evidence’ and ‘the seriousness of the offence with which the defendant is charged’. This methodology may well be adopted in relation to other responses to breaches of rights. If so, some see a danger that the fundamental values in the Bill of Rights Act will be undermined by expediency in the result.
84 See, eg, TVNZ v Rogers [2008] 2 NZLR 277.
Again, the case law on remedies is surprisingly little developed yet in New Zealand. Some cases, for example, treat the remedy of damages as a residual remedy. Damages ordered have generally been described as ‘modest’, in borrowing from English authorities influenced by the approach of the European Court of Human Rights without much consideration of whether the context warrants such transplantation. These matters need much more considered responses.

Section 39 of the Charter seems to me to provide some incentive to reconsider the application of human rights in the context of other causes of action. I have recently had occasion to consider the intersection between the torts of misfeasance in public office and false imprisonment in connection with rights.

The ancient tort of misfeasance in public office has been given new life in major decisions in Australia, New Zealand, England and Canada. In its most recent restatement by the Canadian Supreme Court it has been defined as ‘deliberate disregard of official duty coupled with knowledge that the misconduct is likely to injure the plaintiff’. In jurisdictions with remedies for breaches of rights, the basis of reconciliation of the tort with remedies for breach of the right remains uncertain.

New Zealand breaches of the Bill of Rights Act have been treated as a category of public law compensation. A path not taken was to build on the tort of misfeasance in public office. If that approach had been taken, the remedy would not have been discretionary, as Bill of Rights damages are in New Zealand. An open question is whether, in cases of misfeasance in public office which also entail breaches of the Bill of Rights Act, the Bill of Rights Act breach can be taken into account in the damages awarded and, if so, whether proof of damage will remain necessary irrespective of the breach of the right, as the House of Lords has affirmed for England and Wales in Watkins v Secretary of State for the Home Department. At present, however, at least in my jurisdiction, Bill of Rights compensation stands apart.

Although breach of statutory duty is often said to be simply a matter of statutory interpretation, its status as a tort empowers those who are wronged by non-observance of a duty the statute confers. Wade and Forsyth have suggested that Human Rights damages which are available under the UK Act can be seen as a species of breach of statutory duty. That path was also not taken in New Zealand, where the statute was silent on the provision of such a remedy and the legislative history indicated that had been a deliberate decision. Nor has the idea been

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87 Garrett v Attorney General [1997] 2 NZLR 332 (‘Garrett’).
89 Odhavji Estate v Woodhouse [2003] 3 SCR 263.
90 Ibid 281–282 [23].
91 [2006] 2 AC 395.
92 Nevertheless, in Baigent’s case [1994] 3 NZLR 667 the Court of Appeal awarded public law damages for breach of the Bill of Rights Act. But such damages are discretionary and available only where other remedies are not sufficient to mark the breach of rights.
picked up in England and Wales. Whether it has more scope in Victoria, given the terms of s 39 is something that remains to be seen. It faces the hurdle of s 39(3) and how it is to be reconciled with s 39(1).

The tort of false imprisonment will often occur in circumstances of human rights breach. The tort is committed when someone is detained or imprisoned without lawful justification\(^\text{93}\) and is of strict liability, so is not excused by belief that the detention is lawful.\(^\text{94}\) Although not confined to public office holders, officials are those principally exposed to liability under the tort. Wrong calculation of release dates\(^\text{95}\) or undue delay in bringing a prisoner before the court\(^\text{96}\) will trigger false imprisonment.

Some cases in England have considered whether mistreatment or more stringent confinement than is authorised by law constitutes false imprisonment. To date, the view has been taken that these do not constitute false imprisonment on the basis that there is no entitlement to release and no residual liberty interests in those circumstances.\(^\text{97}\)

Whether the reluctance to extend liability in tort will ease under the influence of the UK Act is not clear. In New Zealand that may depend on whether remedy under the Act is considered to be sufficient, the view tentatively expressed by the New Zealand Court of Appeal in a claim for negligence as well as Bill of Rights compensation.\(^\text{98}\) On the other hand, in the case in which the New Zealand Court of Appeal first awarded damages for breach of the Bill of Rights, Baigent’s case, Gault J (who dissented from the decision of the Court to grant a remedy in damages for breach of the Bill of Rights Act) thought that the tort of false imprisonment might well have to develop under the influence of the Bill of Rights Act to deal with cases of failure to charge promptly, or provide access to counsel, or other breaches of rights.\(^\text{99}\) So far, that suggestion has not been taken up. In Victoria, the argument may gain some impetus from the wording of s 39(1) and the removal of opportunity to award damages directly for breach of the Charter.

It must be expected that in many cases where officials are liable in tort there will be associated Bill of Rights Act breaches. The compensation awarded in New Zealand under the Bill of Rights Act is discretionary and available only where other remedies (declarations, exclusion of evidence and so on) are not sufficient to mark the breach of rights. In Taunoa,\(^\text{100}\) a case where there was no private law cause of action brought, the New Zealand Supreme Court emphasised the public law nature of the compensation remedy adopted in Baigent’s case. Three of the judges thought

\(^{93}\) Willis v A-G [1989] 3 NZLR 574, 579.  
\(^{94}\) R v Governor of Brockhill Prison ex parte Evans [No 2] [2001] 2 AC 19.  
\(^{95}\) Ibid.  
\(^{100}\) Taunoa [2008] 1 NZLR 429.
that compensation might be appropriate to mark the public interest in vindication of rights even if full compensation had been provided in tort to the person wronged. A majority of the judges considered that compensation for Bill of Rights breach should be ‘moderate’ and should not ‘generally approach the level of damages in tort’. There has been some disagreement in first instance decisions in New Zealand about whether the measure of damages may differ according to whether there was no power to arrest or whether an arrest failed to follow the correct procedure, echoing the issues that exercised the United Kingdom Supreme Court in *Lumba*.

Under the *Canadian Charter*, too, remedies for breach of the rights are those the court considers ‘just and appropriate in the circumstances’. The Supreme Court of Canada has made it clear that the existence of a claim in tort does not bar a claimant from obtaining damages under the *Canadian Charter*. But such damages must not lead to a doubling up of compensation and seem also to be modest. The remedy is positioned in public law. McLachlin CJ identified any damages awarded under s 24(1) of the *Canadian Charter* as serving the objectives of ‘(1) compensating the claimant for loss and suffering caused by the breach; (2) vindicating the right by emphasizing its importance and the gravity of the breach; and (3) deterring state agents from committing future breaches’. She considered that vindication underlines the seriousness of the harm to the claimant, but it also marks ‘the harm the [*Canadian*] Charter breach causes to the state and to society’.

In *Lumba* the United Kingdom Supreme Court divided on the question whether breach of the *UK Act* should be marked by an award of ‘vindicatory damages’ in addition to the nominal damages award made in respect of the claimant’s false imprisonment. The judges in the minority would have made a modest conventional award of £1,000. Despite majority rejection of the ‘causation defence’ to liability for false imprisonment, a majority in the Supreme Court considered that the fact that the detention would inevitably have been lawfully imposed meant that the plaintiff was entitled to nominal damages only. They were of the view that there was no occasion to introduce a new category of ‘vindicatory damages’ to the established categories of compensatory damages (including nominal damages for a trespassory tort where no loss could be shown) and exemplary damages. Lord Dyson explained that the ‘unruly horse’ of ‘vindicatory damages’ was not one to be set loose on ‘our law’:

> It is one thing to say that the award of compensatory damages, whether substantial or nominal, serves a vindicatory purpose: in addition to compensating a claimant’s loss, it vindicates the right that has been infringed. It is another to award a claimant an additional award, not in order to

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101 Ibid 525 [265], 523 [258] (Blanchard J).
103 *R (Lumba)* v *Secretary of State for the Home Office* [2012] 1 AC 245 (*Lumba*).
104 *Canadian Charter* s 24(1).
105 See *Vancouver (City)* v *Ward* [2010] 2 SCR 28, where the award of $5,000 to mark the *Canadian Charter* breach in respect of a strip search was upheld in addition to the $5,000 in general damages for false imprisonment.
106 Ibid 43 – 44 [31].
107 Ibid 42 [28].
punish the wrongdoer, but to reflect the special nature of the wrong. As Lord Nicholls made clear in Ramanoop, discretionary vindicatory damages may be awarded for breach of the Constitution of Trinidad and Tobago in order to reflect the sense of public outrage. ... It is a big leap to apply this reasoning to any private claim against the executive.

... In my view, the purpose of vindicating a claimant’s common law rights is sufficiently met by (i) an award of compensatory damages, including (in the case of strict liability torts) nominal damages where no substantial loss is proved; (ii) where appropriate, a declaration in suitable terms; and (iii) again, where appropriate, an award of exemplary damages. There is no justification for awarding vindicatory damages for false imprisonment to any of the [plaintiffs].

Whether over time the view that tort damages and Bill of Rights responses are different will remain is open to question. As is the evolution of the private law torts to better reflect the private human right. In Victoria you may have particular reason to look closely at the remedies available in tort law.

**Concluding Thoughts**

That leads into some final general points about judicial methodology in cases concerning rights.

The former reluctance in Australia about adopting variable intensity review or proportionality analysis may be modifying under the High Court’s recent emphasis on contextualism. In New Zealand the development was underway long before adoption of the *Bill of Rights Act*. What is at stake has long been acknowledged to affect the intensity of judicial supervision. But human rights sharpens the focus. Section 7(2) of the *Charter* sets up proportionality methodology. It is I think accurate and indeed natural to use proportionality reasoning when justifying interference with rights. It seems obvious to say that what are expressed as fundamental rights, essential to human dignity and equality, should not be interfered with unless the interference is justified by some commensurate pressing need and then only to the extent necessary.

Although it was argued by Jowell and Lester many years ago that proportionality is immanent in the common law, so far Lord Diplock’s prediction that proportionality would emerge as a general ground of review has not been generally acknowledged outside human rights. Greater familiarity may now change that. While there is some truth in the charge that proportionality analysis dazzles with a show of objective rationality, it provides structure against which decisions may be increasingly organised. Former habits of decision-making may need to shift.

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108 *Lumba* 283–284 [100]–[101].
110 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 410.
Outcomes need careful justification. Lorraine Weinrib has said of the post-war constitutional paradigm, based on adoption of human rights instruments, the onus of substantive justification is not satisfied if the State simply asserts ‘plenary political authority, promotion of the public good, fidelity to traditional moral values or social roles, or financial constraints’.113

If justification for limitations on rights is centre-stage (as it is now in New Zealand even where legislation is interpreted for consistency with human rights), then these concepts need to be unpicked. We need to grapple with the circumstances in which the courts will have to consider matters of ‘legislative fact’, as the Crown sought to put before the New Zealand Supreme Court in Hansen. And we need to work harder than expressing overall conclusions because we think the considerations we are required to balance are incommensurable.

The problems of incommensurability can be exaggerated. Overcoming them does however require judges to be prepared to make value judgments in context. One commentator makes the point:

> [W]e probably do not believe in complete incommensurability between constitutional values. Few would view with indifference a massive loss of liberty for a marginal gain in national security. Our problem is not that the values are incommensurable but that relative assessments can only be carried out in a crude manner.114

The crudeness of the assessment is too often exacerbated, however, by balancing judgments which are ‘under-written’, jumping straight to conclusions and drawing on the sort of utilitarian calculus that is easier than engagement with wider values. Justification of limitations on rights and determinations that actions taken in the exercise of public functions comply or do not comply with human rights is work that requires careful exposition.

We need to look more closely at the help at hand, such as the statutory texts we work with and the instruments they draw on and reflect. The architecture of the European Convention, for example, constrains and defines the degree to which competing interests may limit rights. Non-derogable rights on this view can never give way to public interest considerations and qualified rights are subject to interference only if one of the stated grounds applies. In between the two are what Ashworth calls ‘strong rights’ – those which are derogable but not specifically qualified.115 This is the sort of analysis that a conscientious court needs to bring to the determination of whether limitations are permissible or justified.

It is also necessary for a court dealing with these difficult matters to engage with the fundamental values in the legal order. Equality, dignity, what is bedrock in ‘a free and democratic society’. This is not the sort of work with which judges in our positivist tradition have traditionally been comfortable. So, the White Paper that preceded enactment of the New Zealand Act explained the

115 Ashworth, above n 78, 97.
omission of a general right to equality in the rights contained in the Bill as being unnecessary because equality is an aspect of the rule of law,116 itself a fundamental value in the constitutional order. Such values immanent in our legal traditions may need to be brought into human rights evaluations. To date, there has been little exploration of these values in human rights cases, with the exception of privacy.117 They plug into a wider world of ideas and scholarship than our generally pragmatic, unintellectual preferences usually admit.

When I started practising law in New Zealand more than forty years ago, human rights were something invoked overseas, not at home. We were proud of our common law heritage and the protections it offered for freedom under law. In a protest case in New Zealand in 1962, one of our senior judges said that the right to protest was ‘one of the most precious of our individual freedoms’ and that ‘[i]t needed no Charter of the United Nations to make it acceptable to us; it has long been part of our way of life’. The New Zealand Supreme Court recently had occasion to differ118 from the conclusion he came to in balancing this ‘most precious of our freedoms’ with a right of the Speaker of Parliament to entertain guests ‘unembarrassed by unseemly behaviour’.119 I do not think the complacency about rights then was justified. But much more importantly than that, in our representative democracies, the view has been taken that human rights need to be acknowledged and observed as fundamental. As I have suggested, that can only have been because they have authentic popular support. The role assigned to judges in these initiatives is not perhaps the main point. These are points of reference for everyone and their statement in accessible form is clearly thought to be valuable in itself. Such statements of rights do provide organising principles which are democratically conferred and of genuine assistance in better judging. It is exasperating when it is suggested that judges are behind these statements and keen for the power on offer. Any judge working in this area knows this imposed obligation is very hard work indeed and does not conceive of the function exercised in terms of power. As I have tried to point out, it requires deep engagement with the domestic legislation and domestic traditions. Although convergence over the long haul may provide the comfort of analogy and a more beaten track, there is considerable work to be done to get there.

116 Palmer, above n 8, 87.
118 Brooker [2007] 3 NZLR 91.
The Role of Judges in Human Rights Jurisprudence: A Comparison of the Australian and UK Experience*

The Rt Hon Lord David Neuberger of Abbotsbury†

The history of human rights and the United Kingdom in the last 100 years can be divided into several periods. First, there are the dark ages, the period before 1951, when the UK simply did not recognise human rights other than through the common law. That would sound very odd to British philosophers, political thinkers and lawyers of the 18th and 19th centuries – and even in the first half of the 20th century. They thought, with a mixture of patriotism and justification, that the British had led the world in promoting individual freedoms, with the signing of the Magna Carta and the formation of the mother of Parliaments in the 13th century, sampling republicanism and the Bill of Rights in the 17th century, judicial decisions such as *R v Somersett*1 and *Entick v Carrington*2 in the 18th century, and the effective and peaceful replacement of monarchical power by parliamentary supremacy in the 19th century.

However, while there is no doubt that the common law was in many ways the origin and promoter of individual rights, it developed such rights in a somewhat haphazard and leisurely way. As a result, in the aftermath of the Second World War, the UK in many ways risked falling behind other European countries, which, with the spectre of totalitarianism and invasion fresh in their memories, were sharply aware of the need for a strong, clear and codified set of human rights.

After the dark ages came the middle ages, between 1951 and 1966. Until 1966, UK citizens could not go to the Strasbourg court and claim against the UK government that their *European Convention on Human Rights* (‘the Convention’) rights were being infringed. With their more fortunate history, the British, while happy to help draft the Convention, even to sign and ratify it in 1951, perhaps rather complacently, did not really think that they needed it. Rather mirroring its attitude to the European Union, the UK initially regarded the purpose of the Convention as being more pour encourager les autres than it was for the UK. So the Convention played no real part in our political or legal thinking in this period. Thus, even as late as the 1990s, the UK Court of Appeal held that the common law did not recognise a free-standing right to privacy.3

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1 (1772) 20 St Tr 1; 98 ER 499.
2 (1765) 19 St Tr 1029; 95 ER 807.

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† President, Supreme Court of the United Kingdom. I wish to thank Zahler Bryan for all her help in connection with this talk.
The years between 1966 and 2000 were the years of transition. UK citizens could complain to Strasbourg that their human rights were being infringed. However, they could not enforce, or even rely on, those rights in UK courts, as the Convention was not part of UK domestic law. English law degree students didn’t learn much about the Convention in the 1960s and 1970s, although it started to impinge on their consciousness by the 1980s. As for UK judges, it was rather a frustrating time, as they realised that they were deciding cases which they knew would be held to be wrong by the Strasbourg court, while being unable to do anything about it, because the Convention was not part of UK law. As thinking developed over this period, UK judges were prepared on occasion to take the Convention into account when deciding common law and statutory issues, but in a somewhat inchoate and inconsistent way. Nonetheless, human rights started to leak into the judicial cerebellum. But not very far: as I have said, no common law right to privacy was recognised even in 1991.

In 1998, Parliament fired the starting gun for the next period, the age of enlightenment, with the Human Rights Act 1998 (UK) c 42 (‘the HRA’), which formally brought the Convention into UK law. From 2 October 2000, judges throughout the UK were obliged to give effect to human rights under the Convention, and, indeed, all ‘public bodies’ were generally under a duty not to infringe the Convention. 4 To use Dame Sian Elias’s words 5 UK judges were pitch-forked into ruling on the most contentious issues of the day — asylum seekers’ rights, balancing press freedom and privacy, prisoners’ rights, the rights of soldiers on active service, prisoners’ votes, the right to be assisted to die.

These are still early days in the age of enlightenment, but Judges are already approaching human rights issues in a different way from that in which they approached such issues fourteen years ago. For instance, the House of Lords initially held that, despite art 8 of the Convention, which recognises the right to respect for privacy, there was no freestanding right to privacy 6 in English law. However, only a year later, the House recognised a right to privacy, 7 albeit not as a freestanding right, but by what Lord Phillips referred to as ‘shoe-horning’ 8 the right into the common law principle of confidentiality, thereby expanding that principle beyond all recognition.

So, since 2000, we have had the Convention effectively incorporated into our legal system, and in its fourteen years of life, it has already had a marked effect on our constitutional settlement. The balance between the three institutional arms of government has been affected, so that, at least as it seems at the moment, the judiciary has been given more power both as against the legislature and as against the executive.

The UK famously has no constitution. Some legal experts argue that it has constitutional

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7 Campbell v Mirror Group Newspapers Ltd [2004] 2 AC 457.
8 Douglas v Hello! Ltd (No 3) [2006] QB 125, 150 [53].
documents — including the Magna Carta, and certain statutes, the Bill of Rights 1688 (UK) c2, the Act of Settlement 1700 c2, and the Union with Scotland Act 1706 (UK) c11. However, only three of the Magna Carta’s eighty or so chapters survive, and, like the Magna Carta, the three statutes simply reflect the particular exigencies of a significant historical event (the Glorious Revolution, the Hanoverian succession, and the Union of Scotland and England) and scarcely represent even an attempt at any sort of constitutional set of rules. Furthermore, so long as the UK enjoys parliamentary supremacy, any provision in any of these instruments can be overturned by a simple majority of one in the House of Commons. It may be said with real force that that is scarcely the hallmark of a constitutional provision.

In a country which has no constitution and does have parliamentary sovereignty, the Judges traditionally enjoy a relatively limited function as against the legislature. They cannot quash any statutes enacted by the legislature. Judges also know that any decision they take which a majority of the legislature does not like can be overturned by a simple majority in Parliament. Indeed, while the judiciary are an independent arm of government, in a parliamentary democracy without a constitution, I think that it is fair to say that there is a pecking order. First, there is the legislature who can always overrule court decisions; second come the judiciary, who have to give effect to statutes and respect to parliament, but are otherwise free to develop and enforce the law; and third comes the executive, who must comply with the law as laid down by the legislature and judiciary.

I pass over the interesting point of whether the judiciary could override an outrageous statute, such as one which abolished the right to judicial review. But I do pause to mention that the role of the judiciary has become particularly important. That is because although the executive is technically third in the pecking order, it is in practice very powerful. Indeed, its powers are ever increasing, with its enormous budget, now well over 40 percent of GDP, and its millions of employees. Its power is reinforced by what can sometimes appear to be the relative lack of independence of a legislature which can be said to be controlled by the head of the executive, namely the prime minister, especially when he or she has a decent majority. However, the point remains that the judiciary in a parliamentary democracy has no real control over the legislature, at least where there is no constitution.

That was at least the position of the UK judiciary on 1 October 2000, the day before the HRA came into force. In terms of legal principle, the HRA did not alter the position. If a statute does not comply with the Convention, we are not entitled to quash it; we merely have power under s 4 of the HRA to declare the statute to be incompatible, in the same way as the Supreme Court in Victoria can make a declaration of inconsistent interpretation under s 36(2) of the Victorian Charter of Human Rights and Responsibilities 2006 (Vic) (‘the Charter’). Such a declaration may be made in the UK by a High Court judge, the Court of Appeal (and their Scottish and Northern Irish equivalents) and the Supreme Court. Where such a declaration is made, it is then up to Parliament to decide what to do about it. Furthermore, the only reason the courts can do this is because Parliament has
given them the power by statute — and what Parliament can give, Parliament can take away. And, I might add, the Conservative Party appear to be seriously considering whether to take away this power, or at least to modify it, if they win next year’s General Election. Like the Charter, the HRA is under political review.

In addition to this power under s 4, by s 3 of the HRA, parliament has given the judges of the UK a new and significant power, in that we are positively enjoined to construe statutes in such a way as to enable them to comply with the Convention, a provision which is equivalent to s 32(1) of the Charter. This s 3 power has been interpreted by the UK Supreme Court as permitting courts to interpret statutes in a way which some may say amounts not so much to construction as to demolition and reconstruction.9 In other words, we can give provisions meanings which they could not possibly bear if the normal rules of statutory interpretation applied.

Thus, as Lord Nicholls said, it enables the court to ‘go further’ than usual, and is ‘apt to require a court to read in words which change the meaning of enacted legislation’ and permits the court to ‘modify [its] meaning’.10 It is clear from what was said when the HRA was introduced into Parliament that the then-Government intended that the courts should have this new power of ‘interpretation plus’ or ‘construction on speed’. In this we differ from Victoria, in the light of the majority of the High Court’s views in Momcilovic v The Queen,11 which limited the effect of your s 32(1) to ensuring the principle of legality. It is interesting to note that in the early days of the HRA some UK judges, including Lord Hoffmann,12 were initially inclined to give our s 3 that same limited effect, but, as he now accepts,13 we have been more radical. This s 3 power has been surprisingly uncontroversial since its enactment among politicians, but it has been unsurprisingly controversial among academic writers. It has been described as both ‘the “genius” of the HRA model’14 and ‘not a legal remedy, but a species of booby prize’.15

Whether booby prize or genius, s 3 of the HRA enables judges to give a statutory provision a meaning which it does not naturally bear and which Parliament never intended it to bear. It is true that this power was bestowed by Parliament, and it can therefore be said that when judges rewrite statutes under s 3, they are giving effect to Parliament's will, but Parliament has written us judges something of a blank cheque in this connection. The way in which s 3 of the HRA has been interpreted by judges is not a case of the UK courts making their own grab for power. Although it was intended by Parliament, this new judicial power of quasi-interpretation can be said to involve a subtle but significant adjustment to the balance of power between the legislature and

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10 Ghaidan [2004] 2 AC 557, 571–2 [32].
the judiciary of the UK. As the majority of the High Court said in *Momcilovic*, the UK approach can be seen as effectively conferring a law making function on the judiciary.16 The UK courts have developed new rules which control the way in which this power can be exercised. For instance, the s 3 power cannot be used in a way which would involve an apparently incompatible statutory provision having a meaning which was inconsistent with the scheme of the statute concerned, or if it is not clear how an apparently incompatible statutory provision would have been rewritten.17

Even the power to make a declaration of incompatibility represents an important shift in the balance of power in a country whose institutions have such a deep respect for the rule of law such as the UK. As Dyson Heydon has pointed out,18 a common law judge’s power to make a declaration of incompatibility is revolutionary, as it does not affect the rights of the parties to the relevant case, and it is ultimately advisory. Unlike a normal declaration, which binds the parties to the litigation, a declaration of incompatibility binds nobody. In that sense it can be said to represent a role for the judiciary which is subordinate to that of Parliament, but, as I have mentioned, in a parliamentary democracy without a constitution, the judiciary can in other ways fairly be seen as ultimately subordinate to the legislature. In more practical terms, however, the power now given to judges in the UK by s 4 of the HRA is demonstrated by the fact that, with one exception, Parliament has always acted on every such declaration and cured any incompatibility. The one exception is prisoners’ right to vote, which is a very contentious political issue in some quarters in the UK, in marked contrast, I believe, to Australia.

In the recent case of *Nicklinson*,19 which raised the question whether the statutory blanket criminalisation of assisted suicide infringed the art 8 (privacy, right to life) rights of some people who wished to die and needed help to do so, some of us held that, even if art 8 was infringed, the courts should hold off giving a declaration of incompatibility so that Parliament could consider the issue with the benefit of our judgments. We felt that a declaration was a strong thing in the context of the relationship between Parliament and the judges, especially in a field which was so emotive and when the House of Lords had held nine years ago that art 8 was not engaged at all.20 My colleague Nicholas Wilson took the view that this was part of a ‘collaboration’ between the courts and the legislature,21 which is an interesting idea which may prove to have some traction. I am inclined to think that it risks devaluing the gravity of a declaration of incompatibility, and blurring the lines which mark the separation of powers. However, Lord Wilson’s observation may be supported by at least one commentator, who has said, ‘at the heart of the HRA [like] the Charter lies the attempted reconciliation of judicial and political power, or – put another way – of interpretive and legislative power’.22

16   (2011) 245 CLR 1.
19   *R (Nicklinson) v Ministry of Justice* [2014] 3 WLR 200 (*Nicklinson*).
20   Ibid 327 [116] (Lord Neuberger).
21   Ibid 356 [204] (Lord Wilson).
I believe that the points made in the brief discussion so far serve to demonstrate why the Convention, through the medium of the HRA, has had much more of an impact on the UK constitutional settlement between the courts and the legislature than on those of other countries which have written and coherent constitutions. Germany, for example, not only has a Constitution, but it is one which generally grants parallel or even greater rights to citizens than they are accorded by the Convention. Therefore, unlike in the UK, (i) Germans are used to their courts challenging statutes and (ii) judgments of German courts, involving issues on which UK courts’ decisions would be based on the Convention, are based on constitutional rights and either involve no consideration of the Convention or include a throw away paragraph, sometimes a cross-check, on the Convention. This means that the effect of the Convention seems far more revolutionary in the UK than in other European countries. There is little danger of the Convention leading to what Dame Sian referred to as public suspicion of judicial aggrandisement in such other countries, particularly in the light of their history which gives rise to rather less confidence in the democratic process than that of the UK.

In the UK, for the first time, the courts have duties under the HRA which in many ways are those which would normally arise under a written constitution. The notion that the UK Supreme Court is almost drifting into being a constitutional court is reinforced by two further recent factors. The first is the UK’s membership of the EU, which revolutionarily means that judges have to disregard statutes if they conflict with EU law. Secondly, with the existence of Scottish, Welsh and Northern Irish parliaments, the Supreme Court has duties which are hard to characterise as anything other than constitutional, not least because they are super-parliamentary. Having said that, it should be added that these powers have been conferred on the courts by statute.

One other effect of the HRA on statutes can be characterised as being, as it were, in advance rather than in arrears. Section 19 of the HRA states that, where a Bill is laid before parliament by a Minister of the Crown, he must provide a written statement which states either that the provisions of the Bill comply with the HRA, or that he is unable to so state but nonetheless wishes the Bill to proceed. This is very similar to s 31 of the Charter.

I have so far dealt with the effect of the HRA on the relationship between courts and Parliament. Let me turn to the effect on the relationship between the courts and the executive. Under our common law, parliamentary supremacist, non-constitutional system, the courts have no more fundamental role than to review executive action and decisions. It is up there with the court’s criminal law function. The second half of the last century saw an explosion in the amount of judicial review. This was attributable to a number of factors, including, I think, (i) the enormous increase in the powers of the executive, (ii) the expansion of executive bodies, (iii) a plethora of new laws, most of them secondary legislation, which were themselves judicially reviewable, (iv) a more questioning and litigation-inclined society, (v) the growth of legal aid, (vi) the weakness of the legislature, which for most of the time enjoyed comfortable government majorities, and (vii) a

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23 Elias, above n 5, 7.
general public awareness of rights, prompted partly by the Convention.

Judicial review is largely concerned with the procedural aspects of a decision or action: a decision or action must be taken in accordance with the law, which sometimes means general legal principles (e.g. natural justice) and sometimes means following the procedure laid down by the relevant legal code. Quashing a decision or action on the merits is traditionally normally only possible if the decision or action was one which the body or person who took it could not have taken rationally (or if relevant factors were ignored or irrelevant ones taken into account). Irrationality is a stiff test. Since 2 October 2000, judicial review is still alive and well, but there is another set of standards by which the action of all public bodies, from Government departments to parish councils, from the Bank of England to providers of TV licences, must be judged: they are all statutorily enjoined not to act incompatibly with the Convention.24

So if a local housing authority decides to evict a residential tenant by court action, the fact that the tenant has no defence in common law does not prevent him or her raising respect for the home (art 8 again) as a reason for holding up the order for possession — albeit that only very exceptional circumstances would justify much suspension.25 So, too, if a school requires a girl to remove her burqa at school, she can challenge the requirement as interfering with her rights of religion under art 9 (she failed).26 And if a city council refuses a licence to a pornographic bookshop, it can raise an art 10 (freedom of expression) claim (which failed).27

However, in all such cases, the exercise carried out by the court can be characterised as far more intrusive or far less technical than under traditional judicial review. Under the HRA, the court is primarily concerned to make its own assessment as to the validity, indeed the key word is ‘proportionality’, of the decision or action bearing in mind (i) the reasons for the decision or action and (ii) the extent of the interference with the human right in question. As Lord Reed has explained in some very helpful remarks in Bank Mellatt v HM Treasury (No 2),28 this sort of assessment involves the court striking the balance, and therefore making a value judgment for itself. This is very different from any ‘merits’ assessment under traditional judicial review, where, as already mentioned, irrationality is normally the only issue.

The role of the court when balancing the reasons against the interference is quite sensitive, and the extent to which the court will have regard to the view of the executive decision maker will depend very much on this nature of the issues. As Lord Reed put it: ‘the degree of restraint practised by courts in applying the principle of proportionality, and the extent to which they will respect the judgment of the primary decision maker, will depend upon the context, and will in part reflect national traditions and institutional culture’.29 On matters such a national security, foreign

24 Human Rights Act 1998 (UK) c 42, s 6(1).
25 Manchester City Council v Pinnock [2011] 2 AC 104 (‘Pinnock’).
26 R (Begum) v Governors of Denbigh High School [2007] 1 AC 100.
27 Belfast City Council v Miss Behavin’ Ltd [2007] 1 WLR 1420 (‘Belfast’).
28 [2013] 3 WLR 179, 247–50 [68]–[76].
29 Ibid 248 [71].
affairs, and economic consequences, the court is likely to give very great weight to the views of the executive decision-maker, whereas on more mundane issues demanding less specialist expertise and knowledge, the court will feel greater confidence about forming its own view. The decision is more likely to be upheld if the decision-maker has expressly taken into account the human right involved – and has done so in a sensible way.  

There are high judicial statements which suggest that human rights assessments of executive decisions involve greater scrutiny of such decisions than judicial review assessments.  

I am not sure that I agree. There is no reason why that should be the case: judges should examine a decision or action, or the relevant aspects of a decision or action, with the same degree of care and detachment, whether it is for the purpose of judicial review or a human rights claim. The difference is in the nature of what the court is looking for, not in the care with which the court is looking.

In summary then, the effect of the HRA’s requirement that all public authorities have to comply with the Convention is that there is an increase in the number of cases where executive decisions can be challenged in court, and the court for the first time is required to make its own assessment of the merits of a decision, has to carry out its own balancing exercise. It may seem to some people that it is almost as if judges have had to remove the referee’s whistle from their mouths and take the decisive penalty themselves. In my view, and in agreement with Dame Sian, there is a strong case for judicial review and Convention review coalescing or at least cross-fertilising, and I think that that is starting almost imperceptibly to happen in the UK.

Where a UK court concludes that an individual’s Convention right has been infringed by a public authority, s 8 of the HRA entitles the individual to seek damages. This contrasts with the Charter, which precludes any such damages save under the rather quaint s 39(1).

Also in contrast with the Charter as I understand it, the HRA expressly states that the courts are public authorities for all purposes. This raises a difficult point on which we have yet to rule. It is best illustrated by reference to a point I have already alluded to, namely the position of a residential tenant whose right of occupation under domestic law has ceased. If his landlord is a public authority then the landlord is bound to take into account the art 8 rights of the tenant, and so the court must take them into account when asked to make an eviction order. On the face of it, however, that would not apply when the landlord is a private company or individual. However, in order to evict a tenant, a private landlord must go to court and obtain an order for possession. So the question is: must the court, as a public authority, take into account the tenant’s art 8 rights when considering whether to make an order for possession. We have yet to hear such a case. This means that the room for the Convention to have horizontal effect in the UK may well be potentially significantly greater than for the Charter in Victoria.

30 See Belfast [2007] 1 WLR 1420.
31 See, eg, Re S (FC) (a Child) [2005] 1 AC 593, 603 [17] (Lord Steyn).
32 Elias, above n 5.
33 Human Rights Act 1998 (UK) c 42, s 6(3)(a).
Another important aspect of the HRA is the interrelationship of the Convention and the common law. Initially at least, the attitude of many lawyers and judges in the UK to the Convention was not unlike that of a child to a new toy. As we became fascinated with the new toy, the old toy, the common law, was left in the cupboard. Recently, the judges have tried to bring the common law back to centre stage. The most dramatic example of this is the UK Supreme Court’s decision earlier this year in *Kennedy v Charity Commissioners*. A journalist wished to see the results of a charity commission inquiry into the affairs of a charity run by a controversial politician, and based the claim on art 10, on the basis that freedom of expression extended to a claim by a journalist, or another member of the public, to see such documents. We considered the claim, as based, to be over-optimistic (although there was limited support for it in a couple of Strasbourg court cases). However, we sent the claim back to the trial judge on the basis that we thought there was a stronger case based on common law, despite the fact that counsel had effectively declined to argue his case on that basis, despite being invited to do so.

This case illustrates the fact that there are now two separate seams, common law rights and Convention rights, which can overlap, but each of which also has its own different area of exclusivity. There are those who feel that the common law should develop so as to incorporate Convention rights, and to some extent it has done so, but in other ways, the two strands of law have been like ships passing in the night. Thus, on the one hand, I have already explained how it was held that art 8 did not justify a new tort of privacy, but that the law of confidentiality should be expanded to incorporate art 8 privacy rights. On the other hand, the general tortious duty of public bodies to prevent injury may be different from the Convention duty of such authorities to prevent death or serious injury under art 2 and 3 of the Convention (the right to life and the right not to suffer cruel and unusual punishment), as interpreted in the Strasbourg court. The issue was discussed in *Van Colle v Chief Constable of Hertfordshire*, where Lord Bingham agreed with dicta in the Court of Appeal that ‘there is a strong case for developing the common law action for negligence in the light of Convention rights’ and ‘where a common law duty covers the same ground as a Convention right, it should, so far as practicable, develop in harmony with it’. However, he was in a minority on the issue, and Lord Brown for example thought that such alignment was inappropriate because ‘Convention claims have very different objectives from civil actions. Where civil actions are designed essentially to compensate claimants for their losses, Convention claims are intended rather to uphold minimum human rights standards and to vindicate those rights’. On this topic, I think we are, as in many other matters raised by the HRA, very much in a transitional period.

Quite apart from this, I think that the introduction of the Convention into UK law has been a breath of fresh air for the judiciary, the legal profession and legal academics. It has, I think, made us more questioning about our accepted ideas and assumptions. That is partly because the introduction

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34 [2014] 2 WLR 808 (*Kennedy*).
38 Ibid 285 [138].
into the law of any new set of principles and concepts will, as it were, wake all lawyers up, and make them less complacent. More particularly, it makes one realise how, in some respects, we have much to learn from mainland Europe, but let me make it clear that the UK has just as much to offer as it has to learn. The HRA has also spurred the UK judiciary into fresh thinking about the law, because we now have new ideas to grapple with and to apply to our domestic law, such as the concept of proportionality. But we are also wondering whether, for instance, it makes sense to have such different approaches between a traditional judicial review challenge to an executive decision on the merits, and a Convention challenge to an administrative decision. On that issue, the judgments in Kennedy have something to offer as well.

That leads me to one of the most controversial aspects of the Convention, namely that it is an international set of rules with the Strasbourg court as its final arbiter. The international character of the Convention, with its treaty status and the Strasbourg court role, is of course wholly lacking for Victorian judges when it comes to the Charter, save to the extent that the federal High Court has a role, as is apparent from the Momcilovic case. The Strasbourg court has one judge from each country, and it can decide cases in Chambers which consist of six or seven judges or it can refer cases to the so-called Grand Chamber on which many more judges sit.

This international aspect has a number of strands. First, there is the statutory duty in the HRA on UK judges, which is not to follow Strasbourg decisions, but to take them into account. In a case in 2011, the Supreme Court said that it was not bound to follow every decision of the [Strasbourg court]. Not only would it be impractical to do so: it would sometimes be inappropriate, as it would destroy the ability of the Court to engage in the constructive dialogue with the [Strasbourg court] which is of value to the development of Convention law. ... Of course, we should usually follow a clear and constant line of decisions by the [Strasbourg court]: ... But we are not actually bound to do so or (in theory, at least) to follow a decision of the Grand Chamber.

As we get more confidence with the passage of time, it is conceivable that we will take a more robust view.

On occasion, we have already taken the view that a decision of the Strasbourg court adverse to the UK was wrong and should be reconsidered. In such cases, the fact that the Strasbourg court's decision may have seemed a little surprising or even inappropriate from the UK perspective is often because the court is very largely made up of lawyers with a civilian, rather than a common law, background, and they have misunderstood or misappreciated our system. In such a case, we have engaged in dialogue, in the form of giving a detailed judgment not following the Strasbourg jurisprudence, and explaining why. On one occasion, concerned with the ability to convict on

40 Human Rights Act 1998 (UK) c 42, s 2(1).
41 Pinnock [2011] 2 AC 104, 125 [48].
hearsay evidence, we have been successful in getting the Strasbourg court to change its mind. In another, involving art 8 and possession actions, we were not, and we eventually followed the Strasbourg court. It should be added that the Strasbourg court also changed its mind on another issue, namely the ability of a UK court to strike out a hopeless human rights claim.

Save where we feel that the Strasbourg court has misunderstood or misappreciated our common law system, we UK judges have, I suspect, sometimes been too ready to assume that a decision, even a single decision of a section of that court, represents the law according to the Strasbourg court, and accordingly to follow it. That approach is attributable to our common law attitude to precedent and to our relatively recent involvement with the Strasbourg court. I think we may sometimes have been too ready to treat Strasbourg court decisions as if they were determinations by a UK court whose decisions were binding on us. It is a civilian court under enormous pressure, which sits in chambers far more often than en banc, and whose judgments are often initially prepared by staffers, and who have produced a number of inconsistent decisions over the years. I think that we are beginning to see that the traditional common law approach may not be appropriate, at least to the extent that we should be more ready not to follow the Strasbourg court in-chambers decisions.

Further, the current thinking is that, on any issue, the UK courts should go as far as the Strasbourg court but no further. In a famous dictum, Lord Bingham said that ‘[t]he duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less’. This has already not been followed in a case where the Strasbourg court’s direction of travel seemed clear and in the recent Nicklinson case we expressly left open the question of whether it was right.

On the other hand, if a UK judge is considering not following Strasbourg jurisprudence, he or she should bear in mind that one of the purposes of introducing the HRA was to prevent litigants whose human rights were not recognised domestically having to go to the Strasbourg court to vindicate their rights against the UK government. If UK judges are too ready to depart from the Strasbourg court, we get back where we were before the HRA came into force.

The absence of a constitution means that UK judges cannot easily refuse to follow a Strasbourg court decision on the ground that it would involve infringing our constitution, as the German courts are able to do. Some may think that this provides support for the argument that the UK should move towards adopting a constitution. As it is, however, there is a recent decision of the European Court of Justice (the Luxembourg court not the Strasbourg court), which suggests that the absence of a written constitution may not always prevent us from relying on our fundamental constitutional conventions. In a case concerned with the question whether a high speed train

42 Al-Khawaja v United Kingdom (2012) 54 EHRR 23.
45 R (Ullah) v Special Adjudicator [2004] 2 AC 323, 350 [20].
proposal conflicted with EU environmental laws,\textsuperscript{47} we had to consider the suggestion that, in order to see if a statute conflicted with those laws, the courts might have to assess the quality of the debate in Parliament on the statute. In a judgment I wrote jointly with Jonathan Mance, the Supreme Court made it clear that it would have reservations about following any such suggestion in the light of s 9 of the \textit{Bill of Rights 1688} (UK) c2 and the well-established principle that the courts do not poke their nose into parliamentary business, and, by the same token, politicians do not get involved with the courts.

The fact that the Strasbourg court is an international court has two other significant features, at least from the point of view of the UK judiciary. The first is that the decisions sometimes seem a little quaint because they have to apply across thirty-odd member states with very different traditions and institutions – from Sweden to Turkey, from Luxembourg to Russia. If uniform standards are to be imposed, and the Convention has to have the same meaning in each state, there has to be a degree of give and take between individual states. Secondly and on the other hand, this very point means that on some topics, the Strasbourg court will accord a ‘margin of appreciation’ to member states. A topical example is assisting a suicide: in some states (e.g. Switzerland and Belgium) it is entirely lawful to assist from compassionate motives a suicide of a mentally competent person who has a firm desire to die. In other states (e.g. Poland and Spain) there is blanket illegality. Accordingly, the Strasbourg court has held that it is a matter for each member state what the law should be on the topic.\textsuperscript{48}

That raises an interesting UK domestic law point, given that there is a current blanket ban on assisting suicide in a primary statute, namely in s 2 of the \textit{Suicide Act 1961} (UK) c60. The point is whether that means that the law on the topic is purely for Parliament or whether the courts can say that, even though there is a clear statutory prohibition which is within the margin of appreciation afforded to the UK by the Strasbourg court, the court can say to Parliament that that is contrary to the Convention as it applies in the UK. In our recent decision of \textit{Nicklinson},\textsuperscript{49} we unanimously held that the courts did have that power. However, we differed on whether it would be appropriate to exercise it.

The fact that ‘unelected’ judges, especially foreign judges, are perceived to have been given powers which they previously had not enjoyed, coupled with the distaste in some political quarters for all things European, and the media’s concentration on prisoners’ votes and asylum seekers, has rendered the Convention something of a whipping boy for some politicians and newspapers. This appears to many people to be unfortunate. There are decisions of the Strasbourg court with which one can reasonably disagree, indeed with which I disagree. This is scarcely surprising; indeed, it would be astonishing if it were otherwise. However, to my mind, there are very few of its decisions which can fairly be said to be misconceived.

\textsuperscript{47} \textit{R (HS2 Action Alliance Ltd) v Secretary of State for Transport} [2014] 1 WLR 324.
\textsuperscript{48} \textit{Pretty v United Kingdom} [2002] III Eur Court HR 155; \textit{Haas v Switzerland} (2011) 53 EHRR 33.
\textsuperscript{49} \textit{Nicklinson} [2014] 3 WLR 200.
Further, it is a feature of all constitutional courts that they generously interpret the constitution and tend to bestow power on themselves: *Marbury v Madison*\(^{50}\) is merely the best known example. Particularly in the light of their recent history, mainland European countries appreciate the need for checks and balances, and realise that undiluted democracy is risky. The tyranny of the majority is bad enough and, as the last century demonstrated, it can lead to far worse things. However, you only have to look at the history of Germany over the last one hundred years to see how valuable it can be for judges to be given a substantial role, supported by the rule of law, in protecting individuals against the might of the modern state. Having said that, I strongly believe that Judges should not be anxious to increase their powers, and indeed should not even be enthusiastic about using any powers they have. A degree of judicial self-restraint is always appropriate.

My colleague Jonathan Sumption has suggested that the Strasbourg court suffers from a democratic deficit, and this undoubtedly has some force. However, the development of pan-European law after centuries, indeed millennia, of separate development and frequent wars, and with different political and legal traditions, and different historical experiences and different traditions, was never going to be easy. It is therefore inevitable that the Convention, like the EU, would be a controversial topic in the UK. Watch this space.

\(^{50}\) 5 US 137 (1803).
Statutory Interpretive Techniques under the Charter: Three Stages of the Charter — Has the Original Conception and Early Technique Survived the Twists of the High Court’s Reasoning in Momcilovic?*

The Hon Justice Pamela Tate†

Introduction

The most significant Charter mechanism to be tested in the courts has been the interpretive obligation under s 32(1); that is, the obligation to interpret legislation compatibly with human rights. More exactly, it is the obligation to interpret all statutory provisions in a way that is compatible with human rights, so far as it is possible to do so consistently with their purpose.²

To explore the interpretive techniques that have been adopted under s 32(1), I will trace three stages of the Charter. The first is the pre-enactment stage. During this stage, as Solicitor-General for Victoria, I was appointed in April 2005 as Special Counsel to the Human Rights Consultation Committee that recommended the enactment of the Charter. The second stage is the early years of the Charter,³ after s 32(1) had come into force in 2008.⁴ This was when RJE v Secretary to the Department of Justice⁵ was being heard by the Court of Appeal, and Hogan v Hinch⁶ by the

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† A judge of the Court of Appeal, Supreme Court of Victoria. I gratefully acknowledge the assistance of two researchers of the Court of Appeal, Claire Leyden-Duval and Kiri McEwan, in the preparation of this paper.

¹ Charter of Human Rights and Responsibilities s 1(1) provides: ‘This Act may be referred to as the Charter of Human Rights and Responsibilities and is so referred to in this Act’. The convention is to refer to an Act by its short title (as expressed in the Charter by s 1(1)) and there is thus no need to refer to the Charter as the ‘Charter of Human Rights and Responsibilities Act’; see Interpretation of Legislation Act 1984 s 10(1)(e); Deming No 456 Pty Ltd v Brisbane Unit Development Corporation Pty Ltd (1983) 155 CLR 129, 162 (Wilson J). It may be cited as the Charter of Human Rights and Responsibilities. In this paper I will simply refer to it as ‘the Charter’.

² Charter s 32(1) reads: ‘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’.

³ The Bill passed the Legislative Assembly on 15 June 2006 and the Legislative Council on 20 July 2006. It was given royal assent on 25 July 2006.

⁴ The Charter’s commencement was staggered and divs 3 and 4 of pt 3 came into operation on 1 January 2008: Charter s 2(2). Section 32(1) is in div 3 of pt 3.

⁵ (2008) 21 VR 526 (‘RJE’).

⁶ (2011) 243 CLR 506.
High Court. The third stage covers *Momcilovic* and the implications that flow from the High Court’s reasoning.

In the course of discussing these historical stages I will say something about the principle of legality and why, in my view, the interpretive obligation under the Charter is not a statutory expression of that principle. The principle of legality is a common law doctrine that provides that Parliament is not to be taken to have intended to interfere with fundamental rights recognised by the common law in the absence of ‘a clear expression of an unmistakeable and unambiguous intention’. The focus is upon discerning an unequivocal intention to interfere with a right and not upon assessing the rationality of the degree of interference consistent with the statutory objective.

My overall aim is to examine how much of the early judicial work, particularly on the relationship between s 32(1) and s 7(2), has survived the High Court’s pronouncements in *Momcilovic*. To my mind there is much force in the proposition that a great deal of that early analytical work on interpretive technique has survived and warrants revisiting. In saying that, I distinguish between interpretive technique, on the one hand, and, on the other hand, the scope of permissible interpretations that can be arrived at in reliance on s 32(1), the *Ghaidan* question. Some of the post-*Momcilovic* decisions exhibit a sense, perhaps justifiably, that the jurisprudence on the interpretive obligation has reached an impasse. I would like to separate some of the threads of that jurisprudence to identify a way through that impasse; to assist with what Chief Justice Elias has described as the responsibility to engage with human rights.

**The First Stage — the Pre-enactment Stage**

During the pre-enactment stage, I became aware that it was taking New Zealand a long time to resolve the question of the appropriate interpretive technique under the *New Zealand Bill of Rights Act 1990* (N.Z.) (‘BORA’). Ultimately, it was resolved 17 years after BORA’s enactment, in *Hansen* in 2007. I assumed, with all the enthusiasm of a former-New Zealander who delighted in the sophistication of the Australian legal system, that Victoria, and Australia, would do much better than that. It was my belief that all it would take to obtain some proper law on the subject would be to find a good case on the merits and make sure it headed to the High Court as quickly as possible. Then we could await a beautifully reasoned majority judgment that was straightforward

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7 *Momcilovic v The Queen* (2011) 245 CLR 1 (‘*Momcilovic*’).
9 *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 (‘*Ghaidan*’).
11 *R v Hansen* [2007] 3 NZLR 1 (‘*Hansen*’).
to apply. The High Court had proven in *Cole v Whitfield*\(^\text{12}\) that it could provide lucid reasoning even on an issue as complex as the guarantee under s 92 of the Constitution that trade, commerce and intercourse among the States shall be absolutely free. Surely s 32(1) of the *Charter* would prove no greater obstacle. It was not to be.

In May 2005\(^\text{13}\) the Attorney-General released the Victorian Government’s *Statement of Intent*\(^\text{14}\) to guide the Committee.\(^\text{15}\) With respect to the role of the courts, the *Statement of Intent* made these observations. The government did not wish to create new individual causes of action based on human rights breaches.\(^\text{16}\) It said, however, that the courts are to ‘have an important role to play in interpreting the law and enforcing rights and obligations’.\(^\text{17}\) Given that enforcement was not to proceed by way of specific or sui generis causes of action, this left interpretation as arguably the

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13 The *Charter* grew out of the Attorney-General’s *Justice Statement* of May 2004 (Department of Justice, *New Directions for the Victorian Justice System 2004-2014: Attorney-General's Justice Statement* (May 2004)), (‘*Justice Statement*’). One of the key initiatives of the *Justice Statement* was to establish a process of discussion and consultation within the Victorian community on how human rights and obligations could best be promoted in Victoria. The *Justice Statement* recognised that alternative models for human rights protection existed in different jurisdictions, including, on the one hand, constitutionally entrenched ‘Bills of Rights’ and, on the other hand, ordinary Acts of Parliament, albeit Acts with implications for other statutes. Those alternative models included a constitutionally entrenched charter, or ‘Bill of Rights’ as exists in the United States, where legislation or executive action that infringes rights can be declared invalid by the courts. Chapter 2 of South Africa’s Constitution, being a Bill of Rights, reflects a similar constitutionally entrenched model: see *Constitution of the Republic of South Africa Act 1996* (South Africa) ch 2. The rigidity of such a model was noted in the *Justice Statement* as was the criticism that it allowed judges to render laws passed by the Parliament inoperative and ineffective: see *Justice Statement*, 54. While it is a familiar feature of Australian constitutional life that the High Court has the power to declare laws invalid (for example, *Williams v Commonwealth* (2014) 309 ALR 41), the criticism remained that the United States and South African models were inappropriate to Victoria where it was unlikely that there would be community support for the entrenching of human rights within Victoria’s *Constitution Act 1975* (Vic): see *Justice Statement*, 56. The principal alternative model was that of a statutory charter of rights. As the *Justice Statement* described it, a statutory charter is an ordinary piece of legislation of the Parliament. It is enacted in a manner that makes it no more difficult to change than other Acts of Parliament. It is subject to amendment or repeal in the same manner as all other legislation. A statutory Charter creates a presumption that other legislation must be interpreted to give effect to the rights listed in that Charter. The model does not invalidate any provision or allow a court to refuse to apply another Act’s provisions because of inconsistency with one of the rights listed in the Charter of Rights instrument. This is the model of the *Human Rights Act 1998* (UK) and the *New Zealand Bill of Rights Act 1990*. This was also the model adopted by the Australian Capital Territory (‘the ACT’ in enacting its *Human Rights Act 2004* (ACT) to which Victoria had regard.

14 See the ‘*Statement of Intent*’ in Human Rights Consultation Committee, *Rights, Responsibilities and Respect — The Report of the Human Rights Consultation Committee* (November 2005) app B (‘the Report’). The *Statement of Intent* indicated that the Victorian Government was interested in a model that was similar to the United Kingdom, New Zealand, and the ACT in which rights were contained in an Act of Parliament that could be amended if Parliament saw fit. It expressly disavowed the United States model.

15 On 18 April 2005 the Attorney-General announced the establishment of the Human Rights Consultation Committee (‘the Committee’) to report back by 30 November 2005. The Committee was chaired by Professor George Williams and its other members were Professor Haddon Storey QC, Ms Rhonda Galbally and Mr Andrew Gaze.

16 This stands in contrast to the specific cause of action under s 7(1)(a) of the *Human Rights Act 1998* (UK) (*UKHRA*).

17 The Report, above n 14, 162.
primary role to be undertaken by the courts. 18

After engaging in extensive consultation, 19 the Committee delivered its report 20 recommending that the Charter impose three principal obligations. The first was the obligation on members of Parliament to prepare statements of compatibility in respect of each Bill introduced into a House of Parliament. This became s 28. 21 The same notion of compatibility was relied upon to describe the obligation on public authorities not to act in ways that are incompatible with human rights. This became s 38 which, while it does not use the language of compatibility, but rather its opposite, incompatibility, draws on the same cognate concept. The third principal obligation was that of interpreting legislation compatibly with human rights, s 32(1). 22 These three principal obligations provide the framework of the Charter. The same notion of compatibility with human rights also occurs in ss 30 and 41 of the Charter; and in s 13 of the Ombudsman Act 1973 (Vic) and s 21 of the Subordinate Legislation Act 1994 (Vic) which were amended by the Charter. 23 The unifying core concept of the Charter is of compatibility with human rights.

18 The Statement of Intent also identified the liberal democratic rights under the International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 1976) (ICCPR) as those to provide a starting point for the Committee’s deliberations, particularly the right to equality before the law, the right to a fair trial, freedom of expression and freedom of thought, conscience, and religion: at ibid 163. The ICCPR was signed by Australia in 1972 and ratified by Australia in 1980. However, international covenants are not binding in Australia unless they have been specifically incorporated into Australia law by legislation. There has also been a limited common law presumption that, at least in the event of ambiguity, statutes are to be interpreted so as not to be inconsistent with established rules of international law: see Coleman v Power (2004) 220 CLR 1, 27–8 [17]–[19] (Gleeson CJ). See Justice J J Spigelman, ‘Blackstone, Burke, Bentham and the Human Rights Act 2004’ (2005) 26 Australian Bar Review 1, 7.

19 The Committee released a discussion paper ‘Have your say about human rights in Victoria’, Human rights consultation community discussion paper (Consultation paper, Human Rights Consultation Committee, 1 June 2005) (‘Consultation Paper’). This was released on 1 June 2005. The Committee actively engaged in community consultation particularly by reference to a set of open-ended questions about whether there was a need further to protect human rights in Victoria, the form that any protection should take, and the range of rights to be protected. It carefully described the key features of the alternative models and, on the role to be performed by institutions, identified that in the ACT, New Zealand, and the United Kingdom ‘courts have the task of interpreting legislation to be consistent with human rights’ noting that ‘the exact wording of this power differs in each case and can be very important in setting out how far courts can go in this process’: see Consultation Paper, 41.

20 The Report, above n 14.

21 Section 28 of the Charter imposes on the Member of Parliament who introduces a Bill into a House of Parliament an obligation to prepare a compatibility statement in respect of that Bill and to have that statement laid before the House of Parliament into which the Bill is introduced before giving his or her second reading speech on the Bill.

22 In this way it was intended that the Charter would bind all three arms of government, — the legislature, the executive and the judiciary — in different ways.

23 Section 30 of the Charter confers a power on the Scrutiny of Acts and Regulations Committee (SARC) to report to Parliament as to whether a Bill is incompatible with human rights. Section 41 provides that a function of the Victorian Human Rights and Equal Opportunity Commission is to review a public authority’s programs and practices, when requested, to determine their compatibility with human rights. Section 13(1)–(2) of the Ombudsman Act 1973 (Vic) includes the power to enquire into and investigate whether any administrative action is compatible with human rights: see Charter sch, item 2. Section 21I(1)(ha) of the Subordinate Legislation Act 1994 (Vic) confers a power on SARC to report to Parliament that any statutory rule laid before Parliament is incompatible with the human rights set out in the Charter: see Charter, sch item 7.4.
This has two implications for interpretive technique.

The first is that appreciating how s 32(1) was intended to operate depends on an understanding of how the interpretive obligation interacts with other parts of the Charter. Section 32(1) cannot be considered in isolation from the rest of the Charter.\(^{24}\)

The second raises the question: what does ‘compatibility with human rights’ mean?

Answering that question turns on how rights were to be treated under the Charter.

Critically, it was acknowledged that the human rights protected under the Charter should not be seen as absolute; the report recognised that ‘rights need to be balanced against each other and other competing public interests’.\(^{25}\) The Charter needed a mechanism to facilitate the balancing of rights against the public policy objectives of legislation and against each other.\(^{26}\) In its report, the Committee sought to explain the mechanism that the Charter was to employ to facilitate the balancing process.

In foreshadowing what became s 7(2) of the Charter, the report said this:

The balancing of rights can happen through an express limitation on a clause-by-clause basis (as in the \[International Covenant on Civil and Political Rights\] (the ‘ICCPR’)) or through a general limitation clause (as is the case in the ACT, Canada, New Zealand and South Africa).

The ICCPR contains express limitation clauses. For example, the right to freedom of expression ... is subject to restrictions such as defamation laws.\(^{27}\)

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\(^{24}\) The brevity of the Charter, if not its charm, depends upon there being a strong inter-relationship between its component parts. This unusual brevity is reflected in other human rights laws such as BORA, the UKHRA, and the \textit{Canada Act 1982 (UK) c 11, sch B pt 1 (‘Canadian Charter of Rights and Freedoms’). An approach to s 32(1) that recognises its place in the context of the Charter as a whole reflects that reaffirmed in \textit{Project Blue Sky Inc v Australian Broadcasting Authority} (1998) 194 CLR 355, 381 [69] (McHugh, Gummow, Kirby and Hayne JJ) (citations omitted):

\begin{quote}
The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined ‘by reference to the language of the instrument viewed as a whole’.
\end{quote}

\(^{25}\) The Report, above n 14, 46.

\(^{26}\) For example, the right to freedom of expression and the right to a fair trial. In \textit{General Television Corporation Pty Ltd v DPP (Vic)} (2008) 19 VR 68 a judge of the Trial Division of the Supreme Court ordered an injunction against a commercial broadcasting station not to transmit or publish its television drama about a series of underworld ‘gangland’ killings. The Charter issues were ultimately withdrawn but the Court said that had it been necessary to consider them, they would adopt the view of Richardson J in \textit{Gisborne Herald Co Ltd v Solicitor-General}: ‘The present rule is that, where on the conventional analysis freedom of expression and fair trial rights cannot be fully assured, it is appropriate in our free and democratic society to temporarily curtail freedom of media expression so as to guarantee a fair trial’: at 90 [38] quoting \textit{Gisborne Herald Co Ltd v Solicitor-General} [1995] 3 NZLR 563, 575.

\(^{27}\) So too, although the \textit{Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) (‘ECHR’), does not contain a general limitation clause, assessments of proportionality are made by reference to express internal limitations in the rights or implied internal limitations, for example, in Art 6(2), namely ‘Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law’: \textit{A-G (Hong Kong) v Lee Kwong-Kul} [1993] AC951, 969. For an application of the proportionality test in respect of the presumption of innocence see \textit{Sheldrake v DPP} [2005] 1 AC 264. Some rights under the ECHR are absolute. The UKHRA protects a number of ‘Convention Rights’ drawn from the ECHR.
While this approach can provide more certainty for the listed exceptions, it does not capture the broader balancing process.\textsuperscript{28}

The report went on to recommend that the right to freedom of expression under the Charter should contain an express internal limitations clause, namely that the right is subject to restrictions reasonably necessary to, for example, respect the rights and reputations of others, or protect public order. This right was applied by the High Court under the Charter in \textit{Hogan v Hinch}.\textsuperscript{29} What the report was adverting to, however, was the existence of a choice between the approach of tailoring an express internal limitations clause for each right, identifying what are the recognised objectives of limiting that specific right, and what type of limits might thereby be considered ‘reasonable’, as with the right to freedom of expression, or including a general limitation clause to govern the assessment of permissible restrictions on any right. Faced with the choice between specifying a set of rights, all with internal limitations, or including a general limitation clause to govern all the rights, the Committee recommended the latter. That was accepted.

The report said, referring to \textit{Oakes}:\textsuperscript{30}

Section 28 of the ACT Human Rights Act 2004 provides one form of limitation clause:

\begin{quote}
\textit{Human rights may be subject only to reasonable limits set by Territory laws that can be demonstrably justified in a free and democratic society.}
\end{quote}

This is consistent with provisions in the human rights instruments in New Zealand (where it resides in s 5) and Canada. The provision embodies what is known as the ‘proportionality test’.\textsuperscript{31} The Canadian Supreme Court [in \textit{Oakes}] has stated that in order for a limitation on a right to be reasonable and demonstrably justified, two key conditions must be met:

\begin{itemize}
  \item The objective that the rights-limiting law is trying to fulfil ‘must be of sufficient importance to warrant overriding a … protected right or freedom’. The objective must ‘relate to concerns which are pressing and substantial’.
  \item The means chosen to achieve the objective must be reasonable and demonstrably justified. This involves considering whether the means adopted are ‘designed to achieve the objective in question’, whether they impair rights and freedoms as little as possible and whether there is proportionality between the effects of the measures and the.
\end{itemize}

\begin{itemize}
\item \textsuperscript{28} The Report, above n 14, 46.
\item \textsuperscript{29} (2011) 243 CLR 506, 550–1.
\item \textsuperscript{30} \textit{R v Oakes} [1986] 1 SCR 103, 138–9 (Dickson CJ) (‘\textit{Oakes}’).
\item \textsuperscript{31} See the discussion of proportionality in \textit{Momcilovic} (2011) 245 CLR 1, 214 [556]–[557] (Crennan and Kiefel JJ), where, in particular, Charter s 7(2)(e) is taken to reflect the test of ‘reasonable necessity’. See also \textit{Christian Youth Camps Ltd v Cobaw Community Health Services Ltd} (2014) 308 ALR 615 where Redlich JA (dissenting in the result) said at 740 [550]:

  The concept of proportionality — the identification and weighting of the conflicting interests and the evaluation of the extent to which the conflict may be minimised by careful choice of means — finds its form in part in s 7(2) of the Charter, which states that rights are subject ‘to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.'
\end{itemize}
objectives which the rights-limiting law is seeking to achieve.32

This statement in the report was the genesis of what we now know as the five factors in s 7(2)33 which invite a consideration of the nature of the right at stake; the importance and purpose of the limitation imposed by the law or by the conduct of a public official; the nature and extent of the limitation; the relationship between the limitation and its purpose; and whether there are any less restrictive means reasonably available to achieve the purpose.34

The report went on to draw a connection between the concept of compatibility and the factors in s 7(2).

For example, the report recommended that a Human Rights Impact Statement be included in Cabinet Submissions.35 The Impact Statement was to include:

- a statement of the purpose of the Bill, regulation, policy or proposal;
- a statement of its effect upon any of the human rights in the Charter; and
- a statement of any limitation placed upon any human right in the Charter by the Bill, policy

32 The Report, above n 14, 47. In Hansen [2007] 3 NZLR 1, Tipping J (at 41 [104]) summarised the Oakes test in this way:
(a) does the limiting measure serve a purpose sufficiently important to justify curtailment of the right or freedom?
(b) (i) is the limiting measure rationally connected with its purpose? (ii) does the limiting measure impair the right or freedom no more than is reasonably necessary for sufficient achievement of its purpose? (iii) is the limit in due proportion to the importance of the objective?.

See also Commerce Commission v Air New Zealand Ltd [2011] 2 NZLR 194, 210 [66].

33 The Committee acknowledged in the report that an unstructured provision such as that then used by the ACT could be difficult to apply on a day-by-day basis and sought to provide a more certain form of guidance for the balancing process by identifying what matters needed to be taken into account to determine if a limitation, or a restriction, or interference with a right was reasonable and justified. The need for specific factors to be identified was raised during the course of the academic roundtable conducted as part of the consultation process by the Committee. In particular, a member of the academic roundtable Andrew Butler, the co-author of Andrew Butler and Petra Butler, The New Zealand Bill of Rights Act: A Commentary (LexisNexis, 2005) explained the utility of specific factors being identified under a general limitation clause.

34 Section 7(2) provides:
A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including — (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.

The five factors (a)–(e) were modelled on s 36 of the Constitution of the Republic of South Africa 1996 (South Africa) ch 2 (Bill of Rights). See the Report, above n 14, 47–8. The last factor, s 7(2)(e), has been interpreted to mean any less restrictive means within a range of reasonable alternatives: see Sabet v Medical Practitioners Board of Victoria (2008) 20 VR 414, 442; RJR McDonald Inc v A-G (Canada) [1995] 3 SCR 199, [160]. For an application of these factors, see Lifestyles Communities Ltd (No 3) [2009] VCAT 1869 (22 September 2009) [316]–[418], especially [387]–[418]; PJB v Melbourne Health (Patrick's Case) [2011] VSC 327 (19 July 2011) [304]–[360], especially [335]–[357]. The ACT later amended its Human Rights Act to include the very same factors as appear in s 7(2) of the Charter. See Human Rights Act 2004 (ACT) s 28(2)(a)–(e). The ACT also amended its interpretive obligation (s 30) to reflect the terms of s 32(1) of the Charter. Section 30 now reads: ‘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’. It had previously been cast as follows:
‘In working out the meaning of a Territory law, an interpretation that is consistent with human rights is as far as possible to be preferred’: Human Rights Act (ACT), as amended by the Human Rights Amendment Act 2008 (ACT).

35 The Report, above n 14, vii–viii (Recommendation 13), 70–1.
or proposal, the importance and purpose of this limitation, the nature and extent of the
limitation, the relation between the limitation and its purpose and whether there is any less
restrictive means to achieve the purpose.\textsuperscript{36}

The report also recommended that, as mentioned, a statement of compatibility be presented to
Parliament on every Bill. It said that ‘the Statement should address the same matters as would
be required in respect of a Human Rights Impact Statement’,\textsuperscript{37} that is, all the five factors in s 7(2).

The report further recommended that for ‘each regulation tabled in Parliament, information
should similarly be provided ... regarding the compatibility of the regulation with the Charter’.\textsuperscript{38}

This was given effect to in the Charter by requiring that a ‘human rights certificate’ be prepared
for proposed statutory rules. The Charter provides\textsuperscript{39} that a human rights certificate must set out
the nature of any human right limited by the rule, the importance and purpose of the limitation,
the nature and extent of the limitation, the relationship between the limitation and its purpose
and any less restrictive means reasonably available to achieve the purpose that the limitation
seeks to achieve.\textsuperscript{40} In other words, an assessment of the compatibility of a statutory rule expressly
calls for an assessment of the same five factors identified in s 7(2). To determine if a regulation is
compatible with Charter rights, a balancing exercise has to be undertaken.

It is a short step to conclude that ‘compatibility’ with human rights, wherever it occurs under
the Charter, was intended to mean that any limit placed on human rights was reasonable and
justified.\textsuperscript{41} In particular, an interpretation of a statutory provision that imposes a justified limit on
a right is a human rights-compatible interpretation.\textsuperscript{42}

That meaning informs the three principal obligations that make up the framework of the Charter.

At the parliamentary level, the hundreds of Statements of Compatibility made in Victoria since
the Charter was enacted almost invariably seek to address the s 7(2) factors to demonstrate that

\textsuperscript{36} Ibid.
\textsuperscript{37} Ibid, viii (Recommendation 14). See also at 73. This was no surprise given that the ACT was producing Statements of Compatibility that did address the issue of the justification of limitations upon rights, pursuant to s 28 of the Human Rights Act 2008 (ACT). For example, in the ACT, the Attorney-General, when introducing legislation for the involuntary administration of electro-convulsive therapy, expressed the opinion that the Bill was compatible with human rights because under the relevant legislation it could only occur in an emergency situation where it was necessary to save a person’s life. Although the Bill limited a person’s right not to be subjected to medical treatment without his or her free consent, the degree of interference was considered to be reasonable and proportionate given the importance and significance of the objective to be achieved. See Australian Capital Territory, Parliamentary Debates, Legislative Assembly, 26 August 2005, 3302 (Attorney-General).
\textsuperscript{38} Ibid, viii (emphasis added). See also at 73.
\textsuperscript{39} By inserting s 12A into the Subordinate Legislation Act 1994 (Vic): see Charter sch 1 item 7.
\textsuperscript{40} Subordinate Legislation Act 1994 (Vic) s 12A.
\textsuperscript{41} In accordance with the maxim that, where possible, a word is to be given a constant or uniform meaning
throughout a statute, Craig Williamson Pty Ltd v Barrowcliff[1915] VLR 450, 452; Registrar of Titles (WA) v
Franzon (1975) 132 CLR 611, 618.
the legislative objective is pressing and substantial, that any limit on rights is proportional to the objectives of the legislation, and that the limits extend no more than is reasonably necessary to achieve those objectives.43

So too, with respect to the obligation on public authorities, the report made it clear that in recommending that all public authorities should be required to comply with the Charter this involved giving effect to human rights standards.44 Under s 38, the effect of acting incompatibly with human rights is unlawfulness. It is unlikely that a consequence as serious as unlawfulness, in any form, could have been intended to flow from actions of public authorities that were reasonable and justified interferences with human rights.45 This recognises that the conduct of a public authority in limiting or interfering with a human right may nevertheless be ‘compatible’ with that human right if the limit or interference is imposed under law, is reasonable and is justified.

The link between the notion of compatibility under the Charter and the balancing exercise in s 7(2) was also expressed by the Attorney-General in introducing the Charter in Parliament when he said that ‘where a right is ... limited [in a reasonable and demonstrably justified way] ... action taken in accordance with that limitation ... is not incompatible with the right’.46

On the interpretive obligation, the report suggested that a court would ask questions which invoked the s 7(2) factors as part of the process of interpretation,47 namely:

- Does the legislation restrict the right?
- Is the restriction reasonable or justifiable?
- Can that statute be interpreted in a way that would be consistent with the right in a way that does not disturb the main purpose of the law?48

This approach, of connecting compatibility with s 7(2), places human rights law within the continuum of measures aimed at ensuring that public power is exercised in a principled manner

43 See Victoria, Parliamentary Debates, Legislative Assembly, 4 May 2006, 1290–1 (Rob Hulls, Attorney-General). For example, the compatibility statement tabled for the Traditional Owner Settlement Bill 2010 (Vic), which sought to facilitate ‘a framework for agreement making between the state and a given traditional owner group entity for an area of Crown land’ acknowledged that it limited, inter alia, the right to freedom of movement in s 12 of the Charter but concluded that it was ‘compatible with the human rights protected by the charter’ as the limitation was reasonable and demonstrably justified in a free and democratic society. It undertook an analysis of each of the five factors listed in s 7(2) of the Charter; the nature of the right being limited, the importance of the purpose of the limitation, the nature and extent of the limitation, the relationship between the limitation and its purpose and any less restrictive means reasonably available to achieve its purpose: see Victoria, Parliamentary Debates, Legislative Assembly, 28 July 2010, 2746–9 (John Brumby, Premier).
44 The Report, above n 14, 63.
45 See Momcilovic (2011) 245 CLR 1, 249 [681] (Bell J).
46 See Victoria, Parliamentary Debates, Legislative Assembly, 4 May 2006, 1291 where the Attorney-General said:

Clause 7 is a general limitations clause that lists the factors that need to be taken into account in the balancing process. It will assist courts and government in deciding when a limitation arising under the law is reasonable and demonstrably justified in a free and democratic society. Where a right is so limited, then action taken in accordance with that limitation will not be prohibited under the charter, and is not incompatible with the right.
47 The Report, above n 14, took the example of interpreting legislation that conferred powers on public authorities.
48 Ibid, 118.
and without abuse. The Charter was intended to encourage a culture that valued rigour and rationality so as to contribute to the making of reasoned and proportionate decisions by both the Legislature and the Executive.

Section 7(2) was intended to be the statutory vehicle to achieve that accountability.

Thus, in my view, during the pre-enactment stage, and at the time of the Charter's enactment, the meaning of the concept of compatibility with human rights under the Charter was intrinsically linked to the balancing exercise in s 7(2). It followed that the obligation to interpret legislation 'in a way that is compatible with human rights' requires that the balancing exercise under s 7(2) be undertaken as part of the exercise of interpretation.

Furthermore, during the pre-enactment stage there was no mention of the principle of legality as an expression of what s 32(1) sought to achieve.

49 See De Smith, Woolf and Jowell, Judicial Review of Administrative Action (Sweet & Maxwell, 5th ed, 1995) 3: ‘In all developed legal systems there has been recognition of a fundamental requirement for principles to govern the exercise by public [officials] of their powers. These principles provide a basic protection for individuals and prevent those exercising public functions from abusing their powers to the disadvantage of the public’. There is a link to measures such as the statutory obligation on public officials to give reasons; see for example, the Administrative Law Act 1978 (Vic) s 8(1) and Administrative Decisions (Judicial Review) Act 1977 (Cth) s 13.

50 This is consistent with the statement made by Murray Hunt, when legal adviser to the UK Joint Committee on Human Rights that scrutinises legislation enacted by the British Parliament for compatibility with human rights, to the effect that the intended impact of the UKHRA was to create ‘a culture of justification’, that is, a society in which any interference with human rights by the Legislature or the Executive must be rationally and publicly justified: see Murray Hunt, ‘The UK Human Rights Act: Key Lessons for Australia’ (Paper presented at the Protecting Human Rights Conference, Melbourne, 25 September 2007). Section 19(1)(a) of the UKHRA obliges a Minister of the Crown in charge of a Bill in either House of Parliament to: (a) make a statement to the effect that in his view the provisions of the Bill are compatible with the Convention Rights (‘a statement of compatibility’) or (b) make a statement to the effect that although he is unable to make a statement of compatibility the government nevertheless wishes the House to proceed with the Bill. In the UK if a Minister takes the view that a Bill is compatible with the rights protected under the UKHRA, all he or she need do is express that by way of a single statement, pursuant to s 19(1)(a). Thus, for example, before the second reading of the UK Borders Bill, designed to provide for the detention of individuals who have arrived unlawfully in the UK, the Secretary of State, John Reid, stated only that he was of the view that the provisions of the UK Borders Bill 2006-2007, Bill 53 06-07, were compatible with the European Convention rights protected under the UKHRA. Those provisions included the registration and use of biometric information about a person. However, the Explanatory Notes to the Bill went somewhat further and set out reasons for supporting the Secretary of State’s opinion. In particular the Explanatory Notes stated (at [133]):

The department recognises that taking biometric or other information from a person, storing that information (on existing INP biometric databases) and requiring the biometric immigration document to be used for specific immigration purposes, is likely to be an interference in the right to respect for private life. However, the department believes the interference is justified and proportionate.

51 Textual and structural support for that link is also to be found in the inclusion of s 7(2) within pt 2 of the Charter, immediately before the rights to be protected are enumerated. As noted above, Evans and Evans refer to the approach adopted by Blanchard J in Hansen (2007) 3 NZLR 1 and say that it ‘assumes that a provision that imposes a justified limit on human rights is consistent with human rights.’ They go on to say: ‘In both Victoria and the Australian Capital Territory, the limitation provision is in Pt 2 (Charter s 7, Human Rights Act 2004 (ACT) s 28) and forms part of the specification of the human rights that are protected by Pt 2. The assumption is therefore justified under the Australian human rights Acts’: Carolyn Evans and Simon Evans, Australian Bills of Rights: The Law of the Victorian Charter and the ACT Human Rights Act (LexisNexis Butterworths, 2008) 100 [3.43].
The Second Stage — the Early Years of the Charter

In the second stage of the Charter, its early years of operation, the question of what interpretive technique the Victorian courts should adopt was first explored in any depth in RJE. The contest was over the interpretation of the word ‘likely’. The word was used within the Serious Sex Offenders Monitoring Act 2005 (Vic) in s 11, which empowered a court to make an Extended Supervision Order (‘ESO’) in respect of an offender who was serving a sentence of imprisonment if it was satisfied, to a high degree of probability, that the offender was ‘likely’ to commit a relevant offence if released into the community on completion of the sentence.

As Solicitor-General I argued for a technique which had significant support in the United Kingdom, New Zealand, Hong Kong and the ACT. While sometimes expressed as a series of steps, the technique amounts to the asking of a single question:

On the ordinary principles of statutory interpretation, does the statutory provision limit any Charter right in a manner that is unjustifiable?

As Tipping J said in Hansen, it is only if the answer is ‘Yes’ that the court must then ‘examine the words in question again ... to see if it is ... reasonably possible for a meaning consistent ... with the relevant right or freedom to be found in them. If so, that meaning must be adopted’.

This technique was adopted in a clear and straightforward way by Nettle JA in RJE so that compliance with s 32(1) required that ‘likely’ meant ‘more probable than not’. The background against which this interpretation was adopted was one in which the Victorian Court of Appeal had held in an earlier case, TSL v Secretary to the Department of Justice, that there was no reason to consider that ‘likely’ meant more than 50 per cent. TSL had been applied by the New South Wales Court of Appeal, in two previous decisions Tillman v Attorney-General (NSW) and

53 ‘Relevant offences’ at that time was confined to sexual offences against children.
55 Hansen [2007] 3 NZLR 1, 36–7 [88]–[92] (Tipping J), 27–8 [57]–[60] (Blanchard J), 66 [192] (McGrath J), 83 [266] (Anderson J). Only Elias CJ adopted a methodology at odds with the other members of the Court (at 9 [6]). While the Hansen approach is the prevailing approach, there is an acceptance in New Zealand that different contexts may require the adoption of an alternative approach (see Moonen v Film and Literature Board of Review (No 2) [2002] 2 NZLR 754, 760 [15]).
57 R v Fearnside (2009) 165 ACTR 22, 43 [97]–[98]. However, Besanko J states that although ‘[i]t seems to me that the general approach taken by the majority in Hansen is the correct one ... whether that will be so in every case is best left for a case in which the issue is decisive and is the subject of detailed submissions from both sides’: at 49 [98].
60 (2006) 14 VR 109 (‘TSL’).
62 (2007) 70 NSWLR 448 (‘Tillman’).
Cornwall v Attorney-General (NSW), because they felt compelled to apply the decision of another intermediate appellate court in the light of Farah Constructions Pty Limited v Say-Dee Pty Ltd. Nettle JA considered himself bound to apply the Tillman meaning, as having in effect fixed the meaning of ‘likely’ in this context if recourse was had only to the ordinary principles of statutory interpretation, unless there was a compelling reason to depart from it. The obligation imposed by the Charter to interpret legislation compatibly with human rights, where possible to do so, and consistently with its purpose, provided that compelling reason.

Against that background, he considered whether the power to order an ESO under s 11, under the pre-existing TSL interpretation, limited any Charter rights. He held that s 32(1) obliged him to construe s 11 as subjecting the appellant’s rights to freedom of movement, privacy, and liberty, only to such reasonable limits as could be demonstrably justified in a free and democratic society, so far as it was possible to do so consistently with the purpose of the section. He then engaged in the balancing exercise required by s 7(2) by identifying the purpose of s 11 as intended to guard against the dire consequences of the commission of a relevant offence which in some circumstances could justify encroaching upon an offender’s rights of freedom of movement, privacy and even the right to liberty. Against that was the consideration that an interpretation of ‘likely’ as less than 50 per cent could ‘mean that a relatively low risk of re-offending could provide a sufficient basis for making an order’.

Even giving full weight to the purpose of s 11, I cannot conceive of the potentially far reaching restrictions on rights provided for in the [Serious Sex Offenders Monitoring] Act as being capable of demonstrable justification in the relevant sense unless the risk of an offender committing a relevant offence is at least more than even.

The other two members of the bench, Maxwell P and Weinberg JA, did not view themselves as otherwise bound to apply TSL and adopted the same meaning of ‘likely’, as ‘more probable than not’ on ordinary principles of statutory construction without it being necessary to consider the

64 (2007) 230 CLR 89, 151 [135].
66 He identified the relevant rights as the right to freedom of movement (Charter s 12); the right to privacy (s 13); and the right to liberty (s 21). Sometimes this step is expressed as asking whether the statutory provision, on its ordinary interpretation, ‘engages’ with a right: See Kracke v Mental Health Review Board [2009] VCAT 646 (23 April 2009) [67]–[68] (Bell J). More generally Bell J conducts an extensive survey of the methodology associated with various interpretive obligations, formulated in different ways in different human rights laws.
68 For an analysis of the s 7(2) exercise in the context not of s 32(1) but of s 38, see Sabet v Medical Practitioners Board of Victoria (2008) 20 VR 414; Lifestyles Communities Ltd (No 3) [2009] VCAT 1869 (22 September 2009) [316]–[418], especially [387]–[418]; FBQ v Melbourne Health (Patrick’s Case) [2011] VSC 327 (19 July 2011) [304]–[360], especially [335]–[357].
69 In particular, if a court was satisfied to a ‘high degree of probability’, as s 11 required, say, 80 per cent, that there was a 45 per cent chance of the commission of a relevant offence, this would mean that the risk of the commission of the offence would be only 36 per cent. See RJE (2008) 21 VR 526, 554 [107] (Nettle JA).
70 RJE (2008) 21 VR 526, 554 [107].
Charter. What is plain is that the interpretation of ‘likely’ applied by Nettle JA was open on the language and consistent with the purpose of s 11. On that basis, and as I will discuss in the third stage, I consider that this interpretive technique, including the deployment of s 7(2), remains open and is consistent with the High Court's reasoning in Momcilovic.

In Hansen, the New Zealand Supreme Court, and most particularly Tipping J, but also Blanchard and McGrath JJ, analysed this technique as made up of a number of steps. Some of these steps are inter-related. They can be adapted to the Charter as follows:

Step 1. Ascertain the meaning of the legislative provision in accordance with the ordinary rules of statutory interpretation. This includes, of course, the principle of legality.

Step 2. Ascertain whether the meaning arrived at by the ordinary principles of statutory interpretation limits or restricts a relevant right or freedom. Importantly, this involves identifying the relevant rights and determining their scope. If a statutory provision construed in accordance with the ordinary rules does not limit any relevant human right, that meaning can be adopted without further analysis. The meaning arrived at by the ordinary principles of statutory interpretation is compatible with human rights and there is no need for any further task of interpretation.

71 Ibid 542 [54] (Maxwell P and Weinberg JA). Their Honours adopted the interpretation which produced the least infringement of common law rights, citing Balog and Stait v Independent Commission Against Corruption (1990) 169 CLR 625, 635–6; Coco v The Queen (1994) 179 CLR 427, 437; CTM v R (2008) 236 CLR 440, 456 [35]. There were a number of other Charter issues argued in RJE, including the interpretation of s 6(2)(b), but the Court did not consider it necessary to resolve them.

72 Shortly after the delivery of judgment in RJE (2008) 21 VR 526, the Parliament of Victoria passed an Act, the Serious Sex Offenders Monitoring Amendment Act 2009 (Vic) (‘the Amending Act’), which sought to ensure that an ESO could be granted, and a determination under s 11(1) made, even where it was not more likely than not that the offender would commit a relevant offence. The Amending Act inserted sub-s (2A) and (2B) into s 11 which provided: ‘(2A) For the purposes of sub-section (1), an offender is likely to commit a relevant offence if there is a risk of the offender committing a relevant offence and that risk is both real and ongoing and cannot sensibly be ignored having regard to the nature and gravity of the possible offending. (2B) For the avoidance of doubt, subsection (1) permits a determination that an offender is likely to commit a relevant offence on the basis of a lower threshold than a threshold of more likely than not.’ The Serious Sex Offenders Monitoring Act has since been repealed and replaced by the Serious Sex Offenders (Detention and Supervision Act) 2009 (Vic) which utilises a somewhat similar test: see Nigro v Secretary to the Department of Justice (2013) 304 ALR 535.

73 Hansen [2007] 3 NZLR 1, 36 [89].

74 See Kracke v Mental Health Review Board [2009] VCAT 646 (24 April 2009) [70], [78].

75 For example, the House of Lords resolved the meaning of the legislation in R (Daly) v Secretary of State for the Home Department [2001] 2 AC 532 (‘Daly’) primarily on the basis of the principle of legality by holding that the statutory provision at issue, under which the prison had developed a policy of conducting searches in cells, failed to state with the necessary unequivocal clarity that it extended to compulsory inspection of legally privileged communications: Daly [2001] 2 AC 532, 548 [30]–[31] (Cooke LJ), 545 [21] (Bingham LJ). The reliance on common law principles alone may also be partly explained because the facts of Daly arose before the main provisions of the UKHRA came into force on October 2, 2000: Jack Beatson et al, Human Rights: Judicial Protection in the United Kingdom (2008) 1–20, n 56.
Step 3. If step 2 reveals that the legislation restricts or limits a relevant right, ascertain whether the limitation is nevertheless justified by reference to s 7(2), just as Nettle JA did.76

Step 4. If the limit is justified, there is no incompatibility with a Charter right and the meaning ascertained by ordinary principles prevails.

Step 5. If the limit is not justified, once the balancing exercise under s 7(2) has been undertaken, the Court should examine the words in question again, to see if it is possible for a meaning compatible with the relevant right or freedom, consistent with statutory purpose, to be found in them. If so, that meaning must be adopted. Again, this is precisely what Nettle JA did.

Thus, importantly, an adverse result on the s 7(2) exercise triggers the obligation to re-examine the statutory words to find a human rights-compatible meaning.

Step 6. If it is not possible to find a compatible meaning, or that meaning is not consistent with statutory purpose, the meaning ascertained by the ordinary principles of statutory construction prevails.77

An example of the use of this technique is Hansen itself. There, the New Zealand Misuse of Drugs Act 1975 (NZ) imposed a reverse onus provision on persons found in possession of more than a certain quantity of various drugs so that they were deemed to be in possession for purposes of supply or sale ‘until the contrary is proved’. Hansen was found in possession of more than 28 grams of cannabis and charged with possession with intent to supply. Hansen argued that the interpretive obligation under BORA78 required that the expression ‘until the contrary is proved’ be construed as imposing only an evidentiary burden upon him that he could discharge by evidence that would raise a reasonable doubt as to the purposes of his possession; he argued that ‘proved’ was to be read as ‘tested’.

76 The equivalent provision to s 7(2) of the Charter in BORA is s 5 which provides: ‘Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society’. Section 4 of BORA provides: ‘No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights), (a) hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or (b) decline to apply any provision of the enactment by reason only that the provision is inconsistent with any provision of this Bill of Rights’. Section 6 is cast in terms of consistency with rights and provides: ‘Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.’ The relationship between ss 4, 5 and 6 of BORA has been the subject of much judicial discourse and academic commentary.

77 Hansen [2007] 3 NZLR 1, 37 [92]. Tipping J summarized his approach as involving six separate steps:

Step 1. Ascertain Parliament’s intended meaning.
Step 2. Ascertain whether that meaning is apparently inconsistent with a relevant right or freedom.
Step 3. If apparent inconsistency is found at step 2, ascertain whether that inconsistency is nevertheless a justified limit in terms of s 5.
Step 4. If the inconsistency is a justified limit, the apparent inconsistency at step 2 is legitimized and Parliament’s intended meaning prevails.
Step 5. If Parliament’s intended meaning represents an unjustified limit under s 5, the Court must examine the words in question again under s 6, to see if it is reasonably possible for a meaning consistent or less inconsistent with the relevant right or freedom to be found in them. If so, that meaning must be adopted.
Step 6. If it is not reasonably possible to find a consistent or less inconsistent meaning, s 4 mandates that Parliament’s intended meaning be adopted.

78 BORA s 6.
On the ordinary principles of interpretation the obligation to prove the contrary had been understood as casting a legal or persuasive onus on an accused to satisfy the jury that, on the balance of probabilities, possession was not for the presumed purpose. Under that interpretation it limited the right to the presumption of innocence. The next step was to ask: was that limitation justified given the public interest associated with facilitating the conviction of those who deal in drugs and cause immeasurable harm to society?  

A majority of the Court held that the reverse onus, traditionally understood, was not a justified limit on the right. They conducted a balancing exercise and concluded that although there was a rational connection between the objective of the legislation and the interference with the presumption of innocence, the limitation was greater than reasonably necessary and not proportionate to its objective. This prompted the question: Was another meaning ‘reasonably possible’ that was consistent with the right to the presumption of innocence? Ultimately, the Court held that the statutory language, ‘until the contrary is proved’ could not bear the rights-consistent meaning for which Hansen contended — in effect ‘proved’ was too stubborn a word and its ordinary meaning too well accepted.

The majority of the Court was in no doubt about the appropriate interpretive technique generally to be applied. All four members of the majority accepted that the justification step, our s 7(2), was included as part of the task of interpretation. In particular, Tipping J explained its significance

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79 See Hansen [2007] 3 NZLR 1, 46 [125] (Tipping J).
80 Tipping, McGrath and Anderson JJ. Blanchard J dissented (at 34–5 [83]) on this issue.
81 Hansen [2007] 3 NZLR 1, 36–7 [90] (Tipping J).
82 Ibid 38 [95] (Tipping J).
83 In so doing, they distinguished the alternative interpretive technique that had been adopted, for example, in Moonen v Film & Literature Board of Review [2000] 2 NZLR 9 (‘Moenen’) which had involved, in circumstances where the relevant words were capable of more than one meaning, adopting the meaning which constituted the least possible limitation on the right or freedom in question and then inquiring as to the extent to which the adopted meaning limits the relevant right or freedom to determine consistency. This methodology had been the subject of criticism. Butler and Butler had argued that the determination of whether a legislative provision is consistent or inconsistent with a right or freedom (s 6) can only be made after consideration has been given to whether the limitation it imposes is justified (s 5): Andrew Butler and Petra Butler, The New Zealand Bill of Rights Act: A Commentary (LexisNexis, 2005) 161 [7.5.4]. The Moonen methodology had also been criticised on the basis that s 6 only requires consistency, and does not create a judicial obligation, when faced with constructional choice, to select a meaning which is least restrictive of rights: Butler and Butler, 165 [7.8.4], see also Paul Rishworth ‘Human Rights’ [1999] New Zealand Law Review 457, 469. There may be other considerations to be taken into account. The recognition that there may be several parameters to be satisfied also better reflects the complexity of statutory interpretation. In Hansen Tipping J noted (37–8 [93]–[94]) that the Moonen approach was not intended to be mandatory. Blanchard J in Hansen (27 [61]) also noted that in Moonen it was recognised that other approaches would be open.
84 Hansen [2007] 3 NZLR 1. See Blanchard J (27 [60]), Tipping J (37 [91]–[92]), Anderson J (83 [266]). In particular, McGrath J (at 66 [192]) said this: ‘An approach that ... fits the desirability of addressing s 5 [the equivalent of s 7(2)] before applying s 6 [the equivalent of s 32(1)] is first to consider whether the circumstances fall within the natural meaning of the statutory provision being applied, then second to ask whether on that meaning there appears to be an inconsistency with a protected right. If so, the third inquiry is whether the limit on the right is a justifiable one in terms of s 5. If the limit is justifiable there is no inconsistency with the Bill of Rights. If not, then fourthly consider whether there is another meaning available through which the statute can be read consistently with the right. If there is no such other meaning, finally, the stage is reached that the natural meaning must be applied as that is required by s 4 of the Bill of Rights. This approach will generally be the most appropriate way of applying the three provisions and is certainly the preferable approach in the present case. I should point out that the approach set out above is broadly consistent with that outlined by Tipping J in his reasons at para [92] above. It is also broadly similar to the test applied by Blanchard J at para [60] above.’ (emphasis added).
as recognising that Parliament has ‘an ability to legislate in terms which constitute a justified limit without having its purpose frustrated’. Importantly, all members of the majority also accepted that where the legislation imposes an unjustified limit, the interpretive obligation mandates further consideration of the meaning of the provision to see if a human rights-consistent meaning is reasonably possible. It triggers the critical requirement to re-examine.

Three immediate observations can be made of the technique endorsed.

First, the judges do not attempt to assimilate the technique they apply to the principle of legality. All common law construction principles are to be captured within the first step in the methodology.

Second, the justification step taken by the judges in Step 3 is one for which there is no equivalent separately articulated step within the principle of legality. Historically at least, that principle has not been pronounced in a manner that assists in determining how to balance competing rights, nor assists in assessing whether the extent of interference with a right is justified. By contrast, the justification step involves the identification of a rational connection between the limitation and the objective for which a statutory provision limits rights, and an assessment of whether the limitation is proportionate to that objective. In engaging in the balancing exercise in the way they did, their Honours in Hansen treated the interpretive obligation as going beyond the principle of legality.

I should say that while I consider that the origins and the orthodox formulation of the principle of legality do not suggest that it incorporates the articulated assessment of proportionality engaged in by the majority in Hansen, or to be found in s 7(2), this is not to deny that the principle is a dynamic doctrine of the common law. The underlying width and potential development of the doctrine will unfold over time. It was not the purpose of s 32(1) to alter the common law or inhibit the development of its doctrines. It may be that, in applying the principle, there has sometimes been an implicit and unstated assessment of the reasonableness of the extent of interference with a right. The assessment may demand more rigour when it is patently clear that a statute authorises an interference with rights and the interpretive contest is focused upon the degree of interference authorised. These are unresolved questions for another day.

The third observation is that the Court in Hansen was sensitive to the particular words chosen by the Parliament and the inelasticity of those expressions. It refused to endorse an interpretation

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85 Ibid 37 [91].
86 Ibid 27 [60] (Blanchard J), 37 [91]–[92] (Tipping J), 66 [192] (McGrath J), Anderson J (83 [266]).
87 Ibid 36 [89] where Tipping J said: ‘The initial interpretation exercise should proceed according to all relevant construction principles, including the proposition inherent in s 6 that a meaning inconsistent with rights and freedoms affirmed by the Bill of Rights should not be lightly attributed to Parliament’.
89 This is particularly so given the well-deserved degree of thoughtful academic and judicial attention the principle has attracted in recent years, including Chief Justice French, ‘Protecting Human Rights Without a Bill of Rights’ (Speech delivered at the John Marshall Law School, Chicago, 26 January 2010), see also Momcilovic, (2011) 245 CLR 1, 46–7 [42]–[45] (French CJ).
90 See PJ v Melbourne Health (Patrick’s Case) [2011] VSC 327, [243]–[271], and, in particular, the English cases cited, including Marcel v Commissioner of Police [1992] CH 225; R v Secretary of State for the Home Department; Ex parte Leech [1994] QB 198; and R (Daly) v Secretary of State for the Home Department [2001] 2 AC 532.
that was not open on the language.

The methodology endorsed in *Hansen* remains the authoritative interpretive technique in New Zealand\(^{91}\) although other approaches are open. It is recognised that the *Hansen* approach will not necessarily be applied on every occasion.

Another early *Charter* case was *Hogan v Hinch*. The broadcaster, Derryn Hinch, was charged with contravening suppression orders protecting the identity of certain sex offenders on ESOs because he published the names of the offenders on his website and in comments he made at a public rally.\(^{92}\)

The Australian High Court endorsed the utility of a test based on proportionality within the context of the interpretive obligation under the *Charter*. This was, admittedly, not as part of a methodology incorporating the general limitation clause, s 7(2), but as a specific balancing exercise in the context of the express internal limitations clause in the right to freedom of expression, under s 15(3) of the *Charter*. But both forms of balancing exercise are of the same character.

The case concerned the power of the County and Supreme Courts to make suppression orders in respect of proceedings for ESOs under, again, the *Serious Sex Offenders Monitoring Act*. That Act conferred the power to make orders prohibiting the publication of any information that might enable an offender to be identified or would identify another person who had appeared or given evidence in the proceeding. It was a precondition to the making of a suppression order that the court be ‘satisfied that it was in the public interest to do so’. Section 42(3) made it an offence to contravene an order.

There were two *Charter* questions. The first concerned the scope of the expression ‘the public interest’. In argument Gummow J made the point that, after the *Charter’s* enactment, ‘public interest’ in Victoria must include pt 2 of the *Charter*.\(^{93}\) This was ultimately reflected in the judgment of the plurality, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ. They observed that the expression ‘in the public interest’ must, of course, be judged by reference to the subject, scope and purpose of the Act. The Act was directed at the enhancement of community protection by the supervision of offenders who have completed their custodial sentences through an intrusive monitoring regime requiring a fixed place of residence. However, their Honours acknowledged that ‘public interest’ must now also be judged by reference to the additional dimension of the requirement under s 32(1) to adopt an interpretation compatible with the civil and political rights in pt 2 of the *Charter*.\(^{94}\) This underscored the importance of arriving at a human rights-compatible interpretation.

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91 It has been consistently applied since. See, for example, *R v Wenzel* [2009] 3 NZLR 47, 53 [31]–[36] (Robertson, O’Regan and Arnold JJ); *Commerce Commission v Air New Zealand Ltd* [2011] 2 NZLR 194, 2–9–12 [65]–[77] (Glazebrook, Arnold and Harrison JJ); *AMM HC v Auckland CIV* [2010] NZFLR 629. See also *Morse v Police* [2012] 2 NZLR 1, 35 [105].

92 The criminal prosecution commenced in the Magistrates’ Court of Victoria but was removed to the High Court, pursuant to s 40(1) of the *Judiciary Act 1903* (Cth).

93 *Hogan v Hinch* (2011) 243 CLR 506, 512.

94 Ibid 548 [69]–[70].
The second question concerned the interpretation of the word ‘contravention’. Their Honours identified as relevant the right of offenders not to have their privacy arbitrarily interfered with as well as the right of the defendant, Hinch, to freedom of expression in any chosen medium. They observed that the right to freedom of expression is subject to lawful restrictions ‘reasonably necessary’ to respect the rights and reputations of other persons, including offenders. Significantly, they understood that this demanded a proportionality analysis. They said:

The phrase ‘reasonably necessary’, which is used in s 15 of the [Charter], supplies a criterion for judicial evaluation and decision-making in many fields. Examples from the common law, statute law and Australian constitutional law were collected and discussed by Gleeson CJ in Thomas v Mowbray. In an earlier decision, his Honour had pointed out that ‘necessary’ does not always mean ‘essential’ or ‘unavoidable’. He also observed that, particularly in the field of human rights legislation, the term ‘proportionality’ might be used to indicate what was involved in the judicial evaluation of competing interests which were rarely expressed in absolute terms.

Most importantly, they conceived of the proportionality analysis as part of the task of arriving at a human rights-compatible interpretation. They concluded that the phrase ‘publish or cause to be published … in contravention of an order’ should be construed as containing a knowledge element; that is, as requiring knowledge of the order in contravention of which the publication is made. They held that ‘contravention’ was used ‘in the sense of disputation or denial rather than mere failure to comply with an unknown requirement’. As they put it, ‘[s]uch a construction … better accommodates the provision in s 15(3) of the [Charter] respecting reasonably necessary restrictions upon the right to freedom of expression’.

While the reasoning was telescoped, in effect what the Court was doing was to reject the meaning of ‘contravention’ as a mere failure to comply with an unknown requirement on the basis that such an interpretation would unreasonably restrict the right to freedom of expression. In other words, the Court viewed that meaning as imposing an unjustified limit on the right. To arrive at an interpretation that was compatible with the right required the Court to examine the word ‘contravention’ again to see if it was possible for a meaning compatible with freedom of expression to be found. This it did by interpreting ‘contravention’ as disputation or denial, which entailed that the offender had knowledge of the order. This clearly reflects RJE and Hansen territory.

That the Court conducted a balancing exercise is demonstrated by the reason it proffered for the constructional choice it made, namely, that the offence of contravening a suppression order is a reasonably necessary restriction on the right to freedom of expression providing that an element

95 Ibid 548–9 [71].
96 Charter s 13(a).
97 Ibid s 15(2).
98 Ibid s 15(3).
99 Hogan v Hinch (2011) 243 CLR 506, 549 [72] (footnotes and citation omitted).
100 Ibid 550 [78].
101 Ibid 550–1 [78].
of the offence is that the offender has knowledge of the order.

There was no mention of the principle of legality in the plurality’s reasoning. It was referred to by French CJ in a separate concurring judgment.102

It was perhaps too much to hope for that the conceptual clarity, and depth of agreement, manifest in Hogan v Hinch would continue in the third stage of the Charter.

The Third Stage — Momcilovic and its Implications

Relevantly, at the core of Momcilovic was the claim that s 5 of the Drugs, Poisons and Controlled Substances Act 1981 (Vic) (the ‘Drugs Act’), by which drugs found upon land or premises occupied by a person were deemed to be in that person’s possession, ‘unless that person satisfies the court to the contrary’, should be construed as imposing only an evidential onus. It was argued that this was required by operation of s 32(1) of the Charter to avoid what would otherwise be an unjustifiable limitation on the right to the presumption of innocence.103

The High Court104 held that this deeming provision ought not to have been relied upon at trial because the accused had not been charged with the offence of possession per se105 but with the separate offence of trafficking. It held that s 5 did not apply to the offence of trafficking106 where the offence was based upon conduct satisfying the compound expression ‘possession for sale’.107 Gummow J expressly supported the adoption of an interpretation of ‘possession for sale’ as a composite expression to which s 5 did not apply, on the basis of an application of s 32(1) of the Charter.108 Given that s 5 was inapplicable, there was no displacement of the presumption of innocence.109 A majority of the Court also held that s 32(1) would not countenance an interpretation of s 5 that imposed only an evidential onus.110

102 Ibid 526 [5], 535 [27], 536 [29], 538 [36].
103 The Charter argument was put in the alternative to the submission that the interpretation flowed on ordinary principles.
105 Drugs Act s 73(1).
106 Ibid s 71AC.
107 Momcilovic (2011) 245 CLR 1, 31 [5], 58 [72]–[73] (French CJ); 80 [133], 99 [198] (Gummow J); 123 [280] (Hayne J); and 221 [581], 229–30 [609]–[611] (Crennan and Kiefel JJ). Thus, it was held that the trial had miscarried by reason of the misapplication of s 5 of the Drugs Act and the appeal was allowed. The appellant’s conviction was quashed and the sentence set aside. Bell J held that s 5 was engaged in a prosecution for the offence of trafficking contrary to s 71AC and it was not possible, consistently with the purpose of s 5, to interpret s 5 otherwise (252 [692]). Her Honour held that the trial had nevertheless miscarried because the failure of the trial judge to direct the jury that the appellant could not be convicted of trafficking unless the prosecution proved her knowledge of its existence was productive of a substantial miscarriage of justice: at 254–5 [700].
108 Ibid 99 [199]. He saw s 32(1) as providing additional support for the construction that could otherwise be arrived at without s 32(1).
109 Ibid 99 [200].
110 Ibid 31 [5] (French CJ); 208 [537] (Crennan and Kiefel JJ); 240 [659], 242–3 [665]–[666] (Bell J).
The significance of *Momcilovic* on the question of statutory techniques under the *Charter* can be divided into three central propositions, one for which the case stands as authority,\(^{111}\) one for which it does not, and one which it leaves unresolved.

Possibly the clearest proposition for which *Momcilovic* stands as authority is that the scope of permissible interpretations under s 32(1) does not extend to those countenanced under the interpretive obligation of the UKHRA, s 3, and in particular does not extend to the type of ‘strong or remedial approach’\(^ {112}\) to be found in *Ghaidan*.\(^ {113}\) That proposition, supported by six of the seven judges,\(^ {114}\) and the conception of the *Charter* it reflects, stands to be applied in future cases. Associate Professor Julie Debeljak has argued forcefully that it is inconsistent with the *Charter*’s legislative history and intended operation.\(^ {115}\) On this issue clearly reasonable minds can differ.

The terms in which s 32(1) was drafted include a restraint that is not reflected in the comparable provision in the United Kingdom, the restraint that any interpretation arrived at must be consistent with the purpose of the statutory provision being interpreted. The obligation is to arrive at a human rights compatible meaning so long as that meaning is also consistent with legislative purpose. As the High Court has recently stated, this is seldom an all or nothing matter.\(^ {116}\) There may be multiple statutory purposes and they may be competing.\(^ {117}\) Under the *Charter*, there are two matters to keep in mind simultaneously in the task of interpretation, legislative purpose and human rights compatibility. They may not always both point in the same direction and there may be constructional choices to be made that satisfy one parameter more than the other, just as an interpretation may satisfy one purpose more than another. On one view, the express requirement of consistency with purpose in s 32(1) reflects no more than the observations in the House of Lords in *Ghaidan* that any interpretation must ‘go with the grain of the legislation’.\(^ {118}\) On another view, the requirement is much more stringent.

Quite apart from the High Court’s reasoning in *Momcilovic*, I have observed over almost ten years a multitude of responses to the conclusion of the House of Lords in *Ghaidan*, that the term ‘spouse’ defined to include a person living with another ‘as his or her wife or husband’, and expressly as not confined to a person in a relationship of marriage, extended to a same sex partner. The response

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\(^{111}\) Some commentators have pointed out that, given the disposition of the appeal, most of the High Court’s reasoning was obiter. Nevertheless it constitutes seriously considered dicta and, on that basis, is binding; see *Farah Constructions Pty Limited v Say-Dee Pty Ltd* (2007) 230 CLR 89, 150–1 [134].

\(^{112}\) *Momcilovic v The Queen* (2011) 245 CLR 1, 38 [20], 48–9 [47] (French CJ).

\(^{113}\) *Ghaidan* [2004] 2 AC 557.

\(^{114}\) See *Momcilovic* (2011) 245 CLR 1, 38 [20], 54–5 [61]–[62] (French CJ); 87-90 [148]–[160] (Gummow J); 123 [280]; 211 [546], 219 [574] (Crennan and Kiefel JJ); and 250 [684] (Bell J).


\(^{118}\) This was how the requirement for consistency with purpose was characterised in the Report, above n 14, 83.
given has typically, although not universally, been informed by whether the speaker accepts that the relationship between a same-sex couple can have a husband-like and wife-like character to it and ‘as’ is read ‘as if’ they were in that relationship. If that is rejected, the conclusion is seen as inconsistent with the purpose of the legislation conferring the right to succeed to a statutory tenancy on the tenant’s spouse. By contrast, if a same sex relationship is viewed as analogous to the relationship between a husband and wife, as a heterosexual de facto relationship is, the conclusion is seen as consistent with statutory purpose.

Those who reject the conclusion in Ghaidan make much of the intention of the enacting Parliament. This is despite the fact that the High Court has repeatedly and powerfully emphasised that legislative intention is not an expression of the collective subjective mental state of the legislators; rather, when a court states it has engaged in the ‘ascertainment of legislative intention’ this is ‘a statement of compliance with the rules of construction, common law and statutory’ and compatibility with human rights is now one of the rules of construction.

In my view, regrettably, the controversial subject-matter in Ghaidan impeded the likelihood of an acceptance that s 32(1) stood as equivalent to the United Kingdom’s interpretive obligation as applied in Ghaidan. Momcilovic has made it clear that analogies with BORA are likely to be more productive than reliance upon meanings adopted under s 3 of the UKHRA. This may be the beginning of an Australasian approach to human rights law.

Interpretations that are ‘possible’ under the Charter may involve departure from literal or grammatical meaning, just as was recognised in Project Blue Sky Inc v Australian Broadcasting Authority if that is necessary to comply with the statutory directive under s 32(1). However, what is also suggested by the rejection of the United Kingdom’s approach and the establishment of an analogous technique to that adopted in New Zealand is that, in future cases, much will depend on the elasticity of the statutory language in question. Open-ended expressions like ‘public interest’ lend themselves to dimensions of meaning that can accommodate human rights standards. The same is not true of comparatively inflexible words like ‘proved’. Flexibility may be found, however, as it was in Momcilovic, in the inter-play of definitions and offences, or in determining elements of offences as in Hogan v Hinch. What seems tolerably clear is that the Australian approach is not to be one of uncovering the underlying concept expressed by a word and adopting a human rights-compatible interpretation that remains faithful to the concept yet conveys a meaning that the particular statutory expression cannot bear. This may simply reflect the importance that the High Court has placed in recent years on fidelity to the statutory language.

The key proposition which Momcilovic left unresolved was the relationship between s 32(1) and s 7(2). Nevertheless four of the judges, Gummow, Hayne, Heydon and Bell JJ, accepted that the balancing exercise of s 7(2) was to be undertaken as part of the task of interpretation in the course of seeking to arrive at a human rights-compatible meaning. As Heydon J was in dissent,

119 Lacey v A-G (Qld) (2011) 242 CLR 573, 592 [43].
121 See Momcilovic (2011) 245 CLR 1, 92 [170] (Gummow J).
his analysis of the relevant relationship cannot be relied upon to establish a binding ratio on the point. But the reasoning of all four judges cannot be ignored.

Gummow J, with whom Hayne J relevantly agreed, drew a direct analogy between s 7(2) and the New Zealand general limitation clause, s 5.122 He then cited Hansen and the methodology I described above, namely, that the general limitation clause is to be considered first before arriving at a conclusion on the meaning of the statutory provision in issue and its compatibility with human rights, under the interpretive obligation in s 6 of BORA. He cited the reasons of McGrath J while noting that Blanchard J and Tipping J spoke to similar effect.123 He went on to say:

Section 32(1) is directed to the interpretation of statutory provisions in a way which is compatible with the human right in question, as identified and described in Pt 2, including, where it has been engaged, s 7(2). This relationship between ss 32(1) and 7(2) is thus similar to that between ss 5 and 6 of the NZ Act [the comparable provisions in BORA].

More generally he considered the reasoning of the majority in Hansen to be of utility.

This is not surprising given the ease with which the Court applied the specific proportionality analysis called for in Hogan v Hinch,124 to which Gummow J referred in Momcilovic, an analysis that carried the support, notably, of Heydon, Crennan and Kiefel JJ as well as Hayne and Bell JJ.

With great respect to their Honours, no explanation is given by Crennan and Kiefel JJ in Momcilovic as to why they accepted the specific proportionality analysis in Hogan v Hinch as part of the task of interpretation and yet in Momcilovic they refused to accept that a more general proportionality

122 The difference in the disposition of the appeal which Hayne J would have ordered stemmed from his conclusion that s 71AC of the Drugs Act was inconsistent with s 302.4 of the Criminal Code (Cth) and was thus invalidated by s 109 of the Constitution (see Momcilovic (2011) 245 CLR 1, 123 [80]). On this issue he disagreed with the other members of the Court. The disagreement did not stem from his approach to the Charter.

123 Momcilovic (2011) 245 CLR 1, 91 [166] where Gummow J said:

In Hansen, McGrath J said: ‘As between ss 5 [the limitations clause] and 6 [the interpretive obligation] it will usually be appropriate for a Court first to consider whether under s 5 there is scope for a justified limitation of the right in issue. The stage is then set for ascertaining if there is scope to read the right, as modified by a justifiable limitation, as consistent with the other enactment.’ Blanchard J and Tipping J spoke to similar effect (citations and footnotes omitted).

124 A similar specific proportionality analysis was carried out, post-Momcilovic, by Nettle JA in Noone, Director of Consumer Affairs Victoria v Operation Smile (Australia) Inc [2012] VSCA 91, [143]–[164]. He held that the prohibition of misleading and deceptive conduct in trade or commerce under s 9 of the Fair Trading Act 1999 (Vic) was compatible with the right to freedom of expression because it was reasonably necessary to respect the rights of other persons, relying on Hogan v Hinch: at [148]. The context was one where statements had been made to the effect that certain alternative cancer treatments involving vitamin C can prolong and improve life. All members of the Court, Warren CJ, Nettle JA and Cavanough AJA, also held that the right to freedom of expression did not require that the prohibition be construed as requiring that the contravenor knew or was reckless as to whether the conduct was misleading or deceptive: at [12] (Warren CJ and Cavanough AJA),[165-6] (Nettle JA). For Warren CJ and Cavanough AJA this was because such a construction would defeat the purpose of the prohibition: [16]-[20]. Nettle JA agreed that such a construction would defeat the purpose and held, in any event, the absence of a mens rea requirement was not incompatible with the right to freedom of expression ([166]) relying, by analogy, on Canadian authority that the absence of a mens rea requirement for misleading and deceptive conduct in regulatory offences akin to s 9 of the Fair Trading Act 1999 does not offend the Canadian Charter of Rights and Freedoms. R v Wholesale Travel Group Inc (1992) 84 DLR (4th) 161; R v 671135 Ontario Ltd (Unreported, Ontario Supreme Court, Mackinnon J, 29 March 1994).
analysis was incorporated within s 32(1).

When their Honours express the view that the justification exercise ‘cannot affect the interpretive process mandated under s 32(1)’\(^\text{125}\) it is almost as though they had forgotten that the justification exercise in which they had engaged in *Hogan v Hinch* had directly informed the interpretive process called for there under s 32(1).

Bell J identified precisely this link when she said:

> Consideration of whether a statutory provision is compatible with the right of freedom of expression must require determination of whether any apparent limitation is a reasonably necessary limitation within s 15(3) of the Charter. It is a task that may be thought to be of the same character as the determination of whether an apparent limitation on [for example] the right of peaceful assembly is demonstrably justified within s 7(2).\(^\text{126}\)

Her Honour implicitly recognised the choice the Committee had earlier faced between two types of balancing exercise, one involving internal limitations on each right, or the option of a general limitation clause, both exercises being of the same character.

She also recognised what ‘compatibility’ means. On the basis of the *Charter’s* legislative history, and the text and structure of the *Charter*, her Honour said, ‘[t]he Charter’s recognition that rights may be reasonably limited and that their exercise may require consideration of the rights of others informs the concept of compatibility with human rights’.\(^\text{127}\) In rejecting the submission that compatibility was to be assessed before evaluating whether any limitation was justified, her Honour considered the obligation on Members of Parliament and stated crisply:

> It is a questionable proposition that informed debate concerning the human rights implications of proposed legislation is advanced by a construction of the Charter that would require statements of incompatibility for every demonstrably justified limitation of a Charter right.\(^\text{128}\)

The same *reductio* reasoning was employed by Heydon J.\(^\text{129}\)

Importantly, Bell J expressly endorsed the *Hansen* interpretive technique, the same technique that had been used in the early years of the *Charter* in *RJE*. Her Honour concluded:


\(^{126}\) Ibid 249 [682] (Bell J).

\(^{127}\) Ibid 247–8 [678] (Bell J).

\(^{128}\) Ibid 248 [679] (Bell J). By contrast with the compatibility statements required under the *Charter*, under s 7 of BORA the Attorney-General is only required to make a statement when, in his or her opinion, any provision in a Bill ‘appears to be inconsistent with any of the rights and freedoms’ in BORA. This appeared to play a part in the reasoning of Elias CJ in *Hansen* [2007] 3 NZLR 1, 13 [16] that inconsistency should be assessed before any assessment is made of whether a limitation imposed on a right by statute is justified. Her Honour said: ‘Interpreting s 6 to refer to the rights identified in Part 2 without qualification is also consistent with the obligation under s 7, which would otherwise require the Attorney-General to draw to the attention of the House only provisions which are inconsistent with the rights as reasonably limited’. Her Honour considered that this would unduly restrict the obligation on the Attorney-General; no such consequence would flow in relation to the *Charter* because the obligation to prepare and table compatibility statements applies to all Bills and not only those where there is an apparent incompatibility.

\(^{129}\) Ibid 165–6 [416].
The Victorian Attorney-General’s submission that the question of justification in s 7(2) is part
of, and inseparable from, the process of determining whether a possible interpretation of a
statutory provision is compatible with human rights should be accepted. It is a construction that
recognises the central place of s 7 in the statutory scheme and requires the court to give effect to
the Charter’s recognition that rights are not absolute and may need to be balanced against one
another.130

In my view her Honour’s reasoning, and the reasoning of the other three judges on this issue, is
faithful to the origins and purpose of the Charter, and to the text and structure of the Charter, in
that they accept that the notion of compatibility depends upon s 7(2), that s 7(2) is central to the
Charter, and that it informs the interpretive task under s 32(1). I consider that the reasoning of
the majority on this issue must be taken account of in any future Charter case invoking s 32(1),
especially given that the context is one in which the High Court overturned the decision below.
Moreover, while in Momcilovic three judges concluded that s 7(2) had no role to play in discharging
the interpretive obligation, two of those three, Crennan and Kiefel JJ, rejected the application of
s 7(2) that had found favour below.131

Momcilovic is also important for the proposition for which it does not stand as authority. It is
the proposition that s 32(1) is a statutory codification of the principle of legality. I have already
expressed the view that this proposition does not find support in the legislative history accepting,
of course, that extrinsic materials are no substitute for statutory language. But, as I’ve said, nor
does it find support in the reasoning in Hansen as approved by the High Court.

Nevertheless, there is a commonly expressed view that the High Court in Momcilovic concluded
that s 32(1) was to be read as a statutory expression of the principle of legality, with a greater sphere
of application due to the range of protected rights extending beyond those recognised at common
law in such cases as Potter v Minahan132 and Coco.133 In my view, a close reading of the judgments

130 Ibid 249–50 [683]. Her Honour referred to the judgment of Blanchard J in Hansen (emphasis in original):

It would surely be difficult to argue that many, if any, statutes can be read completely consistently with the full breadth
of each and every right and freedom in the Bill of Rights. Accordingly, it is only those meanings that unjustifiably limit
guaranteed rights or freedoms that s 6 requires the Court to discard, if the statutory language so permits.

131 Momcilovic (2011) 245 CLR 1, 208–9 [539], 220 [575], where their Honours say: ‘It is not possible to read
s 7(2) so that it operates with s 32(1) or s 36(2) ... it forms no part of the role of the courts in interpreting
a statutory provision in connection with the Charter or the making of a declaration by the Supreme
Court’, and further (220 [576]): ‘It follows that neither the appellant’s methodology nor that of the Court
of Appeal was correct in their application of s 7(2)’. See also French CJ (44[36]) that s 7(2) could play at
most a part in the discretionary decision whether to make a declaration of inconsistent interpretation
and not in determining whether a statutory provision cannot be interpreted consistently with a right.

132 (1908) 7 CLR 277, 304 (O’Connor J).

133 Coco v The Queen (1993) 179 CLR 427, 436–7; Electrolux Home Products Pty Ltd v Australian Workers’ Union
in *Momcilovic* indicates that only French CJ accepted this analysis.  

There is no discussion about the relationship between s 32(1) and the principle of legality by Crennan and Kiefel JJ. Their Honours mention the principle of legality\(^{135}\) before they turn their attention to the *Charter*. They mention it again in their observation that many of the rights and freedoms protected under the *Charter* have for some time been recognised at common law.\(^{136}\) Perhaps the closest their Honours come to endorsing the proposition is the statement that ‘the process referred to in s 32(1) is clearly one of interpretation in the ordinary way’\(^{137}\) but this may only reflect that s 32(1) does not embrace a strong or remedial approach or, in their Honours’ view, is divorced from s 7(2). There is no identification of any of the ordinary rules of interpretation as carrying more weight than others in this context. In particular, there is no singling out of the principle of legality as linked to s 32(1) nor an attempt to assimilate s 32(1) to that principle.

Section 32(1) is not to be treated as a statutory codification of the principle of legality for the other four judges for whom the proportionality exercise under s 7(2) is a necessary part of the task of interpretation. To treat the High Court in *Momcilovic* as having endorsed the proposition that s 32(1) adds nothing to the common law principle of legality, other than an enlarged sphere of application, is, in my view, not a true reflection of the complexity of reasoning exhibited in the judgments.

In summary, a way through the impasse I referred to at the outset can be encapsulated in the following five propositions:

1. The underlying unifying concept of the *Charter* is compatibility;
2. An assessment of compatibility, wherever it occurs under the *Charter*, requires an evaluation of whether any limit or interference with a right is unjustified; that is, whether any limitation is greater than reasonably necessary and not proportionate to its objective;
3. That assessment is to be conducted in accordance with the five factors under s 7(2); this exercise is of the same character as that undertaken more specifically with respect to the right to freedom of expression (under s 15(3));
4. The interpretive obligation under s 32(1) involves determining whether an interpretation on ordinary principles imposes a limit on a right that is unjustified; only where that is so, the Court must re-examine the statutory words to arrive at a human rights-compatible meaning.

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134 See, for example, *Momcilovic* (2011) 245 CLR 1, 50 [51] (French CJ) relying (48–9 [47]) on Lord Hoffman’s remarks in *R v Secretary of State for the Home Department: Ex parte Simms* [2000] 2 AC 115, 132 and in *R v Inland Revenue Commissioners; ex parte Wilkinson* [2006] 1 All ER 529, 535 and on Lord Rodger in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557. His Honour accepted that this differed from the approach of the majority in *Ghaidan* and that ‘[n]otwithstanding the difference in approach between *Ghaidan* and the later case of *Wilkinson*, it is *Ghaidan* which … is routinely cited and applied and treated as authoritative in leading United Kingdom text books and journals’ (49 [48] footnotes and citations omitted).

135 *Momcilovic* (2011) 245 CLR 1, 200 [512].

136 Ibid 203 [522].

137 Ibid 219 [574]. See also 210 [545]–[546].
An adverse result on the s 7(2) exercise in this context triggers the obligation to re-examine the statutory language to find a human rights-compatible interpretation;

(5) The human-rights compatible meaning should be adopted but only if that meaning is consistent with legislative purpose and otherwise ‘possible’, considering in particular the flexibility or otherwise of the statutory language.

A six-member plurality of the High Court applied this approach in Hogan v Hinch and a four-member majority in Momcilovic understood that these principles form the logic of the interpretive obligation under the Charter.

It is apparent that the voyage undertaken by the Charter has been a choppy one. It has sought to cope as best it can and has demonstrated resilience. We have good reason to be hopeful that it can function as a significant public law initiative.

Statutory Interpretive Techniques Under the *Charter* — Section 32*

The Hon Sir Anthony Mason AC KBE GBM†

**Introductions**

My views on the interpretive provision of the *Victorian Charter of Human Rights and Responsibilities 2006* (Vic) (‘the Charter’) — s 32(1) — are fairly well known. I have not had anything to say publicly about the impact of *Momcilovic v The Queen*¹ and this paper presents an unwelcome opportunity to do so. I also want to discuss reasons for the difference between the Australian and English approaches to interpretive provisions such as s 32(1) and s 3(1) of the *Human Rights Act 1998* (UK) c 42. And I shall very briefly mention the relationship between ss 32(1) and 7(2), a matter that has been dealt with comprehensively by Justice Tate.²

**The Relationship Between Sections 32(1) and 7(2)**

In the interests of continuity, I should mention first my view on the relationship between ss 32(1) and 7(2). Although my views on this question have wavered in the past, I agree that s 7(2) is part of the interpretive process. Justice Tate has discussed the reasons comprehensively. For me, the clinching reason is that, if s 7(2) is part of the interpretive process, the process offers an immediate prospect of vindication of the legislative provisions as enacted before any reading down or other adjustment of the legislation is undertaken in order to comply with s 32(1).

*Momcilovic*

In confronting *Momcilovic*, I liken myself to a Roman augur picking over the entrails of a freshly slaughtered beast (or chicken) with a view to predicting future events. True it is that French CJ was alone in *Momcilovic* in expressly equating s 32(1) with the principle of legality. And the pre-enactment history of the *Charter* referred to by Heydon J in his destructive dissent in *Momcilovic*, supplemented by Justice Tate’s account of the pre-enactment history,³ supports an interpretive approach which travels beyond the principle of legality.

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² Justice Pamela Tate, ‘Statutory Interpretive Techniques under the *Charter*: Three Stages of the *Charter* — Has the Original Conception and Early Technique Survived the Twists of the High Court’s Reasoning in *Momcilovic*’ [2014] 2 Judicial College of Victoria Online Journal 43.
³ Ibid 44–52.

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* This paper is based on a presentation at the *Human Rights under the Charter: The Development of Human Rights Law in Victoria* conference, convened by the Supreme Court of Victoria, the Faculty of Law of Monash University, the Judicial College of Victoria, Victoria Law Foundation, and the Human Rights Law Centre, Melbourne, 7 to 8 August 2014.
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One proposition which clearly emerges from the High Court judgments in *Momcilovic* is that the majority of the Court (the entire Court except Heydon J who was in dissent) rejected a *Ghaidan v Godin-Mendoza* interpretation of s 32(1) of the *Charter*. For my part, I have always thought that a *Ghaidan* interpretation was sustainable, though I suspected that the High Court, as well as many Australian judges and lawyers, would find it too indigestible.

The grounds for that suspicion were, first, the popular attitudinal opposition to a Bill of Rights mentioned by Nettle JA in his opening remarks this morning and, secondly, the lack of enthusiasm for a Bill of Rights on the part of a not inconsiderable number of judges and lawyers attributable to the continuing influence of Sir Owen Dixon. His influence found expression in a very narrow view of the scope of judicial power and opposition to the courts exercising jurisdiction to determine controversial or political questions which might affect public confidence in the judiciary.5

Until the High Court has another opportunity to consider s 32(1), when it will be differently composed with at least two new Justices (Gageler and Keane JJ) and perhaps four (with Hayne and Crennan JJ shortly to retire), the critical question is: what interpretation of s 32(1) did the High Court embrace in *Momcilovic*? The question is much easier to state than to answer, simply because there is no clear *ratio* on the question.

French CJ equated s 32(1) to the common law principle of legality — of that there can be no doubt.6 The Victorian Court of Appeal has concluded in this respect that a majority of the Court in *Momcilovic* took the same view. This was the view taken by the Victorian Court of Appeal (Warren CJ, Nettle and Redlich JJ) in *Slaveski v Smith*.7 In that case their Honours said:

French CJ, Crennan and Kiefel JJ and Gummow J, Hayne J and Bell J each held in separate judgments that s 32(1) does not require or authorise a court to depart from the ordinary meaning of a statutory provision, or the intention of Parliament in enacting the provision, but in effect requires the court to discern the purpose of the provision in question in accordance with the ordinary techniques of statutory construction essayed in *Project Blue Sky Inc v Australian Broadcasting Authority*.8

In *Slaveski*, their Honours, having quoted the remarks of French CJ which equated the operation of s 32(1) to the operation of the principle of legality, treated those remarks as encapsulating the view of the High Court in *Momcilovic*. Their Honours had earlier said:

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4  [2004] 2 AC 557 (‘*Ghaidan*’).
5  Sir Owen Dixon’s lack of enthusiasm for a Bill of Rights was evident in his address to the American Bar Association on 24 August 1942; see ‘Two Constitutions Compared’ in S Woinarski (ed), *Jesting Pilate and Other Papers and Addresses* (Law Book, 1965) 100, 102, 104.
6  His Honour gave effect to the proposition stated in *Zheng v Cai* (2009) 239 CLR 446, 455, namely that judicial interpretation of a law is ‘an expression of the constitutional relationship between the arms of government with respect to the making, interpretation and application of law’.
7  (2012) 34 VR 206 (‘*Slaveski*’). See also *Noone v Operation Smile Australia Inc* [2012] VSCA 91 (11 May 2012) [139] (‘*Noone*’).
Consequently, if the words of a statute are clear, the court must give them that meaning. If the words of a statute are capable of more than one meaning, the court should give them whichever of those meanings best accords with the human right in question. Exceptionally, a court may depart from grammatical rules to give an unusual or strained meaning to a provision if the grammatical construction would contradict the apparent purpose of the enactment. Even if, however, it is not otherwise possible to ensure that the enjoyment of the human right in question is not defeated or diminished, it is impermissible for a court to attribute a meaning to a provision which is inconsistent with both the grammatical meaning and apparent purpose of the of the enactment.\(^9\)

The Victorian Court of Appeal’s view of the *Momcilovic* judgments is a tenable view, though there is scope for argument about its correctness. What is surprising is the absence of a clear indication in the judgments other than those of French CJ and Heydon J of the precise limits of s 32(1) and of its scope as compared with the principle of legality. The Court of Appeal’s view is not based on an analysis of the *Momcilovic* judgments other than that of French CJ.

There is a strong case for saying that the joint judgment of Crennan and Kiefel JJ considered that s 32(1) did no more than invoke the ordinary principles of interpretation and did not go beyond the principle of legality.\(^10\) They stated that ‘[i]t cannot therefore be said that s 32(1) requires the language of a section to be strained to effect consistency with the [Charter].’\(^11\)

Less clear is the judgment of Gummow J (with whom Hayne J relevantly agreed). The critical element of his judgment is captured in the words ‘[t]he duty of a court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have’.\(^12\) But that

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\text{[t]he context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning.}\(^13\)
\]

Gummow J then said ‘[t]hat reasoning applies *a fortiori* where there is a canon of construction mandated, not by the common law, but by a specific provision such as s 32(1)’\(^14\). Gummow J was, however, at pains to identify the specific United Kingdom constitutional framework which led to the adoption of the *Ghaidan* interpretation and stated that the New Zealand Supreme Court decision *R v Hansen*\(^15\) was of greater utility.

The last sentence quoted in the preceding paragraph is Delphic. Its significance depends upon

\(^{10}\) *Momcilovic* (2011) 245 CLR 1, 210 [545].
\(^{11}\) Ibid 217 [566].
\(^{13}\) *Momcilovic* (2011) 245 CLR 1, 92 [70], quoting *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 384 [78] (citations omitted).
\(^{14}\) *Momcilovic* (2011) 245 CLR 1, 92–3 [170].
\(^{15}\) [2007] 3 NZLR 1(*Hansen*).
the Latin expression *a fortiori* which means ‘by way of something stronger’ or ‘with yet stronger reason’. In other words, the presumption against interference with human rights and fundamental freedoms is stronger because it has statutory force. It does not necessarily mean that s 32(1) requires an interpretation of the language which in its scope would travel beyond that authorised by the ordinary principles of interpretation, though it could conceivably have that wider meaning. Gummow J may be saying, as Lord Hoffmann said in *R v Her Majesty’s Commissioners of Inland Revenue; ex parte Wilkinson*,\(^\text{16}\) that the interpretation mandated by s 3 of the Human Rights Act ‘means the interpretation which the reasonable reader would give to the statute read against its background, including, now, an assumption that it was not intended to be incompatible with Convention rights’.\(^\text{17}\) Earlier His Lordship had said that ‘the question is still one of interpretation, … the ascertainment of what, taking into account the presumption created by section 3, Parliament would reasonably be understood to have meant by using the actual language of the statute’.\(^\text{18}\)

Although it is possible that Gummow J had in mind something that goes beyond the principle of legality, his Honour did not say what it was. Until I heard Lord Neuberger this morning, I had thought that in the United Kingdom the view was that there was no inconsistency between the approach taken in *Wilkinson* and that taken in *Ghaidan*. That was certainly not the Australasian view, as appears from both *Hansen* and *Momcilovic*. In all this, we need to remember that the principle of legality is itself a strong presumption; it may well require specific rather than general words to displace it.

It is reasonably clear that Bell J did not regard s 32(1) as authorising an interpretation that goes beyond the ordinary principles of interpretation. Her Honour took the view that the words ‘consistency with purpose’ pointed to ‘the intention, objectively ascertained, of the enacting Parliament’, the task being ‘one of interpretation and not of legislation’.\(^\text{19}\)

In the light of the foregoing discussion there is at least a tenable foundation for the view expressed by the Victorian Court of Appeal in *Slaveski* and by Nettle JA in *Noone* as to the interpretation of s 32(1) in *Momcilovic*, notwithstanding the judgment of Gummow J (with Hayne J relevantly agreeing) on this point and the dissenting judgment of Heydon J.

A different view was expressed by Tate JA in *Victorian Police Toll Enforcement v Taha*.\(^\text{20}\)

In that case, Tate JA considered that the majority judgments, other than French CJ, viewed s 32(1) as ‘more stringently’ requiring ‘that words be read in a manner “that does not correspond with literal or grammatical meaning” than would be demanded or countenanced by the common law principle of legality’.\(^\text{21}\) Tate JA read Gummow J’s ‘*a fortiori*’ reference in *Momcilovic* as conveying the notion of ‘more stringently’, thereby presumably supporting an interpretation of s 32(1) that

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\(^{16}\) [2005] 1 WLR 1718 (‘*Wilkinson*’).

\(^{17}\) Ibid 1723–1724 [18].

\(^{18}\) Ibid 1723 [17].

\(^{19}\) *Momcilovic* (2011) 245 CLR 1, 250 [684].


\(^{21}\) Ibid [190], quoting *Momcilovic* (2011) 245 CLR 1, 92–3 [170].
went beyond the principle of legality, even if it did not equate to Ghaidan.

I leave out of account the earlier High Court decision in Hogan v Hinch\(^2\) where the Court applied s 32(1) to give a narrow interpretation to s 42(3) of the Serious Sex Offences Monitoring Act 2005 (Vic), which prohibited the publication of material in contravention of a suppression order. The Court implied, pursuant to s 32(1), as an element of the offence the requirement that the defendant had knowledge of the suppression order and further said that this construction better accommodated s 15(3). But there was no discussion of the scope of s 32(1) in Hogan, though it was mentioned.\(^2\) Nor was the case regarded as significant in Momcilovic.

### The Reason for the Differences Between the Ghaidan Approach and the Australian Approaches

The judgments in Momcilovic, in so far as they rely on the distinction between interpretation and legislation invoke separation of powers considerations and the limits of judicial power. The difference between interpretation and legislation needs to be understood before we necessarily conclude, as the High Court has done, that the Ghaidan approach has no place under the Charter.

Before discussing the limits of judicial power, it is convenient to describe the Ghaidan approach. It travels beyond the principle of legality and is apt to require a court to read in words which change the meaning of the enacted legislation so as to make it Convention-compliant. The House of Lords expressed the limitations on power to make the legislation Convention-compliant in various ways — that ‘the application of section 3 be compatible with the underlying thrust of the legislation’, that the words implied must ‘go with the grain of the legislation’ and that the interpretation adopted not remove ‘the very core and essence’, the ‘pith and substance’ or violate a cardinal principle of the legislation.\(^2\) This interpretive power, as it was said, did not call for ‘legislative deliberation’. Notwithstanding the claim that the Ghaidan approach does not call for ‘legislative deliberation’, it is clear that it may require a change in the meaning of the legislation from the meaning which would be attributed according to the ordinary principles of interpretation applied to a single statute.

The Ghaidan approach is generally accepted by UK courts as correct. In Ahmed v HM Treasury,\(^2\) Lord Phillips of Matravers said:

> By enacting section 3, Parliament has been held to direct the courts to interpret legislation in a way which is compatible with Convention rights, even where such interpretation involves departing from the ‘unambiguous meaning the legislation would otherwise bear’, or the ‘legislative intention ... of the Parliament’: see Ghaidan v Godin-Mendoza [2004] 2 AC 557, para 30, per Lord Nicholls of Birkenhead and Sheldrake v Director of Public Prosecutions [2005] 1 AC 264, para 24, per Lord Bingham. Such an interpretation must, however, be one that is ‘possible’

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22 (2011) 243 CLR 506 (‘Hogan’).
23 Ibid 548 [70].
having regard to the underlying thrust or intention of the legislation.\textsuperscript{26}

His Lordship went on to say: ‘I do not consider that the principle of legality permits a court to disregard an unambiguous expression of Parliament’s intention. To this extent its reach is less than that of section 3 of the \textit{Human Rights Act}.\textsuperscript{27}

None of the judgments in \textit{Momcilovic} (except perhaps that of Heydon J) attributed such a far-reaching effect to s 32(1) as that attributed by Lord Phillips to s 3 in the last sentence quoted.

By what standard or criterion of ‘possibility’ is the \textit{Ghaidan} approach to be applied? At the moment the answer seems to be at large, subject to the qualifications mentioned in \textit{Ghaidan}. It is possible to adopt a strained interpretation so long as it is consistent with the statutory purpose or with the underlying thrust of the statute. But at what point does a ‘strained’ interpretation transcend the bounds of possibility? Perhaps the actual decisions in which the \textit{Ghaidan} approach has been applied provide a clue.

I refer particularly to the cases in which a statute which in terms provides for the imposition of a legal burden of proof on the defendant has been interpreted as imposing an evidential burden.\textsuperscript{28} In these cases, although there has been a departure from the unambiguous meaning of the statutory provision considered on its own, the provision as re-interpreted still serves the particular statutory purpose, though perhaps not quite so effectively. To those who voice the objection that this amounts to amendment or legislation, the response must be that the court is doing no more than construing the legislation against its background pursuant to a legislative direction, as Lord Hoffmann pointed out in \textit{Wilkinson}, and that the concept of a reverse evidential burden has long been regarded as an alternative to the concept of a reverse legal burden. In other words, the court, while departing from the expressed legislative intention, is keeping faith with the underlying thrust of the specific legislation by identifying a cognate or related concept.

The traditionalist’s rejoinder would be that the intention as manifested, even impliedly, in a later statute should prevail over an inconsistent earlier statute according to the doctrine of implied repeal. It is the strength of this view that informs the Australian approach to s 32(1) and similar provisions. On the other hand, a provision such as s 3 is an interpretive provision of the kind that could be found in an Acts Interpretation Act — a standing interpretive provision that is to be applied generally in the absence of a provision countermanding its application. That, to my mind, would have been the expectation when the \textit{Human Rights Act} was enacted in 1998, an expectation supported by ‘constitutional’ considerations in the United Kingdom which, as the \textit{Momcilovic} judgments recognised, have no part to play in Australia.

\begin{footnotes}
\item[26] Ibid 647 [115].
\item[27] Ibid 647 [117].
\item[28] See, eg, \textit{R v Lambert} [2002] 2 AC 545. See also \textit{Hansen} [2007] 3 NZLR 1 where the New Zealand Supreme Court took the opposite view.
\end{footnotes}
On this approach, s 3 may not mandate an exercise by the courts of a function that travels beyond interpretation. It is, however, an approach which may exclude or lessen the role of implied repeal or amendment by eliminating or attenuating the element of necessary implication. If the Ghaidan approach had been adopted in Victoria, we might have arrived at the position whereby an interpretive presumption, like s 32(1), might be so strong that it requires express words to displace it. It is not an infringement of parliamentary sovereignty for a statute to provide than an interpretive approach prescribed by the statute can only be displaced by express words.29

The Australian Concept of Judicial Power

In Australia, as in the United Kingdom, the distinction between interpretation and legislation is thought to mark the limits of judicial power. The distinction has been discussed in Australian cases relating to statutory severability clauses designed to preserve the operation of parts of a statute when another part of the statute has been held to be invalid because it is ultra vires the Australian Constitution either for excess of legislative power or because it infringes a constitutional provision. The effect of such clauses, for example s 15A of the Acts Interpretation Act 1901 (Cth), is to reverse the presumption that a statute is to operate as a whole so that the legislative intention is prima facie that the enactment is divisible and that the valid parts should operate independently of the invalid parts.30

But this outcome is not possible once it appears that the rejection of the invalid part would mean that the otherwise valid part would operate differently or in some other way would produce a different result. In such a case, as Dixon J said, there is a ‘strong logical ground for holding provisions to be inseverable’.31 And it is not for the court to discover and apply some limitation or amendment which would enable the valid part to operate in the way intended by the legislature. To do that, to reconstruct the legislation would require the court to perform a feat which ‘is legislative, not judicial’.32

Although this comment addresses a question of validity, the comment has, in my view, equal application to interpretive reconstruction not involving a question of statutory validity.

There are, in my view, two limitations inherent in the statement quoted. The first is that the legislature by its law must specify a clear standard or criterion to be applied for the purpose of limiting and preserving the validity of the law.33 The second limitation is that the standard or criterion so prescribed must be capable of application so that the legislation can operate without operating differently or producing a different result and without major reconstruction, as opposed to severance, or simply reading down or reading in provisions so as to comply with the legislative direction. Unless these limitations are observed, the judicial task may amount to a legislative, not

30 Pidoto v Victoria (1943) 68 CLR 87, 107-108 (‘Pidoto’).
31 Ibid 371.
32 R v Burgess; Ex parte Henry (1936) 55 CLR 608, 670, cited in Pidoto (1943) 68 CLR 87, 109.
33 Pidoto (1943) 68 CLR 87, 109.
a judicial, function and is not permissible. These limitations may be compared with the Ghaidan qualifications. Although there is a similarity, there is also a difference.

In provisions such as s 15A of the Acts Interpretation Act 1901 (Cth), the legislature has in effect enacted a secondary law which is to take effect conditional on the partial failure of the primary law which it has enacted. The same reasoning is applicable to an interpretive provision which requires or authorises a court, so far as it is possible to do so, consistently with their purpose, to interpret all statutory provisions in a way that is compatible with human rights. There is a prescription of a specific standard or criterion. The only limitations are ‘possibility’ and consistency with statutory purpose. These limitations do not preclude a ‘strained’ construction, that is one which, though departing from the unambiguous meaning of the provisions, gives effect to its purpose and does not involve major reconstruction of it by doing violence to its structure and general thrust.

Of course s 32(1) makes no reference to legislative intention, only to purpose. Section 32(1) assumes that its operation may result in inconsistency with the statutory provision but provides only for a ‘possible’ interpretation that is consistent with the statutory purpose, thereby recognising that the effect of s 32(1) may be to depart from the unambiguous legislative intention manifested in the single statute. That is not, however, how the High Court in Momcilovic saw s 32(1). All the more surprising then that neither in Australia nor the United Kingdom has there been any discussion of implied or pro tanto repeal because that, to my mind, is one explanation of the difference in approach in the two jurisdictions.

The point of difference, however, remains that the High Court is reluctant to depart from the legislative intention of a provision as revealed by the ordinary principles of interpretation, supplemented by s 32(1), whereas the UK courts are prepared to go further. This reluctance stems from a different view of the interpretation/legislation divide, the UK courts being prepared to undertake what may be regarded as a legislatively authorised law-making function that lies outside the traditional scope of judicial power.

**The Responsibility of the Victorian Court of Appeal**

There seems to be an assumption on the part of some writers that because Momcilovic in the High Court does not present a binding ratio on s 32(1), it is for the Victorian Court of Appeal to adhere to its own decision in the case. An alternative course is for the Court to apply the majority considered dicta of the High Court in Momcilovic, a course prescribed by the High Court in Farah Constructions Pty Ltd v Say-Dee Pty Ltd, a course which has much to commend it, notwithstanding that it breaks new ground because it promotes certainty in the law. This is an important policy consideration, particularly in constitutional and major public law cases. As I understand Slaveski, this is the course which the Victorian Court of Appeal has sought to pursue.
Obligations of Public Authorities Under Section 38 of the Victorian Charter of Human Rights and Responsibilities*

The Hon Justice Emilios Kyrou†

Introduction

Division 4 of pt 3 of the Victorian Charter of Human Rights and Responsibilities Act 2006 (Vic) (‘the Charter’) is headed ‘Obligations on public authorities’. It comprises only two sections — 38 and 39. Section 38 regulates the conduct of public authorities in relation to the human rights set out in the Charter and s 39 deals with legal remedies. These provisions are of central importance to the efficacy of the Charter.

Section 38 is enlivened only where a human right in the Charter is engaged.1 The section relevantly provides as follows:

38 Conduct of public authorities

(1) Subject to this section, it is 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.

(2) Subsection (1) does not apply if, 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.

Example

Where the public authority is acting to give effect to a statutory provision that is incompatible with a human right.

(3) This section does not apply to an act or decision of a private nature.2

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* This paper is based on a presentation at the Human Rights under the Charter: The Development of Human Rights Law in Victoria conference, convened by the Supreme Court of Victoria, the Faculty of Law of Monash University, the Judicial College of Victoria, Victoria Law Foundation, and the Human Rights Law Centre, Melbourne, 7 to 8 August 2014.

† A judge of the Court of Appeal, Supreme Court of Victoria. I gratefully acknowledge the assistance of my associate Katherine Cooke in the preparation of this paper.

1 Castles v Secretary, Department of Justice (2010) 28 VR 141, 155 [45] (‘Castles’).

2 Charter ss 38(4)–(5) deal with religious bodies. Those provisions are beyond the scope of this paper.
Section 3(1) defines ‘act’ as including ‘a failure to act and a proposal to act’. It also defines ‘statutory provision’ to include an Act — including the *Charter* — or a subordinate instrument. 3

The structure of s 38 is that sub-s (1) contains two obligations and each of sub-ss (2) and (3) contains an exception to those obligations.

The first obligation applies to acts of public authorities. It provides that public authorities must not ‘act in a way that is incompatible with a human right’. 4 The second obligation, which has been described as a procedural requirement, applies to decisions of public authorities. It provides that public authorities must not ‘fail to give proper consideration to a relevant human right’ in making a decision. 5 The first exception applies where, under law, the public authority ‘could not reasonably have acted differently or made a different decision’. 6 The second exception applies where the ‘act or decision [is] of a private nature’. 7

Although s 38(1) prohibits acts which are incompatible with a human right, it does not prohibit decisions which are incompatible with a relevant human right. In the case of decisions, s 38(1) simply requires public authorities to give proper consideration to a relevant human right. The dichotomy between acts and decisions is not reflected in s 1, which states that one of the means of protecting and promoting human rights is the imposition of ‘an obligation on all public authorities to act in a way that is compatible with human rights’. 8 The dichotomy is also not reflected in s 6 of the *Human Rights Act 1998* (UK) c 42 (‘the UK Act’) upon which s 38 is modelled. 9

The rationale for the dichotomy does not appear in the *Charter*. Of course, decisions are the lynchpin of Australian administrative law and the failure to take into account relevant considerations is a well-established ground of judicial review. It is also true that the implementation of a decision will often involve an act. However, where proper consideration is given to a relevant human right and the resultant decision is not unlawful, can it be said that an act implementing that decision is nevertheless unlawful because it is incompatible with that human right?

The dichotomy between acts and decisions is but one of the many complex legal issues that arise from the deceptively simple provisions of s 38. Those issues include the following:

(a) what is the role of the proportionality principle in s 7(2) in assessing compliance with the obligations in s 38?;

(b) what does ‘incompatible with a human right’ mean?;

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3 Section 4 of the *Charter* defines ‘public authority’. That definition will be discussed by another author in this edition, and is beyond the scope of this paper. See Mark Moshinsky, ‘Bringing Legal Proceedings Against Public Authorities for Breach of the *Charter of Human Rights and Responsibilities*’ [2014] 2 Judicial College of Victoria Online Journal 91.

4 *Charter* s 38(1).

5 Ibid.

6 Ibid s 38(2).

7 Ibid s 38(3).

8 Ibid s 1(2)(c).

9 Section 6 of the UK Act is set out below, 80–81.
(c) what does ‘give proper consideration to a relevant human right’ mean?;
(d) what does ‘reasonably’ mean?;
(e) what does ‘private nature’ mean?; and
(f) does unlawfulness under s 38(1) constitute jurisdictional error?

In this paper, I will address these six issues. Before doing so, I will refer briefly to the legislative history of s 38 and some extrinsic material that discusses it.

**Legislative History of s 38 and Relevant Extrinsic Material**

The Human Rights Consultation Committee in its 2005 report titled ‘Rights, Responsibilities and Respect’ recommended that the Charter should bind public authorities.\(^\text{10}\)

In his second reading speech, the Attorney-General relevantly said the following about cl 38 of the Charter of Human Rights and Responsibilities Bill 2006 (Vic) (‘Bill’):

> Clause 38 of the bill ... seeks to ensure that human rights are observed in administrative practice and the development of policy within the public sector without the need for recourse to the courts. The experience in other jurisdictions that have used this model is that it is in the area of administrative compliance that the real success story of human rights lies. Many public sector bodies that already deal with difficult issues of balancing competing rights and obligations in carrying out their functions have welcomed the clarity and authority that a human rights bill provides in dealing with these issues. In conjunction with the general law, the charter provides a basic standard and a reference point for discussion and development of policy and practice in relation to these often sensitive and complex issues.\(^\text{11}\)

The explanatory memorandum states that s 38 is modelled on s 6 of the UK Act and is intended to ensure that public authorities make decisions and act compatibly with human rights.\(^\text{12}\) Section 6 of the UK Act provides:

> Acts of public authorities

> (1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

> (2) Subsection (1) does not apply to an act if—

> (a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or


\(^{\text{12}}\) Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 27.
(b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.

(3) In this section ‘public authority’ includes—

(a) a court or tribunal, and

(b) any person certain of whose functions are functions of a public nature, but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.

... 

(5) In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private.

(6) ‘An act’ includes a failure to act but does not include a failure to—

(a) introduce in, or lay before, Parliament a proposal for legislation; or

(b) make any primary legislation or remedial order. 13

It will be immediately apparent that s 38(1) of the Charter differs significantly from s 6(1) of the UK Act because the former contains two prohibitions whereas the latter contains only one. 14

In the introduction print of the Bill, cl 38(1) stated ‘subject to sub-section (2)’ whereas in the ‘as sent’ print of the Bill, the wording was ‘subject to this section’. Also, the introduction print of the Bill did not include sub-ss (4) and (5) dealing with religious bodies.

There has not been any change to the text of s 38 since the Bill was passed. The Scrutiny of Acts and Regulations Committee (‘SARC’) conducted a four-year review of the Charter and published its report on 14 September 2011. 15 In that report, the SARC recommended that, if s 38 of the Charter were to be retained, it should be redrafted to state the obligations of public authorities in plain language that is accessible to both employees of public authorities and users of public services without recourse to overseas precedents. 16 The report suggested that sub-ss (1) and (2) ‘could be replaced with a single requirement that a public authority must, in making a decision, give proper consideration to any relevant human right’. 17

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14 Victoria was the first jurisdiction to include a ‘procedural’ requirement in its human rights legislation. The Australian Capital Territory followed, see: Human Rights Act 2004 (ACT) s 40B(1)(b).
16 Ibid 110 recommendation 23.
17 Ibid.
Interrelationship of ss 7 and 38 of the Charter

In the light of the extensive litigation concerning the interrelationship of ss 7(2) and 32(1), complex issues arise about the interrelationship between ss 7(2) and 38 in relation to a human right that is engaged.

Section 7 is in pt 2, which is headed ‘Human Rights’, and s 7 is headed ‘Human rights — what they are and when they may be limited’. Sections 32 and 38 are in pt 3, which is headed ‘Application of Human Rights in Victoria’.

Section 7(2) provides as follows:

> A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including—

(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.\(^\text{18}\)

Section 32(1) provides that, 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.

In *Momcilovic v The Queen*,\(^\text{19}\) the High Court was divided on whether the rights with which legislation must be interpreted compatibly under s 32(1) were rights that had been reasonably limited in accordance with the proportionality principle in s 7(2), or rights in their ‘pure’ form as set out in ss 8 to 27. Gummow, Hayne and Bell JJ favoured the former approach\(^\text{20}\) whereas French CJ and Crennan and Kiefel JJ favoured the latter approach.\(^\text{21}\) Heydon J also favoured the former approach but his Honour concluded that ss 7(2) and 32(1) were invalid.\(^\text{22}\)

Although there are obvious limitations in seeking to apply the High Court’s reasoning by analogy to the interrelationship between ss 7(2) and 38(1), the approach of Gummow, Hayne and Bell JJ supports the following propositions:

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18 Charter s 7(2).
19 (2011) 245 CLR 1 (*Momcilovic*).
20 Ibid 84–5 [146(iv)], 92 [168], 123 [280], 249 [681]–[683].
21 Ibid 43–4 [34]–[36], 219–20 [571]–[576].
22 Ibid 163–4 [408]–[409], 170 [427]–[428], 175 [439], 184 [456].
(a) compliance with the compatibility and proper consideration obligations in s 38 is to be considered in relation to human rights whose scope has been determined in accordance with the proportionality principle in s 7(2); and

(b) the proportionality principle forms part of the test of compatibility under s 38.

On the other hand, the approach of French CJ and Crennan and Kiefel JJ does not support those propositions. French CJ observed that the argument for consistent construction of the phrase ‘compatible with human rights’ does not require the incorporation of s 7(2) into the test for compatibility.23

The heading and location of s 7 might be said to support the first proposition. This is because they suggest that s 7 must be considered as part of the process of defining the scope of a human right and analysing under s 38 whether a public authority has acted compatibly with, or given proper consideration to, that human right.

In Sabet v Medical Practitioners Board of Victoria,24 Hollingworth J adopted an approach that was consistent with the two propositions to which I have referred. In determining whether the public authority in that case had failed to give proper consideration to a relevant human right under s 38(1), her Honour first analysed whether the public authority had imposed any limitation on that right and whether the limitation was reasonable and justified within the circumstances set out in s 7(2).25

The second proposition has been expressly accepted in the two Victorian cases which have directly considered the interrelationship of ss 7(2) and 38(1). The cases are Antunovic v Dawson26 and PJB v Melbourne Health,27 which is commonly known as Patrick's Case. Both cases were decided by Bell J before Momcilovic.

In Patrick's Case, Bell J held that judicially reviewing a decision of a public authority for unlawfulness under s 38(1) on grounds of incompatibility with human rights requires the court to consider and apply the proportionality test in s 7(2), which is a matter of law.28 His Honour stated that ‘[r]eading s 7(2) with s 38(1), an act or decision of a public authority will be unlawful under s 38(1) if it limits a human right in a manner which is not reasonable and demonstrably justified as specified in s 7(2), unless s 38(2) applies’.29

Bell J stated that ‘[t]he function of the court is to make an independent and objective judgment for itself about whether the limitation is justified under s 7(2) and therefore whether the act or

23 Ibid 43 [32].
25 Ibid 431 [108].
26 (2010) 30 VR 355 (‘Antunovic’).
27 [2011] VSC 327 (19 July 2011) (‘Patrick’s Case’).
28 Ibid [304], [309].
29 Ibid [306]. See also Antunovic (2010) 30 VR 355, 371 [70], 385 [135].
decision is unlawful as incompatible with human rights or compatible and therefore lawful’. His Honour added that the better the ‘consideration given to human rights at first instance, the harder it will be to challenge the act or decision concerned’. However, his Honour noted that ‘it is the actual compatibility of the act or decision with human rights that is at issue, not the quality of the reasoning supporting it’.

In both Antunovic and Patrick’s Case, Bell J did not refer to the distinction between acts and decisions in s 38. His Honour’s approach has much to commend it in the case of an act because an act of a public authority that is found under s 7(2) to impose limits on a human right that are unreasonable and not demonstrably justified is unlikely to be held to be compatible with that human right under s 38(1). However, the position might be different in the case of a decision of a public authority because, in such a case, the obligation under s 38(1) is to give proper consideration to the relevant human right rather than an absolute obligation not to make a decision which is incompatible with that right.

The current position is unsettled and requires further clarification from the Court of Appeal and the High Court.

**Meaning of ‘Incompatible’ in s 38(1) of the Charter**

In Momcilovic, French CJ noted that the phase ‘compatible with human rights’ pervades the Charter and that the phrase must be interpreted consistently whenever it appears. However, the High Court did not elaborate on the meaning of compatibility.

The definition of the adjective ‘incompatible’ in the fifth edition of the Macquarie Dictionary relevantly includes: ‘Not compatible; incapable of existing together in harmony ... contrary or opposed in character; discordant ... that cannot coexist or be conjoined.’

A determination of whether something is incompatible with something else usually requires a comparison between their nature and effect and an assessment of whether they are inconsistent or cannot co-exist harmoniously.

On the basis of this approach, the question of incompatibility under s 38 is tied up with the two propositions that I have already discussed. If those propositions are correct, incompatibility will be informed by proportionality under s 7(2). Accordingly, the circumstances of each case and notions of reasonableness will need to be considered in working out both the scope of the human right and whether the act of the public authority was compatible with that right. On the other hand, if the two propositions are not correct, then the comparison that must be undertaken to assess compatibility will be between the human right considered independently of s 7(2), and the act in question.

30 Patrick’s Case [2011] VSC 327 (19 July 2011) [310].
31 Ibid.
32 Ibid.
33 Momcilovic (2011) 245 CLR 1, 43 [32].
Irrespective of which approach is correct, difficult questions may arise. One such question is whether s 38 is capable of recognising degrees of incompatibility with a human right or substantial compliance with a human right such that not all instances of incompatibility will result in unlawfulness. These issues may need to be determined by the application of the principles in *Project Blue Sky Inc v Australian Broadcasting Authority*.34

Regrettably, there has not been sufficient case law to clarify the parameters of the obligation of compatibility in s 38(1) of the *Charter*.

**Meaning of ‘Proper Consideration’ in s 38(1) of the *Charter***

The obligation to take into account relevant considerations is a fundamental principle of administrative law which is well known to lawyers.

The principle was authoritatively explained by the High Court in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*.35 The principle requires a decision-maker to take into account a relevant consideration in good faith but leaves it up to the decision-maker to determine the weight to be given to that consideration.36 Courts cannot intervene by way of judicial review because they would have given different weight to the consideration, as this would be tantamount to reviewing the decision on the merits. The jurisdiction of the courts to judicially review an administrative decision does not extend to a review of the decision on the merits.37

In *Swift v SAS Trustee Corporation*,38 the New South Wales Court of Appeal observed that the phrase ‘proper, genuine and realistic consideration’, if taken out of context, is apt to ‘encourage a slide into impermissible merit review’.39

The definition of ‘proper’ in the fifth edition of the *Macquarie Dictionary* relevantly includes: ‘adapted or appropriate to the purpose or circumstances; fit; suitable’. The definition of ‘consideration’ relevantly includes ‘the act of considering; meditation or deliberation … regard or account; something taken, or to be taken, into account’.

Having regard to the above principles, a question immediately arises as to whether the inclusion of the adjective ‘proper’ in s 38(1) has displaced the Court’s traditional judicial review function by a form of merits review. If the court’s function remains one of judicial review, a second question arises as to whether it is conventional judicial review or some other form of judicial review.

These issues have been considered in academic writings and by two decisions of the Trial Division

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34 (1998) 194 CLR 355 (’Project Blue Sky’).
35 (1986) 162 CLR 24 (’Peko-Wallsend’).
36 Ibid 41–2.
37 *Gamble v Emerald Hill Electrical Pty Ltd* [2012] VSCA 322 (20 December 2012) [8].
38 [2010] NSWCA 182 (3 August 2010).
of the Supreme Court of Victoria. The position remains far from settled.

Associate Professor Debeljak has observed that the inclusion of the word ‘proper’ was a ‘deliberate choice intended to avoid a “tick-a-box” approach to human rights’. According to her, ‘when assessing the relevant consideration ground in a Charter context, a “tick-a-box” approach which might withstand Peko-Wallsend scrutiny, will not withstand Charter scrutiny’. Associate Professor Debeljak has also suggested that the requirement of ‘proper consideration’ in s 38(1) may allow courts to assess whether sufficient weight was given to the relevant human right.

The relevant Trial Division decisions are Castles and Patrick’s Case.

In Castles, Emerton J stated that there is ‘no formula’ prescribed for proper consideration in any given case. Her Honour said:

> [P]roper consideration of human rights should not be a sophisticated legal exercise. Proper consideration need not involve formally identifying the ‘correct’ rights or explaining their content by reference to legal principles or jurisprudence. Rather, proper consideration will involve understanding in general terms which of the rights of the person affected by the decision may be relevant and whether, and if so how, those rights will be interfered with by the decision that is made. As part of the exercise of justification, proper consideration will involve balancing competing private and public interests. There is no formula for such an exercise, and it should not be scrutinised over-zealously by the courts.

While ... the requirement in s 38(1) to give proper consideration to a relevant human right requires a decision-maker to do more than merely invoke the Charter like a mantra, it will be sufficient in most circumstances that there is some evidence that shows the decision-maker seriously turned his or her mind to the possible impact of the decision on a person’s human rights and the implications thereof for the affected person, and that the countervailing interests or obligations were identified.

In Patrick’s Case, Bell J observed that ‘[t]he so-called “procedural” limb of s 38(1) that “proper consideration” be given to relevant human rights requires public authorities to do so in a practical and common-sense manner’. That ‘can be done in a variety of ways which may be suited to particulars (sic) circumstances’.

However, Bell J stated that, because s 38(1) requires the act or decision to be compatible with human rights,

> a consideration by the person who did the act or made the decision will not be ‘proper’, however seriously and genuinely it was carried out, if the act or decision is incompatible with human rights

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41 Ibid.
42 Ibid.
43 Castles (2010) 28 VR 141, 184 [185]–[186].
44 [2011] VSC 327 (19 July 2011) [311].
45 Ibid.
in terms of s 7(2). In cases in which the issue legitimately arises, objectively and independently
determining whether the act or decision is or is not compatible with human rights is the judicial
function of the Court. That function is not confined to, although it may involve, assessing whether
adequate consideration was given to relevant rights (for example, it may be relevant to the weight
to be given to the reasons of the public authority). 46

Bell J observed that,

when judicially reviewing for unlawfulness under ss 38(1) and 7(2), the court does not reconsider
a primary act or decision on the merits. The jurisdiction of the court is ... to determine whether
the act or decision is unlawful by reference to the human rights standards in the Charter, not to
make a determination on the merits of the matter which is in substantive issue. 47

However, his Honour added that, while it does not amount to merits review, judicially reviewing
for unlawfulness under ss 7(2) and 38(1) is ‘a more intensive, and is intended to be a more intensive,
standard of judicial review than traditional judicial review on (say) Wednesbury unreasonableness
grounds’. 48

His Honour cited the decision of Lord Steyn in R (Daly) v Secretary of State for the Home
Department, 49 in which his Lordship expressed the view that proportionality criteria ‘are more
precise and more sophisticated than the traditional grounds of review’. 50

Bell J concluded that,

by its very nature as a standard of review, proportionality draws the court more deeply into
the facts, the balance which has been struck and the resolution of the competing interests than
traditional judicial review. This gives rise to the issue of how the court is to provide effective judicial
protection for human rights whilst at the same time respecting the administrative function of the
public authority under its legislation and not drifting into merits review. 51 His Honour went on
to consider how much weight and latitude the Court should give to the primary decision-maker
when judicially reviewing for proportionality. His Honour concluded that this will depend on
the context and circumstances. Relevant factors are: ‘the comparative institutional advantage
of the court (if any); the experience and expertise of the primary decision-maker; the nature and
importance of the right, and the purpose of the interference, in question; and how well suited the
court is to considering the values and interests which are at stake’. 52

It is apparent that both Bell and Emerton JJ agree that s 38 has not introduced a form of merits

46 Ibid [312].
47 Ibid [314].
48 Ibid [315].
49 [2001] 2 AC 532.
50 Ibid 547 [27].
51 Patrick’s Case [2011] VSC 327 (19 July 2011) [317].
52 Ibid [325] citing Jack Beatson et al, Human Rights: Judicial Protection in the United Kingdom (Sweet & Maxwell,
review. This is clearly correct, as the Charter contains no indication of an intention to do so. Further, s 39 recognises that in many cases issues of compliance with s 38 will come before the Court in judicial review applications or in appeals on questions of law.

Beyond this common ground, however, there is considerable divergence in the approaches of Bell and Emerton JJ to the interpretation of the phrase ‘proper consideration’ in s 38(1). Bell J’s approach allows the Court greater flexibility to substitute its own decision for that of the original decision-maker, whereas Emerton J’s approach is little different from conventional judicial review doctrine.

It has been suggested that Emerton J’s approach sets a low threshold for compliance, which will not be sufficient in all cases. This is because ‘proper consideration’ must be interpreted in a context-specific way, taking into account the identity of the decision-maker, their skills and experience, and the extent to which a particular decision engages and limits Charter rights. The difficulty lies in achieving an interpretation of s 38(1) that is ‘both meaningful and practical’.53

One of the issues that arises with Bell J’s approach is that it does not distinguish between acts and decisions. As I have already stated, whereas s 38(1) prohibits public authorities from acting incompatibly with a human right, there is no such absolute prohibition in relation to decisions. The qualified prohibition in the case of decisions is that a public authority must not fail to give proper consideration to a relevant human right. This appears to allow for a decision being incompatible with a relevant human right provided proper consideration was given to it. It also appears to allow for the possibility that two decision-makers may arrive at a different decision even though both of them gave proper consideration to the relevant human right. This is consistent with traditional judicial review. Under Bell J’s approach, however, the criterion for lawfulness under s 38(1) is whether the decision is objectively compatible with a relevant human right.

Time will tell whether the approach of Bell J or that of Emerton J is adopted in future cases or indeed whether alternative approaches emerge that seek to find some middle position.54

The requirement that the consideration that public authorities give to human rights must be ‘proper’ is likely to have the practical effect of enhancing the standard of reasons for decision that public authorities provide, whether voluntarily or pursuant to a request under s 8 of the Administrative Law Act 1978 (Vic). Where an impugned decision appears on its face to be incompatible with a human right, a perfunctory explanation of how that right has been identified and what weight was given to it in reaching the decision may make it easier for the court to conclude that ‘proper consideration’ was not given to the right.

54 Emerton J’s approach was cited with implicit approval by Williams J in Bare v Small [2013] VSC 129 (25 March 2013) [102], [120] (‘Bare’).
Meaning of ‘Reasonably’ in s 38(2) of the Charter

It will be recalled that s 38(2) provides an exception to the obligations in s 38(1). The exception applies where, under law, a public authority could not reasonably have acted differently or made a different decision. In such a case, any incompatibility with a human right or failure to give proper consideration to a relevant human right, will not result in the act or decision being unlawful.

The word ‘reasonable’ is well known in different areas of the law. In administrative law, one of its manifestations is in the principle of *Wednesbury* unreasonableness. A discretionary decision will be unreasonable in the *Wednesbury* sense if it is so unreasonable that no reasonable decision-maker could have made it.

In *Li*, the High Court discussed the presumption that statutory discretionary powers must be exercised reasonably. The Court stated that an unreasonable discretionary decision may be invalid because an undisclosed underlying error can be inferred or because the decision is so arbitrary, disproportionate, capricious or irrational that the *Wednesbury* test is satisfied.

Hayne, Kiefel and Bell JJ discussed the standard of legal reasonableness. Their Honours stated that the standard should not be taken to be limited to the high threshold of unreasonableness set in *Wednesbury*. Rather, it ‘must be the standard indicated by the true construction of the statute’ because the question is whether the statutory power has been abused. Their Honours noted that *Wednesbury* recognises ‘that an inference of unreasonableness may in some cases be objectively drawn even where a particular error in reasoning cannot be identified’. Their Honours also emphasised that the ‘legal standard of reasonableness does not involve substituting a court’s view as to how a discretion should be exercised for that of a decision-maker’.

Gageler J noted that the *Wednesbury* test of unreasonableness is stringent and that it has rarely been satisfied in Australia.

Unreasonableness in administrative law has also featured in discussion of the ‘illogicality’ or ‘irrationality’ ground of judicial review which is said to have been adopted by the High Court in *Minister for Immigration and Citizenship v SZMDS*. In that case, Crennan and Bell JJ stated that

[a] decision might be said to be illogical or irrational if only one conclusion is open on the evidence, and the decision maker does not come to that conclusion, or if the decision to which the decision maker came was simply not open on the evidence or if there is no logical connection

55 See Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223 (*Wednesbury*).
56 Ibid 230; Minister for Immigration and Citizenship v Li (2013) 249 CLR 332, 347–8 [22], 357 [47], 370 [88] (*Li*).
57 (2013) 249 CLR 332.
58 Ibid 350–1 [27]–[28], 364 [68].
59 Ibid 364 [67].
60 Ibid 364 [68].
61 Ibid 363–4 [66]–[68].
62 Ibid 377–8 [113].
63 (2010) 240 CLR 611 (*SZMDS*).
between the evidence and the inferences or conclusions drawn.\textsuperscript{64}

Gummow ACJ and Kiefel J (who dissented as to the outcome of the appeal) adopted\textsuperscript{65} the following statement of Gummow and Hayne JJ in Minister for Immigration and Multicultural and Indigenous Affairs v SGLB:\textsuperscript{66}

\begin{quote}
[T]he critical question is whether the determination was irrational, illogical and not based on findings or inferences of fact supported by logical grounds. If the decision did display these defects, it will be no answer that the determination was reached in good faith.\textsuperscript{67}
\end{quote}

It is to be doubted that either Wednesbury unreasonableness or irrationality will set the standard by which reasonableness is to be assessed for the purposes of s 38(2). This is consistent with the approach that was adopted by Bell J in Patrick’s Case.

**Meaning of ‘Private Nature’ in s 38(3) of the Charter**

The second exception to the obligations in s 38(1) is in s 38(3) and relates to acts or decisions of a ‘private nature’.

The phrase ‘private nature’ is not defined but it is clear that it is used in the Charter in contradistinction to the phrase ‘public nature’ which is used constantly in the definition of ‘public authority’ in s 4. It also appears that, as that definition includes private entities when exercising public functions on behalf of the State or a public authority, one of the aims of s 38(3) is to exclude from the scope of the obligations in s 38(1) the private acts and decisions of those entities. That is certainly the case with s 6 of the UK Act, upon which s 38 is based. An example of a decision to which the exclusion in s 38(3) might apply is a decision of a private security firm which provides security services to public and private organisations in Victoria to require a manager in its private division to move to Perth and reside there in order to head up a new business unit.

The wide wording of s 38(3) could also exclude from the obligations in s 38(1) acts and decisions of a private nature of public authorities which perform both public and private functions.

**Whether Breach of s 38(1) Constitutes Jurisdictional Error**

Section 38(1) characterises non-compliance with its obligations in relation to an act or a decision of a public authority as ‘unlawful’. A question arises as to whether non-compliance which results in unlawfulness constitutes a jurisdictional error as distinct from a non-jurisdictional error of law. A further question is whether all breaches of s 38(1) will have the same status or whether this will depend on the nature and degree of incompatibility with a human right or the failure to

\begin{footnoteseparation}
\footnotetext[64]{Ibid 649–50 [135].}
\footnotetext[65]{Ibid 625 [40].}
\footnotetext[66]{(2004) 207 ALR 12.}
\footnotetext[67]{Ibid 20 [38] (citations omitted). In SZMDS (2010) 240 CLR 611, 634–5 [86]–[87], Heydon J agreed that the relevant reasoning was not illogical.}
\end{footnoteseparation}
properly consider a relevant human right. It is likely that the principles in *Project Blue Sky*[^68] will need to be considered.

In *Director of Housing v Sudi*[^69], the Court of Appeal left these questions open.[^70] However, in the subsequent decision of *Bare v Small*,[^71] Williams J held that a decision made in breach of s 38(1) is not necessarily vitiated by jurisdictional error and is thus capable of being excluded from judicial review by an ouster clause.[^72] An appeal from her Honour’s decision was heard by the Court of Appeal in May 2014. The Court of Appeal’s decision on this important issue is eagerly awaited.

**Conclusion**

My discussion of s 38 has demonstrated that beneath its apparently simple language lurk complex legal issues which, to date, have not been fully explored.

[^69]: (2011) 33 VR 559.
[^70]: Ibid 569 [49], 596 [214], 605 [271]. See also *DPP (Vic) v Debono* [2013] VSC 407 (1 February 2013) [88].
[^72]: *Bare* [2013] VSC 129 (25 March 2013) [92]–[93], [116]–[121].
Bringing Legal Proceedings Against Public Authorities for Breach of the *Charter of Human Rights and Responsibilities* *

Mark Moshinsky QC †

One of the central provisions of the *Charter of Human Rights and Responsibilities* is the rule that it is 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.  

Immediately after that section is a provision — s 39 — dealing with legal proceedings. Sub-section (1) provides that:

> If, *otherwise than because of [the] ... Charter*, a person may seek any relief or remedy in respect of an act or decision of a public authority on the ground that the act or decision was unlawful, that person may seek that relief or remedy on a ground of unlawfulness arising *because of [the] ... Charter*.

Sub-section (3) provides that '[a] person is not entitled to be awarded any damages because of a breach of [the] ... Charter'. The denial of a right to seek damages for breach of the *Charter* reflects a political compromise embodied in the *Charter*. While the *Charter* introduced, for the first time in an Australian State, a statutory bill of rights, a decision was taken to limit the remedies available...
for breach of the *Charter* to remedies other than an award of damages. In this respect, the *Charter* differs from the United Kingdom *Human Rights Act*, upon which many of the other provisions of the *Charter* are modelled.

The focus of this paper will be on sub-s (1) of s 39. As is apparent from its text, s 39(1) creates a *right* to seek legal redress against a public authority for breach of the *Charter*, but also imposes a *condition* on the right to seek such redress. One of the issues that I will address in this paper is the proper interpretation of that condition. Another issue that I will address is the relationship between administrative law principles and remedies and the remedy provision in the *Charter*. This is important because, on any view, it is necessary for a person wanting to sue a public authority on the ground of unlawfulness under the *Charter* to be able to seek the same relief or remedy ‘otherwise than because of [the] ... *Charter*’ and in many cases the other relief or remedy will be in the field of administrative law.

To take an example based on one of the cases, suppose that a compulsory medical treatment order has been made by an authorised psychiatrist in respect of a patient. The compulsory medical treatment order has the effect that the patient is required to take, and submit to, medication without the patient’s consent — otherwise, the patient will be detained in a hospital. As he is entitled to do, the patient brings an application for review of the decision of the psychiatrist to the Mental Health Review Board. The governing statute provides that Board *must* review the decision of the psychiatrist within eight weeks. Seven weeks after the application for review is filed, the Board holds a directions hearing and adjourns the further hearing of the application for review for several months. The patient wishes to contend that, in adjourning the application for review, the Mental Health Review Board breached s 38 of the *Charter*, in that it failed to give proper consideration to the right not to be subjected to medical treatment without full, free and informed consent and the right to a fair hearing. In these circumstances, is it open to the patient to seek administrative law relief or remedies relying on breach of s 38 of the *Charter*, and what is the interaction between administrative law principles and remedies and the remedy provision in the *Charter*?

**Public Authorities**

Before discussing the issues that I have referred to, I will first address the definition of ‘public authority’ in the *Charter*. The meaning of this expression is, of course, critical because it is only public authorities that are subject to the obligation not to act in a way that is incompatible with a

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6 Human Rights Act 1998 (UK) c 42.
7 Director of Housing v Sudi (2011) 33 VR 559, 580 [96] (‘Sudi’).
8 Charter s 39(1).
9 Kracke v Mental Health Review Board (2009) 29 VAR 1 (‘Kracke’). While the example is broadly based on the facts of this case, for the purposes of this paper I have assumed that the patient wishes to seek judicial review of the Mental Health Review Board’s decision to adjourn the hearing, whereas in the actual case the patient adopted a different procedural route, seeking merits review by VCAT of the substantive decision of the Board.
10 See Charter s 10(c).
11 See ibid s 24.
human right and, in making a decision, to give proper consideration to a relevant human right.\textsuperscript{12}

The expression ‘public authority’ is defined in s 4 of the Charter. It is a detailed definition comprising five sub-sections and spanning more than three pages. The commentaries on the Charter\textsuperscript{13} refer to two types of public authorities as falling within the definition — ‘core’ public authorities and ‘functional’ public authorities. ‘Core’ public authorities\textsuperscript{14} are entities which are always public authorities, while ‘functional’ public authorities\textsuperscript{15} are entities which may or may not be public authorities depending on the function that they are performing. The main part of the definition which deals with (what may be described as) a core public authority reads: ‘an entity established by a statutory provision that has functions of a public nature’.\textsuperscript{16} The part of the definition which deals with (what may be described as) a functional public authority reads: ‘an entity whose functions are or include functions of a public nature, when it is exercising those functions on behalf of the State or a public authority (whether under contract or otherwise)’.\textsuperscript{17}

In comparison with a core public authority, a functional public authority need not be established by statute and will be a public authority within the meaning of the Charter only in some circumstances and not others, depending on the type of function it is performing. The inclusion of functional public authorities in the definition reflects the reality of modern government that many of the functions that were previously carried out by government are now often ‘out-sourced’ to private entities. This purpose was specifically referred to in the second reading speech of the Attorney-General when introducing the Bill for the Charter.\textsuperscript{18} A typical example of a functional public authority is a private entity which provides public housing to those in need and is funded by government to carry out this task.\textsuperscript{19} On the other hand, an ‘example’ which appears in the Charter itself\textsuperscript{20} indicates that a non-government school which educates students would not be a public authority for the purposes of the Charter — this is because, although it may be exercising functions of a public nature, it is not doing so ‘on behalf of the State’\textsuperscript{21}.

\textsuperscript{12} Ibid s 38.
\textsuperscript{14} See Charter ss 4(I)(a), (b), (d)–(f).
\textsuperscript{15} See ibid s 4(I)(c).
\textsuperscript{16} Ibid s 4(I)(b).
\textsuperscript{17} Ibid s 4(I)(c).
\textsuperscript{18} Victoria, Parliamentary Debates, Legislative Assembly, 4 May 2006, 1294 (Rob Hulls, Attorney-General): ‘The obligation to comply with the Charter extends beyond ‘core’ government to other entities when they are performing functions of a public nature on behalf of the state. This reflects the reality that modern governments utilise diverse organisational arrangements to manage and deliver their services.’ See also Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 4.
\textsuperscript{19} Cf Poplar Housing and Regeneration Community Assn Ltd v Donoghue [2002] QB 48, discussed in Pound and Evans, above n 13, 55.
\textsuperscript{20} Under Charter s 4(I)(c).
\textsuperscript{21} Ibid s 4(I)(c) (emphasis added).
The Charter includes a list of factors to be taken into account in determining whether a function is ‘of a public nature’ for the purposes of the definition of both core and functional public authorities. The list includes matters such as:

- whether the function is connected to or generally identified with functions of government;
- whether the function is of a regulatory nature; and
- whether the entity is publicly funded to perform the function.

There are also exclusions from the definition of ‘public authority’; that is, certain entities which might otherwise fall within the definition are expressly excluded. The exclusion which has been the subject of a number of cases is: ‘a court or tribunal except when it is acting in an administrative capacity’.

Thus, prima facie, a court or tribunal is not a public authority. However, it will be a public authority when it is acting in an administrative capacity. The rationale of the exclusion is explained in the extrinsic materials for the Bill for the Charter, in particular, the report of the Human Rights Consultation Committee which recommended the introduction of the Charter. The Committee’s report indicates that there was a concern that if courts were subject to the obligations applicable to public authorities, this could require them to develop the common law in a particular way, and this could spell invalidity for the Charter in circumstances where the High Court has held that there is a single common law for all of Australia.

Consistently with that rationale, the cases that have considered the exclusion have interpreted it as drawing a distinction between when courts and tribunals are exercising judicial power, on the one hand, and when they are exercising administrative power, on the other. When exercising judicial power, courts and tribunals will not be public authorities for the purposes of the Charter. When exercising administrative power, courts and tribunals will be public authorities.

The practical implications of this dichotomy can be seen in the case of the Victorian Civil and Administrative Tribunal (‘VCAT’). This tribunal, depending on the statute conferring jurisdiction, may exercise administrative power — typically ‘merits review’ where the tribunal stands in the shoes of the original decision maker — or it may exercise judicial power in much the same way as courts, for example, in residential tenancy disputes. Several cases have held that VCAT will be a public authority for the purposes of the Charter when it is exercising administrative power.
but not when it is exercising judicial power.  

It follows that, for a large part of its case load, i.e. where it is exercising administrative power, VCAT is a ‘public authority’ and must comply with the obligations imposed upon public authorities by s 38 of the Charter.

One of the first cases to consider the ‘courts and tribunals’ exclusion from the definition of ‘public authority’ was Sabet. In that case, the Medical Practitioners Board had suspended the registration of a doctor in circumstances where he had been charged with three counts of rape and five counts of indecent assault of a patient. The doctor sought judicial review of the decision on grounds that included a failure to give proper consideration to the human right to be presumed innocent. The application for judicial review, both on Charter and non-Charter grounds, was unsuccessful. In relation to the Charter grounds, it was common ground between the parties to the proceeding, including the Attorney-General, who intervened, that the Medical Practitioners Board was a public authority to which s 38 of the Charter applied. Nevertheless, it was necessary for the Court to be satisfied that that was the case, otherwise the Charter ground would not arise. Hollingworth J held that the Medical Practitioners Board was prima facie a ‘public authority’ within the part of the definition dealing with (what may be described as) ‘core’ public authorities; it was established by statute, received government funding, and carried out regulatory activities. However, because the Board was a tribunal, it was necessary to consider the meaning of the exclusion for ‘a court or tribunal except when it is acting in an administrative capacity’. Her Honour referred to the decision of the High Court in Albarran v Companies Auditors and Liquidators Disciplinary Board a decision which concerns the distinction between judicial and administrative power in a constitutional law context, and held that distinction was applicable in construing the words ‘administrative capacity’ in the exception. As the Medical Practitioners Board was exercising administrative power in exercising its power to suspend the doctor, although it was a tribunal, it was a ‘public authority’ for the purposes of the Charter.

In the case of courts, they will, generally, fall outside the definition of ‘public authority’ in the Charter. However, it would be wrong to conclude from this that courts are generally not subject to the Charter. Courts are subject to the interpretational obligation in s 32 of the Charter, and thus must interpret statutory provisions so far as is possible, consistently with their purpose, in a way that is compatible with human rights. Further, it is courts that determine whether a public authority has complied with its obligations under the Charter, and in that context they apply the

29 See Charter s 25.
31 Ibid 431–2 [112]–[118].
32 Charter s 4(1)(j).
34 Sabet (2008) 20 VR 414, 432–3 [121]–[127].
35 Ibid 433 [127].
provisions of the *Charter*.  

**Section 39**

Having discussed the definition of ‘public authority’ I now return to the remedy provision in s 39 of the *Charter*. Section 39(1) reads as follows:

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

An interpretational issue that arises in relation to this provision is as follows. Taking as an example a case where the non-*Charter* relief or remedy is based on judicial review, does s 39 require that the plaintiff must *in fact* have a non-*Charter* ground for seeking judicial review, or does it merely require that the act or decision in question is amenable to judicial review in the *abstract*, that is, without regard to the facts of the particular case? I will call the first interpretation the ‘factual availability’ interpretation and the second interpretation the ‘abstract availability’ interpretation. On the ‘abstract availability’ approach, it would be sufficient if the relief or remedy that the plaintiff seeks is, in principle, available in respect of the particular act or decision, and the plaintiff has the right process, the right court and is within time to seek the relief or remedy. On the ‘factual availability’ approach, the plaintiff would also need to rely on a non-*Charter* ground in seeking the relief or remedy in the proceeding.

In my opinion, both interpretations are open on the words of the provision, construed in the context of the *Charter* as a whole and in light of its purposes.

One of the arguments in favour of the ‘abstract availability’ interpretation is based on the structure and purpose of the *Charter* as a whole. Section 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’. In this context, one would expect a remedy to be available should a public authority act unlawfully. It is understandable that the right to seek relief or a remedy might be conditioned on the general availability of that type of relief or remedy in respect of the act or decision. But it is difficult to see any reason why the right to seek relief or a remedy should depend on whether there happens to be, on the facts of the particular case, an independent non-*Charter* basis to seek the relief or remedy. That would seem to produce arbitrary results, suggesting that it was not what Parliament intended. For these reasons, it is...
arguable that the ‘abstract availability’ approach better reflects the structure and purpose of the Charter as a whole.41

On the other hand, a comparison between the draft Bill attached to the report of the Consultation Committee that led to the enactment of the Charter, and the Charter as enacted, perhaps suggests that the ‘factual availability’ interpretation is what was intended. The wording of the corresponding provision in the draft Bill42 reflects what I have called the ‘abstract availability’ interpretation. Clearly, a change was made to the drafting of the provision, which perhaps suggests an intention to depart from the ‘abstract availability’ approach and to confine the provision to the ‘factual availability’ approach.43 Also, the wording of the explanatory memorandum is arguably more in line with the ‘factual availability’ approach than the ‘abstract availability’ approach.44

The Court of Appeal considered s 39 of the Charter in Sudi45 but this issue does not appear to have been raised, and the Court of Appeal’s discussion of s 39 is, in my opinion, consistent with both of these approaches.46

In Debono,47 Kyrou J considered whether the condition in s 39 was satisfied in circumstances where an accused sought to rely on a breach of the Charter in mounting a ‘collateral challenge’ to a coercive powers order, or CPO. Kyrou J held that it was open to the accused to rely on Charter grounds in mounting the collateral challenge, because, independently of the Charter, the accused had sought to collaterally challenge the CPO.48 I think it is fair to say that, in the course of that decision, his Honour proceeded on the basis of the ‘factual availability’ approach, but the point does not appear to have been argued, nor was it

41 In recent years, the High Court has emphasised the importance of having regard to the text of the provision, as well as the structure and purpose of the statute as a whole. See, eg, Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT) (2009) 239 CLR 27, 31–2 [4]–[5], 46–7 [47]; Commissioner of Taxation v Consolidated Media Holdings Ltd (2012) 293 ALR 257, 268 [39]; Plaintiff M70/2011 v Minister for Immigration and Citizenship (2011) 244 CLR 144, 188 [85], 189 [90].
42 Clause 40(1) of the draft Bill attached to the Consultation Committee Report provided:

If an act or decision of a public authority is made unlawful by this Charter, a person aggrieved by that act or decision may seek any relief or remedy, including (a) judicial review under the Administrative Law Act 1978 or under Order 56 of Chapter I of the Rules of the Supreme Court; and (b) a declaration of unlawfulness and associated relief including an injunction, a stay of proceedings or exclusion of evidence — where that relief or remedy would have been available had the act or decision been unlawful apart from this Charter.

43 See Sudi (2011) 33 VR 559, 606 [277].
44 Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 28–9. Sub-section (2) of s 39 of the Charter should be noted for completeness. It provides:

This section does not affect any right that a person has, otherwise than because of this Charter, to seek any relief or remedy in respect of an act or decision of a public authority, including a right (a) to seek judicial review under the Administrative Law Act 1978 or under Order 56 of Chapter I of the Rules of the Supreme Court; and (b) to seek a declaration of unlawfulness and associated relief including an injunction, a stay of proceedings or exclusion of evidence — where that relief or remedy would have been available had the act or decision been unlawful apart from this Charter.

45 (2011) 33 VR 559, 569 [47]–[48], 579–80 [95]–[98], 596–7 [214]–[218], 604–7 [267]–[282].
46 The language adopted by Maxwell P in Sudi (2011) 33 VR 559, 580 [97] seems to be more consistent with (what I have called) the ‘abstract availability’ approach.
48 Ibid [85]–[86].
necessary, given his Honour's conclusion, for him to decide between the two approaches.

The Debono case raises a further issue that should be mentioned. If the ‘factual availability’ interpretation is correct, is it sufficient to satisfy the condition that the non-Charter ground is arguable, or must the non-Charter ground actually succeed? The wording of s 39 would suggest that the former is correct, and this is what Kryou J held in Debono. His Honour held that the mere exercise of an available right to seek relief or remedy in respect of an act or decision that is independent of the Charter is sufficient to satisfy the condition in s 39; that is, s 39 does not depend upon a successful exercise of the right that is based on the non-Charter ground.49

**Administrative Law Principles and Remedies**

Having referred to some of the issues surrounding the condition in s 39, I now turn to a more general issue, namely the relationship between administrative law principles and remedies and the remedy provision in the Charter. This is important because, in many cases, the type of relief or remedy that a claimant will wish to seek for breach of the Charter will be an administrative law remedy. By ‘administrative law remedy’ I mean both orders in the nature of the prerogative writs of certiorari, mandamus and prohibition, as well as the declaration and injunction which, although having their origins in private law, may be utilised as public law remedies. The issues which I am about to discuss are relevant whether the correct approach to the condition in s 39 is the ‘factual availability’ approach or the ‘abstract availability’ approach. The theme which I wish to develop is that in recent years the High Court has undertaken a significant rationalisation and, to some extent, expansion of administrative law principles and remedies, which need to be borne in mind in seeking relief for breach of the Charter, and which should facilitate satisfaction of the condition in s 39.

In Victoria, the usual mechanism for seeking administrative law relief is to commence a proceeding in the Supreme Court of Victoria pursuant to Order 56 of ch I of the Rules of the Supreme Court. This Order provides a streamlined procedure for seeking a judgment or order in place of the prerogative writs of certiorari, mandamus or prohibition.50 In the interests of time, I will not go into the details of this procedure.51

The Administrative Law Act 1978 (Vic) is another part of the statutory architecture for bringing administrative law claims in Victoria. Although the wording and scope of the statute are now somewhat dated, the Act provides a process by which any person affected by a decision of a

49 Ibid [82].
50 See Supreme Court (General Civil Procedure) Rules 2005 (Vic) Order 56. A judgment or order may also be sought in place of quo warranto.
51 The claimant commences the proceeding by way of originating motion, naming as defendant any person having an interest to oppose the claim, and the court, tribunal or person in respect of whose exercise of jurisdiction or failure or refusal to exercise jurisdiction the plaintiff brings the proceeding: ibid r 56.01(2). The originating motion must state the grounds upon which the relief or remedy specified in the originating motion is sought: at r 56.01(4). A proceeding under the Order must be commenced within 60 days after the date when the grounds for the grant of the relief or remedy first arose: r 56.02. The Court may only extend the time fixed by the rules in special circumstances: at r 56.02(3).
'tribunal' (as defined) may bring an ‘application for review’, in the Supreme Court of Victoria seeking an ‘order for review’. Additionally, the Act confers on a person affected by a decision of a tribunal, a right to seek reasons and provides that the reasons form part of the record.

As mentioned, the principles underlying an application for judicial review have been significantly rationalised in recent years. There are four main developments that I wish to highlight.

First, the High Court has affirmed the distinction between jurisdictional and non-jurisdictional error of law, with the category of ‘jurisdictional error’ embracing grounds such as failure to take into account relevant considerations, taking into account irrelevant considerations, certain types of error of law as well as the traditional ground of ‘ultra vires’.

Secondly, in Kirk the High Court emphasised that the examples of ‘jurisdictional error’ referred to in the earlier case of Craig were but examples of the types of errors that qualify as jurisdictional, and said that it is ‘neither necessary, nor possible, to attempt to mark the metes and bounds of jurisdictional error’.

Thirdly, the High Court in Kirk held that, by force of s 73 of the Commonwealth Constitution, there is an entrenched minimum provision of judicial review applicable to state executive decisions, such that it is not open to a state legislature to oust the jurisdiction of the state Supreme Court to review decisions of inferior courts or tribunals for jurisdictional error. At the Commonwealth level, s 75(v) of the Constitution has the effect that it is not open to the Commonwealth Parliament to oust the jurisdiction of the High Court to review decisions of the Commonwealth executive for jurisdictional error. As a result of the decision in Kirk, the position at the state level is essentially aligned with that of the Commonwealth.

Fourthly, there has been increasing use of declarations and injunctions as public law remedies. These remedies may be available where the remedies based on the prerogative writs are not.

52 The expression ‘tribunal’ is defined as meaning a person or body of persons (not being a court of law or a tribunal constituted or presided over by a Judge of the Supreme Court) who, in arriving at the decision in question, ‘is required … to act in a judicial manner to the extent of observing one or more of the rules of natural justice’: Administrative Law Act 1978 (Vic) s 2. Upon the return of the application, the Supreme Court has all of the jurisdiction and powers in proceedings for relief or remedy in the nature of certiorari, mandamus, prohibition or quo warranto or in proceedings for a declaration of invalidity or for an injunction.


54 (2010) 239 CLR 531.


56 Kirk (2010) 239 CLR 531, 573 [71]. See also 574 [73].

57 Ibid 566 [55], 580–1 [96]–[100].

58 See James J Spigelman, ‘The Centrality of Jurisdictional Error’ (2010) 21 Public Law Review 77, 91: ‘One salutary effect of Kirk is to bring into alignment the principles of administrative law applicable at a State level and those applicable at a Commonwealth level.’

However, they are, of course, subject to a range of discretionary considerations which will affect whether it is appropriate to grant such relief. The decision of the High Court in the *Offshore Processing Case*\(^{61}\) provides a good example of the use of the declaration as a public law remedy.\(^ {62}\)

**Interaction with s 39**

The entrenchment of the Supreme Court’s judicial review jurisdiction, as well as the streamlining of the concept of ‘jurisdictional error’, are important in the context of s 39, because they enhance the prospect of the condition in s 39 being satisfied. As a result of these developments, it is more likely that a person affected by an act or decision will be able to seek judicial review on a non-Charter ground, thus satisfying the condition in s 39.

An interesting and difficult question is whether a breach of s 38 of the *Charter* constitutes ‘jurisdictional error’. As will be recalled, s 38 of the *Charter* provides that it is unlawful for a public authority to act in a way which is incompatible with a human right or, in making a decision, to fail to give proper consideration to a human right. Does breach of this provision constitute a ‘jurisdictional error’? This can affect the type of administrative law relief that may be available for breach of s 38.\(^ {63}\)

Conceptually, it seems possible to accommodate unlawfulness under s 38 within the rubric of ‘jurisdictional error’. In essence, jurisdictional error covers cases where a court or tribunal acts beyond the limits of its power or authority. Section 38 undoubtedly places limits on the powers of a public authority. In these circumstances, there does not seem to be any conceptual difficulty in saying that a public authority which breaches s 38 acts beyond its power or authority.

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\(^{61}\) *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319 (‘*Offshore Processing Case*’). In that case, the Minister did not have a duty to consider whether to exercise the relevant power, therefore mandamus would not issue. The unavailability of mandamus meant that there was no utility in granting certiorari to quash the recommendation of the independent reviewer. Nevertheless, the Court held that a declaration should be made that the processes undertaken to arrive at the reviewer’s recommendation were flawed in the respects that the Court identified. The Court held that in the circumstances of the litigation it could not be said that a declaratory order would produce no foreseeable consequences for the parties — presumably it would be relevant in any further consideration of the plaintiff’s claim — and that the other discretionary considerations surrounding the grant of declaratory relief were satisfied. See also the discussion of the case in Aronson and Groves, above n 60, [3.220], [15.110], [16.10].

\(^{62}\) Another development which bears upon satisfaction of the condition in s 39 of the *Charter* is the applicability (or otherwise) in Australia of the decision of the English Court of Appeal in *R v Panel on Take-overs and Mergers; Ex parte Datafin plc* [1987] QB 815 (‘*Datafin*’). In that case, the Court of Appeal held that a decision of a private body which was not made in the exercise of a statutory power may be amenable to judicial review if the decision is, in a practical sense, made in the performance of a ‘public duty’ or in the exercise of a power which has a ‘public element’. The applicability of *Datafin* in Australia has been accepted at the first instance level and the Victorian Court of Appeal has said that the *Datafin* principle is ‘appealing’: see *CECA Institute Pty Ltd v Australian Council for Private Education and Training* (2010) 30 VR 555, 569–76 [73]–[99]; *Mickovski v Financial Ombudsman Service Ltd* (2012) 36 VR 456, 465–6 [30]–[32]; cf *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393, 410–13 [74]–[81].

\(^{63}\) However the significance of the distinction between jurisdictional and non-jurisdictional error is somewhat diminished because of the availability of certiorari for non-jurisdictional errors of law on the face of the record and the availability of declarations and injunctions for non-jurisdictional errors of law. See Aronson and Groves, above n 60, [3.350].
On the other hand, we are used to thinking of the limits on the powers or authority of courts and tribunals as stemming from the statute which governs their operations. There are statements in the cases along these lines. However, those statements may be explained by the context in which they were made, where there was a single statute governing the establishment of the relevant body and regulating its work. As a matter of principle, why should it matter if the limits on power stem from two statutes rather than one? In Kirk, the High Court quoted a passage from Jaffe which stated that the denomination of some questions as ‘jurisdictional’ is ‘almost entirely functional: it is used to validate review when review is felt to be necessary’.

It is important to recall that classification of an error as jurisdictional does not necessarily mean that the court will nullify the decision. As Professors Aronson and Groves explain, the expression ‘jurisdictional error’ is both a conclusion and a departure point. It is a conclusion reached after applying other tests, in much the same way as negligence is a conclusion after applying other tests. But it is also a departure point for considering the consequences of the error. It does not necessarily follow that the court will nullify the act or decision, although that is the usual consequence.

The question whether a breach of s 38 of the Charter constitutes a ‘jurisdictional error’ was considered in Bare v Small. At first instance, Williams J held that s 38 unlawfulness does not per se amount to ‘jurisdictional error’. The decision is the subject of an appeal to the Court of Appeal, and therefore the question remains open at this stage.

To illustrate the way in which these principles may apply in practice, I return to the example I gave at the beginning of this paper. To recap: in the example, a compulsory medical treatment order has been made by an authorised psychiatrist in respect of a patient. The compulsory medical treatment order has the effect that the patient is required to take, and submit to, medication without the patient’s consent. The patient brings an application for review of the decision of the psychiatrist to the Mental Health Review Board. The governing statute provides that the Board must review the decision of the psychiatrist within eight weeks. Seven weeks after the application for review is filed, the Board holds a directions hearing and adjourns the further hearing of the application for review for several months. The patient wants to challenge the decision of the Board to adjourn the hearing and to compel the Board to determine the application for review. Thus the patient would want an order in the nature of certiorari quashing the Board’s decision and order in the nature of mandamus compelling it to act.

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64 See, eg, Kirk (2010) 239 CLR 531, 573–4 [72]: ‘Those limits are real and are to be identified from the relevant statute establishing the body and regulating its work.’
66 Aronson and Groves, above n 60, [1.110].
67 Jadwan Pty Ltd v Secretary, Department of Health (2003) 145 FCR 1, 16.
69 Ibid [116], [119], [121].
70 Based on Kracke (2009) 29 VAR 1.
The first question is whether the patient may seek such relief or remedy ‘otherwise than because of [the] Charter’. In this example, it is arguable that the statute governing the Mental Health Review Board requires it to hear and determine an application for review within the period of eight weeks, rather than merely hold a directions hearing and adjourn the substantive hearing. On this basis, it would be open to the patient to seek judicial review in the Supreme Court of Victoria alleging that the Board has committed ‘jurisdictional error’ by reason of having misapprehended or disregarded the nature or limits of its functions or powers. The patient could seek an order in the nature of certiorari to quash the Board’s decision and mandamus to compel the Board to conduct the review. In these circumstances, whether the ‘factual availability’ or the ‘abstract availability’ interpretation is correct, the condition in s 39 would seem to be satisfied.

The next question is whether orders in the nature of certiorari and mandamus are available for unlawfulness under the Charter. Insofar as mandamus is concerned, this would depend on whether the obligations in s 38 are considered to be duties. Insofar as certiorari is concerned, this remedy would be available if the error is jurisdictional or if the error of law appears on the face of the record. If such relief is not available, it may be that declaratory or injunctive relief could be sought in respect of breach of s 38 of the Charter.

In the actual case upon which this example is based, which arose in a different procedural context, Bell J held that there had been a breach of the patient’s human rights. In fact, the Board had not reviewed the decision of the authorised psychiatrist for over two years. His Honour held that this constituted a breach of the human right to a fair hearing which he held required the hearing to be conducted within a reasonable period of time, and made a declaration to this effect.

In conclusion, in considering the scope and availability of the remedies provision in the Charter it will be important to have regard to developments in the field of administrative law. In this paper I have sought to outline some of the important developments in that field which will impact of satisfaction of the condition in s 39.

71 Charter s 39(1).
72 See Craig (1995) 184 CLR 163, 177 in the context of inferior courts, but these grounds apply, ex hypothesi, in the case of administrative tribunals.
73 Kracke (2009) 29 VAR 1. As noted above, the procedural route adopted in the actual case was different to that which I have assumed in the example. The case was brought by way of merits review to VCAT rather than judicial review to the Supreme Court.
74 Sitting as President of VCAT.
75 Charter s 24(1).
76 Kracke (2009) 29 VAR 1, 109–14 [495]–[532], 171 [859].
77 Ibid 161–7 [800]–[828].
Proportionality in Comparative Analysis*

Professor Bryan Horrigan†

Overview

What are the proper roles and tools for judges in making decisions about guaranteed human rights and treatment of those rights by other institutional actors, and to what extent does proportionality analysis assist in that enterprise? This is one of the most common and yet difficult questions in 21st century global human rights jurisprudence. Like its counterpart instruments elsewhere in Australia (i.e. the ACT) and overseas (e.g. the UK, Canada, New Zealand, and South Africa), the Victorian Charter of Human Rights and Responsibilities Act 2006 (Vic) (‘the Charter’) contains some important answers to this question.

No less an authority than a recent former Chief Justice of the High Court of Australia (‘HCA’) sees the intersection between human rights, rights-protective legislation, and proportionality as an important focal point in 21st century global human rights jurisprudence. In Mulholland v Australian Electoral Commission,1 Chief Justice Gleeson expresses the view that

> human rights legislation, which declares fundamental rights or freedoms but, recognising that they are rarely absolute, permits limits or restrictions provided they can be ‘demonstrably justified in a free and democratic society’, is the context in which current jurisprudence on proportionality is most likely to be seen at work.

Such is the context for the Charter, as it enters the next phase of its interpretation, application, and reform, beyond the relatively diluted form in which it has survived its first major test in the HCA in the Momcilovic case.2 This article examines what the Charter both contributes to, and draws from, comparative proportionality jurisprudence.3 It distils and amplifies the presentation

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3 A Charter-relevant taxonomy and framework for proportionality analysis needs its own terminology and dimensions. In what follows, the term ‘proportionality jurisprudence’ embraces both ‘proportionality law’ and ‘proportionality discourse’ as two distinct but related sources of law. ‘Proportionality law’ refers to primary sources of law in which proportionality figures as an element or test, such as proportionality’s use in legal interpretation of precedent, legislation, and constitutions. Section 7 of the Charter is such an example. ‘Proportionality discourse’ refers to secondary sources of law in which proportionality figures as an object of focus, such as authoritative commentaries, learned texts, and other academic outlets. ‘Comparative proportionality jurisprudence’ refers to the primary and secondary sources of proportionality law under international law and the law of comparable jurisdictions for the purposes of the Charter. ‘Global law’ refers to international law as well as foreign law (i.e. the law of other countries).
on this topic given by the author at the *Human Rights Under the Charter* conference in August 2014, and can be read together with the accompanying presentation as delivered.4

The Victorian Parliament has enshrined proportionality in the *Charter*, principally through various provisions that permit justified limitations upon human rights generally or specific rights in particular. These provisions both draw upon and contribute to a broader body of comparative proportionality jurisprudence, especially focused upon human rights. To that extent, the *Charter* and those engaged in its work all form part of a grander global project on proportionality jurisprudence, with benefits going in both directions.

Proportionality-talk needs a way to identify and discuss in turn what is unique, similar, and different about proportionality’s manifestations in each of the jurisdictions that contributes to comparative proportionality jurisprudence. This paper offers an analytical framework for the proportionality-based work of the *Charter* that grounds such work in the broader transnational landscape of proportionality jurisprudence. A framework of that kind can prove useful to legal actors and commentators alike in working through proportionality’s issues in Victorian human rights law’s post-*Momcilovic* phase of development.

The *Charter’s* enshrinement of proportionality shares with proportionality jurisprudence in other countries the three main challenges of proportionality analysis — namely, the extent to which proportionality provides clear tests for decision-making, the soundness of using proportionality to justify limits upon human rights, and the appropriate role(s) for courts in various possible institutional decisions about human rights. A considerable body of academic and judicial thought points to proportionality’s value in revealing and articulating a structured process of decision-making for justifying limits upon human rights, provided that such a guided adjudicative process is not confused with dictated substantive outcomes, especially given the value-judgments and intertwined institutional roles in play.5

Five themes permeate the discussion and analysis of comparative proportionality jurisprudence that follows. First, the *Charter’s* jurisprudence is still at a relatively early stage of development, in comparison with the evolution of judicial exploration of bills or charters of rights in other jurisdictions over a series of decades, which means that we are still on a journey towards a framework for comparative proportionality analysis through the prism of the *Charter*. Secondly, as proportionality analysis is actually or potentially built into four dimensions of statutory interpretation as well as multiple judicial and non-judicial roles under the *Charter*, the ultimate post-*Momcilovic*6 resolution of proportionality’s place in rights-limiting justification under

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4 This conference presentation can be found at the following webpage for the Judicial College of Victoria: [http://www.judicialcollege.vic.edu.au/sites/default/files/Proportionality in Comparative Analysis.ppt](http://www.judicialcollege.vic.edu.au/sites/default/files/Proportionality in Comparative Analysis.ppt)


6 (2011) 245 CLR 1.
s 7(2) and rights-sensitive statutory interpretation under s 32(1) must accommodate this broader landscape of proportionality analysis.

Thirdly, whatever the broader political difficulties surrounding the policy question of whether to use proportionality analysis and the operational aspects of how to use it within its proper bounds, the policy question has at least been settled to some degree by the mandating of proportionality analysis in the rights-limiting s 7 of the Charter, leaving residual issues about s 7’s interaction with the interpretative mandate in s 32(1) and refocusing the operational question upon the practical application of s 7. Fourthly, it is possible to relate cross-jurisdictional concepts and standards of proportionality to the rights-limiting provisions of s 7 and other Charter provisions and to cases about them. A framework for such work is badly needed in this post-Momcilovic phase of Charter jurisprudence.

Finally, the Charter is simply one species amongst other species of proportionality across jurisdictions. So, the journey towards a framework of comparative proportionality analysis through the prism of the Charter must transcend technical and doctrinal analysis of the cross-jurisdictional differences between such species, and rise to a higher-order appreciation of the genus to which these various species of proportionality ultimately belong.

**Different Areas of Proportionality Analysis**

‘Proportionality’ is neither a mono-dimensional concept nor a context-independent one. In a broad sense, proportionality provides a basis for deciding the lawfulness of particular exercises of public power that focuses upon how various interests stand in relation (or proportion) to one another. ‘Why all the fuss about “proportionality”?’ we might ask. After all, “[p]roportionality”, as a rule of reason in public law, is hardly a new idea, according to one of the HCA’s current members. In Justice Kiefel’s characterisation, ‘notions of proportionality’ are implicated ‘in balancing public and private interests’.

Interestingly, at least on one high-level judicial view, there is a level of acceptable and applicable proportionality law that is inherent in Australia’s constitutional and legal culture, whatever lessons might be gleaned from comparative proportionality jurisprudence. In *Rowe v Electoral Commissioner*, Justice Kiefel identified that thread of proportionality and its derivation as follows:

> There is no doubt that the [proportionality] principle has a different status in other legal systems ... Nevertheless, the question to which it is directed is common to these systems *and our own*. It is how to determine the limit of legislative power, where its exercise has the effect of restricting protected interests or freedoms ... Further, proportionality is a principle having its roots in the *rule of law*.9

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8 Ibid 87.
Still, its ultimate grounding in the rule of law does not mean that proportionality has only one meaning and context. A cursory scan of high-level Australian judicial dicta is sufficient to illustrate the very different contexts in which notions of proportionality arise.10 Discussing proportionality in the context of constitutional validity of legislation, Justice Kirby comments in Mulholland that ‘[b]y inference, “proportionate” is a description of a law which falls on the right side of the boundary and is thus within constitutional power’.11 Conversely, in referring to Chief Justice Gleeson’s earlier discussion of proportionality and human rights legislation, the majority judgment of six members of the bench in Hogan v Hinch summarises Chief Justice Gleeson’s view as being that ‘the term “proportionality” might be used to indicate what was involved in the judicial evaluation of competing interests which were rarely expressed in absolute terms’.12

Australian public law still debates the difference between proportionality and alternative formulations of the test for constitutionally acceptable interference with freedom of political expression, although the HCA is veering closer towards acceptance of at least the language of proportionality in this context.

According to the HCA’s joint majority judgment in a 2013 case on constitutionally protected political free speech:

Where a statutory provision effectively burdens the freedom [of political communication], the second limb of the Lange test ... asks whether the provision is reasonably appropriate and adapted, or proportionate, to serve a legitimate end in a manner which is compatible with the maintenance of the prescribed system of representative government.13

However, these debates about justified governmental limits upon rights only travel so far in providing analogous guidance about proportionality in rights-based decisions by various institutional arms of government under the Charter.

What proportionality means in the context of constitutional heads of power and their limits is different from what it means in the context of an alternative head of judicial review of administrative action. For example, continuing debate occurs in the UK about the pervasiveness of proportionality as a basis for judicial review in administrative law. The battle lines are drawn in a 2014 UK Supreme Court judgment between those who view reasonableness and proportionality as equally valid legal constraints upon arbitrary political power and those who caution that ‘it is at best uncertain to what extent the proportionality test ... has become part of domestic public law’.14

14 Kennedy v The Charity Commission [2014] 2 WLR 808, 892 [246]. Contrast the positions of Lord Mance and Lord Carnwath respectively at 837–840 [51]–[55], 891–892 [245]–[246].
In turn, such contexts for proportionality can differ from proportionality’s relevance in human rights law, notwithstanding considerable overlap between them where choices are made involving human rights, public interests, and governmental actions and decisions concerning them.\textsuperscript{15}

Even in Australian states without a bill/charter of rights, courts applying Commonwealth law on human rights, racial discrimination, and ‘special measures’ to state governmental laws and actions cannot avoid engaging in some form of proportionality analysis.\textsuperscript{16} In short, there are different contexts and areas of law for proportionality. In the human rights context, proportionality has a core transnational role in identifying and justifying acceptable limits upon fundamental rights and freedoms. ‘[T]he proportionality test … is a foundational concept in the international human rights jurisprudence [and] is applied universally across the various jurisdictions in determining whether limitations on human rights are justified’, as explained by Justice Bell in the \textit{Kracke} case.\textsuperscript{17} Accordingly, in human rights discourse, proportionality has a discrete use as a controlling mechanism for protecting and qualifying guaranteed human rights, whether through judicial review of the constitutionality of rights-affecting legislation, judicial interpretation of legislation in rights-sensitive ways (under charters/bills of rights and otherwise), or official determinations of justified limits upon human rights (including judicial and non-judicial mechanisms).\textsuperscript{18}

Methodologically, the underlying threads of proportionality commonly involve the alignment of different governmental means and ends, a calculus of considerations in undertaking that means-ends analysis, and an overall cost-benefit evaluation of the chosen means and ends, considered from a range of legal, institutional, and systemic standpoints. This still begs many questions about the subjects of alignment, scales of measurement, and institutional actors involved in proportionality analysis, for different purposes and across different areas of law. Such questions are also implicated in the standards of proportionality, as distilled in this article.

And there’s the rub (with apologies to Shakespeare). Even when required under constitutional, statutory, or judge-made law, the actions of judges in drawing lines between societal ends, politically chosen means, and individual rights always carry the potential for public controversy, because of the nature of the interests and roles at stake, especially in a country whose media and politicians remain prone to chanting the mantra that politicians make the law while judges merely apply it. The ‘fairy tale’\textsuperscript{19} lingers on, at least in some quarters of political and public debate, although the judicial and academic discussion of law-making has progressed.

\textsuperscript{15} For an important 2014 discussion of proportionality in the context of human rights concerning assisted suicide for terminally ill people, see \textit{R (Nicklinson) v Ministry of Justice} [2014] 3 WLR 200 (‘\textit{Nicklinson}’).

\textsuperscript{16} See, eg, \textit{Aurukun Shire Council v CEO Office of Liquor, Gaming and Racing in the Department of Treasury} [2012] 1 Qd R 1, 49 [74], 49 [76], 51–3 [83]–[91] (McMurdo P), 60–1 [123], 66 [144], 72 [164], 72 [167], 89 [209] (Keane JA), 99 [245], 100 [249] (Philippides J).

\textsuperscript{17} \textit{Kracke v Mental Health Review Board} (2009) 29 VAR 1, 35 [111] (‘\textit{Kracke}’).

\textsuperscript{18} For example, judicial declarations that valid legislation is nevertheless inconsistent with guaranteed rights, and ministerial statements that proposed laws are compatible with guaranteed rights.

\textsuperscript{19} Lord Reid, ‘The Judge as Law Maker’ (1972) 12 \textit{Journal of the Society of Public Teachers of Law, New Series} 22, 22.
Multiple Levels of Comparative Analysis Involving the Charter

Like ripple effects on a lake, comparative proportionality analysis concerning the Charter has a series of concentric circles of influence. First, in terms of Australian human rights laws, Victoria and the ACT are sub-national jurisdictions with comparable human rights laws. Secondly, in terms of Australian law generally, the species of proportionality under Charter jurisprudence bears comparison and contrast with other species of proportionality under that general genus in Australian public, criminal, and other areas of law. Thirdly, the Charter contains a proportionality-based provision for justified limits upon rights (i.e. s 7) that has counterparts to one degree or another in the constitutional or statutory bills/charters of rights operating in each of New Zealand, Canada, and South Africa in particular, as well as other provisions potentially bearing upon proportionality analysis that also have similar counterparts in other jurisdictions, especially the UK.

Fourthly, the proportionality-based analysis required under the Charter does not occur in a vacuum, but rather draws to one degree or another from comparative proportionality jurisprudence more generally, with due allowance for relevant jurisdictional, constitutional, and other relevant legal differences. For example, proportionality analysis under Strasbourg influenced human rights law from the UK does not translate completely or indiscriminately to Australian (including Victorian) conditions. Similarly, the ongoing UK debate in the judicial and academic arms of the legal profession about the capacity and desirability of proportionality analysis overtaking other bases for judicial review of governmental action does not correspond on all levels and in all details with debates about proportionality under the Charter.

Fifthly, such concentric circles of influence point towards the two-way interaction between the Charter and comparative proportionality jurisprudence. In other words, comparative analysis under the Charter cuts both ways. Considered from the outside in (i.e. from outside Victoria, looking in), the law and judgments from other countries must proceed through a mediating filter that accounts for the impact of relevant jurisdictional differences upon the transposition of lessons across jurisdictions.

Take the UK as a point of comparative reference, for example. Once the most direct and suitable source of comparative precedential guidance, UK law and judgments now diverge significantly from their Australian counterparts, under a variety of influences. Australian constitutional conditions differ from those operating in the UK. UK law is subject to EU directives in a way that Australian law is not. The UK has a national human rights law; Australia does not. The institutional ‘dialogue’ model of human rights laws enshrined in the UK and some other countries does not translate completely to the model enshrined in the Charter, at least according to the HCA.20

The interpretative provision under the Human Rights Act 1998 (UK) c 42 has a declared capacity for rights-sensitive ‘reinterpretation’ of laws beyond the ordinary judge-made rules of statutory

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interpretation that has been judicially withheld from the equivalent interpretative mandate in the *Charter*, at least in the wake of the HCA’s decision in the *Momcilovic* case. The nature, scope, and contexts of different forms of proportionality analysis differ under Australian and UK constitutional and administrative law, in ways that render difficult yet necessary a forensic dissection of proportionality’s contextual and substantive nuances in each field of its operation. This affects everything from debates about proportionality as an EU-generated norm as well as a general head of review in UK administrative law, to debates about proportionality under the HCA’s *Lange* test for lawful limits on constitutionally protected free speech, as well as debates about the operation of the rights-limiting provisions in both the *Charter* and the *Human Rights Act 2004* (ACT).

However, considered from the inside out (i.e. from inside Victoria, looking out to the rest of the world), Victoria’s *Charter* jurisprudence has much to offer comparative (within Australia) and transnational (beyond Australia) politico-legal analysis, on at least six levels. First, s 7’s mandating of rights-limitations allows Victorian judges the opportunity to develop and show the world a model for legislatively crafted and judicially interpreted rights-focused proportionality analysis. Secondly, this work on rights-analysis by Victorian courts contributes not only to an emerging body of human rights precedent for Victorian purposes, but also to the broader body of comparative proportionality law that is available for reference in those jurisdictions whose courts are permitted or directed to use such resources in rights-based adjudication. Thirdly, to the extent that the HCA is correct, for Australian constitutional reasons, in characterising the *Charter* in the *Momcilovic* case as not conforming strictly to an institutional ‘dialogue’ model of human rights laws, Victoria’s human rights law adds value as another model in the range of institutional options for legal rights-protection globally. Fourthly, Victorian precedent surrounding proportionality analysis under the *Charter* provides another point of reference and contrast in the various Anglo-Commonwealth debates about proportionality analysis within and beyond the domain of rights-protection.

Fifthly, the use of comparative proportionality jurisprudence under the *Charter* requires a balanced assessment of proportionality’s uses and difficulties in that work.

As warned by Chief Justice Gleeson in a constitutional context in *Mulholland*:

> The concept of proportionality has both the advantage that it is commonly used in other jurisdictions in similar fields of discourse, and the disadvantage that, in the course of such use, it has taken on elaborations that vary in content, and that may be imported ... into a different context without explanation.

This passage neatly distils the translational challenge confronting proportionality analysis under the *Charter* and elsewhere. However, even such a warning from such an authority contains an implicit comparative imperative, in its acceptance that proportionality in each of its manifestations

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21 Ibid.
22 *Lange v Australian Broadcasting Company* (1997) 189 CLR 520 (‘*Lange*’).
23 (2004) 220 CLR 181, 197–8 [34].
has similarities and differences to its other manifestations. The bull must be grasped by both horns, so to speak.

So, one of the great challenges in judicial and academic analysis of proportionality from a comparative perspective is to identify whether there is middle ground between the ‘nightmare’ of fragmented, divergent, and jurisdiction-specific models of proportionality and the ‘noble dream’ of an integrative, coherent, and cross-jurisdictional understanding of proportionality, to borrow Professor HLA Hart’s famous metaphor.24 The suggestion in this paper is that the path towards the latter lies in ascending from focusing upon the doctrinal differences between different species of proportionality in different domains, over which a disproportionate amount of judicial and academic ink has been spilt, towards focusing upon the features of a genus of proportionality traceable across different domains.

Nothing in that enterprise assumes or propels us towards universality, homogeneity, or disregard of meaningful jurisdiction-specific differences on proportionality. Rather, it suggests starting with a frame of reference, even from within a particular jurisdiction, that makes sense of what is unique, similar, and different about that jurisdiction’s particular species of proportionality, given the broader transnational genus of proportionality to which its concepts, methodologies, and uses belong. Understanding at this level of genus provides enhanced appreciation in return at the level of species, with due adjustment for species-level uniqueness and difference as well as similarity.

Indeed, institutional devices such as authorised reference to relevant global law on proportionality, as in s 32(2) of the Charter and comparable human rights laws, presuppose the development of a position from which it is possible for an institutional decision-maker in such a jurisdiction to assess the extent to which comparable law from outside the jurisdiction is useful, distinguishable, or unhelpful. The position suggested in this paper is that such an enterprise leads to a framework for comparative proportionality analysis with at least five key features, including an order of 10 analytically distinct but related enquiries and a correlative set of 10 standards with unifying descriptions.

Finally, Charter jurisprudence forms part of a broader global project of internationalisation of law generally and transnational adjudication in particular, especially on human rights matters. At the same time, the comparative/transnational analysis required or permitted under the Charter shares some strengths and weaknesses with comparative/transnational judicial analysis generally. Serious issues arise concerning the range of jurisdictions consulted, the basis for their selection, jurisdiction-specific factors that affect transposition of reasoning and outcomes across jurisdictions, and a range of other factors going to filtering and quality-control in judicial outcomes.

Debates and Schools of Thought about Proportionality

At the outset, it is convenient to identify the key debates about proportionality under the Charter that draw upon comparative proportionality jurisprudence as well as contribute to it, in a two-way interaction. One debate involves the Charter's particular allocation of different institutional responsibilities between politicians, judges, and other public officials for making decisions about limits on human rights. The Victorian Parliament's express enactment in s 7(2) of what it knew was a proportionality-based test for justified limits upon human rights has not foreclosed all parts of this debate; there is a lingering and fundamental controversy over the relevance of this proportionality-based provision to the exercise of interpreting Victorian laws under applicable norms of statutory interpretation.

Extrapolated beyond the Charter, this debate reflects a broader debate in comparative proportionality jurisprudence about the appropriateness and aptitude of courts engaged in rights-limiting analysis as part of the judicial function. Some commentators and judges view proportionality's implication of public-private interests and end-means analysis as lying at or beyond the outer boundary of the proper judicial function, while others view it as a concept whose jurisdictional reach, methodological sophistication, comparative legislative enshrinement, and precedential development now belong in the judicial mainstream. The division of views between these two camps underpins differences in judicial views about the proper place of s 7 of the Charter in statutory interpretation.

A second and related debate concerns the location of proportionality-analysis under the Charter within a broader hierarchy of legislative and judge-made norms of statutory interpretation, whatever the outcome of the controversy outlined above. Even if s 7(2) has no part to play in statutory interpretation, for example, proportionality analysis is still inherent to the elements or limits of particular rights under the Charter, which still must be interpreted through the mediation of a series of constitutional, legislative, and judicial norms. Many aspects of this debate await resolution, including the amenability to proportionality analysis of norms of statutory interpretation such as the principle of legality, as discussed further below.

A third and yet further related debate revolves around the methodology of proportionality as a tool of analysis by institutional officials. This debate revolves around twin concerns about proportionality's functionality. One concern focuses upon the kind of legal norm that proportionality is (i.e. its nature). In other words, does it operate like a legal rule or does it have other qualities as a norm in legal reasoning? On one view, ‘balancing and proportionality tests are most usually associated with standards-based approaches to adjudication’, whereas rule-based reasoning relies upon strict categorical analysis and application of rules and their elements and exceptions.25

25 Evans and Stone, above n 5, 5.
The next and perhaps deeper concern focuses upon the correct characterisation of proportionality as an outcome-determining test (or set of tests) in its own right, or alternatively as a systematic and coherent process of reasoning that leads to substantive conclusions about human rights. Here, proportionality-analysis transcends a mere head of judicial review of administrative action, legislative constitutionality, and rights-interfering justifications. Instead, proportionality becomes a focal point for a structured process of decision-making that usefully illuminates the issues for consideration, as distinct from a substantive and outcome-determining test in its own right. The structuring nature of proportionality is encapsulated in the 10 sequential questions and 10 associated standards on proportionality outlined in this article.

Adjudicating in a constitutional context about proportionality, Justice Kiefel seems to view it as having sufficient certainty and workability from both outcome-based and process-driven standpoints:

The methods used to test the principle of proportionality are rational and adaptable. Some bear resemblance to tests which have already been utilised in this Court ... It should not be assumed that the application of identifiable tests of proportionality will lead to widening, impermissibly, the scope of review of legislation. The statement and explication of the tests employed in the assessment of proportionality should result in a more rigorous and disciplined analysis and render the process undertaken more clear. Once it is acknowledged that constitutional protections are not absolute, some test must be utilised in an assessment of proportionality ... It is preferable to identify how that assessment is undertaken in order to avoid the invocation of proportionality as a mere statement of conclusion.

A fourth and yet another related debate concerns the content of proportionality. Conversations in this debate identify a series of discrete but related categories of components of proportionality. A first strand relates to the competition between interests, such as public/collective versus private/individual interests, one right/interest versus another right/interest, or even a given right/interest and its proper scope/limits. The nature of the interests being juxtaposed in this way matters, given that proportionality’s main sphere of operation concerns the relation between appropriate governmental means and ends.

A second strand of the cross-jurisdictional judicial analysis and academic commentary surrounding proportionality variously describes its content in terms of ‘tests’ (and ‘sub-tests’), ‘principles’ (and ‘sub-principles’), ‘prongs’, and ‘elements’ (or ‘aspects’/‘dimensions’). Judges and commentators in the common law world reach considerable consensus in this debate about the broad factors relating to proportionality-analysis, whatever the differences across jurisdictions. The 10 standards of proportionality distilled in this article represent an attempt to bring order to this debate from both Victorian and non-Victorian perspectives.

26 See, eg, Elliott, above n 5; Woolf et al, above n 5; Timothy Endicott, ‘Proportionality and Incommensurability’ in Grant Huscroft, Bradley W Miller and Gregoire Webber (eds), Proportionality and the Rule of Law: Rights, Justification, Reasoning (Cambridge University Press, 2014) 311.

27 Rowe (2010) 243 CLR 1, 139–40 [457]–[458].
A final debate, related to all of the others, draws back from the various species of proportionality analysis associated with the Charter, and invites consideration of what all of this means for contemporary liberal democratic governance under the rule of law. In other words, rights-sensitive statutory interpretation, rights-limiting justifications, and rights-compatibility assessments are best made by what kinds of institutions, in what domains of institutional action, using what kinds of reasoning, having what impact upon modern democratic governance, and with what lessons in each case for jurisdictions who draw from a common wellspring of ideas and techniques about proportionality.

The Politics and Dimensions of Proportionality Analysis under the Charter

The Politics of Proportionality

The human rights guaranteed under the Charter draw upon the human rights enshrined in major international human rights instruments. Proportionality analysis in rights-limiting justifications under s 7(2) and elsewhere under the Charter draws to one degree or another upon comparative proportionality jurisprudence. Courts are legislatively authorised under s 32(2) to refer to relevant transnational human rights jurisprudence in rights-sensitive statutory interpretation under s 32(1). The three legislative provisions mentioned above have equivalents to varying degrees in human rights laws in other countries.

In these ways, the Charter also provides a useful model of how different sources or parts of global law (as ‘input’ factors) have multiple points of interface with different sources or parts of national and sub-national law. Global law of different kinds interacts in different ways in the formulation and interpretation of domestic law (in the ‘process’ stage of various forms of legal interpretation), through different uses and forms of reasoning about such interactions, which result in different products of these interactions between global and national law in adjudicative results (as ‘output’ factors).

In terms of the broader impact upon different legal orders, the ultimate fate of proportionality analysis under the Charter, especially its role in statutory interpretation, risks further potential isolation of Australian law in the common law world. In Australia, the USA, and elsewhere, there is an ongoing debate at the highest judicial levels about the legitimacy of reference to global human rights jurisprudence in constitutional interpretation, for example, with more HCA judges on the judicial and extra-judicial record against it than for it in the last decade or so.

28 For additional politico-legal considerations surrounding the Charter’s operation, see: Slides 8-9 in the author’s corresponding conference presentation, accessible at http://www.judicialcollege.vic.edu.au/sites/default/files/Proportionality in Comparative Analysis.ppt


30 For more on this discussion, upon which this analysis draws, and for relevant cases and commentaries, see Bryan Horrigan, ‘Human Rights and Common Good: Volume III — Global and Jurisprudential Dimension of Natural Law, Human Rights and the Common Good’ in Mark Sayers and Aladin Rahemtula (eds), Jurisprudence as Practical Reason: A Celebration of The Collected Essays of John Finnis (Supreme Court Library, 2013) 68–72.
However, the HCA’s overwhelming refusal to entertain judicial globalisation of domestic constitutional law in human rights matters is in stark contrast to the numerous occasions in both constitutional and non-constitutional law where its judges make reference to global law for reasons other than to reject the interpretative use of such law, and without yet articulating a full account and justification of the multiple points of interaction that now exist between global and domestic law. In the interim, the danger is that the tendency evident in the HCA’s various judgments in the Momcilovic case to differentiate the Charter as a whole from the institutional ‘dialogue’ model apparent in other jurisdictions, as well as the relevance (for Australian purposes) of comparative proportionality law in non-Australian instruments and cases, could add another nail to the coffin of isolationism in which Australian law increasingly finds itself in the common law world.32

Importantly, the approach to proportionality within any jurisdiction is likely to be influenced by aspects of legal culture, prevailing forms of legal analysis, and legal attitudes towards influences from other legal orders. Given the pervasive influence throughout the common law world of the Canadian Oakes formulation of proportionality, it is instructive to consider one set of commentators’ views on the difference made by background conditions in the politico-legal order to attitudes towards proportionality, as follows:

The comparative openness of the Canadian Supreme Court to influence of foreign law explains why it is proportionality rather than some other form of doctrinal flexibility that has prevailed in the Canadian Courts. Further the spread of proportionality beyond Canada is also largely due to the influence of the practice of comparative constitutional law by scholars and, most significantly, courts. It stands to reason then that it will be a [sic] more likely to be seen in legal cultures that are more open to outside influences.33

The Dimensions of Proportionality

Importantly, proportionality has multiple dimensions in Charter jurisprudence. Questions of proportionality are not limited to the work done by the rights-limiting s 7(2) concerning Charter rights generally. Accordingly, proportionality will have more rather than less work to do, depending upon the ultimate resolution of the thorny issue of proportionality’s role in deciding limits upon Charter rights through the interaction of the main rights-limiting provision (i.e. s 7) and the main rights-sensitive interpretative provision (i.e. s 32).

32 The other areas across public and private law now in this ‘isolationalist’ camp include: (a) the Australian Government’s non-endorsement of a national human rights law; (b) Australian divergences in Anglo-Commonwealth law on various equitable doctrines and unjust enrichment; (c) Australian jurisprudence on the legislating of standards of (i) misleading or deceptive conduct and (ii) unconscionable conduct in business and consumer dealings; (d) Australian contract law’s relative distance from transnational commercial law in key doctrines (such as good faith in commercial agreements); and (e) Australia law on judicial review of administrative action. For more on these areas and commentaries on them, see Horrigan above n 30.
33 Evans and Stone, above n 5, 16.
Some Charter rights have their own in-built proportionality requirements and are characterised as such in Charter jurisprudence. This catalogue of Charter rights includes s 13’s right to privacy, at least to the extent that the equivalent UK human rights jurisprudence legislatively rendered relevant by the comparative directive in s 32(2) ‘provides some guidance as to how to determine what amounts to an “arbitrary interference” with privacy where arbitrariness is concerned with capriciousness, unpredictability, injustice and unreasonableness — in the sense of not being proportionate to the legitimate aim sought’, to frame the proportionality aspect in the way framed by Chief Justice Warren in WBM v Chief Commissioner of Police. Extrapolated beyond the Charter’s right to privacy, the proportionality aspect of arbitrariness might also apply elsewhere, as in the Charter right against arbitrary arrest or detention under s 21.

The catalogue of human rights with in-built proportionality elements also includes the right to freedom of expression under s 15, as qualified by s 15(3) as follows:

Special duties and responsibilities are attached to the right of freedom of expression and the right may be subject to lawful restrictions reasonably necessary—

(a) to respect the rights and reputation of other persons; or

(b) for the protection of national security, public order, public health or public morality.

Pausing there, human rights jurisprudence from the UK and elsewhere in the common law world indicates that constitutional and legislative qualifications to rights by reference to identified public interests and otherwise as required by law transforms a pure political exercise of choosing between interests on governmental policy grounds into a judicial exercise of choosing between interests on legally sanctioned policy grounds. Framed in this way, it is readily apparent that what might superficially appear as a conflict between collective and individual interests, on one hand, or between two different individual interests, on the other, is often better viewed as a competition and choice between two different and officially enshrined public interests – namely, the public interests served by advancement of each of the particular interests at stake.

To use the language adopted by three judges in a 2014 UK case involving alleged interference with journalistic freedom of expression, ‘the balance is not between private right and public interest, but between two aspects of the public interest’. Courts are accustomed in various contexts to evaluating individual and competing public interests. Moreover, the exercise of reconciling different public interests must still be conducted within the boundaries of permissible legal reasoning, methodology, and sources, as distinct from broader political consideration from a whole-of-society perspective. The characterisation and differentiation of these things is

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34 [2012] VSCA 159 (30 July 2012) [114] (Hansen JA agreeing) (‘WBM’).
36 Noone (Director of Consumer Affairs Victoria) v Operation Smile (Aust) Inc [2012] VSCA 91 (11 May 2012) (Nettle JA) (‘Noone’).
37 Miranda v Secretary of State for the Home Department [2014] EWHC 255 (Admin) (19 February 2014) [65] (Laws LJ, with the other judges agreeing) (‘Miranda’).
important, notwithstanding the practical difficulty of remaining on the right side of the line as characterised in the case at hand. These are important boundary-setting parameters for debate about appropriate institutional roles in human rights decision-making. Such parameters inform related debates about the boundaries of legislative and judicial law-making, whether viewed through the prism of proportionality analysis from a doctrinal perspective or Dworkinian analysis from a jurisprudential perspective, as discussed later in this article.

In summary, there are four key dimensions of operation for some form of proportionality analysis under the *Charter*. They can be listed for reference throughout this article as follows:

1. Individual Charter rights whose elements or terms are apt to raise issues of proportionality, such as:
   - notions of ‘arbitrariness’ implicated in the right to life (s 9), the right to privacy (s 13), and the right to liberty and security (s 21);
   - assessments of reasonable necessity implicated in the right to freedom of expression (s 15) and the right to humane treatment in detention (s 22);
   - expressly mandated limits upon rights by reference to other interests (s 15); and
   - aspects of discrimination (e.g. appropriateness of special measures to alleviate disadvantage, the discriminatory effect of chosen means, and the relation between an imposed requirement and the resulting discrimination) implicated under rights of recognition and equality under the law (s 8), protection of families and children (s 17), participation in public life (s 18), due respect for cultural rights (s 19), and rights in criminal proceedings (s 25);

2. Express limits on Charter rights generally under the rights-limiting s 7, implicated potentially in:
   - the exercise of rights-sensitive statutory interpretation under s 32(1), according to at least some members of the Victorian Supreme Court and the HCA;
   - the exercise of the judicial power under s 36 to make ‘a declaration of inconsistent interpretation’ about legislation’s rights-incompatibility;
   - statements of rights-compatibility by members of the Victorian Parliament who introduce Bills, under s 28; and
   - assessments of rights-incompatibility for the purpose of pre-enactment scrutiny of Bills by the Victorian Parliament’s Scrutiny of Acts and Regulations Committee under s 30;

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38 Arguably, such tensions underpin the concern about judicial engagement in some aspects of broader proportionality analysis that is expressed by three UK judges in *Miranda* [2014] EWHC 255 (Admin) [40], in terms of assessing ‘where the balance should lie’ and the ‘real difficulty in distinguishing this from a political question to be decided by the elected arm of government’.

(3) human rights jurisprudence on equivalent rights under the international and foreign legal orders, including proportionality analysis of the limits of human rights in those legal orders, imported into Charter jurisprudence as part of the comparative material authorised under s 32(2) for reference by judges engaged in rights-sensitive statutory interpretation under s 32(1); and

(4) actual or potential implication of proportionality analysis in the co-extensive operation in statutory interpretation of:
   (a) ordinary norms of statutory interpretation in general;
   (b) the principle of legality in particular; and
   (c) rights-sensitive statutory interpretation under s 32(1).

Relevant Provisions of the Charter and Equivalent Human Rights Laws

The most basic thing to notice about the Charter from a comparative perspective is the two levels of analysis on which proportionality is relevant. More than one provision of the Charter generates proportionality issues and these provisions have equivalents to varying degrees in other jurisdictions. For ease of reference in the discussion that follows, some of the key instruments and provisions are outlined and annotated immediately below.

The Charter’s Main Proportionality-Based Provision – Section 7 and Equivalents

Proportionality law contains a spectrum of global models for constitutional, legislative, and judicial enforcement of justified limits upon human rights. In that sense, the Victorian, ACT, and South African models are closely related species of a common genus of proportionality, whatever other differences they might have with one another or other species within that genus. Moreover, there are key aspects of correspondence across the species within this genus.

Proportionality analysis is legislatively enshrined in s 7 as the main provision governing limitations on Charter rights generally. It is worth setting out all of s 7 for reference at the outset, and not just the rights-limiting s 7(2), as follows:

7 Human rights – what they are and when they may be limited

(1) This Part sets out the human rights that Parliament specifically seeks to protect and promote.

(2) A human right may be subject under law only to such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors including —

(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.

For the purpose of comparing and contrasting equivalent rights-limiting provisions under Australian statutory bills of rights, s 7(2) can be juxtaposed with the rights-limiting s 28 of the Human Rights Act 2004 (ACT), which is in the following terms:

**28 Human rights may be limited**

(1) Human rights may be subject only to reasonable limits set by laws that can be demonstrably justified in a free and democratic society.

(2) In deciding whether a limit is reasonable, all relevant factors must be considered, including the following:

(a) the nature of the right affected;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relationship between the limitation and its purpose;

(e) any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.

At the very least, evolving judicial treatment of these provisions in Victoria and the ACT can inform each other, drawing in turn upon the customised translation of proportionality jurisprudence beyond Australia. These two Australian provisions are most closely modelled on the equivalent provision in the South African Constitution, in terms of available models of legal instruments that embody justified limits on rights through the lens of proportionality. Section 36(1) of the Constitution of the Republic of South Africa Act 1996 (South Africa) provides:
36 Limitation of rights

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including:

(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.

For additional comparison in terms of rights-limiting justifications, s 1 of the Canadian Charter of Rights and Freedoms uses a similarly structured and yet slightly different formula from that contained in the Charter, without delineating specific proportionality-based factors, but in terms that have been interpreted to embody proportionality and that also bring into play standards of what I shall call ‘propriety’, ‘legality’, and ‘justification’. It says:

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

As interpreted by Chief Justice Dickson in the landmark case of R v Oakes, s 1’s criteria provide ‘a stringent standard of justification, especially when understood in terms of the two contextual considerations [of] ... the violation of a constitutionally guaranteed right or freedom and the fundamental principles of a free and democratic society’. 40

Similarly, s 5 of the New Zealand Bill of Rights Act 1990 (NZ) states that:

Subject to section 4, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Section 32 and Equivalents on Rights-Sensitive Interpretation and Comparative Reference

Section 32 of the Charter has provisions that both mandate rights-sensitive statutory interpretation and facilitate judicial reference to relevant global human rights law, without calling into question the validity of legislation on rights-interference grounds, as follows:

40 [1986] 1 SCR 103, 136 ('Oakes').
(1) 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.

(2) 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.

(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.

Similar (although differently worded) provisions governing rights-sensitive statutory interpretation appear in the equivalent human rights laws in the ACT, UK, New Zealand, and South Africa. In terms of rights-sensitive statutory interpretation, s 30 of the Human Rights Act 2004 (ACT) states that ‘[s]o 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’.

In addition, from the perspective of judicial reference to comparable human rights law, s 31 of the Human Rights Act 2004 (ACT) states that:

(1) 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.

(2) In deciding whether material mentioned in subsection (1) or any other material should be considered, and the weight to be given to the material, the following matters must be taken into account:

(a) the desirability of being able to rely on the ordinary meaning of this Act, having regard to its purpose and its provisions read in the context of the Act as a whole;

(b) the undesirability of prolonging proceedings without compensating advantage;

(c) the accessibility of the material to the public.
In terms of rights-sensitive statutory interpretation, s 3 of the Human Rights Act 1998 (UK) c 42 states that:

1. 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.

Section 6 of the New Zealand Bill of Rights Act 1990 (NZ) states that:

Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

Finally, s 39 of the Constitution of the Republic of South Africa Act 1996 (South Africa) states that:

1. When interpreting the Bill of Rights, a court, tribunal or forum —
   a. must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
   b. must consider international law; and
   c. may consider foreign law.

2. When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

These South African provisions cover statutory interpretation as well as judicial reference to comparable human rights law.

Judges in the common law world routinely refer to relevant laws and cases from other jurisdictions, within the ordinary confines of common law reasoning. So, strictly speaking, a provision such as s 32(2) of the Charter is not technically necessary.41 However, the chief advantage of a provision such as s 32(2) of the Charter and its cognates in other global legal instruments is two-fold. Such provisions provide constitutional or legislative reinforcement of that judicial practice in the important context of rights-related statutory interpretation. They also affect the hierarchy of applicable norms of statutory interpretation, in the important sense that constitutional and legislated norms of interpretation take precedence over judge-made ones.

The comparative significance of provisions such as section 32(2) is explained by Justice Emerton in a Victorian case about access to IVF treatment claimed under human rights of privacy, family life, and health, as follows:

Presently, much of the content of rights that is urged upon decision-makers and the courts here in Victoria emanates from human rights decisions and commentary from overseas. This is entirely consistent with s 32(2) of the Charter, which provides for international law and the judgments

of foreign and international courts and tribunals relevant to human rights to be considered in interpreting a statutory provision, including a provision in the Charter itself. This is a good thing, as it will expose Victorian jurisprudence to relevant jurisprudence from other parts of the world and, indeed, make Victorian jurisprudence more relevant in an international context.\footnote{Castles v Secretary to the Department of Justice (2010) 28 VR 141, 161 [70] (citations omitted).}

**The Momcilovic Case’s Impact on the Interaction Between ss 7 and 32**

On a strict count of votes, four out of seven HCA judges in the *Momcilovic* case thought that s 7(2) was relevant in some way to s 32(1),\footnote{Warren CJ and Cavanough AJA accepted as much in Noone [2012] VSCA 91 (11 May 2012) [28], concluding that ‘there seems to be a 4:3 majority in the High Court that s 7(2) should be considered as part of the s 32(1) interpretative exercise’.} whatever the factors affecting the precedential authority of each of those votes, in terms of which judges constituted a majority on which questions and which judges agreed on which aspects of the ultimate outcome and orders. However, two of those four judges have now left the bench, and the views of their two replacements – Justices Gageler and Keane – await the next test case under the Charter. If that next test case happens in 2015 or beyond, additional new appointments to the HCA will potentially alter the balance of views on these issues. The post-*Momcilovic* phase therefore remains unsettled from the twin perspectives of binding precedent and predictable judicial views.\footnote{See Slide 28 in the author’s corresponding conference presentation, accessible at [http://www.judicialcollege.vic.edu.au/sites/default/files/Proportionality in Comparative Analysis.ppt](http://www.judicialcollege.vic.edu.au/sites/default/files/Proportionality in Comparative Analysis.ppt)}

In mid-2012, Chief Justice Warren distilled the crucial issue of statutory interpretation that the HCA’s division of opinion in the *Momcilovic* case effectively left unresolved for courts, administrators, and the public alike. She did so in these terms: ‘For completeness, I observe that there is no obvious ratio from the High Court in *Momcilovic v R* as to whether s 7(2) should be considered as part of the s 32(1) interpretative exercise’.\footnote{WBM [2012] VSCA 159 (30 July 2012) [122] (Hansen JA agreeing) (citations omitted).} The post-*Momcilovic* position on the interaction between the rights-limiting s 7(2) and the interpretative mandate in s 32(1) is also summarised in the Victorian Court of Appeal’s decision in *Nigro v Secretary to the Department of Justice*:

> *Slaveski* and *Operation Smile* have left open the question whether this Court should follow its own decision in *Momcilovic* or whether, as the commission urges, it should follow the view expressed by four members of the High Court in *Momcilovic* that the interpretative task required by s 32 brings in the proportionality analysis under s 7(2). For reasons that follow, it is unnecessary to resolve this uncertainty.\footnote{(2013) 304 ALR 535, 559 [88].}

So, while all three judges from the Victorian Court of Appeal voted against s 7’s application to rights-sensitive statutory interpretation under s 32(1), the uncertainty produced by the division of judicial opinion on this point in the HCA has allowed other Victorian Supreme Court judges to second-guess or at least work around the view expressed by the Victorian Court of Appeal in the *Momcilovic* case. Moreover, even if the HCA decision effectively leaves this point open, other
precedential questions must then be worked through before any Victorian judge can formally depart from the view expressed by the Victorian *Momcilovic* judges on this point.\(^{47}\)

In simple terms, why does it matter whether the rights-limiting s 7 is engaged initially in the task of judicial interpretation or only operates contingently and at a later stage? It matters for three reasons. First, it makes a difference to the conventional or unconventional nature of the available tools of interpretation, and hence to the range of possible interpretations of a rights-affecting statute. Secondly, and as a corollary, it makes a difference to the scope of applicable human rights. However, even if s 7 is implicated in statutory interpretation under s 32, the question of a human right’s full scope and content remains analytically distinct from reasonable and justified interference with it.\(^{48}\) Finally, it makes a difference to the scope of responsibility of the bodies subjected to Charter rights and the various organs of government with responsibility for Charter matters. Politicians make statements of rights-compatibility, judges interpret legislation and make declarations of inconsistency, and public bodies are subject to Charter rights, for example.

Similarly, the question of s 7’s degree of correspondence with comparative proportionality law is analytically distinct from its degree of connection to the task of statutory interpretation. At the same time, the two-way interaction between Victorian jurisprudence surrounding s 7 and comparative proportionality jurisprudence would be enhanced considerably under the following four conditions – namely: (i) enshrinement of proportionality in s 7 (i.e. Condition One); (ii) co-identification of proportionality standards in s 7 with standards derived from comparative proportionality jurisprudence (i.e. Condition Two); and (iii) engagement of s 7’s rights-limiting operation in the exercise of rights-sensitive statutory interpretation under s 32(1) (i.e. Condition Three), as informed by (iv) relevant international and foreign law under s 32(2) (i.e. Condition Four). Condition One is uncontroversial. Condition Two is controversial up to a point, depending upon how much of comparative proportionality jurisprudence is inherently reflected or judicially imported in s 7. Condition Three remains tenable but still highly controversial in the wake of the *Momcilovic* decision. Condition Four is enshrined within the Charter.

Focusing directly upon s 7(2), in the most detailed consideration of s 7 and proportionality in the *Momcilovic* case, Justices Crennan and Kiefel arguably try to have their cake and eat it too. Their joint judgment links various parts of the provision to comparative proportionality law for some purposes, and yet isolates it as a stand-alone provision that is not to be regarded wholly as an amalgam or repository of standards from that body of law. The specificity of their comparative analysis of s 7 and its sub-sections is worth repeating for ease of reference:

> Proportionality as a principle may generally be said to require that any statutory limitation or restriction upon a right or freedom having a particular status be proportionate to the object or purpose which it seeks to achieve. Proportionality is also stated to be a test, and in the sense just described it is, but the term does not itself explain how the conclusion whether a statutory

\(^{47}\) *Noone* [2012] VSCA 91 (11 May 2012) [30] (Warren CJ and Cavanough AJA); cf *[142]* (Nettle JA).

\(^{48}\) *WBM* [2012] VSCA 159 (30 July 2012).
measure is proportionate or disproportionate is to be reached ...

The terms of the New Zealand provision, and the words with which s 7(2) of the Charter commences, follow those of s 1 of the Canadian Charter ... A detailed comparison of these provisions against the test applied with respect to the general Canadian Charter provision, s 1, is not warranted in this case. It is sufficient to observe that there are some obvious differences which suggest that the test here to be applied is best understood within the confines of what is provided in s 7(2) ...

The tests which are provided in s 7(2) bear a closer resemblance to those already employed by this court and may have a closer affinity to tests employed in some European jurisdictions. And, while s 7(2) does not purport to exclude other tests, there would appear to be real questions about the extent to which other tests would be consistent with it, given the specific test in s 7(2)(e) and the framework provided in the other paragraphs of the sub-section. Likewise there would be a real question about the consistency of s 7(2) with tests utilised in jurisdictions such as Canada.

Section 7 of the Charter follows the tests for proportionality set out in the South African Bill of Rights ... The tests stated in s 7(2) for proportionality are not novel. They are well known to European jurisdictions and have their origin in German law and rule of law concepts ... One test of proportionality is that of ‘reasonable necessity’ [and] [t]his test is stated in s 7(2)(e) ... Paragraphs (a)-(d) of s 7(2) are structured so as to permit another test of proportionality, which is sometimes called ‘proportionality in the strict sense’. It too tests whether a legislative restriction is excessive and therefore disproportionate, but it does so by reference to the nature and importance of the right or interest sought to be protected and what is sought to be achieved.49

On its own terms, this judicial evaluation of s 7(2) is not the final word on its operation or scope. At the very least, this evaluation confirms the need for a comparative approach to s 7(2), to identify what is common, different, and unique about it.

Contemporary Comparative Starting Points

Modern Canadian Origins

What does comparative proportionality law offer to the Charter, and where should such analysis begin? The classic modern statement of proportionality as a justified rights-limiting notion in the common law tradition appears in the judgment of Chief Justice Dickson in the Canadian Supreme Court decision in Oakes.50 Adjudicating in the context of acceptable limits upon constitutionally guaranteed rights by reference to the values of a liberal democracy, Chief Justice Dickson outlines a two-step line of enquiry as follows:

49 Momcilovic (2011) 245 CLR 1, 212 [549], 213 [551]–[554], 214 [556]–[557], 215 [561] (emphasis added) (citations omitted).

To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be ‘of sufficient importance to warrant overriding a constitutionally protected right or freedom’ …

Second, once a sufficiently significant objective is recognized, then the party … must show that the means chosen are reasonable and demonstrably justified. This involves ‘a form of proportionality test’ … Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups.51

In terms of that proportionality-focused second step, Chief Justice Dickson proceeds to outline three essential elements of proportionality, as follows:

There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair ‘as little as possible’ the right or freedom in question … Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of ‘sufficient importance’.52

In these important passages for comparative proportionality jurisprudence, the judgment of Chief Justice Dickson in the Oakes case can also be analysed in terms of the relation between the standard of ‘justification’ and associated elemental standards of ‘significance’, ‘rationality’, ‘necessity’, and ‘excessiveness’, as outlined later in this article.

One set of commentators expresses surprise that the Oakes judgment makes no reference to the historical sources for its formulation of proportionality:

Although Oakes is recognised as a landmark case, it introduced the four-step proportionality analysis to Canadian law with relatively little fanfare … What is striking is that the Oakes Court made no reference to foreign antecedents of its proportionality analysis, and referenced no other authority. The formula presented in Oakes is so close to the German version of [proportionality analysis] that we presume the Court was familiar with German doctrine. The Canadian Supreme Court does not avoid citing foreign law on principle; indeed, discussions of foreign law are quite common … The silence here suggests that, rather than resting on a foreign pedigree, the [C]ourt wishes to present proportionality as a reasoned and sensible approach to the particular problem posed by Charter rights.53

51 Ibid 138–9 (citations omitted).
52 Ibid 139.
Nevertheless, later Canadian courts clearly acknowledge the debt owed by *Oakes* to earlier proportionality jurisprudence. Speaking for the court in *Attorney-General of Canada v JTI-Macdonald Corp*, Chief Justice McLachlin neatly crystallises the *Oakes* test as follows:

> The concept of proportionality finds its roots in ancient and scholastic scholarship on the legitimate exercise of government power. Its modern articulations may be traced to the Supreme Court of Germany and the European Court of Human Rights ... This Court in *Oakes* set out a test of proportionality that mirrors the elements of this idea of proportionality — first, the law must serve an *important purpose*, and second, the *means* it uses to attain this purpose must be *proportionate*. Proportionality in turn involves *rational connection* between the means and the objective, *minimal impairment* and *proportionality of effects.*54

Just as the relationship between comparative proportionality law and s 7 of the *Charter* has presented difficulties in differentiating between common, contrasting, and unique aspects of both sources of proportionality law, so too the transplantation of the *Oakes* test for proportionality to UK conditions has not been without its own difficulties. In particular, Chief Justice Dickson’s third element of proportionality has sometimes been lost in translation.

**Modern UK Origins**

As characterised by the UK High Court of Justice in early 2014, the conventional three-pronged test for proportionality accepted by the UK House of Lords and the UK Supreme Court before 2013 (and adopted with approval in pre-2013 HCA decisions55 and *Charter* jurisprudence56) underwent a significant reformulation in 2013 in the UK Supreme Court’s decision in *Bank Mellat v Her Majesty’s Treasury (No 2).*57 Until that point, Anglo-Commonwealth judicial assessments of proportionality were conventionally framed in the classic three-pronged terms set by the Privy Council in *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing*, namely:

> whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.58

The three limbs of this test enshrine what can be described respectively as standards of ‘significance’, ‘rationality’, and ‘necessity’. In turn, this three-limbed test has its own genealogical roots in earlier proportionality law in both civil and common law systems, with which it overlaps. For example, Justice Kiefel refers in an Australian constitutional context to three associated tests of proportionality from German law that have influenced European law, and

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57  [2013] 3 WLR 179 (*Bank Mellat*).
58  [1999] 1 AC 69, 80 (Lord Clyde) (*De Freitas*).
which embody associated notions of ‘suitability’, ‘necessity’, and ‘proportionality in the strict sense’. A framework for comparative proportionality analysis in work under the Charter must accommodate such cross-jurisdictional references and standards on proportionality.

Subsequent UK case law and commentary notes the similarities between the three-limbed test for proportionality in the De Freitas case and Strasbourg human rights jurisprudence on democratically necessary interference with human rights. It also traces the De Freitas test back to the landmark formulation of proportionality by Chief Justice Dickson in the decision of the Canadian Supreme Court in the equally significant Oakes case. For example, De Smith’s Judicial Review locates the genesis of the De Freitas formulation of proportionality’s elements in earlier Canadian, South African, and Zimbabwe precedent – a worthy point of comparative genealogy on its own. It elaborates upon the full elements of proportionality analysis and sets the scene for subsequent UK Supreme Court analysis of proportionality, as follows:

Clearly, this test … requires the court to seek first whether the action pursues a legitimate aim (ie one of the designated reasons to depart from a Convention right, such as national security). It then asks whether the measure employed is capable of achieving that aim, namely, whether there is a ‘rational connection’ between the measures and the aim. Thirdly it asks whether a less restrictive alternative could have been employed. Even if these three hurdles are achieved, however (and the tripartite de Freitas test ignores this) there is a fourth step which the decision-maker has to climb, namely, to demonstrate that the measure must be ‘necessary’ which requires the courts to insist that the measure genuinely addresses a ‘pressing social need’, and is not just desirable or reasonable, by the standards of a democratic society. In Huang, Lord Bingham acknowledged that the fourth step, which featured in the judgment of Dickson CJ in the Canadian case R v Oakes, ‘should never be overlooked or discounted’ and the failure to consider that final step ‘should be made good’.

The 2013 Bank Mellat Case

In the Bank Mellat case, Lord Sumption (on behalf of a majority of judges) updated the three-pronged formulation of the proportionality principle from the De Freitas case in the light of subsequent UK case law and commentary, requiring the addition of a fourth prong at the end, as follows:

[T]he question depends on an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to that objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights

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59 Rowe (2010) 243 CLR 1, 140–1 [460].
60 As outlined by Lord Reed in Bank Mellat [2013] 3 WLR 179, [72]–[76].
of the individual and the interests of the community.\textsuperscript{62}

In dissent on the case’s outcome, Lord Reed nevertheless traced the development of these four inter-related prongs of the proportionality test in their migration from other common law countries to UK law, in terms that are important for Australian purposes because of the endorsement or differentiation of the Canadian and UK lines of authority mentioned in this passage as well as in both \textit{pre-Momcilovic Charter} jurisprudence and the \textit{Momcilovic} case itself. The following passages of Lord Reed’s judgment contain important analyses of the cross-cutting streams of authority and their degree of commonality in articulating proportionality’s key components:

The approach to proportionality adopted in our domestic case law under the Human Rights Act has not generally mirrored that of the Strasbourg court. In accordance with the analytical approach to legal reasoning characteristic of the common law, a more clearly structured approach has generally been adopted, derived from case law under Commonwealth constitutions and Bills of Rights, including in particular the Canadian Charter of Fundamental Rights and Freedoms of 1982. The three-limb test set out by Lord Clyde in \textit{De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing} [1999] 1 AC 69, 80 has been influential …

The \textit{De Freitas} formulation has been applied by the House of Lords and the Supreme Court as a test of proportionality in a number of cases under the Human Rights Act … \textsuperscript{[T]}he formulation was derived from the judgment of Dickson CJ in \textit{R v Oakes} [1986] 1 SCR 103 \textsuperscript{[and]} a further element mentioned in that judgment was the need to balance the interests of society with those of individuals and groups …

The judgment of Dickson CJ in \textit{Oakes} provides the clearest and most influential judicial analysis of proportionality within the common law tradition of legal reasoning. Its attraction as a heuristic tool is that, by breaking down an assessment of proportionality into distinct elements, it can clarify different aspects of such an assessment, and make value judgments more explicit. The approach adopted in \textit{Oakes} can be summarised by saying that it is necessary to determine (1) whether the objective of the measure is sufficiently important to justify the limitation of a protected right, (2) whether the measure is rationally connected to the objective, (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (4) whether, balancing the severity of the measure’s effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter. The first three of these are the criteria listed by Lord Clyde in \textit{De Freitas}, and the fourth reflects the additional observation made in Huang. I have formulated the fourth criterion in greater detail than Lord Sumption, but there is no difference of substance. In essence, the question at step four is whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure.\textsuperscript{63}

\textsuperscript{62} [2013] 3 WLR 179, [20].

\textsuperscript{63} Ibid [72], [74].
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The Fourth Elemental Prong of Proportionality – The Standard of Excessiveness

Each of the formulations of the fourth prong of proportionality (i.e. the standard of ‘excessiveness’) by Lords Sumption and Reed in the Bank Mellat case demonstrates the interplay between relevant rights and other interests, as well as the interplay between the fourth prong and the other three prongs (i.e. the standards of ‘significance’, ‘rationality’, and ‘necessity’). For example, Lord Sumption qualifies his articulation of the fourth prong’s emphasis upon adverse effects by reference back to the other three prongs (i.e. ‘whether, having regard to these matters and the severity of the consequences, a fair balance has been struck’). This feature of these prongs and standards is important in relating them back to the matters raised by s7(2) of the Charter. It also demonstrates that some proportionality standards juxtapose two or more interests in relation to one another as in ends-means analysis (i.e. ‘relational proportionality’), whereas other proportionality standards require a holistic cost-benefit judgment from a totality of factors (i.e. ‘overall proportionality’). 67

It is tempting to stray more broadly into jurisprudential consideration of whether, as formulated, the fourth prong of proportionality–analysis is so different in kind from the other prongs that it raises additional questions about the appropriateness of judges making such decisions instead of politicians. The recent UK decision in Miranda68 certainly supplies grist to that mill. Writing with the agreement of the other two judges, and referring to the reformulation of proportionality’s elements in the Bank Mellat case, Lord Justice Laws wondered whether courts would be trespassing on parliament’s turf if they ruled that a given measure, ‘though it has a justified purpose and is no more intrusive than necessary, is nevertheless offensive because it fails to strike the right balance between private right and public interest’. 69 This qualm has greater significance if that ‘balance’ is completely at large, because at that extreme the judicial function would be co-extensive with the legislative function, contrary to the normal separation of powers.

However, the language used by Chief Justice Dickson in his original formulation of the fourth prong (i.e. the standard of ‘excessiveness’) positions it within the realm of interests and reasoning processes that are familiar to judges in a variety of contexts where various public interests are at stake. Moreover, as outlined elsewhere in this paper, some of this language is closely related to expressions that also appear in the listed matrix of proportionality factors under s 7(2). So, it is worth placing here the complete analysis of Chief Justice Dickson on what he calls the third component of proportionality (i.e. the fourth prong under discussion here):

Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom, and the objective which has been identified as of ‘sufficient importance’. 67

69 Ibid [40].
With respect to the third component, it is clear that the general effect of any measure impugned under s 1 will be the infringement of a right or freedom guaranteed by the Charter; this is the reason why resort to s 1 is necessary. The inquiry into effects must, however, go further. A wide range of rights and freedoms are guaranteed by the Charter, and an almost infinite number of factual situations may arise in respect of these. Some limits on rights and freedoms protected by the Charter will be more serious than others in terms of the nature of the right or freedom violated, the extent of the violation, and the degree to which the measures which impose the limit trench upon the integral principles of a free and democratic society. Even if an objective is of sufficient importance, and the first two elements of the proportionality test are satisfied, it is still possible that, because of the severity of the deleterious effects of a measure on individuals or groups, the measure will not be justified by the purposes it is intended to serve. The more severe the deleterious effects of a measure, the more important the objective must be if the measure is to be reasonable and demonstrably justified in a free and democratic society.70

In debating (and applying) the fourth prong, it is therefore important to be clear about the kind of debate or application we are having. The sense in which a legislature might assess the ‘fair balance’ between political ends and chosen means at large and as a matter of policy can differ from the sense in which a court’s assessment within prescribed legal parameters of whether a chosen measure’s consequences are so severe in their impact or wide-ranging in their reach that such consequences are out of proportion for the particularised context in which the measure operates (i.e. disproportionate), and hence not a ‘fair balance’ between the interests at stake and therefore not a legally acceptable outcome.

To be sure, even the latter and narrow sense of ‘fair balance’ can provoke understandable concerns about the amenability of even that sense of ‘fair balance’ to the judicial function and judicial process over legislative ones. However, at the very least, they are concerns directed at a different sense of ‘fair balance’ from those that operate in its former and broad sense, and debate surrounding them must adapt and refocus accordingly. We cannot switch between them as though they are the same thing and have the same considerations, or ignore the real points of distinction between them on at least some levels, whatever intersections or mergers between them exist on other levels.

**Recent Judicial Handling of the Politics of Proportionality – Jurisprudence Revisited**

Properly understood, the standards of proportionality outlined in this article and the corresponding judicial analysis of them are sensitive to these nuances. Consider in this context the following combined UK, Canadian, and US consideration of factors affecting proportionality’s third and fourth elemental prongs, as analysed in recent UK Supreme Court decisions:

In relation to the third of these criteria, Dickson CJ made clear in *R v Edwards Books and Art Ltd* [1986] 2 SCR 713, 781-782 that the limitation of the protected right must be one that ‘it was reasonable for the legislature to impose’, and that the courts were ‘not called upon to substitute

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judicial opinions for legislative ones as to the place at which to draw a precise line. This approach is unavoidable, if there is to be any real prospect of a limitation on rights being justified: as Blackmun J once observed, a judge would be unimaginative indeed if he could not come up with something a little less drastic or a little less restrictive in almost any situation [and so] a margin of appreciation is also essential ... since a strict application of a ‘least restrictive means’ test would allow only one legislative response to an objective that involved limiting a protected right.

In relation to the fourth criterion, there is a meaningful distinction to be drawn (as was explained by McLachlin CJ in *Alberta v Hutterian Brethren of Wilson Colony* [2009] 2 SCR 567, para 76) between the question whether a particular objective is in principle sufficiently important to justify limiting a particular right (step one), and the question whether, having determined that no less drastic means of achieving the objective are available, the impact of the rights infringement is disproportionate to the likely benefits of the impugned measure (step four).

Nevertheless, the accommodation within the judicial method of such judicial choices involving different human rights, competing public interests, and alternative governmental options is one that remains controversial. Is it the same as, or simply different in degree from, other contexts where courts must make such choices, all within permissible boundaries for judicial interpretation and law-making, or does it go to interests and methodologies that are so different in kind that they trespass into areas of legislative concern?

This debate about positioning the third and fourth elemental prongs of proportionality along the spectrum of legislative and judicial law-making has resonances with the old jurisprudential debate about the difference between legal ‘rules’ and ‘principles’ being the domain of judges and ‘policy’ at large being the domain of legislatures, as reflected in 50 years of Dworkinian analysis and commentary by jurisprudges and jurists alike. As is now readily accepted, there are senses in which judges legitimately engage with ‘policy’ considerations of some kind, within the confines of existing law, legal methodology, and litigant-focused contexts, and that this is different in at least some ways from the broader consideration of policy from a whole-of-society perspective and without such constraints by the non-judicial arms of government engaged in policy-making, law-making, and legal and regulatory reform. Such questions of policy in both domains can raise issues about relations between legislative means and ends, effects of particular interpretations or measures, and resolution between competing or conflicting interests. By analogy, the question is where the kind of ‘overall balance’ encapsulated within the standard of ‘excessiveness’ falls on the spectrum between permissible and impermissible judicial reasoning.

The supposed contrast between standards that operate like Dworkinian ‘rules’ and ‘principles’, on one hand, and those that operate like ‘policy’, on the other, has analogous relevance for proportionality’s methodology, as foreshadowed earlier in this article’s discussion about

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71 *Bank Mellat* [2013] 3 WLR 179, [75]–[76] (Lord Reed), quoted approvingly by Lord Mance in *Nicklinson* [2014] 3 WLR 200 [168].

proportionality’s different philosophical debates. In Dworkin’s eyes, ‘rules’ apply in an ‘all or nothing’ fashion – where the elements of the relevant rule are all satisfied, the rule applies and no question of judicial discretion arises. Indeed, this is how many judges, lawyers, and citizens view the nature and operation of rules of law. Conversely, in Dworkinian jurisprudence, ‘principles’ that underlie the existing rules of law have weight, compete, and must be ‘balanced’ in some way to create new rules where the existing law does not have an applicable rule.

Here is the link to proportionality. In one form, proportionality-analysis offers a choice of judicial approach that is principle-based rather than rule-based, in the sense that it focuses less upon the use of tools such as categorisation by absolute rules and their elements and exceptions, and more upon the balancing of different interests in different contexts, alignment of means and ends by reference to a matrix of factors, and other non-rule-based forms of reasoning, to the extent that these distinctions hold water in theory and in practice across different jurisdictions. In her seminal analysis of proportionality, for example, Professor Vicki Jackson crystallises what separates proportionality from other forms of means-ends analysis in comparative constitutional law by arguing that

a distinguishing feature of proportionality analysis is its eschewal of doctrinal sub-categories, its commitment to returning to foundational questions of constitutional purpose in structuring analyses of challenges to government action, and its requirement that the government come forward with justifications for statutes that infringe on protected rights.

Towards a Charter-Customised Framework for Proportionality

Background Considerations in Developing a Framework

Clearly, standards of the kind commonly mentioned in comparative proportionality jurisprudence bear one relation or another to the standards for justified rights-interference under s 7 of the Charter. A Victorian-centred framework is needed to enable the work of deciding the extent to which s 7 is unique, similar, or different, relative to other proportionality laws. Whatever the degree of difference in Victorian and HCA jurisprudence on the interaction between s 7 and s 32, what cannot be ignored is the correspondence to varying degrees between, on one hand, the structure and stages of the relevant Canadian, New Zealand, South African, and Australian laws as proportionality-encapsulating provisions for democratic limits upon designated human rights and, on the other hand, the correspondence between aspects and components of those stages and their correlative standards in broader comparative proportionality jurisprudence. In that sense, what unites us all as participants in this transnational proportionality enterprise is greater than what divides us.

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73 Evans and Stone, above n 5.
Such back-tracking through the history and development of proportionality tests is directly relevant under the Charter on two grounds. The European, UK, and Canadian lines of authority, as illustrated in the landmark Oakes and De Freitas cases, feature prominently in decisions under and beyond the Charter in Australian jurisprudence. In addition, the nature and elements of proportionality analysis from those lines of authority provide a comparative reference point for commonalities and differences with proportionality analysis under the Charter.

At the very least, referencing and translating the Oakes case's distillation of proportionality for conditions in the UK, New Zealand, and Australia (including Victoria), with whatever customisation or differentiation is appropriate from its original Canadian context, paves the way at the level of genus for a common cross-jurisdictional touchstone on proportionality, which in turn informs the four elemental standards of proportionality that are apparent from recent Anglo-Commonwealth precedent on proportionality in human rights contexts.

In other words, if the Oakes case is such a landmark cross-jurisdictional reference point, even where it is distinguishable in jurisdiction-specific terms, the question is no longer one of whether or not a common framework for the judicial and extra-judicial work of comparative proportionality analysis is possible. Rather, the question becomes one of whether and how the framework for undertaking this kind of work is articulated and in what detail.

**The Framework’s Basic Components**

In what follows, I outline a suggested set of building blocks for an analytical framework for Charter jurisprudence on proportionality. It has five key elements, as follows:

(i) It adopts a locational standpoint in the landscape of comparative proportionality jurisprudence, from which to examine what is unique, common, and distinctive about the Charter, as one model of human rights laws amongst others in the international and foreign legal orders;

(ii) It uses and develops the taxonomy of proportionality concepts and elements across jurisdictions;

(iii) It accommodates a spectrum of proportionality-receptivity within the landscape of comparative proportionality jurisprudence that can be described in terms of points of exclusion-resistance-customisation/adaptation-convergence-divergence-uniqueness;

(iv) It provides a structured baseline for use and analysis that comprises:
   (a) an order of questions; and
   (b) a correlative set of thematically labelled standards; and

(v) It offers a Victorian-focused position on the comparative landscape of proportionality law that is reflexive in its nature and outlook, in the sense that:
   (a) it operates ‘from the outside in’, in showing comparative proportionality jurisprudence’s
relevance for the Charter’s work; and

(b) it also operates *from the inside out*, in showing what the Charter contributes to comparative proportionality jurisprudence.

Some of the features of such a framework deserve further elaboration. First, such a framework is necessarily a comparative one. In other words, it is a proportionality-focused analytical framework for undertaking the work of the Charter that also offers a common reference point for how that work corresponds in its various components to equivalent proportionality work on human rights in other places. While complete synchronicity is impossible between the Charter’s proportionality-based work and equivalent work in other jurisdictions, there is a sufficient baseline of relatable concepts, standards, and instruments to make comparative analysis possible and worthwhile, provided enough care is taken in transposing models and lessons from one jurisdiction to another.

After all, the Charter is not the first legal instrument in the world to incorporate proportionality, and its interpretation and application does not occur in a comparative legal vacuum. So, this framework serves as a touchstone for looking inwards to the Charter and outwards to the rest of the world simultaneously.

Secondly, it has a taxonomy of proportionality that relates s 7 and other proportionality-related provisions of the Charter to equivalent concepts and standards in proportionality jurisprudence more broadly. Thirdly, it identifies 10 distinct but related standards of proportionality analysis that are implicated directly or indirectly in rights-limiting justification under s 7 of the Charter, with analogs to one degree or another in comparative proportionality jurisprudence. While it has application to other proportionality questions in rights-based contexts and hence other provisions of the Charter, this analytical framework centres upon the rights-limiting operation of s 7 as the primary provision for proportionality analysis.

Fourthly, it distils an approach to the identified standards of proportionality in which no standard is examined in isolation from other standards, and each standard is examined through the four-fold prism of the particular standard in question, the interests implicated in that standard, the institutional responsibility for evaluating those interests, and the relation between all of these things. For example, conventional doctrinal analysis accepts that the standard of excessiveness, encapsulating proportionality in the strict sense, also relates back to earlier standards. Similarly, there is judicial authority at Victorian and HCA levels for correspondence between particular standards and one or more of the items listed in s 7(2)(a)-(e) of the Charter. In short, there is an ongoing project in the work of the Charter in aligning various elemental standards of proportionality with the provisions of s 7(2)(a)-(e), none of which is determined conclusively by either the HCA’s Momcilovic decision or the earlier Victorian Court of Appeal decision in the case.

Nor is it enough to work progressively through the factors itemised in s 7(2) in checklist fashion. The factors implicate other things and their relational aspects, reinforced by terminology that juxtaposes the matters in play, such as ‘the relation between the limitation and its purpose’ and ‘less
restrictive means to achieve the purpose’. One or more of the factors itemised in s 7(2) correspond to one or more of the standards of proportionality. So, locating s 7(2) as a proportionality-based provision within a coherent approach to the proportionality analysis needed itself requires a way of bringing the factors itemised in s7(2) into a coherent relation with one another and the standards of proportionality to which they relate.

**Contextualising the Framework and its Transnational Character**

The search for a conceptual framework for interpreting and applying s 7 (and other proportionality-related elements of the *Charter*) is not a search for a universal ‘one size fits all’ test for proportionality as a genus, for none exists. This is unsurprising, in light of the different evolutionary forms of proportionality law that have emerged across different jurisdictions at different times in different forms and for different purposes. Witness the various manifestations of proportionality as a tool for justified limitations upon human rights in EU human rights law, UK administrative law, the landmark Canadian *Oakes case*, the landmark New Zealand case of *Hansen v The Queen*, the South African Constitution, Australian constitutional law concerning political free speech, and the human rights laws in the ACT and Victoria.

Even in one country such as Australia, the various species of proportionality displayed in aspects of law as diverse as criminal defences (e.g. self-defence and provocation) and sentencing, s 92 of the Australian Constitution, implied constitutional freedom of political expression, and sub-national human rights laws are hardly amenable to one all-encompassing test. Nor is this framework-developing exercise a search for something that bears no or little relationship to proportionality as a genus. It is the search for a common terminology, frame of reference, and structured analytical approach that can inform s 7’s interpretation and application, in a way that draws from the wellspring of proportionality jurisprudence, but through a filter that accommodates each of the uniqueness, commonality, and difference that s 7 bears in relation to its constitutional, legislative, and judicial counterparts elsewhere. In other words, it is not enough to rest judicially or otherwise simply on how s 7 is different, as there is a flip side to that coin.

This still leaves the important question of the transposability of comparative analyses and elements of proportionality to *Charter* conditions. Such a transposition is possible and desirable, if due regard is paid to relevant jurisdictional, constitutional, and other differences affecting the suitability and customisation of the transposed lessons for local conditions. A number of reasons can be given. First, as evidenced throughout this article, courts in the common law world draw from a common wellspring on proportionality-analysis. Secondly, a distinct, identifiable, and cross-jurisdictional jurisprudence on proportionality clearly exists, whatever the differences in its design or use in each jurisdiction. Thirdly, there is a high degree of commonality in the features and factors across jurisdictions that are relevant in making decisions that limit or qualify human rights, whatever the underlying constitutional, legislative, or judicial framework for that decision.

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75  [2007] 3 NZLR 1 (‘*Hansen*’).

76  All of these species of Australian proportionality law are identified as such in Kiefel, above n 7.
in each jurisdiction. Witness the common occurrence of discussions centred upon standards such as ‘rationality’, ‘necessity’, and so on across jurisdictions, whatever the differences of terminology or other nuances of treatment at the level of detail.

Fourthly, the express legislative authorisation of comparative reference to relevant international and foreign human rights jurisprudence in the main rights-sensitive interpretative provision of the Charter (i.e. s 32) provides further impetus for references to proportionality-analysis within that body of transnational jurisprudence, whatever the relevance (or not) of the proportionality-analysis required under the rights-limiting s 7, because of the relevance of other forms of proportionality-analysis in assessing the nature, scope, and limits of particular rights under other Charter provisions. Fifthly, the problems of methodology for comparative proportionality jurisprudence, as applied to the Charter, are not unique to this field of proportionality. Such problems sit within a broader global project of bringing greater accuracy, reliability, and customisation in translating relevant comparative and international law for national conditions.

Finally, there are numerous Victorian cases and judges who use the non-Australian landmarks of proportionality-analysis as touchstones for at least starting analysis under the Charter. Considered from that standpoint, the pre-Momcilovic and post-Momcilovic consideration of the Charter by the HCA, the Victorian Court of Appeal, and the Victorian Supreme Court comprises a chain of judicial building blocks in the evolutionary development of a suitable framework for undertaking the proportionality-based work required under s 7. To that extent, in the context of the necessary issues for resolution in the Momcilovic case, the attempts by some HCA judges to distinguish or analogise s 7 within the broader body of proportionality jurisprudence are the first and not the last words on what such a framework might look like. Indeed, they lay some important foundations for such a framework, without constituting a complete framework in their own right, and whatever legitimate criticisms might otherwise be made of the HCA’s institutional failure to provide clear and authoritative guidance for future action on the most fundamental issue of the interaction between the rights-limiting s 7 and the interpretative imperative in s 32.

**10 Corresponding Questions for a Framework of 10 Standards of Proportionality**

For the purposes of comparative proportionality jurisprudence, in the two-way interaction between proportionality analysis under s 7 of the Charter and equivalent proportionality analysis for rights-limiting purposes in comparable jurisdictions, a series of unifying step-by-step questions can be posed, which relate the standards of proportionality to the kinds of factors listed in provisions such as s 7(2), as follows:

1. Is this particular institution the right one to make relevant decisions about the lawfulness of governmental interference with human rights, and for what purpose(s)? (i.e. the standard of

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2. Has the particular limit upon a particular human right been done validly under the law? (i.e. the standard of 'propriety');\(^78\)

3. Is the particular limit upon a particular human right of a kind that is justified according to democratic and other public values? (i.e. the standard of ‘justification’);

4. Is the particular governmental objective sufficiently important to justify limiting the particular human right in question? (i.e. the standard of ‘significance’);

5. Is the particular rights-limiting measure rationally connected to the particular governmental object in question? (i.e. the standard of ‘rationality’);

6. Is there a less rights-disruptive means available without unacceptably compromising the desired governmental objective? (i.e. the standard of ‘necessity’);

7. Is the rights-limiting impact of the chosen means excessive (and hence disproportionate), on an overall calculus of a cost-benefit and means-ends assessment of the rights-disrupting impact, the measure-engendering benefits, and the objective-based needs served by the chosen measure? (i.e. the standard of ‘excessiveness’);

8. What are the appropriate measures for making the various ends-means, cost-benefit, and other proportionality-related judgments involved? (i.e. the standard of ‘measurement’);

\(^{78}\) Like many (if not all) of the other questions and corresponding standards, ‘propriety’ has an institutional dimension, with at least three sub-dimensions of analysis — the legitimacy of such a role as a matter of politics, the authorisation of such a role as a matter of law, and the appropriateness of acting in such a role in particular circumstances, as a matter of institutional choice, within the broader constitutional context of democratic governance and the separation of powers, including undoubted constitutional capacity for courts to hold the legislature and executive to account under the law. ‘Propriety’ is a better term in this context than, say, ‘legitimacy’ alone, which can be conflated with some senses of ‘legality’, and which also can be conflated with some senses of ‘constitutionality’, whereas ‘propriety’ is broader and, for example, includes interpretative and other (e.g. declarative) functions. ‘Propriety’ is also a better description in this context than either ‘suitability’ or ‘justification’. ‘Suitability’ is a term that is often associated in comparative proportionality jurisprudence with the standard of rationality. ‘Justification’ risks confining attention to questions of formal legal authority or empowerment, when broader questions are clearly implicated beyond technical jurisdictional power, as when more than one arm of government is clearly empowered to make preliminary or ultimate rights-limiting decisions, or that question is itself a controversial one. Implicit in the standard of ‘propriety’ associated with this question is a flip side — namely, how does the rights-affecting decision by this institutional arm of government impact upon related rights-affecting decisions by other institutional arms? In other words, the appropriation or rejection by courts of the use of s 7 in statutory interpretation has knock-on effects for the scope and capacity of other arms of government involved in rights-limiting justifications through various mechanisms under the Charter — e.g. parliamentarians who provide statements of rights-compatibility for proposed legislation, public authorities who must respect human rights under the Charter, parliamentary scrutiny committees who scrutinise proposed laws for rights-compatibility, courts who use parliamentary scrutiny reports as extrinsic material in statutory interpretation, and legislators who respond to a declaration of rights-incompatibility by the courts.

\(^{79}\) Understood in this way, the standard of legality in this framework for Victorian-centred comparative proportionality analysis is not the same as the principle of legality as a norm of statutory interpretation, as discussed elsewhere in this article. Like proportionality itself, legality is not a mono-dimensional concept.
9. What leeway (if any) should one institutional arm of government afford another’s rights-limiting decision? (i.e. the standard of ‘deference’); and

10. Who bears the onus and by what means of demonstrating a justified rights-limitation, and for what purpose(s)? (i.e. the standard of ‘proof’).\(^{80}\)

Collectively forming an analytical framework for Charter purposes that has comparative uses as well, the 10 sequential standards to which these step-by-step questions correspond are as follows,\(^{81}\) grouped accordingly, with bracketed references to the terminology of key instruments implicating the standard in question:

**A. Framing (or Threshold) Standards**

1. the standard of (institutional) propriety;
2. the standard of legality (i.e. ‘under law’ or ‘according to law’);
3. the standard of justification (i.e. justifiable rights-interference in a ‘free’ and ‘democratic’ society);

**B. Alignment (or Elemental) Standards**

4. the standard of significance (i.e. ‘sufficiently important objective’);
5. the standard of rationality (i.e. ‘rational connection’ or ‘suitability’);
6. the standard of necessity (i.e. ‘minimal impairment’ or ‘least injurious means’);
7. the standard of excessiveness (i.e. ‘overall balance’, ‘fair balance’, or ‘disproportionate effects’ – what is often called ‘proportionality in the strict sense’).\(^{82}\)

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\(^{80}\) The range of purposes here includes political rights-compatibility assessments and judicial statutory interpretation. Some of these formulated questions (i.e. Standards 4 to 7 in particular) closely draw upon the recent analysis of proportionality in *Bank Mellat* [2013] 3 WLR 179, [74]–[76], although the questions are framed to be of general application. Standards 4 to 9 also feature heavily in Judge Barak’s analysis of proportionality and constitutional rights: see Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press, 2012).

\(^{81}\) The terminology for many of these standards is not original, as it closely tracks the terminology used in cases and commentary about the applicable standard, especially the four elemental standards of ‘significance’, ‘rationality’, ‘necessity’, and ‘excessiveness’. See, for example: the description of ‘the principle of proportionality’, ‘the legitimate goal stage’, ‘the principle of suitability’, ‘the principle of necessity’, ‘the balancing stage’, and ‘the margin of appreciation’ in Moller, above n 67; and the labels of ‘legitimate aim’, ‘sufficiently important objective’, ‘rational connection test’, ‘minimal impairment’, ‘least-restrictive means’, ‘overall balance’, and ‘proportionality in the narrow sense’, in Tom Hickman, ‘Proportionality: Comparative Law Lessons’ [2007] *Judicial Review* 31.

\(^{82}\) ‘Excessiveness’ is a better description for the standard involved here than ‘balance’, which is too broad to convey the nature, focus, and relation of the discrete considerations in play, and their relation to one another. ‘Balance’ also obscures rather than illuminates the real issues of incomparability, incommensurability, and indeterminacy that can arise in choosing measures of evaluation and alignment about various ends and means, for example. ‘Excessiveness’ also better captures the sense in which the adverse effects or consequences of a rights-limiting measure are disproportionate to what the legislation is genuinely trying to achieve and hence not apt on an overall cost-benefit assessment. Its suitability is bolstered by the use and linkage of terms such as ‘excessive’ and ‘disproportionate’ by Justices Crennan and Kiefel in *Momcilovic* (2011) 245 CLR 1, in describing this standard and its correlative provisions in s 7. For that reason alone, ‘excessiveness’ is a better term than, say, ‘aptness’ or ‘alignment’ – i.e. terms that still beg the question of the scales and measures of evaluation in play.
C. Filtering (or Quality-Control) Standards

8. the standard of measurement;
9. the standard of deference; and
10. the standard of proof.

**Contextualising the 10 Standards**

**The Three Threshold Standards**

The first three standards of ‘propriety’, ‘legality’, and ‘justification’ are reflected in proportionality jurisprudence surrounding instruments that explicitly permit justifiable limits upon human rights, particularly the bills or charters of rights operating in Victoria, the ACT, South Africa, and Canada. They focus respectively upon the need for a duly authorised institutional role for courts in making rights-limiting decisions (i.e. the standard of ‘propriety’), the need for any interference with human rights to be done lawfully (i.e. the standard of ‘legality’), and the need for encroachment upon human rights to be justified according to criteria grounded in the values of a liberal democracy and civil society (i.e. the standard of ‘justification’).

In pre-**Momcilovic** times, Chief Justice Warren outlined her view of the relevant standard of ‘justification’ and associated standards under the **Charter**, in terms that draw upon comparative proportionality law, as follows:

Section 7 of the Charter demonstrates that the rights guaranteed by it are not absolute. The Charter acknowledges that, in some instances, it is necessary to limit rights in circumstances where the exercise of the right would interfere with the operation of a free and democratic society. Section 7 provides the criteria by which a limitation on rights might be justified. Hence, limitations on rights are permissible only when limited in accordance with s 7. The question then becomes, is the limitation on the right ... as guaranteed by ... the Charter ‘demonstrably justified in a free and democratic society based on human dignity, equality and freedom, and taking into account all relevant factors’?

A free and democratic society is the fundamental hallmark of our system of governance and way of life. Notions of the ‘public interest’ stem from notions of what is best for a free and democratic society. I find I am assisted by the remarks of Dickson CJ in **Oakes**:

The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society. The underlying values and principles of a free and democratic society are the genesis of the rights and freedoms guaranteed by the [Canadian] Charter and the ultimate standard against which a limit on a right or freedom must be shown,
despite its effect, to be reasonable and demonstrably justified. \(^{83}\)

In what follows, I sketch what 21\textsuperscript{st} century democratic governance means for the standard of ‘justification’. At this point, doctrinal analysis of s 7 intersects with wider notions of democracy and civil society that relate as considerations within the legal order (i.e. not at large) to the protection and qualification of human rights. Accordingly, the structure and text of this important legislative formulation of justified interference with human rights therefore raises challenges that can be approached with a nuanced understanding of contemporary democratic conditions. Indeed, given that the \textit{Charter} bases justified interference with rights on criteria that are linked to the features of a free and open democracy, at some level both statutory interpretation and doctrinal analysis demand the identification and application of these features in decision-making about \textit{Charter} rights.

Democracy is defined historically and constitutionally - but not exhausted in its operation - by reference to underpinning notions such as the separation of powers, representative democracy, majoritarian rule, parliamentary supremacy, and ministerial responsibility. These institutional features of democracy frame but do not necessarily exhaust democracy’s structures and practices. Contemporary democratic governance is increasingly understood to embrace additional facets. Such facets include the related aspects of institutional respect for the preconditions of democracy and substantive values of the rule of law, accountability-holding across arms of government and to the people in accordance with those values, systemic protection of fundamental human rights and freedoms, and publicly available and reasoned justification of encroachment upon basic democratic features, including guaranteed human rights. In short, under an evolving understanding of democracy in practice in 21\textsuperscript{st} century conditions, there is an emerging emphasis upon what is variously called ‘participatory’, ‘deliberative’, and ‘monitory’ democracy. \(^{84}\) Justified interference with human rights under s 7 and other provisions of the \textit{Charter} sits comfortably within this contemporary conception of democracy. Indeed, some of these additional facets of democracy are implicated doctrinally in legislative and judicial treatment of s 7’s conditions for justified interference with human rights.

\textbf{The Four Elemental Standards}

The middle four standards of ‘significance’, ‘rationality’, ‘necessity’, and ‘excessiveness’ represent the discrete substantive elements of proportionality that commonly arise in multiple instruments, cases, and commentaries in both rights-based and other contexts. At this stage, the emphasis is upon legislation whose policy objective is sufficiently important to override guaranteed rights (i.e. the standard of ‘significance’), through a measure that reasonably relates to that objective (i.e. the standard of ‘rationality’), does the least damage possible to human rights (i.e. the standard of ‘necessity’), and allows for such damage only if it is in proportion to the gains achieved by that

objective (i.e. the standard of ‘excessiveness’). In turn, those middle four standards constitute the elements of proportionality that generally are discussed in fulfilling the third standard’s justification of limits upon human rights in a free and democratic society, and they are enshrined to one degree or another in the rights-limiting provisions of s 7 of the Charter.

The Final Three Filtering Standards

The final three standards of ‘measurement’, ‘deference’, and ‘proof’ cover ancillary but important aspects of reasoning about proportionality. While they are not substantive elements of proportionality, they relate to it by underlying the consideration of other standards and therefore affect the final resolution of justified limits upon human rights. In terms of ‘measurement’, proportionality analysis throws up hard questions about the availability of suitable scales of analysis for measuring and evaluating the different interests at stake, as well as their relation to one another. What has been termed the ‘relative proportionality’ of how particular interests are juxtaposed in terms of particular questions and standards of proportionality analysis is different from what has been termed the ‘overall proportionality’ evident, for example, in the question and standard associated with what is called ‘proportionality in the strict sense’. In addition, bringing various assessments of cost-benefits, means-ends, and particular collective and individual interests into alignment with one another for proportionality purposes can raise genuine and difficult questions of incommensurability and incomparability of interests that no amount of judicial rhetoric about ‘balancing’ and ‘weighing’ can gloss over effectively.

In terms of ‘deference’, courts and commentators alike commonly explore the extent to which one arm of government should afford leeway for proportionality-based decisions of another arm of government (in the case of decisions within one jurisdiction) and to which an international or regional adjudicating body should allow leeway for proportionality-based decisions that are enshrined in national law (as in the case of Strasbourg rulings affecting member countries such as the UK). In what follows, I sketch what 21st century democratic governance means for the standard of ‘deference’.

The conditions of 21st century ‘participatory’, ‘deliberative’, and ‘monitory’ democracy as outlined earlier in this article both reflect and are reflected by what might be described as a ‘culture of justification’, as distinct from a ‘culture of authority’. This view of democratic governance requires that the exercise of governmental power in its various legislative, executive, and judicial

85 See further discussion about these standards below.
86 On ‘relational proportionality’ and ‘overall proportionality’, see: Moller, above n 67; Hickman, above n 67.
87 On incommensurability and incomparability in the context of proportionality analysis, see generally Endicott, above n 26, 311–42; Paul Craig, ‘The Nature of Reasonableness Review’ (2013) 66 Current Legal Problems 131; and Barak, above n 80.
forms is conditioned by ‘the culture of justification, in which decision-makers are obliged to justify their decisions by showing either how the decisions conform to those [democratic] values, or that they are justifiable departures from those values’. 89

The acceptance of such an understanding of democracy under an evolving constitutional concept of democratic governance has implications for the stance that courts take in deferring to other institutions where interference with human rights is at stake. Indeed, on one view, it presupposes the formulation of a judicial stance one way or the other on the question of institutional deference, because contextual factors can affect the degree of scrutiny of the adequacy of a governmental justification for interfering with human rights. 90 It can lead to a judicial approach to deference that might differ from that which prevailed in an era when our understanding of democracy was not as evolved, and without the supervening impact of an instrument such as a charter or bill of rights, however interpreted.

In strictly legal terms, this aspect of democratic constitutionalism manifests itself in the points at which various courts position themselves at different points of time and in different systems of government along a spectrum of institutional respect for the political decisions of the legislative and executive arms of democratic government. Here, the familiar terminology is about margins of appreciation, levels of scrutiny, and institutional deference.

In terms of ‘proof’, the question of who bears the onus of proof on matters going to the justification of rights-limiting measures is not simply a procedural matter of evidence in litigation or a technical aspect of statutory interpretation. Combined with earlier standards such as ‘propriety’ and ‘justification’, the standard of ‘proof’ also joins with standards such as ‘measurement’ and ‘deference’ to require a judicial account of justified rights-limitation under the Charter that makes sense in terms of the broader system of governance.

Drawing upon earlier Canadian and Victorian judgments of high authority, the joint judgment of the three judges in the Victorian Court of Appeal in the Momcilovic case crystallises the standard of proof under s 7 as follows: 91

There may be circumstances where the justification for interfering with a human right – and for doing so by the particular means chosen – is self-evident, but they are likely to be exceptional. The government party seeking to make good a justification case under s 7(2) will ordinarily be

89 Dyzenhaus, Hunt, and Taggart, above n 88, 6. While these authors are writing primarily with a view to the domestic and international sources of values in common law reasoning that regulate governmental discretions in administrative law, their articulation of a ‘culture of justification’ has broader application, and the notion of a ‘culture of justification’ has a pedigree elsewhere in comparative proportionality jurisprudence: see Huscroft, above n 88; Barak, above n 80.
90 Dyzenhaus, Hunt, and Taggart, above n 88, 6.
91 R v Momcilovic (2010) 25 VR 436, 476 [146]. This raises but does not address broader questions about the range of parliamentary and extra-parliamentary evidence that is suitable for such a purpose, the relation of such material to evidencing legislative facts, and how far such material extends beyond the kind of material conventionally used in litigation (e.g. expert reports). At the very least, the possible need for such evidence from appropriate sources might generate corresponding changes and developments in the parliamentary material surrounding rights-compatibility statements and assessments, given their potential use as extrinsic material by courts.
expected to demonstrate, by evidence, how the public interest is served by the rights-infringing provision. The nature and extent of the infringement of rights sought to be justified will usually determine how much evidence needs to be led, and of what kind(s).

**Reflexivity of Standards**

All 10 standards of proportionality are reflexive standards, in a special sense. Whether enshrined in a legal instrument or not in their particular jurisdictional manifestations, their use in one jurisdictional context is informed by relevant comparative proportionality jurisprudence (with appropriate translation and customisation), and also informs that body of jurisprudence for potential reference in other jurisdictions too. An integral quality of their reflexivity is the need for appropriate customising and filtering in translating and modelling comparative proportionality jurisprudence for Victorian conditions.

As standards, they are capable of encompassing the uniqueness, commonality, and differences of s 7 relative to comparative proportionality jurisprudence. In their own way, they each operate at an appropriate level of abstraction as a holistic description for a series of discrete concepts and tests from comparative proportionality jurisprudence, each having a thematic connection to the standard in question, whatever nuances and differences exist at the level of detail concerning such discrete tests across jurisdictions. For example, what the HCA’s Justice Kiefel discusses in *Rowe* as proportionality ‘tests’ or ‘sub-principles’ of ‘suitability’, ‘necessity’, and ‘proportionality in the strict sense’ from German and European proportionality jurisprudence, what the UK Supreme Court’s Lords Sumption and Reed treat as four step-by-step prongs of proportionality in the *Bank Mellat* case, and the proportionality components discussed in landmark cases in the common law world such as the UK *De Freitas* case, the Canadian *Oakes* case, the New Zealand *Hansen* case, and the Australian *Momcilovic* case are all amenable to analysis in terms of the 10 standards of proportionality outlined here.

**Correspondence between Proportionality Standards and Section 7’s Provisions**

Consider how some of these standards of proportionality relate to the various sub-provisions of s 7 of the *Charter*, as reflected in the embryonic case law on this pivotal provision. Each of Justice Bell in the *Kracke* case and Justices Crennan and Kiefel in the *Momcilovic* case associates s 7(2)(e) of the *Charter* with the standard of necessity (i.e. the ‘minimal impairment’ or ‘least injurious means’ question), which itself corresponds to a key aspect of proportionality in comparative proportionality law in both common law and civil law jurisdictions. Next, that joint judgment of Justices Crennan and Kiefel also identifies the considerations listed in subsections (a) to (d) of s 7 of the *Charter* with what is commonly called ‘proportionality in the strict sense’, which itself is identifiable with what I have called the standard of ‘excessiveness’, although those subsections

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92 (2010) 243 CLR 1, 140–1 [460]–[461].

93 *Momcilovic* (2011) 245 CLR 1, 214 [557].
also relate to other standards of proportionality too. The De Freitas case’s encapsulation within proportionality of what I have called the standards of ‘significance’, ‘rationality’, and ‘necessity’ has at least some correlation not only with the Canadian Oakes test, but also with both Strasbourg human rights jurisprudence on justified democratic limits upon designated human rights and Charter jurisprudence about the standards under s 7.

Finally, the language used by Chief Justice Dickson in explaining what he calls the ‘third component’ of proportionality, what the UK cases describe as the fourth prong of proportionality, what proportionality discourse calls the ‘overall balance’ or ‘fair balance’ test, and what I have called the standard of ‘excessiveness’ has a close correlation with at least some of the elements listed in s 7 of the Charter. In describing what he calls the ‘inquiry into effects’ required under his third component of proportionality, Chief Justice Dickson states amongst other things that ‘[s]ome limits on rights and freedoms protected by the Charter will be more serious than others in terms of the nature of the right or freedom violated, the extent of the violation, and the degree to which the measures which impose the limit trench upon the integral principles of a free and democratic society’. Similarly, under the Charter, s 7(2)(a) draws attention to ‘the nature of the right’, and s 7(2)(c) draws attention to ‘the nature and extent of the limitation’ upon human rights.

In short, the various subsections of s 7 can and must be linked — individually and collectively — to corresponding proportionality standards, all within a framework that makes workable sense of them in their own right and by reference to comparative proportionality jurisprudence. Such a Janus-like perspective enables courts, lawyers, and public officials engaged in the work of rights-sensitive statutory interpretation and rights-limiting justifications to work systematically through the features of the Charter that are similar, different, and unique in terms of the comparative approach to proportionality analysis that is mandated or otherwise necessary under the Charter.

Indeed, it is difficult to see how it can happen any other way. Either judges and other institutional actors are working from within an analytical framework for proportionality analysis, or they are not, on each occasion where an instance-specific occasion of proportionality analysis is needed. The only question is whether the analytical framework is articulated or unarticulated, and with what degree of sophistication and completeness. Even working theories and rules of thumb for judges, public officials, and legal practitioners have underlying frameworks of analysis supporting them.

**Proportionality and the Principle of Legality Beyond the Momcilovic Case**

In addition to the important interaction between s 7 and s 32 under the Charter, proportionality can figure in other ways in statutory interpretation. How does proportionality under the Charter

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relate to the principle of legality? This question itself requires an understanding that the principle of legality is only one of the norms of statutory interpretation that is applicable to laws subject to the Charter. As such, it interacts with other norms within an overall hierarchy of statutory and judge-made norms of statutory interpretation concerning human rights in Victoria.

In its most basic form, the principle of legality is a displaceable judge-made norm of statutory interpretation. In essence, it says that a parliament that wants to interfere by legislation with fundamental rights and liberties (and other aspects of systemic democratic governance) must make that intention apparent in clear and unmistakable terms, whether expressly or by necessary implication in the legislation in question. Of course, the HCA has made it clear that this institutional intention is attributed to the parliament as the product of known norms of statutory interpretation.

In recent Australian law, the principle of legality has been elevated to a status beyond merely a displaceable norm of statutory interpretation. It is now simultaneously a rebuttable presumption of statutory interpretation, a working institutional assumption that courts will impute to parliaments when interpreting legislation, a crucial systemic regulator of the relationship between different arms of democratic government, and a fundamental feature of the rule of law and its democratic preconditions. Its future development raises important issues for Charter jurisprudence and Australian law generally about its interaction with proportionality analysis, internationally recognised human rights (and the methodology surrounding their judicial treatment), and other legislative and judge-made norms of statutory interpretation.

In terms of the other two routes for future development, the current Chief Justice of Australia outlined the undoubted relevance and potential reach of international human rights jurisprudence in an extra-judicial speech in 2009, as follows:

> The effects of rules of international law and obligations on the interpretation of statutes has already been referred to. These may interact to a degree with other common law rules affecting statutory interpretation. One area which awaits further exploration is the interface between human rights norms in Conventions to which Australia is a party or in customary law and the presumption against statutory displacement of fundamental rights and freedoms of the common law. If the former can inform the latter through developmental processes of the kind mentioned in Mabo then the content of the so-called principle of legality may be deepened.97

Admittedly, this important pre-Momcilovic extra-judicial reflection on the principle of legality by Chief Justice French corresponds most directly with his view in the Momcilovic case that the principle of legality and the rights-sensitive interpretative mandate in s 32(1) of the Charter have

96 On this and the following analysis of the principle of legality, see Bryan Horrigan, ‘Commonalities, Intersections, and Challenges for the Scrutiny and Interpretation of Legislation in Trans-Tasman Jurisdictions and Beyond’ (2012) 27 Australasian Parliamentary Review 4.

97 Chief Justice Robert French, ‘Oil and Water? – International Law and Domestic Law in Australia’ (Speech delivered at the Brennan Lecture, Bond University, 26 June 2009).
co-extensive operation in statutory interpretation in Victoria, with the latter opening up a broader catalogue of human rights for reference than under the common law, with significant overlaps between the two catalogues.\textsuperscript{98} Obviously, these extra-judicial comments of Chief Justice French also pre-date subsequent HCA analysis of the principle of legality and the introduction of rights-compatibility assessment of Commonwealth legislation according to Australia’s international human rights obligations.\textsuperscript{99}

However, this still leaves room for development of the principle of legality, both in its own right and in its interaction with other legislative and judge-made norms of statutory interpretation, some of which have the potential to import rights-limiting proportionality analysis into statutory interpretation. For example, in considering the cognate treatment of a human right recognised under the \textit{Charter} and also under international human rights instruments affecting Australia, a court might refer to relevant global human rights jurisprudence and correlative proportionality analysis of rights-compatible legislation by courts or in scrutiny of legislation reports.

In addition, having been authorised by the Victorian Parliament through s 32(1) to give a duly rights-sensitive reading of Victorian legislation that is authorised through s 32(2) to take due account of relevant global human rights jurisprudence, a court might at least interrogate the extent to which such reference material (including rights-limiting proportionality analysis from the international and foreign legal orders) can be brought to bear upon the exercise of rights-sensitive statutory interpretation under the \textit{Charter}, either independently (depending on the ultimate judicial fate of the interaction between s 7 and s 32) or co-extensively with s 7. In doing so, a court would need to be mindful of the possible symmetry between s 32(1) and 32(2) in each doing no more than respectively enshrining the principle of legality and aspects of the presumption of consistency in statutory form, although such a presumed symmetry is itself predicated upon a particular view of s 32(1)’s relation to the principle of legality that remains in question.

Such future exploration of the interaction between various statutory and non-statutory norms and their relation to proportionality analysis can be conducted without diluting necessary recognition and protection of \textit{Charter} rights. It is important not to conflate the exercise of defining the full content of a right to be recognised and protected under both the principle of legality and s 32(1) with the distinct but related exercise of deciding whether and how far other Victorian legislation impinges upon that right as defined with that content, whether through conventional statutory interpretation or via the introduction of some kind of proportionality analysis in statutory interpretation. Moreover, from a systemic perspective, the ultimate judicial landing point on the interaction between rights-limiting justification and rights-sensitive interpretation has institutional significance beyond the domain of courts and statutory interpretation under the \textit{Charter}, for purposes such as formulating parliamentary statements of rights-compatibility, scrutinising legislation for rights-compatibility, assessing rights-compatible responsibilities of

\textsuperscript{98} \textit{Momcilovic} (2011) \textit{245 CLR} 1, 50 [51].

\textsuperscript{99} \textit{Human Rights (Parliamentary Scrutiny) Act 2011} (Cth).
public bodies, and making judicial declarations of rights-incompatibility.

Put another way, the set of individual *Momcilovic* judgments from the HCA and the Victorian Court of Appeal do not conclusively settle all aspects of the interaction between the proportionality-based s 7, the interpretative instructions in s 32(1) and s 32(2), and other relevant norms of statutory interpretation, however one counts the votes on the precedential and substantive dimensions of the *Momcilovic* case. Moreover, this point subsumes within that broader avenue of enquiry the precedential analysis and division of judicial opinion, as reflected in the differences of judicial views in *Noone* on exactly what *Momcilovic* stands for (if anything) on the important but limited question of whether or not s 7(2) is relevant to s 32(1). Needless to say, and important as this issue is for *Charter* jurisprudence, it remains only one of the contexts in which the *Charter* generates the need for some kind of proportionality analysis.

If both proportionality and the principle of legality have roots in the rule of law, are there other possible connections between them? One follow-up question for Victorian and comparative purposes therefore concerns the extent to which the methodology of the principle of legality is amenable to proportionality analysis. Common law reasoning about norms of statutory interpretation is nuanced enough to embrace situations where legislation unmistakably intends to interfere with a human right and to a clear extent, where legislation has that intention but the extent of interference with rights is unclear, and where a real question exists about whether legislation intends such interference or not.

While the principle of legality has its most obvious application in situations where legislation undeniably limits human rights to a determinate degree, such a ‘binary (all-or-nothing)’ operation does not necessarily exhaust its reach, although there are hurdles to overcome in adapting it to embrace proportionality analysis.101 A glimpse of such a possibility appears in the approach and proportionality-related language used by Justice Bell in his discussion of the principle of legality in *Patrick’s Case*, as follows:

> [T]he principle of legality is a strong presumption that legislative provisions are not intended to override or interfere with fundamental common law rights and freedoms and basic human rights ... Applying this principle to legislation which unmistakably intends some interference to be authorised but the scope of the permitted interference is in issue, it is first necessary to identify the right or freedom which is said to be infringed and consider the importance of the interests which it protects in the particular circumstances. Then it is necessary to identify the nature and extent of the interference by, and the purposes of, the statutory provisions in question. If the interference complained of goes beyond what is shown to be reasonably necessary to meet a substantial and pressing need or legitimate aim, the proper interpretation will be that the interference is beyond the scope of the provision.102

101 See, generally Meagher, above n 88, 470–1.
102 *RJB v Melbourne Health and State Trustees Ltd* [2011] VSC 327 (19 July 2011) [270]–[271] (emphasis added) (‘*Patrick’s Case*’).
Considered more broadly, from the systemic perspective of Victorian democratic governance, the question of the interaction between proportionality analysis and statutory interpretation not only transcends the discrete but important question of the proper relationship between s 7 and s 32 of the *Charter*, but also directs attention at factors pushing in that direction, beyond the considerations cited on this point in the *Momcilovic* judgments in both the Victorian Court of Appeal and the HCA. In summary, affording s 7 a role of some kind in statutory interpretation is easier rather than harder to argue where at least the following conditions prevail:

(i) the exercise of giving the fullest possible interpretation of the nature and scope of human rights is analytically distinct from the exercise of assessing justified interference with human rights as defined;

(ii) comparative proportionality jurisprudence contains sufficient guidance on managing these distinct analytical exercises;

(iii) proportionality analysis is already required in statutory interpretation under in-built limits or elements of some *Charter* rights, as well as translation and customisation of authorised reference to comparative proportionality law under s 32(2);

(iv) courts are not the only institutions who might be called upon to assess the compatibility of legislation with human rights under the *Charter*, given the broader relevance of such assessments to institutional roles of policy-making, executive decision-making, scrutiny of legislation, and law-making;

(v) institutional actors making assessments of rights-compatibility for various purposes under the *Charter* include reference to justified interference with rights and would benefit from a body of judicial precedent to guide such assessments;

(vi) the material on rights-compatibility produced by politicians introducing and speaking to Bills, and legislative scrutiny committees evaluating such Bills, counts as authorised extrinsic material for reference by courts in statutory interpretation;

(vii) the production by legislatures and use by courts of such material to form views about the compatibility of legislation with international human rights is a feature at both Commonwealth and Victorian levels, with the possibility of interplay between Commonwealth and Victorian laws designed to protect or qualify human rights;

(viii) the set of norms of statutory interpretation capable of applying to human rights includes (but is not limited to) the principle of legality, including other norms that go directly or indirectly

(ix) the context to this point in the development of the principle of legality does not inherently preclude further evolutionary development of its content to encapsulate proportionality analysis; and

(x) the principle of legality and the doctrine of proportionality have both been judicially identified as aspects of the rule of law,\footnote{See, eg, respectively: \textit{Electrolux Home Products Pty Ltd v Australian Workers’ Union} (2004) 221 CLR 309; Kiefel, above n 7.} whose further elucidation in human rights contexts remains a work-in-progress.

Concluding Human Rights Governance Considerations

At some point in the aftermath of the \textit{Momcilovic} case, attention should return afresh to the double-barrelled structure of the justification for interference with guaranteed rights that is mandated by s 7(2). Under that proportionality-based provision, the \textit{Charter} countenances only those ‘reasonable limits’ upon human rights that are ‘demonstrably justified’ by the conditions of ‘a free and democratic society based on human dignity, equality and freedom and taking into account all relevant factors including’ the set of factors listed together in s 7(2)(a)-(e).\footnote{\textit{Charter} s 7(2), emphasis added.} In this manifestation, the standard of ‘justification’ is expressly linked to the combined operation of two sets of considerations – namely, the features of a particular kind of society and the proportionality-based considerations framed by those societal features that inform the evaluation of institutional measures that interfere with human rights.

One does not have to agree completely with TRS Allan’s view of the world or ignore important cross-jurisdictional constitutional differences to see that the nature and scope of proportionality analysis under the \textit{Charter} implicates broader questions for democratic governance under the rule of law in Victoria than simply the correct relationship between the rights-limiting justification under s 7 and the rights-sensitive interpretation of laws under s 32, as follows:

The requirement of proportionality provides an important link between our related concepts of law and democracy. Law itself is conceptually egalitarian, imposing constraints of generality and rationality that resist disproportionate measures, which treat their victims’ legitimate interests as of little or no account. And democracy consists of more than collective deliberation and decision about matters of public policy and social justice; it entails a more thoroughgoing...
equality, requiring collective decisions to be fairly applied to particular cases, having proper regard to the constitutional context ... It is implicit in this conception of democracy, moreover, that the burdens borne by individuals must be proportionate to the advancement of the public interest ... And as well as judicial restraint, as regards the nature and urgency of the public interest, there must be judicial deference to superior expertise and experience; but the degree of such deference must depend on what is at stake in the particular case. The more important a constitutional right and the greater the curtailment envisaged, the greater must be the depth and rigour of judicial scrutiny. Moral judgment cannot be evaded by resort to the plain words of legislation or the expertise of public officials – legality and rationality are too much dependent on appraisal of the particular case, albeit in the light of its broader context. Proportionality is not only an implicit feature of constitutional rights, it also regulates the boundary between governmental discretion and judicial review.  


All of this leads to a broader systemic point about optimal human rights protection in Victoria and beyond. The debate over s 7’s role in statutory interpretation by judges under the Charter as currently legislated and interpreted is not the be-all and end-all. Considered from a broader policy-making and law-making perspective, there are opportunities to reform the Charter’s provisions, as the evolving jurisprudence reveals problems or gaps in its interpretation and coverage. One such possibility for future reform arises from the unsatisfactory outcome of the Momcilovic case for clear forward guidance on that aspect of proportionality’s role in statutory interpretation concerned with the interaction between the rights-limiting s 7 and the rights-sensitive interpretative imperative in s 32.

Considered from an institutional standpoint, various arms of government are involved in the rights-protection project enshrined in the Charter. Whatever the niceties and technicalities of legal approaches to statutory interpretation that lead to s 7’s inclusion or exclusion from judicial exercises of statutory interpretation, courts are not the only official participants in this broader Victorian project from a whole-of-government perspective. Aspects of systemic symmetry, coherence, and consistency are at stake in decisions about whether and how proportionality assessments under s 7 inform the rights-related work of others governed by the Charter, from parliamentary committees scrutinising rights-impacting legislation and courts interpreting such legislation to public bodies obliged to comply with Charter rights, courts deciding to make declarations of incompatibility, and parliamentary processes and rights-based assessments triggered by such declarations.

The balance of institutional rights protection in this systemic critical path is affected by every step in the direction of minimising or maximising the occasions for proportionality assessments and by whom under the Charter those assessments are made. In meeting their responsibilities under the Charter, various institutional actors across the democratic arms of government must engage in the structured decision-making process required by proportionality analysis and rights-compatibility assessment. If they are to work progressively, systematically, and comprehensively through the issues that such matters illuminate for attention, it makes a difference from both legal and political standpoints whether or not such governmental work is undertaken in conjunction with sufficient guidance from courts.

This important work includes courts being engaged fully in proportionality assessments in statutory interpretation through the interaction of s 7 and s 32, however those provisions might be re-interpreted or recast, and not simply in the more discrete occasions of proportionality assessments thrown up by the legislated scope or limits of particular Charter rights and comparative human rights jurisprudence about them. In that sense, the post-Momcilovic journey towards reinvigoration of the Charter depends significantly upon the maturation of approaches to comparative proportionality jurisprudence.
The Impact of Charter Jurisprudence on Human Rights in Prisons*

Dr Julie Debeljak†

Introduction

This article considers the impact of the jurisprudence under the Charter of Human Rights and Responsibilities Act 2006 (Vic) (‘the Charter’) in relation to closed environments. A more accurate description of the article is an examination of the Charter-inspired jurisprudence vis-à-vis closed environments. The term “Charter-inspired” is used intentionally because many (if not all) of the decisions in this area have occurred in the shadow of the Charter, rather than directly under the Charter.

The article focuses on one particular closed environment, being prisons. Particularly, it will examine cases where the treatment of prisoners or their conditions of detention have generated Charter jurisprudence. The question is not the legitimacy of the detention (that is, the right to liberty); rather, the question is the rights-compatibility of the conditions of detention and treatment of people whose detention is assumed to be lawful.

The article is split into three sections. The first section will identify and examine the high point of Charter jurisprudence in prisons. The second section will consider the low point of (or, more precisely, the lack of) Charter jurisprudence. The final section highlights the ongoing challenges for litigating prisoners’ rights, and suggests a fundamental re-examination of the Charter enforcement mechanisms as a way forward.

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1 A working definition of closed environments is ‘any place where persons are or may be deprived of their liberty by means of placement in a public or private setting in which a person is not permitted to leave at will by order of any judicial, administrative or other order’. This is the definition used in the ARC Linkage project entitled Applying Human Rights Legislation In Closed Environments: A Strategic Framework For Managing Compliance. Dr Debeljak would like to thank Anita Mackay for her excellent research assistance for this paper and on this project.

2 This paper was delivered as part of a panel, with associated time constraints. Accordingly, by way of generating discussion, the panel members were asked to limit their comments to the three topics identified.

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The High Point of Charter Jurisprudence

The high point of Charter jurisprudence on prisons is the 2010 decision of Castles. This is the first time s 47(1) of the Corrections Act 1986 (Vic) (‘Corrections Act’) has been enforced in legal proceedings. Section 47(1) of the Corrections Act lists the rights of prisoners, including the right to open air exercise, to adequate food and clothing, to reasonable dental treatment, to take part in educational programmes, to make complaints about prison management to various public officials, and to send letters to and receive letters from various public officials without those letters being opened by prison staff, as well as religious rights and visiting rights.

There are numerous challenges to enforcing s 47(1) rights. Some of the rights are stated in absolute terms; however, many other rights are stated in qualified terms. Moreover, the statement of many of the rights is vague, suggesting that the protections offered are more akin to aspirations than enforceable legal rights. Further, all but the most explicit s 47(1) rights are vulnerable to being outweighed by the s 21(1) requirement that the Governor maintains the ‘security and good order of the prison and the safe custody and welfare of the prisoners’. Balancing s 21(1) considerations against the s 47(1) rights usually falls in favour of the former. Furthermore, there is no provision of a remedy for breach of s 47(1). Finally, being only statutorily protected, s 47(1) rights can be overridden by ordinary legislation. Overcoming these obstacles presented a major challenge in the Castles litigation.

The Decision

Castles was a female prisoner who wished to resume in vitro fertilisation (‘IVF’) treatment at Melbourne IVF Clinic, which had commenced before her imprisonment. Castles’ infertility was age related – she was 45 years old at the time of application, and was only eligible for treatment until she turned 46, so needed to resume treatment during her period of imprisonment.

3 Castles v Secretary to the Department of Justice (2010) 28 VR 141 (‘Castles’).
4 See Bronwyn Naylor, ‘Protecting the Human Rights of Prisoners in Australia’ in Paula Gerber and Melissa Castan (eds), Contemporary Perspectiveness on Human Rights Law in Australia (Thomson Reuters, 2013) 395, 404; Matthew Groves, ‘Prisoners and the Victorian Charter’ (2010) 34 Criminal Law Journal 217, 218. Rights under s 47 were raised in Minogue v Williams [2000] FCA 125 (17 February 2000), but that aspect was not decided in the Federal Court. They were also raised without much impact in cases where prisoners claimed a right to access to computers to assist with their preparation for legal proceedings: for example Rich v Secretary, Department of Justice [2007] VSC 405 (19 October 2007) and Knight v Anderson (2007) 16 VR 532. See Groves, 218 and fn 6.
5 These rights are ‘additional to, and do not affect any other rights which a prisoner has under an Act other than this Act or at common law’: Corrections Act s 47(2).
6 See, eg, Corrections Act sub-ss 47(1)(b), (d) and (o).
7 See, eg, Corrections Act sub-ss 47(1)(c), (f), (h), and (i), as well as ss 47A, 47C and 47D.
8 Groves, above n 4, 218; Naylor, above n 4, 404.
9 Corrections Act s 21(1).
10 See Naylor, above n 4, 404.
11 Groves, above n 4, 218.
12 Castles was convicted of social security fraud on 20 November 2009 and sentenced to three years imprisonment, to be released on her own recognisance after 18 months: Castles (2010) 28 VR 141, 146 [6].
Justice Emerton upheld Castles’ application under s 47(1)(f) of the Corrections Act, which provides that all prisoners have a ‘right to have access to reasonable medical care and treatment necessary for the preservation of health’. Her Honour held that s 47(1) ‘confers on Ms Castles the right to continue to undergo IVF treatment for her infertility’, although not necessarily at the clinic of Castles’ choice, and only on a visit by visit basis rather than a general permit to leave the prison to attend IVF treatment.

Castles’ relied on s 38(1) of the Charter — the prison, as a public authority, could not act incompatibly with her human rights. Castles based her argument on numerous human rights, but Justice Emerton focused her decision on the s 22 right of persons deprived of their liberty to be treated with humanity and respect for their inherent dignity.

Justice Emerton accepted that the s 10 prohibition on cruel, inhuman and degrading treatment ‘prohibits “bad conduct towards any person”’; whereas, ‘s 22 mandates “good conduct” towards people who are detained.’ Her Honour also referred to a General Comment of the United Nations Human Rights Committee, which states that the right to humane treatment ‘imposes a positive obligation towards persons who are particularly vulnerable because of their status as persons deprived of liberty.’ Justice Emerton referred to the Standard Guidelines for Corrections in Australia (Revised 2004) (‘National Guidelines’), which are based on the United Nations Standard Minimum Rules for the Treatment of Prisoners and are endorsed by the Department of Justice.

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13 (Emphasis added.) This includes the right to treatment ‘with the approval of the principal medical officer but at the prisoner’s own expense, a private registered medical practitioner, dentist, physiotherapist or chiropractor chosen by the prisoner’: Corrections Act s 47(1)(f).


15 Ibid 177 [147].

16 Ibid 145 [3].

17 Charter ss 3 and 4.


19 The Human Rights Committee is the treaty monitoring body established under Part IV of the International Covenant on Civil and Political Rights, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (‘ICCPR’).


21 The National Guidelines provide, inter alia, that every prisoner is to have access to “evidence based” health services provided by a competent, registered health professional who will provide a standard of health services comparable to that of the general community; that every prisoner is to have access to the services of specialist medical practitioners; referrals ‘should take account of community standards of health care’; that prisoners can ‘receive treatment from private health professionals’; and where treatment precedes imprisonment, ‘that prisoner should be permitted to maintain contact, on the approval of the prison health service, with the medical service that was treating the prisoner’; see Castles (2010) 28 VR 141, 168–169 [107], citing National Guidelines 2.26, 2.27, 2.33 and 2.35.

22 Castles (2010) 28 VR 141, 168–169 [107]. Naylor recognises the importance of the National Guidelines ‘in establishing concrete, if minimum, requirements and to guide policy and practice, but they are of little relevance to individual prisoners, providing no remedy for non-compliance’: Naylor, above n 4, 403.
To give content to the s 22 Charter right, Justice Emerton held it was ‘necessary to go no further than’ the National Guidelines and s 47(1)(f) of the Corrections Act. Justice Emerton held that ‘the starting point should be that prisoners not be subjected to hardship or constraint other than the hardship or constraint that results from the deprivation of liberty’, that ‘access to health care is a fundamental aspect of the right to dignity’, and that ‘the health of a prisoner is as important as the health of any other person.’

Although prisoners do not forfeit their human rights, Justice Emerton recognised that a prisoner’s enjoyment of rights ‘will necessarily be compromised’, “curtailed”, “attenuated”, and “qualified” by their deprivation of liberty. Accordingly, her Honour held that s 22 ‘does not encompass the right to any and all medical treatment that is available in the community’; but that the more limited right to medical treatment must ‘[guarantee] that the health of prisoners is protected and accorded no less importance than the health of other members of the community.’ Section 47(1)(f) satisfies these requirements of the s 22 right.

Justice Emerton’s decision may be the correct outcome, but her Honour seems to conflate two distinct questions: what is the scope or content of the s 22 right; and, if the scope of s 22 is compromised by a law or a decision, is this reasonable and demonstrably justified? Justice Emerton appears to read down the scope of the s 22 right in order to accommodate the fact of deprivation of liberty. However, under comparative human rights jurisprudence, rights are given a wide scope of application, and limitations to rights are accommodated under general limitations provisions. For example, the Supreme Court of Canada has been more willing to pursue broad, purposive interpretations of Canadian Charter of Rights and Freedoms rights, given that s 1 allows reasonable limits to be placed on the rights. In Canada, restrictions on the scope of rights are not incorporated into the definition of the rights themselves, as s 1 provides the mechanism for justifying any limits placed on rights.

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24 Ibid.
27 Ibid 170 [113].
29 This approach is also used under the New Zealand Bill of Rights Act 1990 (NZ) s 5 (NZBORA), and the Constitution of the Republic of South Africa 1996 (South Africa) s 36 (commonly known as the ‘South African Bill of Rights’).
This translates to recognising that s 22 dictates that prisoners have the *same right* to access to medical treatment as the rest of the community, *but* that it is reasonable and demonstrably justifiable under s 7(2) to curtail this right because of security, good order and limited resources. Instead, Justice Emerton appears to read down the scope of s 22, and avoided the proportionality balancing exercise that provides public transparency and accountability for such decisions.\(^{30}\) This is a weakness in her Honour’s reasoning.

Having ensured that the ordinary interpretation of s 47(1) was consistent with the s 22 *Charter* right, Justice Emerton then considered the requirements of ‘necessity’ and ‘reasonableness’ under s 47(1), finding both requirements to be satisfied. Her Honour’s view that Castles’ IVF treatment was ‘necessary’ for the preservation of her reproductive health within s 47(1)(f) was ‘reinforced’\(^{31}\) by, inter alia, s 32(1) of the *Charter*. Section 47(1)(f) had to be ‘construed consistently with’ the s 22 rights to humanity and dignity. Humanity and dignity require ‘the provision of facilities, goods, services and conditions necessary for the realisation of the standard of health enjoyed by other members of the community’, and an interpretation of s 47(1)(f) consistent with humanity and dignity was ‘open under the *existing rules of statutory interpretation* and affords proper protection against interfering with Ms Castles’ fundamental human rights.’\(^{32}\) Most importantly, Justice Emerton based her decision primarily on an ordinary interpretation of s 47(1)(f), with the *Charter* only ‘serv[ing] to confirm the interpretation that had been arrived at in any event.’\(^{33}\)

Consideration of whether treatment was ‘reasonable’ involved various factors, including the clinical assessment, ‘the cost of the treatment and the magnitude of any disruption to the prison system.’\(^{34}\) Treatment that is found to be necessary ‘is likely also to be reasonable.’\(^{35}\) For Castles, the factors in favour of reasonableness included that: it was a continuation of treatment; it was Castles’ last chance to undertake the treatment; Castles would pay for the treatment; and, being a short-term prisoner, any resultant pregnancy would not place a burden on the prison.\(^{36}\) However, a significant factor against reasonableness was the request to travel to Melbourne to receive the treatment, given the logistical problems of transport to Melbourne and the opportunity cost of the resources.\(^{37}\)

Thus, on a proper construction of s 47(1)(f), Justice Emerton held that ‘IVF treatment is both reasonable and necessary for the preservation of Ms Castles’ health’, but that ‘this does not

\(^{30}\) There is a difference between limiting the definition of rights such that a particular governmental action is consistent with human rights, and finding a human right to be violated although justified. Justice Emerton’s reasoning may have been influenced by the then recent decision of the Victorian Court of Appeal in *R v Momcilovic* (2010) 25 VR 436 (*VCA Momcilovic*); however, this is not apparent from her reasoning. The decision in *VCA Momcilovic* (2010) 25 VR 436 was handed down on 17 March 2010, whilst *Castles* (2010) 28 VR 141 was handed down on 9 July 2010.

\(^{31}\) *Castles* (2010) 28 VR 141, 173 [125].

\(^{32}\) Ibid 173 [127] (emphasis added).

\(^{33}\) Ibid 146 [4].

\(^{34}\) Ibid 174 [133].

\(^{35}\) Ibid 175 [138].

\(^{36}\) Ibid 175 [139].

\(^{37}\) Ibid 175 [140], [142].
necessarily entail the right to receive such treatment from [her nominated specialist] at the Melbourne IVF Clinic." Section 47(1)(f) would be satisfied if the Secretary, in consultation with Castles, investigated whether treatment was available closer to the prison, and approved treatment at the alternative clinic.

**Difficulties with the Decision**

There is further scope to analyse the decision, particularly in relation to the issuing of permits to leave the prison. However, analysis now turns to difficulties with the decision.

First, Justice Emerton was reluctant to indirectly recognise aspects of a right that were not directly recognised in the Charter. This gives cause for concern, because it is not consistent with comparative jurisprudence, and will tend to stagnate what should be a “living instrument”.

Secondly, Castles highlights the multitude of competing interests facing prisoners, and the difficulty of enforcing rights in the context of such competing interests. Had Justice Emerton not resolved the limitations issue within the definitional issue — that is, addressed the restriction of rights when defining the scope of the right rather than under s 7(2) — the outcome may have been different. Section 22 is acknowledged as a positive right and, if given a broad and purposive interpretation, the obligations on a State may have been more considerable than identified by her Honour. Moreover, if limitations to that right had to be justified under s 7(2), there may have been a greater balance in favour of Castles.

Finally, for purists, the decision in Castles did not strictly rely on s 32(1); rather, a solution was found on ordinary interpretative principles, with the Charter rights reinforcing that interpretation. This is what is meant by jurisprudence “inspired by the Charter”, or decisions made in the “shadow of the Charter”.

**The Low Point of Charter Jurisprudence**

The low point of Charter jurisprudence relating to the rights of prisoners is illustrated by a series of cases where the conditions of detention have led to a reduction in sentence.

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38 Ibid 177[147].
39 Ibid.
40 Dickson v United Kingdom (2007) 44 EHR 21 [65]–[66], [79]. The European Court of Human Rights (ECtHR) jurisprudence has developed the parenting aspects of the art 8 right to a private and family life, whilst the Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) (commonly known as the European Convention on Human Rights) (ECHR) contains an explicit right to found a family. To protect parenting rights under art 8 privacy and family rights is not considered an indirect protection of a claim that could be protected directly under the art 13 right to found a family by the ECtHR. Moreover, at the international level, there are many examples of indirect recognition of rights that are not directly protected: Human Rights Committee, Communication No 488/1992: Australia 04/04/94 (UN Doc CCPR/C/50/D/488/1992) (1994) ("Toonen Case").
41 Justice Emerton did undertake a limitations analysis when considering the issue of permits to leave the prison: see Castles (2010) 28 VR 141, 179–183 [156]–[174].
In *DPP v Foster*, four prisoners at Melbourne Remand Centre participated in a riot. The prisoners were between 18 and 20 years at the time of the offence, and between 19 and 22 years at the date of sentencing. In his Honour's sentencing remarks, Judge Gucciardo noted that four of the five prisoners had been in lockdown for significant periods of time. For example, Liszczak had been in 23-hour lockdown for 16 months and 22-hour lockdown for 2 months.

Judge Gucciardo noted the consultant forensic psychologist's report addressed 'matters which give rise to serious concerns about such prolonged periods of what is, in effect, solitary confinement.' Judge Gucciardo also noted the confinement 'occurred during a developmentally very significant period of [his] life', such that it is 'likely to have a lasting impact on [his] view of [him]self and society.' Judge Gucciardo concluded that the conditions of detention necessitated a reduction in sentence 'reflecting the fact that those periods have not been spent in more conventional prison conditions, but in a situation which [the judge] consider[ed] of great deprivation for periods of time which are not only difficult to accept, but which could be potentially harmful, particularly to prisoners’ mental health.'

This sentencing decision is not remarkable for its concern about conditions of detention, or the reduction in sentence; rather, it is remarkable because there was no mention of the *Charter*. Judge Gucciardo was essentially indicating that the conditions of detention bordered on a violation of ss 10 and 22 of the *Charter*, but there was no reference to the *Charter*.

Another example is *Collins v The Queen*. Collins was 'locked in his cell, alone, for almost 23 hours per day, seven days per week.' He had 30 minutes access per day to the telephone centre, where he could talk to those he telephoned and four other prisoners in the day room, although he could not mingle with them. Collins was held in these conditions for his own safety: an incident resulted in injury to Collins, and prison authorities suspected a prisoner-on-prisoner assault because of speculation that Collins had cooperated with police and was a police informer. Collins was 'unwilling or unable to identify the prisoners who threatened him, so prison management [were not] able to identify suitable prisoners that he [could] mix with' – hence Collins' placement in the management unit. These conditions were likely to continue indefinitely.

Collins sought for 'the harshness of [his] prison conditions ... to be taken into account in assessing the appropriateness of the non-parole period' of his sentence. Justice Hansen observed that Collins ‘is serving his sentence in circumstances of significant confinement which ... do not seem

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42 *DPP v Foster* [2014] VCC (14 February 2014) (‘*Foster*’).
43 His sentence expiring in May 2015.
44 *Foster* [2014] VCC (14 February 2014) [52].
45 Ibid [53].
46 Ibid [59].
48 Ibid [4].
49 Ibid [76].
50 Ibid [6].
51 Ibid [75].
justly sustainable over time’, although at present there was justification for his confinement, and Collins had not cooperated in efforts to ensure his safe mixing with other prisoners. Justice Hansen was ‘not persuaded that the hardship inherent in the appellant’s present arrangement lead to the conclusion that the sentence is manifestly excessive.’

Chief Justice Warren and Justice Redlich agreed with Justice Hansen’s reasoning and decision, and offered additional observations on Collins’ conditions of detention, which their Honours described as ‘very difficult.’ Their Honours noted that

the Court asked the appellant’s counsel whether he was making any submissions based on the Charter. Counsel expressly disavowed any reliance on the Charter. It is therefore unnecessary to consider whether the Charter has any effect on the legality of the continued detention of the appellant in the present conditions.

The basis for the decision of Collins and his counsel not to pursue the Charter in this case will never be known. However, on the rights jurisprudence, Collins had an arguable case under the Charter, which it seems the bench recognised and sought to prompt.

Indeed, rights jurisprudence is relevant in both Collins and Foster. Both cases represent ‘missed opportunities’ to avail prisoners of the benefit of rights jurisprudence. Brief reference to a selection of relevant jurisprudence includes:

- **Brough v Australia (2006):** the Human Rights Committee found that Australia violated the art 10 ICCPR right to be treated with humanity and dignity when deprived of liberty. Specific vulnerability factors reinforcing this conclusion include Brough’s age, indigenous status and his mild intellectual disability.

- **X v Turkey (2012):** the European Court of Human Rights (‘ECtHR’) held that the detention of X in solitary confinement for X’s protection amounted to inhuman and degrading treatment in violation of art 3 of the ECHR. Factors relevant to whether solitary confinement breaches art 3 include ‘the particular conditions, the stringency of the measure, its duration, the objective pursued and its effects on the person concerned.’ Regarding duration, one must carefully examine its justification, the necessity, the proportionality compared to other

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52 Ibid [77].
53 Ibid.
54 Ibid [4].
55 Ibid [12].
56 Conditions of detention may provide a justification for exceptional circumstances in bail applications, as was argued in Re Paul Noel Dale [2009] VSC 332 (10 August 2009); and Dale v DPP [2009] VSCA 212 (11 September 2009). Based on the manner in which these cases were argued and analysed, they qualify for the ‘Charter missed opportunity’ category too.
58 X v Turkey (European Court of Human Rights, Chamber, Application No 24626/09, 9 October 2012) (‘X v Turkey’).
60 X v Turkey (European Court of Human Rights, Chamber, Application No 24626/09, 9 October 2012) [40].
measures, the safeguards against arbitrariness, and ‘the measures taken by the authorities to satisfy themselves that the applicant’s physical and psychological condition allowed him to remain in isolation’.  

- **Mathew v Netherlands (2005)**: The ECtHR held that, although Mathew’s sentence was reduced as ‘compensation’ for his treatment, the judgment of the domestic court ‘stop[ped] short of finding the applicant’s conditions of detention unacceptable’ under art 3. Because the applicant was not expressly or substantively acknowledged to be the victim of an art 3 violation, he could still claim a violation of art 3.

- **Vogel v Attorney-General & Ors (2013)**: The New Zealand Court of Appeal found a 21-day sentence to solitary confinement violated the right to be treated humanely and with dignity when deprived of liberty. The right cast a positive duty on the State ‘to ensure ... that the sentence was one which could safely be imposed’, with the State not avoiding its positive duty ‘on the basis that the prisoner sought the sentence imposed’. Vogel was considered vulnerable because of his drug addiction and his diagnosed mental health issues – factors that were key to assessing whether the sentence could be safely imposed.

- **Shahid v Scottish Ministers (2014)**: The Scottish Lords of Appeal outlined the conditions that must be satisfied for extended solitary confinement to amount to a violation of art 3 of the ECHR: (a) ‘a proper purpose for the segregation’; (b) procedural safeguards, such as regular reviews, including prisoner input; (c) reasons must be given for continuing the segregation; (d) the prisoner must not be held in ‘total isolation’; and (e) the prisoner’s health must be kept under review.

- **Callanan v Attendee X; Callanan v Attendee Y; Callanan v Attendee Z (2013)**: The Supreme Court of Queensland reduced sentences for contempt of court from 5 months to between 5 and 6 weeks, because the defendants would serve their sentences in the ‘Restricted Management Unit’ at Woodford Prison for Criminal Motorcycle Gangs, and would be subject to a ‘Restricted Management Regime’, including 22 hours per day of solitary confinement. In Callanan v Attendee X, Justice Applegarth reduced the sentence to four weeks, taking into account ‘the fact that a period of four weeks in solitary confinement is harsh punishment and carries a substantial risk of psychological harm.’ His Honour noted the ‘risk the respondent will suffer serious psychological harm by any substantial period in solitary confinement, and

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61 Ibid.
62 *Case of Mathew v The Netherlands* (2006) 43 EHRR 23 (‘Mathew’).
63 Ibid [151].
64 Ibid.
65 *Vogel v A-G* [2013] NZLR 67 (‘Vogel’).
66 Ibid [72] and [73] respectively.
67 Ibid [71] and [72] respectively.
69 Ibid [43].
71 The policy is described in *Attendee X* [2013] QSC 340 [28].
72 *Attendee X* [2013] QSC 340 [55].
thereby receive what many would regard as a cruel and unusual punishment, must be taken into account.”
His Honour made extensive reference to international law, and research on the harmful effects of solitary confinement. It ought to be noted that there is no equivalent human rights instrument in Queensland.

- R v Kent is a salutary case in this context. In Kent, Justice Bongiorno mentioned the Charter in the context of sentencing a prison suffering a mental illness.

Anecdotally, it seems that an argument based on the Charter is perceived as a sign of weakness— that your claim under statute or the common law is weak — and that your client has more money than sense. This is discouraging, given that the potential of the Charter will not be realised if not utilised by counsel.

The Future for Prisoners’ Rights under the Charter

Challenges for Litigating Prisoners’ Rights

Based on these high and low points, and the other Charter jurisprudence on prisoners, a number of themes arise which pose major challenges for litigating prisoners’ rights under the Charter.

First, the s 32(1) interpretative obligation has had little impact in the area of prisoners. Section 32(1) has reinforced the existing and ordinary interpretation of relevant legislative provisions, but is yet to necessitate a re-visiting of an existing and ordinary interpretation — that is, s 32(1) is yet to necessitate a “rights-compatible” interpretation of an otherwise “rights-incompatible” provision.

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73 Ibid.
76 [2009] VSC 375 (2 September 2009) (‘Kent’).
77 One other judgment makes passing reference to the Charter. In DSC Tarrant v Stuart Townsend (Unreported, Magistrates’ Court of Victoria, S Garnett, 7 August 2010) [9], Magistrate Garnett noted that ‘in considering the appropriate period of detention, I have taken into account ... the fact that he has been detained in the custody centre for an excessive period of 10 days which, in my opinion, is contrary to s 22 of the Charter... due to its inhumane conditions’.
Secondly, the s 7(2) power to impose reasonable and demonstrably justifiable limitations on Charter rights is of great significance in the prison context. Prisoners are in ‘prison as punishment and not for punishment’, and legally retain all rights other than the right to liberty. However, a prisoners’ loss of liberty inevitably impacts on their enjoyment of other rights, especially because of the security-focus in prison environments. The Charter requires a balance to be struck between rights and limitations thereto, inspiring a fresh exercise of the balance in the prison context — both in the context of relevant legislation and decisions by public authorities. Section 7(2) will, on occasion, require the balance to be struck in favour of prisoners’ rights; and, where the balance is in favour of security, the reasons for that decision must be fully articulated against the standards of reasonableness and justifiability, providing transparency and accountability of decision-making.

The full potential of s 7(2) analysis has not been reached in the prison context to date. This is not an easy task, but it is necessary. As Justice Emerton recognised, ‘proportionality assessment is a key part of the Court’s role’, but the ‘Court cannot enter into the process of fine-tuning arrangements’ under the Corrections Act.

Thirdly, there is a distinct under-utilisation of the Charter in the context of prisons. The instrument has been under-utilised by both litigants on the one hand, and judges and tribunal members on the other. Compared to other similar jurisdictions, such as Canada, New Zealand and the United Kingdom, the Charter ‘has generated far less litigation concerning prisoners.’

Re-Examination of Charter ‘Enforcement Mechanisms’

These three challenges are inter-related. Anecdotally, the Charter is viewed as an argument of last resort. Given the state of uncertainty of the main “enforcement mechanisms”, being ss 7(2) and 32(1), this is not surprising. With some jurisprudence suggesting that s 32(1) is no more than the codification of the principle of legality, and some jurisprudence suggesting that’s 7(2) proportionality is not relevant to assessing rights compatibility, where is the ‘value add’ of the Charter?

81 The common law statement of this principle is found in Raymond v Honey [1983] 1 AC 1, 10 (see Naylor, above n 4, fn 6). Internationally, Principle 5 of the United Nations Basic Principles for the Treatment of Prisoners (1990) states that ‘[e]xcept for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights, and, where the State concerned is a party, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and the Optional Protocol thereto, as well as such other rights as are set out in other United Nations covenants’; and Principle 9 states that ‘[p]risoners shall have access to the health services available in the country without discrimination on the grounds of their legal situation’: General Assembly, Basic Principles for the Treatment of Prisoners 68th plen mtg UN Doc A/RES/45/111 (4 December 1990). Justice Emerton refers to these in Castles (2010) 28 VR 141, 168 [103].
82 Castles (2010) 28 VR 141, 176 [145].
84 See, eg, Foster [2014] VCC (14 February 2014).
85 Groves, above n 4, 217.
A closer analysis of the decision of the High Court of Australia in *Momcilovic v R* (‘*HCA Momcilovic*’) is required. As Justice Tate’s article suggests, with respect, the decision is much more nuanced than simply being reduced to the judgment of Chief Justice French. In a forthcoming article, my analysis of *HCA Momcilovic* confirms Justice Tate’s findings. In particular, first, four judges acknowledge that proportionality analysis under s 7(2) was part of the task of rights compatible interpretation, Heydon J included.

Secondly, four judges support the approach to interpretation in New Zealand (‘NZ’) and the United Kingdom (‘UK’). In essence, if an ordinary interpretation of a provision limits a right, s 7(2) analysis is undertaken to see if the provision is nevertheless ‘compatible with human rights’ because it is reasonable and demonstrably justifiable. If the limit is not justified under s 7(2), the ordinary interpretation is re-visited under s 32(1).

The main point of difference between the UK and NZ methods is how ‘strong’ the remedial use of s 32(1) would be — with s 3(1) of the *Human Rights Act 1998* (UK) being described as ‘strong’ and s 6 of the *Bill of Rights Act 1990* (NZ) being ‘weak’. Using Justice Tate’s reference to the ‘elasticity’ of the statutory language, the UK judges find the statutory language more elastic than the NZ judges. Justices Gummow, Hayne and Bell were certainly prepared to go as far as the NZ judges. Justice Heydon went further, holding that s 32(1) was a codification of the UK case of *Ghaidan v Godin-Mendoza*. In the end, the strength of the rights-compatible interpretation enforcement mechanism is less important than the inclusion of proportionality analysis as part of the interpretative exercise aimed at interpretations that are ‘compatible with human rights’, and a re-visiting of statutory interpretation where an interpretation that is not ‘compatible with human rights’ is not reasonable and/or demonstrably justified.

Thirdly, with respect, it is not correct to identify the judgment of Chief Justice French as the ratio of *HCA Momcilovic*. Chief Justice French was the only judge who accepted the Court of Appeal’s view that s 32(1) codified the principle of legality. The judgments of Justices Gummow, Hayne, Bell and Heydon certainly entertain s 32(1) being something quite different to the principle of

86 *Momcilovic v The Queen* (2011) 245 CLR 1 (‘*HCA Momcilovic*’).
87 Pamela Tate, ‘Statutory Interpretive Techniques under the Charter: Three Stages of the Charter — Has the Original Conception and Early Technique Survived the Twists of the High Court’s Reasoning in *Momcilovic*’ [2014] 2 Judicial College of Victoria Online Journal 43.
89 *HCA Momcilovic* (2011) 245 CLR 1, 91–92 [166]–[168] (Gummow J, with Hayne J relevantly concurring); 165–170 [415]–[426], especially 165 [415] and 166 [417] (Heydon J); 247–250 [678]–[685], especially 249–250 [683] (Bell J).
90 *HCA Momcilovic* (2011) 245 CLR 1, 91 [166], 92 [168], 97–99 [190]–[199] (Gummow J, with Hayne J relevantly concurring); 181–183 [450]–[452] (Heydon J); 250 [684] (Bell J).
91 Tate, above n 87, 58 and 63.
92 [2004] 2 AC 557 (‘*Ghaidan*’).
93 *HCA Momcilovic* (2011) 245 CLR 1, 50 [51] (French CJ).
legality.\textsuperscript{94} The joint judgment of Justices Crennan and Kiefel is the closest to French CJ on s 32(1), but their Honours explicitly reject the methodology of the Court of Appeal, which itself was based on the principle of legality characterisation.\textsuperscript{95}

Revisiting \textit{Momcilovic} is vital for rights protection in this area. Much of the law-making and decision-making in the context of prisoners requires a balancing of interests: those of the individual prisoner against numerous other competing demands, including the demands of other prisoners and the community in general. To subject these laws and decisions to a proportionality analysis is key to securing the rights of prisoners, because proportionality analysis in many situations gives you the \textit{solution} to the problem — it identifies where an over-reach has occurred, it allows for excesses of laws and decisions to be softened, it ensures individualised decision-making.

Moreover, the capacity to \textit{re-visit} an ordinary interpretation of a provision where that provision unreasonably and/or unjustifiably limits a right is vital. A rights compatible interpretation is \textit{the solution} to the implementation of an otherwise right-\textit{incompatible} law.

The nuances in the jurisprudence on ss 7(2) and 32(1) of the \textit{Charter} must be explored and tested. There is strong judicial opinion, based on the text and structure of the \textit{Charter}, the intention of the \textit{Charter}-enacting parliament, and sound judicial reasoning, suggesting ss 7(2) and 32(1) have a much greater role to play than the role attributed in \textit{VCA Momcilovic}. Provided ss 7(2) and 32(1) are given the role envisaged by Justice Nettle in \textit{RJE},\textsuperscript{96} Justice Bell in \textit{Kracke},\textsuperscript{97} Chief Justice Warren in \textit{Das},\textsuperscript{98} and four Justices of the High Court of Australia in \textit{HCA Momcilovic}, there is plenty of reason for litigants to be utilising the \textit{Charter} in argument. Moreover, to quote Dame Sian Elias, quoting Geoffrey Palmer, judges and lawyers alike ‘need to step up’ to the challenge of human rights analysis, and resist the temptation of ‘tactical reticence’ with the \textit{Charter}.\textsuperscript{99}

\textsuperscript{94} Ibid 92 [168], 92 [170] and [171] (Gummow J, with Hayne J relevantly concurring); 250 [684] (Bell J). Indeed, Justice Heydon explicitly rejects the \textit{VCA Momcilovic} characterisation of s 32 as codifying the principle of legality: at 164 [411] and 181 [450].

\textsuperscript{95} After an analysis of the meaning of s 32 (ibid 210 [544]–[545]), Justices Crennan and Kiefel hold that ‘[s] 32 does not state a test of construction which differs from the approach ordinarily undertaken by courts towards statutes... The \textit{Charter} forms part of the context in which a statute is to be construed’ (217 [565]), relying on Lord Hoffman in \textit{R (Wilkinson) v Inland Revenue Commissioners} [2005] 1 WLR 1718. Accordingly, their Honours do not explicitly accept the argument that s 32 is simply a codification of the principle of legality, and do explicitly reject the \textit{VCA Momcilovic} methodology which is based on the principle of legality codification argument (at 217 [565]).

\textsuperscript{96} \textit{RJE v Secretary to the Department of Justice & Others} [2008] VSCA 265, especially Nettle JA.

\textsuperscript{97} \textit{Kracke v Mental Health Review Board} (2009) 29 VAR 1 (‘Kracke’).

\textsuperscript{98} \textit{Re Application under the Major Crime (Investigative Powers) Act 2004} [2009] VSC 381 (‘Das’).

Application of the Victorian Human Rights Charter in Legal Practice: Discrimination and Equal Opportunity*

Hugh de Kretser†

Introduction: the Benefits of the Charter

The Charter of Human Rights and Responsibilities Act 2006 (Vic) (‘the Charter’) has been good for Victoria, but the most important benefits have arisen in government and Parliament, rather than in the courts, where the impact has been limited.

Early on, when the Charter was enacted, I helped to draft a Charter Compliance Guide for community legal centres. Community legal centres are unlikely to be public authorities bound by the Charter, but we thought it was important to act as if we were bound by the Charter.

We posed a set of difficult but familiar questions in the guide about who to help and on what legal issues — everyday questions in legal centres with limited funding and overwhelming client demand. Then we answered those questions using a human rights based approach.

There were still no easy answers to the difficult questions but the human rights decision-making framework provided a very helpful process to engage with the competing issues, making it more likely that the ultimate decisions were reasonable and justifiable.

That process highlighted for me the benefits in government embracing the Charter to assist in its decision-making, increasing the likelihood of better, more human-focused decisions. The difficulty in assessing those benefits has been that their visibility has been limited.

To give one example, last year the Human Rights Law Centre was approached by two public housing residents who wanted advice on new public housing policies that expressly banned residents from holding political rallies of any kind on housing estates and also banned residents from placing political information on notice boards. The policies also prohibited politicians and candidates from booking community facilities and door knocking.

* This paper is based on a presentation at the Human Rights under the Charter: The Development of Human Rights Law in Victoria conference, convened by the Supreme Court of Victoria, the Faculty of Law of Monash University, the Judicial College of Victoria, Victoria Law Foundation, and the Human Rights Law Centre, Melbourne, 7 to 8 August 2014.

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We thought it was clear that the policies breached freedom of expression and peaceful assembly rights under the Charter as there were far less restrictive means to achieve any legitimate aims that may have underpinned the policies.¹

We wrote to the Victorian Government and the policy was changed to remove the offensive provisions.

This was a good, visible result for the Charter.

If the government had refused to change the policies, it would likely have been a good, visible result for Charter litigation.

But if the Charter is working as it should, a human rights compliant outcome on an issue like this will not be publicly visible because it will happen in the drafting stage of the policy when the Department’s Charter processes identify and remedy potential inconsistencies with human rights.

It’s in these government decision-making processes, and in Parliamentary processes, that the Charter has had its biggest impact. When we turn to the courts, and in particular to the area of discrimination and equal opportunity, the impact has been modest.

**Equality and Non-Discrimination under the Charter**

Section 8 of the Charter, at first glance, has a broad equality guarantee. It provides that:

- **(1)** Every person has the right to recognition as a person before the law.
- **(2)** Every person has the right to enjoy his or her human rights without discrimination.
- **(3)** Every person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination.
- **(4)** Measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination.

Discrimination is defined as discrimination within the meaning of Victoria’s separate anti-discrimination statute, the Equal Opportunity Act 2010 (Vic), on the basis of an attribute set out in that Act such as sex, age, religion, disability and more.

So in broad terms, the Charter repeats the discrimination protections of the Equal Opportunity Act, but within a different framework, and then adds a broader equality guarantee in s 8(3).

The Charter’s preamble also refers to principles of non-discrimination and equality.

¹ See Charter ss 15, 16, 7(2).
Overview of Case Law

The Law Institute of Victoria audit of Charter cases between 2006 and 2012 showed that s 8 was the third most commonly cited right in Charter litigation after privacy and fair hearing rights. The audit also showed that discrimination cases made up 13% of all Charter cases.

While these numbers seem significant, an analysis of the case law shows that the Charter has had little impact in these areas and most of the cases relate to applications for exemptions from the discrimination provisions of the Equal Opportunity Act, for example for women-only pool sessions or Indigenous specific recruitment.

Exemption Decisions

Under the Equal Opportunity Act, the Victorian Civil and Administrative Tribunal (‘the Tribunal’) may grant an exemption from the discrimination prohibitions in the Act. In deciding whether to grant the exemption, one of the factors the Tribunal must consider is whether or not the proposed exemption is a reasonable limitation on the right to equality set out in the Charter.

There are a number of cases considering applications for exemptions under the Equal Opportunity Act, and under the previous version of the same legislation, which consider s 8 of the Charter.

In some of these cases, the Tribunal has made strong comments about the importance of the equality provisions in the Charter. For example, in Lifestyle Communities Ltd [No 3] (Anti-Discrimination), Bell J stated:

> The human rights of equality and non-discrimination are of fundamental importance to individuals, society and democracy. Any limitations must be subject to a stringent standard of objective justification. Equality means substantive equality, not just formal equality. Where differentiation is a measure for redressing disadvantage, it is not discrimination because it furthers equality.²

In nearly all of the cases, the application for an exemption was successful. In Lifestyle, however, the Tribunal refused an application by a business that provides gated residential accommodation for an exemption to exclude people who are not aged over 50 years. The Tribunal found that the exclusion of younger people did not fall within the special measures exemption in s 8(4) and was not otherwise justified.

² [2009] VCAT 1869 (22 September 2009), [107] (‘Lifestyle’).
Discrimination by a Religious Body

In one important case, Cobaw Community Health Services Limited v Christian Youth Camps Limited, the Tribunal at first instance relied in part on s 32 of the Charter to support a narrow interpretation of religious exemptions in the Equal Opportunity Act.

On appeal to the Victorian Court of Appeal, the court held that the interpretative provision of the Charter did not apply because the conduct in question happened prior to s 32 becoming operational.

Interestingly the Court noted that the parties agreed that the Tribunal’s error on this point was immaterial to the interpretation of the relevant provisions of the Equal Opportunity Act — the interpretation would be the same whether or not the Charter’s interpretative provision applied.

Gay adoption

In AB v Victorian Equal Opportunity and Human Rights Commission the Victorian County Court considered an application for adoption of a child by a man in a long term same-sex relationship.

The Adoption Act 1984 (Vic) (‘the Act’) expressly discriminates against same-sex couples by allowing only heterosexual couples to adopt as a couple. The legislation allows an individual to adopt in ‘special circumstances’ but expressly bans adoption by an individual if they are married or in a de facto heterosexual relationship.

AB applied as an individual to adopt a child.

The adoption was not opposed by any party and it was generally agreed that it was in the best interests of the child. However, a question was raised as to whether adoption by an individual was permitted under the Act where the individual was in a long-term relationship, albeit not one of the long-term relationships identified by the statute as a bar to individual adoptions.

AB argued that to interpret the Act so as not to permit adoption by a person in a long-term same-sex relationship would breach his equality and non-discrimination rights in ss 8(2) and (3) on the grounds of sexual orientation and also that s 32 of the Charter required that the Act be interpreted accordingly.

Judge Pullen construed the Act so as to permit the adoption by AB, but preferred to use normal interpretative methods to arrive at this conclusion, saying only that s 32 of the Charter ‘confirms my interpretation’.

4  Christian Youth Camps Limited v Cobaw Community Health Service Limited (2014) 308 ALR 615, 729 [507].
5  Ibid 654 [178].
6  (Unreported, County Court of Victoria, Judge Pullen, 6 August 2010).
Capacity of Children to Give Instructions

In *A & B v Children’s Court of Victoria*, the Victorian Supreme Court overturned a decision of a magistrate that two children were not mature enough for the purposes of instructing a lawyer. The court found that maturity extended to more than age and needed some contextual consideration about the matters on which instructions would be given.\(^8\)

Sections 8(3) and 32 were argued in support of this interpretation but the court arrived at its decision without relying on the *Charter*, simply noting:

> Consideration of the human rights sought to be relied on by the plaintiffs and the presumption of statutory interpretation that provisions should be interpreted consistently with international law only serve to provide further reasons why the construction of ss 524(2) and (10) that I have preferred should be adopted.\(^9\)

**Discrimination on the grounds of disability**

In *PJB v Melbourne Health*, the Victorian Supreme Court in part relied on s 8 and its protection against discrimination on the grounds of disability, to overturn a Tribunal decision to appoint an administrator to manage the finances of a long-term involuntary mental health patient who owned a house.

In *Slattery v Manningham City Council*, the Tribunal considered a ban by Manningham City Council that prohibited a ratepayer, Paul Slattery, from attending any council buildings. Mr Slattery has a mental illness and an acquired brain injury and had made thousands of complaints to the council and had also been involved in other incidents that led to the council’s ban.

The Tribunal found that in imposing the ban, Manningham City Council both directly discriminated against Mr Slattery on the grounds of disability under the *Equal Opportunity Act*, and also breached s 38(1) of the *Charter* by acting incompatibly with, or failing to give proper consideration to, human rights under the *Charter* including the right to non-discrimination under s 8(2). The Tribunal found that there were less restrictive means available to achieve the council’s aim. The Tribunal had not yet ruled on remedies at the time of preparing this paper.

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8  Ibid [120]–[121].
9  Ibid [110].
11  [2013] VCAT 1869 (30 October 2013) (‘Slattery’).
Conclusion

Overall, the Charter so far has had a modest impact on discrimination and equal opportunity jurisprudence. Partly, this is a result of the definition of discrimination in the Charter which refers back to the Equal Opportunity Act and partly this is a result of a conservative approach by courts to the interpretation power in s 32 of the Charter. Cases like Slattery highlight the interesting intersection between the equality protections in the Charter and the Equal Opportunity Act and the potential for the Charter to be used in this area in new ways.