

SUBMISSION TO THE 2015 REVIEW OF THE *CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES ACT 2006*: SECTION 32(1) AND STATUTORY DISCRETIONS

By Bruce Chen*
PhD Candidate, Faculty of Law, Monash University

This submission addresses one particular issue under Term of Reference 2(c) for the 2015 Review of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (Charter). That term of reference refers to '[a]ny desirable amendments to improve the operation of the Charter', including 'clarifying the role of human rights in statutory construction'. The purpose of this submission is to draw attention to the issue of s 32(1) of the Charter and broad statutory discretions, and to provide some discussion for consideration of this issue. The author submits that the Charter does not presently make clear whether s 32(1) confines broad statutory discretions, such that those discretions may only be exercised compatibly with Charter rights. This issue has been raised on several occasions in court litigation, yet remains unresolved.¹ The State of Victoria has also taken different positions on this issue with changes in government.² As part of clarifying the role of human rights in statutory construction, s 32(1) of the Charter should make clear whether it confines broad statutory discretions.

A *MOMCILOVIC V THE QUEEN*

Section 32(1) is directed at the interpretation of legislation to give effect to human rights recognised under the Charter. That sub-section states 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'.

A 6:1 majority of the High Court in *Momcilovic v The Queen* (*Momcilovic*) held that s 32(1) of the Charter is an ordinary principle of statutory interpretation and does not replicate the extensive effects of s 3 of the *Human Rights Act 1998* (UK) (UK HRA). In subsequent cases, judges of the Victorian Court of Appeal have predominantly

* This submission is adapted from a chapter of the author's doctoral thesis (presently in draft, working title – *Interpretive Provisions under Statutory Bills of Rights in Australia, the Principle of Legality and the Presumption of Consistency: Comparisons, Contrasts and Interrelationships*). The author would like to thank Professor Jeffrey Goldsworthy and Associate Professor Julie Debeljak for their insightful comments on earlier drafts of this submission. A disclaimer – the author is also a Senior Legal Adviser at the Victorian Equal Opportunity and Human Rights Commission. The views expressed in this submission are those of the author and do not purport to represent the views of the Commission.

¹ See *Nigro & Ors v Secretary to the Department of Justice* [2013] VSCA 213, [179].

² Compare, for example, Jeremy Gans, 'The Government's Charter Dodge' on Jeremy Gans, *Charterblog: Analysis of Victoria's Charter of Human Rights* (30 December 2008) <<https://charterblog.wordpress.com/2008/12/30/the-governments-charter-dodge/>>; and *Nigro & Ors v Secretary to the Department of Justice* [2013] VSCA 213.

interpreted *Momcilovic* as providing that s 32(1) is a codification of the common law principle of legality, but with ‘a wider field of application’.³ This seems to be based on the judgment of French CJ, who explicitly equated s 32(1) with the principle of legality.⁴ His Honour essentially agreed with the Court of Appeal’s findings in the proceeding below. However, doubts have been raised as to the correctness of this characterisation of the High Court’s findings, and the precise boundaries of s 32(1) post-*Momcilovic* remain unclear.⁵

B SECTION 32(1) AND STATUTORY DISCRETIONS

There are potentially three competing positions regarding s 32(1) and broad statutory discretions. They are summarised below, together with their rationale and implications for statutory interpretation.

(1) Confines statutory discretions

The first possibility is that s 32(1) confines broad statutory discretions, such that a person or body upon whom the discretion is conferred can only exercise it compatibly with human rights. This is consistent with the notion that statutory discretions are subject to interpretation, and is supported by the approach of courts to the principle of legality (see further below). This gives s 32(1) more work to do and provides for the most positive human rights outcomes. There is further support for this position in comparative jurisdictions with bills of rights, particularly Canada and New Zealand.

The confinement of broad statutory discretions pursuant to s 32(1) means that the issue would be dealt with through the lens of interpretation, rather than conduct examined on a case-by-case basis. There are a number of practical implications arising from this:

- Section 32(1) applies to everyone who interprets and applies legislation, not only ‘public authorities’. As such, the operation of s 32(1) to confine statutory discretions would include all discretionary powers conferred on non-public authorities, including courts and tribunals. It has been said that: ‘Given that courts are not public authorities when acting judicially, s 32 will be the principal way in which the Charter can affect the exercise of statutory powers by courts’.⁶

³ See Bruce Chen, ‘Making Sense of *Momcilovic*’ (2013) 74 *Australian Institute of Administrative Law Forum* 67.

⁴ *Momcilovic v The Queen* (2011) 245 CLR 1, 50 [51].

⁵ See Julie Debeljak, ‘Proportionality, Rights-Consistent Interpretation and Declarations under the Victorian *Charter of Human Rights and Responsibilities*: the *Momcilovic* Litigation and Beyond’ (2014) 40(2) *Monash University Law Review* 340; *Victorian Toll & Anor v Taha & Anor; State of Victoria v Brookes & Anor* [2013] VSCA 37, [188]-[190] per Tate JA (in *obiter*); The Hon 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; The Hon Sir Anthony Mason AC KBE GBM, ‘Statutory Interpretive Techniques under the Charter: Section 32’ (2014) 2 *Judicial College of Victoria Online Journal* 69.

⁶ Joanna Davidson, ‘Judicial Review of Decisions and Conduct under the *Charter of Human Rights and Responsibilities Act*’ (Speech delivered at the Human Rights in Administrative Law Series, Seminar 3, Judicial Review, Law Institute of Victoria, Melbourne, 17 April 2013) 3.

More generally, discretionary powers conferred by statute have been described as covering ‘the vast majority of occasions when rights are limited in Victoria’.⁷

- Another primary mechanism for the protection of human rights under the Charter is s 38(1). That provision states 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’. However, the Charter does not purport to provide a new or independent right to relief or remedy for breach of public authority obligations under s 38(1).⁸ No new cause of action is created under the Charter. The bringing of claims of breach of s 38(1) before courts and tribunals is subject to satisfaction of the preconditions in s 39(1) of the Charter.⁹ Section 39 has been the subject of much criticism for lacking clarity in its drafting.¹⁰ While the Court of Appeal has made clear that s 38(1) claims could comfortably be brought in judicial review proceedings, the precise boundaries of s 39(1) outside of judicial review are less clear.¹¹ By contrast, s 32(1) applies to the interpretive exercise and is not subject to such complexities. Section 32(1) arguments can be raised in any court or tribunal proceeding where a question of interpretation arises.
- If s 32(1) were to confine a broad statutory discretion, it can give rise to challenges on the basis that it would be an error of law and beyond power to act incompatibly with human rights¹² (ie. *ultra vires*). That is because s 32(1) would confine the scope of the discretion so that it must be exercised compatibly with Charter rights, and a particular exercise of the discretion may be beyond that confined scope. This would in some ways mitigate – through statutory interpretation – the conservative approach taken in *Bare v Small*¹³ in respect of s 38(1). In that case, the Supreme Court held that breach of s 38(1) unlawfulness ‘does not per se amount to jurisdictional error’.¹⁴ It was not automatically invalid. In reaching this decision, Williams J considered that a legislative purpose to invalidate any act that fails to comply with s 38(1) could not be discerned from

⁷ Gans, ‘The Government’s Charter Dodge’ on Jeremy Gans, *Charterblog: Analysis of Victoria’s Charter of Human Rights* (30 December 2008) <<https://charterblog.wordpress.com/2008/12/30/the-governments-charter-dodge/>>. See also R S French AC, ‘Administrative Law in Australia: Themes and Values Revisited’ in Matthew Groves (ed) *Modern Administrative Law in Australia: Concepts and Context* (Cambridge University Press, 2014) 38; Jack Beatson et al, *Human Rights: Judicial Protection in the United Kingdom* (Sweet & Maxwell, 2008) 537 [6-05].

⁸ Explanatory Memorandum, *Charter of Human Rights and Responsibilities Act 2006* (Vic) 2849.

⁹ Section 39(1) provides that: ‘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.’

¹⁰ See, for example, *Director of Housing v Sudi* (2011) 33 VR 559, 596 [214] per Weinberg JA; Jeremy Gans, ‘The Charter’s Irremediable Remedies Provision’ (2009) 33(1) *Melbourne University Law Review* 105.

¹¹ See Bruce Chen, ‘When is “Unlawful” Unlawful? Section 39(1) of the Charter of Human Rights and Responsibilities Act 2006’ (2015) 3 *Law Institute Journal* 54.

¹² Davidson, ‘Judicial Review of Decisions and Conduct under the *Charter of Human Rights and Responsibilities Act*’ (Speech delivered at the Human Rights in Administrative Law Series, Seminar 3, Judicial Review, Law Institute of Victoria, Melbourne, 17 April 2013) 3; Julie Debeljak, ‘Human Rights Responsibilities of Public Authorities Under the Charter of Rights’ (Speech delivered at The Law Institute of Victoria Charter of Rights Conference, Melbourne, 18 May 2007) 13.

¹³ [2013] VSC 129.

¹⁴ *Ibid* [116].

the Charter. That decision is presently on appeal, and contrasting approaches have been taken by other judges of the Supreme Court.¹⁵

- The operation of s 32(1) is different in respect of subordinate instruments. Section 32(3) provides that s 32 ‘does not affect the validity of [...] 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’. It is not spelt out in the Charter exactly how clearly an instrument must be ‘empowered’ to be incompatible. Since statutory provisions which provide for the making of subordinate instruments are usually broadly expressed, the confinement of such provisions pursuant to s 32(1) would neatly align with subsection (3). Taking the same approach as the principle of legality (see below), clear and unambiguous language in the empowering provision would be required before it can be taken to authorise the making of subordinate instruments which are incompatible with Charter rights.

(2) Does not confine statutory discretions

The question which is the subject of these submission is not whether s 32(1) applies to broad statutory discretions, but *how* it applies. The second possibility is that s 32(1) does not operate to confine broad statutory discretions. It does not circumscribe the scope of the statutory discretion in respect of Charter rights. The main overarching argument is that it would be inconsistent with the Charter model, for the following reasons:

- Section 38(1) of the Charter deals specifically with the obligations of public authorities. It applies to circumstances where a public authority has a discretion.¹⁶ It is the *exercise* of the statutory discretion under s 38(1), rather than its interpretation under s 32(1), which is of relevance under the Charter. If s 32(1) were to confine broad statutory discretions, then s 38(1) ‘has little to do in contexts governed by a statute’.¹⁷
- The obligations in s 38(1) only apply to ‘public authorities’. Public authorities are defined in s 4 of the Charter, and include public officials and certain entities exercising functions of a public nature. There are however two exclusions from the definition which are particularly relevant to the present issue. Firstly, public authorities do not include courts and tribunals, except when they are acting in an administrative capacity (s 4(1)(j)). Secondly, an entity may be declared by regulations to not be a public authority (s 4(1)(k)),¹⁸ effectively exempting them

¹⁵ See *PJB v Melbourne Health & Anor (Patrick's case)* [2011] VSC 327; *Sudi v Director of Housing* (2010) 33 VAR 139 (this decision was overturned, but the issue left open on appeal); *Burgess & Anor v Director of Housing & Anor* [2014] VSC 648.

¹⁶ By contrast, where a public authority has no discretion in the exercise of its functions or powers, and the relevant Act (or provision of that Act) is incompatible with human rights, the public authority must nevertheless apply the legislation: see the example provided under s 38(2).

¹⁷ Gans, ‘The Government’s Charter Dodge’ on Jeremy Gans, *Charterblog: Analysis of Victoria’s Charter of Human Rights* (30 December 2008) <<https://charterblog.wordpress.com/2008/12/30/the-governments-charter-dodge/>>.

¹⁸ The power to make regulations is conferred on the Governor in Council: see s 46(2), particularly subss (2)(b) and (c).

from their obligations under s 38(1).¹⁹ Confining broad statutory discretions pursuant to s 32(1) would mean that when courts and tribunals are exercising statutory discretions (regardless of whether they are acting in a judicial or administrative capacity), and when exempt public authorities are exercising statutory discretions, they must nevertheless act compatibly with Charter rights. Arguably, this effectively converts those non-public authorities into public authorities when they are exercising broad statutory powers. This defeats the purpose of, or cuts across, those exclusions, which have been expressly enacted by Parliament. Here is a clear example of this point:

Example

An entity established by statute that has functions of a public nature *is* a public authority under the Charter (s 4(1)(b)). It is therefore bound by s 38(1). As a creature of statute, its powers are derived entirely from statute. Some powers set out in the statute (or possibly implied from, or incidental to, the statute where necessary to enable it to perform its functions) might be broad, so the entity has a discretion. Section 38(1) would apply to such powers.

The question of course is whether s 32(1) also circumscribes those powers.

Let us now assume that the same statutory entity has been declared *not* to be a public authority pursuant to s 4(1)(k). The entity is no longer bound by s 38(1). If s 32(1) were to confine broad statutory discretions, then the entity would be required to exercise those powers compatibly with human rights – as if it were bound by s 38(1) and despite its exemption. The exemption has had no effect on the entity’s status quo. It could be said that the exemption power under s 4(1)(k) has been defeated.

- The approach in Canada does not inform the way in which s 32(1) should operate. The *Canadian Charter of Rights and Freedoms* (Canadian Charter) is a constitutional bill of rights. It is ‘the supreme law of Canada and any law that is inconsistent with its provisions is, to the extent of the inconsistency, of no force or effect’.²⁰ This is arguably central to the reasoning in the Canadian jurisprudence when the Supreme Court of Canada said that ‘legislation conferring an imprecise discretion must therefore be interpreted as not allowing the Charter rights to be infringed’.²¹ As the Charter in Victoria is only a statutory bill of rights and does not affect the validity of primary legislation, the position in Canada is arguably distinguishable.²²

¹⁹ At present, there are three entities which are so declared – the Adult Parole Board, Youth Residential Board and Youth Parole Board: *Charter of Human Rights and Responsibilities (Public Authorities) Regulations 2013*.

²⁰ *Slaight Communications Inc v Davidson* [1989] 1 SCR 1038, 1078 per Lamer J (dissenting, but not on this point).

²¹ *Ibid*.

²² Gans, ‘The Government’s Charter Dodge’ on Jeremy Gans, *Charterblog: Analysis of Victoria’s Charter of Human Rights* (30 December 2008) <<https://charterblog.wordpress.com/2008/12/30/the-governments-charter-dodge/>>.

(3) Confines certain statutory discretions

A third possibility is that s 32(1) operates to confine broad statutory discretions as a general rule, but exceptions apply. Those exceptions are where courts and tribunals are acting judicially, and where a public authority is exempted from the Charter. Whereas the second position renders s 32(1) inapplicable when s 38(1) applies, this third position recognises that s 32(1) stands independently of s 38(1) as a mechanism to protect and promote human rights. The operation of these two mechanisms is not mutually exclusive. Section 32(1) and 38(1) complement each other.

Nevertheless, this approach involves having regard to the character or status under the Charter of the person or body upon whom the discretion is conferred. This may be problematic as a statutory interpretation exercise, particularly in respect of the exemption of public authorities. When a public authority is exempted, this simply reflects that the Governor in Council has decided to exempt it and is subject to change as a matter of mere regulation.

C STATUTORY DISCRETIONS GENERALLY

Speaking more generally, statutory discretions are subject to implied limits. Administrative law allows for the exercise of public powers to be challenged on various grounds of judicial review. For example, the exercise of power may be for an improper purpose or in bad faith, the decision maker may have failed to take into account relevant considerations or taken into account irrelevant considerations, made an illogical or irrational decision, or breached the principles of natural justice. Mark Aronson and Matthew Groves have rightly said: ‘all public power has its limits [...] One of administrative law’s mantras is that there is no such thing as an unfettered power’.²³

According to French CJ (speaking extra-curially), this is a matter of interpretation:

The question whether an official has acted within the limits of his or her power will depend on the interpretation of the statute or delegated legislation conferring that power. [...] The lawfulness of the exercise of the power will depend critically upon the interpretation of its scope and limits. Good faith, rationality and fairness all apply within the framework and to the extent defined by the statute. In administrative law, statutory interpretation always a threshold issue, even if not contested.²⁴

And David Dyzenhaus, Murray Hunt and Michael Taggart have asked forcefully and rhetorically:

What on earth do common lawyers think they are doing in relation to statutory discretions if they are not interpreting them? The courts have always limited discretionary powers by reading into (or out of) statutes implied conditions on those powers. This is done by intuiting the purpose of the power, and identifying the factors or considerations relevant to its exercise. This is partly an exercise in divining statutory purpose and

²³ Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Lawbook Co, 5th ed, 2013) 108 [3.30] (footnotes omitted).

²⁴ French AC, 'Administrative Law in Australia: Themes and Values Revisited' in Matthew Groves (ed) *Modern Administrative Law in Australia: Concepts and Context* (Cambridge University Press, 2014) 38.

relevant considerations, and partly an application of the strong rule of law ideal that no power is unfettered.²⁵

In light of such arguments, which are now widely accepted in modern statutory interpretation, it would seem on the face of s 32(1) that it does confine statutory discretions. Moreover, this position is supported by the approach of the courts in respect of the principle of legality, *particularly* since s 32(1) has been equated with that principle post-*Momcilovic*.

D THE PRINCIPLE OF LEGALITY AND STATUTORY DISCRETIONS

The principle of legality has been applied to confine broad statutory discretions empowering the making of subordinate instruments. The leading case is *Evans v New South Wales*.²⁶ Legislation had been enacted to facilitate the hosting in Sydney of World Youth Day. The *World Youth Day Act 2008* (NSW) specifically authorised the making of regulations dealing with ‘the use by the public of, and the conduct of the public on, World Youth Day venues and facilities’. The legislation conferred a regulation-making power broad in subject matter. The Full Court of the Federal Court (per French, Branson and Stone JJ) recognised that on its terms, the empowering provision could potentially encompass ‘any conceivable conduct’, including ‘speech and communication’.²⁷ Regulations had been made pursuant to that provision, which provided that a person could be directed to cease engaging in conduct that ‘causes annoyance or inconvenience to participants in a World Youth Day event’. However, the Full Court, applying the principle of legality, considered that the empowering provision was circumscribed by the common law freedom of speech. It held that the regulations were partly invalid.²⁸ It fell outside the conferred power, properly construed.

Such an approach has obtained support from members of the High Court in *Attorney-General (SA) v Corporation of the City of Adelaide*,²⁹ which concerned local council by-laws prohibiting preaching and distributing printed matter on a road without permission.

Moreover, the High Court has not confined the operation of the principle of legality to primary legislation empowering the making of subordinate instruments by non-judicial bodies. Indeed, a leading authority on the principle of legality – *Coco v The Queen* – involved the interpretation of a provision conferring a discretionary judicial power. In that case, the *Invasion of Privacy Act 1971* (Qld) provided that a Supreme Court judge could approve the use of a listening device by a police member performing their duty ‘subject to such conditions, limitations, and restrictions as are specified in his approval and as are in his opinion necessary in the public interest’. The question was whether this broad discretionary power extended to authorising entry onto private premises to install a listening device. The High Court held that it did not. The High Court noted

²⁵ David Dyzenhaus, Murray Hunt and Michael Taggart, ‘The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation’ (2001) 1(1) *Oxford University Commonwealth Law Journal* 5, 26.

²⁶ (2008) 168 FCR 576.

²⁷ *Ibid* 592 [68].

²⁸ *Ibid* 579 [7]; 592-6 [68]-[77], 597 [83].

²⁹ (2013) 249 CLR 1, 66-7 [150] per Heydon J (dissenting); see also 32 [44] per French CJ.

that '[e]very unauthorized entry upon private property is a trespass, the right of a person in possession or entitled to possession of premises to exclude others from those premises being a fundamental common law right'. Applying the principle of legality, it found that there was no clear and unambiguous language in the Act which abrogated or curtailed that fundamental right.³⁰

A more recent example is *Lacey v Attorney-General (Qld)*.³¹ The High Court considered the scope of legislation which conferred on an appellate court an 'unfettered discretion' to vary a sentence for an indictable offence. A 6:1 majority of the High Court referred to the common law rule against double jeopardy. The majority held – as a 'specific application of the principle of legality' – that, in the absence of clear language, the 'unfettered discretion' should be more narrowly construed so that error on the part of the sentencing judge was required before it was enlivened.³² Thus, the principle of legality was applied to confine even an apparently 'unfettered' discretion, so that it did 'not actually mean without limits'.³³

In the above cases, broad statutory discretions (both administrative and judicial) have been 'read down' on the basis that Parliament does not intend to interfere with fundamental common law protections except by clear and unambiguous language. As the High Court said in *Coco v The Queen*, 'general words will rarely be sufficient' to abrogate or curtail fundamental common law protections 'because, in the context in which they appear, they will often be ambiguous on the aspect of interference' with those protections.³⁴ As in Australia, the principle of legality confines broad statutory discretions in New Zealand³⁵ and the United Kingdom.³⁶ This provides a powerful argument that s 32(1) must at least operate in a similar fashion. It is unlikely that Parliament, in taking the significant step of enacting a bill of rights to better protect human rights in domestic law, would have intended that s 32(1) be weaker than a pre-existing common law presumption.³⁷

³⁰ (1994) 179 CLR 427, 435 per Mason CJ, Brennan, Gaudron and McHugh JJ.

³¹ (2011) 242 CLR 573.

³² (2011) 242 CLR 573, 582-4 [17]-[20] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

³³ Michelle Sanson, *Statutory Interpretation* (Oxford University Press, 2012) 206. Chief Justice French has also said (extra curially) that the principle of legality 'has the form of a strong presumption that broadly expressed official discretions are to be subject to rights and freedoms recognised by the common law': 'Protecting Human Rights Without a Bill of Rights' (2010) 43 *John Marshall Law Review* 769, 788; see also *Hogan v Hinch* (2011) 243 CLR 506, 534-5 [27] per French CJ.

³⁴ (1994) 179 CLR 427, 437; see also 438.

³⁵ See, for example, *Canterbury Regional Council v Independent Fisheries Ltd* [2013] 2 NZLR 57; and *Cropp v Judicial Committee* [2008] 3 NZLR 774, although in those cases the principle of legality was held to be rebutted by necessary implication.

³⁶ See, for example, *R v Secretary of State for the Home Department; ex parte Pierson* [1998] AC 539, 587 per Lord Steyn; *R v Secretary of State for the Home Department, Ex parte Leech* [1994] QB 198; *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115; and *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532.

³⁷ Indeed, the predominant view prior to *R v Momcilovic* (2010) 25 VR 436 and *Momcilovic v The Queen* (2011) 245 CLR 1 was that the effect of s 32(1) was to replicate s 3 of *Human Rights Act 1998* (UK), which went further than the principle of legality.

E THE CASE LAW ON SECTION 32(1) AND STATUTORY DISCRETIONS

The Victorian jurisprudence to date on the issue of s 32(1) and statutory discretions is mixed. The analysis below is divided into cases prior to, and subsequent to, the decisions of the Court of Appeal in *R v Momcilovic* and the High Court in *Momcilovic v The Queen* (*Momcilovic* litigation).

(1) Pre-*Momcilovic* litigation

The early jurisprudence in the Victorian Civil and Administrative Tribunal (VCAT) is consistent with the notion that s 32(1) confines broad statutory discretions.³⁸ For example, in *Kracke v Mental Health Review Board*³⁹ (*Kracke*), Bell J found that not only was the respondent Board a public authority and so had to comply with its s 38(1) obligations, but s 32(1) was also relevant in interpreting the Board's general statutory powers and discretions.⁴⁰ Accordingly:

Because s 32(1) requires all legislation to be interpreted compatibly with human rights if possible, it imposes a particular interpretation on provisions which confer open-ended discretions. If possible consistently with their purpose, the provision must be interpreted such that the discretion can only be exercised compatibly with human rights.⁴¹

His Honour relied on the Supreme Court of Canada case of *Slaight Communications Inc v Davidson* (*Slaight*).⁴² That case is authority for the proposition articulated by Lamer J that pursuant to the Canadian Charter: 'Legislation conferring an imprecise discretion must [...] be interpreted as not allowing the Charter rights to be infringed'.⁴³ This approach continues to be applied by the Supreme Court of Canada.⁴⁴ Justice Bell in *Kracke* adapted the finding in *Slaight* to the Victorian context.⁴⁵ Justice Bell repeated and applied this approach in *Lifestyle Communities Ltd (No 3)*⁴⁶ (*Lifestyle*). As will be seen later in this chapter, this reliance on *Slaight* in respect of s 32(1) has been questioned.

In the early cases decided in VCAT, there was a demonstrated willingness to apply s 32(1) to 'read down' the scope of the provision conferring a discretion, so that it cannot be exercised incompatibly with Charter rights. After all, s 32(1) applies to all Victorian statutes and subordinate instruments, including statutory discretions. It also seems, at first glance, 'possible'⁴⁷ to interpret such provisions in this way. All public

³⁸ *Royal Victorian Bowls Association Inc* [2008] VCAT 2415, [47] per Judge Harbison; *Victorian Netball Association Inc* [2008] VCAT 2651 [40]-[42] per Deputy President McKenzie; *Kracke v Mental Health Review Board* (2009) 29 VAR 1 per Bell J (sitting as President of VCAT); and *Lifestyle Communities Ltd (No 3)* [2009] VCAT 1869 per Bell J (sitting as President of VCAT).

³⁹ (2009) 29 VAR 1.

⁴⁰ (2009) 29 VAR 1, 108 [489]; 53-4 [206]-[209].

⁴¹ *Ibid* 54 [208].

⁴² [1989] 1 SCR 1038.

⁴³ *Ibid* 1078 per Lamer J (dissenting, but not on this point).

⁴⁴ *R v Conway* [2010] 1 SCR 565.

⁴⁵ (2009) 29 VAR 1, 54 [211].

⁴⁶ [2009] VCAT 1869, [89]-[91].

⁴⁷ Section 32(1) states 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'.

power has limits and statutory discretions are subject to interpretation. Section 32(1) is directed squarely at interpreting legislation. An alternative characterisation of these cases that is not without support is that Charter rights have been ‘read in’ to the provision conferring the discretion,⁴⁸ such that the person or body upon whom the power was conferred must act compatibly with Charter rights.

However, the jurisprudence prior to the *Momcilovic* litigation might not all point the one way. In *RJE v Secretary, Department of Justice*,⁴⁹ the Court of Appeal considered the interpretation and operation of the *Serious Sex Offenders Monitoring Act 2005* (Vic), which provided a scheme for the making of post-custodial supervision orders for convicted serious sex offenders. The Adult Parole Board could impose further ‘onerous’ restrictions on the offender under that Act. A question arose as to whether s 32(1) could operate to confine the scope of the power to make a post-custodial supervision order. More specifically, could a court only make the supervision order if satisfied that the restrictions *likely* to be imposed by the Adult Parole Board would not be incompatible with the offender’s Charter rights?

Ultimately, Maxwell P and Weinberg JA found it unnecessary to consider this issue. By contrast, Nettle JA did give it some consideration. His Honour had regard to the proposition in *Slaight*. Although not conclusive, Nettle JA said:

In my view, however, it is to be doubted that the same kind of reasoning applies to the interpretation of [the relevant provision] of the Act—if only because the Parole Board is for the time being exempted by regulations from compliance with the Charter. Presumably, the exemption was given just so the Parole Board could act lawfully in ways that are not demonstrably justified in a free and democratic society having regard to the criteria delineated in s 7 of the Charter.⁵⁰

Moreover, in *DPP v Ali (No 2)*⁵¹ (*Ali (No 2)*) the Supreme Court sought to interpret discretionary powers under the *Confiscation Act 1997* (Vic) compatibly with the Charter. That Act permitted the DPP to apply for a court order for forfeiture of property, where the property was used in connection with the commission of certain serious offences. Nevertheless, the court had discretionary powers to ameliorate hardship, including exclusion of property from the operation of the forfeiture order. It was submitted by the respondent and the Victorian Equal Opportunity and Human Rights Commission (Commission) that unless the making of a forfeiture order was compatible with human rights, the court must exercise its discretion to exclude the property in question from the forfeiture order. This submission was rejected by Hargrave J. His Honour essentially found that to apply s 32(1) such that the discretion was ‘circumscribed’ by Charter rights would be inconsistent with the text and purpose of the statutory provisions.⁵²

Although this point would have been sufficient to resolve this issue, Hargrave J went further. His Honour said that the submission made by the respondent and the

⁴⁸ See Andrew Butler and Petra Butler, *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis NZ Limited, 2005) 184 [7.13.2], Beatson et al, *Human Rights: Judicial Protection in the United Kingdom* (Sweet & Maxwell, 2008) 537 [6-05].

⁴⁹ (2008) 21 VR 526.

⁵⁰ *Ibid* 555 [111].

⁵¹ [2010] VSC 503.

⁵² *Ibid* [40]-[41].

Commission ‘would have the effect of imposing an obligation on the Court to act in a way that is compatible with human rights’, which only applies to public authorities.⁵³ This was a reference to s 38(1) of the Charter. It was not agitated by the parties that the court was acting as a public authority.

The judgments of Nettle JA in *RJE* and Hargrave J in *Ali (No 2)* can be construed in alternate ways. On the one hand, they might be read as accepting the general proposition that s 32(1) confines broad statutory discretions, but subject to exceptions. This is the third position on s 32(1) outlined earlier in these submissions. In *RJE*, the Adult Parole Board was an exempted public authority. In *Ali (No 2)* the court was not a public authority as it was acting judicially, and it would have been contrary to the text and purpose of the legislation (see further below on this point).

Conversely, the judgments of Nettle JA and Hargrave J, whilst context-specific, could be read as their Honours raising wider implications regarding the confinement of broad statutory discretions – namely, it would be inconsistent with particular features of the Charter (ie. the distinction between courts and tribunals acting judicially and administratively, and the ability to exempt entities from being public authorities) and the Charter’s overall framework (ie. s 38(1) only applies to public authorities). Arguably, the Charter model is indicative that Parliament could not have intended that s 32(1) confine broad statutory discretions. This is the second position outlined previously in these submissions.

(2) Post-*Momcilovic* litigation

Most recently, in *Nigro & Ors v Secretary to the Department of Justice (Nigro)*,⁵⁴ the Court of Appeal (per Redlich, Osborn and Priest JJA) cast doubt on whether s 32(1) could confine broad statutory discretions. This is the only case to consider the issue following the High Court’s decision in *Momcilovic*.⁵⁵ As with *RJE*, it involved post-custodial supervision and detention of convicted serious sex offenders.⁵⁶

In *Nigro*, the Commission submitted that s 32(1) operated to confine broad statutory discretions. It relied upon *Slaight* and Bell J’s findings in *Kracke* and *Lifestyle*⁵⁷ that s 32(1) ‘imposes a particular interpretation on provisions which confer open-ended discretions’.⁵⁸ Further in support, the Commission relied on High Court authorities whereby the scope of discretionary powers were confined by the Australian Constitution as a matter of interpretation,⁵⁹ including *Wotton v Queensland*.⁶⁰ The Secretary to the Department of Justice resisted those submissions. It argued that to imply a limitation on the exercise of a judicial discretion is inconsistent with the

⁵³ Ibid [42].

⁵⁴ [2013] VSCA 213.

⁵⁵ But see also *PJB v Melbourne Health & Anor (Patrick's case)* [2011] VSC 327 [235]-[237], where Bell J maintained the view that s 32(1) confined broad statutory discretions in light of the Court of Appeal’s decision in *R v Momcilovic*. *PJB* was decided prior to the High Court’s decision in *Momcilovic v The Queen*.

⁵⁶ The applicable legislation was the *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic), having repealed and replaced the *Serious Sex Offenders Monitoring Act 2005*.

⁵⁷ [2013] VSCA 213, [181], [184].

⁵⁸ *Kracke v Mental Health Review Board* (2009) 29 VAR 1, 54 [208].

⁵⁹ [2013] VSCA 213, [183].

⁶⁰ (2012) 246 CLR 1.

Charter's structure, particularly where s 38 has only imposed a duty on public authorities in the exercise of their discretionary powers. Neither the Supreme Court nor the County Court – which were conferred power under the legislation to make post-custodial orders for sex offenders – were public authorities.⁶¹

Ultimately, the Court of Appeal avoided deciding this issue of general principle. It held that to construe the discretion as subject to an implied limitation, even if that were possible under the Charter, would (like *Ali (No 2)*) be contrary to the text and purpose of the legislation.⁶² Nevertheless, what the Court did say in *obiter* on the issue was telling:

The decisions of the House of Lords in *Re S (Care Order) (Implementation of Care Plan)* and *R (Gillan) v Commissioner of Police of the Metropolis* provide some guidance as to the propriety of using the interpretative obligation to govern or restrict the exercise of a statutory discretion. Those decisions suggest that ordinarily there will be no warrant for using the interpretative obligation to impose restrictions upon the statutory power itself, challenges being confined to the exercise of the power. Whether the principles derived from *Wotton* and *Slaight* support the conclusion that a broad judicial discretion may be subject to an implied limitation so that it may not be exercised where to do so would involve an unjustified limitation with rights is open to serious question.⁶³

The Court of Appeal considered that Charter rights might still be taken into account when exercising a discretion,⁶⁴ but seemingly like a non-mandatory consideration.

The Court of Appeal in *Nigro* also noted that in relation to *Kracke and Lifestyle*, Bell J was dealing with public authorities bound by s 38(1) of the Charter.⁶⁵ One way of interpreting *Nigro* is that while s 32(1) cannot confine judicial discretions, it might still confine administrative discretions. However, one of the authorities cited by the Court of Appeal, *R (Gillan) v Commissioner of Police of the Metropolis*⁶⁶ (*Gillan*), related to a statutory power conferred on senior police to authorise, and the Secretary of State to confirm, designated zones for random stops and searches as an anti-terrorism measure. It involved *administrative* discretions. Moreover, the Court of Appeal noted Nettle JA's observations in *RJE* (set out earlier above), saying that his Honour had 'responded to a similar submission advanced by the Commission, noting the difficulty in applying *Slaight*'.⁶⁷ Those observations of Nettle JA related to the Adult Parole Board, which is not a judicial body. Therefore, the *obiter* remarks of the Court of Appeal should not be read as limited to judicial discretions (ie. s 32(1) is unlikely to confine both judicial and administrative discretions).

⁶¹ [2013] VSCA 213, [180], [182].

⁶² *Ibid* [10], [188]-[204].

⁶³ *Ibid* [185] (footnotes omitted).

⁶⁴ *Ibid* [199]; see also *DPP v Ali (No 2)* [2010] VSC 503, [45].

⁶⁵ This was similar to the observation outlined earlier in *DPP v Ali (No 2)*. Justice Hargrave distinguished *Kracke and Lifestyle Communities* on the basis that those cases decided by Bell J related to public authorities bound by s 38(1), whereas the court in that instance was not bound: [2010] VSC 503, [44]. In any event, while it is true that both those cases involved bodies found to be public authorities – the Mental Health Review Board and the Victorian Civil and Administrative Tribunal, it is nonetheless clear on the face of those decisions that Bell J's findings were intended to be of general application.

⁶⁶ [2006] 2 AC 307.

⁶⁷ [2013] VSCA 213, [186].

F FURTHER ANALYSIS OF OVERSEAS JURISPRUDENCE

(1) Canada

Jeremy Gans has argued that s 32(1) ought not confine broad statutory discretions.⁶⁸ He considers there to be a qualifying remark in the reasoning in *Slaight* (which was not noted by the Court of Appeal in either *RJE* or *Nigro*). That remark is italicised and set out below in the context in which it appears:⁶⁹

*The fact that the Charter applies to the order made by the adjudicator in the case at bar is not, in my opinion, open to question. The adjudicator is a statutory creature: he is appointed pursuant to a legislative provision and derives all his powers from the statute. As the Constitution is the supreme law of Canada and any law that is inconsistent with its provisions is, to the extent of the inconsistency, of no force or effect, it is impossible to interpret legislation conferring discretion as conferring a power to infringe the Charter, unless, of course, that power is expressly conferred or necessarily implied. Such an interpretation would require us to declare the legislation to be of no force or effect, unless it could be justified under s. 1. Although this Court must not add anything to legislation or delete anything from it in order to make it consistent with the Charter, there is no doubt in my mind that it should also not interpret legislation that is open to more than one interpretation so as to make it inconsistent with the Charter and hence of no force or effect. Legislation conferring an imprecise discretion must therefore be interpreted as not allowing the Charter rights to be infringed.*⁷⁰

The Supreme Court of Canada went on to say that where a person ‘exercising delegated powers does not have the power to make an order that would result in an infringement of the Charter’, then ‘he exceeds his jurisdiction if he does so’.⁷¹ Thus, Gans argues there are pertinent differences between the Canadian Charter and the Charter in Victoria. The Canadian Charter is constitutionally entrenched – not only is legislation which cannot be interpreted compatibly with it invalid,⁷² but ‘any government conduct that breaches it is automatically afforded a remedy’.⁷³ The Canadian Charter is both supreme and self-executing. Gans argues that the remarks in *Slaight* are premised on these features of the Canadian Charter. Since the Charter in Victoria is not a constitutional bill of rights, Gans argues that the reasoning in *Slaight* does not apply. Moreover, s 38(1) deals specifically with public authority obligations and, according to

⁶⁸ Gans, ‘The Government’s Charter Dodge’ on Jeremy Gans, *Charterblog: Analysis of Victoria’s Charter of Human Rights* (30 December 2008) <<https://charterblog.wordpress.com/2008/12/30/the-governments-charter-dodge/>>.

⁶⁹ That case involved an adjudicator appointed under statute to handle an employee’s complaint of unjust dismissal.

⁷⁰ [1989] 1 SCR 1038, 1077-8 per Lamer J (Gans’ emphasis)

⁷¹ *Ibid* 1078.

⁷² Section 52(1) of the *Constitution Act 1982* (CA) provides that the Constitution of Canada (of which the Canadian Charter is a part) is ‘the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect’.

⁷³ Gans, ‘The Government’s Charter Dodge’ on Jeremy Gans, *Charterblog: Analysis of Victoria’s Charter of Human Rights* (30 December 2008) <<https://charterblog.wordpress.com/2008/12/30/the-governments-charter-dodge/>>.

Gans, is ‘hedged by a narrow scope,⁷⁴ broad defences⁷⁵ and limited remedies’⁷⁶ – whereas there is no equivalent to s 38(1) under the Canadian Charter.

However, there are persuasive counter-arguments to this. Firstly, the interpretive obligation under s 32(1) is independent of the public authority obligations imposed by s 38(1). The operation of these two Charter mechanisms is not mutually exclusive. It is not the case that where s 38(1) applies, s 32(1) cannot apply. Secondly, the predominant difference between the Canadian Charter and the Charter in Victoria is one of remedy. Where legislation cannot be interpreted compatibly with human rights pursuant to the Canadian Charter – given its constitutional status – that legislation is invalidated. Under the Charter in Victoria, primary legislation which cannot be interpreted compatibly with human rights is not invalidated. Rather, a declaration of inconsistent interpretation may be issued by the Supreme Court.⁷⁷ This is a matter of remedial outcome rather than interpretation, and so the Victorian Charter’s non-constitutional status has arguably no bearing on whether s 32(1) confines broad statutory discretions (see further below the approach in New Zealand and United Kingdom, where they have statutory bills of rights).

Another argument Gans makes is that while it ‘might seem like’ the adoption of the *Slaight* approach has a significant pro-human-rights element’, this would actually be to the detriment of the Charter. He goes on to reason that s 32(1) ought not be ‘a magic cure-all for overly broad legislation’. Gans says that ‘there would be no incentive for drafters to draft legislation appropriately narrowly nor for parliament to insist on appropriate narrowness’.

Indeed, the nature of some Charter rights arguably suggest that overly broad statutory provisions ought not be remedied by interpretation. For example, the right to privacy in s 13(a) provides that a person has the right ‘not to have his or her privacy, family, home or correspondence *unlawfully* or *arbitrarily* interfered with’. The right to property in s 20 states that a person ‘must not be deprived of his or her property *other than in accordance with law*’. ‘Unlawful’ means that interferences with privacy must be authorised by law that is sufficiently precise and appropriately circumscribed. Similarly, ‘in accordance with law’ requires that the law be confined and structured rather than unclear, and precisely formulated. As to ‘arbitrary’, international human rights law requires the law to indicate the scope of any discretion and the manner of its exercise with sufficient clarity.⁷⁸ Broad statutory discretions may not satisfy these requirements, and it would seem contrary to the nature of those Charter rights to render such discretions compatible by way of s 32(1) (and averting the issuing of a declaration of inconsistent interpretation).

⁷⁴ Presumably a reference to s 38(1) only applying to public authorities.

⁷⁵ Presumably a reference to s 38(2) of the Charter.

⁷⁶ Presumably a reference to s 39(1) of the Charter.

⁷⁷ Section 36 of the Charter.

⁷⁸ Although the meaning of ‘arbitrary’ under s 13(a) of the Charter has been the subject of conflicting case law: see *WBM v Chief Commissioner of Police (Vic)* (2012) 230 A Crim R 322, 345-9 [98]-[114].

(2) New Zealand and United Kingdom

(i) *The position in New Zealand and United Kingdom*

The *New Zealand Bill of Rights Act 1990* (NZ) (NZ BORA) and the UK HRA are both based on a ‘dialogue’ model which retains parliamentary sovereignty. Like the Charter, primary legislation which cannot be interpreted compatibly with human rights will not result in invalidity.

In New Zealand, its statutory bill of rights confines broad statutory discretions as a matter of interpretation. As commentators Paul Rishworth et al have said of the equivalent to s 32(1) of the Charter, s 6 of the NZ BORA⁷⁹ ‘operates to circumscribe the range of possible decisions. Importantly, it is not merely a “consideration”. It sets the legal boundaries of the power’.⁸⁰ Andrew Butler and Petra Butler have also said that the confinement of a broad statutory discretion is a result that ‘*could* have been legitimately reached by a Court’ pre-NZ BORA ‘upon the application of conventional common law principles of statutory interpretation’. However, what s 6 of the BORA has done ‘is to convert *could* to *should*’.⁸¹ The confinement of broad statutory discretions by s 6 is borne out in the jurisprudence.⁸²

Turning to the United Kingdom, the Charter most closely resembles the UK HRA framework. Section 32(1) is arguably based⁸³ on s 3(1) of the UK HRA⁸⁴ and additionally, s 38(1) is modelled⁸⁵ on s 6 of the UK HRA.⁸⁶ In commentary on the UK HRA, Sir Jack Beatson et al outline their view that s 3(1) confines broad statutory discretions. They say that there is ‘considerable overlap’ between the effect of ss 3 and 6 of the UK HRA:

⁷⁹ Section 6 states: ‘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’.

⁸⁰ Paul Rishworth et al, *The New Zealand Bill of Rights* (Oxford University Press, 2003) 159-160 (footnote omitted).

⁸¹ Butler and Butler, *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis NZ Limited, 2005) 186 [7.13.9].

⁸² See, for example: *R v Laugalis* (1993) HRNZ 466; *Police v Beggs* [1999] 3 NZLR 615; and *Drew v Attorney-General* [2002] 1 NZLR 58. These authorities are discussed in Butler and Butler, *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis NZ Limited, 2005) 184-6 [7.13]; Rishworth et al, *The New Zealand Bill of Rights* (Oxford University Press, 2003) 158-160; and Philip A Joseph and Thomas Joseph, ‘Human Rights in the New Zealand Courts’ (2011) 18(2) *Australian Journal of Administrative Law* 80, 95-6. See further *Zaoui v Attorney-General (No 2)* (2006) 1 NZLR 289, 321-2 [90]-[91], 322 [93], discussed in Claudia Geiringer, ‘International Law through the lens of Zaoui: Where is New Zealand at?’ (2006) 17 *Public Law Review* 300, 308-9, 315-8; Philip A Joseph, ‘Exploratory Questions in Administrative Law’ 25(1) *New Zealand Universities Law Review* 74, 99-100; and Joseph and Joseph, ‘Human Rights in the New Zealand Courts’ (2011) 18(2) *Australian Journal of Administrative Law* 80, 98-9. See also *Schubert v Wanganui District Council* [2011] NZAR 233, 250 [82], 251 [87], 252 [89], 252-3 [93]-[94].

⁸³ Human Rights Consultation Committee, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005) 82-3. I say ‘arguably’ because the United Kingdom approach to interpretation pursuant to s 3(1) was rejected by both the Court of Appeal and the High Court in the *Momcilovic* litigation.

⁸⁴ Section 3(1) states: ‘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’.

⁸⁵ Explanatory Memorandum, *Charter of Human Rights and Responsibilities Act 2006* (Vic) 2848.

⁸⁶ Section 6(1) states: ‘It is unlawful for a public authority to act in a way which is incompatible with a Convention right’.

s.3 leads to Convention rights being read into enabling statutory provisions as implied limitations. In this way *both s.3 and s.6 apply the Convention directly* to the decisions of public officials made under statutory authority. Decisions that are incompatible with Convention rights will [...] be unlawful and ultra vires. [...] It follows that where a decision of a public official is taken under statutory powers it may not be necessary to rely on s.6.⁸⁷

However, the United Kingdom jurisprudence is equivocal in this respect. In *R (Uttley) v Secretary of State for the Home Department*,⁸⁸ the Court considered the human rights compatibility of new legislation providing for more restrictive licence conditions on prisoners upon their early release. It had been applied to a person who committed offences prior to the legislation being enacted, but convicted after the new legislation came into force. Lord Phillips said that – with respect to compatibility with the right against retrospective increases in penalty – the important question was whether it was ‘open’ to the trial judge to reduce the sentence to reflect that the release conditions were more onerous under the new regime. If the new legislation ‘left him free to so’, it cannot be said that the new legislation is incompatible.⁸⁹

In *Nigro*, the Court of Appeal cited *Re S (Care Order) (Implementation of Care Plan)*⁹⁰ (*Re S*) and *Gillan* as suggestive that ‘ordinarily there will be no warrant for using the interpretative obligation to impose restrictions upon the statutory power itself’. *Re S* related to child protection proceedings. The relevant legislation entrusted to local authorities responsibility for looking after children who were the subject of care orders made by the courts. In the leading judgment, Lord Nicholls said:

the possibility that something may go wrong with the local authority’s discharge of its parental responsibilities, or its decision making processes, and that this would be a violation of [human rights] so far as the child or parent is concerned, does not mean that the legislation itself is incompatible, or inconsistent [...]⁹¹

As previously mentioned, *Gillan* concerned a challenge to the authorisation and confirmation of designated zones for random stops and searches. The powers to authorise and confirm were conferred by statute on senior police and the Secretary of State respectively. Lord Bingham, who gave the leading judgment, said it is clear that the authorisation and confirmation pursuant to statutory powers ‘cannot, of themselves, infringe’ the human rights of anyone. Rather, ‘the threshold question is whether, if a person is stopped and searched’ they are deprived of liberty.⁹²

Nevertheless, the House of Lords in both *Re S* and *Gillan* relied heavily on express safeguards and limitations contained in the relevant statutes in finding that they were

⁸⁷ Beatson et al, *Human Rights: Judicial Protection in the United Kingdom* (Sweet & Maxwell, 2008) 537 [6.05] (emphasis added). See also Mark Elliott, ‘Fundamental Rights as Interpretative Constructs: The Constitutional Logic of the Human Rights Act 1998’ in Christopher Forsyth (ed) *Judicial Review and the Constitution* (Hart Publishing, 2000) 279-80: ‘Reading sections 3(1) and 6(1) together, it becomes clear beyond any doubt that [...] the interpretation of statutory provisions giving rise to discretionary powers will henceforth reveal the existence of implied limits relating to [human rights]’.

⁸⁸ [2004] 1 WLR 2278.

⁸⁹ Ibid 2283 [17].

⁹⁰ [2002] 2 AC 291.

⁹¹ Ibid 317 [56].

⁹² [2006] 2 AC 307, 341-2 [22].

not incompatible with human rights.⁹³ In *Re S*, Lord Nicholls noted that an infringement of human rights was not ‘compelled, or even countenanced’ by the legislation. Rather, any infringement ‘flows from the local authority’s failure to comply with its obligations under the Act’.⁹⁴ Lord Bingham in *Gillan* said that the legislation ‘informs the public that these powers are, if duly authorised and confirmed, available. It defines and limits the powers with considerable precision’.⁹⁵ This suggests that the discretions conferred by those statutes were not, in any event, so broad as to require confinement in order to be compatible with human rights. It is arguable that *Gillan* and *Re S* do not rule out the proposition that s 3(1) of the UK HRA can operate to confine broad statutory discretions.

(ii) Comparisons with Victoria

Although the New Zealand jurisprudence, and at least some commentary in the United Kingdom, is supportive of s 32(1) operating to confine broad statutory discretions, there are some distinctions which might arguably be drawn. Both the NZ BORA and UK HRA bind courts and tribunals in their conduct regardless of whether they are acting in an administrative or judicial capacity.⁹⁶ Neither contains a power to make exemptions from public authority obligations. The NZ BORA, like the Canadian Charter, has no equivalent to s 38(1). It is these features of the Charter which give rise to arguments that s 32(1) cannot be taken to confine broad statutory discretions, on the basis that it would render those qualifications meaningless.

However, the various differences in the Charter may be explained. Firstly, as a State bill of rights operating within a federal framework, the distinction drawn in the definition of ‘public authority’ between courts and tribunals acting in an administrative capacity and in a judicial capacity, is for constitutional reasons. The extrinsic materials indicate concern that the Charter might have been found partly unconstitutional should the Charter apply to courts acting judicially, such that they are required to develop the common law (as courts overseas have done) so that it is consistent with human rights. This concern reportedly arose from the notion that there is only one unified common law of Australia, which is ‘not susceptible to direct influence by legislation in any one State’.⁹⁷

Secondly, the apparent purpose of the ability to declare ‘an entity [...] by the regulation not to be a public authority for the purposes of the Charter’ was for additional clarity

⁹³ I note that the European Court of Human Rights disagreed with the House of Lords as to the latter’s findings on compatibility with human rights: *Gillan and Quinton v United Kingdom* (2010) 50 EHRR 45.

⁹⁴ [2002] 2 AC 291, 317 [57], read with 317 [56].

⁹⁵ [2006] 2 AC 307, 346 [35]; see also 344-5 [29]-[30].

⁹⁶ The NZ BORA applies to ‘acts done [...] by the legislative, executive, or judicial branches of the Government of New Zealand; or 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’: s 3. The UK HRA applies to ‘a court or tribunal, and any person certain of whose functions are functions of a public nature [...]’: s 6(3)

⁹⁷ Human Rights Consultation Committee, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005) 59, citing the submission of the Australian Human Rights Centre, University of New South Wales.

and certainty to be provided to the scope of the public authority definition.⁹⁸ It should be noted that the definition of ‘public authority’ encompasses not only what may be termed as ‘core’ public authorities, but also ‘functional’ public authorities. That is, where entities are performing functions of a public nature on behalf of the State.⁹⁹ It may be that the exemption power was intended to allow certain entities to be declared beyond doubt that they were *not* public authorities, particularly where there was uncertainty whether the entity might be a ‘functional’ public authority and thus bound by the Charter.

Thirdly, while the Charter can be contrasted with New Zealand (and Canada) – where it is inferred from the text and structure of the NZ BORA that those bound by the NZ BORA must not act incompatibly with human rights – it appears that the inclusion of specific obligations under s 38(1) was to avoid doubt as to precisely what obligations public authorities had under the Charter.¹⁰⁰ It arguably has no bearing on the present issue.

It can be seen from the above that none of these differences relate directly to the issue of s 32(1) and statutory discretions. The above features were not incorporated into the Charter for the purpose of precluding s 32(1) from operating to confine broad statutory discretions. In fact, the extrinsic materials do not indicate *any* contemplation by Parliament of whether or not s 32(1) confines broad statutory discretions.¹⁰¹ Having regard to their intended purpose, it could be argued that the above features of the Charter should not be relied upon to reject the notion that s 32(1) confines discretions.

G LIMITATIONS ON SECTION 32(1) CONFINING STATUTORY DISCRETIONS

If s 32(1) does confine broad statutory discretions, it is nevertheless clear that there are limits. Section 32(1) will not confine discretions where the effect would be to completely alter the overall statutory scheme or to go against the purpose of its provisions.¹⁰² This accords with the approach overseas.¹⁰³ Parliament’s intention remains respected. It is consistent with the broader notion that application of s 32(1) will not always be able to remedy legislation that is incompatible with human rights – hence the power conferred on the Supreme Court to issue a declaration of inconsistent interpretation.

⁹⁸ Explanatory Memorandum, *Charter of Human Rights and Responsibilities Act 2006* (Vic) 2825; Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2006, 1294 (Rob Hulls).

⁹⁹ See s 4(1)(b) and (c); Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2006, 1294 (Rob Hulls).

¹⁰⁰ Human Rights Consultation Committee, *Rights, Responsibilities and Respect: The Report of the Human Rights Consultation Committee* (2005) 63.

¹⁰¹ Cf Explanatory Statement, Human Rights Bill 2003 (ACT) 5.

¹⁰² *Nigro & Ors v Secretary to the Department of Justice* [2013] VSCA 213, [187], [188]ff.

¹⁰³ See Beatson et al, *Human Rights: Judicial Protection in the United Kingdom* (Sweet & Maxwell, 2008) 506-7 [5-117]; Butler and Butler, *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis NZ Limited, 2005) 184 [7.13.1], 186 [7.13.10].

H SECTION 6(2)(b) OF THE CHARTER

Further guidance on the issue may be drawn from s 6(2)(b) of the Charter. Section 6(2)(b) states that the Charter applies to ‘courts and tribunals, to the extent that they have functions under Part 2 and Division 3 of Part 3’. Section 32(1) is contained within Division 3 of Part 3, and it is beyond doubt that s 32(1) applies to courts and tribunals. The reference to functions under Part 2 is however, less clear. Part 2 contains the human rights protected by the Charter. Section 6(2)(b) has in this respect been criticised for generating uncertainty.¹⁰⁴ How is s 6(2)(b) to be reconciled with s 38(1), which only applies to courts and tribunals when acting in an administrative capacity?

Initial academic commentary suggested several possible interpretations of s 6(2)(b). One view, known as an ‘intermediate approach’, is that courts and tribunals may only directly enforce those Charter rights which ‘relate to’ court and tribunal proceedings (such as the right to a fair hearing in s 24(1) and the rights in criminal proceedings in s 25 of the Charter).¹⁰⁵

The jurisprudence to date supports this intermediate approach. In *Victorian Toll & Anor v Taha & Anor; State of Victoria v Brookes & Anor (Taha)*,¹⁰⁶ Tate JA applied the intermediate approach to s 6(2)(b).¹⁰⁷ Her Honour found that a magistrate had acted incompatibly with the Charter by failing to give effect to the right to a fair hearing in s 24(1).¹⁰⁸ Furthermore, in a leave to appeal decision by the Court of Appeal, Neave JA and Williams AJA stated that it appeared s 6(2)(b) ‘implicitly reads down’ the definition of ‘public authority’ in respect of courts and tribunals.¹⁰⁹ In other words, it curtails what might be considered a strict distinction between courts or tribunals acting in a judicial and administrative capacity.

These cases demonstrate that the argument that Charter rights only impose obligations on public authorities may not be as clear cut a proposition. Despite s 38(1) and its confined application to public authorities, certain Charter rights may still apply to courts and tribunals pursuant to s 6(2)(b),¹¹⁰ regardless of whether they are acting judicially or administratively. They have been applied to the Children’s Court¹¹¹ and the Magistrates’ Court.¹¹² This goes some way to countering the argument that the operation of s 32(1) to confine broad statutory discretions would impermissibly convert non-public authorities into public authorities.

¹⁰⁴ See, for example, Timothy Lau, ‘Section 6(2)(b) of the Victorian Charter: A Problematic Provision’ (2012) 23 Public Law Review 181.

¹⁰⁵ Carolyn Evans and Simon Evans, *Australian Bills of Rights: The Law of the Victorian Charter and ACT Human Rights Act* (LexisNexis Butterworths, 2008) 12-3 [1.42]-[1.43].

¹⁰⁶ [2013] VSCA 37.

¹⁰⁷ Albeit without determining its correctness.

¹⁰⁸ [2013] VSCA 37, [248], [252].

¹⁰⁹ *De Simone v Bevnol Constructions & Developments Pty Ltd* (2009) 25 VR 237, 247 [52].

¹¹⁰ See *Kracke v Mental Health Review Board* (2009) 29 VAR 1, 63-4 [253]-[254]; *Lifestyle Communities Ltd (No 3)* [2009] VCAT 1869, [142]; *Secretary to the Department of Human Services v Sanding* (2011) 36 VR 221, 258-9 [164]-[167]; *Victorian Toll & Anor v Taha & Anor; State of Victoria v Brookes & Anor* [2013] VSCA 37, [247]-[249]; *De Simone v Bevnol Constructions & Developments Pty Ltd* (2009) 25 VR 237, 247 [52]; see also *Momcilovic v The Queen* (2011) 245 CLR 1, 204 [525] per Crennan and Kiefel JJ.

¹¹¹ *Secretary to the Department of Human Services v Sanding* (2011) 36 VR 221, 266 [208], 267 [214].

¹¹² *Victorian Toll & Anor v Taha & Anor; State of Victoria v Brookes & Anor* [2013] VSCA 37, [252].

I THE CHARTER IS BENEFICIAL AND REMEDIAL LEGISLATION

A final argument in support of s 32(1) confining broad statutory discretions is that the Charter is beneficial and remedial legislation. There is a principle of statutory interpretation that such legislation should be given a liberal construction.¹¹³ The Charter clearly has beneficial and remedial objects. As such, the Charter 'is to be given a "fair, large and liberal" interpretation rather than one which is "literal or technical".'¹¹⁴ This includes s 32(1). That provision should be construed 'so as to give the fullest relief which the fair meaning of its language will allow'.¹¹⁵ Thus, it could be said that s 32(1) should be construed to operate widely to confine broad statutory discretions. This gives s 32(1) more work to do and provides for the most positive human rights outcomes, as discussed earlier in these submissions.

J CONCLUSION

There are valid arguments both for and against the proposition that s 32(1) of the Charter operates to confine broad statutory discretions. As part of clarifying the role of human rights in statutory construction under the 2015 Review, it should be made clear how s 32(1) of the Charter operates in this context (whether it be by amendment of the words of the provision, or the inclusion of a note). Having the issue clarified will save time and costs in litigation. It will provide certainty to those persons and bodies who have been conferred a discretion by statute, as well as to persons whose human rights may be affected by the exercise of the discretion. It will also provide the courts and tribunals with clarity in interpreting legislation compatibly with human rights.

¹¹³ *IW v City of Perth* (1997) 191 CLR 1, 12 per Brennan CJ and McHugh J; *AB v Western Australia* [2011] HCA 42, [24] per French CJ, Gummow, Hayne, Kiefel and Bell JJ.

¹¹⁴ *IW v City of Perth* (1997) 191 CLR 1, 12 per Brennan CJ and McHugh J, citing *Coburn v Human Rights Commission* [1994] 3 NZLR 323, 333.

¹¹⁵ *Bull v Attorney-General for NSW* (1913) 17 CLR 370, 384 per Isaacs J, cited in *Waugh v Kippen* (1986) 160 CLR 156, 164 per Gibbs CJ, Mason, Wilson and Dawson JJ.