

SECTION 32(1) OF THE CHARTER: CONFINING STATUTORY DISCRETIONS COMPATIBLY WITH CHARTER RIGHTS?

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ABSTRACT

Parliament frequently enacts legislation which confers broad discretionary powers on decision-makers. Such statutory discretions are not at large — they are confined by principles of statutory interpretation. In Victoria, the Charter of Human Rights and Responsibilities Act 2006 (Vic) ('Charter') has a role to play in interpreting statutes. Section 32(1) of the Charter provides that so far as it is possible consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights. A question therefore arises as to whether discretions conferred by Victorian statutory provisions must be interpreted so that they may only be exercised compatibly with the human rights protected by the Charter. This article explores the issue. The answer is not as straightforward as it might first seem.

I INTRODUCTION

In the present 'age of statutes', Parliament frequently enacts legislation which confers discretionary powers on administrative and judicial decision-makers. These are commonly known as statutory discretions. Francis Bennion has described statutory discretions as follows:

Discretion is applied where the empowering enactment leaves it to the chosen functionary to make a determination at any point within a given range ... For an enactment to bestow a discretion on a person (D) involves a built-in looseness of outcome. In reaching a decision, D is not required to assume there is only one right answer. On the contrary D is given a choice dependent to a greater or lesser extent on personal inclination and preference.¹

Where the statutory discretion conferred on a decision-maker is broad, depending on the nature of the decision, this will often impact on human rights. After all,

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1 F A R Bennion, *Understanding Common Law Legislation: Drafting and Interpretation* (Oxford University Press, 2001) 131–2.

human rights are very often about protection from the exercise of arbitrary power by the state. Where the exercise of a power is left to ‘personal inclination and preference’, there is a possibility for that power to be exercised arbitrarily and in a way that might breach human rights.

In Victoria, we have the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the ‘*Charter*’) — a statutory bill of rights enacted in 2006. The *Charter*’s main purpose is to ‘protect and promote human rights’.² One of the primary mechanisms by which it does this is s 32(1) of the *Charter*, which is directed at the interpretation of legislation to give effect to human rights recognised under the *Charter*. That sub-section states that ‘[s]o 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’. This article demonstrates that the *Charter* does not presently make clear whether s 32(1) confines broad statutory discretions, so that they may only be exercised compatibly with *Charter* rights. The State of Victoria has also taken different positions on this issue with changes in government.³

The substantive analysis in this article commences with Part II, being an overview of the mechanisms under the *Charter* relevant to this issue — predominantly s 32(1) (together with s 36), but also s 38(1) (together with ss 4 and 39(1)) and s 6(2)(b). Part III sets out the rationale and implications for the competing positions — s 32(1) does confine statutory discretions, does not confine statutory discretions, or only partially confines statutory discretions. Part IV briefly discusses the position with respect to discretions under statutory interpretation generally. Part V examines the position with respect to the ‘principle of legality’ — a common law interpretive principle, with which s 32(1) has been equated. The article then turns to consider the *Charter* jurisprudence to date under Part VI, and compares the situation with certain bills of rights overseas under Part VII, namely, Canada, New Zealand, and the United Kingdom. In doing so, the features and structure of the *Charter* are analysed, and this continues under Part VIII, which is specifically on s 6(2)(b) of the *Charter*. Part IX considers whether recommendations made under the recent eight-year review of the *Charter* will have a bearing on this issue. Finally, in Part X, the article concludes that the weights of the arguments are finely balanced, and the answer is unclear. It may not simply be a matter of equating s 32(1) with the principle of legality, as recent Australian jurisprudence has done.

2 *Charter* s 1(2).

3 See *RJE v Secretary, Department of Justice* (2008) 21 VR 526, 554–5 [108]–[109]; cf *Nigro v Secretary, Department of Justice* (2013) 41 VR 359, 407 [180], 407–8 [182].

II RELEVANT CHARTER MECHANISMS

A Sections 32(1) and 36

The leading authority on s 32(1) is *Momcilovic v The Queen*.⁴ Here, a 6:1 majority of the High Court of Australia held that s 32(1) does not replicate the extensive effects of the corresponding interpretive mechanism under s 3(1) of the *Human Rights Act 1998* (UK) c 42 ('*UK HRA*').⁵ In subsequent cases, judges of the Victorian Court of Appeal have predominantly 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'.⁶

The principle of legality is a common law interpretive principle. It is a 'unifying concept' in Australia,⁷ said to encompass a broad range of common law principles of statutory interpretation. However, it has most commonly been associated with the presumption that Parliament does not intend to interfere with fundamental common law rights, freedoms, and immunities except by clear and unambiguous language.⁸

The Victorian Court of Appeal's interpretation of *Momcilovic* seems to be based on the judgment of French CJ, who explicitly equated s 32(1) with the principle of legality.⁹ His Honour essentially agreed with the Court of Appeal's finding in the proceeding below.¹⁰ 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.¹¹

4 (2011) 245 CLR 1 ('*Momcilovic*').

5 Section 3(1) of the *UK HRA* 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.' See also *Ghaidan v Godin-Mendoza* [2004] 2 AC 557. The *UK HRA* incorporates the human rights protected by 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) ('*European Convention on Human Rights*') into United Kingdom domestic law.

6 *Momcilovic* (2011) 245 CLR 1, 50 [51]. See Bruce Chen, 'Making Sense of *Momcilovic*: The Court of Appeal, Statutory Interpretation and the *Charter of Human Rights and Responsibilities Act 2006*' [2013] (74) *Australian Institute of Administrative Law Forum* 64.

7 Chief Justice J J Spigelman, 'Principle of Legality and the Clear Statement Principle' (2005) 79 *Australian Law Journal* 769, 774.

8 Bruce Chen, 'The Principle of Legality: Issues of Rationale and Application' (2015) 41 *Monash University Law Review* 329, 330, 342 n 91.

9 *Momcilovic* (2011) 245 CLR 1, 50 [51].

10 *R v Momcilovic* (2010) 25 VR 436.

11 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 *Monash University Law Review* 340; *Victoria Police Toll Enforcement v Taha* [2013] VSCA 37 (4 March 2013) [188]–[190] (Tate JA) (in obiter); 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; Sir Anthony Mason, 'Statutory Interpretive Techniques under the *Charter* — Section 32' (2014) 2 *Judicial College of Victoria Online Journal* 69.

Section 32(1) requires interpretation of statutory provisions compatibly with *Charter* rights so far as it is possible to do so consistently with their purpose. Where such an interpretation is not possible, this does not affect the validity of the provisions.¹² Nevertheless, the executive and Parliament can be notified by the courts through a formal mechanism provided by the *Charter*. Section 36(2) provides that the Victorian Supreme Court or Court of Appeal may make a ‘declaration of inconsistent interpretation’.¹³ This declaration does not affect ‘the validity, operation or enforcement of the statutory provision’.¹⁴

B Sections 38(1), 4 and 39(1)

Another primary mechanism for the protection of human rights under the *Charter* is s 38(1). Section 38(1) 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’. These obligations will apply where a public authority has a discretion.¹⁵ One might reasonably ask: if s 38(1) applies to statutory discretions, then why does it matter whether or not s 32(1) confines those same discretions?

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 will be drawn upon as particularly relevant to the issue. First, public authorities do not include courts and tribunals, except when they are acting in an administrative capacity.¹⁶ Secondly, an entity may be declared by

12 See *Charter* s 32(3)(a).

13 Although somewhat confusing, the reference to an ‘inconsistent’ interpretation is broadly accepted to mean an interpretation that is ‘incompatible’ with human rights. Nothing of import should be drawn from this difference in terminology: see Michael Brett Young, ‘From Commitment to Culture: The 2015 Review of the *Charter of Human Rights and Responsibilities Act 2006*’ (September 2015) 161–2 (*2015 Charter Review Report*); National Human Rights Consultation Committee, Parliament of Australia, *National Human Rights Consultation* (2009) app E, 430 [16]. Cf George Williams, ‘The Victorian *Charter of Human Rights and Responsibilities*: Origins and Scope’ (2006) 30 *Melbourne University Law Review* 880, 902–3. The Victorian Government has accepted that s 36 should be amended to ensure consistency in terminology ([r]ecommendation 32 is supported’): Department of Justice and Regulation (Vic), *Government Response to the 2015 Review of the Charter of Human Rights and Responsibilities Act* <<http://www.justice.vic.gov.au/home/justice+system/laws+and+regulation/human+rights+legislation/government+response+to+the+2015+review+of+the+charter+of+human+rights+and+responsibilities+act>>.

14 *Charter* ss 36(5)(a), 37. As to this facilitating a ‘dialogue’ about human rights between the executive, Parliament and the judiciary, see: Julie Debeljak, ‘Does Australia Need a Bill of Rights?’ in Paula Gerber and Melissa Castan (eds), *Contemporary Perspectives on Human Rights Law in Australia* (Lawbook, 2013) 37, 61–2 n 104, in response to remarks by the High Court in *Momcilovic* criticising the ‘dialogue’ characterisation.

15 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) of the *Charter*.

16 *Charter* s 4(1)(j).

regulations to not be a public authority,¹⁷ effectively exempting them from their obligations under s 38(1).¹⁸

Moreover, 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).¹⁹ 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*. 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*.

C Section 6(2)(b)

Section 6(2)(b) of the *Charter* is also arguably relevant, for reasons which will later become apparent. It 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.²⁰ 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?

III THE COMPETING POSITIONS

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. It is essentially a question of the interaction between ss 32 and 38 — do they overlap or rather, do they operate in distinct spheres?

A Confines Statutory Discretions

The first possibility is that s 32(1) confines broad statutory discretions, such that a decision-maker upon whom the discretion is conferred can only exercise it

17 Ibid s 4(1)(k). The power to make regulations is conferred on the Governor in Council: see at s 46(2), particularly sub-ss (2)(b)–(c).

18 At the time of writing, there were three entities which were so declared — the Adult Parole Board, Youth Residential Board, and Youth Parole Board: *Charter of Human Rights and Responsibilities (Public Authorities) Regulations 2013* (Vic) reg 5.

19 Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 2849.

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

compatibly with *Charter* rights. Section 32(1) applies to ‘all’ statutory provisions, including discretions conferred by statute. This gives s 32(1) more work to do and arguably provides for the most positive human rights outcomes. The confinement of broad statutory discretions pursuant to s 32(1) means that the issue could be dealt with through the lens of interpretation, instead of conduct. There are a number of practical implications arising from this.

First, s 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 discretionary powers conferred on non-public authorities, including courts and tribunals. It has been said that ‘[g]iven 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’.²¹ More generally, discretionary powers conferred by statute have been described as covering ‘the vast majority of occasions when rights are limited in Victoria’.²²

Section 32(1) applies to the interpretive exercise and can be raised in any court or tribunal proceeding where a question of interpretation arises. By contrast, the bringing of claims of breach of s 38(1) is restricted by s 39(1). Section 39 has been the subject of much criticism for lacking clarity in its drafting.²³ While the Court of Appeal has made clear that s 38(1) claims could comfortably be brought in judicial review proceedings,²⁴ the precise boundaries of s 39(1) outside of judicial review are less clear.²⁵ Section 32(1) is not subject to such complexities.

If s 32(1) were to confine a broad statutory discretion, it could give rise to challenge on the basis that it would be ultra vires or a jurisdictional error of law to act incompatibly with human rights.²⁶ That is because s 32(1) would confine the scope of the discretion so that it must be exercised compatibly with *Charter* rights. An exercise of the discretion may be beyond that confined scope and thus exceed authorised power. This would in some ways mitigate — through statutory interpretation — the uncertainty arising from *Bare v Independent Broad-Based Anti-Corruption Commission*²⁷ in respect of the consequences of breach of s 38(1). In that case, Warren CJ in dissent found that breach of s 38(1) did not

21 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, Melbourne, 17 April 2013) 3.

22 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/>>. See also Chief Justice R S French, ‘Administrative Law in Australia: Themes and Values Revisited’ in Matthew Groves (ed), *Modern Administrative Law in Australia: Concepts and Context* (Cambridge University Press, 2014) 24, 38; Jack Beatson et al, *Human Rights: Judicial Protection in the United Kingdom* (Sweet & Maxwell, 2008) 537 [6-05].

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

24 See *Director of Housing v Sudi* (2011) 33 VR 559.

25 See Bruce Chen, ‘When Is “Unlawful” Unlawful?’ (2015) 89(3) *Law Institute Journal* 54.

26 Davidson, above n 21, 3–4; 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.

27 (2015) 326 ALR 198 (*‘Bare’*).

amount to jurisdictional error leading to automatic invalidity.²⁸ However, the majority of *Tate and Santamaria JJA*, whilst casting serious doubt on the notion that breach of s 38(1) constitutes jurisdictional error, did not determine the issue.²⁹ Contrasting approaches have previously been taken by the Supreme Court.³⁰ So while a breach of s 38(1) in the exercise of a statutory discretion might not amount to jurisdictional error in light of *Bare*, such a result might be reached if s 32(1) confines the scope of a statutory discretion.

Finally, the operation of s 32(1) is different in respect of subordinate instruments. Section 32(3)(b) refers specifically to subordinate instruments. It 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*’ (emphasis added). It is not spelt out in the *Charter* exactly how clearly an instrument must be ‘empowered’ to be incompatible. Since statutory provisions in the primary legislation 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 sub-s (3)(b).

The decision of the Full Court of the Federal Court in *Kerrison v Melbourne City Council* is relevant.³¹ The respondent Council had made local laws under the *Local Government Act 1989* (Vic), which prohibited camping in tents in a public place and certain other conduct without a permit, and provided mechanisms for enforcement. The appellant participated in the ‘Occupy Melbourne’ protest, and was served notices to comply under the local laws. An issue before the Full Court was whether the making of the local laws was unlawful under s 38(1) for being incompatible with the *Charter* rights to freedom of expression, peaceful assembly, and freedom of association.

The Full Court found that s 38(1) did not apply to the making of subordinate instruments by public authorities.³² Amongst other things, this was ‘not comprehended by the phrase “to act in a way” that is incompatible with *Charter* rights in s 38(1).³³ Section 38(1) is focused on conduct,³⁴ such as conduct engaged in pursuant to a subordinate instrument, and according to the Full Court did not encompass the *making* of subordinate instruments.³⁵ However, the Full Court

28 Ibid 236–40 [139]–[152].

29 Ibid 303–10 [378]–[397] (Tate JA), 370–4 [617]–[626] (Santamaria JA).

30 See *PJB v Melbourne Health* (2011) 39 VR 373 (*‘Patrick’s Case’*); *Re Director of Housing and Sudi* (2010) 33 VAR 139 (this decision was overturned, but the issue left open on appeal); *Burgess v Director of Housing* [2014] VSC 648 (17 December 2014); cf *Bare v Small* [2013] VSC 129 (25 March 2013) (which led to the appeal in *Bare* (2015) 326 ALR 198).

31 (2014) 228 FCR 87 (*‘Kerrison’*).

32 Ibid 129–30 [182], 133 [198]–[199].

33 Ibid 129 [182], 130–1 [187].

34 Ibid 130 [187].

35 Ibid 131 [189].

‘decision does not fully explore the impacts of s 32 on subordinate instruments’.³⁶ Even if the obligations under s 38(1) do not apply to the making of subordinate instruments, s 32(1) (having regard to s 32(3)(b)) should confine broad statutory discretions in the primary legislation which empower those instruments to be made. In such circumstances, the empowering provision would be interpreted as not allowing for the making of a subordinate instrument that is incompatible with *Charter* rights.

B Does Not Confine Statutory Discretions

The question which is the subject of this article 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 reasons outlined below.

Section 38(1) of the *Charter* deals specifically with the obligations of public authorities. For the purpose of statutory discretions, it is the *exercise* of the discretion under s 38(1), rather than its interpretation under s 32(1), which is of relevance under the *Charter*.³⁷ If s 32(1) were to confine broad statutory discretions, then s 38(1) ‘has little to do in contexts governed by a statute’.³⁸ In addition, as noted above, s 39 of the *Charter* confines the circumstances in which claims of s 38(1) breaches may be brought. It might be said that to utilise s 32(1) to regulate public authority conduct through statutory interpretation, instead of s 38(1), impermissibly skirts around the restrictions imposed by s 39. And if s 38(1) might not produce jurisdictional error, why should s 32(1) do so, in respect of the same subject matter?

As outlined above, there are exclusions to the definition of ‘public authority’ for the purposes of s 38(1). 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.

What follows is a clear example of this point. An entity established by statute that has functions of a public nature *is* a public authority under the *Charter* (s 4(1)(b)).

36 Gudrun Dewey, *Appeal to Occupy Melbourne Decision Dismissed* (3 October 2014) Human Rights Law Centre <<https://www.hrlc.org.au/human-rights-case-summaries/appeal-to-occupy-melbourne-decision-dismissed>>.

37 In *Bare* (2015) 326 ALR 198, the Court of Appeal described s 38(1) as imposing ‘an additional, or supplementary obligation, upon public authorities in the exercise of their statutory powers’: at 287 [323] (Tate JA), 287 [322], 258 [227] (Warren CJ), 347 [547] (Santamaria JA).

38 Gans, ‘The Government’s *Charter* Dodge’, above n 22.

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.

C Confines Certain Statutory Discretions

A third possibility is that s 32(1) operates to confine certain broad statutory discretions. It may be that s 32(1) confines 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*. This 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. Sections 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.

Another view is that s 32(1) confines only subordinate instruments. On the Full Court of the Federal Court's view in *Kerrison*, s 38(1) does not apply to the making of subordinate instruments. If that is the case, the same structural tensions between ss 32(1) and 38(1) outlined above arguably do not exist. Section 32(1) (read with s 32(3)(b)) confines broad statutory discretions empowering the making of subordinate instruments and applies to the interpretation of the instruments themselves, whereas s 38(1) deals with the conduct of public authorities pursuant to those instruments.

IV 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.³⁹ 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’.⁴⁰ According to Chief Justice French (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 is always a threshold issue, even if not contested.⁴¹

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 relevant considerations, and partly an application of the strong rule of law ideal that no power is unfettered.⁴²

In modern statutory interpretation, it is now widely accepted that, as the High Court said in *Wotton v Queensland*, ‘the notion of “unbridled discretion” has no place in the Australian universe of discourse’.⁴³ This makes for a powerful case that s 32(1) does confine statutory discretions. Statutory discretions are subject to limits, identified by statutory interpretation. Section 32(1) forms part of that interpretive exercise. The confinement of statutory discretions by way of interpretation is supported by the courts’ approach in respect of the principle of legality, with which s 32(1) has been equated post-*Momcilovic*.

39 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, made an unreasonable decision, or breached the principles of natural justice.

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

41 French, ‘Administrative Law in Australia’, above n 22, 38.

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

43 (2012) 246 CLR 1, 10 [10] (citations omitted). See also: at 9 [9] (French CJ, Gummow, Hayne, Crennan and Bell JJ). See further *Minister for Immigration v Li* (2013) 249 CLR 332, 348–9 [23]–[24] (French CJ), 362 [63], 363–4 [67] (Hayne, Kiefel and Bell JJ), 370–1 [90] (Gageler J); *North Australian Aboriginal Justice v Northern Territory* (2015) 256 CLR 569, 591 [34] (French CJ, Kiefel and Bell JJ).

V THE PRINCIPLE OF LEGALITY AND STATUTORY DISCRETIONS

A Making Subordinate Instruments

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*.⁴⁴ 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’.⁴⁵ The legislation conferred a regulation-making power broad in subject matter. The Full Court of the Federal Court (French, Branson and Stone JJ) recognised that on its terms, the empowering provision could potentially encompass ‘any conceivable conduct’, including ‘speech and communication’.⁴⁶ 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’.⁴⁷ 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.⁴⁸ It partly 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*,⁴⁹ which concerned local council by-laws prohibiting preaching and distributing printed matter on a road without permission. Heydon J said that:

The principle of legality can apply both to parliamentary legislation creating a power to make delegated legislation, and to the delegated legislation itself. *The consequence of applying the principle of legality to a power in parliamentary legislation to make delegated legislation will tend to be a relatively narrow construction of that power.* And the consequence of applying the principle of legality to delegated legislation made under that power will tend to be a relatively narrow construction of that delegated legislation.⁵⁰

44 (2008) 168 FCR 576.

45 *World Youth Day Act 2006* (NSW) s 58(2).

46 *Evans v New South Wales* (2008) 168 FCR 576, 592 [68].

47 *World Youth Day Regulations 2007* (NSW) reg 7(1)(b).

48 *Evans v New South Wales* (2008) 168 FCR 576, 579 [7], 592–6 [68]–[77], 597 [83].

49 (2013) 249 CLR 1. For a more detailed discussion of the various approaches taken by the judges of the High Court in that case, see Dan Meagher and Matthew Groves, ‘The Common Law Principle of Legality and Secondary Legislation’ (2016) 39 *University of New South Wales Law Journal* 450, 472–6.

50 *A-G (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1, 66–7 [150] (Heydon J) (dissenting) (emphasis added).

French CJ stated that the construction of a broad statutory provision which empowered a council to make by-laws ‘generally for the good rule and government of the area, and for the convenience, comfort and safety of its inhabitants’⁵¹ was ‘informed by the principle of legality in its application to freedom of speech’.⁵² The principle of legality ‘may affect the scope of discretionary powers which involve the imposition of restrictions’ upon that freedom.⁵³

Recently, Dan Meagher and Matthew Groves have said that the application of the principle of legality to subordinate instruments ‘reflect[s] a longstanding tradition by which the courts will declare delegated legislation invalid if, for some reason, it conflicts with the terms of the statute under which it is made’.⁵⁴ Pursuant to the principle of legality, ‘common law rights and freedoms can only be infringed by secondary legislation if the empowering statute provides that power by express words or necessary implication’.⁵⁵ If that is not the case, ‘the secondary legislation must be read down to protect the common law right or freedom in play or it will be ultra vires the lawmaking power if that is not interpretively possible’.⁵⁶

B Other Statutory Discretions

The High Court has not confined the operation of the principle of legality to primary legislation broadly empowering the making of subordinate instruments.

Indeed, a leading authority on the principle of legality — *Coco v The Queen*⁵⁷ — involved the interpretation of a provision conferring a discretionary power on the judiciary. In that case, the *Invasion of Privacy Act 1971* (Qld) made it an offence to use a listening device to ‘overhear, record, monitor or listen to a private conversation’.⁵⁸ However, the Act provided an exception whereby 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’.⁵⁹

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 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’.⁶⁰ Applying the principle of legality, it found that there was no clear and

51 *Local Government Act 1934* (SA) s 667(1)(9)(XVI).

52 *A-G (SA) v Corporation of the City of Adelaide* (2013) 249 CLR 1, 31 [43] (French CJ).

53 *Ibid* 32 [44] (French CJ).

54 Meagher and Groves, above n 49, 451.

55 *Ibid* 469.

56 *Ibid*.

57 (1994) 179 CLR 427.

58 *Invasion of Privacy Act 1971* (Qld) s 43(1).

59 *Ibid* s 43(3).

60 *Coco v The Queen* (1994) 179 CLR 427, 435 (Mason CJ, Brennan, Gaudron and McHugh JJ).

unambiguous language in the Act which abrogated or curtailed that fundamental right.⁶¹

A more recent example is *Lacey v Attorney-General (Qld)*.⁶² 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.⁶³ A 6:1 majority of the High Court referred to the common law rule against double jeopardy, as well as the more amorphous notion of ‘common law principles governing the administration of [criminal] justice’.⁶⁴ The majority held — as a ‘specific application of the principle of legality’⁶⁵ — 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.⁶⁶ Thus, the principle of legality was applied to confine even an apparently ‘unfettered’ discretion, so that it did ‘not actually mean without limits’.⁶⁷

The above is consistent with the notion that statutory discretions are subject to interpretation. It also reflects the rationale of the principle of legality. In the seminal High Court case of *Potter v Minahan*⁶⁸ in 1908, O’Connor J quoted approvingly from *Maxwell on Statutes*, which said:

It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness; and to give any such effect to general words, simply because they have that meaning in their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used.⁶⁹

Similarly, in *Coco v The Queen*,⁷⁰ the High Court said that ‘[g]eneral 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.⁷¹

61 Ibid 439.

62 (2011) 242 CLR 573.

63 *Criminal Code* (Qld) s 669A(1).

64 *Lacey v A-G (Qld)* (2011) 242 CLR 573, 583 [18].

65 Ibid 582 [20] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

66 Ibid 582–4 [17]–[20], 594 [50], 598 [62] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

67 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’: Chief Justice Robert French, ‘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] (French CJ).

68 (1908) 7 CLR 277.

69 Ibid 304, quoting Sir Peter Benson Maxwell, *On the Interpretation of Statutes* (Sweet & Maxwell, 4th ed, 1905) (citations omitted) (emphasis added).

70 (1994) 179 CLR 427.

71 Ibid 437–8.

C Further Remarks on the Principle of Legality and Section 32(1)

As in Australia, the principle of legality confines broad statutory discretions in New Zealand⁷² and the United Kingdom.⁷³ This provides a powerful argument that s 32(1) must *at least* operate in a similar fashion. It seems 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.⁷⁴

Specifically in respect of the making of subordinate instruments, it will be recalled that s 32(3)(b) of the *Charter* provides that s 32 does not affect the validity 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. So whilst the *Charter* does not affect the validity of primary legislation, construing primary legislation which empowers the making of subordinate instruments, pursuant to s 32, *could* lead to invalidity of subordinate instruments. If the same approach as the principle of legality were adopted, clear and unambiguous language in the empowering provision would be required before it can be taken to empower the making of subordinate instruments which are incompatible with *Charter* rights. Otherwise, the subordinate instrument must be read down, if possible, or be found invalid.

VI 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 High Court's decision in *Momcilovic*.

A Pre-Momcilovic

The early jurisprudence in the Victorian Civil and Administrative Tribunal ('VCAT') is consistent with the notion that s 32(1) confines broad statutory discretions. For example, in *Re Kracke and Mental Health Review Board*, Bell J found that not only was the respondent Board a public authority and so had to

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

73 See, eg, *R v Secretary of State for the Home Department; Ex parte Pierson* [1998] AC 539, 587 (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; *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532.

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

comply with its s 38(1) obligations, but s 32(1) was also relevant in interpreting the Board's general statutory powers and discretions.⁷⁵ 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.⁷⁶

His Honour relied on the Supreme Court of Canada case of *Slaight Communications Inc v Davidson*.⁷⁷ That case is authority for the proposition articulated by Lamer J that pursuant to the *Canadian Charter of Rights and Freedoms*⁷⁸: 'Legislation conferring an imprecise discretion must ... be interpreted as not allowing the *Charter* rights to be infringed'.⁷⁹ Bell J in *Kracke* adapted the finding in *Slaight* to the Victorian context.⁸⁰ Bell J repeated this approach in the VCAT case of *Lifestyle Communities Ltd [No 3] (Anti-Discrimination)*⁸¹ and the Supreme Court case of *PJB v Melbourne Health*.⁸² As will be seen later, this reliance on *Slaight* in respect of s 32(1) has been questioned.

In the early cases decided in VCAT,⁸³ 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. An alternative characterisation of these cases that is not without support,⁸⁴ is that *Charter* rights have been 'read in'⁸⁵ to the provision conferring the discretion, such that the decision-maker upon whom the power was conferred must act compatibly with *Charter* rights.

However, the jurisprudence prior to *Momcilovic* might not all point the one way. In *RJE v Secretary, Department of Justice*,⁸⁶ 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

75 (2009) 29 VAR 1, 53–4 [206]–[209], 108 [489] ('*Kracke*').

76 Ibid 54 [208].

77 [1989] 1 SCR 1038 ('*Slaight*').

78 *Canada Act 1982* (UK) c 11, sch B pt I ('*Canadian Charter*').

79 *Slaight* [1989] 1 SCR 1038, 1078 (Lamer J) (dissenting, but not on this point).

80 *Kracke* (2009) 29 VAR 1, 54 [211].

81 [2009] VCAT 1869 (22 September 2009) [89]–[91] ('*Lifestyle*').

82 (2011) 39 VR 373, 424–5 [235]–[237].

83 *Royal Victorian Bowls Association Inc (Anti-Discrimination Exception)* [2008] VCAT 2415 (17 November 2008) [47] (Harbison J); *Victorian Netball Association Inc (Anti-Discrimination Exception)* [2008] VCAT 2651 (24 December 2008) [40]–[42] (McKenzie DP); *Kracke* (2009) 29 VAR 1 (Bell J) (sitting as President of VCAT); *Lifestyle* [2009] VCAT 1869 (22 September 2009) (Bell J) (sitting as President of VCAT).

84 See Andrew Butler and Petra Butler, *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis, 2nd ed, 2015) 268 [7.13.2]; Beatson et al, above n 22, 537 [6–05].

85 But is this a distinction without a difference? Arguably, 'reading down' discretions to confine their scope involves 'reading in' limitations on that scope.

86 (2008) 21 VR 526 ('*RJE*').

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.⁸⁷ 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*.⁸⁸

Moreover, in *DPP v Ali [No 2]* the Supreme Court sought to interpret discretionary powers under the *Confiscation Act 1997* (Vic) compatibly with the *Charter*.⁸⁹ That Act permitted the Director of Public Prosecutions 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 ('the 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.⁹⁰

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 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.⁹¹ 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 alternative 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. 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.⁹²

87 Ibid 542 [54]–[56].

88 Ibid 555 [111].

89 [2010] VSC 503 (10 November 2010) (*Ali [No 2]*).

90 Ibid [40]–[41].

91 Ibid [42].

92 See further below and n 100.

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*⁹³ and the *Charter*'s overall framework.⁹⁴ Arguably, the *Charter* model indicates that Parliament could not have intended that s 32(1) confines broad statutory discretions.

B Post-Momcilovic

Most recently, in *Nigro v Secretary, Department of Justice*,⁹⁵ the Court of Appeal (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*. As with *RJE*, it involved post-custodial supervision and detention of convicted serious sex offenders.⁹⁶

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* that s 32(1) 'imposes a particular interpretation on provisions which confer open-ended discretions'.⁹⁷ 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,⁹⁸ including *Wotton v Queensland*.⁹⁹ 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 *Charter*'s structure, particularly where s 38(1) has imposed a duty only 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.¹⁰⁰

Ultimately, the Court of Appeal avoided deciding this issue of general principle. Nevertheless, what the Court did say in obiter was telling:

The decisions of the House of Lords in *Re S (Care Order) (Implementation of Care Plan)*¹⁰¹ and *R (Gillan) v Commissioner of Police of the Metropolis*¹⁰² 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

93 That is, the distinction between courts and tribunals acting judicially and administratively, and the ability to exempt entities from being public authorities.

94 That is, s 38(1) only applies to public authorities.

95 (2013) 41 VR 359 ('*Nigro*').

96 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* (Vic).

97 *Kracke* (2009) 29 VAR 1, 54 [208].

98 *Nigro* (2013) 41 VR 359, 408 [183].

99 (2012) 246 CLR 1.

100 *Nigro* (2013) 41 VR 359, 407 [180], 407–8 [182].

101 [2002] 2 AC 291 ('*Re S*').

102 [2006] 2 AC 307 ('*R (Gillan)*').

impose restrictions upon the statutory power itself, challenges being confined to the exercise of the power.¹⁰³ 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.¹⁰⁴

The Court of Appeal, while not determining the issue, was of the view that the United Kingdom authorities it cited suggested that it was ordinarily not correct or appropriate to utilise s 32(1) to confine broad statutory discretions. Rather, challenges should be made under s 38(1) against the exercise of power. The Court considered that *Charter* rights might still be taken into account when exercising a discretion,¹⁰⁵ but seemingly like a non-mandatory consideration.

The Court of Appeal also noted that in relation to *Kracke* and *Lifestyle*, Bell J was dealing with public authorities bound by s 38(1) of the *Charter*.¹⁰⁶ 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)*, 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), saying that his Honour had 'responded to a similar submission advanced by the Commission, noting the difficulty in applying *Slaight*'.¹⁰⁷ 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 either judicial or administrative discretions).

C 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. In *Nigro*, the Court of Appeal considered that, even if it were possible to construe a broad statutory discretion as subject to an implied limitation that

103 Beatson et al, above n 22, 506–7 [5-117]. However, this citation does not support the Court of Appeal's observation. That passage of the citation discusses the boundaries around s 3(1) of the *UK HRA* confining statutory discretions: see below on the limitations on s 32(1) confining statutory discretions.

104 *Nigro* (2013) 41 VR 359, 408–9 [185].

105 *Ibid* 411 [199]. See also *Ali [No 2]* [2010] VSC 503 (10 November 2010) [45].

106 This was similar to the observation outlined earlier in *Ali [No 2]*. Hargrave J distinguished *Kracke* and *Lifestyle* 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: *Ali [No 2]* [2010] VSC 503 (10 November 2010) [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 VCAT — it is nonetheless clear on the face of those decisions that Bell J's findings were intended to be of general application.

107 *Nigro* (2013) 41 VR 359, 409 [186].

it be exercised compatibly with human rights, s 32(1) ‘would have no scope for operation if its application required a rearrangement of the statutory scheme and an alteration of the assignment of powers and responsibilities between distinct entities specified in the scheme’,¹⁰⁸ or if it were contrary to ‘the purpose ... of the statutory provisions’.¹⁰⁹

This accords with the approach in New Zealand and the United Kingdom.¹¹⁰ Parliament’s intention remains respected. It is consistent with the broader notion that 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 and Court of Appeal to issue a declaration of inconsistent interpretation under s 36.

VII FURTHER ANALYSIS OF OVERSEAS JURISPRUDENCE

A Canada

Jeremy Gans has argued that s 32(1) ought not confine broad statutory discretions.¹¹¹ He considers there to be a qualifying remark in the reasoning in *Slaight*¹¹² (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:

*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.*¹¹³

108 Ibid 409 [187].

109 Ibid 409 [188]. See also: at 364 [10]. Those passages in whole refer to inconsistency with the purpose and text of the statutory provisions. A construction cannot be inconsistent with both. See *Slaveski v Smith* (2012) 34 VR 206, where the Court of Appeal made clear that a court may sometimes ‘depart from grammatical rules to give an unusual or strained meaning to a provision’, provided that it is not ‘inconsistent with both the grammatical meaning and apparent purpose of the enactment’: at 215 [24] (emphasis added).

110 See Beatson et al, above n 22, 506–7 [5-117]; Butler and Butler, above n 84, 268 [7.13.1].

111 Gans, ‘The Government’s Charter Dodge’, above n 22.

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

113 Gans, ‘The Government’s Charter Dodge’, above n 22, quoting *Slaight* [1989] 1 SCR 1038, 1077–8 (Lamer J) (Gans’ emphasis).

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’.¹¹⁴ Thus, Gans argues there are pertinent differences between the *Canadian Charter* and the *Charter* in Victoria. The *Canadian Charter* is a constitutional bill of rights — not only is legislation which cannot be interpreted compatibly with it invalid,¹¹⁵ but ‘any government conduct that breaches it is automatically afforded a remedy’.¹¹⁶ 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 Gans, is ‘hedged by a narrow scope,¹¹⁷ broad defences¹¹⁸ and limited remedies’¹¹⁹ — whereas there is no equivalent to s 38(1) under the *Canadian Charter*.

However, there are persuasive counter-arguments to this. First, 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 or Court of Appeal. 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. This is consistent with the approach in New Zealand and the 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*.¹²⁰ He goes on to reason that s 32(1) ought not be ‘a magic cure-all for overly broad legislation’.¹²¹ Gans says that ‘there would be no incentive for drafters to draft legislation appropriately narrowly nor for parliament to insist on appropriate narrowness’.¹²²

114 *Slaight* [1989] 1 SCR 1038, 1078.

115 Section 52(1) of the *Canada Act 1982* (UK) c 11, sch B (*Constitution Act 1982*) 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’.

116 Gans, ‘The Government’s *Charter* Dodge’, above n 22.

117 Presumably a reference to s 38(1) of the *Charter* only applying to public authorities.

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

119 Gans, ‘The Government’s *Charter* Dodge’, above n 22. Presumably a reference to s 39(1) of the *Charter*.

120 Gans, ‘The Government’s *Charter* Dodge’, above n 22.

121 *Ibid.*

122 *Ibid.*

Indeed, the nature of some *Charter* rights arguably suggests 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' (emphasis added). 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*' (emphasis added). '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.¹²³ 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).

Finally, Canada has moved on from the position set out in *Slaight*. In *Doré v Barreau du Québec*, the Supreme Court of Canada reformulated the approach to how the *Canadian Charter* ought to be applied to statutory discretions.¹²⁴ The Court adopted an approach that seems akin to the public authority obligations under s 38(1) of the *Charter*. It held that in applying *Canadian Charter* 'values' in the exercise of a statutory discretion, the decision-maker:

should first consider the statutory objectives. ... Then the decision-maker should ask how the *Charter* value at issue will best be protected in view of the statutory objectives. This is at the core of the proportionality exercise, and requires the decision-maker to balance the severity of the interference of the *Charter* protection with the statutory objectives.¹²⁵

The Court went on to say that if the exercise of the discretion is challenged on judicial review, the question is whether the decision-maker has, 'in assessing the impact of the relevant [*Canadian*] *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the [*Canadian*] *Charter* protections at play'.¹²⁶ If the decision-maker has 'properly balanced the relevant [*Canadian*] *Charter* value with the statutory objectives, the decision will be found to be reasonable' and upheld.¹²⁷ It appears then that the Canadian approach to broad statutory discretions has shifted from one of interpretation so as not to permit infringing the *Canadian Charter*, to one concerned with conduct — in the process and outcome of the decision-making. This approach potentially supports the argument that under the *Charter* in Victoria, the exercise of statutory discretions is dealt with by s 38(1), not s 32(1).

123 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) 43 VR 446, 468–72 [98]–[114].

124 [2012] 1 SCR 395.

125 Ibid 426 [55]–[56] (Abella J, delivering the judgment of the Court).

126 Ibid 426–7 [57]. See also *Loyola High School v Quebec (A-G)* [2015] 1 SCR 613, 639 [39] (Abella J, delivering the judgment of LeBel, Abella, Cromwell and Karakatsanis JJ): 'A proportionate balancing is one that gives effect, as fully as possible to the [*Canadian*] *Charter* protections at stake given the particular statutory mandate. Such a balancing will be found to be reasonable on judicial review'.

127 *Doré v Barreau du Québec* [2012] 1 SCR 395, 427 [58].

B New Zealand and the United Kingdom

1 The position in New Zealand and the 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, it is beyond doubt that its statutory bill of rights confines broad statutory discretions as a matter of interpretation. As commentators Paul Rishworth and others have said of the equivalent to s 32(1) of the *Charter*, s 6 of the *NZ BORA*¹²⁸ 'operates to circumscribe the range of possible decisions. Importantly, it is not merely a "consideration". It sets the legal boundaries of the power'.¹²⁹ 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'.¹³⁰ However, '[w]hat s 6 of [the NZ] BORA has done ... is to convert *could* to *should*'.¹³¹ The confinement of broad statutory discretions by s 6 is borne out in the jurisprudence.¹³²

Turning to the United Kingdom, the *Charter* most closely resembles the *UK HRA* framework. Section 32(1) is arguably based¹³³ on s 3(1) of the *UK HRA*¹³⁴ and additionally, s 38(1) is modelled¹³⁵ on s 6 of the *UK HRA*.¹³⁶

128 Section 6 of the *NZ BORA* 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'.

129 Paul Rishworth et al, *The New Zealand Bill of Rights* (Oxford University Press, 2003) 159–60 (citations omitted).

130 Butler and Butler, above n 84, 272 [7.13.14] (emphasis in original).

131 *Ibid* (emphasis in original).

132 See *R v Laugalis* (1993) 1 HRNZ 466; *Police v Beggs* [1999] 3 NZLR 615; *Drew v A-G* [2002] 1 NZLR 58; *Cropp v Judicial Committee* [2008] 3 NZLR 774; *Schubert v Wanganui District Council* [2011] NZAR 233; *Zaoui v A-G [No 2]* [2006] 1 NZLR 289. These authorities are discussed in Butler and Butler, above n 84, 268–72 [7.13]. See further Rishworth et al, above n 129, 158–60; Claudia Geiringer, 'International Law through the Lens of *Zaoui*: Where Is New Zealand at?' (2006) 17 *Public Law Review* 300, 308–9, 315–18; Philip A Joseph and Thomas Joseph, 'Human Rights in the New Zealand Courts' (2011) 18 *Australian Journal of Administrative Law* 80, 95–6, 98–9; Philip A Joseph, 'Exploratory Questions in Administrative Law' (2012) 25 *New Zealand Universities Law Review* 73, 99–100. See also *Dotcom v A-G* [2015] 1 NZLR 745, 785 [100] (McGrath, William Young, Glazebrook and Arnold JJ).

133 Human Rights Consultation Committee, Parliament of Victoria, *Rights, Responsibilities and Respect* (2005) 82–3. 'Arguably' because the United Kingdom approach to interpretation pursuant to s 3(1) was rejected by both the Court of Appeal in *R v Momcilovic* (2010) 25 VR 436 and the High Court in *Momcilovic* (2011) 245 CLR 1.

134 See above n 5.

135 Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 2848.

136 Section 6(1) of the *UK HRA* states: 'It is unlawful for a public authority to act in a way which is incompatible with a *Convention* right'.

In commentary on the *UK HRA*, Sir Jack Beatson and others 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*:

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 6.¹³⁷

In *Nigro*, the Court of Appeal cited *Re S and R (Gillan)* as suggestive that ‘ordinarily there will be no warrant for using the interpretative obligation to impose restrictions upon the statutory power itself’.¹³⁸ *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 ...¹³⁹

As previously mentioned, *R (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.¹⁴⁰

Nevertheless, the House of Lords in both *Re S and R (Gillan)* relied heavily on express safeguards and limitations contained in the relevant statutes in finding that they were not incompatible with human rights.¹⁴¹ In *Re S*, Lord Nicholls noted that an infringement of human rights was not ‘compelled, or even countenanced’ by the legislation.¹⁴² Rather, any infringement ‘flows from the local authority’s failure to comply with its obligations under the Act’.¹⁴³ Lord Bingham in *R*

137 Beatson et al, above n 22, 537 [6.05]–[6.06] (citations omitted) (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) 269, 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]’.

138 *Nigro* (2013) 41 VR 359, 408 [185].

139 *Re S* [2002] 2 AC 291, 317 [56].

140 *R (Gillan)* [2006] 2 AC 307, 341–2 [22].

141 The European Court of Human Rights subsequently disagreed with the House of Lords as to the latter’s findings on compatibility with human rights: *Gillan v United Kingdom* (European Court of Human Rights, Chamber, Application No 4158/05, 12 January 2010).

142 [2002] 2 AC 291, 317 [57].

143 *Ibid.* See also: at 317 [56].

(*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’.¹⁴⁴ 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.

That s 3(1) of the *UK HRA* can confine broad statutory discretions was put beyond doubt by the more recent United Kingdom Supreme Court case of *R (GC) v Metropolitan Police Commissioner*.¹⁴⁵ That case related to a statutory discretion conferred on police to retain fingerprints and DNA samples taken lawfully from persons who were not convicted. Section 64(1A) of the relevant Act provided that such data ‘may be retained after they have fulfilled the purposes for which they were taken’ but could only be used for certain purposes, such as the prevention or detection of crime.¹⁴⁶ The data was kept on a police national database. No express time limits for retention were provided for. Police guidelines stated there was a discretion to delete such data from the database, although this should only be exercised in exceptional circumstances. In effect, it meant that in the usual course, the data was kept indefinitely.

This case was complicated by a number of factors.¹⁴⁷ But shortly stated, the upshot was that s 3(1) of the *UK HRA* as a matter of general principle can confine broad statutory discretions, so that they cannot be exercised incompatibly with human rights. In the majority, Lord Dyson SCJ (Lord Phillips P and Lord Kerr SCJ agreeing) read down the provision. His Lordship found it was ‘possible to read and give effect to s 64(1A) in a way which is compatible with’ the *European Convention on Human Rights*.¹⁴⁸ Lord Dyson SCJ concluded that the guidelines requiring indefinite retention were unlawful for incompatibility with the right to respect for private life.¹⁴⁹ Lord Phillips P (Lord Kerr SCJ agreeing) added that s 3(1) ‘imposes a duty on the police, as a public authority, in so far as it is possible to do so, to give effect to the power conferred on them in a way which is compatible with convention rights’.¹⁵⁰ Note the reference here to both the interpretive obligation under s 3(1) and public authority obligations under s 6,

144 [2006] 2 AC 307, 346 [35]. See also: at 344–5 [29]–[30].

145 [2011] 3 All ER 859 (*R (GC)*).

146 *Police and Criminal Evidence Act 1984* (UK) c 60, s 64(1A).

147 The House of Lords had upheld the retention of data under s 64(1A) for being compatible with the right to respect for private life in *R (S) v Chief Constable of South Yorkshire* [2004] 4 All ER 193. However, the matter was taken to the European Court of Human Rights, who disagreed: *S v United Kingdom* (European Court of Human Rights, Grand Chamber, Application Nos 30562/04 and 30566/04, 4 December 2008). In *R (GC)* [2011] 3 All ER 859, there was no dispute between the parties that in light of the European Court’s decision, indefinite retention of the data was not compatible with human rights. In response to the European Court decision, the retention scheme was under review by the government. The question then in *R (GC)* was what relief should be granted — declaring the police’s conduct unlawful for acting incompatibly with human rights, quashing the police guidelines for invalidity, issuing a declaration of incompatibility in respect of s 64(1A), or not issuing such a declaration.

148 *R (GC)* [2011] 3 All ER 859, 874 [35], 886–7 [88] (Lord Kerr SCJ agreeing).

149 *Ibid* 876 [46].

150 *Ibid* 878 [55], 887 [89] (Lord Kerr SCJ agreeing).

which are treated as overlapping. The majority declared the police guidelines unlawful.¹⁵¹

Lords Rodger and Brown SCJJ dissented. Despite the apparently wide discretion conferred, their Lordships considered that the policy and objects of that provision compelled their finding that fingerprint and DNA samples were to be retained indefinitely. Lord Rodger SCJ said that using s 3(1) to interpret the provision otherwise ‘departs substantially’ from a ‘fundamental feature’ of the legislation, being the indefinite retention of data.¹⁵² Lord Brown SCJ asked, ‘suppose there were some doubt’ about the scope of the discretion under s 64(1A), ‘why would that not fall to be resolved by the interpretative imperative of s 3?’¹⁵³ His Lordship answered his own doubt — it was for Parliament to devise and implement a *Convention*-compliant scheme. It could not be remedied by s 3(1); this was an instance where ‘legislative deliberation’ was required.¹⁵⁴ Their Lordships both considered that the provision itself was incompatible with human rights, rather than the guidelines (which fell within power).

In *R (GC)*, both the majority and minority recognised that there were limitations on how s 3(1) could confine statutory discretions.¹⁵⁵ Lord Dyson SCJ in the majority considered that reading down¹⁵⁶ the provision did not ‘impermissibly cross the line’ into legislating¹⁵⁷ — indefinite retention was not a fundamental feature of the Act.¹⁵⁸ In comparison, the dissenting judges found that s 3(1) could not be read down to require s 64(1A) to be exercised compatibly with human rights. That would go beyond what s 3(1) could permissibly do *in light of* the enactment. However, the minority seemed to accept that, as a matter of general principle, s 3(1) can confine statutory discretions in an appropriate case.

2 Comparisons with Victoria

Although the New Zealand and recent United Kingdom jurisprudence is supportive of s 32(1) operating to confine broad statutory discretions, there

151 Ibid 877 [52] (Lord Dyson SCJ), 879 [60] (Lord Phillips P), 883 [73] (Lady Hale SCJ), 885 [81] (Lord Judge CJ), 887 [91] (Lord Kerr SCJ).

152 Ibid 893 [114]–[115].

153 Ibid 900 [141].

154 Ibid 902 [146], 903 [150].

155 See above on the limitations of s 32(1) of the *Charter* confining statutory discretions.

156 However, Lady Hale, who was in the majority, took a converse approach. Her Ladyship said: to say that s 64(1A) cannot be [read compatibly with *Convention* rights] involves reading ‘may be retained’ as ‘must be retained, save in exceptional circumstances’. This would be doing the reverse of what s 3(1) requires. In other words, it would be reading into words which *can* be read compatibly with the *Convention* rights a meaning which is incompatible with those rights. It would be giving the broad discretion provided in s 64(1A) an unnatural or strained meaning to require it to be given effect in an incompatible way.

Re (GC) [2011] 3 All ER 859, 882 [69]. Although this was responding to the Metropolitan Police Commissioner and Secretary of State for the Home Department’s submissions, with respect, her Ladyship’s characterisation is not correct. A discretion that data may be retained indefinitely, on a broad literal approach, includes the discretion to retain all data indefinitely.

157 Ibid 874 [35], citing *Sheldrake v DPP; A-G’s Reference (No 4 of 2002)* [2005] 1 AC 264.

158 *Re (GC)* [2011] 3 All ER 859, 872 [27].

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 a judicial or administrative capacity.¹⁵⁹ 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). The *UK HRA*, unlike the *Charter*, provides for a direct cause of action for breaches of s 6.¹⁶⁰ 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, some of the differences in the *Charter* may be explained. First, as a state bill of rights operating within a federal framework, the *Charter*'s distinction 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.¹⁶¹

Secondly, the purpose of the ability to declare 'an entity ... by the regulations not to be a public authority for the purposes of this *Charter*'¹⁶² was arguably for additional clarity and certainty to be provided to the scope of the public authority definition.¹⁶³ It should be noted that the definition of 'public authority' encompasses not only what may be termed 'core' public authorities, but also 'functional' public authorities. That is, where entities are performing functions of a public nature on behalf of the state.¹⁶⁴ It may be that the exemption power was intended to allow it to be declared beyond doubt that certain entities 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 — where it is inferred from the text and structure of the *NZ BORA* that those bound by the

159 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': at s 3. The *UK HRA* applies to 'a court or tribunal, and any person certain of whose functions are functions of a public nature': at s 6(3).

160 Section 7(1) of the *UK HRA* states: 'A person who claims that a public authority has acted (or proposes to act) in a way which is made unlawful by section 6(1) may — (a) bring proceedings against the authority under this Act in the appropriate court or tribunal, or (b) rely on the *Convention* right or rights concerned in any legal proceedings'.

161 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': Human Rights Consultation Committee, above n 133, 59, citing Australian Human Rights Centre, Submission No 1080 to Human Rights Consultation Committee, *Rights, Responsibility and Respect* (2005).

162 *Charter* s 4(1)(k).

163 Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic) 2825; Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2006, 1294 (Rob Hulls, Attorney-General).

164 See *Charter* ss 4(1)(b)–(c); Victoria, *Parliamentary Debates*, Legislative Assembly, 4 May 2006, 1294 (Rob Hulls, Attorney-General).

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*.¹⁶⁵

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.¹⁶⁶ 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.

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

Further guidance on the issue may be drawn from s 6(2)(b) of the *Charter*. As set out earlier, it provides that the *Charter* applies to courts and tribunals to the extent that they have functions under Part 2, which contains the human rights protected by the *Charter*. 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*).¹⁶⁷

The jurisprudence to date supports this intermediate approach. In *Victoria Police Toll Enforcement v Taha*,¹⁶⁸ Tate JA applied the intermediate approach to s 6(2)(b).¹⁶⁹ 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).¹⁷⁰ Furthermore, in a leave to appeal decision by the Court of Appeal, Neave JA and Williams AJA stated that ‘it appear[ed] s 6(2)(b) implicitly reads down’ the definition of ‘public authority’ in respect of courts and tribunals.¹⁷¹ In other words, it curtails what might be considered a strict distinction between courts or tribunals acting in a judicial and administrative capacity.

165 Human Rights Consultation Committee, above n 133, 63.

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

167 Carolyn Evans and Simon Evans, *Australian Bills of Rights: The Law of the Victorian Charter and ACT Human Rights Act* (LexisNexis Butterworths, 2008) 12–13 [1.42]–[1.43] (emphasis altered).

168 [2013] VSCA 37 (4 March 2013).

169 Albeit without determining its correctness.

170 *Victoria Police Toll Enforcement v Taha* [2013] VSCA 37 (4 March 2013) [248], [252].

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

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),¹⁷² regardless of whether they are acting judicially or administratively. They have been applied to the Children’s Court¹⁷³ and the Magistrates’ Court.¹⁷⁴ 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 (s 32(1) would still leave the discretion of the courts untouched where it is inherent, rather than conferred by statute).

IX THE 2015 CHARTER REVIEW

Finally, the *Charter* mandates that a review take place after four¹⁷⁵ and eight¹⁷⁶ years of operation. The four-year review of the *Charter* was undertaken by the Victorian Parliament’s Scrutiny of Acts and Regulations Committee, with its report tabled in September 2011.¹⁷⁷ However, no legislative amendments to the *Charter* resulted from that review.

The eight-year review of the *Charter* was undertaken by an independent reviewer, Mr Michael Brett Young — former Chief Executive Officer of the Law Institute of Victoria. The 2015 *Charter* review report was tabled in September 2015.¹⁷⁸ Whilst the report does not consider whether s 32(1) confines statutory discretions, some of its recommendations might arguably impact on this issue.

Some of the points which this article has identified as causing difficulty for the proposition that s 32(1) confines statutory discretions are: the existence of the power to exempt public authorities from their s 38(1) obligations; the non-application of s 38(1) to courts and tribunals when acting in a judicial capacity, and the confinement of claims for breach of s 38(1) by way of s 39 of the *Charter*.

At least a couple of these features of the *Charter* will remain for the foreseeable future. As noted above, it is arguable that the purpose of the ability to declare a public authority as exempt was for additional clarity and certainty to be provided with respect to entities which may be ‘functional’ public authorities bound by the *Charter*. However, the 2015 *Charter* review report made no recommendation

172 See *Kracke* (2009) 29 VAR 1, 63–4 [253]–[254]; *Lifestyle* (2009) 31 VAR 286, 318 [142]; *Secretary, Department of Human Services v Sanding* (2011) 36 VR 221, 258–9 [164]–[167]; *Victorian Police Toll Enforcement v Taha* [2013] VSCA 37 (4 March 2013) [247]–[249]; *De Simone v Bevnol Constructions & Developments Pty Ltd* (2009) 25 VR 237, 247 [52]. See also *Momcilovic* (2011) 245 CLR 1, 204 [525] (Crennan and Kiefel JJ).

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

174 *Victoria Police Toll Enforcement v Taha* [2013] VSCA 37 (4 March 2013) [252].

175 *Charter* s 44.

176 *Ibid* s 45.

177 Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Review of the Charter of Human Rights and Responsibilities Act 2006* (2011).

178 2015 *Charter Review Report*, above n 13.

that the exemption power be restricted for such purposes.¹⁷⁹ As to the distinction between courts and tribunals acting in an administrative capacity and in a judicial capacity, and s 38(1) only applying in respect of the former, the 2015 *Charter* review report considered that this position should be maintained.¹⁸⁰

There are two major recommendations in the 2015 *Charter* review report which may be favourable towards s 32(1) confining statutory discretions. First, the report expressed the view that s 32(1), as it presently stands, is a ‘stronger rule of interpretation than the principle of legality’.¹⁸¹ The report recommended various amendments to s 32(1), bearing that clarification in mind.¹⁸² Pursuant to those proposed amendments, an interpretation of a statutory provision that is ‘most compatible’ or ‘least incompatible’ with human rights should be adopted.¹⁸³ If implemented, then going forward s 32(1) *must* confine statutory discretions, *at the very least*, in the same way that the principle of legality does. Moreover, wouldn’t an interpretation so that a broad statutory discretion may only be exercised compatibly with *Charter* rights be the ‘most compatible’ one?

Secondly, the 2015 *Charter* review report noted the uncertainty of s 39(1), and effectively proposed that this be replaced by a freestanding, direct cause of action.¹⁸⁴ The report’s recommendations, if implemented, would to an extent negate the argument that s 32(1) should not be used to bypass the restrictions imposed by s 39(1) (and the ‘limited remedies’¹⁸⁵ permitted under it) in respect of s 38(1). Nevertheless, the report did not propose to make clear that breach of s 38(1) amounts to jurisdictional error, so the question remains — why should s 32(1) confine statutory discretions so as to give rise to jurisdictional error, when s 38(1) might not?

The Victorian Government has responded by saying that the recommendations on amending s 32(1) as proposed by the 2015 *Charter* review report was ‘supported in principle’, and on introducing a freestanding, direct cause of action was ‘under further consideration’.¹⁸⁶ It remains to be seen how such legislative amendments would look, if they were implemented.

X CONCLUSION

Despite statutory discretions being confined by principles of statutory interpretation, the question of whether s 32(1) of the *Charter* confines broad

179 Ibid 63. Although it did encourage that the exemption power be used ‘to prescribe entities to be or not be public authorities ... where necessary to resolve doubt’.

180 Ibid 74–9. The report also considered that in respect of s 6(2)(b), the courts and tribunals had ‘struck an appropriate balance’ and the provision ‘should be retained without amendment’: at 78.

181 Ibid 146. See also: at 144, 147. This issue is at large: see above n 11.

182 2015 *Charter Review Report*, above n 13, 146, 148.

183 Applying s 7(2) of the *Charter*, which provides for a test of justification and proportionality.

184 2015 *Charter Review Report*, above n 13, 117–27.

185 Gans, ‘The Government’s *Charter* Dodge’, above n 22.

186 Department of Justice and Regulation (Vic), above n 13.

statutory discretions, such that they may only be exercised compatibly with human rights, is complex. This issue is no small thing. It affects administrative and judicial decision-makers in Victoria who have been conferred a discretion by statute, as well as individuals who are subject to those decision-makers and whose *Charter* rights may be affected by the exercise of the discretion. The issue impacts on how everyone, courts and tribunals included, interprets legislation compatibly with human rights.

There are valid arguments both for and against the proposition that s 32(1) operates to confine broad statutory discretions. In short, there are features of the *Charter* and its particular structure which tend against the notion that s 32(1) can confine broad statutory discretions. But those arguments can largely be negated, with the proper role of s 32(1) being seen as interpreting the scope of broad statutory discretions. The weights of the arguments are finely balanced. How the issue will be affected by any legislative amendments in light of the Victorian Government's response to the 2015 *Charter* review report remains to be seen.

For now, the issue means either one of two things. On one view, the Victorian courts are exercising undue caution in respect of s 32(1) and statutory discretions, and *not* applying it similarly to the principle of legality — despite representations that they are close to the same thing. Alternatively, s 32(1) does not simply operate as a kind of codification of the principle of legality — as French CJ in *Momcilovic* and the Victorian Court of Appeal have predominantly found. There are nuances at play, and equating the two ‘does not provide a magic key’.¹⁸⁷ There are aspects of s 32(1) which may require further exploration or operate differently from the principle of legality.¹⁸⁸ How s 32(1) applies to statutory discretions is just one potential example.

187 Claudia Geiringer, ‘The Principle of Legality and the *Bill of Rights Act*: A Critical Examination of *R v Hansen*’ (2008) 6(1) *New Zealand Journal of Public and International Law* 59, 83, in the context of s 6 of the *NZ BORA* and the principle of legality.

188 In relation to the differences in nature, conception, and scope between the principle of legality and s 32(1), see Bruce Chen, ‘The Principle of Legality and Section 32(1) of the *Charter*: Same Same or Different?’ on Gilbert + Tobin Centre of Public Law, *AUSPUBLAW* (26 October 2016) <<https://auspublaw.org/2016/10/same-same-or-different/>>.