Mr Edward O’Donohue MLC  
Chairperson  
Scrutiny of Acts and Regulations Committee  
Parliament of Victoria  
MELBOURNE VIC 3002

By email: charter.review@parliament.vic.gov.au

10 June 2011

Dear Mr O’Donohue

REVIEW OF THE CHARTER OF HUMAN RIGHTS AND RESPONSIBILITIES ACT 2006

I refer to your letter dated 5 May 2011 inviting the Victorian Bar to make a submission to the Committee concerning the matters contained in all or any of the terms of reference for the inquiry and review of the Charter of Human Rights and Responsibilities Act 2006.

I have much pleasure in enclosing the Bar’s submission.

Yours sincerely

Mark Moshinsky SC  
Chairman  
Victorian Bar Council

Enc.
Submission of the Victorian Bar to the Scrutiny of Acts and Regulations Committee -

Review of the Charter of Human Rights and Responsibilities

10 June 2011
Contents

INTRODUCTION ........................................................................................................... 3
EXECUTIVE SUMMARY AND FOCUS OF SUBMISSION ........................................... 3
PRACTICAL EXPERIENCE OF CHARTER AS IT HAS BEEN USED IN LITIGATION IN COURTS AND TRIBUNALS ................................................................. 4
  No flood of litigation ............................................................................................ 4
  Courts assume a conventional role .................................................................... 4
  Educative Effect of the Charter ......................................................................... 6
  Pragmatism ......................................................................................................... 6
  Outcomes ............................................................................................................ 7
PRACTICAL EXPERIENCE OF CHARTER AS IT HAS AFFECTED BEHAVIOUR OF PUBLIC AUTHORITIES (OTHER THAN IN LITIGATION) ....................................................... 7
  Systemic recognition of Charter rights .............................................................. 7
  Developing a culture of respect ......................................................................... 8
  Decision making under the Charter .................................................................. 8
SUBMISSIONS ABOUT PARTICULAR ASPECTS OF THE CHARTER ..................... 8
THE INTERVENTION FUNCTION .............................................................................. 8
SECTION 32 – THE INTERPRETATIVE OBLIGATION .................................................. 10
  Introduction ...................................................................................................... 10
  Reference to international authorities ............................................................. 10
  Preservation of validity ..................................................................................... 11
  Interpretation obligation is still in transitional phase ....................................... 11
  Comment ........................................................................................................... 12
  Background of the ordinary common law principles ....................................... 12
  Assessment of s 32(1) ....................................................................................... 13
  Advantages of a legislative catalogue of specific rights .................................... 13
SECTION 38 – OBLIGATIONS OF PUBLIC AUTHORITIES ................................. 13
REMEDIES UNDER THE CHARTER ......................................................................... 15
  What legal redress is available under the Charter? ......................................... 15
RESOURCE ALLOCATION IN RELATION TO LITIGATION .................................... 17
ATTACHMENT A ........................................................................................................ 20
  Examples of Consideration of Section 32 ........................................................ 20
  Endorsement of Drivers Licence under the Transport Act ............................... 20
  Exception from operation of the Equal Opportunity Act .................................. 21
  Application for Child Care as a result of Motor Vehicle Accident .................. 22
  Supervised Treatment Order under the Disability Act .................................... 23
  Application under FOI ....................................................................................... 23
  Extended Supervision Order under Serious Sex Offenders Monitoring Act .... 24
  Right to a Fair Hearing under the VCAT Act .................................................... 24
  Application of the Charter in a Planning Context .............................................. 24
  Victims of Crime application under the Criminal Injury Compensation Act .... 25
INTRODUCTION

1. Consistently with the predominant experience and expertise of its members as participants in the litigation aspect of the legal system, the Victorian Bar’s submission focuses on terms of reference 4 and 5(c),(d) and (e) and 7. Those terms of reference are:

"4. Whether the Charter should include further provisions with respect to legal proceedings that may be brought or remedies that may be awarded in relation to acts or decisions of public authorities made unlawful by the Charter.

5. What have been the effects of the Charter Act on

(c) the provision of services and the performance of other functions by public authorities;

(d) litigation and the roles and functioning of courts and tribunals

(e) the availability to Victorians of accessible, just and timely remedies for infringements of rights.

7. What options are there for reform or improvement of the regime for protecting and upholding rights and responsibilities in Victoria;"

2. The Victorian Bar (the Bar) considers it is perhaps uniquely placed to inform the Review about the way the Charter is operating in courts and tribunals, and in other areas related to litigation such as legal advice work because its members see the Charter’s operation from many different perspectives, depending on which clients they are briefed by.

EXECUTIVE SUMMARY AND FOCUS OF SUBMISSION

3. In summary, the Bar makes the following recommendations, discussed in further detail below.

(a) The Government should promote further training and education of public authorities in the Charter. Training and education has and will continue to promote a greater understanding of the human rights of individuals with whom public authorities engage and interact. It will also encourage better decision making processes, and therefore enhance the protection of public authorities from successful challenges.

(b) The intervention functions of the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) and the Attorney-General in ss 40(1) and 34(1) of the Charter should be retained. The Bar considers that the intervention function is playing a critical role in the development of a coherent and principled Charter jurisprudence in Victoria. There are many cases in which the Supreme Court has been assisted by the intervention of either the Attorney-General or the VEOHRC, or both. The Bar therefore considers that it is imperative that the intervention function be retained, and that adequate funding is made available, to the VEOHRC in particular, for that role to continue.

(c) In relation to s 32 of the Charter, the Victorian Government should wait for the High Court’s decision in R v Momcilovic before considering any changes to that provision. Section 32(1) provides a valuable addition to the current interpretative obligations for those bound by the law and those interpreting it.

(d) Section 38(1) of the Charter should be retained, as it promotes thorough and rights compliant decision making processes. Further, the emphasis on taking human rights into consideration
encourages dialogue between public authorities and individuals, which in turn, may result in the resolution of potential disputes, thus avoiding unnecessary litigation.

(e) Consideration should be given to setting aside a pool of funds in order to ensure access to pro bono counsel is not the principal way in which people are represented in litigation where there is a serious Charter issue to be heard and determined. Whilst the Bar expects pro bono representation by barristers to continue to play an important part in Charter litigation, to assume its continued availability at the present high level is unwise and may undermine the efficacy of the Charter.

PRACTICAL EXPERIENCE OF CHARTER AS IT HAS BEEN USED IN LITIGATION IN COURTS AND TRIBUNALS

4. The Bar's practical experience of the operation of the Charter supports the following conclusions about its effect on litigation, courts and outcomes.

No flood of litigation

5. The Charter has been invoked in diverse factual and legal contexts, but most frequently in cases concerning public housing and homelessness, and in criminal matters. Those on whose behalf the Charter has been raised, include the most vulnerable (those at risk of homelessness, mental health patients, criminal accused). Early cases were concerned with the application of the Charter and construction of its transitional provisions.\(^1\) Decided Charter cases are relatively few in number. There is no evidence of a flood of claims. Consideration of Charter issues has been supported in large measure by the assistance of pro-bono counsel.\(^2\)

Courts assume a conventional role

6. Courts have applied conventional judicial methods to interpret and apply the Charter. In particular:

(i) In R v Momiclovic\(^3\) the Court of Appeal decided that s 32(1) was not intended to create a "special" rule of interpretation requiring the court, where necessary, to depart from the meaning of statutory provisions which would have been arrived at by ordinary principles of interpretation. In Krychevsky,\(^4\) decided earlier, Bell J took the contrary view. The result was different in each case, but in each case the decision was reached by the court (or tribunal) construing Parliament's intention from the language of the Charter. In each case it was expressly recognised that, whether or not Parliament had in fact intended to confer on the court a remedial interpretive power (and obligation), the court's role is to interpret, not to legislate.\(^5\) In other words, the Charter has not produced anything but an orthodox approach to the Court's task of statutory interpretation.

(ii) Courts have consistently recognised the Charter as affirming the existing fundamental common law presumption against interference with rights.\(^6\)

(iii) The application of the Charter by courts and tribunals has been strongly governed by the facts, evidence and terms of the statutory provisions under consideration. It is the Bar's experience that there is no particular enthusiasm amongst the Courts, and rightly so, to raise or examine Charter issues unless they are necessary for the proper resolution of a particular proceeding. Indeed, it is often the case that judges are preferring not to decide a case on a Charter ground if there is a non-

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1 See R v Williams (2007) 16 VR 168
2 Resources are considered at paragraphs 72-80 below.
3 [2010] 265 ALR 751, on appeal before the High Court, reserved
4 [2009] VCAT 646
5 Momiclovic at 114-116; Krychevsky at 216-218
Charter ground available. This cautious approach is understandable while Charter jurisprudence remains embryonic.

(iv) The following cases are illustrative.

(v) *Kracke v Mental Health Review Board & Ors* 7 concerned a mental health patient who had been subject to involuntary treatment orders, without those orders having been reviewed by the Mental Health Review Board (MHRB) as required by law. Mr. Kracke complained that the failure of the board to review his involuntary treatment within the required time meant that the orders were void, and sought a declaration that his human rights had been breached. The VCAT held that Mr. Kracke's right to a fair hearing had been breached and made a declaration to that effect. The VCAT held, however, that the continuation of an involuntary treatment order under the *Mental Health Act 1986* (Vic) was not made contingent on a review, and that it was not consistent with the purposes of that Act for treatment orders to be rendered invalid in that way. In *Kracke v Mental Health Review Board (No.2)* 8 the VCAT found that Mr. Kracke's human rights were engaged by the decisions of the MHRB. However, having found the medical evidence as to the necessity and effects of his treatment unequivocal, the VCAT decided that the involuntary treatment given under law had been demonstrably shown to be medically necessary and proportionate to Mr. Kracke's needs, and therefore compatible with his human rights.

(vi) In *Castles v Secretary to the Dept of Justice* 9 the plaintiff sought orders permitting her to continue IVF treatment whilst imprisoned. The court decided that on proper construction of the *Corrections Act 1986* (Vic), IVF treatment was both reasonable and necessary for the preservation of Ms Castles' health and that she therefore had a right to such treatment. Having regard to the evidence about the strain on resources that permitting treatment of Ms Castles in Melbourne would cause, the court decided that the right to treatment did not include treatment at the Melbourne clinic where Ms Castles had been previously treated. The court decided the principal issues on the basis of the *Corrections Act*, but was confirmed in its interpretation of the Act by consideration of the right of prisoners under s 22(1) of the Charter to be treated with humanity and respect to their human dignity. In construing the scope and meaning of Charter rights (on the question of the omission of the right to found a family) the court paid particular regard to the statements by the legislature as to parliament's intention.

(vii) In *XYZ v Victoria Police* 10 the VCAT considered the impact of the Charter right to freedom of expression on requests for documents made under the *Freedom of Information Act 1986* (Vic). The VCAT held that the right to freedom of expression (which can be subject to reasonable, proportionate limitations) incorporates a positive right to obtain access to government held documents, however the scheme of the FOI Act was not inconsistent with freedom of expression – the legislation was of itself protective of human rights.

(viii) In *Re Application under the Major Crime (Investigative Powers) Act 2004* 11 the court considered the relationship between the powers of investigation of organized crime offences contained in the *Major Crime (Investigative Powers) Act 2004* and rights under the Charter to a fair hearing and not to be compelled to testify against oneself or to confess guilt. The Act permitted persons charged with an offence to be compelled to give evidence and abrogated the privilege against self-incrimination, but did not protect against derivative use of evidence obtained. Having analysed at length the nature of

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7 [2009] VCAT 646
8 [2009] VCAT 1548
9 [2010] VSC 310
10 [2010] VCAT 256
11 [2009] 24 VR 415
the privilege against self-incrimination as a “deep-seated fundamental common law right” and construing the Charter by reference to “ordinary principles of statutory construction”. Warren CJ decided that the Act limited the Charter rights. On the question of whether the limitation was demonstrably justified by reference to s 7(2) of the Charter, the court considered that cogent and persuasive evidence was required. No evidence on the proportionality of the limitation was presented by the police. The court found, in those circumstances, that the limitation was purposeful but more drastic than was justified. In the result (pre-Momcilovic) the court interpreted the legislation by reading it to require a form of derivative use immunity less than absolute immunity. That reading would, the court considered, both permit interrogation and uphold the Charter rights.

Educative Effect of the Charter

7. As the Court of Appeal said in Momcilovic, it is significant that Parliament has, in emphatic terms, embraced and affirmed the “powerful presumption” against interference with rights. The presumption is “no longer a merely a creature of the common law but is now an expression of the ‘collective will’ of the parliament.” The existence of the Charter has positively assisted consideration by courts of existing law. Castles is one example. DPP v Pottinger is another. In that case the Crown applied for an extension of time for the holding of a special hearing under s 371 of the Criminal Procedure Act 2009, permitting a child complainant in a sexual offence case to give evidence which would be recorded and later played to a jury. The County Court considered that s 17 of the Charter (the right of children to protection of their best interests) by application of s 32 was a factor (together with others) that supported the grant of an extension, which was permitted in exceptional circumstances and when the court considered it interests of justice. This “galvanizing and legitimizing effect” has also been experienced by numerous counsel acting in matters which, Charter rights having been raised substantively, have resolved without the need to litigate.

Pragmatism

8. Consideration of Charter questions in litigation has frequently been resource intensive. However pragmatism is also evident. In Director of Housing v Sudi (Residential Tenancies) [2010] VCAT 328 the position of the Director of Housing was that human rights questions arising under the Charter were not justiciable in VCAT. The VCAT disagreed, finding that it had the jurisdiction, expertise and procedures for adjudicating Charter issues and should resolve them if it can properly do so when they legitimately arise. The VCAT’s approach in Sudi avoids the undesirable consequences of fragmentation of proceedings and impeding access to justice for people who may simply not have the means or wherewithal to seek an adjournment of the proceeding and take their disputes to the Supreme Court. That approach is complemented by the observations of Emerton J in Castles, that “the consideration of human rights is intended to become part of decision making processes at all levels of government. It is therefore intended to become a "common or garden" variety activity for persons working in the public sector, both senior and junior”, and therefore that the consideration of human rights in accordance with the Charter should not be “scrutinized over-zealously by the courts.” Again, her Honour’s approach reflects a restrained and

12 At [42].
13 At [50].
14 At [104].
15 [2010] VCC
17 Resources are considered in section X.
18 The Director of Housing appealed VCAT’s decision, and the matter is currently reserved for judgment before the Court of Appeal.
19 [2010] VSC 310 at [185].
20 [2010] VSC 310 at [185].
incremental attitude to the application of the Charter, and the Bar supports such an approach as Charter jurisprudence is developed.

Outcomes

9. As to outcomes for litigants:

(i) Counsel appearing in cases in which the Charter has been raised, but which have been decided favourably to applicants on other grounds, describe the effect of the Charter as powerfully educative. That effect is not readily quantifiable but is nevertheless real.

(ii) The effect of Momcilovic is to constrain the remedial effect of the Charter (to litigants) on the interpretation of legislation. For example, Momcilovic may not permit the relief which was previously given in Re Application under the Major Crime (Investigative Powers) Act 2004.

(iii) Declarations of inconsistency serve an important role in the ‘dialogue’ between the Court and Parliament, which is one of the aims of this particular Charter model, but they are unlikely, in an immediate way, to vindicate the rights of plaintiffs. The consequences of a declaration are not a matter for the courts.

(iv) Section 38 (discussed below) is a more potent source of redress, where rights are affected by the decisions of public authorities. Director of Housing v Sud[21] is a case in point. As discussed below, generally speaking s 39 is very restrictive on the capacity of the public to enforce such breaches.[22]

(v) As the case of Kracke demonstrates, because of the particular facts and evidence relevant to the relief sought by the affected person, favourable legal determinations under the Charter, after the devotion of considerable resources, may not necessarily avail the applicant an immediate sense. However, the Bar acknowledges that there can be changes ‘behind the scenes’ so to speak (for example, in terms of the treatment of a particular patient) and also that patients can feel vindicated by a declaration, even if there is no immediate practical change in their conditions. Declaratory relief can also modify the behaviour of those subject to the declaration on an ongoing basis and outside the particular piece of litigation. Because Charter arguments can consume significant time and resources, careful consideration of the evidence and clear articulation of the nature of the breach is warranted before litigants who may have meager resources and limited time, should be encouraged to decide to raise Charter claims. That reality is, of course, also commonly encountered by litigants in non-Charter cases.

PRACTICAL EXPERIENCE OF CHARTER AS IT HAS AFFECTED BEHAVIOUR OF PUBLIC AUTHORITIES (OTHER THAN IN LITIGATION)

10. The experience of counsel has shown that the Charter’s enactment has resulted in positive change in the conduct of public authorities. Policies have been adapted to include human rights consideration, decisions are made having regard to the Charter, and the Charter has directly improved interactions with members of the public.

Systemic recognition of Charter rights

11. Although it is not yet universal, members of counsel have observed that many public authorities have incorporated the Charter into their policies and practices. Given that an authority’s policies will often be a staff member’s primary source of guidance in dealing with the public, the incorporation of the Charter into

[21] (Residential Tenancies) [2010] VCAT 328
[22] This comment subject to what is said in submissions about s.39
policy documents has generated real and practical advances in the recognition and protection of human rights in Victoria.

12. Public authorities have sought advice from counsel on compliance with the Charter at a systemic level, as well as in the making of individual decisions. Many public authorities have expressed a genuine desire to ensure that Charter-protected rights are not merely given lip service, but are genuinely considered.

13. The updating of policies to include mandatory consideration of human rights has been complemented by internal training to assist staff to recognise when human rights are involved in the making of a decision, and to take those rights into account.

Developing a culture of respect

14. A further benefit of this training has been the improvement of relationships between certain public authorities and the members of the public with whom they have contact. Education on human rights is reported to have significantly reduced derogatory and discriminatory treatment of clients of certain public agencies, and increased the level of dignity accorded to some marginalized people.

Decision making under the Charter

15. To the knowledge of counsel, at least one public authority has developed a template to ensure that matters that might otherwise only have been informally considered are formally taken into account in the making of a decision. The Bar expects other public authorities have done the same. This ensures that a rights-compliant approach is actively taken in making decisions, and also provides evidence of such compliance in the event that a decision is challenged. These proactive and protective functions are complementary.

16. Again, not universally, but many public authorities have been genuinely and seriously considering human rights when making decisions.

17. Although individuals at public authorities have expressed approval of the Charter because of the protection of rights that it offers, some have expressed a desire for greater education and training. Such training will no doubt promote greater understanding of human rights and increase the benefits set out above. It should also enhance the protection from successful challenges which comes with better decision making processes.

SUBMISSIONS ABOUT PARTICULAR ASPECTS OF THE CHARTER

THE INTERVENTION FUNCTION

18. The Charter confers a right on each of the VEOHRC and the Attorney-General to intervene in proceedings raising Charter issues. Those rights are found in ss 40(1) and 34(1) of the Charter respectively, which provide that the VEOHRC and the Attorney-General:

   may intervene in, and may be joined as a party to, any proceeding before any court or tribunal in which a question of law arises that relates to the application of this Charter or a question arises with respect to the interpretation of a statutory provision in accordance with this Charter.

19. Section 35 of the Charter requires the VEOHRC and the Attorney-General to be notified of cases before superior Courts that raise Charter issues. The experience of the Bar has been that, after some initial problems caused by lack of awareness, that requirement is now generally understood and that it is taken into account as part of the Court timetable before matters are set down, with the result that it does not operate in practice to delay the progress of matters to a full hearing. Both the Attorney and the
Commission are, in the Bar’s experience, concerned to ensure their respective interventions do not cause delay in any given proceeding. In addition to facilitating the exercise of the intervention power, the notice requirement has served a useful role in requiring parties to identify and elucidate Charter matters at an early stage in litigation.

20. The Bar considers that the intervention function is playing a critical role in the development of a coherent and principled Charter jurisprudence in Victoria. It does so because to date the intervention role has operated in practice to ensure that in most cases raising significant Charter issues the courts have the assistance of well-resourced and expert parties in resolving those issues. That assistance is particularly important in circumstances where otherwise the resources of parties are uneven, while the Courts are still becoming familiar with the Charter, and where there is not yet a substantial body of Victorian jurisprudence to provide guidance.

21. The intervention function is particularly critical in the early development of Charter jurisprudence because, in the absence of relevant Victorian authorities, it is often necessary to consider the approach that has been taken to similar human rights issues in comparable jurisdictions. That necessity was envisaged in s 32(2) of the Charter. However, the identification of relevant comparative materials can require both time and expertise, and the presence of interveners can help to ensure that the Court - and the parties - are made aware of all relevant material in circumstances where the parties may not have the time, funding or expertise to do so.

22. Interveners have played a major role in most of the major cases that have been decided concerning the operation of the Charter. It is common for both the Attorney-General and the VEOHRC to intervene, frequently (although not invariably) in support of opposing parties.

23. For example, in Mamichovic, which was argued before the High Court in February 2011, both interveners played a central role. Rather than making her own submissions on the Charter, the Appellant adopted the submissions concerning the operation of the Charter that were made by the VEOHRC, while the First Respondent, the Director of Public Prosecutions, substantially adopted the submissions made by the Attorney-General concerning the operation of the Charter.

24. There are many cases in which the Supreme Court has been assisted by the intervention of either or both the Attorney-General or the VEOHRC. For example, the Attorney-General has intervened in a series of cases concerning the Serious Sex Offenders (Detention and Supervision) Act 2009 (Vic), and in each of those cases the Supreme Court has drawn heavily on the expertise of the Attorney-General in resolving the Charter issues that have been raised. The intervention function has proved valuable even when the State is separately represented, as for example in cases involving the Director of Public Prosecutions. For example, in DPP v Ali (No 2),23 the Attorney General intervened and supported the outcome sought by the DPP, but made submissions on the operation of the Charter addressing matters that had not been addressed by the DPP. Those submissions were accepted and adopted by the Court.

25. The VEOHRC has played a similar role. For example, in Re Application under the Major Crime (Investigative Powers) Act 2004,24 the Chief Justice noted that in that case there was no contradictor in the true sense, but that the VEOHRC had intervened and made submissions addressing relevant international jurisprudence. Those submissions were, to a large extent, adopted and applied in that case. Likewise, in Castles v Secretary to the Department of Justice,25 Emerton J referred to the “extensive and helpful submissions on the content of the rights in ss 13(a) and 22(1) of the Charter” that had been made by the VEOHRC, and noted that those submissions had been adopted in their entirety by the Applicant.

24 [2009] 24 Wi 415 at [34].
25 [2010] VSC 310 at [34]-[55].
26. Both Castles and Momcilovic illustrate an approach that has become common in cases involving the Charter, whereby interveners make impartial submissions concerning the relevant human rights principles and international authorities, and the parties adopt some or all of those submissions, make any different or additional submissions on principle that they consider necessary, and apply the identified principles to the facts. That practice has ensured that interventions have not unnecessarily extended the length of hearings, that Charter issues have been properly canvassed, and that parties can focus their resources effectively.

27. Many other examples of interventions that have had an important influence on cases in the Supreme Court could be given. Furthermore, the intervention role of both the Attorney-General and the VEOHRC has also been exercised to assist in the resolution of complex Charter issues in the County Court and in VCAT.27

28. In light of the above, the Bar considers that it is imperative that the intervention function of both the Attorney-General and the VEOHRC be retained, and that adequate funding is made available, to the VEOHRC in particular, for that role to continue.

29. However there are two aspects of the operation of the intervention functions, which could benefit from some improvement or modification. First, it is important that interveners give proper notice of the arguments they propose to make and the authorities on which they propose to rely (most of which are comparative and with which other counsel are not necessarily familiar). In the Bar’s experience, this does not always occur, particularly in the case of the Attorney General. Second, there is a tension evident in proceedings where the State or an emanation of the State is a party, and the Attorney exercises his intervention function. The result is that there are then two sets of arguments being put essentially on behalf of the State, and those arguments are not always consistent. Generally, the Bar’s view is that the State should be capable of putting one view to the Court in any given case, including on Charter issues and this may simply mean a revision of briefing practices to ensure the State is represented by counsel capable of putting both the Charter and non Charter arguments in any given case.

SECTION 32 – THE INTERPRETATIVE OBLIGATION

Introduction

30. Section 32 of the Act has three discrete aspects:

(i) a direction to Courts and tribunals as to how to interpret all statutory provisions (s 32(1));

(ii) statutory approval of reference to international law and to overseas and interstate courts for the purpose of statutory interpretation (s 32(2)); and

(iii) protecting the validity of a statutory provision even if it is incompatible with human rights (s 32(3)).

31. We consider each of these separately, dealing first with subsections (2) and (3), as these are not controversial.

Reference to international authorities

32. Section 32(2) authorises Courts and tribunals to consider international law and the judgments of

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28 During the course of oral argument in the special leave application in Momcilovic, French CJ commented that it was "curious" that the Crown and the Attorney were putting different arguments; [2010] HCA Trans. 227.
domestic, foreign and international courts and tribunals relevant to a human right in the course of interpreting statutory provisions.

33. This is declaratory of the common law, and is orthodox, sensible and conventional. As early as Polites v The Commonwealth (1945) 70 CLR 60, the High Court accepted that all statutes should be interpreted, in cases of doubt, so as to accord with customary international law. This approach has also long been adopted by the Courts as the usual position for the interpretation of legislation that is based on an international treaty (as the Charter is on the ICCPR): James Buchanan & Co Ltd v Babco Forwarding & Shipping (UK) Ltd [1978] AC 141 and Fothergill v Monarch Airlines Ltd [1981] AC 251 at 276, Koowarta v Bjelke-Petersen (1982) 153 CLR 168, SS Pharmaceutical Co Ltd v Qantas Airways Ltd [1991] 1 Lloyd’s Rep 288 (NSW CA) and Commonwealth v Bradley (1999) 95 FCR 218 (FCA FC), Minister for Immigration and Ethnic Affairs v Tech (1995) 163 CLR 273 at 287–8; Thomas v Mowbray (2007) 233 CLR 307 at [208], [380].

34. The Bar submits that s 32(2) requires no amendment.

Preservation of validity

35. Section 32(3) has a legitimate place in a dialogue model of human rights legislation such as the Charter, and the Bar accepts its presence is appropriate in this model.

Interpretation obligation is still in transitional phase

36. Finally, s 32(1) directs Courts and tribunals to interpret statutory provisions in a way that is compatible with human rights so far as it is possible to do so consistently with the purpose of those provisions.

37. A provision of this kind is found in other common law human rights instruments (e.g. in UK and NZ). Nevertheless, the meaning of s 32(1) has proved difficult, with the result that the meaning effect of s 32(1) of the Charter remains currently in a transitional phase, with Mnjimava still pending in the High Court on the precise scope of s 32(1).

38. The Bar recommends that the Victorian Government should wait for the High Court’s decision before considering any changes to s 32.

39. Being a new interpretative obligation for Australian jurisprudence, several discrete legal questions remain to be resolved, (whether in Mnjimava or otherwise):

   (i) What does “interpretation” (i.e. “must be interpreted”) mean? Specifically does the section require (or permit) the employment of the interpretative techniques of “severance, reading in, reading down or striking out”29 in order to make a particular statutory provision that might otherwise be incompatible, compatible with human rights?

   (ii) What does “compatible with human rights” mean for the purposes of s 32? Specifically, does the section require one to examine whether the limitation placed on human rights by a statutory provision is able to be justified as reasonable under s 7(2) or does s 7(2) have no role to play in the interpretative exercise and only become important when and if the Supreme Court is considering

29 See for example RJE v Secretary to the Department of Justice [2008] VSCA 265 per Nettle JA (minority judgment) referring to Poplar Housing and Regeneration Community Association Limited v Damaghue (2002) QB 48; HKSAR v Wai and Man (unreported, Final Court of Appeal of the Hong Kong Special Administrative Region 21 August 2006) [2006] HKCFA 84 per Sir Anthony Mason NJH.
making a declaration of inconsistent interpretation under s 36 that a particular statutory provision cannot be interpreted consistently with a human right.\(^3\)

(iii) What does the phrase “So far as it is possible to do so” mean? This question is related to both i. and ii. It raises the question of what is “possible” in regard to the exercise of interpretation and also how “far” one should go in reading legislation to promote and protect particular human rights.

40. The question of the scope of any retrospective operation of the interpretative requirement of s 32 (which applies to all statutory provisions whenever an Act may have been enacted or a subordinate instrument made)\(^3\) was addressed by Kracke v Mental Health Review Board [2009] VCAT 646 at [340] per Bell J.\(^3\) In that case VCAT decided that s 32 does not apply to the operation of past legislation on past events so as to alter settled legal relations arising from them.

Comment

41. That these questions of meaning have arisen with respect to s 32(1) does not represent anything unusual for a piece of legislation.

42. The introduction in the Acts Interpretation Acts of the Commonwealth and various States and Territories of purposive provisions such as s 35 of the Interpretation of Legislation Act 1984 (Vic) after they were enacted raised not dissimilar issues concerning the scope of the provision, including whether there needed to be any ambiguity present before recourse could be had to extrinsic material.\(^3\)

Background of the ordinary common law principles

43. The scope of s 32(1) is to be understood against the background of the common law presumptions underpinning statutory construction. One such presumption requires that legislation is to be interpreted in conformity with fundamental rights.

44. The importance of this principle has been given significant attention in decisions of superior courts over the past decade. In Plaintiff S157/2002 v The Commonwealth (2003) 211 CLR 476, Gleson CJ held:

“[C]ourts do not impute to the legislature an intention to abrogate or curtail fundamental rights or freedoms unless such an intention is clearly manifested by an unmistakable and unambiguous language. General words will rarely be sufficient for that purpose. What courts will look for is a clear indication that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment. ... in the absence of express language or necessary implication, even the most general words are taken to be ‘subject to the basic rights of the Individual’.”\(^3\)

45. In Coco v R (1994) 179 CLR 427 at 437-438, Mason CJ, Brennan, Gaudron and McHugh JJ explained that:

\(^{39}\) Section 36(2) relevantly provides:
(2) Subject to any relevant override declaration, if, in a proceeding the Supreme Court is of the opinion that a statutory provision cannot be interpreted consistently with a human right, the Court may make a declaration to that effect in accordance with this section.

\(^31\) See s 1(2) and s 49(1).

\(^32\) Which conclusion was not disturbed by the Court of Appeal’s disapproval of other parts of the judgment in Monicov regarding the proper approach to interpretation required by s 32.

“curial insistence on a clear expression of an unmistakable and unambiguous intention to abrogate or curtail a fundamental freedom will enhance the parliamentary process by securing a greater measure of attention to the impact of legislative proposals on fundamental rights”.

46. The Victorian Court of Appeal remarked in R v Monicolovic [2010] VSCA 50 that “the existing framework of interpretative rules, including of course the presumption against interference with rights” determines what it is possible for a court to do in determining the legal meaning of a statute. Referring to the common law’s presumption against interference with rights, the Court noted that: “That is a powerful presumption, as Gleeceon CJ made clear in Plaintiff S157/2002 v The Commonwealth”.

47. The Victorian Court of Appeal also stated:

“As the above passage makes clear, the presumption does not depend for its operation on the existence of any ambiguity in the statutory language.”

Assessment of s 32(1)

48. The scope of s 32(1) is still in transition for the reasons outlined above, and its impact is not yet clear. The Bar considers that the section provides a valuable addition to the current interpretative obligations for those bound by the law and those interpreting it.

Advantages of a legislative catalogue of specific rights

49. An advantage of a legislative catalogue of specific rights to which the Parliament requires particular attention be paid when interpreting legislation is straightforward. The list is contained in domestic Victorian legislation and the rights are articulated in language that the Parliament has endorsed.

50. An express statement of rights promotes clearer articulation of human rights arguments and clearer thinking.

51. It is to be borne in mind that State legislative drafting after 2005 should, if the Parliamentary processes have been followed, already have taken human rights into consideration.

52. Examples of consideration of s 32 are given in Attachment A to this submission. They demonstrate that the interpretative obligation has been used to strengthen the protection offered by some statutory provisions, and to limit the adverse effects of others, but those uses have not been radical or far reaching. An incremental development is observable, and this is to be expected with a new interpretative obligation such as s 32(1).

SECTION 38 - OBLIGATIONS OF PUBLIC AUTHORITIES

53. Section 38 applies to public authorities, which includes government departments, city councils, the VCAT when it is exercising its review jurisdiction, and in some circumstances, social and transitional housing.

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36. See, for example, Smith v Hobsons City Council [2010] VCAT 665.

37. See Knapke v Mental Health Review Board [2009] VCAT 646 at [232]. Other examples are Department of Human Services & Department of Health (Anti-Discrimination Exemption) [2010] VCAT 1116 (29 June 2010); Wesley College (Anti-
54. Arguably, s 38 of the Charter has had the greatest impact upon cases involving public housing, and therefore has arisen in cases where the Director of Housing is a party in the Residential Tenancies List at VCAT.

55. In the decision of Director of Housing v Sudil, Justice Bell found that the VCAT had the jurisdiction to determine the lawfulness or otherwise of an application made by a public authority to the VCAT. According to the reasoning in Director of Housing v Sudil, the VCAT may determine whether a public authority, in deciding to file an application with the VCAT, acted in a way that was compatible with a human right, or gave proper consideration to a human right. The VCAT has since followed the decision of Director of Housing v Sudil, although as earlier observed an appeal from Justice Bell’s decision is currently reserved for judgment before the Court of Appeal.

56. Section 38 has been raised by public housing tenants in response to applications by the Director of Housing to evict them following the issuing of a Notice to Vacate. In practice, respondents have been alleging that the Director of Housing, in filing an application, has breached its obligations under s 38(1) of the Charter, without further particulars or identification of any non-compliance. The relevant human right is taken to be engaged by the decision of the Director to issue a Notice to Vacate. Once a breach of s 38 is alleged, the Director of Housing has been required to establish that, in making the decision to issue a Notice to Vacate, it has complied with its obligations pursuant to that section.

57. In cases such as Director of Housing v TK [2010] VCAT 1839 (16 November 2010) and Director of Housing v KI [2010] VCAT 2026 (16 December 2010), the Director of Housing has led evidence that established compliance with its obligations under s 38. This evidence has been given by Housing Officers from the relevant Offices of Housing at the same time as giving evidence in support of the substantive application. In these cases, the Director of Housing witnesses gave evidence of its policies and processes, and demonstrated that the tenant’s human rights were considered in the decision-making process.

58. Counsel involved in these cases have found that the public authorities are becoming more familiar with the Charter, and with the obligations under s 38. The benefits have been apparent in the increased awareness of public authorities, at all levels, of human rights, and an increased level of engagement with individual members of the public and their individual needs. Whilst being educated about the relevant human rights, the consideration of the relevant human rights is becoming a normal part of decision making processes. With public authorities and the VCAT becoming increasingly more familiar with the Charter, counsel have also found that less time is being spent on the Charter arguments and evidence.

59. Further, the decisions reflect that allegations of a breach of s 38 against the Director of Housing have not resulted in more tenants successfully defending applications brought pursuant to the Residential Tenancies Act 1997. Anecdotally it has resulted in more thorough decision making, and a greater emphasis on the resolution of potential disputes without recourse to the Tribunal or courts.

60. The decision of Castles clarified, to some extent, the role of the Charter in the decision making process of public authorities, in particular, the requirement to give proper consideration to human rights. As Emerton J states at [185]:

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40 See Director of Housing v Turcon [2010] VCAT 328 (31 March 2010) (currently on appeal); Director of Housing v TK [2010] VCAT 1839 (16 November 2010) and Director of Housing v KI [2010] VCAT 2026 (16 December 2010).
"...The Charter is intended to apply to the plethora of decisions made by public authorities of all kinds. The consideration of human rights is intended to become part of decision-making processes at all levels of government. It is therefore intended to become a 'common or garden' activity for persons working in the public sector, both senior and junior. In these circumstances, proper consideration of human rights should not be a sophisticated legal exercise. Proper consideration need not involve formally identifying the 'correct' rights or explaining their content by reference to legal principles or jurisprudence. Rather, proper consideration will involve understanding in general terms which of the rights of the person affected by the decision may be relevant and whether, and if so how, those rights will be interfered with by the decision that is made."

61. Consequently, in order to establish that proper consideration was given to a relevant human right, a decision maker "must do more than merely invoke the Charter like a mantra", but it will be sufficient in most circumstances to show that they "... seriously turned his or her mind to the possible impact of the decision on a person's human rights and the implications thereof for the affected person, and that the countervailing interests or obligations were identified."41

62. Where a public authority could not have acted any differently, s 38(2) is being applied.42

63. Section 39 of the Charter does not of itself create an independent cause of action. The decision of Hollingsworth J in Sabet v Medical Practitioners Board of Victoria [2008] VSC 346 at [104] made it clear that the avenue for pursuing a relief or remedy pursuant to s 38 of the Charter, is through the ordinary administrative law avenues of merits review or judicial review of the relevant administrative decision.43

64. The Bar sees the justiciability of public authorities' compliance with human rights obligations as an important component of a legal system which takes human rights seriously. Section 38 should be retained, and strengthened by allowing for a free standing cause of action in relation to breaches of public authorities' obligations.

65. However, the Bar recommends that consideration be given to introducing more clarity around the definition of public authority within the Charter. There remains considerable uncertainty about what kind of institutions may be caught by the definition – Universities are an obvious example, as bodies established by statute for purposes which clearly include public purposes, yet the question whether such bodies are bound, amongst other things, by s 38 of the Charter is unclear. It is unsatisfactory that there be a lack of clarity around these definitions.

**REMEDIES UNDER THE CHARTER**

What legal redress is available under the Charter?

66. *The Charter is correctly described as fitting the 'dialogue model' because its focus is on "mechanisms that promote dialogue, education, discussion and good practice" not on litigation or legal remedies. This is reflected in the facts that:*

(i) the Charter does not provide an independent cause of action for a breach of Charter rights and expressly excludes any right to damages arising from the Charter; and

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41 [2010] VSC 310 at [186].
42 See Casserly v Director of Public Transport [2011] VCAT 98 (27 January 2011) at [36].
43 See, for example, Director of Housing v IF (Residential Tenancies) [2008] VCAT 2413 at [54].
there is limited legal redress available to those affected by breaches of Charter rights.\(^{48}\)

67. Where a Charter right is relevantly engaged, the following actions\(^{49}\) may be undertaken:

(i) a Court or Tribunal is obliged to interpret statutory provisions, so far as is possible to do consistently with their purpose, in a manner compatible with the human rights set out in the Charter at ss 7-27\(^{46}\);

(ii) the right to refer a proceeding or a question of law from a court or tribunal to the Supreme Court concerning statutory interpretation in accordance with the Charter\(^{49}\);

(iii) the right to seek a declaration of inconsistent interpretation\(^{52}\);

(iv) public scrutiny/justification: Parliament is obliged to scrutinise, explain and justify proposed legislation as to its compatibility with Charter rights\(^{35}\); the Minister must respond to declarations of inconsistent interpretation\(^{34}\); and the Attorney-General must table reports of the Commission\(^{35}\);

(v) the rights of intervention by the VEOHRO\(^{56}\) and the Ombudsman\(^{57}\);

(vi) the obligation on public authorities to act compatibly with the Charter\(^{59}\);

(vii) the right to "piggyback" on unlawfulness arising from the Charter as a further basis for relief or remedy arising from a non-Charter action\(^{60}\);

(viii) the right to seek other remedies in respect of a decision of a public authority including the right to seek judicial review of a decision\(^{60}\) or seek a declaration of unlawfulness and associated relief including an injunction, a stay or exclusion of evidence\(^{61}\).

\(^{47}\) See s 39(3) of the Act. See also Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic), p.28.


\(^{49}\) These are not strictly legal remedies but are methods by which the courts can give some effect to the Charter rights; see S and Evans C, "Legal redress under the Victorian Charter of Human Rights and Responsibilities" (2006) 17 PLR 264 at 270.

\(^{50}\) See s 32 of the Act. In A v Mominovic [2010] VSCA 50, the Court of Appeal held this task required the decision-maker to explore all possible interpretations of the relevant legislation in question and to adopt the interpretation that least infringes Charter rights and that s.32 is to be regarded as part of the rules governing statutory interpretation, not a special rule; at [35]. See also Cobaw Community Health Services v Christian Youth Camps Ltd [2010] VCAT 1613 where Judge Hampel interpreted the standing provisions of the Equal Opportunity Act in a manner that gave effect to the rights to equality and freedom from discrimination.

\(^{51}\) See s 33 of the Act. This requires an application by a party and a finding by the court or tribunal that such a referral to the Supreme Court is appropriate.

\(^{52}\) See s 36 of the Act. This must be followed by a written parliamentary response to the declaration by the relevant Minister: see s 37 of the Act. In R v Mominovic [2010] VSCA 50, the Court of Appeal made a declaration that s 5 of the Drugs, Poisons and Controlled Substances Act (Vic) 1981 could not be interpreted consistently with the presumption of innocence under s 25 of the Charter.

\(^{53}\) See ss 28, 30, 31.

\(^{54}\) S 37.

\(^{55}\) S 43.

\(^{56}\) See s 40 of the Act. In 2010, the Commission was notified on 59 occasions and intervened in 11 of these cases: see "Talking Rights 2010 report of the operation of the Charter of Human Rights and Responsibilities" published by the Victorian Equal Opportunity and Human Rights Commission and tabbed in the Victorian Parliament, p.51.

\(^{57}\) See s 47 Consequential Amendments Act. The Ombudsman may also investigate administrative actions which are incompatible with a Charter right; see Ombudsman Act 1973 (Vic) ss 2, 13(1A), 13A inserted by Charter Schedule 1.

\(^{58}\) See s 38 of the Act. To the extent that the public authority’s actions are not compatible with the Charter’s rights, its actions are unlawful. See, for example, Director of Housing v Sudd (Residential Tenancies) [2010] VCAT 328 where Bell J determined that the Director of Housing’s failure to justify its actions in seeking to evict a tenant meant that its application for a possession order was unlawful.

\(^{59}\) See s 39(1) of the Act; See also Explanatory Memorandum, Charter of Human Rights and Responsibilities Bill 2006 (Vic), p.28: Sabet v Medical Practitioners Board [2008] VSC 346 at [104] per Holingworth J.

\(^{60}\) See s 39(2)(a) of the Act which refers to the rights available under the Administrative Law Act 1978 and Order 56 of the Supreme Court Rules.
68. Only some of these avenues can lead to a positive outcome for the aggrieved\textsuperscript{63}. For the following reasons they are limited in both scope and enforceability and this creates barriers to effective and appropriate redress\textsuperscript{64}. First, the absence of a direct, stand-alone remedy means\textsuperscript{65} that the complainant must seek indirect avenues for relief or encourage intervention by a third party. Whilst it has been theorised that indirect use of the Charter in conjunction with other causes of action might lead to awards of damages\textsuperscript{66}, the Victorian Bar is not aware of any cases where this has occurred. On one view this is the clear intent of s 39(3). There is an obvious and unresolved tension between ss 39(1), (2), (3) and (4).\textsuperscript{67}

69. Second, the piggyback provisions under s 39(1) have been heavily criticised as unnecessarily complex and unworkable\textsuperscript{68}.

70. Third, the general interpretative mandate and the power to make declarations of inconsistent interpretation are subject to override provisions by Parliament\textsuperscript{69} and if Parliament’s attitude to compatibility is not strict, there is no real legal consequence for the legislation in question\textsuperscript{70}.

71. Fourth, despite the intention of the government when devising the Charter to focus on education andconciliation rather than litigation and damages, there is no complaints handling or conciliation function on the Human Rights Commissioner.\textsuperscript{71}

RESOURCE ALLOCATION IN RELATION TO LITIGATION

72. It is apparent from an examination of cases in which Charter issues have arisen in Victorian courts, that the Charter is becoming to bring human rights issues to the forefront of judicial determination in a wide variety of cases, civil and criminal. However, what is not apparent from the decided cases is that a substantial part of the burden of preparation of Charter issues is often carried by barristers who undertake work in Charter cases on a pro bono basis.

73. Whilst the Bar encourages barristers to provide pro bono assistance in meritorious cases, it would be unwise, when assessing the future of the Charter, to assume that the current level of pro bono support will be maintained longer term, particularly having regard to the complexity of Charter issues. Given the importance of the Charter to the wider recognition of human rights in legal proceedings, the Bar considers that, as part of the Charter Review, funding support for appropriate Charter cases should be investigated.

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\textsuperscript{63} See s 39(2)(b) of the Act; R v Upton [2005] ACTSC 52. In Re Gray [2008] VSC 4, Bongiorno J released a person on bail because of the failure of the Crown to meet its Charter obligations. See also Order 56 of the Supreme Court Rules which confers various powers on the Supreme Court in relation to different appeal proceedings. This might also be relevant to sentencing of offenders whose human rights have been breached: Sentencing Act 1991 (Vic) s 9(1)(a).

\textsuperscript{64} Particularly, those under s 38 of the Act.


\textsuperscript{66} Indeed, the express attempts to confine the relief available were intended to avoid a possible implication of a right to remedies as has occurred in New Zealand. See Victoria, Department of Justice, "Human Rights in Victorian: Statement of Intent, May 2005" reprinted as App B in Victoria, Human Rights Consultation Committee, Human Rights Consultation Committee: Rights, Responsibilities and Respect (2005), pp.144-146.


\textsuperscript{71} See s 29 of the Act.

74. To prepare this aspect of this submission, the Committee examined 30 cases decided either in the Supreme Court or the VCAT between 2008 and 2011, in which a Charter issue was raised. In some cases, it was the main issue the Court or the VCAT was called upon to resolve. Where possible, the barristers who appeared in the surveyed cases were asked to provide information about the work they had performed.

75. The following key points emerged from the survey:

(i) In most cases, Charter issues were raised by disadvantaged applicants. 71

(ii) In the vast majority of cases surveyed (26 out of 30), applicants who raised Charter issues were legally represented, in almost every case (24 out of the 26), by Counsel.

(iii) In more than half of the cases (16 out of the 30 cases), the party relying on the Charter was represented pro bono.

(iv) In more than half the cases surveyed, the applicant enjoying pro bono legal representation by Counsel was represented by more than one member of Counsel, in some cases, more than once by the same barrister or one of them. 72

(v) The preparation and presentation of Charter issues is often complex. The barristers who provided information reported high workloads associated with the preparation of the Charter aspects of a case. 73 Whilst the number of work hours varied considerably, no barrister who responded said the workload was minimal. A large amount of time was devoted to comparative law research and analysis, by which we mean the examination and analysis of decisions in other jurisdictions with analogous human rights laws.

76. From the case investigation, the following points can be made.

77. The Bar regards pro bono work as a critical way in which barristers can contribute to the social good by promoting and improving access to justice for disadvantaged members of the community. The high incidence of pro bono work in Charter cases suggests that individual barristers share the Bar’s view concerning the importance of access to legal representation.

78. The Bar also accepts that part of the explanation for the significant time taken to prepare Charter cases is the relative novelty of the Charter issues and their interaction with other laws. A body of case law is yet to fully emerge and as the local case law evolves, the Bar would expect that less time would need to be devoted to considering the case law in other jurisdictions. But this does not diminish the need for a substantial effort on the part of those preparing submissions on Charter issues. This is as it should be. The Charter is important. An appropriate level of effort should be devoted to its development in litigation.

79. However, the high reliance on pro bono assistance from the Bar in these cases, particularly on behalf of applicants, does concern the Bar Council. In most cases, the applicant was one with few resources,

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71 For example, the most numerous category of applicant (the mode number) was B. That category was public housing tenants.

72 For example, there were two proceedings in the cases surveyed of Castles v Secretary to the Department of Justice [2010] VSC, and appeals to the Court of Appeal from Director Housing v Sudi [2010] VCAT 328 and to the High Court from R v Momcilovic [2010 VSCA 50].

73 For example, one of the barristers surveyed estimated that each Charter right seriously in issue consumed between 10 and 15 hours. Another reported that in the 3 Charter cases in which he had appeared he had spent 40 hours, 20 and 15 hours respectively preparing the Charter aspects of each of the cases. He estimated that the Charter workload consumed 70%, 60% and 50% respectively of the preparation for the whole case. A workload of up to 40 hours was not uncommon, but was not at the upper end. One of those surveyed devoted 165 hours to a case in which the Charter issues predominated. Whilst he was unable to identify with the precision the number of hours consumed by the Charter issues his estimate was that it consumed two-thirds of the 165 hours. Yet another barrister devoted 102 hours to the preparation of submissions for a case that was mainly concerned with the Charter issues pressed by his client. The case ran for 4.5 days.
seeking access to and the vindication of the fundamental human rights to which the Charter gives effect. By contrast, a common respondent is a State agency, with intervention by the Attorney General and/or the VEOHRC, all of whom have access to resources, not only in the form of representation and funding, but by way of access to human rights information databases. Pro Bono assistance, whilst of obvious assistance to applicants in the cases examined, cannot be assumed, let alone guaranteed. A clear imbalance in the distribution of resources in Charter litigation exists between applicant and respondents. This is likely to impact on outcome in litigation in which Charter issues arise.

80. In these circumstances, the Bar recommends that the Charter Review give consideration to setting aside a pool of funds in order to ensure there is a more sustainable and stable means of obtaining access to the rights promised by the Charter in litigation where there is a serious Charter issue to be heard and determined.16 Whilst the Bar expects pro bono representation by barristers to continue to play an important part in Charter litigation, to assume its continued availability is unwise and may undermine the efficacy of the Charter.

In formulating this response on behalf of the Victorian Bar, the Bar Council has been assisted by the Victorian Bar Human Rights Committee, comprising Debbie Mortimer SC (Chair), Eliza Holt, Elizabeth Bennett, Peter Billings, Stephen Donaghue, Rosaline Gormov, Malcolm Harding, Simon Marks SC, Glen McGowan SC, Travis Mitchell, Lisa Nichols, Alexandra Richards QC, Toby Shnookal, Michael Stanton, Cam Truong, Kristen Walker, Peter Willis and Richard Wilson.

MARK MOSHINSKY SC  
Chairman  
Victorian Bar Council  
10 June 2011

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16 Charter issues are not raised exclusively by parties or an intervener. It is not uncommon for the court or tribunal to raise a Charter issue it wishes the parties to address by way of submissions. One example was Kortai v Minik and Minik [2008] VSC 103 at [5].
ATTACHMENT A

Examples of Consideration of Section 32

Endorsement of Drivers Licence under the Transport Act

1. In Director of Public Transport v XJF75 Ross J considered an appeal from a VCAT decision granting driver accreditation to drive a taxi under the Transport Act in circumstances where the applicant had killed his wife 20 years earlier when insane and was then released 13 years later. The Victorian Equal Opportunity and Human Rights Commission intervened to raise issues arising under the Charter. The case was determined after the decision of the Court of Appeal in Momcilovic. The human right claimed to be engaged was the right to equality, and His Honour indicated that although the contention that the interpretation of the statutory provision pressed by the Director was not without difficulty76 he was inclined to interpret protected rights broadly.77 However, His Honour rejected the interpretation of the legislation pressed by the Director on other grounds and, in addition, found there was no error of law in any event. In the result, the discussion of s 32 was no more than to succinctly restate the principles to be drawn from Momcilovic.

2. In Caserta v Director of Public Transport (Occupation and Business Regulation)78 Deputy President Dwyer considered s 32 in the context of a refusal of an application for driver licence accreditation for commercial passenger vehicles under the Transport (Compliance and Miscellaneous) Act 1983 where a visual test had been failed. The Deputy President held the Charter is "now one of the standard components of all statutory interpretation under Victorian law".79 While recognising Momcilovic was on appeal to the High Court, the Deputy President applied the 3 step process the Court of Appeal had set out:

3. The Deputy President found that the provisions of the Transport (Compliance and Miscellaneous) Act 1983 that set out in s 169 the matters the Director was to take into account on issue or renewal of licences were not in conflict with the Charter. He said:

"the decision in Momcilovic requires me to consider whether the Charter is breached. I do not believe it requires me to re-interpret the clear wording of the Act in a manner that establishes a different process for driver accreditation testing that is contrary to the express wording of the Act and Regulations."80

4. Nevertheless, the framework of the Charter was employed in argument:

"I also agree with the Director that the protected attribute under the Charter is the right for Mr Caserta to enjoy his human rights without discrimination on the basis of his 'lazy eye' impairment."81

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76 At paragraph 67.
77 At paragraph 70.
79 Ibid at paragraph 25.
80 Paragraph 30.
81 Ibid at paragraph 31. If a 32(1) of the Charter was to be considered to have the effect that the section makes some decisions of public authorities unlawful, the Deputy President considered that s 38(2) applied to remove that effect anyway. Section 38(2) provides as (1) does not apply where the Act under consideration has the effect that the public authority could not reasonably have acted differently or made a different decision.
Exception from operation of the *Equal Opportunity* Act

5. There have been many cases in the Equal Opportunity jurisdiction of VCAT where the Charter has been considered as part of an application for exemption from operation of the *Equal Opportunity* Act.

6. In *Carey Baptist Grammar School Ltd*[^2] the school sought an exception from the *Equal Opportunity Act 1995* so that it could give preferential treatment to students on its waiting list to promote gender balance. Deputy President McKenzie held:

> "The human rights possibly engaged here are important. What underlies them is the promotion of respect for the individual, individual dignity, and individual participation in society. The limitation on these rights represented by this proposal is also important. It is aimed to provide choice in education. It is aimed to ensure that the coeducational experience which this school has chosen to provide continues to be viable and to benefit both sexes. This is not a matter of commercial advantage. The limitation does not affect access to education and school facilities by boys and girls once they have entered the school. It is only directed at entry to the school. The limitation is connected to and proportionate to its purpose. In my view, there is no less restrictive way to control the number of boys entering the school so as to prevent the number of boys in the school being so great that the girls are swamped and coeducation for both sexes is undermined."

7. In *YMCA – Ascot Vale Leisure Centre [2009]* VCAT 765 Deputy President McKenzie considered and granted an application for exemption from the operation of the *Equal Opportunity Act 1995* under s 83 of that Act to permit the YMCA to run women’s only sessions. The rights she considered engaged were as follows:

> "In my view, the rights which are possibly engaged are the right to enjoy human rights without discrimination, the right to equality before the law, the right to the protection of the law without discrimination, and the right to equal and effective protection against discrimination."

8. The Deputy President then went on to consider:

> "I must then ask: would the granting of the exemption represent a reasonable limit on those rights which can be demonstrably justified in a free, democratic society based on human dignity, equality and freedom and having regard to the factors listed in s7(2) of the Charter? In my view, the proposed exemption does represent such a reasonable limit. Its aim is to redress a disadvantage currently suffered by certain women because of their religious or cultural beliefs in relation to access to recreation – a disadvantage not suffered by those without those religious or cultural beliefs. It is the least restrictive way of redressing this disadvantage, because it does not impact on the use of the Centre’s facilities by both men and women during ordinary public opening hours, and it does not impact on the Centre financially because women who will access the facility out of hours under the exemption must also pay the same fees."

9. In *Department of Human Services & Department of Health*[^3] Senior Member McKenzie considered and granted an application for exemption from the operation of the *Equal Opportunity Act 1995* under s 83 of that Act to permit the Department to advertise and employ up to 118 Indigenous people in positions with the Department.

10. The first bracket of rights the Senior Member considered were the same as in the YMCA case above. However the Senior Member went on:

“There is also the right under... of the Charter to have and to be given the opportunity to every eligible person to access, on general terms of equality, the Victorian public service. I am satisfied that... applies to this proposal. This is a measure which is taken to assist or advance a disadvantaged group, which is disadvantaged because of discrimination.”

11. In City of Whittlesea v Thomastown Recreation and Aquatic Centre [2011] VCAT (22 February 2011) Member Dea was concerned with an application for an exemption from operation of the Equal Opportunity Act of women only swimming times and fitness sessions. The member considered the human right engaged was “men’s right to enjoy human rights without discrimination, to equality before the law, to the protection of the law without discrimination, and to equal and effective protection against discrimination.” The Member considered that the limitation of these rights was within a reasonable limit as provided for under s 7(2) of the Charter.

Application for Child Care as a result of Motor Vehicle Accident

12. In Dawson v Transport Accident Commission Deputy President McNamara considered the effect of s 32 of the Charter on the interpretation of the Transport Accident Act in circumstances where the Transport Accident Commission has refused an application for child care. The nub of the appeal was that the provision of child care was necessary to enable the applicant to have access to rehabilitation and disability services.

13. The case was decided after the Court of Appeal’s decision in Momcilovic and it was the 3 step process that was followed by the Deputy President. The applicant contended there were a number of human rights that were alleged to be engaged in the debate while the respondent contended no human rights were engaged because what was sought was child care and none of the human rights referred to invoked that right. The respondent said s 32 of the Charter could not be used to create legislation where there is none; “the meaning of ‘disability services’ and ‘rehabilitation services’ so as to encompass what is now sought ‘crosses the line from interpretation into legislation and s 32 cannot be utilised to achieve that result’.

14. In deciding the issue the Deputy President held at [72]-[73]:

“An initial question that arises with respect to a provision which pre-dated the Charter is whether Section 32 can have the effect that the same provision, say a subsection of an ordinary statute, could mean one thing in 2004 before the Charter and have a different meaning in 2010 by the operation of Section 32 of the Charter. Mr Young, on behalf of the Commission, contended that if a statutory provision had acquired a fixed meaning by authoritative judicial decision before the Charter came into force, that meaning would remain even after the Charter despite the application of Section 32. If no fixed meaning had authoritatively been ascribed to a provision before the Charter came into force, the provision was to be construed in light of the Charter leaving open the possibility that a different result as to its true meaning will be reached post-Charter than would have been reached had the matter been adjudicated pre-Charter.

I find no support in the Charter or elsewhere for this type of distinction. By enacting Section 32 Parliament has necessarily added a new factor to the equation in interpreting Victorian legislation. There must be a substantial possibility, perhaps even a likelihood, that the introduction of a new factor into the

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84 Ibid at paragraph 12.
85 At paragraph 33.
86 At paragraph 36.
88 Ibid at paragraph 10.
89 Paragraphs 46 to 54.
90 Paragraph 57.
91 Paragraph 63.
interpretational equation will necessarily modify the ultimate result. I see no reason why the existing authoritative determination by a court pre-Charter can have the effect of ‘freezing’ the operation that Section 32 would otherwise have with respect to the relevant provisions.”

15. In then considering the operation of the Charter, the Deputy President came to the view that “[n]o relevant human right is engaged.”

Supervised Treatment Order under the Disability Act

16. In LM (Guardianship)9 Member Grainger was concerned with an application for a supervised treatment order under s 191(1) of the Disability Act 2006. The Member considered s 32 and its impact on s 191(1) and in particular the rights to recognition and equality before the law, the right to freedom of movement, the right to liberty and security of person and the right not to be punished more than once. In each case the imposition of a supervised treatment order and its effect on the right under consideration was found not to be more than s 7 of the Charter permitted.

Application under FOI

17. In Simpson v VicRoads [2011] VCAT 321 (28 February 2011) Senior Member Billings considered an FOI request for a document held by VicRoads which VicRoads claimed need not be produced as it was obtained in confidence and was protected by secrecy provisions of the Road Safety Act. Simpson contended the document, which originated from his estranged wife, had been sent to VicRoads with the purpose of interfering with his licence so that he would be unable to collect his children for the school holidays. He sought the document for the purpose of Family Court proceedings. He contended denying access to the document breached his right not to have his family unlawfully or arbitrarily interfered with under s 13 of the Charter.

18. The Senior Member considered s 32(1) in the light of the Court of Appeal decision in Momcilovic. The Senior Member concluded:85

“Even if the actions of a private citizen had an adverse effect on Mr Simpson’s family life, non-disclosure of the document by VicRoads (or the Tribunal) cannot be said to be an unlawful or arbitrary interference with his family. Freedom of expression includes freedom to receive information but non-disclosure cannot be said to infringe the right that that section protects. In any event, section 7(2) of the Charter permits reasonable limits being placed on these rights. For reasons given in the context of the public interest I am of the view that any limitation that could be said to be imposed on those rights in this situation would be justified.”

19. In Rogers v Chief Commissioner of Police96 an application for documents under the Freedom of Information Act sought to engage the Charter in support for documents relating to an incident at a prison. The Senior Member found that no rights were engaged and the provisions of the Charter relied on by the applicant were not engaged. If they had been engaged the Senior Member found that s 7(2) of the Charter would have operated to justify the intrusion into the applicant’s rights.

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92 Paragraph 86.
94 At paragraph 5.
95 At paragraph 30.
Extended Supervision Order under Serious Sex Offenders Monitoring Act

20. In Secretary to the Department of Justice v A&B [2009] VCC 1132 Judge Ross was concerned with an application for an extended supervision order (ESO) under s 11 of the Serious Sex Offenders Monitoring Act. His Honour considered an ESO made a person a prisoner in all but name and therefore profoundly affected human rights.\(^2\) He applied the three stage process of Momcilovic.\(^3\)

21. His Honour was not persuaded s 11 of the Act was compatible with human rights. He said:

>"I am not satisfied that the limitations on such a person’s human rights that flow from the imposition of an ESO are reasonable or demonstrably justified in a free and democratic society based on human dignity, equality and freedom.”\(^4\)

22. His Honour was not persuaded there was any alternative construction of s 11 that was compatible with human rights.\(^5\) He said it followed that:

>"I am not persuaded that that the interpretive obligation [of s 32] alters the construction of s 11 which flowed from the application of the usual or standard principles of statutory construction. I then apply that interpretation to the application.”\(^6\)

23. In this way s 32 had no impact on the interpretation of the section of the Serious Sex Offenders Monitoring Act. His Honour did not make a declaration of inconsistency as only the Supreme Court could do that.\(^7\)

24. The inconsistencies with human rights which his Honour identified have not been addressed by the Parliament, and that is clearly a legislative policy choice. It is a good example of the dialogue model at work, and an example of the proposition that even a judicially found inconsistency does not compel Parliament to change legislation if it decides that the legislative policy as it currently exists is correct, even though it is not compatible with human rights of sex offenders.

Right to a Fair Hearing under the VCAT Act

25. In Guss v Aldy Corporation Pty Ltd [2008] VCAT 912 Senior Member Vassie considered an application for rehearing under s 120 of the Victorian Civil and Administrative Act. One of the rights contained in the Charter is a right to a fair hearing and s 32(1) required the VCAT Act to be interpreted compatibly with human rights. It followed that one of the reasons for granting the rehearing was to interpret s 120 of the VCAT Act compatibly with the Charter.\(^8\)

Application of the Charter in a Planning Context

26. In Smith v Hobsons Bay CC\(^9\) Deputy President Dwyer considered whether a condition requiring a balcony screen would breach the Charter. It was held that the Charter does not manifestly change the role and responsibility of the Tribunal as implicitly the Tribunal already considered the reasonableness of potential infringement on a person’s privacy and home.

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\(^2\) At paragraph 4 and 175.
\(^3\) At paragraph 14.
\(^4\) At paragraph 18 and 267.
\(^5\) At paragraph 21 and 285.
\(^6\) At paragraph 285.
\(^7\) At paragraph 34.
\(^8\) [2010] VCAT 668.
Victims of Crime application under the Criminal Injury Compensation Act

27. In DJP v Victims of Crime Assistance Tribunal (CAT)104 Deputy President Coghlan considered an appeal by DJP against the decision by CAT rejecting her application for special assistance under the Act. The rejection was based on CAT’s interpretation of transitional provisions. The applicant sought to engage s 32 of the Charter, however the Deputy President was not satisfied any right was engaged by the refusal of compensation.105

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105 At paragraph 29.